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.

BRIEF AND APPENDIX OF APPELLANT

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ISSUE PRESENTED

I. Whether or not the trial court erred in finding that

Defendant did not have standing to object to the police search of Mallory's residence and then denying Defendant's Suppression Motions. This, when Defendant had been an overnight guest at the residence. Furthermore, the police entry was without a warrant and the State did not provide a justified exception to the warrant requirement. Also, Mallory's confession was both involuntary as well as insufficiently attenuated from this initial police illegal activity.

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

In case 10 CF 1603, Mr. Andre Bridges was charged in a five Count Criminal Complaint dated March 29, 2010. The Complaint also charged a codefendant, Raymond Golden. Only Counts Two through Five charged Defendant Bridges. Count Two charged Defendant with Possession with Intent to Deliver Heroin, ten to fifty grams, Second or Subsequent Offense, contrary to Wis. Stats.

961.41(1m)(d)3, 939.50(3)(d),, and 961.48(1)(b); Count Three charged Defendant with Possession with Intent to Deliver Cocaine, fifteen to forty grams, Second or Subsequent Offense, contrary to Wis. Stats. 961.41(1m)(cm)3, 939.50(3)(d), and 961.48(1)(b); Count Four charged Possession with Intent to Deliver Controlled Substance (MDMA), Second or Subsequent Offense, contrary to Wis. Stats. 961.41(1m)(hm)4, 939.50(3)c, and 961.48(1)(a); and Count Five charged Possession of Firearm by Felon, contrary to Wis. Stats. 941.29(2), 939.50(3)(g). The charges allege that police searched a residence located in Milwaukee. Defendant was in the residence at the time. During the search, police found the charged drugs in a toolbox located in the basement of that residence. In the kitchen, the police found items consistent with drug delivery and packaging, such as baggies and a gram scale. Also in the basement, the police found two firearms. Police recovered fingerprints from the toolbox and a digital scale found in the basement. Also, subsequent to that search, Defendant consented to a search of his mother's residence. At that residence, police found baggies as well as a loaded firearm magazine and unfired cartridges. The Complaint indicated that this was the same brand and manufacturer of the cartridges recovered from one of the guns found at 7146 W. Appleton Avenue. (2:1-6).

A preliminary hearing occurred on April 19, 2010. Two individuals testified, a police detective and a fingerprint

identification technician. After hearing this testimony and receiving other evidence, the Court Commissioner found probable cause and bound Defendant over for trial. The State filed a Criminal Information charging the same four charges against Defendant as indicated in the Criminal Complaint. (34:21; 6:1-3).

Arraignment in 10 CF 1603 occurred immediately after the bindover after the preliminary hearing. At that time, Defendant entered pleas of Not Guilty to the four Counts in the Information that applied to him. (34:21-22).

On June 7, 2010, Defendant filed his Fourth Amendment Suppression Motions. He sought suppression of the items found at the residence where the search had occurred. This was 7146 W. Appleton Avenue in Milwaukee. Furthermore, as indicated, subsequent to this search, Defendant had allegedly consented to a search of his mother's residence. A gun case and ammunition had been found at that residence. He sought suppression of these items as well, but under a "fruit of the poisonous tree" argument. (7:1-3).

In response to Defendant's Suppression Motions, the State filed its Response. The State alleged that Defendant lacked standing to object to the search of the residence where the initial search had occurred. The State alleged that this residence belonged to someone else. (8:1-4).

In reply to the State's Response, the Defendant filed his Reply Brief. He argued that he had consent to object to this

search. (9:1-3).

The trial court conducted an evidentiary motion hearing on February 11, 2011. Two witnesses testified. First was Frederick Mallory. He lived in the apartment. Then, Defendant testified. After taking testimony, the trial court ruled that Defendant did not have standing to contest the search of the residence located at 7146 W. Appleton Avenue. Furthermore, the trial court ruled that Mallory had voluntarily consented to the police search of his residence. (37:160-179).

Eventually, a jury trial commenced on September 26, 2011. The trial lasted until September 30, 2011.

The jury returned guilty verdicts on the four Counts that applied to Defendant of each case against the Defendant. This occurred on September 30, 2011. (44:3-13).

On March 9, 2012, the trial court sentenced Defendant on Counts Two, Three and Four to eight years of initial confinement plus three years of extended supervision on each Count, to run concurrent to each other. On Count Five, the trial court sentenced Defendant to two years initial confinement plus two years of extended supervision. However, the court ran this Count consecutive to the other concurrent terms. (45:42-43; 27:1-2).

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

STATEMENT OF THE FACTS

In case 10 CF 1603, Mr. Andre Bridges was charged in a five Count Criminal Complaint dated March 29, 2010. The Complaint also charged a codefendant, Raymond Golden. Count One applied only to Golden. Counts Two through Five only charged Defendant Bridges. Count Two charged Defendant with Possession with Intent to Deliver Heroin, ten to fifty grams, Second or Subsequent Offense, contrary to Wis. Stats. 961.41(1m)(d)3, 939.50(3)(d),, and 961.48(1)(b); Count Three charged Defendant with Possession with Intent to Deliver Cocaine, fifteen to forty grams, Second or Subsequent Offense, contrary to Wis. Stats. 961.41(1m)(cm)3, 939.50(3)(d), and 961.48(1)(b); Count Four charged Possession with Intent to Deliver Controlled Substance (MDMA), Second or Subsequent Offense, contrary to Wis. Stats. 961.41(1m)(hm)4, 939.50(3)c, and 961.48(1)(a); and Count Five charged Possession of Firearm by Felon, contrary to Wis. Stats. 941.29(2), 939.50(3)(g). The charges allege that police searched a residence located in Milwaukee. This was at 7146 W. Appleton Avenue, Milwaukee. It occurred on March 4, 2010. Defendant was in the residence at the time. During the search, police found the charged drugs in a toolbox located in the basement of that residence. In the kitchen, the police found items consistent with drug delivery and packaging, such as baggies and a gram scale. Also in the basement, the police found two firearms. Police recovered

fingerprints from the toolbox and a digital scale found in the basement. Also, allegedly, subsequent to that search, Defendant consented to a search of his mother's residence. At that residence, police found baggies and a loaded firearm magazine as well as unfired cartridges. The Complaint indicated that this was the same brand and manufacturer of the cartridges recovered from one of the guns found at 7146 W. Appleton Avenue. (2:1-6).

A preliminary hearing occurred on April 19, 2010. Two individuals testified, a police detective and a fingerprint identification technician. After hearing this testimony and receiving other evidence, the Court Commissioner found probable cause and bound Defendant over for trial. The State filed a Criminal Information charging the same four charges against Defendant as indicated in the Criminal Complaint. (34:21; 6:1-3).

Arraignment occurred immediately after the bindover after the preliminary hearing. At that time, Defendant entered pleas of Not Guilty to the four Counts in the Information that applied to him. (34:21:22).

On June 7, 2010, Defendant filed Fourth Amendment Suppression Motions. He sought suppression of the items found at the residence where the search had occurred. This was 7146 W. Appleton Avenue in Milwaukee. According to Defendant, this was an illegal, warrantless search. Furthermore, subsequent to this search, Defendant had allegedly consented to a search of his mother's residence. A gun

case and ammunition had been found at that residence. He sought suppression of these items as well, but under a "fruit of the poisonous tree" argument. His consent to search had occurred only as a result of the illegal search of 7146 W. Appleton Avenue. (7:1-3).

In response to Defendant's suppression motions, the State filed its Response. The State alleged that Defendant lacked standing to object to the search of the residence where the initial search had occurred. The State alleged that this residence belonged to someone else. (8:1-4).

In reply to the State's Response, the Defendant filed his Reply Brief. He argued that he had consent to object to this search. (9:1-3).

The trial court conducted an evidentiary motion hearing on February 11, 2011. Two witnesses testified. Both testified on behalf of the Defendant. The State did not present any witnesses or evidence. The first witness was Frederick Mallory. He lived in the apartment. Then, Defendant testified.

After taking testimony, the trial court ruled that Defendant did not have standing to contest the search of the residence located at 7146 W. Appleton Avenue. Furthermore, the trial court ruled that Mallory's consent was voluntary. (37:160-179).

Prior to testimony, the State indicated that it was challenging Defendant's standing to object to the search of 7146 W.

Appleton Avenue. The defense was prepared to first put on witnesses to establish standing. Then, the State would proceed. (37:4). The court indicated that it would discuss the search only once the Defendant had established standing. (37:11).

The first witness to testify at the Motion hearing was Frederick Mallory. Once again, he testified for the Defendant. He lived at 7146 W. Appleton Avenue. This was the lower unit to a duplex. There are stairs that lead to an apartment on the second floor. In that first floor hallway, there was also a door that lead to the stairway that went into the basement. (37:13-14). He knew Andre Bridges. On March 4, 2010, Mr. Bridges was in Mallory's apartment. He allowed Bridges to bring females over. In the evening of March 3 leading into March 4, Mr. Bridges stayed overnight at his house. He could also stay overnight three to four nights per week. He was also present during the day three to four days per week. He had some of his stuff over there, such as a treadmill machine. This schedule had been for a matter of months. (37:15-17). It was more than three months. Defendant could come and go as he pleased. He could bring friends to the apartment. He could exclude people for a good reason. Defendant had keys to the apartment for about two to three months. He had keys to the outside door. This was a different door than the key to the apartment door proper. Defendant had keys to both doors. With respect to the basement, Defendant did not have a key to the basement. Mallory had the key.

However, the key was available to the Defendant if he asked Mallory. (37:18-19).

Mallory testified that Defendant had access to the basement if he chose to have access. Defendant had property at the apartment. He had a treadmill, toiletries, clothes, work uniform. (37:20-21). Defendant would go to work from the apartment, Monday through Friday. Defendant had given him money. He also earned his keep by shoveling, taking out the trash, clean, vacuum, doing the dishes, buying dish soap, various chores. Defendant helped Mallory with his job of managing 150 properties. Defendant would help move things, empty out apartments. (37:22-27). Defendant could do anything that he wanted to do at the apartment. (37:28).

Mallory testified that he was present when the Defendant was there on March 4, 2010. Mallory heard police knocking on the door. He did not answer the door because he was lying down. Defendant did not answer the door. He saw the police enter his apartment. He did not see what the Defendant was doing prior to the entry of the police. The only thing that he saw was the police saying "hands up" and their guns. Before the doors opened, the Defendant was in the living room. When the officers entered the apartment, they had their weapons out. (37:29-31). At some point, an officer put down his firearm. He informed Mallory that they were there for a drug investigation. (37:31-33).

Defendant objected to the State's interrogation of Mallory

with respect to the search. Defendant indicated that he thought that this hearing was only with respect to the issue of standing. However, contrary to its initial position that the court would entertain the issue of the search only after having established standing, the trial court denied this objection. The court indicated that the State could go into the issue of consent. The court wanted to utilize the time efficiently. (37:31-32).

With respect to the search of the apartment and the basement, Mallory refused consent with respect to the basement. Any consent that he might have given towards a search of the basement was after the fact, after the fact that they had completed the search of the basement. Although he signed a written consent to the basement, the police only presented the written consent to him after they had already come up from the basement. They came up from the basement, then they presented him with the written consent. (37:35-36). The basement door was locked. Mallory had lost the keys. The apartment owner was the only one with the key. Mallory did not give the police keys to go to the basement. (37:37).

Mallory testified that he initially heard the officers knocking. He heard the door open, "police." He can't say that the officers knocked before entering. (37:48-49).

According to Mallory, the police bashed in. He was in his bedroom. Once they realized that he was in there, they shouted "put your hands up." One stayed in the bedroom with him. The officer

already had the gun drawn. (37:51-53). He did not hear them knock on the apartment door to gain entry. The first thing that he heard from the door area was the police breaking down the door. (37:61). At first, the police that entered his room had their guns drawn. (37:62). The police started searching his room before he gave them consent to search that room. He was in his bedroom with an officer with him. Mallory was not free to get up and move about. About twenty minutes had elapsed before they asked him for consent to search. (37:65-66). When he said "I don't care" when they asked if they could search, he did not believe that he had any choice when he said "yeah." (37:67). With respect to the basement search, he indicated to the police "You gonna anyway. I don't care. Go head on." (37:68).

With respect to the written signed consent, he's not sure if he signed it before or after the officers did their search. Twenty to thirty minutes had elapsed from the time that the officers had entered his unit until the time that he signed the form. The police asked him for the key before he had signed the form. (37:69).

The State objected to any continuing Defense questioning about the voluntariness of the search. After hearing some initial argument, the trial court made the initial ruling, during Mallory's testimony, that Defendant had no expectation of privacy to the residence, the kitchen, or the basement. The trial court sustained the State's objection. (37:70-78).

Defendant had odds and ends stored in the basement. He had hub caps, mostly car stuff, jumper cables. His entertainment center was stored in the basement. (37:78-79).

Once again, Mallory testified that the written consent was after the fact of the search of the basement. (37:82). The written consent was after the fact. When they had brought up the contraband, to include the drugs and guns, they gave him the written consent to sign. They only gave him the consent to sign after they had already come up. He signed the statement after. This was after they had already found everything. (37:83-84, 87).

Defendant Andre Bridges testified next. He also testified for the defense. He testified that he stayed part time at 7146 W. Appleton with a friend of his, Frederick Mallory. From August of 2009 until March 4, 2010, he stayed at the apartment three to four times per week. On his days off, it would be days. Most of the time, it would be night after he got off of work. (37:99-101). He had freedom to come and go from the apartment as he pleased. Mallory gave him a key to the front entrance and also to his door. He kept them through March 4, 2010. He could bring people into the apartment as he pleased. He could exclude his company from the apartment that he felt should not be there. He would be in the apartment alone. He had property in the apartment. He had a treadmill, two sets of uniforms, boots, shirts, pants, hygienes, stereo receiver, speakers. He also had food. He brought food. Fred

ate his food. He had a female friend spend the night with him from the night of March 3 going into March 4. She left about 6:45, 7:00. (37:102-104). He had access to the basement through Fred and Todd. Todd was the owner of the apartment building. He went into the basement at least three times. He would go into the basement to work out on his treadmill. He stored his hub caps down there. He stored his entertainment center in the basement. (37:104-106).

Defendant testified that he went into the basement by asking Fred to open the door with his key. Fred gave him the key to the basement when he put his hub caps in there. He also helped Fred clean up the hallway. He put the stuff from the hallway into the basement. This was probably two weeks prior to March 4. He compensated Fred for allowing him to stay there. He would bring food, shovel snow, clean up, paint the hallways. He often helped Todd and Fred do various work in the other apartment buildings. He helped Fred paint the hallway of 7146 W. Appleton. He also did minor work such as dry walling, dry walling repairs, and wet sanding. (37:106-108). His nephew would come over and lounge around. (37:109).

When the police came, he was on the couch asleep. He was woken by the door being hit in or forced in by the police officers. The first thing that he heard was a boom. That noise woke him up. He got up and stood by the couch. He was just about to ask Fred "what was that?" However, there was another boom and the police officers

came in. They were waving their guns telling him to get on the floor. The police forced the door open. The door was locked. He did not hear the police identify themselves prior to the kick. He did not hear any knocking on either the outside or inside door to the apartment. He never heard anyone announce "police." After the police entered, they told him to get on the floor at gunpoint. The officer did not put the gun away until after he had sat the Defendant up. (37:110-111). About six to seven officers entered the apartment. He saw one officer go into Fred's bedroom. After they had him lay face down on the floor, they frisked him. They were in the kitchen searching. As soon as they came into the apartment, they started searching the kitchen, the living room, and going through drawers. From the time they entered, they started searching almost immediately. (37:112-113).

With respect to the basement, the police actually went into the hallway after they searched the house. It was a detective at the hallway and another at the door to the basement. The detective at the door indicated that the basement was locked. He asked if they should go down there. The other detective said "yeah." (37:114-115). Defendant observed the other detective leave and come back with a crowbar. He jimmied the door open with the crowbar and then they both went downstairs. With respect to Fred's bedroom, he only heard conversation about Fred's drug use. That was about it. He never heard the police ask him about a consent to search. He did

not see either detective that were at the basement door go into Fred's room after looking at the basement door. No one went into that bedroom to talk. (37:116-117). Defendant sat on the floor for what seemed like hours. He never saw Fred leave the bedroom. There was an officer with the Defendant the entire time. After leaving the apartment, the police took the Defendant to his mother's house. The police got out. They were talking to his mother at the door. They got him out of the police car because he was in handcuffs. They went into the kitchen. Two detectives were with him, his mother and sister in the kitchen. Two to three more detectives went into the basement. (37:118-119). The police never asked him consent to search his mother's house. (37:120).

Every time that he asked for the key to the basement, he was never denied. Any time that he asked for this key, he did not have to explain. This was more than two or three times. (37:149).

After Defendant's testimony, the State chose not to present any witnesses. The trial court then indicated that it would hear from the parties as to the issue of standing. (37:151).

After hearing argument as to the issue of standing, the trial court issued its oral decision. The court found that both Defendant and Mallory were in the residence when the police came in through the front door. They had their guns drawn and came in. (37:165). The court found that the door had been forced open. He found that Mallory had given verbal consent to search because he had nothing

to hide. (37:167-168). Accordingly, even though the trial court had indicated that it would only entertain arguments as to standing, it still decided the suppression motion on its merits. This, by finding that Mallory had voluntarily consented to the police search.

With respect to the issue of standing, the trial court found that Defendant did not have standing with respect to the apartment. The trial court denied Defendant's suppression motion with respect to the search of Mallory's residence. Furthermore, Defendant indicated that the entire challenge to the search of Defendant's mother's residence was a fruit of the poisonous tree analysis based upon the search of Mallory's residence. (37:174-179; 182). However, the trial court ignored that Defendant had been an overnight guest at the residence from March 3 until March 4, 2010.

Eventually, a jury trial commenced on September 26, 2011. The trial lasted until September 30, 2011.

The jury returned guilty verdicts on the four Counts that applied to Defendant of each case against the Defendant. This occurred on September 30, 2011. (44:3-13).

On March 9, 2012, the trial court sentenced Defendant on Counts Two, Three and Four to eight years of initial confinement plus three years of extended supervision on each Count, to run concurrent to each other. On Count Five, the trial court sentenced Defendant to two years initial confinement plus two years of

extended supervision. However, the court ran this Count consecutive to the other concurrent terms. (45:42-43; 27:1-2).

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

ARGUMENT

I. DEFENDANT HAD STANDING TO OBJECT TO THE SEARCH OF THE ENTIRE RESIDENCE, TO INCLUDE 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).

An overnight guest has an expectation of privacy in a home that society is prepared to recognize as reasonable. Minnesota vs. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). Jones vs. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

In Jones, Jones was present at the time of the search of an apartment owned by a friend. The friend had given Jones permission to use the apartment and a key to it. He had a suit and shirt at the apartment and had slept there "maybe a night" but his home was elsewhere. He paid nothing for the use of the apartment. Id. at

362 U.S. 257 at 259. Here, the Supreme Court found that Jones had standing to contest the police search for narcotics that formed the basis for this case. Id. at 263.

The U.S. Supreme Court later affirmed that the Jones Supreme Court had correctly decided that Jones had standing. The Court, once again, found that Jones had suffered a violation of his Fourth Amendment rights by the search. Rakas vs. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

An overnight guest has standing to object to a search in a premises over all areas to which he has access. State vs. Curbello-Rodriquez, 119 Wis.2d 414 at 424-425.

In Olson, the U.S. Supreme Court indicated that an overnight guest has a legitimate expectation of privacy in his host's home. Such a position merely recognizes the everyday expectations of privacy that we all share. The houseguest is there with the permission of the host, who is willing to share his house and his privacy with the guest. It is unlikely that the guest will be confined to a restricted area of the house. Minnesota vs. Olson, 495 U.S. 91 at 98-99.

In the present situation, Defendant clearly had standing to object to the police search of the entire residence. Both Mallory and the Defendant testified at the Motion hearing that Defendant had spent the night at the residence with a lady friend. Under the relevant and applicable case law, this, by itself, confers standing

upon the Defendant to contest the search. Under both Jones and Rakas, even a one night stay confers standing upon the overnight guest.

Furthermore, Defendant's case for standing is even stronger than that of Jones in U.S. vs. Jones, cited above. Defendant had been staying several nights per week at the apartment for a few months. He had clothes and personal items there. Such items included toiletries, a treadmill, a stereo system, and car equipment to include hub caps and jumper cables. The treadmill, entertainment center, and car equipment were in the basement. He provided money and services to Mallory by helping to pay for food and providing services such as drywalling and painting. He had keys to both doors of the apartment. He had the right to invite, and exclude, guests. Furthermore, he had access to the basement anytime that he wanted it. He kept his treadmill and stereo equipment in the basement.

Based upon the foregoing, and the evidence at the Motions hearing, the trial court erred in determining that Defendant did not have standing to contest the search. 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 HEARING, 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 Recognized Exception to the Generalized Requirement for a Warrant to Justify this Entry.

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).

In the present situation, only two witnesses testified at the Motion hearing, and both testified on behalf of the Defendant. Both witnesses testified that they were essentially sleeping when they heard the police break down the door. Mallory testified that he was sleeping in his bed. Defendant testified that he was sleeping on the couch. There might have been a knock, but there was no request for entry. Upon breaking down the door, the police entered with guns drawn.

Here, there was no testimony that any police officer ever showed Mallory a warrant for a search. Furthermore, no police officer ever provided justification for the warrantless entry.

Neither witness testified that any police officer ever provided such justification. They merely burst in with guns drawn, seized Mallory, and began to search. No one had permitted the police to enter the apartment. This was a warrantless entry without a lawful justification. Generally, this would require a suppression of all evidence seized as a result of this warrantless entry.

Based upon the record of the Motions hearing, the trial court prevented Defendant from making this argument.

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).

In Arctic, the Court of Appeals found the subsequent voluntary

consent sufficiently attenuated from the original illegal entry. The police had illegally entered the duplex itself by breaking down the main door. The police worked their way upstairs to the second floor flat. A police officer knocked on that door and Arctic answered. Arctic then voluntarily opened the door. The police officer asked if he could come in and talk. They entered the kitchen and started talking. After a conversation, the police officer asked for consent to search. Arctic said "I have nothing to hide." Id. at 316 Wis.2d 133 at 140-141.

As to the first of the factors, the Court found a number of events that had occurred from the original illegal entry. This included talking and a series of events to include waiting. This created sufficient temporal distance so as to support attenuation. Id. at 147.

With respect to the second Arctic factor, the Court found many intervening factors, but most importantly that Arctic had consensually opened his door. The police had waited after knocking and identifying themselves. There was no force, or threat, to enter. Even after the entry, the police waited for Arctic's lady friend to dress and enter the kitchen. The conversations in the kitchen also served as intervening circumstances. Id. at 148.

Finally, with respect to the third Arctic factor, the Court analyzed the police reason for the initial entry. The police had just witnessed and arrested Arctic's son on a controlled buy of

four and one half ounces of cocaine. The son had just come out of Arctic's building. The police were not on a fishing expedition. The police had probable cause for a warrant. Id. at 149.

Here, the facts of this present situation show a clear failure to satisfy the three Arctic requirements. First, there was an insufficient temporal distance from the unlawful entry to the consent. Immediately upon the police "barging in" with guns drawn, they immediately began searching the apartment, to include the kitchen. They immediately prevented Mallory from leaving his bedroom and seized him in that room the entire period. The need to search the basement occurred "part and parcel" with this initial search, seizure, and the illegal entry. There was no temporal distance.

Second, there were no intervening circumstances from the illegal entry to Mallory's purported consent. Unlike in Arctic where the illegal entry had occurred to enter the duplex itself, and the entry into Arctic's apartment was itself consensual, here there was no consensual entry whatsoever. The police barged in with guns drawn, immediately began searching, and seized Mallory in his room and Defendant in the living room. Without any intervening circumstances, the police realized that they needed to search the basement. According to Mallory, they began searching before even asking for consent. Accordingly, unlike Arctic, there were no intervening circumstances from the illegal entry until the consent

to search the basement.

Finally, here, the purpose of the misconduct did rise to the level of conscious or flagrant misconduct requiring suppression of all of the seized evidence, to include evidence seized from the basement. This present situation markedly differs from the situation in Arctic. No police officer testified as to the reason for the forced entry with guns drawn. The State had the opportunity to introduce such testimony. During Mallory's examination, the trial court indicated that, in order to maximize the time, it would allow evidence as to the consent and the search. Accordingly, the record supports the conclusion that there was no warrant and no justified exception to this forced entry at gunpoint with a large number of police. Hence, this is precisely the conscious or flagrant misconduct that requires suppression.

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. Accordingly, this Court must suppress all of the seized evidence.

Based upon the record of the Motions hearing, once again, the trial court prevented Defendant from making this argument.

C. Mallory's Consent was Not Voluntary.

When the purported legality of a warrantless search is based upon consent, the consent must be freely and voluntarily given. A

prosecutor who seeks to rely upon consent to justify the lawfulness of a search has the burden of proving that the consent was freely and voluntarily given. Acquiescence to an unlawful assertion of police authority is not equivalent to consent. State vs. Johnson, 299 Wis.2d 675, 729 N.W.2d 182 (2007).

Consent must be more than mere acquiescence to a claim of lawful authority. State vs. Giebel, 297 Wis.2d 446, 724 N.W.2d 402 (2006).

The State must prove by clear and convincing evidence that consent was given, without any duress or coercion, either express or implied. State vs. Phillips, 218 Wis.2d 180, 577 N.W.2d 794 (1998). The test for voluntariness asks whether consent was given in the absence of actual coercive, improper police practices designed to overcome the resistance of the consenter. State vs. Clappes, 136 Wis.2d 222, 401 N.W.2d 759 (1987).

In Johnson, police had essentially seized Johnson after police had stopped his car. They had asked him to step out of his car after the stop. They patted him down. The police asked him if they could search his car. He responded "I don't have a problem with that." Id. at 299 Wi.2d 675 at 682.

In Johnson, the Supreme Court found that the testimony of the testifying police officers showed that Johnson had merely acquiesced to the search. He did not freely and voluntarily give his consent. Id. at 688.

Compelling a suspect to go to a room constitutes a show of authority and creates a reasonable belief that the suspect is not free to leave. The voluntariness of consent raises a fact question, to be determined from the totality of the circumstances, and subject to review for clear error. U.S. vs. Pena-Saiz, 161 F.3d 1175 (8th Cir. 1998).

Here, the State had argued at the Motions hearing that Mallory later, while in his room, voluntarily provided consent to search the basement. The State argued that this was the basis for a denial of Defendant's suppression motions. The trial court found the evidence sufficient to conclude that the consent was voluntary. However, this was a clearly erroneous conclusion.

Mallory's consent was not voluntary. The police kept Mallory in his room. The entry into the apartment was illegal, and by use of force and firearms. There was "shock and surprise." They entered the bedroom with guns drawn. Once the guns had been put away, one police officer was in the bedroom with him at all times. Importantly, Mallory testified that he was not free to leave that room. Accordingly, he had been seized by force under extremely coercive circumstances.

Furthermore, while in his bedroom, he simply responded "go ahead, you gonna anyway" to the request for the search. He knew that the police had already been searching his residence. There were a large number of armed police officers. The police had drawn

their guns on him. The police had already forcibly broken his apartment door down and charged in with guns drawn. Under the totality of the circumstances, a reasonable person would not believe that he had a choice to refuse.

Under the totality of the circumstances, the police had created a coercive atmosphere for Mallory's consent. The police had acted in a manner designed to overcome his resistance. He clearly reasonably felt that he had no choice. Hence, his "consent" was not voluntary. Instead, it was mere acquiescence. Under the relevant and applicable case law, the trial court erred in concluding that this consent was voluntary. This Court must reverse this decision.

CONCLUSION

The trial court erred in finding that Defendant did not have standing to object to the search of the residence. He had been an overnight guest with significant ties to the apartment. Furthermore, the subsequent search was illegal. The initial entry into the apartment was warrantless and the State never presented evidence as to a justified exception to this generalized warrant requirement. 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, 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, 2013.

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INDEX TO APPENDIX

CERTIFICATION

I hereby certify that the revised Appellant's 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 nine (29) pages.

Dated this 30th day of May, 2013, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of the revised Appellant's 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 30th day of May, 2013, 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 30th day of May, 2013, in Waukesha, Wisconsin.

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Attorney for Defendant-Appellant