STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE A. BRIDGES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, THE HONORABLE MICHAEL D. GUOLEE, PRESIDING, AND AN ORDER DENYING A SUPPRESSION MOTION, THE HONORABLE WILLIAM POCAN, PRESIDING, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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ARGUMENT

I. BRIDGES LACKED STANDING TO CHALLENGE BOTH ENTRIES AND SEARCHES.

A. Relevant legal principles.

1. *Rewolinski*.

To invoke the constitutional protection against unreasonable searches and seizures, the defendant must

first have a reasonable expectation of privacy in the property to be searched. *State v. Rewolinski*, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990).

The defendant must demonstrate, by a preponderance of evidence, both an actual, subjective expectation of privacy in the area searched, and that his expectation was legitimate in that society would recognize it as reasonable. *State v. Orta*, 2003 WI App 93, ¶11, 264 Wis. 2d 765, 663 N.W.2d 358; *Rewolinski*, 159 Wis. 2d at 16.

In addressing objective reasonableness, courts examine whether the defendant: (1) had a property interest in the premises; (2) was legitimately (lawfully) on the premises; (3) had complete dominion and control and the right to exclude others; (4) took precautions customarily taken by those seeking privacy; (5) put the property to some private use; and (6) has a claim consistent with historical notions of privacy. *Rewolinski*, 159 Wis. 2d at 17-18. These factors are neither controlling nor exclusive. *Orta*, 264 Wis. 2d 765, ¶14.

2. *Rakas/Amos*.

The defendant also lacks standing when his expectation of privacy in a place is not legitimate because his very presence there is contrary to law. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978); *State v. Amos*, 153 Wis. 2d 257, 269-70, 450 N.W.2d 503 (Ct. App. 1989). The defendant bears the burden of proving his presence is not wrongful. *United States v. Mitchell*, 64 F.3d 1105, 1109-10 (7th Cir. 1995).

In *Rakas*, the United States Supreme Court discussed the classic example of the burglar who claims an expectation of privacy in the burgled home, and concluded that although a "burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy," his

presence there was wrongful, and society would not recognize that privacy expectation as reasonable. *Rakas*, 439 U.S. at 143 n.12.

In *Amos*, this court addressed whether the defendant, a prison escapee, had an expectation of privacy in his friend's residence where he was hiding from authorities. *Amos*, 153 Wis. 2d at 269-70. This court concluded that, while the defendant may have had a subjective expectation of privacy, his expectation was not objectively reasonable or legitimate: as an escapee, he was nothing more than a trespasser on society. *Id*.

3. Standard of review.

This court upholds a circuit court's factual findings unless clearly erroneous, but reviews independently the legal determination of standing. *State v. Trecroci*, 2001 WI App 126, ¶23, 246 Wis. 2d 261, 630 N.W.2d 555.

B. Under *Rakas/Amos*, Bridges lacked standing.

Bridges argues he had standing because he was a frequent overnight guest at Mallory's unit (Bridges' supplemental brief at 14-16).

Bridges, however, was not a typical houseguest, because under the terms of Bridges' extended supervision, Bridges had no lawful right to stay overnight at Mallory's apartment, even though Mallory had invited him. *State v. McCray*, 220 Wis. 2d 705, 713, 583 N.W.2d 668 (Ct. App. 1998) (although overnight guest may have expectation of privacy in host's premises, defendant lacked standing when testimony established defendant was not such a guest); *United States v. Brown*, 484 F. Supp. 2d 985, 992-94 (D. Minn. 2007) (invited overnight guest lacked standing, because landlord had banned him from premises).

Any purported expectation of privacy loses its legitimacy not because of the wrongfulness of the activity on the premises, but because of the wrongfulness of the suspect's very presence in the place where he purports to have an expectation of privacy. *Commonwealth v. Morrison*, 710 N.E.2d 584, 586 (Mass. 1999). Although overnight guests generally have expectations of privacy, "this overnight guest did not," because he was the subject of a protective order forbidding him to be on the premises. *Id.* It was "simply nonsense to say that society is prepared to recognize his right to be where society by the processes of the law has ordered him not to be." *Id.*

Here, Bridges violated the rules of his extended supervision when he stayed as an overnight guest at Mallory's home. During the remand hearing, the circuit court incorporated evidence from the original suppression hearing in finding Bridges had violated his supervision conditions (56:17; 57:91-99):[1]

- Bridges was required stay at his mother's house, and violated his supervision terms by staying at Mallory's residence overnight without his agent's permission (37:15-18, 101, 119);

- Bridges never asked his supervision agent for permission to stay at Mallory's, and personally admitted he violated his supervision terms by staying there (37:130-131); and

- Although Bridges maintained the appearance he was staying at his mother's, he stayed at Mallory's more often (37:132, 137).

Bridges has failed to meet his burden in showing his very presence in Mallory's apartment was not wrongful. *Mitchell*, 64 F.3d at 1109-10. Bridges cannot

[1]On remand, the parties presented no additional evidence about Bridges' supervision terms (57:91-93).

simply say Mallory invited him to stay there: under the undisputed terms of Bridges' supervision, only Bridges' agent was authorized to do so (57:91-94). *See* 6 Wayne LaFave, *Search and Seizure*, §11.3(b) at 203-06 & nn.140-148 (5th ed. 2012) (defendant required to show that person authorized to do so gave permission for him to be present).

Bridges had no reasonable expectation of privacy in the premises—and no standing—because society would not recognize Bridges' expectation of privacy as reasonable when Bridges' very presence there was contrary to law. *Rakas*, 439 U.S. at 143 n.12; *Amos*, 153 Wis. 2d at 269-70.[2] It is "simply nonsense" to allow Bridges to claim an expectation of privacy in a place where he had no legal right to be. *Morrison*, 710 N.E.2d at 586.

C. Under *Rewolinski*, Bridges lacked standing.

Bridges also lacked standing under the six-factored *Rewolinski* test. *Rewolinski*, 159 Wis. 2d at 17-18.

1. Bridges had no property interest.

The remand testimony established:

- Bridges lived with his mother, but occasionally spent the night at Mallory's, and slept on the couch in order to bring women over for sex (56:46-52, 64, 105, 121-122);

[2]This court owes no deference to the circuit court's ruling that Bridges had standing to object to the apartment entry and search (57:76-77). *Trecroci*, 246 Wis. 2d 261, ¶23.

- Mallory lived there alone as the sole legal tenant, and no one, including Bridges, paid him rent (56:122, 134); and

- Bridges had keys and kept clothes and other items in the living room used as a makeshift bedroom; but that was "really about it as far as Mr. Bridges" (56:63-65, 105, 122).

Bridges was at most, a guest—not a resident. *State v. Fox*, 2008 WI App 136, ¶19, 314 Wis. 2d 84, 758 N.W.2d 790 (different analysis applies to guests than residents). As a guest, Bridges derived any expectation of privacy from his relationship to the premises; and more significantly, from his relationship to Mallory. *Id.* ¶¶19-20.

As in *Fox*, Bridges' status as Mallory's guest was tenuous and not firmly rooted, because it was illegal for Bridges to stay there. *Id.* ¶21 (status as mere friend to homeowner's son was not firmly rooted like guest in *Trecroci* who was engaged to lessee). Moreover, Bridges did not have a long-term relationship to the premises itself. *Id.* Bridges cannot have a property interest in Mallory's apartment when he was told by his supervision agent he did not have permission to be there, was not a party to the rental agreement, and did not pay rent. *State v. Whitrock*, 161 Wis. 2d 960, 980-81, 468 N.W.2d 696 (1991).

Finally, Bridges clearly had no property interest in the basement. Bridges originally testified he only went down into the basement three times in four months (37:105-106).[3] Bridges, however, needed Mallory's key and permission to go into the basement (37:106-107). Any time he might have gone down other times was without Mallory's permission (37:42-43).

[3]At trial, Bridges testified it was only once (42:202-203).

The remand court found Bridges did not have a basement key, and only had access to the apartment through the owner or Mallory (37:165, 169). Thus, the basement was "very different than the apartment" (57:88-89). Bridges' credibility was also suspect, because his self-serving testimony was "all over the place" (57:88-89). In contrast, the court expressly found the officers were "very credible" (56:156). This court should uphold these credibility findings as not clearly erroneous. *Trecroci*, 246 Wis. 2d 261, ¶23.

2. Bridges was not lawfully or legitimately present.

Bridges was not staying lawfully in the apartment (57:94-99). This factor weighs heavily against an objectively reasonable expectation of privacy. *Rakas*, 439 U.S. at 143 n.12; *Amos*, 153 Wis. 2d at 269-70. Because Bridges had no lawful right to be there overnight, Mallory's invitation for him to be an overnight guest cannot serve as the foundation for a Fourth Amendment right. *McCray*, 220 Wis. 2d at 711-13 (guest legitimately entered premises by invitation, but could not claim expectation of privacy because guest did not have permission to remain on premises).

The remand court also found Bridges was not legitimately present in the basement, because it was a locked area for which only Mallory and the owner had a key (37:169; 57:89).

3. Bridges did not have complete control over the premises, or the right to exclude others.

Mallory originally testified that Bridges could only exclude people from the building if Mallory felt Bridges had "good reason" to do so (37:18). On remand, the

testimony similarly established that, while Bridges had his own set of apartment keys, and could come and go as he pleased, Bridges was not supposed to go—and did not go—into the basement, because he did not have a key (37:42-43; 56:105, 123-126, 133-139). The remand court found that Bridges did not have the right to exclude others, either from the apartment or from the basement (57:76, 88-89).

Bridges argues he excluded others, and took precautions to protect his privacy, by locking the basement door "through" Mallory (Bridges' supplemental brief at 15). As a matter of law, however, Bridges cannot personally take precautions to protect his own privacy through the actions of others. *Rakas*, 439 U.S. at 133-34 (personal right to privacy cannot be vicariously asserted).

Moreover, Bridges cannot have dominion over, or exclude others from, an area which was only available to tenants through the permission of Mallory. *State v. Eskridge*, 2002 WI App 158, ¶¶16-17, 256 Wis. 2d 314, 647 N.W.2d 434 (tenant did not have complete dominion and control over, nor right to exclude others from, common laundry area available to other tenants of building).

Finally, Bridges did not have complete control over the premises, because his control and ability to exclude others was limited by the fact that Mallory also had keys. *State v. Neitzel*, 2008 WI App 143, ¶20, 314 Wis. 2d 209, 758 N.W.2d 159 (no absolute control over premises when others could open door and give out key). Importantly, Bridges provided no evidence that he had the right to exclude others at the point in time when officers conducted the searches. *Id.*

4. Bridges did not take precautions customarily taken by those seeking privacy.

Bridges argues he "took steps to ensure that his items were secure" (Bridges' supplemental brief at 15). Again, however, Bridges himself could not, and did not, lock the door to the basement; only Mallory could (57:88-90). Moreover, Bridges' items were strewn around the living room (56:63-65, 122), where anyone could see them. Bridges made no effort to put his property away in drawers or closets, or otherwise protect his privacy.

Thus, Bridges did not even exhibit a subjective expectation of privacy in his items, or at least, not in an objectively reasonable way. *Orta*, 264 Wis. 2d 765, ¶¶11-13. This factor is dispositive. *Id.* ¶¶13-14.

5. Bridges did not put the basement to private use.

The remand court found that Bridges used the apartment for a variety of uses, including bringing women there and supplying illegal drugs to Mallory (57:76). As to the basement, however, the court found that Bridges did not put it to private use, because he only went down there twice (57:88-90). Bridges' primary use of the basement was to store contraband (37:106), not to seek privacy.

This factor favors the State, because Bridges was not using the basement for its intended purpose. *Orta*, 264 Wis. 2d 765, ¶23 (defendant did not put area to private use when he used it for conducting drug transactions); *McCray*, 220 Wis. 2d at 713 (defendant's hiding of drugs in rafters was not to seek privacy but to access drug-buying public).

6. Bridges' privacy claims are not consistent with historical notions of privacy.

Bridges argues his alleged privacy interest in the apartment automatically includes an "identical" privacy interest in the "attached" basement—making it "part and parcel" with his apartment privacy interest (Bridges' supplemental brief at 15).

That the basement was "attached," however, cannot be dispositive, because it was a shared space, which—by its very nature—was not private for individual tenants. *Eskridge*, 256 Wis. 2d 314, ¶19 (historical notions of privacy do not encompass common areas in apartment buildings, such as unenclosed areas of basements).

II. THE WARRANTLESS ENTRY INTO MALLORY'S APARTMENT WAS JUSTIFIED BY PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

Even if Bridges had standing to challenge the apartment entry,[4] it was justified by probable cause and exigent circumstances.

A. Relevant legal principles and standard of review.

Warrantless entries into homes are presumptively prohibited, subject to a few well-delineated exceptions, including where the government can show both probable cause and exigent circumstances. *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621.

[4]Bridges does not challenge the building entry, which was proper because another tenant consented to that entry (56:33-34, 80-84, 113-114).

Exigent circumstances objectively exist when a police officer reasonably believes that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape. *Id.* ¶¶24-25.

Whether exigent circumstances exist is a mixed question of fact and law, reviewed under the two-pronged standard discussed above. *Id.* ¶15.

B. Probable cause existed for the entry.

Detectives Marlock and Lopez knew Raymond Golden—who was already being investigated for selling Ecstasy out of Bridges' apartment (56:23-24)—would be leaving the building with a large amount of Ecstasy pills (56:30, 77-78). Officer Newport also knew "Fred" and "Dre" were about to order 800 Ecstasy pills (56:111). Officers also knew that "Dre" drove the burgundy-colored Buick Roadmaster that was parked there and was registered to Bridges (56:26-30).

Officers observed Golden having a brief conversation with someone inside a parked vehicle, and then going into Mallory's apartment building (56:31-34, 80-81). Approximately four to five minutes later, Golden exited the building, but then fled upon seeing detectives, discarding a baggie of Ecstasy pills along the way (56:34-37, 81). Golden told Detective Marlock he obtained the pills from inside the building (56:37, 56-58, 82).

Officer Newport confirmed from the upstairs tenant, Thyron Honeycutt, that unit two was not involved; and yelled down that no one named Fred lived upstairs (56:37-39, 59-60, 111-116). Detectives Marlock and Lopez went inside the outer door—which was already opened when Honeycutt let Officer Newport in—and proceeded directly to unit one, knowing unit two was not involved (56:39-41, 83-84).

C. Exigent circumstances existed for the entry.

Bridges does not dispute probable cause,[5] but argues no exigent circumstances existed (Bridges' supplemental brief at 16-19). The record, however, clearly belies this claim.

1. Officers reasonably believed the occupants of apartment one were destroying evidence.

Officer Newport had been knocking and pounding on the outer locked door for approximately two minutes, loudly yelling and identifying himself as police, when Honeycutt came downstairs from apartment two and let him inside (56:113-114).

After Officer Newport yelled down that apartment two was not involved (56:115), Detective Marlock knocked on the door to apartment one several times and announced himself as Milwaukee Police, but received no answer (56:39). He stopped and listened, and heard movements—someone walking, moving, and shuffling items around inside (56:39-41, 60). It sounded like "somebody slid something across the floor," which concerned Detective Lopez because he thought someone was either arming himself or "potentially trying to destroy evidence, possibly even … barricading the door by the slidings [he] heard" (56:85).

Detective Marlock knocked and announced once again, and still did not receive an answer, but again heard movements from inside unit one (56:39-40). Three to four times they knocked or banged loudly, and loudly yelled "Milwaukee Police" (56:42, 84).

[5]The remand court found this a "classic" or "textbook case" of probable cause plus exigency, with "model police work" and "logical things that were done throughout" (56:156-157).

Detective Lopez kicked the door open, believing someone was either destroying potential evidence or narcotics, or arming themselves, based on his many years as a narcotics investigator (56:42-43). Detectives Marlock and Lopez felt an urgency to breach the door for this reason (56:71-72).

When asked whether he believed the occupants inside were aware of the police presence outside the door, Detective Marlock replied, "Absolutely. Based on … what was happening outside and also based on my pounding on the door yelling, Milwaukee Police. In my mind, I believe there's no doubt for them to know that we are the police" (56:72).

Detective Marlock noted that Ecstasy pills—which they just found on Golden (56:36-37)—were easily destroyed by "flushing, crushing, [or] consuming," and cocaine base had also been purchased there previously, so they were concerned any drugs inside would be discarded (56:85-86). Officer Newport similarly testified there was a "high probability of further evidence inside this residence" (56:112-113).

Bridges argues that officers never testified that someone inside could hear them (Bridges' supplemental brief at 7, 17); but the record belies this claim.

Detective Marlock testified there was "no doubt" in his mind that the occupants "[a]bsolutely" knew the police were outside the door, based on their pounding and yelling police (56:72). Officer Newport similarly testified he was concerned about evidence destruction, because neither Bridges nor Mallory opened the door, even though they "kn[ew] … the police were there" (56:119-120). Detective Lopez testified a person within apartment one would know "what [they] had done outside with the presence of Officer Newport upstairs" and it was "very possible" the police presence was "already alerted to by the occupants within" (56:85-86).

Indeed, Bridges was directly in front of Detective Marlock when the apartment door opened (56:44). It was a very small apartment, so Bridges was only about 15 feet away from where Detective Marlock had just been pounding and yelling at the door (56:72), and was in a position to hear the officers (37:171).

Even upstairs in apartment two, Honeycutt could hear the knocking and pounding on the outside door below, and Officer Newport had already yelled down to Detectives Lopez and Marlock that they should investigate apartment one (56:37-39, 59, 113-114).

The remand court had sufficient evidence from which it could conclude the occupants in apartment one heard the police shouting and pounding on the exterior doors, knew a narcotics investigation was occurring, and thereafter engaged in their shuffling and moving—which the officers reasonably interpreted as the exigent circumstance of potential evidence destruction (56:39-41, 60, 85-86, 112-113). *Hughes*, 233 Wis. 2d 280, ¶¶24-26.

2. Officers did not create the exigency by knocking on the door.

Bridges argues police created the exigency themselves when they knocked on his door (Bridges' supplemental brief at 18). As just discussed, however, Bridges was likely aware of the police presence even before they knocked on the door.

More importantly, both the United States Supreme Court and the Wisconsin Supreme Court have rejected Bridges' argument as a matter of law. *Kentucky v. King*, __ U.S. __, 131 S. Ct. 1849, 1862 (2011); *State v. Robinson*, 2010 WI 80, ¶¶31-32, 327 Wis. 2d 302, 786 N.W.2d 463. When a police officer lawfully knocks and announces his presence, he does not create an exigent

circumstance. *Id.* Rather, the defendant's response to the knock creates the exigent circumstances. *Id.*

Here, the police were lawfully in a position to execute the "knock and talk" at Bridges' apartment, because Honeycutt had already let them into the building (56:83-84, 113-114). *State v. Phillips*, 2009 WI App 179, ¶11 n.6, 322 Wis. 2d 576, 778 N.W.2d 157 ("knock and talk" is proper investigative technique, with or without probable cause); *Robinson*, 327 Wis. 2d 302, ¶32 (police conduct themselves in "utterly appropriate and lawful manner" when knocking and announcing); *King*, 131 S. Ct. at 1862 (police "knock and announce" does nothing more than private citizen can do in walking up to door).

Thereafter, the occupants' response to the knocking—the movements and sliding or shuffling around items which officers interpreted as possible evidence destruction—created the exigency, justifying the warrantless entry (56:39-43, 60, 85-86). Police had just found easily destroyable Ecstasy pills on Golden, and were concerned any drugs inside would also be destroyed (56:36-37, 86, 112-113).

The officers were simply trying to execute a lawful "knock and talk" when unexpectedly faced with the high likelihood of evidence destruction. Officers were not required to "contain[] the situation" first to obtain a warrant, as Bridges contends (Bridges' supplemental brief at 16, 19). They were fully justified in entering without a warrant based on the exigent circumstances at hand. *Robinson*, 327 Wis. 2d 302, ¶32.

III. THE WARRANTLESS BASEMENT SEARCH WAS JUSTIFIED BY MALLORY'S VOLUNTARY CONSENT.

Bridges argues Mallory's consent to the basement search[6] was not voluntary (Bridges' supplemental brief at 21-22), and was insufficiently attenuated from the allegedly illegal entry (*id.* at 19-21). Neither argument has any merit.

A. Relevant legal principles and standard of review.

Another exception to the warrant requirement is a consent search. *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). The State has the burden of proving, by clear and convincing evidence, the consent was voluntary—absent duress or coercion—considering the surrounding events and the characteristics of the consenter. *Id.* at 197-98 (no single criterion controls).

Among the factors to be considered are: whether any misrepresentation, deception or trickery was used; whether the consenter was threatened or physically intimidated; the conditions at the time of the request; the consenter's response to the request; the consenter's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed him consent could be withheld. *Id.* at 198-203.

Whether a person actually consents is a factual determination, upheld on appeal unless contrary to the great weight and clear preponderance of evidence. *Id.* at 196-97. Whether the consent is voluntary, however, is a

[6]Although police found some evidence during the protective sweep, they found the majority of the evidence against Bridges during the basement search (56:48-51, 66-68).

question of constitutional fact, reviewed independently. *Id.* at 194-95.

B. Mallory's consent was voluntary.

1. Mallory actually consented.

Bridges first argues Mallory did not actually consent, or that his consent was after-the-fact (Bridges' supplemental brief at 11); but the record belies these contentions. Officer Newport testified that, when they found Mallory during the protective sweep, Mallory spontaneously told him "you guys can search wherever you want" (56:121). Officer Newport followed up with consent questions, and confirmed Mallory actually lived there (56:121). Mallory later signed a written consent form (56:127-128).

The remand court expressly rejected Bridges' contention that Mallory merely acquiesced (57:16-19, 27-29). As the court explained, Mallory testified credibly he told officers to "go ahead" and search (57:27). Although Mallory's testimony was "somewhat inconsistent, in places," "overall, [Mallory] does confirm that his response was yes" (57:27-28).

Mallory's consent was "more than acquiesce[nce]" (57:29). Officers "went step-by-step" to determine that Mallory lived there, and "got the consent" (57:34). This court should affirm that factual determination as not contrary to the great weight and clear preponderance of evidence. *Phillips*, 218 Wis. 2d at 196-97.

2. Mallory's consent was voluntary.

Bridges argues Mallory's consent was involuntary, because he merely acquiesced to the "sobering show of force," which allegedly included: keeping Mallory "prisoner," pointing their firearms at him, handcuffing him, and accompanying him to the bathroom (Bridges' supplemental brief at 11-12, 20-22).[7] Again, however, the record belies these claims.

Although Detective Marlock had his firearm drawn upon entry into the apartment, he put it away after determining the apartment was safe (56:45). Detective Lopez similarly holstered his weapon (56:87). Officer Newport did not have his gun drawn when he went into the bedroom to obtain Mallory's consent (56:132), and Mallory was never handcuffed (56:139).

Further, Mallory remained alone in his bedroom, without officers, watching television, while officers searched (56:132). Mallory left the bedroom to use the bathroom, and was not kept in the bedroom during the search (56:131-132). Mallory's handwritten consent also indicated his consent was given without coercion, threats, or promises (51).

State v. Artic, 2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430, is highly instructive in showing why Mallory's consent was voluntary. Here, as in *Artic*, the officers did not threaten, intimidate, or in any way punish Mallory; nor did they offer him any promises in exchange for his consent (57:27). *Artic*, 327 Wis. 2d 392, ¶37.

Moreover, any initial tension that may have existed when officers first arrived then dissipated after Mallory chatted and talked with officers cordially. *Id.* ¶39

[7]Bridges also attempts to impugn Detective Newport's credibility (Bridges' supplemental brief at 10); but the circuit court explicitly found Officer Newport to be "very credible" (56:156; 57:26-28).

(although "mutual apprehension" existed when officer first arrived with weapon drawn, initial tension dissipated quickly after weapon was holstered, followed by police accommodations and mutual conversation). That officers drew weapons upon entry did not prevent the situation from evolving into something non-threatening and relatively congenial. *Id.* ¶46.

When asked to describe the tenor of his conversation with Mallory, Officer Newport replied: "It was a level of normal conversation. At times it was jovial, informative, somewhat caring. But it was … normal contact. There was not anything out of the ordinary with it" (56:129).

Officer Newport also discussed Mallory's cocaine habit at length with Mallory, and over the course of the hour they talked, "it wasn't just a meeting of somebody at a gas station or tak[ing] a [domestic violence] call" (56:123, 140-141). It was "more on a personal level," and he distinctly remembered the conversation, even four years later (56:141).

The remand court found Officer Newport especially credible, given the level of detail in his testimony (57:26-28). Officer Newport was pleasant, nice, and "almost bonded" with Mallory, and the court did not "get the idea that it was a terribly hostile situation" (57:50). Rather, it was "very congenial, non-threatening" (57:27).

Bridges also argues Detective Marlock never told them the protective sweep was not a search (Bridges' supplemental brief at 8-10).[8] Here, as in *Artic*, however, there is no evidence the police misrepresented to Mallory what they were doing or used deception to obtain consent. *Artic*, 327 Wis. 2d 392, ¶¶35-36.

[8]The initial police action was clearly a protective sweep, not a search for evidence (56:45-48, 66, 118-120). During the protective sweep, officers found Mallory inside the bedroom (56:45-46).

Far from misrepresenting their purpose, officers forthrightly explained to Mallory why they had kicked in the apartment door: they were investigating narcotics in the apartment complex; they had just chased an individual that came out of the building and arrested him for narcotics; and they needed to prevent the destruction of evidence (56:119-120). As in *Artic*, officers truthfully disclosed the information they possessed. *Artic*, 327 Wis. 2d 392, ¶¶35-36.

In response, Mallory spontaneously said he had no narcotics, contraband, or guns in his house, and officers could search his place (56:120-121). Specifically, Mallory said "I have nothing to hide" or "you guys can search wherever you want" (56:121). As in *Artic*, such spontaneous consent remarks signified that—at the time of the consent—the conditions were non-threatening and cooperative. *Artic*, 327 Wis. 2d 392, ¶¶43-44 (finding voluntariness when questioning congenial, and defendant wanted to be straightforward and had nothing to hide). Mallory's affirmative response to the consent inquiry also indicated voluntariness, because he believed nothing incriminating would be found. *Id.* ¶¶56-58.

Moreover, as in *Artic* and *Phillips*, there was no evidence that Mallory's personal characteristics made him particularly susceptible to improper influence or duress, nor was any psychological pressure brought to bear on Mallory. *Id.* ¶59; *Phillips*, 218 Wis. 2d at 198-203. To the contrary, Officer Newport specifically testified Mallory was "intelligent" and "oriented" (56:129-130; 57:28).[9]

Bridges contends that, under *State v. Kiekhefer*, 212 Wis. 2d 460, 471-73, 569 N.W.2d 316 (Ct. App. 1997), Mallory's consent was involuntary because officers never told Mallory he could refuse consent (Bridges' supplemental brief at 22). But *Kiekhefer* is factually

[9]Mallory originally testified he always "had a choice" whether to consent (37:83, 88-91).

distinguishable, because the defendant there initially refused consent and was immediately handcuffed, not *Mirandized*, and threatened with a warrant. *Kiekhefer*, 212 Wis. 2d at 471.

In contrast here, under *Artic*, Mallory's consent was voluntary. *Artic*, 327 Wis. 2d 392, ¶¶35-44. That police failed to notify Mallory he could refuse consent is only one fact in the totality of the circumstances, and is not dispositive. *Id.* ¶¶60-61 (fact did not weigh heavily into totality of circumstances analysis; other factors supported voluntariness).

C. Mallory's consent was sufficiently attenuated from the entry.

Finally, Bridges argues Mallory's consent was insufficiently attenuated from the allegedly illegal entry (Bridges' supplemental brief at 19-21). Bridges baldly asserts, without record citation, that the search "happened very quickly," without intervening circumstances (*id.* at 12).

Again, Bridges' arguments have no factual basis. Based upon Mallory's original testimony (37:66), the remand court found at least 20 minutes elapsed between the entry and Mallory's consent to the basement search—a "significant amount of time" with "a lot of intervening circumstances, a lot of discussion" between the entry and the search (57:46, 51).

Further, after the 20-minute protective sweep, officers also had to figure out how to get into the locked basement, so they asked Mallory for a key (56:49, 125-126). Mallory did not know where the key was, so Mallory stated they could either wait two hours to get the key from Mallory's boss, or kick the door down (*id.*).[10]

[10]Officers ultimately did not damage the door (56:49).

The remand court found that, far from exploiting the allegedly illegal entry, the officers here did not engage in any flagrant abuse, such as "breaking into this apartment with no basis, not trying to knock first, not doing the fine police work that they did in this case" (57:52). Rather, they investigated first, and did "model police work," such that any illegality was "more of a technicality" or a "minor error," not flagrant exploitation (57:52-53).

This court should reject Bridges' contention that *Kiekhefer* governs (Bridges' brief at 20), because the attenuation here was almost identical to that in *Artic*. First, a significant period of time elapsed between the entry and the consent for the basement search—at least 20 minutes—and the search was also separated from the entry by congenial and non-threatening conditions. *Artic*, 327 Wis. 2d 392, ¶¶73-78.

Second, the presence of meaningful intervening circumstances showed Mallory acted of free will, and his consent was unaffected by the initial alleged illegality. *Id.* ¶¶79-80. Mallory originally testified that how the police entered his residence played no role in his giving consent, and he was not upset or threatened by the police entry (37:94, 168, 177). The interim facts showed a discontinuity between the entry and the consent search, such that the original alleged illegality was weakened and attenuated. *Artic*, 327 Wis. 2d 392, ¶¶85-86.

Third, officers entered the home based on their belief that exigent circumstances existed, and no evidence suggested the officers acted under pretext or in bad faith. *Id.* ¶¶92, 102 (police presence was consistent with initial investigation). Any illegal conduct was not purposeful or flagrant, and officers did not exploit the entry in any way in seeking consent. *Id.* ¶¶91, 105 (police conduct may be purposeful or flagrant if impropriety of misconduct was obvious or if official knew his conduct was likely unconstitutional but engaged in it nevertheless).

As in *Artic*, the consent search here was sufficiently attenuated from the entry. Officers were not specifically targeting Mallory, but were furthering a legitimate law enforcement purpose in entering—acting on a reasonable belief that evidence might be destroyed. *Id.* ¶105.

CONCLUSION

This court should AFFIRM the judgment of conviction and the circuit court's post-remand order denying Bridges' suppression motion.

Dated this 7th day of August, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,427 words.

Dated this 7th day of August, 2014.

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

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

Dated this 7th day of August, 2014.

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