COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1954-CR **Cir. Ct. No. 2011CF74**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS V. MARKOV,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Dennis V. Markov appeals from a judgment of conviction for two counts of first-degree intentional homicide entered upon his guilty pleas following the trial court's denial of his suppression motion. Markov argues that the trial court erred in denying his motion to suppress the fruits of police officers' warrantless search of his home. We conclude that the search was

justified under the community caretaker exception to the warrant requirement and affirm.

¶2 In April 2011, police received a telephone call from Larissa Markov's employer stating that she had not shown up for work and that the employer was concerned. The employer stated that the office had called Larissa's home and that a male claiming to be her son, Dennis, told them she was on vacation with her husband, Dennis's father. Unconvinced by Dennis's story, the employer decided to call the police, and officers were dispatched to the Markov residence to check on Larissa's well-being. Dennis Markov answered the door and was unable to provide a satisfactory explanation for his parents' whereabouts. During a brief search through the residence, police discovered the bodies of Larissa and Victor Markov in the garage. Dennis Markov confessed to shooting both of his parents in the back of the head and was charged with two counts of first-degree intentional homicide.

¶3 Markov filed a motion to suppress the fruits of the warrantless search of the Markov residence. Three officers testified at the suppression hearing. Officer Darren Selk testified that he and his partner, Douglas Cook, were dispatched to the Markov residence at around 2:30 p.m., after Larissa's employer called to express concern over Larissa's two-day unexpected absence from work. The employer reported that this behavior was unusual for Larissa and that they did not believe her son's story. The officers were instructed to try and make contact with Larissa. Cook testified that he had prior contact with Dennis Markov, including two incidents involving conflict between Dennis and his father. Upon their arrival, officers noticed a fresh set of tire tracks in the driveway. Based on

that day's snowfall,[1] officers believed that the tracks were made recently by a car "either exiting or entering the driveway, ending or beginning in the garage itself." There were no footprints outside the car leading to or from the front door.

¶4 Cook and Selk knocked and rang the doorbell for "[a] couple of minutes." During that time, Selk noticed that the window blinds and curtains were drawn, despite it being an overcast afternoon. Eventually, Markov appeared and poked his head outside of the interior front door. Cook informed Markov that they were there to check on his mother's welfare and needed to speak with her, preferably inside the residence since it was cold outside. Markov then opened the exterior door while simultaneously closing the interior door behind him, requiring him to slide or "slither[]" outside such that officers were unable to see into the house. Markov was wearing slipper-type shoes and no hat, coat, or gloves.

¶5 Once outside, Markov told the officers that his parents were on a planned vacation in Missouri with friends. Markov said that he did not know who the friends were, how to contact them, or in which city his parents were staying. Markov told officers that his parents would be gone for a week and provided inconsistent answers about when they left. At one point, he stated that they had left the day before, a Monday. At another point, he told officers they had left three days ago, on Saturday. Markov stated that no one else was inside the house and that nobody had been to the residence in several days, despite the evidence of fresh tire tracks in the driveway. Selk told Markov he thought he was being untruthful and asked if they could continue the conversation inside. Markov told

[1] Officers testified that it was sleeting, snowing and raining, and that since around 9:00 or 9:30 that morning, about four to six inches of precipitation had accumulated. Selk testified that the tracks "had not yet filled back in with new additional snow."

him no, stating that he was busy and his parents did not want anyone inside the house, including the police. When asked what he was busy with, Markov said "nothing" and was unable to further elaborate.

¶6 Officers asked Markov if there was any way to reach his parents, and he provided their cell phone numbers. Cook called both numbers and each immediately went to voice mail. Cook testified that in his experience, the immediate transfer to voice mail on a cell phone indicates that the phone is turned off or disconnected. Cook left a message on both parents' phones, explaining the situation and asking them to call back as soon as possible. When Markov asked how long officers would be at the residence, Selk told him they would not leave until they found an independent person to corroborate Larissa's safety.

¶7 Several minutes later, Officer Steve Rugaber arrived and joined the conversation at the front door. Rugaber asked why they were standing outside in the snow and rain, and Selk told him that Markov wanted to speak outside. When asked whether there was anyone who could corroborate his parents' location, Markov said that he had a grandmother in Milwaukee, but that her number was inside the house. Cook told Markov that the officers would leave once they were able to speak with somebody who was able to verify his parents' whereabouts. Markov agreed to let officers stand in the home's foyer while he looked for his grandmother's number. In their testimony, all three officers remarked on Markov's demeanor, including that he appeared pasty, frequently looked down at the ground, avoided eye contact, and that his answers were short and vague. Selk testified that based on Markov's lack of eye contact, his soft voice, and short, one-word answers, he believed that Markov was being evasive or untruthful.

¶8 As the officers waited in the foyer, Markov manipulated the keys on "two or three cell phones," apparently in an attempt to locate his grandmother's phone number. Markov was unable to provide her phone number to police. From the foyer, officers could see into the living room and noticed a residential phone, two additional cell phones, and two jackets sitting on or near the couch. Cook testified that one "was a female's jacket." When asked, Markov stated that all of the items belonged to him and that no one else was in the house. Concerned that there were other people in the residence, Selk loudly announced the officers' presence and asked anyone inside to come out. There was no response and it was "[f]airly dark" inside the residence. Selk told Markov he thought he was lying to the officers, that he feared for the safety of both the officers and Markov's parents, and that he and Cook were going to perform a quick sweep of the residence while Rugaber waited with Markov. Rugaber testified that he never told Markov he was in custody, had not done anything to restrict his freedom, and that the officers never drew their weapons on Markov. Using the lights on their guns for illumination, Selk and Cook quickly went through the house, spending about fifteen to twenty seconds in each room. Selk testified that they limited the search to areas where a person would be able to hide and did not manipulate any objects or open drawers. Due to the tracks in the driveway, officers went quickly to the garage and opened the service door. There were two vehicles backed into in the garage. Behind the vehicles, officers saw a floral quilt with a human foot protruding from underneath. Below the quilt, police discovered Markov's parents' bodies.

¶9 The trial court denied the suppression motion, concluding that the warrantless search of the Markov residence was justified by the community

caretaker exception to the warrant requirement. Markov pled guilty to both counts and was sentenced on each to a term of life imprisonment.

¶10 Markov contends that the warrantless search of his house violated his constitutional right to be free from unreasonable searches. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Warrantless searches of private residences are presumptively unreasonable. ***State v. Horngren***, 2000 WI App 177, ¶8, 238 Wis. 2d 347, 617 N.W.2d 508. However, "a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures," including the search of a home. ***State v. Pinkard***, 2010 WI 81, ¶¶14, 22, 327 Wis. 2d 346, 785 N.W.2d 592. To determine whether a warrantless home entry is justified under the community caretaker exception, the court applies a three-part test:

> (1) [W]hether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Id., ¶29. In reviewing the denial of a motion to suppress, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). Whether those facts satisfy a given constitutional requirement is a question of law we review de novo. ***Id.***

¶11 In this case, the parties do not dispute and we agree that the first two test prongs are satisfied. The officers' actions in looking though the rooms of the house constituted a search. *See* ***State v. Gracia***, 2013 WI 15, ¶13, 345 Wis. 2d 488, 826 N.W.2d 87 (where police were in a residence pursuant to the owner's

consent, crossing the bedroom threshold constituted a search). Further, it is undisputed that the officers were acting in a bona fide caretaking capacity out of concern for Larissa's well-being. ***Id.***, ¶17 (police are acting in a bona fide community caretaker function where, based on the totality of the circumstances, they have an objectively reasonable basis to believe that a member of the public is in need of assistance). Our analysis considers only the third prong, whether the officers reasonably exercised their community caretaker function. ***Pinkard***, 327 Wis. 2d 346, ¶41. In making this determination, we consider the following four factors:

> (1) [T]he degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [search], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Id., ¶42 (footnote and citation omitted). "The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." ***Id.***, ¶41 (citation omitted).

¶12 We conclude that the community caretaker search of the Markov residence was reasonable. First, the public interest in allowing officers to ascertain the whereabouts and well-being of missing persons is substantial and considerable exigencies attach to the need to verify a missing citizen's health and safety. ***Id.***, ¶¶45-48 (where police entered a residence out of concern for the occupants' safety but were unable to confirm their well-being, they could reasonably assume that further immediate search was necessary to prevent harm). Officers reasonably believed that there was an exigency requiring them to search the house immediately. They were informed that Larissa had not been to work for

two days and had uncharacteristically failed to alert her employer. The employer contacted Markov and suspected that he was lying about Larissa's whereabouts. When the officers confronted Markov, all three believed that he was lying to them and seemed to be trying to hide something. Both of Markov's parents' cell phones went unanswered and appeared to be turned off. Markov's stories were inconsistent and suspicious, and he was unable to provide the contact information for an independent source to verify their well-being. *Cf.* ***State v. Maddix***, 2013 WI App 64, ¶¶32-33, 348 Wis. 2d 179, 831 N.W.2d 778 (where police responded to reports of screams from inside a residence and were able to meet with the female occupant, verify her safety, and obtain a plausible explanation from two occupants for the screams, further search of the residence was unreasonable). Markov was unable to provide an explanation for the tire tracks in the driveway or for his mother's failure to forewarn her employer. Additionally, Selk testified that the tracks were deteriorating due to the weather. Any useful information the tracks might provide was therefore dissipating. This factor weighs in the State's favor.

¶13 The second factor, which considers the attendant circumstances of the search, also weighs in the State's favor. The officers did not control the time or location of the welfare check, but were dispatched in response to a telephone call. *See* ***Pinkard***, 327 Wis. 2d 346, ¶49. The police were initially let inside the house and stood in the foyer with Markov's consent. *See* ***Gracia***, 345 Wis. 2d 488, ¶26 (that police were initially inside the residence with consent considered relevant to the attendant circumstances inquiry). The police did not threaten, handcuff, restrain, or point their weapons at Markov during the search. The search was brief (less than twenty seconds per room) and limited in scope to those areas where a person could be hidden. Officers did not manipulate objects, open

drawers, or break down any doors. ***Id.***, ¶¶26, 29. The search was minimally intrusive and consistent with the goal of verifying Larissa's well-being.

¶14 This case does not involve an automobile and the third factor is therefore irrelevant "except to recognize that one has a heightened privacy interest in preventing intrusions into one's home." ***Pinkard***, 327 Wis. 2d 346, ¶56; *see also* ***Gracia***, 345 Wis. 2d 488, ¶27 ("The third factor is irrelevant because the search was not of an automobile, so we look next at the fourth factor.").

¶15 Finally, our examination of the feasible, effective alternatives weighs in the State's favor. Markov argues:

> Considering the evidence the police had at this time, especially considering Markov informed them his parents were on vacation, that Markov had cooperated with them in answering questions and providing them with phone numbers, that he even tried to obtain his grandmother's number so she could corroborate his story, and that he had no violent history, the police should have left, and maybe tried to follow up at a later time. Any thought that the parents were in danger is not reasonable. Nonetheless, even if this Court believes the officers should not have left, the officers should have at least tried to apply for a warrant. The incident was during business hours.

To leave and "maybe" return at a later time would not have been an effective alternative. *See* ***Gracia***, 345 Wis. 2d 488, ¶27 (where police were concerned about the safety of an individual and were already present on the scene, the existence of a less-effective alternative did not itself render any further search "an unreasonable exercise of the community caretaker doctrine"). Officers knew that Larissa had been unexpectedly absent from work for two days without alerting her employer and were informed by Markov that his parents would not be back for a week. In the meantime, Markov was unable to provide them with any fruitful contact information. To fail to act as quickly as possible would have been

irresponsible given the nature of the officers' concern, the potentially week-long time lapse, Markov's suspicious behavior, and his inability to provide useful information. "Principles of reasonableness demand that we ask ourselves whether the officers would have been derelict in their duty had they acted otherwise." ***Pinkard***, 327 Wis. 2d 346, ¶59 (citations omitted). Had officers shrugged their shoulders and "maybe" followed up at some later date, "we are convinced the community would have understandably viewed the officers' actions as poor police work." ***Id.***

¶16 Further, Markov's suggestion that the police could have obtained a search warrant overlooks the rationale underlying the community caretaker exception. Police were primarily concerned with verifying Markov's parents' health and safety, not with the need to investigate a crime. *See* ***id.***, ¶42 n.13 (differentiating the exigency required for a community caretaker search from the requirements of the exigent circumstances exception to the warrant requirement, which includes the existence of probable cause). Under the totality of the circumstances, the need for police to take quick action in order to verify the well-being of missing citizens outweighed the minimal intrusion into Markov's privacy caused by the brief, goal-driven search of the residence.[2]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[2] Because we conclude that the search was justified under the community caretaker doctrine, we need not address the State's alternative argument that the officers' actions constituted a lawful protective sweep.