STATE OF WISCONSIN

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

District I

Case No. 2013 AP 000350 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.

SUPPLEMENTAL BRIEF AND APPENDIX OF APPELLANT

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ISSUE PRESENTED

I. Whether or not the trial court erred in finding that the police entry into Mallory's residence, with a subsequent search, was legal. The trial court found that Defendant had a reasonable expectation

of privacy in that apartment, but not the basement. The police entry was without a warrant and the State's theory of exigent circumstances was not justified. Contrary to the State, the exigent circumstances exception to the generalized requirement for a warrant did not apply here, for various reasons. Furthermore, as indicated in Appellant's Brief, and contrary to the trial court, Mallory's consent was not sufficiently attenuated from the illegal entry. Finally, his consent was not voluntary.

Trial Court Answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

This Brief is a supplement to Defendant's original Appellant's Brief. Hence, Defendant will not completely re-recite the facts indicated within that Brief. This Brief is before this Court and is part of this Appeal. This Supplementary Brief does not replace the arguments and facts outlined in that original Brief.

Subsequent to the completion of the original briefing schedule, the Court of Appeals had issued an Order remanding the matter to the trial court for additional testimony and trial court fact-finding and analysis. This Order is dated December 3, 2013. (50:1-5). Subsequent to this Order,

the trial court conducted an evidentiary hearing on January 31, 2014. The trial court issued an Oral, as well as written Decision, on February 3, 2014.

On January 31, 2014, three witnesses testified for the State. These witnesses were all Milwaukee County police officers. They were Detective Scott Marlock, Detective David Lopez, and Police officer Dean Newport. The court also heard some oral arguments.

On February 3, 2014, the trial court heard further oral arguments. At that time, the court issued both an Oral, and written, Order. This written Order indicated that Defendant had: (1) standing to object to the warrantless entry and search of the apartment on March 4, 2010; (2) did not have standing to object to the warrantless entry and search of the basement of that apartment; (3) was in violation of the terms of extended supervision when he stayed at Fred Mallory's residence 3-4 times per week. The written Order also indicated that: (1) there was a legal basis for the entry into the apartment; (2) there was a legal basis for the entry into the basement; (3) Defendant was never asked for consent to the search of the apartment and/or basement, however, since he denied living there, law enforcement properly asked Fred Mallory for consent; (4) Mallory voluntarily consented to the search of the apartment and/or basement; (5) even assuming that the initial entry into the apartment was illegal, Mallory's consent was sufficiently attenuated from that illegal entry. (52:1-2; A 103-104).

Subsequent to the February 3, 2014 Written Order by the trial court, the Court of Appeals issued an Order dated March 3, 2014. This Order allowed the parties to file Supplemental Briefs concerning the matters

raised in the January 31, 2014 and February 3, 2014 evidentiary hearings and subsequent trial court Orders. This Supplemental Brief now follows.

STATEMENT OF THE FACTS

Subsequent to the completion of the briefing schedule with respect to Appellant's original Brief, the Court of Appeals issued a five-page written Order remanding the matter to the trial court for additional testimony and trial court fact-finding and analysis. This Order is dated December 3, 2013. The Court directed the trial court to address: (1) whether Defendant had standing to object to the warrantless entry and search of the apartment; (2) whether Defendant had standing to object to the warrantless entry and search of the basement; (3) whether the terms of Defendant's extended supervision allowed him to sleep anywhere other than his mother's home. In addition, the Court required the trial court to make findings and legal conclusions with respect to the following: (1) whether there was a legal basis for the warrantless entry into the apartment; (2) whether there was a legal basis for the warrantless entry into the basement; (3) whether Bridges consented or acquiesced to the search of the apartment and/or basement, and if so, whether the consent was voluntary; (4) whether Mallory consented or acquiesced to the search of the apartment and/or basement and, if so, whether the consent was voluntary; and (5) assuming the initial entry to the apartment was illegal, whether any consent by Bridges or Mallory was sufficiently attenated from that illegal entry. (50:1-5).

Subsequent to the Court of Appeals' December 3, 2013 Order, the

trial court conducted an evidentiary hearing on January 31, 2014. On that date, three witnesses testified for the State. These witnesses were Milwaukee County police officers. They were Detective Scott Marlock, Detective David Lopez, and Police officer Dean Newport. The court also heard some oral arguments.

The State's first witness on January 31, 2014 was Detective Scott Marlock. He testified that the police had started an investigation regarding drug dealing from the apartment building located at 7146 W. Appleton Avenue in Milwaukee. This was a four unit apartment building, separated by two, two unit halves, upper and a lower on one side, and equally upper and lower on the other half. Upon receiving information from a confidential informant, the police started surveilling the building. The information was that someone named Raymond Golden was selling ecstasy for someone in that apartment building. (56:23-24). On one occasion, the police observed a subject seated in a vehicle in the rear of the apartment building. The subject entered the door that lead to apartments 1 and 2. The police conducted a traffic stop of that individual. (56:25-26). This individual supposedly identified that he had received the cocaine from apartment number 1 and from a black individual named Dre. The police ultimately released this individual. (56:28).

The traffic stop, however, had occurred about two weeks prior to March 4, 2010. The police recovered cocaine, not ecstasy. Furthermore, after this traffic stop, the police never obtained a warrant to go the apartment that this person had supposedly identified. (56:52, 54).

On March 4, 2010, the police again had contact with the apartment building. The police observed Golden walk towards 7146 W. Appleton

Avenue. He knocked on the common exterior, outermost, door to apartments 1 and 2. He entered the apartment building. The police could not see who opened the door. Approximately four to five minutes later, Golden exited the apartment building and walked back towards Appleton Avenue on the sidewalk. He ran westbound after police had exited their vehicles. When apprehended, he was a building to the north on the sidewalk. (56:33-35). The police apprehended Golden a couple of blocks away from the initial pursuit location. During the run, he had discarded a bag containing what was ultimately identified as ecstasy pills. The police learned, during interrogation, that he did obtain the ecstasy pills from an individual inside the stairway of 7146 W. Appleton, but he did not enter an apartment but stayed in the hallway. (56:36-37).

Marlock testified that he went back to the apartment building. Officer Newport had already entered the apartment building. Newport shouted out that there was nobody by the name of Fred upstairs. Marlock was aware of the name of Fred from the traffic stop that he had described. He and Detective Lopez entered the building. They entered the outer door. Directly inside the outer door to your right, there was a stairwell going to the second floor. Passed the opened stairway is a closed doorway which led to the basement. Finally, to the left at the end of the short hallway is a door which led to apartment 1. He and Lopez proceeded to the door leading to unit 1. Marlock knocked on that door several times, receiving no answer. (56:38-39).

Here, clearly, based upon Marlock's testimony, the outer entry door is just next to the stairway leading to apartment 2. This outer entry door is at one end of a hallway. However, apartment 1 is at the opposite

end of that hallway. The police never testified whether anyone in apartment 1 could hear if someone was announcing to seek entry at the outer entry door at the other end of the hallway.

After knocking on the door to apartment 1, Marlock testified that he could hear movements of someone walking and moving items around the inside of apartment 1. While knocking, he shouted Milwaukee police. He remembered hearing walking, and as far as objects being moved, it sounded something would make like you are shuffling something around. Then, Detective Lopez forced the door open by kicking it with his foot. Marlock testified that he believed that someone was either destroying potential evidence or arming themselves. (56:39-43). Hence, the police theory of entry was exigent circumstances.

Marlock testified that once the door had been opened, he could see inside of the apartment. Directly in front of him, straight through the apartment, he could see the Defendant standing next to a couch. He was approximately fifteen feet from the door. Defendant was cooperative with police orders. Marlock testified that he had his firearm drawn. There was one other subject, Fred Mallory, in the one bedroom of the one bedroom apartment. (56:44-46). Marlock testified that he asked the Defendant why he did not open the door. Defendant said that he did not hear them knocking. (56:47).

Marlock testified that after the traffic stop approximately two weeks prior to March 4, he never obtained a warrant to go into the apartment identified by the driver of the car. They just continued the surveillance. (56:54). The upstairs tenant was also a black male. (56:55). Marlock had apprehended Golden about two to three blocks from

the apartment. (56:56). Interestingly, Marlock showed Golden a picture of the Defendant. Golden indicated that this was not the subject that he had purchased the pills from. He said that he had bought it from a black male in the common stairway of 7146 W. Appleton. (56:57-58). Marlock testified that the upstairs tenant could have flushed drugs down the toilet, or washed them down a sink or something of that nature. (56:60). As far as apartment 1, when he knocked on the door, he did not hear the sound of the toilet flushing or somebody flushing something down the sink. The walking around sound could simply have been the sound of someone walking around the apartment. (56:61). When Marlock entered the apartment, Defendant had informed them that he had been sleeping. He did not have any contraband on him. He was not in the bathroom or in the kitchen. He was also not armed. (56:62-63). Marlock did not know what either Defendant or Mallory were doing when he and Lopez were knocking on the door. (56:64). He testified that just before Mallory gave them consent, he and Lopez were looking around opening doors and looking in closets. (56:66). This was the protective sweep. However, he never testified that he had told either the Defendant or Mallory that this was not a search.

Detective David Lopez testified next. He testified essentially consistent with that of Detective Marlock. When Golden left 7146 W. Appleton Avenue, he approached a sidewalk area, maybe a house or two west of 7146. Other detectives approached him. At that time, Golden fled west. (56:81). Lopez testified that when he and Marlock entered the outermost door to the apartment building, it was already open. Other law enforcement officers were already in that building. (56:83). When he

entered apartment 1, he had his gun drawn. (56:87). Hence, when he and Marlock entered this apartment, both of them had their guns drawn.

With respect to the cocaine traffic stop about two weeks prior to March 4, 2010, Lopez testified that he did not show the stopped individual any pictures of the Defendant. He was not sure if anyone did. He never saw that person walk into any apartment in the building. He just saw the person walk into the outermost door of the apartment building. He did not know if the person went into apartment 1 or went upstairs to apartment 2. (56:92-93). With respect to the knocking of the door on March 4, 2010, Lopez could not testify if the sound of someone moving was the sound of somebody moving towards the door. He also testified that he did not have any idea what a person inside unit 1 knew or did not know with respect to what was going on with Golden. (56:94-95). With respect to a subsequent custodial interview with the Defendant, the Defendant advised him that he did not answer the door because he was sleeping. He may have indicated that he did not answer the door because it was not his house. (56:105).

Officer Dean Newport was the third and final police officer to testify on January 31, 2014. He was also part of the investigation and search that had occurred at 7146 W. Appleton Avenue on March 4, 2010. (56:110). With respect to the arrest of Golden, he testified that he assisted in the footchase arrest of him. Golden ran through the yards and was ultimately arrested. After the arrest, Newport returned to 7146 W. Appleton Avenue. He knocked on the outer locked door for approximately two minutes, identifying himself as the police. The upstairs tenant opened the door. (56:113-114). He then conducted a consent search of the

upstairs apartment. He yelled down to either Detective Lopez or Marlock that there was no Fred upstairs and no Dre and that the place upstairs was good meaning that there was no contraband in there. (56:115). He then entered unit 1 after Lopez and Marlock had already entered that apartment. He observed a subject in a bedroom right to the right of entering the door. This was Fred Mallory. (56:117). He then briefed Mallory as to why they were there. This was probably two minutes into it. This was after the protective sweep of the apartment. Mallory informed him that the reason that he did not answer the door was because he was sleeping and did not hear them. He told the police that they could search where they wanted. (56:119-121).

However, no police officer ever testified that anyone had ever informed Mallory that the "protective sweep" and not an actual search. This is consistent with Mallory's testimony at the February 11, 2011 Motion hearing that the police had begun searching the apartment prior to his consenting to any search. (37:64-65).

Newport testified that, although Mallory left his bedroom to go the bathroom and even helped try to find the key to the basement, he as always in Newport's presence. (56:131-132). He also testified that any statement made by Mallory that he had received crack cocaine from the Defendant was not in his police report. Similarly, his report did not contain any entry with respect to any alleged statement that Mallory was afraid of Defendant. (56:136-137). Newport testified that he did not put any of this information in his report, but he did not have any problem testifying about it, in front of the Defendant, on January 31, 2014. (56:141).

With respect to the entry into the apartment, the trial court concluded that the police had probable cause and exigency. The court concluded that there was a legal basis for a warrantless search of the apartment. (56:156-157; A 105-106).

On February 3, 2014, the court continued to hear oral arguments and rule upon the issues raised by the Court of Appeals in its December 3, 2013 Order.

With respect to the issues of whether there was a legal basis for entry into the basement, and whether Mallory's consent to the search of the apartment and basement was free and voluntary, the State had argued that Mallory's consent created this legal basis. The State had argued that the consent was free and voluntary. (57:3-4). Defendant had argued that, to materially rebut any inference that Mallory was ever scared of Defendant, he had appeared voluntarily at the February 11, 2011 Motion hearing, and while Defendant was in custody. (57:105). Defendant also presented Mallory's testimony at the Motion hearing. Defendant argued that mere acquiescence is insufficient to constitute voluntariness. Mallory testified that he did not give initial consent to the officer to search the apartment basement prior to his initial perception that the police were already conducting a search. Any consent was after the fact, and was "you might as well go ahead." Mallory testified that there was an officer with him the entire time. He was not free to get up and move about. He was basically a prisoner in his room. He also felt that he did not have any choice when he told the officer that they could search the apartment. Any consent was mere acquiescence, and hence, involuntary. (57:16-23).

Defendant had presented a much fuller outline of Mallory's testimony on February 11, 2011 in his original Appellant's Brief.

The trial court concluded that Mallory's consent was voluntary. (57:26-29; A 107-110).

The trial court also heard arguments with respect to if the initial entry was illegal, whether or not Mallory's subsequent consent was sufficiently attenuated from that illegal entry. Defendant had argued the testimony in the February 11, 2011 motion hearing transcript. Mallory testified that he was lying in bed when he heard the door smashed in. Police came in, blocked the bedroom, and said put your hands up, with guns drawn. They then, according to Mallory, started searching. Only seconds elapsed from the time they got into his bedroom from the time that he heard them enter. A total of two to three officers came into the bedroom. At first, they had their guns drawn. The officers handcuffed him. The officers went into his closet, patting his clothes. Basically, the entire situation happened very quickly. There was no freedom. There were no intervening circumstances from the illegal entry to Mallory's purported consent. This was a continuing search. There was insufficient attenuation from the illegal entry. (57:42-49).

Defendant's original Appellant's Brief provides further legal and factual analysis of this attenuation issue.

The trial court had concluded that Mallory's consent was sufficiently attenuated from any illegal entry. (57:50-53; A 111-114).

The court also concluded that Defendant had standing to object to the warrantless search of the apartment. (57:77).

Defendant testified on February 11, 2011 that every time he wanted to go to the basement, Fred let him in. Mallory never refused this request. Defendant stored property in the basement. He stored hubcaps and an entertainment center in the basement. (57:77-82).

The trial court concluded that Defendant did not have standing to object to the search of the basement. (57:88-90; A 115-117).

Once again, with respect to the issue of standing, Defendant had previously provided facts and analysis in his original Appellant's Brief.

The trial court issued an Oral, as well as written Decision, on February 3, 2014.

As indicated, on February 3, 2014, the trial court heard further oral arguments. At that time, the court issued both an Oral, and written, Order. This written Order indicated that Defendant had: (1) standing to object to the warrantless entry and search of the apartment on March 4, 2010; (2) did not have standing to object to the warrantless entry and search of the basement of that apartment; (3) was in violation of the terms of extended supervision when he stayed at Fred Mallory's residence 3-4 times per week. The written Order also indicated that: (1) there was a legal basis for the entry into the apartment; (2) there was a legal basis for the entry into the basement; (3) Defendant was never asked for consent to the search of the apartment and/or basement, however, since he denied living there, law enforcement properly asked Fred Mallory for consent; (4) Mallory voluntarily consented to the search of the apartment and/or basement; (5) even assuming that the initial entry into the apartment was illegal, Mallory's consent was sufficiently attenuated from that illegal entry. (52:1-2; A 103-104).

Subsequent to the February 3, 2014 Written Order by the trial court, the Court of Appeals issued an Order dated March 3, 2014. This Order allowed the parties to file Supplemental Briefs concerning the matters raised in the January 31, 2014 and February 3, 2014 evidentiary hearings and subsequent trial court Orders. The Orders were both written and oral. This Supplemental Brief now follows.

This Supplementary Brief has been filed within the schedule established by the Court of Appeals.

ARGUMENT

I. CONTRARY TO THE TRIAL COURT, DEFENDANT HAD STANDING TO OBJECT TO THE SEARCH OF THE BASEMENT.

The Court of Appeals need not defer to the trial court's legal conclusion that an appellant had not proven standing. State vs. Curbello-Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct.App. 1984) at 119 Wis.2d 424 citing State v. Fillyaw, 104 Wis.2d 700 at 711, 312 N.W.2d 795 at 801 (1981).

The following elements are relevant, although neither controlling nor exclusive, in the determination of whether the Defendant had a legitimate expectation of privacy: (1) whether the Defendant had a property interest in the premises; (2) whether he was legitimately on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical

notions of privacy. State vs. Rewolinski, 159 Wis.2d 1, 464 N.W.2d 401 (1990).

The trial court had already concluded that Defendant had standing to object to any search of the apartment. He was there as an overnight guest. However, part and parcel of the apartment included the basement. Although he did not have a key to the basement, Mallory provided him with a key, and access, anytime that he wanted. Defendant kept items in that basement, to include hubcaps and other items. He could exclude others from the basement due to his standing and relationship with the apartment. He took precautions customarily taken by those seeking privacy by ensuring that the basement was locked through Mallory. Defendant took steps to ensure that his items were secure. He put the basement to a private use, by keeping his personal property in that basement. Furthermore, his relationship with the basement is tied to his standing to the apartment. A historical notion of privacy includes a finding that an individual who has a legitimate expectation of privacy over an apartment has the identical expectation of privacy with respect to a basement attached to that property. The basement has been provided to individuals as part of the apartment. They are allowed to use that basement and keep items there, with a legitimate expectation of privacy. Individuals who use the apartment with such a reasonable and legitimate expectation are entitled to use the basements with such an expectation. Defendant is no exception to this rule. Furthermore, as discussed, he exercised that right by utilizing the basement with the legitimate expectation that his personal items would be protected and be private.

Based upon the foregoing, and the evidence at all of the Motions

hearings, the trial court erred in determining that Defendant did not have standing to contest the search of the basement. This Court is not bound by the trial court's decision. This Court must overturn that decision.

II. MALLORY'S CONSENT WAS NOT VOLUNTARY. MERE ACQUIESCENCE ON HIS PART IS INSUFFICIENT TO SHOW CONSENT. FURTHERMORE, BASED UPON THE MOTIONS HEARINGS, THE POLICE HAD NO REASON TO ENTER THE PREMISES. FINALLY, THERE WAS INSUFFICIENT ATTENUATION FROM THIS ILLEGAL CONDUCT TO THE CONSENT.

A. The Police Entry into the Apartment was Illegal. There was No Warrant, and no Justifiable Recognized Exception to the Generalized Requirement for a Warrant to Justify this Entry.

The conclusion here is the same as previously presented in Defendant's original Appellant's Brief. The testimony of the officers does not alter that conclusion. The police entry into the apartment was illegal.

A seizure is illegal if there are no recognized exceptions to the generalized requirement of a warrant to justify a warrantless entry into a residence. Minnesota vs. Olson, 495 U.S. 91 at 100-101.

Generally, evidence seized in a warrantless search of one's home is inadmissible absent a well-delineated, judicially recognized exception. State vs. Johnson, 177 Wis.2d 224, 501 N.W.2d 876 (Ct.App. 1993); State vs. Douglas, 123 Wis.2d 13, 365 N.W.2d 580 (1985). The Fourth Amendment has drawn a firm line at the entrance to the house. Payton vs. New York, 445 U.S. 573 (1980).

The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. All warrantless searches and seizures inside a home are presumptively unreasonable. The police bear

a heavy burden when trying to establish an urgent need justifying warrantless searches. State vs. Kryzaniak, 241 Wis.2d 358, 624 N.W.2d 389 (Ct.App. 2001).

The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. U.S. vs. Johnson, 333 U.S. 10; 68 S.Ct. 367; 92 L.Ed.2d 436 (1948).

The conduct of law enforcement cannot create exigent circumstances. State vs. Kiekhefer, 212 Wis.2d 460, 569 N.W.2d 316 (Ct.App. 1997).

There is no exigent circumstances where officers had the Defendant's trailer home under surveillance so that it was unlikely that the Defendant would escape. Furthermore, the mere presence of officers does not qualify as an exigency justifying an immediate entry or arrest. Id. at 478.

Here, there is no reason that the police could not have obtained a warrant prior to knocking on the door to unit 1. They had the building under control. There is mere speculation that anyone in unit 1 could have heard Newport at the outer entry to the apartment building shouting to enter. Neither Bridges nor Mallory ever testified that they heard Newport at the front door. The physical layout of that apartment building supports this testimony. Unit 1 was at the end of a hallway while unit 2 was at the top of the stairs just to the right of that outer way. Furthermore, there was no evidence that anyone in unit 1 had any

knowledge of Golden's arrest. The detectives did not attempt to stop him until he was away from the building. The arrest did not occur until a couple of blocks later. Hence, the reasonable inference is that the individuals in unit 1 did not know of the police presence until the police knocked on that unit's door. Both Mallory and Bridges confirmed this conclusion by their testimony. Mallory had no motive to lie on February 11, 2011. Furthermore, as indicated, the mere presence of police officers does not create exigency. Hence, there is no evidence whatsoever that, prior to the time that Detectives Marlock and Lopez pounded on the door to unit 1, there were any exigent circumstances whatsoever. Furthermore, the testimony of these two detectives were that they believed exigent circumstances existed only after they had knocked on this door. However, as indicated in the relevant and applicable case law, the police cannot create the exigent circumstances. This is what happened here. Here, any argument of exigent circumstances must rest upon a conclusion that the police created such exigency, if any. However, as indicated in the relevant and applicable case law, the police officers cannot legally justify exigent circumstances based upon their conduct.

Furthermore, any argument concerning Defendant and Mallory having a firearm is not an exigent circumstance. The mere presence of firearms does not create exigent circumstances. Moreover there was no indication that either Defendant or Mallory were considered dangerous. This is a relevant factor. State vs. Kiekhefer, 212 Wis.2d 460 at 477.

Here, the State has failed to meet its heavy burden that the police could not obtain a search warrant, even after Newport had determined that unit 2 was not involved. There was no indication that anyone in unit 1

had, even reasonably, learned of this indication. Furthermore, the mere presence of officers is insufficient to constitute exigency. The presence of officers in the apartment building is not an exigent circumstance to any unit. Otherwise, the police could have used this rationale to justify a nonconsensual search of unit 2. Here, the police should have simply contained the situation until they had obtained a search warrant. The warrantless search was illegal and impermissible. The trial court erred in concluding otherwise. This Court must reverse this conclusion.

B. Mallory's Purported Consent was Not Sufficiently Attenuated from the Illegal Entry so as to Purge the Taint.

A consensual search of a residence must be sufficiently attenuated from the initial illegal entry so as to purge the taint attached to the evidence found during the consensual search. In assessing whether the consent overcomes the illegal entry, there is a three part test. First, the court must examine the temporal proximity of the official misconduct and the seizure of the evidence. Second, there must be the presence of intervening circumstances. Third, the court must examine the purpose and flagrancy of the official misconduct. With respect to this third factor, the Court must ask if the police conduct, although erroneous, rise to the level of conscious flagrant misconduct requiring prophylactic exclusion of evidence? State vs. Arctic, 316 Wis.2d 133, 762 N.W.2d 436 (Ct.App. 2008).

Here, Mallory's testimony, as presented in the original Appellant's Brief, shows that any consent was not sufficiently attenuated from the original illegal search. The police entered with guns drawn. Even after the guns had been put away he knew that the police were still armed. He

was not free to leave. He had been handcuffed. According to his perception, the police began searching the residence immediately. He was kept in his bedroom. His consent was only "after the fact" of the police searching. Although law enforcement testified that this was a "protective sweep," he had no indication that this was anything other than a full search. The police were opening, and searching, closets and doors. To him, the search had already begun. Furthermore, although Newport testified that his conversation with Mallory was cordial, Mallory never testified that he had any choice. He was not allowed to leave the bedroom. Newport's testimony essentially corroborates this assertion. He only left to go to the bathroom, but Newport accompanied him during the entire chain of events.

Here, the facts are identical to that in Kiekhefer. During the moments between entry and the purported consent, he had been detained in his room, in the presence of armed agents. He had been restrained. Id. at 482. Here, the situation is similar, even based upon Newport's testimony. Furthermore, based upon Mallory's observations, the police had begun the search immediately upon entry.

Furthermore, as in Kiekhefer, there were no intervening circumstances between the illegal entry and the consent. Id. at 482-483. Immediately upon the illegal entry, Mallory was kept in his bedroom, or only allowed to go to the bathroom, while law enforcement searched his residence. There were no intervening circumstances, even despite some idle chit chat between him and Newport. Interestingly, such chit chat had occurred while Newport, who was armed, kept Mallory in his bedroom, or the bathroom, while other officers conducted their "protective sweep."

A police officer was with Mallory the entire time.

Finally, the conduct of the agents rise to the level of flagrant misconduct. Here, the surveillance was for the purpose of identifying Defendant, or someone in unit 1. The traffic stop of two weeks prior had identified unit 1. That stop had identified Defendant's vehicle, which the police had surveilled and identified. (56:26, 29). Marlock testified that the surveillance was of a particular unit, unit 1. (56:24). The police never bothered to obtain a search warrant. Instead, the police illegally entered the apartment without consent and with a show of force. Multiple officers entered with guns drawn. Mallory had been restrained the entire time. The investigation had a quality of purposefulness, which is prohibited. In Kiekhefer, the Court found that it could not ignore such flagrant abuse. The Court ordered suppression and found that attenuation had not occurred. For the reasons indicated in this, and Defendant's original Brief, this is the same conclusion present here. The trial court's conclusion is erroneous. It must be reversed.

Based upon the evidence adduced at the Motions hearing, any consent by Mallory was insufficiently attenuated from the illegal entry so as to purge the taint. As discussed, the testimony at the January 31, 2014 motion hearing does not change Defendant's conclusion in his original Appellant's Brief. Accordingly, this Court must suppress all of the seized evidence, and find that Mallory's purported consent is insufficiently attenuated from the police's illegal conduct.

C. Mallory's Consent was Not Voluntary.

Under the relevant and applicable case law, the trial court erred

in concluding that Mallory's consent was voluntary. This Court must reverse this decision. Even by Newport's own testimony, the police made a sobering show of force. Mallory was immediately kept in his room, and prevented from leaving except accompanied by law enforcement. He had been handcuffed and restrained. The officers testified that at least three officers were in the apartment. Both Lopez and Marlock had shown their weapons. Regardless of chit chat between Mallory and Newport, Mallory had still been confined, under such coercive circumstances. His testimony that his consent was not voluntary is unrebutted. Furthermore, no police officer ever testified that Mallory had been informed of his right to withhold consent to search, particularly after the agents had searched the area that he was in. This would include Mallory's closet and its clothes. In Kiekhefer, the Court of Appeals found, under circumstances almost identical to those present here, that Kiekhefer's statements were not voluntary. The Court found particularly troubling that Kiekhefer had not been informed of his right to withhold consent to search, particularly after the agents had searched the area that he was in. Id. at 471-473.

For the aforementioned reasons, and those indicated in Defendant's original Appellant's Brief, Mallory's consent was not voluntary. The trial court erred in concluding otherwise. This conclusion must be reversed.

CONCLUSION

The trial court erred in finding that Defendant did not have

standing to object to the search of the basement. The initial entry into the apartment was warrantless and the State's theory of exigent circumstances is erroneous. Furthermore, Mallory's consent was not sufficiently attenuated, under the totality of the circumstances, from this illegal conduct. Finally, Mallory's consent, contrary to the trial court, was not consensual.

Based upon the foregoing, as well as Defendant's original 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 has raised in this Brief. This would include suppression of all evidence seized from the residence in question, to include the basement, as well as a new jury trial.

Respectfully Submitted, this _____ day of May, 2014.

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CERTIFICATION

I hereby certify that the Supplementary Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Andre 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 twenty three (23) pages.

Dated this 7th day of May, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

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

Dated this 7th day of May, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of May, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant