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.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

MARK S. ROSEN
ROSEN AND HOLZMAN, LTD.

400 W. Moreland #C
Waukesha, WI 53188
1-262-544-5804
Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATE OF WISCONSIN

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

DISTRICT I

20130AP000350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

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 REPLY BRIEF OF THE APPELLANT

ARGUMENT

I. CONTRARY TO RESPONDENT'S BRIEF, DEFENDANT'S EXTENDED SUPERVISION STATUS AND TERMS OF SUPERVISION ARE IRRELEVANT TO THIS COURT'S DETERMINATION.

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.

Defendant had addressed this issue previously in his original Reply Brief. Defendant will not readdress those arguments herein. Instead, Defendant will focus on the arguments raised in Respondent's Supplemental Brief.

Respondent's case law is inapplicable to the present situation. Respondent has argued case law that have facts that materially differ from the present situation. These material differences make these cited cases irrelevant to this present matter. In State vs. Amos, Resp. Brf. Pges 2-3, Amos had been trespassing at the residence in question. He admitted that he had been at the residence for only forty minutes prior to his arrest. Furthermore, the resident did not know that he was present. State vs. Amos, 153 Wis.2d 257, 450 N.W.2d 503 (Ct.App. 1989). Also, Amos was an escapee from a prison. He was hiding in the residence to avoid law enforcement. Id. at 269-270. Clearly, an individual who has escaped from a prison has committed a felony and is avoiding apprehension.

Similarly, in State vs. McCray, Resp. Brf. Pge 3, police found McCray lying on the basement sofa of a residence in the morning. Crack cocaine was found in his presence. However, neither the owner of the residence, nor her son who had lived there, had authorized McCray to spend the night in the basement. The owner testified that she did not even know of his presence. The son had testified that McCray had come to the residence the night before. However, the son had testified that he specifically told McCray "if it gets too late in the night, I'm going to have to tell you to leave." State vs. McCray, 220 Wis.2d 705, 583 N.W.2d 668 (Ct.App. 1998). Hence, McCray was not an overnight guest. He had stayed in the basement without permission and had no standing.

The Respondent's other case law fails simply from the recitations in its Brief. In United States vs. Brown, 484 F.Supp. 2d 985, 992-994 (D.Minn. 2007), the landlord had banned Brown from the premises. Similarly, in Commonwealth vs. Morrison, 710 N.E.2d 584, 586 (Mass. 1999), Morrison was the subject of a protective order forbidding him from being on the premises. Hence, in both of these cases, Brown and Morrison were clearly trespassing on the residence and were present without permission. Interestingly, both of these individuals had been specifically prohibited from being on the premises, yet had ignored these prohibitions.

Clearly, as argued in all of Defendant's prior pleadings, Mallory had specifically permitted Defendant to be on the premises.

Mallory had allowed Defendant to spend the night, not only as an overnight guest on the night in question, but as a frequent overnight guest with a key. Defendant had Mallory's permission to come and go as he pleased, leave personal property, and exclude others. Defendant will not otherwise re-recite those facts.

Here, the facts and Supreme Court's ruling and reasoning in State vs. Fillyaw, is more relevant to the present situation than the Respondent's case law. In Fillyaw, Fillyaw was on probation at the time of the search. A condition of his probation was that he live at 204 E. Vine. However, the search had occurred at 116-C E. Vine where his girlfriend, the murder victim, had resided. However, the Court found his relationship to the apartment, and not his status as a probationer, the deciding factor in determining his standing. He was not a regular occupant of the premises, did not pay rent, food, bills, utility bills, did not have a key when his girlfriend wanted him to be there. He had to return the key each time. The victim's mother had testified that he lived with her, not the victim, at 204 E. Vine. Essentially, the Court found that Fillyaw was merely a paramour of the victim and a part-time babysitter. His expectation of privacy was limited by that relationship. Furthermore, the searches in question had been conducted while he was away from that residence. State vs. Fillyaw, 104 Wis.2d 700, 312 N.W.2d 795 (1981).

Interestingly, the Court in Fillyaw did not consider his

status of a probationer who had permission from his probation agent only to reside elsewhere at the time of the search. Hence, to the Court, this fact was not relevant to the Court's determination. However, this fact is factually identical to the present situation. Hence, the Supreme Court's ruling in Fillyaw is crucial to the Court's determination in the present matter.

The State has not even mentioned in its Brief, or in its original Respondent's Brief, that Defendant's status as an overnight guest, by itself, had granted him standing to object to the search. Appellant's Briefs have 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 Briefs, 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 Briefs 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, to include the basement. The State has erred in arguing otherwise.

Based upon the foregoing, as well as the arguments raised in Appellant's Brief and Supplemental 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. His extended supervision status, and conditions of supervision, are irrelevant to this Court's consideration.

II. CONTRARY TO THE RESPONDENT'S BRIEF, THE POLICE ENTRY INTO THE APARTMENT WAS ILLEGAL. THERE WERE NO EXIGENT CIRCUMSTANCES TO JUSTIFY THE FORCED ENTRY.

Respondent's Brief asserts that the warrantless entry into Mallory's apartment was justified by probable cause and exigent circumstances. However, this is not correct.

The Respondent's Brief has laid out the factual basis for probable cause. Resp. Brf. Pges 11-12. However, this is the probable cause to justify a warrant. As indicated in Defendant's Supplemental Brief, 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).

The appellate courts independently review questions of constitutional fact de novo. State vs. Arroyo, 166 Wis.2d 74, 479 N.W.2d 549 (Ct.App. 1991).

Here, the officers' speculation to the effect that they "knew" that the tenants in unit 1 heard of the pounding on the door

contradicts the evidence. Neither Mallory nor the Defendant testified that he had heard any pounding at the door. Mallory testified such at the original evidentiary hearing. The Respondent has taken great effort to bolster the credibility of Mallory. The Respondent has attempted to almost portray him as being a victim. Hence, according to this position, Mallory's testimony that he did not hear any pounding at the door until the forced entry is credible. It also materially rebuts the police officers speculative testimony that they "knew" that the individuals inside the residence had heard the pounding. Thus, the police officer's testimony as to "knowledge" is nothing more than pure speculation and, hence, objectively unreasonable. This is insufficient to find exigent circumstances.

Here, the State has cited State vs. Robinson to support its position that exigent circumstances had existed to force open the door. However, the facts of that case materially differ from the present situation. In that case, the police had knocked on the door and a male voice answered "who is it?". The police then answered "Terion?" The male voice responded "Yes" or "Yeah." The police officer then had identified himself as "The Milwaukee police department. You need to open the door." At that point, the police testified that they immediately heard footsteps running from the door. State vs. Robinson, 327 Wis.2d 302, 786 N.W.2d 463 (2010).

In the present matter, clearly, the evidence supposedly

justifying the exigency is far weaker than that in Robinson. Here, all that the police testified that they heard was shuffling or walking. The police officer also testified that he did not hear any sounds consistent with a toilet flushing or someone flushing something down a sink. Clearly, these facts are far weaker than those in Robinson, that of an individual clearly fleeing at the sound of police after having acknowledged hearing, and responding to, the police's identification. Hence, the facts in Robinson are materially distinguishable from that of the present situation.

The Respondent has also cited Kentucky vs. King, 131 S.Ct. 1849, 179 L.Ed.2d 865, (2011). However, in that case, the police heard noises coming from the apartment. The Supreme Court had indicated that the Kentucky Supreme Court had some concerns about whether or not the sound of persons moving inside of the apartment was sufficient to establish that evidence was being destroyed. Kentucky vs. King, 131 S.Ct. 1849 at 1855. Furthermore, the U.S. Supreme Court also did not answer that question or resolve that issue. Instead, the Supreme Court had merely remanded the matter to the Kentucky Supreme Court for a factual determination. Id. at 1862-1863.

Interestingly, the U.S. Supreme Court in King cited an earlier U.S. Supreme Court case for a factual analysis identical to that present here. This case was Johnson vs. United States. Id. at 1861-1862. In Johnson, the police had approached the room of a hotel

because of a strong odor of opium. The police had knocked on the door and indicated that there was a slight delay, some "shuffling or noise" in the room and then the Defendant opened the door. Johnson vs. United States, 333 U.S. 10 at 12, 68 S.Ct. 367, 92 L.Ed.2d 436 (19487). However, in that case, the Supreme Court found the evidence, to include the shuffling or noise, insufficient to justify exigent circumstances. The Court found no evidence that a suspect was fleeing or likely to take flight. Furthermore, the Court found that no evidence or contraband had been threatened with removal or destruction. Johnson vs. United States, 333 U.S. 10 at 15.

In the present case, the facts are identical to those in Johnson. Here, the police testified they had heard nothing more than walking or shuffling. This is factually identical to the situation in Johnson. Furthermore, as indicated in that case, this evidence is factually insufficient to justify exigent circumstances.

Based upon the case law, the facts at the evidentiary hearing, and both of the Appellant's Briefs, both the State and the trial court are incorrect in asserting that the police conduct here justified a finding of exigent circumstances that allowed police entry without a search warrant.

III. CONTRARY TO THE RESPONDENT'S BRIEF, MALLORY'S CONSENT WAS NEITHER VOLUNTARY NOR SUFFICIENTLY ATTENUATED FROM THE ILLEGAL

POLICE ENTRY.

Here, the State has attempted to argue that the present situation is more analogous to that in State vs. Arctic, 327 Wis.2d 392, 786 N.W.2d 430 (Ct.App. 2008) than that in State vs. Kiekhefer, 212 Wis.2d 460, 569 N.W.2d 316 (Ct.App. 1997). However, this is incorrect.

In Arctic, a police officer had knocked on a door. Other officers were behind him. Arctic then voluntarily opened the door. Although the police officer had his gun drawn when he entered the residence and as he knocked on the door, he had holstered it when Arctic had opened the door. The police officer had asked if he could come into the apartment and talk, and Arctic gave permission. State vs. Arctic, 327 Wis.2d 392 at 140.

Here, clearly, the facts are materially distinguishable from those in Arctic. Here, multiple police officers broke the door down with guns drawn. They entered with their pistols drawn. No one in the apartment ever gave consent for any entry, much less an armed forced entry. No one in the apartment gave consent to the entry. Furthermore, as presented in Defendant's Briefs, Mallory had been confined to his room with a police presence, or in the presence of police. He did not believe that he had any choice but to consent to the search. (37:67). His consent to the basement search was simply "you gonna anyway. I don't care. Go ahead on." (37:68). Unlike

Arctic, Mallory's consent was not voluntary. His testimony is unrebutted, regardless of any "chit chat," as alleged by Officer Newport. Furthermore, Mallory's testimony, as discussed earlier, is credible.

As argued in Defendant's Supplemental Brief, the situation is more analogous to that in Kiekhefer. In that case, as in this, Kiekhefer had been restrained in his room, in the presence of armed agents. This is the identical situation here.

Furthermore, the State has incorrectly argued that simply because twenty minutes had elapsed from the time of the forced entry until Mallory's consent to the purported consent to the basement search, that there was sufficient attenuation. However, this is incorrect. Here, there were no intervening circumstances from the forced entry until the purported consent, as required by Arctic. There must be a break in the causal chain between illegality and seizure. State vs. Arctic, 316 Wis.2d 133 at 147. Mallory, from the time of the forced entry until the consent had been essentially held captive in his room under police presence. The only time that he had been allowed to leave police presence, even by Newport's testimony, was to go to the bathroom. Furthermore, he was always in Newport's presence. Mallory knew that the police were armed. Mallory reasonably believed that he had been confined this entire time. Hence, contrary to the State, there was no break in the causal chain, and no intervening circumstances,

from the illegal police entry until Mallory's purported consent.

Based upon the case law, the facts at the evidentiary hearing, and both of the Appellant's Briefs: (1) Mallory's consent was involuntary; and (2) Mallory's consent to the basement search was insufficiently attenuated from the illegal police entry. Both the Respondent and the trial court are incorrect in asserting 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, exigent circumstances did not exist to justify the warrantless search of the apartment. Finally, Mallory's consent was neither voluntary, nor sufficiently attenuated from the illegal police entry.

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 15th day of August, 2014.

Respectfully Submitted,

_____

Mark S. Rosen
State Bar No. 1019297

Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
ATTN: Mark S. Rosen
(262) 544-5804

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 thirteen (13) pages.

Dated this 15th day of August, 2014, 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 15th day of August, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant