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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL C. BOISSELLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 14-1-03503-1

Supplemental Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ARGUMENT.

1. ATTENDING TO A DECOMPOSING HUMAN
BODY IS A VITAL COMMUNITY
CARETAKING FUNCTION.

The disposal of human remains after death has long been a matter of significant public concern.¹ For example, RCW Title 68 is “a general and comprehensive act covering the whole field relating to the disposal of human remains after death.” *Oakwood Co. v. Tacoma Mausoleum Ass'n*, 22 Wn.2d 692, 695, 157 P.2d 595, 596 (1945) (addressing Chapter 247 of the Laws of 1943). Respect for the deceased person’s beliefs is written into the law. *See* RCW 68.50.050(2). RCW Title 68 is a fundamental expression of community caretaking.

The coroner has jurisdiction over the bodies of all deceased persons “found dead.” RCW 68.50.010. A person not authorized by the coroner, or medical examiner or their deputies cannot remove, move, disturb, or molest, or interfere with those remains. RCW 68.50.050, RCW 68.50.130. It follows that if a state actor is not going to remove the body of a deceased person found in a house, then that body will not lawfully be moved.

¹ *See State v. Boisselle*, 3 Wn.App. 266, 287 (fn. 13) (2018).

Human decomposition within dwellings is bad and should be minimized as much as possible. One reason is the obvious health hazard. Another reason is preservation of the dignity we afford our deceased. Another reason is respect for the family of the person who might lie dead inside the home. Another reason is that decomposition frustrates our desire to understand the cause of death for non-criminal reasons such as public health and informing the family of the decedent.

Someone has to discover and recover the body of the person who has died alone in a home, and often that person must be a state actor, subject to Article 1, § 7 of the Washington Constitution.

2. ATTENDING TO A DECOMPOSING HUMAN
BODY IS A *SUI GENERIS* COMMUNITY
CARETAKING ACT.

In *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) the Supreme Court noted that “local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as “community caretaking” functions, totally divorced from detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” 413 U.S. at 441. This Court has interpreted *Cady* narrowly: “As noted in *Cady*, the community caretaking function exception is totally divorced from a criminal investigation.” *State v.*

Kinzy, 141 Wn.2d 373, 385, 5 P.3d 668, 675 (2000). Community caretaking is “strictly limited,” and cannot serve as a pretext for an investigatory search. *State v. Duncan*, 185 Wn.2d 430, 441, 374 P.3d 83, 89 (2016). The critical focus is whether the officer’s desire to perform a community caretaking function is used as a pretext for an otherwise unlawful search. *Duncan*, 185 Wn.2d at 442.

A sincere and well founded search for a dead body is not a pretextual search. Pretext is the use of a minor matter to support an otherwise unlawful intrusion into protected private areas. *See State v. Ladson*, 138 Wn.2d 343, 355-59, 979 P.2d 833, 841 (1999). Recovery of human remains is a major matter, not a pretext.² Pretext is useful when evaluating proffered emergencies and routine health and safety actions because the rule needs to be broad enough to encompass unforeseen emergencies and unforeseen health and safety checks. The recovery of decomposing human bodies is a foreseeable and vitally important activity. Furthermore, when the need to recover a possible dead body presents

² Respondent could not identify any “authority of law” which would have enabled the investigating officers to secure an administrative warrant for the recovery of human remains in this case. *Seattle v. McCready*, 123 Wn.2d 260, 281–82, 868 P.2d 134, 145 (1994). RCW 16.52.085 could have been sufficient to authorize entry to address the uncared-for dog, but that wouldn’t authorize entry to search for the source of the odor of “decaying flesh or garbage.” CP 43-47 (Findings of Fact III, V, IX, XVII). Looking for a dog could not serve as pretext for looking for a decomposing human body. *State v. Acrey*, 148 Wn.2d 738, 755, 64 P.3d 594, 603 (2003); *State v. Ladson*, 138 Wn.2d 343, 97 P.2d 833 (1999).

itself, the suspicion or possibility of crime may also be present and concerning to the responding officers. How should a lower court conduct a pretext inquiry when the recovery of decomposing human remains and the detection of crime are both engaged? When community caretaking and criminal procedure each may implicate the search for the cause of death? How is a responding officer to direct his behavior when he needs to recover human remains in a situation where the possibility of crime presents itself?³ Respondent suggests that if the reason for the intrusion is sincerely based upon a reasonable concern that a decomposing human body requires recovery and if the intrusion is limited to verifying or dispelling that concern, then a valid community caretaking need is demonstrated.⁴

“In this State, the community caretaking function exception to the warrant requirement encompasses not only the search and seizure of automobiles, but also situations involving either emergency aid or routine checks on health and safety.” (internal quotation admitted) *State v. Acrey*,

³ The “primary purpose” test of *State v. Smith*, 177 Wn.2d 533, 541-42, 303 P.3d 1047 (2013) may have utility in the emergency context where the officers have little time for self-reflection, but in a case like this, where the officers are on the outside trying to figure out what to do with a possible dead body inside, such a rule requires them to consider their own “primary purpose” before taking action. Such a self-referential rule is decidedly unhelpful.

⁴ When a court knows that it will be addressing the recovery of decomposing human bodies, the balancing of the competing interests involved in light of the surrounding facts and circumstances can be more carefully performed at the time the rule is created. See *State v. Acrey*, 148 Wn.2d at 738.

148 Wn.2d 738, 749, 64 P.3d 594 (2003). Neither of these two broad categories is a particularly good fit for the necessary governmental function of recovering unattended human remains.

Emergency aid is a recognized community caretaking function. *State v. Acrey*, 148 Wn.2d 738, 749, 64 P.3d 594, 600 (2003). This Court has articulated four factors necessary to establish the emergency aid exception. The government must show that (1) the officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; (3) there was a reasonable basis to associate the need for assistance with the place being searched; (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property is in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484, 487–88 (2011).

The recovery of human remains does not fit the “emergency” exception in a tidy way. A dead body does not “need assistance” and is not always accompanied by “an imminent threat of substantial injury to persons or property.” The emergency exception, as defined by this Court, needs to be contorted in order to justify the warrantless recovery of

decomposing human bodies. Nevertheless, there is an undeniably strong public interest in recovering those bodies.

This Court has also held that the community caretaking function is “divorced from the criminal investigation.” *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). The invasion of a home for a routine health and safety check is allowed only if

(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.

State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228, 232 (2004). The entry into a home to recover human remains is difficult to shoehorn into this category, because aid cannot be rendered to a dead body. It may also prove difficult to “divorce” the need to recover the body from the agency (perhaps criminal) which caused that death. Whether criminal agency is suspected, or not, the need to humanely recover the dead body remains a constant community caretaking need. As Sgt. Clarkson (one of the responding deputies in this case) testified: “you can’t just walk away from something like that; if we did, there would be a lot of rotting dead bodies in Pierce County.” VRP 46.

In *State v. Duncan*, this Court crafted a *sui generis* community caretaking rule for unsecured firearms in cars, after the driver has been arrested, because unsecured firearms are so inherently dangerous:

Accordingly, we hold that under the community caretaking exception to the warrant requirement, officers may make a limited sweep of a vehicle when (1) there is reasonable suspicion that an unsecured weapon is in the vehicle and (2) the vehicle has or shortly will be impounded and will be towed from the scene.

State v. Duncan, 185 Wn.2d at 441. One salutary benefit of such a rule is that it provides police officers with a clear decision path and avoids unnecessary delays.

This court should apply a similar *sui generis* community caretaking rule for the recovery of human remains in constitutionally protected areas. Respondent suggests the following rule:

Under the community caretaking exception to the warrant requirement, if officers have a sincere and well-founded or reasonable concern that unattended human remains are present in a place, and that there is probable cause to associate that concern with that place, then the officers may make a limited sweep of that place to verify or dispel that concern.

This case demonstrates the utility for such a rule. CP 47 (Finding of Fact XV). An hour and a half investigation involving four deputies was unnecessarily long where the concern regarding a possible dead body was amplified by the presence of an unattended dog.

3. IN THIS CASE, THE FACTS SUPPORT A LIMITED SWEEP INTO THE HOME TO ADDRESS A SINCERE REASONABLE CONCERN THAT A DEAD BODY MIGHT BE INSIDE.

- a. The responding deputies had sufficient reason to enter the home to verify or dispel their concern that a dead body might be found inside.

An anonymous caller reported that there was a “possible dead body” at an address. CP 43 (Finding of Fact III). The caller said that “Mike” said that he shot someone there and possibly killed him. *Id.* Mike also “said it was self defense.” *Id.* That address was Brandon Zomalt’s address. CP 44 (Finding of Fact VI). An investigating deputy knew that a missing person case and a potential homicide involving Mr. Zomalt was being investigated by the Auburn Police Department. CP 46 (Findings of Fact XII-XIII). Neither of the two occupants of the building had been seen or heard from in days, there was no traffic at all in or out of the duplex, the dog associated with the duplex had not been seen outside for days (and was alive inside), there was unclaimed mail in the mailbox, and a foul odor (a) of possibly bleach or urine that might be from an animal or (b) which could be from a dead body or could be from rotting garbage, was present. CP 47 (Finding of Fact XVII); CP 44 (Finding of Fact V, VII); CP 45 (Finding of Fact VIII). Looking inside, the deputies could see carpeting missing from the floor. CP 46 (Finding of Fact XIV). This

could have been related to a burn pile involving flooring materials which included Mr. Zomalt's DNA. CP 46 (Finding of Fact XIV).

None of the deputies responding to Mr. Zomalt's residence subjectively believed that they had probable cause to conclude that any crime had occurred inside the residence. CP 48 (Finding of Fact XIX). None of the deputies thought that they had sufficient evidence to identify any person as a suspect thought to have committed any crime. *Id.*

This case presented the responding Sheriff's Deputies with a reasonable concern that a dead body was decomposing within the house. That was sufficient factual support to enter the home and check to see if a decomposing body was present. This factual support was supplemented by the fact that the deputies had reason to believe that an unattended dog had been in the house for some time, along with a possible dead body. CP 44 (Finding of Fact V)

b. Should this Court consider pretext, this case is devoid of pretext.

In this case, an anonymous caller told police that his friend "Mike" told him (a) that he shot someone (b) that the shooting was in self defense; and (c) that the person shot was possibly dead. CP 43 (Finding of Fact III). The responding deputies were also aware that there had been some effort to dispose of flooring materials which contained Mr. Zomalt's DNA, although there was no indication that Mr. Zomalt was actually

deceased. CP 46 (Findings of Fact XII, XIII); CP 46-47 (Finding of Fact XIV). By the time they had checked out the property from the outside, the deputies had a reasonable belief “that there might be a dead body inside the duplex, and that the death might have been a homicide.” CP 48 (Finding of Fact XIX).

The investigating deputies did not believe that they had probable cause sufficient to obtain a warrant. CP 48 (Finding of Fact XX). The trial court found this belief credible. CP 48 (Finding of Fact XXI). In this case, the deputies had a good faith belief that there might be a dead body inside the duplex. CP XIX, CP XXI.

This case presented no probable cause for murder or manslaughter, but even if it did that probable cause was extremely thin. The investigating deputies had an anonymous tip of homicide, a strong concern about a possible dead body, and some suggestion that evidence might have been removed. On the other hand, the only evidence of homicide in this case came from the same person who said that the homicide was in self defense.⁵ This factual backdrop highlights the investigating deputies’

⁵ *State v. Fry*, 168 Wn.2d 1, 8, 228 P.3d 1, 5 (2010) along with *McBride v. Walla Walla County*, 95 Wn.App. 33, 975 P.2d 1029 (1999) can be presented for the proposition that evidence of self defense is wholly irrelevant in a probable cause inquiry. Or they can be presented for the narrower proposition that the weighing of self defense evidence is inappropriate in the probable cause inquiry. In this case, however, the only mental state evidence the officers had was the statement that the shooting was in self defense. CP 43 (Finding of Fact III). See e.g. *Jocks v. Tavernier*, 316 F.3d 128, 135 (2d Cir. 2003).

subjective belief that they lacked probable cause to secure a warrant to enter the home. CP 48 (Findings of Fact XX, XXI). Furthermore, the trial court found that “All four of the deputies at the duplex believed, both subjectively and collectively, that it was their duty to public safety and welfare, and part of their community caretaking function, to enter the duplex without a warrant. CP 47 (Finding of Fact XVII). “None of the deputies intended to conduct a criminal investigation inside the duplex. CP 48 (Finding of Fact XIX). In other words, this case is devoid of pretext.

B. CONCLUSION.

The present state of Article 1, § 7 community caretaking law does not provide a clear decision path for officers addressing the vital community caretaking function of recovering unattended decomposing human bodies. Since the recovery of decomposing human remains does not fit neatly into either the emergency category or the routine check on health and safety category, this Court should articulate a rule which recognizes the vital community caretaking function accomplished by the recovery of decomposing human bodies.

More importantly, this Court should conclude that in this case, the Sheriff’s Deputies responding to 13008 Military Road on September 1, 2014 acted for a valid community caretaking reason, without pretext,

when they entered that residence for the purpose of verifying or dispelling their sincere and reasonable concern that a dead body or a dying person might be found within the residence.⁶

The Court of Appeals decision should be affirmed.

DATED: September 20, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.20.18 Therese Kar
Date Signature

⁶ 45 CP (Finding of Fact IX).

PIERCE COUNTY PROSECUTING ATTORNEY

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