STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CASE NO. 2009AP002690 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MIGUEL AYALA

Defendant-Appellant.

REPLY BRIEF
OF DEFENDANT-APPELLANT

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON JULY 24, 2008 AND FROM THE MILWAUKEE COUNTY CIRCUIT COURT'S ORDER OF MAY 9, 2008 DENYING AYALA'S MOTION TO SUPPRESS EVIDENCE, THE HONORABLE JEFFREY WAGNER, PRESIDING

CRAIG S. POWELL
State Bar No. 1046248
Kohler & Hart, LLP
735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Telephone: (414) 271-9595
Attorney for Defendant-Appellant

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Defendant-Appellant Miguel Ayala hereby provides the following in reply to the brief of plaintiff-respondent, State of Wisconsin:

ARGUMENT

I. THE CIRCUIT COURT'S CREDIBILITY DETERMINATION ON THE ISSUE OF CONSENT WAS CLEARLY ERRONEOUS

The State argues that Ayala provided no valid reason to reject the trial court's credibility determination. (States Brief at 16). In making this argument, the State suggests that "[the court of appeals] cannot substitute its judgment for that of the trial court, and, therefore, this court must reject Alaya's request that it reverse the trial court's finding that Rochell gave police consent to enter." (State's Brief at 16). In making this statement, the State suggests that a credibility finding by the trial court is beyond review. That is simply not the case. While a trial court's credibility finding is accorded deference, those findings are subject to review under a clearly erroneous standard. See State v. Williams, 2010 WI App 39, ¶ 6, 323 Wis. 2d 460, 781 N.W.2d 495. A finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence. State v. Popke, 2009 WI 37, ¶ 20, 317 Wis. 2d 118, 756 N.W.2d 569.

In his brief-in-chief, Ayala described several inconsistencies in the officers' testimony at the suppression hearing. (App. Brief at 18-20). The State's responses to these inconsistencies are underwhelming. First, the State finds it "overly fussy" of Ayala to point out that the trial court identified an "Officer Siller" as testifying at the suppression hearing when no such officer testified. (Resp. Br. at 14). It is hardly fussy to point out that a non-existent witness is being credited with testimony supporting the officers' version of events when credibility is at issue.

The State next attempts to diminish the circuit court's failure to resolve inconsistencies in the officers' testimony about the alleged consent received from Rochelle Cervantes. As Ayala pointed out in his brief-in-chief, Officer Bandt testified that Rochelle and Jose Cervantes both said "go, go, go," whereas Officer Wearing testified that Jose Cervantes said "He's in there, you can go get him." (App. Br. at 18). Further, Officer Bandt testified that Ayala was cooperative when Bandt and Wearing entered to room to arrest him, while Wearing testified that Ayala was combative and that several officers had to struggle with Ayala to subdue him. (App. Br. at 18).

The State's response to these inconsistencies is off the mark. The State ignores the inconsistent nature of Bandt and Wearing's testimony on the issue of consent: "the State does not know how testimony that more than one person gave consent undermines consent to enter undermines the finding that police had consent to enter." (Resp. Br. at 15). The point is not that multiple people gave consent, but that two officers standing next to each other gave differing accounts of who gave consent and what was said to indicate consent. The officers' inconsistency is a factor undermining their credibility.

The State also dismisses the starkly inconsistent testimony of Bandt and Wearing on the issue of Ayala's cooperative nature during the arrest as "irrelevant to the issue of consent" because the conduct in question occurred after the entry. (Resp. Br. at 15). The inconsistencies are relevant to the determination of credibility, which is at the heart of the consent finding by the court. You have two officers in the same room at the same time taking the same subject into custody offering two irreconcilable versions of events. The State's invitation to this court to ignore it simply because this testimony was not about consent is simply wrong. It is another piece of the evidentiary record that is properly viewed in reviewing the trial court's credibility findings.

Lastly on this issue, the State contends that Ayala "goes too far" by arguing that the totality of the circumstances surrounding the entry of the residence and arrest of Ayala show that police intended to enter the residence at that time whether or not they received consent. (Resp. Br. at 15-16). According to the State, "there are innumerable situations in which it is dangerous or troublesome for law enforcement to ask for consent—but that does not mean that the court can simply presume that they never do so." (Id. at 16). The State takes Ayala's argument too far, because he has not argued for any per-se rule or blanket presumption that police have not sought consent when they are prepared to enter with or without it.

Ayala's argument on this point is that the circumstances of record in this case clearly support Rochelle Cervantes' version of what happened at the door to the apartment. The most critical fact is the undisputed testimony of Rochelle Cervantes that when she came to open the door she observed officers holding a battering ram and ready to smash in the door. (R.53: 21-22; App. 421-22; App. Br. at 20). What does this fact tell a reasonable person about the intentions of the officers at the door? Do you need a battering ram if you only intend to enter upon receiving consent? Of course not. You need a battering ram if you intend to enter after you are denied entry by an express denial of consent or by a refusal of anyone inside to open the door. This undisputed fact supports Rochelle Cervantes' version of events which, it is worth noting, was not that she denied police consent to enter, but only that they did not ask for it.

The great weight of the evidence--including the large number of officers and a tactical unit present before the entry, the obvious preparedness of officers to enter without consent, the high-profile and serious nature of Ayala's suspected crime, and the fact that officers had information that Ayala was there—clearly indicates that police intended to enter the residence no matter

what. This clear intent evidences a total lack of regard for the requirement that searches be conducted pursuant to a warrant. Rochelle Cervantes' testimony is almost entirely consistent with the police but for whether she gave police consent to enter. The great weight of the evidence exposes the police intentions and supports Rochelle's version of events over the officers[1]. The circuit court's finding to the contrary, necessary to its conclusion that police had consent to enter, is therefore clearly erroneous.

II. POLICE ENTRY TO THE APARTMENT AND BEDROOM CANNOT BE JUSTIFIED BY EXIGENT CIRCUMSTANCES

In its response, the State contends that the recognized exigent circumstance of a threat to safety of a suspect or others was present and justified the police entry. (Resp. Br. at 19). In doing so, the State rightfully recognizes that the remaining three exigent circumstances--(1) hot pursuit; (2) a risk that evidence will be destroyed; and (3) a likelihood that the suspect will flee—are not present.

The State gives short shrift to Ayala's main argument that officers created any exigency concerning the safety of others by choosing to go to the apartment without a warrant. The law is clear that police may not create the exigency used to justify their actions. See State v. Kiekhefer, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997); see also, United States v. Curzi, 867 F.2d 36, 43 n.6 (1st Cir. 1989)(police may not manipulate events to create exigency justifying warrantless entry); United States v. Khut, 490 F.Supp.2d 35, 40 (D. Mass. 2007) (police may not create exigent circumstances by choosing not to get a warrant, making themselves known by knocking and announcing, and claiming that a warrantless search is necessary due to the exigency); and United State v.

[1] Detective Blaszak's attempted intimidation of Rochelle Cervantes prior to her testimony at the suppression hearing should also be considered as a factor weighing against the police account. (R.53: 4-6; App. Br. 7-8).

Chambers, 395 F.3d 563, 566 (6th Cir. 2005) (no exigent circumstances where warrantless entry was forgone conclusion once officers knocked on door without attempting to get warrant beforehand).

The State claims that this argument ignores that (1) obtaining consent is a valid exception to the warrant requirement; and (2) police had obtained consent to enter the apartment and thus "were lawfully in a position to observe the exigent circumstances" that justified their warrantless entry of the bedroom. (Resp. Br. at 20).

The State entirely misses the point; the decision to attempt to get consent to enter instead of getting a warrant is the problem, it is the conduct that creates the exigency. See e.g., United States v. Richard, 994 F.2d 244, 249-50 (5th Cir. 1993) (exigent circumstances contrived where they did not arise until officers knocked and announced themselves and no evidence to establish that suspect was aware of surveillance of residence).

The State's argument focuses narrowly on whether exigent circumstances justified the entry to the bedroom. (Resp. Br. at 20). Any exigency was created, however, once officers presented themselves at the outer door. The State's response ignores Ayala's assertion that the officers' conduct here was a planned arrest situation, one in which a warrant should have been obtained. (App. Br. at 26). The day prior to going to 600 W. Maple Street, officers knew Ayala was wanted for a homicide, that the weapon had not been recovered, and that he was present in a location that police associated with gang activity. While these things would suggest that Ayala presented a danger if confronted, the realization of the exigency – concerns for safety – would not occur until they presented themselves to Ayala. Put another way, the exigency was reasonably foreseeable to police at the time the arrest decision was made. LAFAVE, SEARCH AND SEIZURE, § 6.3(f) at 271-72. Under these circumstances, the reasonable, and constitutional,

course of action would have been to stake-out the premises and obtain a warrant. See e.g. United States v. Glover, 555 F.supp. 604, 612 (D.C. D.C 1982) (no exigent circumstances where sufficient personnel to watch premises while obtaining warrant).

Because the officers created the exigency, it cannot be relied upon to justify the warrantless entry.

III. BOTH AYALA'S STATEMENT AND THE GUN MUST BE EXCLUDED ON REMAND

The State does not dispute Ayala's contention that the gun and his post-arrest statement were fruit of the illegal search. Accordingly, the State has conceded this point, and upon a finding by this court that the entry of the apartment and bedroom were unconstitutional, such evidence must be excluded upon remand. See Charlois Breeding Ranches Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)(arguments not refuted deemed admitted).

CONCLUSION

Wherefore, based on the foregoing, Ayala requests that this court enter an order vacating his conviction and ordering a new trial.

Dated at Milwaukee, WI, this 18th day of June, 2010.

__/s/ *Craig S. Powell*_____
Martin E. Kohler
State Bar No. 1016725
Craig S. Powell
State Bar No. 1046248

KOHLER & HART, LLP
Attorneys for Miguel Ayala

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for brief and appendix produced with a proportional serif font. The length of this brief is 1,646 words.

_/s/ *Craig S. Powell*_____
Craig S. Powell
State Bar No. 1046248
KOHLER & HART, LLP

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

(1) I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

(2) This electronic brief is identical in content and form to the printed for of the brief filed as of this date.

(3) A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

_/s/ *Craig S. Powell*_____
Craig S. Powell
State Bar No. 1046248
KOHLER & HART, LLP