STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000927-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIE C. PHILLIPS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction entered
in the Brown County Circuit Court,
the Honorable Marc A. Hammer presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Did a strong odor of fresh marijuana emanating from Ms. Phillips' home constitute "exigent circumstances" to enter without a warrant, where police were responding to a complaint about a dog, it was 4:00 p.m., Ms. Phillips answered the door and offered to wait outside for a warrant, and there was no indication that another person was inside the house?

The circuit court denied Ms. Phillips' motion to suppress the evidence found pursuant to the warrantless entry.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, but would be welcomed if ordered. This case does not qualify for publication because it is a misdemeanor appeal. Wis. Stat. §§ 809.23(1)(b)4 and 751.31(2)(f).

STATEMENT OF THE CASE AND FACTS

Ms. Phillips was charged in Brown County Case No. 13-CF-1736 with Count 1, possession with intent to deliver Tetrahydrocannabinol (THC), more than 200 grams, as party to a crime (PTAC), Count 2, maintaining a drug trafficking place (PTAC), and Count 3, possession of drug paraphernalia (PTAC). (2).

Ms. Phillips filed a motion to suppress the evidence based on the unlawful entry into her home. (14). A hearing was conducted on April 2, 2014. (41). The witnesses were

Officer Michael Haines, Commander Thomas Rolling, and Ms. Phillips.

Officer Haines testified that on November 26, 2013, at approximately 4:00 p.m. he was dispatched to Ms. Phillips' residence on a complaint that a dog was left outside without food or water. (41:6, 20). He knocked on the door and Ms. Phillips answered. (41:6). When Ms. Phillips opened the door, Officer Haines smelled a pungent, strong odor of non-burnt marijuana. (41:7). Ms. Phillips came outside and closed the door behind her. Officer Haines called for backup. He explained to Ms. Phillips that he smelled a strong odor of marijuana. He asked her if she would consent to a search of the residence. She said no, he would need to get a warrant. Ms. Phillips testified that she clearly told Officer Haines, "I'm not giving you access to my house. I know my rights. You are not allowed to enter without a warrant. I want a warrant." (41:66). Officer Haines acknowledged that Ms. Phillips was not equivocal in her request for a warrant. (41:27). She offered to stay on the porch with him until he got one. (41:27).

However, Officer Haines told Ms. Phillips that the odor of marijuana created exigent circumstances and he would need to go inside and secure the residence. (41:9). Ms. Phillips said that her daughter, who was the only other person inside the home, was afraid of the Ashwaubenon police. (41:9, 66-67). Officer Haines allowed Ms. Phillips to take her daughter to the neighbors' house.

Officer Haines explained why he believed there was an exigency. He testified:

> Well, based upon that - - it was just an overpowering pungent smell of fresh marijuana, based on my training and experience, that would be – wouldn't be a personal

> type use of smell, from a multitude of people with personal use marijuana, and this was just that pungent that I believe it that there could be potential of possession with intent to deliver of marijuana. It was just that much of a smell coming from that residence…I can't emphasize how overpowering the smell of fresh marijuana was.

(41:29).

The prosecutor asked Officer Haines whether, in his training and experience, there was a "dangerous element" to marijuana possession and intent to deliver cases. He replied yes, that "sometimes they have guns, they will flush their - - try to get rid of their marijuana." (41:11). Officer Haines testified that the area is not high crime. (41:56). There had been drug calls in the general vicinity, but none concerning Ms. Phillips' house.

Commander Thomas Rollins arrived and he and officer Haines entered Ms. Phillips' home. Officer Haines "did a quick protective sweep just checking for other people within the residence," and located some jars with green plant material outside the kitchen door going into the garage. (41:12). At that point, Ms. Phillips' husband arrived home. He was carrying an infant. The police directed him to sit in the living room with his wife. He did not want to sit down and instead wanted to move around, so the police handcuffed him. (41:30). Officer Haines told Mr. and Mrs. Phillips that they could either consent to a search or he would apply for a search warrant. (41:17). He could not recall if Mr. Phillips was handcuffed when he asked for consent. (41:31). Mr. and Mrs. Phillips signed a consent form, and the police conducted a full search of the premises.

On cross-examination, Officer Haines acknowledged that there was no indication that anyone else was in the residence, except for the child. (41:28). He did not hear a toilet flushing, a garbage disposal, or anything else that would lead him to believe that something was being destroyed. (41:22). Likewise, Commander Rolling did not hear anything to suggest that there was an emergency inside. (41:45).

Ms. Phillips did not dispute that the police had probable cause to believe that her home contained evidence of a crime. However, she argued that no exception to the warrant requirement applied, and therefore, the warrantless entry to her home was unconstitutional. The court disagreed, finding that exigent circumstances existed. (41:109).

On December 1, 2014, Ms. Phillips pled no contest to an amended Count 1, possession of THC (PTAC), contrary to Wis. Stat. § 961.41(3g)(e), and to Count 3, possession of drug paraphernalia (PTAC), contrary to § 961.573(1). (46). She entered into a deferred entry of judgment agreement with the State on Count 2, maintaining a drug trafficking place, (PTAC), contrary to § 961.42(1). Under the agreement, if Ms. Phillips successfully completes probation, the State will dismiss the charge. The Brown County Circuit Court, the Honorable Marc A. Hammer presiding, accepted the pleas and deferred judgment agreement, withheld sentence, and imposed one year of probation. (46).

This appeal follows.[1]

[1] Under Wis. Stat. § 971.31(10), "An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint."

ARGUMENT

I. The Police Violated Ms. Phillips' Fourth Amendment Rights against Warantless Entry into her Home.

A. Standard of review.

An order granting or denying a motion to suppress evidence presents a question of constitutional fact. A question of constitutional fact is reviewed under a mixed, two-step standard. ***State v. Hajicek***, 2001 WI 3, 240 Wis. 2d 349, 620 N.W.2d 781. An appellate court reviews the circuit court's findings of historical fact under the clearly erroneous standard; however, it reviews the circuit court's determination of constitutional fact de novo. ***Id.*** ¶15.

B. Warrantless home entry is presumptively unreasonable.

A police officer's warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution. "A warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." ***Payton v. New York***, 445 U.S. 573, 587 (1980) (internal citation omitted).

The home occupies a special place in Fourth Amendment jurisprudence. "A greater burden is placed ... on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." ***Id.*** at 588.

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

Id. at 589.

The protection is the same regardless of whether the entry is to seize a person or to search the premises.

> It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home…this difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest….Any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home.

Id. at 589.

Evidence obtained in violation of the warrant requirement must be suppressed. "In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search." ***Wong Sun v. U.S.***, 371 U.S. 471 (1963).

C. "Exigent Circumstances" may provide an exception to the warrant requirement.

There is an exception to the warrant requirement if the government can show both probable cause and exigent circumstances. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601. This exception recognizes that in special circumstances, when there is an urgent need coupled with insufficient time to obtain a warrant, "it would be unrealistic and contrary to public policy to bar law enforcement officials at the doorstep." ***Id.*** at 228. In such instances, "an individual's substantial right to privacy in his or her home must give way to the compelling public interest in effective law enforcement." ***State v. Robinson***, 2010 WI 80, ¶24, 327 Wis. 2d 302, 786 N.W.2d 463.

The government bears the burden of showing that a warrantless entry was both: (1) supported by probable cause and (2) justified by exigent circumstances. ***Id.*** This court has recognized four circumstances which, when measured against the time required to procure a warrant, constitute exigent circumstances that justify a warrantless entry: (1) an arrest made in "hot pursuit," (2) a threat to the safety of the suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee. ***Hughes***, 233 Wis.2d 280, ¶ 25. The objective test for determining whether exigent circumstances exist is whether a police officer, under the facts as known at the time, "would reasonably believe 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." ***Smith***, 131 Wis. 2d**.** at 230.

D. An odor of marijuana, when combined with other relevant factors, may form a basis for exigent circumstances.

The Wisconsin Supreme Court has held that, when officers detect a strong odor of marijuana emanating from a residence, and they have reason to believe that the occupants will destroy the evidence, exigent circumstances may apply. ***State v. Hughes***, 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621. In ***Hughes***, police officers responded to an apartment to investigate a complaint of trespassing. ***Id.*** ¶2. The apartment building was considered a high-drug area. ***Id.*** The officers spoke with the security guard, who said that there were two men in apartment number 306 who were not welcome in the building because of their involvement with illegal drugs. ***Id.*** ¶3. The officers approached the apartment and heard loud music and many voices inside. ***Id.*** ¶4. The officers called for backup. Id. 4. As they were waiting in the hallway, a woman opened the door and the officers immediately smelled a strong odor of marijuana. ***Id.*** ¶5. The woman tried to shut the door, but the officers prevented her and went inside. ***Id.*** "There was initial chaos in the apartment." Seven or eight people were in the main room and two people began running down the hallway toward the back bedrooms." ***Id.*** The police ordered everyone to stand still and put their hands up. ***Id.*** The tenant subsequently consented to a search of the apartment. The search yielded drugs and drug paraphernalia. ***Id.***

The Wisconsin Supreme Court held that the odor of marijuana provided probable cause, and that the risk of destruction of evidence constituted exigent circumstances.

> The strong odor of marijuana that hit the officers as the door to the defendant's apartment was opened gave rise to a reasonable belief that the drug—the evidence—was

> likely being consumed by the occupants and consequently destroyed. But the greater exigency in this case is the possibility of the intentional and organized destruction of the drug by the apartment occupants once they were aware of the police presence outside the door. Marijuana and other drugs are highly destructible.

Id. ¶26.

The ***Hughes*** Court distinguished a relevant United States Supreme Case, ***Johnson v. United States***, 330 U.S. 10 (1948). In ***Johnson***, the police smelled burning opium while they were standing in the hallway outside Johnson's closed hotel room door; the defendant was unaware of their presence. The ***Hughes*** court reasoned, "[t]hus, the only risk of evidence destruction implicated in ***Johnson*** is that associated with the burning of the drug in order to consume it, rather than the risk of intentional destruction of the drug in order to avoid its discovery and seizure by the police." By contrast, in ***Hughes***, "we have in this case an additional and important factor that was not present in ***Johnson***: the suspects here were fully aware of the presence of the police." ***Id.*** ¶27.

The Court clarified, however, "we do not base our finding of exigent circumstances on the marijuana alone." ***Id.***

E. An odor of marijuana standing alone does not meet the test for exigent circumstances.

In this case, unlike in ***Hughes***, the police justified their warrantless entry into Ms. Phillips' home based solely on the odor of marijuana. The circuit court acknowledged that there "are some significant facts in this case that are different from [***Hughes***]." (41:103). "I think the exigency in ***Hughes*** is cleaner. I think it's better." (41:107). However, the court

found that the cases shared sufficient similarities such that ***Hughes*** was the controlling law.

As explained above, exigent circumstances exist where a delay in procuring a search warrant would (1) gravely endanger life, (2) risk destruction of evidence, or (3) greatly enhance the likelihood of the suspect's escape. ***Smith***, 131 Wis. 2d at 230. Here, the circuit court relied on the first two factors. The court ruled:

> The objective test for determining exigent circumstances is whether the police officer under the facts as they were known to him at that time would reasonably believe that a delay in procuring a warrant would gravely endanger life, risk destruction of the evidence, or greatly enhance the likelihood of an escape. In this case, there's really no issue of escape.
>
> I think the State is arguing there is sufficient evidence that there may be an endangerment of life and that's why they have labeled officers' initial action as a protective sweep.
>
> I do think it's relevant the strength of smell of the marijuana. I respect your argument, Mr. Murray. It doesn't matter. I think it does matter. I think that what Officer Haines was testifying was when you have that type of odor or smell, there's a lot of marijuana in the house. The volume of the marijuana affects the officer's perception of risks involved in being at the place, standing outside of the place, going into the place, entering with or without a warrant. This isn't, you know, some single individual smoking a joint.
>
> In terms of what Haines saw when he went to the home, I think that substantially impacts an objective assessment as to life endangerment, quite frankly. I think the overpowering smell also directly affects whether or not it's likely that the evidence be destroyed. If you're

> dealing with a single joint or a small amount of marijuana, quite frankly, it could have already been consumed by the time that Haines made the initial contact at the house.
>
> When you're dealing with this much volume, I think it's reasonable to assume that there is more than one actor involved. I don't think that's a jump in logic, quite frankly. I think it's reasonable to assume that it is more likely for marijuana to be destroyed if it is of high volume.

(41:103-106; App. 102-105).

The court also stated that marijuana is easy to destroy. "Once the marijuana is flushed, it's gone." (41:106; App. 105). The court concluded, "I'm satisfied that there was a sufficient minimum exigency so as to justify the protective search based upon a fear of destruction of evidence and law enforcement safety." (41:109; App. 108).

The circuit court's ruling was erroneous.

There was no reason to suspect that anyone was in danger. The police arrived at Ms. Phillips' residence at approximately 4:00 p.m., which is not a dangerous time of day. Also, the police were responding to a complaint about a dog. There was no suggestion of ongoing criminal activity. Although there had been complaints regarding drug activity in the general vicinity, Officer Haines was not aware of any complaints about Ms. Phillips' home. And Officer Haines denied that Ms. Phillips lives in a "high crime area." This is unlike in ***Hughes***, where the police were "investigating a trespass by persons who were known to be involved with illegal drugs in a building known for its heavy drug activity." ***Hughes***, 233 Wis. 2d 280, ¶35. Moreover, Ms. Phillips willingly went outside to speak with Officer Haines and

agreed to wait with him on the porch while he obtained a warrant. Unlike in ***Hughes***, she did not shut the door or take any other evasive action.

Next, there was no reason to believe that evidence was being destroyed. Ms. Phillips told Officer Haines that her daughter was the only other person at home. She asked if she could take her to the neighbors. After the child left, Officer Haines acknowledged that he did observe anything to suggest that anyone else inside the home. This is unlike ***Hughes***, in which the police heard loud music and several voices inside the apartment. It is also unlike ***State v. Robinson***, in which the police knocked on a person's door, whom they suspected of marijuana possession, and immediately heard footsteps running from the door. 327 Wis. 2d 302, ¶31. Officer Haines detected an odor of fresh marijuana, not burnt. Thus, there was no suggestion that the evidence was being ingested. Moreover, Officer Haines denied hearing a toilet or garbage disposal. He testified that the odor was "overwhelming" and suggested a very large quantity of marijuana. The odor was akin to a grow operation. "[W]hen we went to the grow, we could smell that from about 100 yards away of the raw smell of marijuana. That was a very similar smell that I smelled when Ms. Phillips opened the door. It was that pungent…" (41:8). It is possible to imagine someone flushing a single marijuana cigarette down the toilet, but an entire grow operation?

This case is similar to a Texas appellate case, ***Turrubiate v. State***, in which the police detected an odor of marijuana within a residence and knocked on the door, and the defendant answered the door but "did not engage in any conduct suggesting that he intended to destroy evidence, such as making furtive movements…" 399 S.W.3d 147, 149, 154 (TX 2013). The court explained:

> We can conceive of many instances in which an occupant possessing contraband would not attempt to destroy it after a police officer has identified himself at the occupant's door…an occupant may know that it would be futile to attempt to destroy the illegal substance, such as someone in possession of 100 kilos of well-packaged cocaine.

Thus, "[w]e require some evidence of exigency beyond mere knowledge of police presence and an odor of illegal narcotics." ***Id.***

There was no reason why the police could not have obtained a warrant in this case. Ms. Phillips was fully cooperative, but unequivocal in her demand for a warrant. And there was no reason to suspect that anyone was in danger or that evidence was being destroyed. Courts should refrain from "effectively creat[ing] a situation in which the police have no reason to obtain a warrant when they want to search a home with any type of connections to drugs." ***United States v. Ellis***, 499 F.3d 686, 691 (7th Cir.2007).

The police violated Ms. Phillips' constitutional rights when they entered her home without a warrant. The evidence obtained through this unlawful action must be suppressed.

CONCLUSION

For the reasons stated above, Ms. Phillips respectfully asks this Court to reverse the circuit court and order that the evidence found pursuant to the warrantless entry be suppressed.

Dated this 17th day of August, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,354 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 17th day of August, 2015.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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