STATE OF WISCONSIN

C O U R T A P P E A L S

District I

Case No. 2013AP000350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

ANDRE A. BRIDGES,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON MARCH 14, 2012, THE HONORABLE
MICHAEL GUOLEE PRESIDING,
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. CONTRARY TO RESPONDENT'S BRIEF, DEFENDANT HAD STANDING TO OBJECT TO THE POLICE SEARCH OF THE ENTIRE RESIDENCE, TO INCLUDE THE BASEMENT AND THE KITCHEN.

A. Contrary to the Respondent's Brief, Defendant's Status of Being on Extended Supervision did not Extinguish his Fourth Amendment Privacy Rights, to include Standing. This, Especially Given that this was a Police, and not a Probationary, Search.

The Respondent indicates in its Brief that Defendant did not have standing to object to the police search of Mallory's residence. This, due to Defendant's status as an individual under extended supervision who had been, arguably, in violation of his agent's permission by staying overnight with Mallory. However, the Brief is incorrect in this conclusion.

The Respondent's Brief indicates that the issue presented herein is novel. (Resp. Brf, pge 2). However, this is not accurate. The Wisconsin Supreme Court, Wisconsin appellate courts, and the United States Supreme Court, have held that individuals on extended supervision/probation do not lose their Fourth Amendment rights. Such individuals have diminished expectations of privacy, but not total extinguishment. Furthermore, such diminished expectations of privacy only apply to probation agent searches. There is no diminished expectations of privacy with respect to police searches.

Even though a probationer has a diminished expectation of privacy, he still has Fourth Amendment privacy rights that must be respected. Furthermore, any diminished right of privacy only applies to searches by probation agents pursuant to the Wisconsin Administrative Code. There is no right by the police to undertake warrantless searches. State vs. Griffin, 131 Wis.2d 41, 388 N.W.2d

535 (1986). Any search of a probationer's home by a probation agent pursuant to Wisconsin Administrative Code still must satisfy the Fourth Amendment, even though by only a reasonable grounds standard. Griffin vs. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). So, a probationer still has Fourth Amendment rights, even under a probation search. Furthermore, a probationer has no diminished rights with respect to police searches.

The holding of the Wisconsin Supreme Court in Griffin applies to probationers as well as parolees. This applies to individuals who are on extended supervision. State vs. Jones, 314 Wis.2d 408, 762 N.W.2d 106 (Ct. App. 2008) citing State vs. Flakes, 140 Wis.2d 411, 410 N.W.2d 614 (Ct. App. 1987).

Here, undeniably, Defendant was on extended supervision. However, there was no indication that Defendant's probation agent had any involvement in the search by the Milwaukee Police. According to testimony at the Motion hearing, the police had conducted the entire search. Defendant's agent was not part of the search, much less even present. Hence, this was not a probation search. It was entirely a police search. Therefore, Defendant's Fourth Amendment privacy rights had not diminished at all. He still had the same reasonable expectation of privacy as would any other citizen not on extended supervision.

The State's case law is irrelevant to the present situation. This present situation concerns a probationer/parolee's Fourth

Amendment privacy rights with respect to a warrantless police search. The State's case law concerns individuals such as a burglar, an escapee, or a person under a protective order not to be at the residence. However, these are not the facts present before this Court in this matter. As indicated, the Wisconsin Courts, and the U.S. Supreme Court, have already considered this present issue before this Court. These Courts have already ruled against the State.

Based upon the foregoing, as well as the arguments raised in Appellant's Brief, Defendant had a reasonable expectation of privacy, and hence standing, to raise the Suppression Motion and object to the unlawful police search of 7416 W. Appleton Avenue.

B. Contrary to the Respondent, Defendant's Status as an Overnight Guest Granted Him Standing to Object to the Illegal Search and Seizure.

The State's Brief argues that this Court must conduct a six-part analysis to determine Defendant's right to standing. This, if the Court determines that his extended supervision status does not affect his right to contest standing. However, unfortunately for the State, a "six-part analysis," or any such analysis, is not necessary. The State has not even mentioned in its Brief that Defendant's status as an overnight guest, by itself, had granted him standing to object to the search. Appellant's Brief has presented abundant case law to support this position. He had spent

the night prior to the search at the residence. Furthermore, as discussed in his Brief, he had a reasonable expectation of privacy with respect to the basement and the kitchen. He kept personal items in the basement, such as his treadmill and stereo system. He had never been denied access to this basement. With respect to the kitchen, he had food there. He had used the kitchen. As indicated, Defendant has cited long standing case law in his Brief to support this legal conclusion that an overnight guest has a reasonable expectation of privacy in his host's residence. Furthermore, none of the case law distinguishes between parts of the residence. Hence, this case law supports Defendant's position that Defendant had standing to object to the police search of the entire residence. The State has erred in arguing otherwise.

II. CONTRARY TO THE RESPONDENT'S BRIEF, A REMAND FOR FURTHER PROCEEDINGS IS NOT WARRANTED.

Respondent's Brief asserts that, even if the Court rules that Defendant had standing to object to the search, then a remand is warranted for further evidentiary proceedings. However, this is not true.

A Court of Appeals may not consider an issue raised for the first time on appeal. The burden is upon the party alleging error to establish that the error had been specifically called to the attention to the trial court. A failure to make a timely objection

constitutes a waiver of the objection. State vs. Terpstra, 63 Wis.2d 585, 218 N.W.2d 129 (1974); Allen vs. Allen, 78 Wis.2d 263, 254 N.W.2d 244 (1977). In neither of these cases did the Supreme Court allow a remand in order to cure the error. The Court simply found the error forfeited.

Prior to taking any testimony, the State had presented an offer of proof and summary of the facts surrounding the alleged police reason for the search. The State had indicated that the police had information from a confidential informant that there would be an individual leaving the residence with an amount of narcotics. This was Mr. Golden. He was seen leaving the residence, and during the arrest process, had thrown down some ecstasy pills or MDMA. Officers then went to the residence, attempted to make contact, heard while they were making contact some commotion inside of the residence. This caused them some concern that evidence was being destroyed. Hence, the officers forced entry. (37:5-6). Clearly, the State had presented these facts to support its position that Mallory's purported consent was valid. However, unfortunately, the State chose not to present any police evidence to support this statement of facts/offer of proof.

The only testimony at the hearing came from Mallory and Defendant. Both of these individuals testified essentially that they were asleep at the time that the police had broken the door down and had "charged in with guns drawn."

Clearly, the police testimony would have been relevant to rebut the testimony of Mallory and Defendant. However, based upon the case law and the evidence at the hearing, and as discussed in Defendant's Brief, Mallory's consent was not voluntary. This, regardless of his testimony as to how he had "consented" while the police had him trapped in his bedroom. The police search was illegal. There was no warrant and no testimony as to a recognized exception as to the generalized requirement for a warrant. Furthermore, the consent was not sufficiently attenuated from this illegal search. However, the State's statement of facts as to the reasons for the search, as told to the trial court and presented herein above, never became evidence at the hearing.

Furthermore, contrary to the Respondent's Brief, the State had chosen not to present evidence pertaining to the police reason for the search and the consent. This was the State's Decision. However, the trial court had clearly informed the parties that it was intending to take evidence relevant to consent. Here, the trial court had ruled during Mallory's testimony that it was not just taking testimony concerning standing. The trial court had indicated that it wanted to use its time well. The trial court had indicated that it would allow the State to go into the issue of consent. (37:31). Hence, the trial court had informed the parties, during the testimony of the first witness at the hearing, that it had clearly wanted to consider Fourth Amendment issues outside of just

standing.

Prior to closing arguments, the Defendant had indicated that the initial police entry was unlawful at Mallory's residence, 7146 W. Appleton Avenue. The trial court had indicated that it was prepared to address this issue unless the State had some evidence that it wanted to introduce. In response, the State had indicated "No, your Honor. I am ready to move on to the next issue." (37:150-151). Clearly, the Defendant's statement contested the entire search. So, this colloquy, in conjunction with the trial court's statement during Mallory's testimony that it would consider consent, had unequivocally informed the State that the trial court would consider the entire search in order "to use its time wisely". Contrary to the Respondent's Brief, this was clear and direct. It was not confusing. Nevertheless, the State made the decision not to not introduce any evidence pertaining to the reasons for the entry. Accordingly, the State had voluntarily forfeited its right to present any such evidence.

Based upon the case law, the facts at the evidentiary hearing, and the Appellant's Brief, the State has waived its right to now seek a remand for further proceedings. Instead, the State has forfeited its right to make such a request. The trial court had provided it with an opportunity to provide police evidence concerning the search and consent. The State chose not to do so. Hence, the State has forfeited its right to now seek a remand. The

Respondent’s Brief has erred in concluding otherwise.

CONCLUSION

As indicated within this Rebuttal Brief and within Appellant's original Brief, Defendant had standing to contest the search. The police, and not the probation agent, had conducted the search. Defendant’s status of being on extended supervision did not extinguish any Fourth Amendment rights with respect to police searches. Furthermore, the State has forfeited its right to seek a remand. The trial court clearly had advised the parties at the Motion hearing that it would consider evidence, at that time, relevant to the matter to which the State now seeks remand. However, the State had waived its right to present such evidence at that time. Hence, it has now forfeited the right to both argue the issue on Appeal, as well as to seek remand.

Based upon this present Reply Brief, and the arguments raised in Appellant’s Brief, Defendant respectfully requests that this Court reverse the Judgment of Conviction and enter all appropriate decisions consistent with the issues that Defendant had raised in these Briefs. This would include a new jury trial.

Dated this 5th day of August, 2013.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Andre A. Bridges, 2013AP000350 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is ten (10) pages.

Dated this 6th day of August, 2013, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Andre A. Bridges, Case No. 2013AP000350 CR is identical to the text of the paper brief in this same case.

Dated this 6th day of August, 2013, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant