

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2137-CR

Cir. Ct. No. 2015CF2943

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACOB A. BASTERASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Jacob Basterash appeals an amended judgment of conviction for possession of marijuana with intent to deliver as a party to the crime. Basterash argues that the circuit court erred in denying his motion to suppress evidence seized during a warrantless search of his home. Because we conclude that the search was reasonable under the community caretaker exception to the Fourth Amendment, we reject Basterash's arguments and affirm.

BACKGROUND

¶2 Basterash was charged with one count of possession with intent to deliver a controlled substance (THC), as a party to the crime, after officers found marijuana while searching his home. The following facts are relevant to that search.

¶3 Following a call from a neighbor reporting a disturbance, officers were dispatched to the duplex where Basterash resided. Upon arriving, officers met with the neighbor, who reported that she feared for the safety of the residents. Specifically, she reported hearing screaming and arguing coming from the upstairs portion of the duplex, followed by a loud thud that ended the argument. She believed that the thud was the sound of a person being thrown against a wall or onto the floor. The neighbor reported that two males and a female resided in the upper portion of the duplex but she did not know their names. The neighbor further reported that no one had left the apartment following the argument, and that the van parked in front of the house belonged to the residents.

¶4 Officers made repeated attempts to contact the occupants of the residence, including ringing the doorbell, knocking on the downstairs entry door with a baton, and loudly announcing their presence from the back and front of the duplex. Officers also attempted to telephone Basterash using the registered

contact information for the van. The officers received no response, but did hear movement inside the duplex.

¶5 Officers believed that someone was inside the home and possibly injured, so they obtained a key from Basterash's landlord and entered the downstairs door of the duplex. After again announcing their presence, they proceeded to the top of the stairs, where they kicked the door to Basterash's residence and continued to announce their presence. After announcing their presence for several minutes without a response, officers used the landlord's key to enter the apartment. They entered the apartment behind a shield and with their guns drawn. They saw two occupants, one male and one female. Officers asked if anyone was hurt but received no response. As officers looked around the apartment to determine whether anyone else was present, another male emerged from behind a closed bedroom door and was uncooperative with police commands. All three individuals were handcuffed and removed from the premises.

¶6 Officers believed that there still may be someone in the apartment who was hurt. After approximately two or three minutes inside the apartment, officers found a locked bedroom. Believing that an injured and unresponsive person might be inside, officers kicked down the door. Inside, they found marijuana in plain view. Meanwhile, another officer conducted a sweep of the other bedroom and found drug contraband in plain view.

¶7 Basterash moved to suppress this evidence, arguing that the officers had unlawfully searched his residence. The circuit court denied the motion, concluding that the officers were acting in their community caretaker function when they entered and searched the apartment. The court further concluded that

the contraband was in plain view. Basterash pleaded guilty to the charged offense, and now appeals the denial of his motion to suppress.

DISCUSSION

¶8 Whether the circuit court properly denied Basterash’s motion to suppress evidence presents a question of constitutional fact, requiring a two-step review. *See State v. Matalonis*, 2016 WI 7, ¶28, 366 Wis. 2d 443, 875 N.W.2d 567. We first review the circuit court’s findings of historical fact for clear error. *See id.* We then independently apply constitutional principles to those facts. *See id.*

¶9 Here, Basterash does not dispute the historical facts. We therefore begin with the second step, which is to independently review the reasonableness of the search. Specifically, we are determining whether the community caretaker exception to the warrant requirement applies to the officers’ actions. In determining whether the community caretaker exception applies, we use a three-step test:

“(1) whether 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.”

See id., ¶31 (quoted source omitted).

¶10 Here, the parties agree that a search took place. However, they disagree about whether the second and third factors support the application of the community caretaker exception in this case. The State has the burden of demonstrating that both factors have been met. *Id.*

A. *Whether the Officers Were Exercising a Bona Fide
Community Caretaker Function*

¶11 The question of whether officers were exercising a bona fide community caretaker function requires us to examine “the totality of the circumstances as they existed at the time of the police conduct.” *Id.*, ¶32 (quoted source omitted). The State must show that the officers had an objectively reasonable basis for exercising their community caretaker function. *See id.*, ¶42.

¶12 Here, Basterash argues that police were not engaged in a bona fide community caretaker function because there were no signs or sounds of a disturbance by the time the officers arrived at the residence. We disagree.

¶13 As set forth in the background section, a neighbor reported that she heard screaming and arguing followed by a loud thud, which sounded like a person being thrown against a wall or a floor. After the thud, the argument stopped. Based on this information, the officers could reasonably believe that someone in the apartment may have been seriously injured. The fact that the noise had stopped by the time the officers arrived does not undercut this reasonable concern for safety.

¶14 Basterash also points to prior decisions applying the community caretaker exception, arguing that its application in his case is not consistent with this decisional law. For example, he relies on *State v. Maddix*, 2013 WI App 64, ¶38, 348 Wis. 2d 179, 831 N.W.2d 778, a case in which we declined to apply the community caretaker exception to a warrantless search. In *Maddix*, officers entered the defendant’s residence after hearing a woman yelling and screaming. *Id.*, ¶¶2-4. The officers spoke with two occupants, who admitted that they had been fighting. *Id.*, ¶¶4-6. However, officers decided to continue searching the

residence to determine whether there was another victim or aggressor inside the apartment. *Id.*, ¶¶7-8.

¶15 Basterash argues that the facts surrounding the search of his home are even weaker than the facts in *Maddix*, particularly because the officers in *Maddix* heard screaming, whereas the officers in this case relied on a secondhand report from a neighbor. However, as explained above, the fact that the residence was quiet by the time officers arrived was consistent with the neighbor's report and supported the officers' belief that there may be an injured victim in the residence. Moreover, a key fact in *Maddix* was that, after police entered the apartment, the occupants identified themselves and informed police that they were the ones who had been arguing and screaming. *See id.*, ¶27. In contrast, here the occupants were uncooperative and there was reason to believe that someone else in the residence might be injured.

¶16 Basterash similarly relies on *State v. Pinkard*, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592, a case which our supreme court described as a "close case" for the application of the community caretaker doctrine. *See id.*, ¶33. In *Pinkard*, an anonymous caller told police that occupants of a house appeared to be asleep with the door of their house open and with cocaine and cash present, and the caller asked police to check on the welfare of the occupants. *Id.*, ¶2. Our supreme court concluded that the officers had an objectively reasonable basis to enter the home in order to check on the welfare of the occupants.

¶17 We reject Basterash's argument that the officers' actions in this case were less reasonable than the officers' actions in *Pinkard*. As explained above, the officers entered Basterash's home based on a reasonable belief that a person inside the apartment had been injured. Given the lack of cooperation by the

occupants they encountered, it was reasonable for the officers to continue to search the apartment for a possible victim.

¶18 Finally, Basterash argues that there were many other questions the officers could have asked the occupants before searching the home. He contends that, if officers had asked the occupants additional questions, the officers would have been able to fulfill their community caretaker function without searching the home. *See Maddix*, 348 Wis. 2d 179, ¶¶26-27. But there is no reason to believe that the occupants would have responded to additional questions in a way that would have explained away the screaming-thud-silence sequence.

¶19 We therefore conclude that the officers were acting in a bona fide community caretaker capacity when they found the marijuana.

B. Whether the Public Interest Outweighs the Private Intrusion

¶20 The parties also disagree about the third step in the analysis, which requires us to “balance the public interest or need that is furthered by the officers’ conduct against the degree and nature of the intrusion on the citizen’s constitutional interest.” *See Pinkard*, 327 Wis. 2d 346, ¶41. Our case law identifies four considerations that are relevant to this balancing:

“(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.”

Matalonis, 366 Wis. 2d 443, ¶33 (quoted source omitted). We address each factor in turn.

*1. The Degree of the Public Interest and
the Exigency of the Situation*

¶21 Basterash argues that several facts undermined the exigency of the situation and lead to the conclusion that the public interest was not served by the officers' entry into the residence. Specifically, a neighbor called police, as opposed to a victim, and the officers did not hear any disturbance when they arrived. We disagree. The neighbor's report of screaming and arguing, followed by a thud that ended the argument, warranted action by the police.

¶22 Basterash next argues that the fact that the officers did not immediately enter Basterash's home undermined the exigency of the situation. Again, we disagree. Here, the neighbor reported that the argument and thud had occurred shortly after 6:00 a.m. Officers were dispatched at 6:36 a.m., arrived at the home at 6:50 a.m., and entered the home at 7:20 a.m. Our case law supports the conclusion that this 80-minute period between the incident and the entry did not diminish the exigency of the situation. *See, e.g., State v. Ziedonis*, 2005 WI App 249, ¶28, 287 Wis. 2d 831, 707 N.W.2d 565 (affirming application of the community caretaker doctrine despite a 90-minute delay). Moreover, in this case, the delay between the officers' arrival and entry occurred because they were taking steps to try to assess the situation before entering Basterash's home. However, when the occupants of the apartment failed to respond to the officers' attempts to make contact, the officers took action based on their concern that someone inside the apartment was injured or incapacitated. The officers' actions reasonably balanced the public interest and the exigency of the situation.

¶23 Finally, Basterash argues that the neighbor's complaint was uncorroborated, and that it is not in the public interest to enter residences based on such complaints. This argument is easily rejected. Officers are permitted to rely

on citizen reports. *See State v. Powers*, 2004 WI App 143, ¶9, 275 Wis. 2d 456, 685 N.W.2d 869 (“[W]e view citizens who purport to have witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established.” (quoted source and internal quotation marks omitted)).

2. *The Circumstances Surrounding the Search*

¶24 The second consideration involves the attendant circumstances surrounding the search, including the time, location, and degree of overt authority and force displayed. We note at the outset that the officers were responding to a call, so they did not choose the time or the place. *See Pinkard*, 327 Wis. 2d 346, ¶49. We further note that the officers obtained a key from the landlord, rather than breaking down the door. Both of these facts indicate that the officers were acting reasonably in a community caretaker capacity.

¶25 Basterash argues that this conclusion is undermined by the officers’ show of force and authority once they were inside the apartment. However, the officers’ decision to enter the residence with guns drawn occurred after officers had been knocking on the door and announcing their presence, with no response. We agree with the circuit court’s determination that officers did not know what to expect. Moreover, once the officers entered the residence, the occupants they encountered remained unresponsive and uncooperative.

3. *Whether an Automobile is Involved*

¶26 The parties agree that this search does not involve an automobile but rather a residence.

4. *Whether There Were Alternatives to the Intrusion*

¶27 The fourth consideration is the availability, feasibility, and effectiveness of alternatives to the intrusion. *See Matalonis*, 366 Wis. 2d 443, ¶33. Basterash contends that the officers did not take sufficient investigative steps prior to entering his residence. For example, he argues that officers should have asked the landlord for additional contact information for the occupants, or should have waited to make contact with the occupants later in the day.

¶28 For reasons that are clear by now, we disagree. The officers reasonably attempted to make contact with the occupants, and had a reasonable belief that there may be an incapacitated victim inside the apartment.

CONCLUSION

¶29 For the foregoing reasons, we conclude that the officers were acting in their community caretaker function when they searched Basterash's home and found marijuana in plain view. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

