

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case Nos. 2014AP002604

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

JEFFREY SMART,
Defendant-Appellant,

**APPEAL FROM A JUDGMENT OF WAUKESHA
COUNTY CIRCUIT COURT JUDGE DONALD J. HASSIN
AGAINST THE DEFENDANT APPELLANT ENTERED
ON MAY 8, 2014 IN THE CIRCUIT COURT FOR
WAUKESHA COUNTY.**

BRIEF OF DEFENDANT-APPELLANT

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CIRCUIT COURT JUDGE DONALD J. HASSIN AGAINST THE
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CIRCUIT COURT FOR WAUKESHA COUNTY.**

BRIEF OF DEFENDANT-APPELLANT

ISSUES PRESENTED

I. Did the physical entry of the motel room without a warrant by the police with the permission of the motel clerk violate the defendant's fourth amendment rights?

Trial court answered no.

II. Is the warrantless search of the motel room presumptively unreasonable?

Trial court answered no.

III. Is the burden on the state to prove the existence of circumstances permitting entry into a home, motel room, without a warrant?

Trial court concluded exigent circumstances to justify the warrantless entry were established by the state.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested. The issues are of sufficient complexity that their determination would benefit by the question and answer format of oral argument. Publication will be warranted because the issue is of constitutional proportion.

STATEMENT OF CASE

On November 30, 2013 at approximately 4:45 am a Pewaukee police officer was dispatched to a residence to investigate a domestic disturbance. (Pg. 5, ln 10-25 Transcript of motion hearing March 31st, 2014.) Jeffrey Smart had left the residence with his two sons after the disturbance. (Pg. 7, ln 24.) Smart lived with his girlfriend at the residence until that fight. The boys were ages 9 and 6. (Pg. 8, ln 4.) The girlfriend reported Smart to be intoxicated (Pg. 8, ln 20.) She accused Smart of trying to strangle her. (Pg. 9, ln 2.) The officer noticed no physical marks on the woman and the woman appeared to be intoxicated. (Pg. 12, ln 12-16.) She thought he may have gone to a hotel where he previously went when they got into an argument. (Pg. 12, ln 21.) The officer contacted dispatch and asked that they check out the information whether his vehicle could be found at the motel. (Pg. 15, ln 2.)

Smart's vehicle was located in the parking lot at the local Holiday Inn. (Pg. 15, ln 25.) (Pg. 15, ln 9.) 25-30 minutes had now transpired. (Pg. 16, ln 9.) The vehicle was unoccupied. The officers were told to make an arrest of Smart. (Pg. 16, ln 24.)

The night auditor of the Holiday Inn indicated that when Smart checked into the hotel, Smart asked that photographs be taken of him. (Pg. 38, ln 9-16.) The clerk also indicated that there were marks on the back of his neck that were caused from an

altercation as well as mashed potatoes on the front of his shirt that had been thrown at him. Pg. 38 ln, 6-20.

A captain, two deputies, and a village police officer went to Smart's hotel room. (Pg. 40, ln 4.) Another officer stayed outside just in case the subject tried to escape. (Pg. 40, ln 16.) The officers knocked but there was no answer. (Pg. 40, ln 25.) The officers could not hear anyone in the room. (Pg. 42, ln 1.)

The captain attempted telephone contact, but no one answered the phone. (Pg. 42, ln 14.) Ten more minutes passed. (Pg. 42, ln 18.) The officers obtained a room key. The door was opened and all four officers entered the room. (Pg. 43, ln 7.) There was a bathroom and a long hall, so the officers could not get an immediate visual until they went down the hall and around the corner. The officers identified Smart and then requested that he put his hands up. (Pg. 43, ln 10-14.)

The officers requested Smart to come with them so that they could detain him away from his sleeping children. They decided to detain Smart before handing him over to the Village of Pewaukee for the investigation that Pewaukee was conducting. (Pg. 44, ln 5-22.) He was handcuffed in the room, (Pg. 45, ln 8.) and escorted to a patrol vehicle, where he was placed in the back seat and held until the Village of Pewaukee finished their investigation 20-30 minutes later. (Pg. 45, ln 19-20.) The officers had no warrants when they entered the room.

ARGUMENT

1. A physical entry into the hotel room, like that of a home, is the chief evil against which the wording of the Fourth Amendment is directed.

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), the police entered the defendant's home only minutes after a witness observed the defendant fleeing from his car. The U.S. Supreme Court held that "the claim of hot pursuit was unconvincing because there was no immediate or continuous pursuit of the [defendant] from the scene of a crime. *Id.* 753 (1984). The motion was brought by Smart to suppress all evidence as a result of the illegal arrest and search of Smart at the Holiday Inn motel room where the police entered without a warrant.

This trial court drew inferences and reached conclusions that the facts do not support. According to the officers' testimony at the suppression hearing there was no evidence to support an officer's belief that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of suspect's escape. *State v. Smith*, 131 Wis.2d 220,230, 388 N.W.2d 601 (1986). Further, the record does not demonstrate there was an immediate or continuous pursuit of the suspect from the scene of the original incident with Smart's girlfriend. *State v. Richter*, 224 Wis. 2d 814, 821-22, 592 N.W.2d 310 (Ct. App. 1999).

At the motion hearing, the officer stated the police entered the Smart's motel room based on information that they had been given from his girlfriend. There was no warrant sought for his arrest. No evidence was submitted to indicate that the police were at the motel for any reason other than a previous incident that happened between him and his girlfriend earlier in the evening. He was handcuffed and placed in a patrol vehicle. He was put in the squad for twenty to thirty minutes because other officers were still making an investigation at his girlfriend's house. Pg. 45, ln. 5, 8, 11, 19.

2. A warrant-less search of a motel room, or a home is presumptively unreasonable.

No exigent circumstances justify this warrantless search. The warrantless search was unconstitutional. The suppression motion should have been granted. In *State v. Welsch*, 108 Wis.2d 319, 321 N.W. 2d 245 (1982), the Wisconsin Supreme Court was reversed by the United States Supreme Court in *Welsch v. Wisconsin*, 466 U.S. 740 (1984). The Supreme Court held that law enforcement officers may not enter a home to arrest a driver suspected of driving under the influence of intoxicants without a warrant.

The Fourth Amendment to the United States Constitution provides: *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.* U.S. CONST. Amend. IV. The Wisconsin Constitution is essentially the same. See WIS. CONST. Art. I § 11. Warrantless searches “are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions”. *State v. Boggess*, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983).

3. The burden of proof is on the State to prove the existence of circumstances permitting entry into a motel room, or a home without a warrant.

In *State v. Pires*, 55 Wis. 2d 597, 201 N.W. 2d 153 (1972), the Wisconsin Supreme Court approved the emergency rule as an exception to the warrant requirement. The emergency exception is based on the idea that “the preservation of human life is paramount to right of privacy, protected by the Fourth Amendment.” The test for a valid warrantless search under the emergency doctrine necessitates a two-step analysis. First, the searching officer must be actually motivated by a perceived need to render aid or assistance. Second, even if the requisite motivation exists, it must be found that, under the

circumstances, a reasonable person would have thought an emergency existed. See *Boggess*, 116 Wis.2d at 450-51. In other words, the search would only be valid if the officers subjectively observed a need to provide immediate assistance and intended to do so when they entered the home, or in this case the motel room, and the facts viewed objectively sustained the conclusion that the officers had probable cause that there was an emergency and immediate action was necessary for the protection of life or property. Both the subjective and objective components of this test must be met for the warrantless search to be valid. See *Boggess*, 115 Wis.2d. at 451.

In *Richter* a stand-alone justification for the warrantless entry was the prevention of possible harm to the occupants of the mobile home. The exigent circumstance must justify a warrantless entry because there is reason to believe a person is in need of assistance or still posed a threat to others. If one concludes that *Richter* applies, the test used is an objective test:

As in other Fourth Amendment cases, the determination of whether exigent circumstances are present turns on considerations of reasonableness, and we apply an objective test. The test is “[w]hether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect’s escape.

CONCLUSION

Even under less than optimal circumstances, it would have taken no more than minutes to contact a judge, relate the facts, and obtain a telephone warrant. The delay in obtaining a search warrant would have been negligible. The police had located the defendant in a motel and there was no risk of escape because the police had surrounded both the entrance to defendant’s room as well as the car registered to him. See: *Stoner v.*

California, 376 U.S. 483, 84 S.Ct. 889, 11 l.Ed.2d 856 (1964). Police may not enter without a warrant.

For all the reasons set forth, the defendant respectfully requests that this court vacate the judgment of conviction and remand this case for further proceedings. Evidence which is the fruit of the illegal search and arrest must be suppressed as well.

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 2,121 words.

Dated this 2nd day of January, 2015.

Gerard F. Kuchler
Attorney for Defendant-Appellant

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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 2nd day of January, 2015.

Gerard F. Kuchler
Attorney for Defendant-Appellant

