STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2010AP3034-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. SOBCZAK,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal from the circuit court for Washington County, The Honorable Patrick J. Faragher, presiding.

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ON APPEAL TO REVIEW THE ORDER DENYING
DEFENDANT-APPELLANT'S MOTION TO SUPPRESS,
THE HONORABLE PATRICK J. FARAGHER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

In this case, Officer Nathaniel Dorn entered Kenneth Sobczak's parents' residence without a warrant to search the contents of a computer. Dorn received the permission of Sobczak's short-term girlfriend, Kristina Podella, to enter the premises. She had neither actual nor apparent authority to grant consent. The state has produced no evidence that Dorn was unable to obtain a search warrant prior to

entering the residence, or that some other exception to the warrant requirement existed. Furthermore, in filing its motion to supplement the record, the state has conceded that the Court's denial of Sobczak's suppression motion cannot be sustained based upon the record before the court. To allow a first-time, temporary houseguest to give consent to search another's house is an unreasonable and unwarranted expansion of existing Wisconsin search and seizure jurisprudence. This Court should overturn the Circuit Court's decision and grant Sobczak's suppression motion.

I. PODELLA DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO CONSENT TO DORN'S ENTRY OR SEARCH OF SOBCZAK'S RESIDENCE.

A. Podella did not have actual authority to consent to the entry or search of the residence.

Podella lacked actual authority to consent to a search of Sobczak's parents' residence because she he was a temporary guest who did not have joint access or control of the house.

The state argues that Podella had actual authority to consent purely because she was at the home for the weekend and the only person at the residence while Sobczak was at work. No existing Wisconsin authority suggests that a houseguest who stays at a home without her host for a period of time has actual authority. Moreover, the state does not cite any case to support its contention that a host's absence demonstrates he has given control of the premises to his guest for the purpose of authorizing a search. To the contrary, if an estranged wife, returning to

her home with permission to collect her belongings, has no actual or apparent authority to consent to the search of her former home, how could a short-term girlfriend on her first overnight stay have such authority? *See State v. Verhagen,* 86 Wis.2d 262, 272 N.W.2d 105 (Ct. App. 1978).

Additionally, the state's reliance on *State v. Harrell* to support its contention that Podella's guest status was sufficient to authorize her to consent is inaccurate. 2010 WI App 132, 329 Wis.2d 480, 791 N.W.2d 677. In *Harrell*, the defendant was a suspect in a shooting, and police officers went to the house for which he was house-sitting. *Id*. at ¶ 4. While both the defendant and the officers were at the house, the defendant gave the officers consent to enter. *Id*. The court upheld the trial court's finding that the defendant had sufficient authority to permit the officers to enter the house. *Id*. at ¶ 11.

However, the facts of *Harrell* are dissimilar to the facts of this case. First, unlike Sobczak's situation where Podella, a third party, granted consent for the officer to enter the house to search Sobczak's property, the defendant in *Harrell* granted consent to the officer to enter the residence to search his own property. He was the subject of the search, rather than his host, as in the present case. Further, referring to the *Matlock* factors, the defendant in *Harrell*, by virtue of being a house-sitter, was likely staying at the residence for an extended period of time, had keys to the residence, and had enough control over the residence to bring in the mail and newspaper. Additionally, he had a friend staying with him at the house and had invited other friends over the night of the incident. *Id*. at ¶ 2. Conversely,

Podella had spent one night at Sobczak's parents' house and was only alone while Sobczak was at work. Thus, unlike the defendant in *Harrell*, Podella did not have joint access or control such that she would have actual authority to give consent.

B. This court should not create an exception to our Constitutional protections by adopting a limited entry exception

The state attempts to distinguish between consent to enter the premises and consent to search the premises. It contends that guests may be allowed to consent to entry, but not search, because entry is a lesser intrusion into the host's privacy. However, it has not cited any binding case law demonstrating such a distinction actually exists. Further the State notes no such distinction has been made in existing Wisconsin jurisprudence.

The state claims Sobczak cannot rely upon *State v. McGovern* because it because does not distinguish between providing consent to enter and consent to search. 77 Wis.2d 203, 252 N.W.2d 365 (1977). The state's contention is misguided, however, because the *McGovern* court used the same standard to determine whether authority to consent to entry existed as courts have used to determine whether there is authority to consent to search. *See McGovern*, 77 Wis.2d at 214-15. The court in *McGovern* upheld the finding of the trial court that the third-party did not have authority to consent to entry. *Id*. at 214. In making this determination, the Court looked to the criteria of *Matlock* that requires the third party to have joint access or control. *Id*. Because the *Matlock* standard is used to determine both whether a third-party has actual authority to consent to enter the

premises and search the premises, any distinction that may exist between them in other jurisdictions is irrelevant. *Id*. at 215. Because such a distinction does not exist, and because Podella did not have joint access or control of Sobczak's house, she did not have actual authority to give consent.

Any deviation from the standard set forth in *McGovern*, as encouraged by the State, would require illegitimate expansion of existing search and seizure law, unlawfully encroaching upon a citizen's privacy right in the sanctity of their home.

C. Podella did not have apparent authority to consent to the entry or search of the residence.

Podella did not have apparent authority to consent to entry or search of the residence because Dorn would not have been reasonable to believe Podella, a temporary houseguest, had authority over the premises.

The state agrees that the officer must make a sufficient inquiry before his belief can be rendered reasonable. *State v. Kieffer*, 217 Wis. 2d 531, 550-55, 577 N.W.2d 352 (1998) . Based on the conversation between Podella and Dorn before his entry into the house, Dorn was aware that Podella was a weekend houseguest who did not own or reside in the house. She did not imply that she had mutual use or joint access of the premises in a way one with actual authority would have access. Thus, Dorn would not have been reasonable to conclude Podella had authority to consent to a search of the residence.

Although the state correctly articulates the reasonableness requirement, it is incorrect that the considerations that apply to determine whether a minor child could reasonably have the authority to give consent to a search are the same as those of a temporary houseguest. In *Tomlinson*, the court found that the defendant's high school-aged daughter had apparent authority to consent to a police officer entering her home while the defendant was standing nearby. *State v. Tomlinson*, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. The state argues that children are essentially the same as houseguests. This contention is inaccurate. A high school-aged child who lives in a house, has all of her belongings at the house, and can enter freely without knocking is not the same as a temporary houseguest who has spent one night in the home by the permission of her host. This issue boils down to whether there would be an expectation of privacy.

Moreover, the considerations the *Tomlinson* court enumerated are specifically for a situation where the individual who consented was a minor child. These factors are "the child's age, intelligence, and maturity, and the scope of the search." *Tomlinson*, at ¶ 31.

The considerations for Podella, a houseguest who is undisputedly an adult, are different. The officer should have inquired whether Podella had joint access and mutual control of the home. He should have inquired about her connection to the property, and the people who had actual authority to consent. Because the conversation between Dorn and Podella revealed that she was a temporary

houseguest who had been at the home for one night, it was unreasonable to conclude she had authority to consent to his entry or search.

The state also cites a number of cases from other jurisdictions, which are not binding on this Court. In both cases cited by the State, the officers made limited or no inquiry with respect to authority to consent to search, which directly violates our law, as set forth in *Kieffer, supra.*

II. PODELLA DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO CONSENT TO DORN'S SEARCH OF THE COMPUTER.

Podella did not have actual or apparent authority to consent to the search of the computer because she did not have joint access or control of the computer, and Dorn would have been unreasonable to believe she had such authority.

The state argues that because Podella was given permission to use the computer, she had authority to consent to a search of the computer. This is an incorrect characterization of the law. The state concedes that the same consent principles for residences apply equally to computers, and, the fact that someone has permission to be in a house does not mean that person has the authority to consent to a search. *See McGovern*, 77 Wis.2d 203. Thus, the mere fact that Podella had permission to use the computer does not mean that she had permission to give consent to search the computer.

Additionally, an officer may have to inquire regarding the third-party's relationship to the property to reasonably believe authority exists. *See Kieffer*, 217

Wis.2d at 548-59. The state has not produced evidence that Dorn gained any knowledge from Podella regarding her relationship with the computer beyond that she had asked Sobczak for permission to use the laptop, and he had given her permission. Permission to use the laptop does not equate to authority to consent to another to search the laptop. Thus, because the officer's only knowledge regarding Podella and the computer was that she had permission to use it, and he did not inquire further, it would not have been reasonable to believe she had apparent authority to consent.

The state again cites to authority from other jurisdictions, which is not binding on this Court.

III. THE FACT THAT THE STATE FILED A MOTION TO SUPPLEMENT THE RECORD IS A CONCESSION THAT PODELLA DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO GIVE CONSENT TO SEARCH THE HOUSE OR COMPUTER.

The state filed a motion with the Court to supplement the record with the warrants that were eventually obtained by police. In its filing, the State has conceded that the trial court's ruling cannot be sustained upon the record before the Court.

On June 15, 2011, the state filed a Motion to Supplement the Record on Appeal. (Mot.) The reason for the motion was to add two search warrants to the record. (*Id*. at 4.) The state believed that, if the warrants were added to the record, it could "save" the conviction with the "independent source" doctrine. (*Id*. at 3.)

This Court properly denied the motion because its appellate jurisdiction is limited to the record of the Circuit Court. (Order.)

The fact that the state attempted to save the conviction with the "independent source" doctrine acknowledges that the trial Court's ruling cannot stand upon the record alone. The motion was filed in an effort to make an end-around argument not argued by the State nor considered by the trial court. Instead, the State has conceded, in its motion, that Podella did not have authority to consent to the search. Thus, the trial court's decision must be reversed.

CONCLUSION

The defendant, Kenneth Sobczak, requests that the decision of the Circuit Court denying his suppression motion be overturned, that his conviction be vacated, and that this matter be remanded to the Circuit Court. A person does not cede his privacy interest in his home by simply allowing another person to lawfully be there. Our law recognizes that in order to trump the requirement of a search warrant, consent, by someone with authority must be obtained. Consent by an overnight house guest is historically insufficient.

The State's remedy is simple. The officer needed to obtain a warrant. He chose not to and violated Kenneth Sobczak's right to the privacy of his residence.

Dated: _____

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_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

- Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,347 words.

Dated: _____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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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.

Signed: _____