

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.**

REPLY BRIEF OF DEFENDANT-APELLANT

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ARGUMENT

- I. Mr. Smart's brief establishes multiple failures on the part of law enforcement to comport with warrant requirements.

The state responds to Smart's brief with numerous erroneous assertions:

- 1) Did the physical entry of the motel room without a warrant but with the permission of the motel clerk violate the defendant's fourth amendment's rights? The following facts were derived from the testimony at the motion hearing held before the Waukesha Circuit Court judge Donald J. Hassin Jr. on March 31st 2014.
- 2) Christine King called police to make a report of a domestic disturbance. At the same time she also expressed concern for Smart's children. Smart left her residence with his children in his vehicle and was allegedly intoxicated. (R 23 p. 14 lines 5-10; App. 14)
- 3) King accused Smart of strangling her. (R.23, page 11, lines 8-9; App. 11.)
- 4) King indicated Smart may have scratch marks because she fought back. R. 23, p. 14, lines 11-14; App 14.)
- 5) Officer Foth did not recall seeing marks on Ms. King. (R. 23, p. 12, lines 10-12; App 12.)
- 6) Officer Foth observed Ms. King was intoxicated (R. 23, p. 12, lines 15-16; App 12.)
- 7) Ms. King stated Smart may have gone to his parents in Waukesha or to a hotel in the city of Pewaukee because he had gone to the same hotel in the past after they had gotten into arguments (R. 23, p. 12, lines 19-23; App 12.)
- 8) Smart was on probation and had a prior conviction for operating while intoxicated.
- 9) Deputies located Smart's unoccupied vehicle on the parking lot of the Wild Wood lodge across the street from the Holiday Inn.
- 10) It was confirmed Smart checked into the Holiday Inn by the night auditor who was familiar with Smart from past check-ins to the motel.
- 11) It was forty-five minutes since police were dispatched to look for Smart. (R. 23, p. 38, lines 3-6; App 38.)

- 12) The auditor indicated that Smart asked her to take pictures with his cell phone of marks on the back of his neck and mashed potatoes thrown at him on the front of his shirt. (R. 23, p. 38, lines 12-16; App 38.)
- 13) The auditor stated that Smart appeared to have been consuming alcohol, but did not know his level of intoxication. (R. 23, p. 38, lines 25; p. 39 lines 1-3; App. 38-39.)
- 14) Four officers went to Smart's motel room door. At this point the whereabouts of Smart's children was unknown. The auditor did not see any children when Smart checked in. (R. 23, p. 39, lines 7-10, 15-18, 21-22; App 39.)
- 15) Another deputy stayed outside the building in case Smart tried to escape. (R. 23, p. 40, lines 14-17; App 40.)
- 16) The police could not contact Smart by phone or by trying to call the motel room. After ten minutes a deputy received the key to Smart's motel room from the night auditor and the deputies entered the room. (R. 23, p. 43, lines 6-7, 9-10; App 43.)
- 17) Ms. Smart was detained and two female deputies remained with two children who were found sleeping. (R. 23, p. 44, lines 7-17; App 44.)
- 18) Officer Foth arrived at the scene of the detention twenty to thirty minutes later and made contact with Smart. He was initially handcuffed but then was unhandcuffed pending the investigation for operating while intoxicated according to Foth. (R. 23, p. 20, lines 19-23; p. 21 =, lines 2-3; App 20-21.)
- 19) Foth believed Smart was intoxicated based upon the fact that he detected an odor of intoxicants from Smart who admitted he had been drinking; Smart subsequently failed sobriety tests. (R. 23, p. 22, lines 3-6, p. 23 line 10; App 22-23.)
- 20) He was given a preliminary breath test with the result of .138%. Smart was then arrested for operating while intoxicated. (R. 23, p. 24, lines 8-10; App. 24.)

DECISION

- 21) Judge Hassin denied Smart's motion to suppress, finding that exigencies of the situation, including the concern for the health and welfare of the two minor children weighed in favor of the state. (R. 23, p. 55, lines 14-22, p. 56, lines 1-3; App. 55-56.)

LAW

- 22) The protection of the fourth amendment against unreasonable searches and seizures applies to a guest in a motel room. *Stoner v. State of Cal.*, 376 U.S. 483, 490 (1964).
- 23) A warrantless entry cannot be justified based on the fact that hotel clerk gave consent to search. *Id.* At 483.
- 24) An objective test is used to determine whether a warrantless entry based on the need to render assistance or prevent harm is justified.
- 25) The test to be applied is whether a police officer under the circumstances known to the officer believes the delay in procuring a warrant gravely endangers life. *Larsen*, 2007 WI App. 147, Section 17, 18 and 19. However an officer's subjective beliefs or motivations are not relevant. *Id.*; *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 2006. The object of test alone is determinative.

LAW SUPREME COURT DECISION

In *Welsh v. Wisconsin*, 466 U.S. 740(1984) the Supreme Court held that the claim of hot pursuit was unconvincing were there was no continuous pursuit from the scene of a crime. The police entered the home of the defendant only minutes after a witness observed the defendant fleeing from his car, but because there was no warrant before the police entered the home to arrest the man for drunk driving, all drunk driving charges were dismissed as a result of evidence tainted by an illegal entry in violation of the fourth amendment.

April 17th, 2013 the United States Supreme Court in *Missouri vs. Tyler G McNeely* 569 U.S addressed the issues presented by the state in this case. Exigency requires more than the mere dissipation of blood alcohol evidence to support a warrantless blood draw in an alcohol-related case. The fourth amendment provides the right of people to be secure against unreasonable searches and seizures and no warrants shall issue but upon probable cause. The cases of the Supreme Court have held that a warrantless search of a person is reasonable only if it falls in a recognized exception. The natural dissipation of alcohol in the blood stream does not excuse “the absence of a search warrant without a showing of those who seek exemption from the constitutional

mandate that the exigencies of the situation made the search imperative. The court then went on to point out that it will not allow a per se rule to eliminate the necessity to seek a warrant. The court went on to note that well over a majority allow police officers and prosecutors to apply for search warrants through electronic communications. In the case at hand the state who has the burden of proof made no evidentiary offer to support a finding of exigency contrary to the decision of the Supreme Court requiring a determination on a case by case basis to support a finding of exigency.

In the case at hand no observations were made to support a probable cause finding that a crime had been committed before the search of the motel room occurred without a warrant. Further there was no evidence in the record that the children were in danger of death or great bodily harm at the time this search occurred. All cases that permit waiver of warrant requirements to enter a premises without a warrant have specific evidentiary basis founded upon complaints of a kidnapping or other criminal behavior directly implicating like crimes. In this case all of the evidence secured prior to the entry into the room supported a conclusion that Smart was not driving at the time the officers broke into the room. There would have been no problem getting a search warrant if it was felt there was a need to violate the fourth amendment requirement the search warrant be secured before one conducts a warrantless search. In the case at hand no evidence was taken the time of the evidentiary hearing that would justify a warrantless search after the police have located the defendants automobile at the very motel they verified that he would periodically go to if there was a problem at home. Both the girlfriend as well as the night auditor at the motel confirmed the fact that he was a regular customer. The present record does not support the violation articulated by the Supreme Court in *Missouri vs. McNeely* and *Welch vs. Wisconsin*.

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, in Smarts initial brief defendant respectfully requests that this court vacate a reverse the Circuit Courts denial of his motion to suppress evidence and remand this case for further proceedings consistent with such a reversal.

This 6th day of April, 2015.

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 3,736 words.

Dated this 6th day of April, 2015.

Gerard F. Kuchler
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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 6th day of April, 2015.

Gerard F. Kuchler
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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 2016 words.

Dated this 7th day of April, 2015.

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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).

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