

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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OF WISCONSIN**

Case No. 2015AP000927-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs

JULIE C. PHILLIPS,
Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. Marc A. Hammer,
Circuit Judge, presiding.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Ms. Phillips was charged with Possession of THC as Party to a Crime, Maintaining a Drug Trafficking Place as Party to a Crime, and Possession of Drug Paraphernalia in Brown County Case 2013CF1736. Ms. Phillips filed a Motion to Suppress Evidence – Unlawful Search. (14). On April 2, 2014, in Brown County Circuit Court Branch V, a motion hearing was held pursuant to Ms. Phillips Motion to Suppress Evidence – Unlawful Search. (43). The Court held that, based on the totality of the circumstances and the credibility of the witnesses, a minimal exigency existed sufficient to find the warrantless protective sweep by Officer Michael Haines of the Ashwaubenon Department of Public Safety, was reasonable. (43:104-109). Ms. Phillips entered a No Contest plea to Possession of THC as Party to a Crime, Possession of Drug Paraphernalia as Party to a Crime, and entered into a twelve month Deferred Judgment Agreement on the charge of Maintaining a Drug Trafficking Place as Party to a Crime. (31).

April 2, 2014, Officer Haines, the initial responding officer testified to the following facts: On November 23, 2013 at approximately 4:00 p.m., Officer Haines was sent to Ms. Phillips' residence regarding a complaint about a dog being left outside. (43:6). Upon arrival, Officer Haines approached the residence in an attempt to make contact with the owner of the dog. (43:6). Ms. Phillips opened the door just enough to slip through the opening and onto the stoop, quickly closing the door behind her. (43:6-8). At this time Officer Haines smelled an overwhelming odor of what he believed to be raw marijuana, emanating from the residence and from Ms. Phillips herself. (43:7). Officer Haines testified that in regards to his training and experience in the detection of the smell of raw marijuana that he has completed several training programs as well as an assignment with the Drug Task Force. Officer Haines compared the smell coming from Ms. Phillips and her house as comparable to the smell that emanated from

one of the largest marijuana grow operations that he had investigated. (43:8). Upon detecting the strong odor of raw marijuana, Officer Haines immediately requested back-up and did not confront Ms. Phillips about the smell until he was aware back-up was nearby. (43:8). Upon Commander Thomas Rolling's arrival, Officer Haines confronted Ms. Phillips about the odor of marijuana and asked if he could search the premises. (43:9). Ms. Phillips did not give consent to search at this point and requested a search warrant. (43:9). Ms. Phillips then informed Officer Haines that her minor daughter was inside the residence. (43:10). Officer Haines was able to see Ms. Phillips' daughter through a window and was unaware if anyone else was inside the residence. (43:10). Officer Haines and Ms. Phillips discuss Ms. Phillips removing her child from the residence and Ms. Phillips informs Officer Haines that her child is afraid of the police. (43:10). Ms. Phillips' child then comes out of the residence. Officer Haines and Commander Rolling testified that they were both aware that drug activity had taken place in the area of Ms. Phillips' residence. (Haines 43:33-34) (Rolling, 43:56). Officer Haines testified that based on his training and experience he believed that this was a possession with intent to deliver situation and was aware that individuals involved in drug distribution will try to protect their assets through the use of weapons, specifically guns, and that this is the biggest danger for law enforcement when confronted with such a situation. Based on his training and experience, Officer Haines knew that individuals in a residence with large quantities of illegal substances will often attempt to destroy the drugs or arm themselves when made aware of police presence. (43:11). Therefore, Officer Haines believed it was necessary to secure the residence to ensure no other individuals were present who could destroy evidence or pose a threat to the parties. (43:11-12). Officer Haines performed a protective sweep of the residence which he testified lasted approximately two (2) minutes. Officer Haines observed multiple items of drug paraphernalia and raw marijuana in

glass jars in plain view and testified that he did not look in drawers or cabinets but only in places where an individual might be located. (43:12-15)

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested in this case, pursuant to Wis. Stat. §§ 809.22(2)(b) and 752.31(2)(f).

ARGUMENT

I. Warrantless Entry Into Ms. Phillips' Home is Supported By Exigent Circumstances, Namely: The Odor of Marijuana Combined With The Concern for the Safety of Occupants and Law Enforcement and the Risk of Destruction of Evidence

A. Standard of Review

In reviewing an order granting or denying a motion to suppress evidence by the trial court, the reviewing court must uphold the finding of fact unless clearly erroneous, and independently apply the law to those facts *de novo*. *State v. Hughes*, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621.

B. Search Warrant is Generally Required to Search a Residence

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures by the government or its agents. U.S. Const. amend. IV. A warrantless search of a home is presumptively unlawful unless exigent circumstances exist. *Ky. v. King*, 563 U.S. ___, 131 S.Ct. 1849, 1856 (2011). The State has the burden to prove that a warrantless search of a residence is supported by one or more exigent circumstances. *State v. Smith*, 131 Wis. 2d 220, 228, 388 N.W.2d 601, 605 (1986), *abrogated* by *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775. These exigent circumstances “make the needs of law enforcement so compelling that [a] warrantless search is

objectively reasonable under the Fourth Amendment”. *Ky. v. King*, S.Ct. at 1856, quoting *Mincey v. Ariz.*, 437 U.S. 385, 394, 98 S.Ct. 2408 (1978); *Ill. v. Rodriguez*, 497 U.S. 177, 185-186, 110 S.Ct. 2793 (1990); *State v. Hughes*, 2000 WI 24, ¶17.

C. When Exigent Circumstances Exist During an Investigation

Although a residence is strictly protected from warrantless searches, a small number of exceptions have been created when both probable cause and exigent circumstances exist. *State v. Hughes*, 2000 WI 24, ¶24. Exigent circumstances arise, if given the totality of the circumstances and the reasonable belief of the police officer at that time, any of the following conditions exist: 1) an arrest made in ‘hot pursuit’, 2) a threat to safety of a suspect or others, 3) a risk that evidence would be destroyed, 4) likelihood that suspects would flee. *State v. Smith*, 131 Wis. 2d at 229. These exceptions are narrowly tailored, limiting the scope of intrusion only to the amount of intrusion necessary to remove the exigency from the situation. *Mincey*, 437 U.S. at 390. When making a determination as to whether an exigency exists, the trial court must objectively look to the totality of the circumstances at the time the decision to search was made, while keeping in mind the fact that an officer has to make split second decisions as to the potential risks in the situation. *Ky. v. King*, S.Ct. at 1860-64; *Ill. v. Rodriguez*, 297 U.S. 185-186; *State v. Hughes*, 2000 WI 24, ¶24.

D. The Odor of Raw Marijuana And the Presence of at Least One Child in the Residence Creates an Exigent Circumstance

The State is mindful that *Hughes* requires more than just the odor or marijuana for an exigency to exist. *State v. Hughes*, 2000 WI 24, ¶28, citing *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W.2d 316 (Wis. Ct. App. 1997); *Turrubiate v. State*, 399 S.W.3d 147 (TX 2013). If an officer has probable cause to believe drug activity is occurring within the home and the

occupants of the home are aware of police presence, an exigency of destruction of evidence and the safety of the parties is created. *State v. Hughes*, 2000 WI 24, ¶26 (It is not unreasonable to assume that a drug possessor who knows the police are outside waiting for a warrant would use the delay to get rid of the evidence).

Four cases, some of which are examined in Appellant's Brief, provide examples as to when such probable cause and exigency arise:

First, *Turrubiate v. State*, a case cited in Appellant's Brief, which held that the odor of raw marijuana alone is insufficient for a warrantless entry. In *Turrubiate*, a case from the Texas Court of Criminal Appeals which was reversed and remanded,¹ officers were able to smell marijuana from a substantial distance away from the house. *Turrubiate v. State*, 399 S.W.3d at 149. Officers then approached the house to make contact with the resident of the house and subsequently informed the resident that they were going to search the house for marijuana. *Id.* The only reason officers had in entering the property and subsequently searching the was the smell of marijuana and the possibility of a child in the residence.² *Id.* The Court held that the odor of marijuana, without other factors, is insufficient to support the warrantless entry into the house. *Id.* at 154. *Turrubiate* is distinct from the present case. Here, Officer Haines was lawfully responding to a complaint regarding a dog. Upon knocking on the door, Ms. Phillips opened the door only enough to slide outside before closing it again. After making contact with Ms. Phillips and in just the brief time the door

¹ Remanded to Court of Appeals to because that court did not review the exigency of child safety.

² Officers were unaware of the child's presence, they were only aware that a child resided within the home.

was open, Officer Haines became aware of the overwhelming odor of raw marijuana coming from Ms. Phillips and her home that he compared to, in his training and experience as an Officer and former member of a Drug Task Force, as being similar to one of the largest marijuana grow operations he had investigated. Upon speaking with Ms. Phillips, Officer Haines became aware that there was at least one child within the residence. Officer Haines, in his training and experience, was aware that the pungent smell of raw marijuana coming from Ms. Phillips and her home was often associated with drug operations which include more than one individual working to package and distribute the drugs. Officer Haines, in his training and experience, was aware that such drug operations are often associated with violence and destruction of evidence when law enforcement becomes aware of the existence of such an operation. In fact, Officer Haines refrained from confronting Ms. Phillips until an additional Officer, Commander Rolling, arrived due to safety concerns. Based on the totality of the circumstances and his particularized training in Drug Enforcement, Officer Haines believed that a protective sweep of the residence was necessary to ensure the safety of all involved, particularly if there were more children in the residence, but also to prevent the destruction of illegal drugs and locate any other individuals involved in illegal activity from fleeing the residence. Second, *State v. Sanders*, 2007 WI App 174, 304 Wis. 2d 159, 737 N.W.2d 44, provides an example of when insufficient probable cause exists to suspect drug activity, despite officers lawfully being on the defendant's property. In *Sanders*, officers were sent to the home for a complaint regarding a dog. *State v. Sanders*, 2007 WI App ¶2. Officers made contact with Sanders in his backyard and was holding a black and yellow canister as well as some cash. *Id.* ¶3. Officers believed the canister and presence of cash to be consistent with drug dealing. *Id.* Officers asked Sanders for identification and to search the canister, to which Sanders refused and went inside of his home, against officer orders to

the contrary. *Id.* ¶3, 4. Believing the situation to be ‘hot pursuit’ officers gave chase and searched Sanders’ bedroom, eventually finding cocaine. *Id.* ¶4, 5. The Court held that while the officers had a legal purpose for their presence on the property, the officers lacked any independent probable cause to believe any drug activity was occurring at the residence. *Id.* ¶32. There had never been any type of drug activity reported at this address, nor had Sanders had any contact with law enforcement regarding drugs at the residence. *Id.* Therefore, without some independent probable cause of drug activity, a warrantless entry into the residence had violated Sanders’ Fourth Amendment rights. *Id.* ¶33. Similarly, in this case, Officer Haines had responded to a call regarding a dog. However, unlike in *Sanders*, Officer Haines did form probable cause based on an independent, articulable factor, the overwhelming odor of raw marijuana, indicating the presence of illegal drug activity within the residence.

Third, *Johnson v. U.S.*, 333 U.S. 10 (1948), also cited in Defense’s Brief, explains when probable cause and the presence of individuals being in the residence does not give rise to an exigent circumstance. In *Johnson*, officers were responding to a complaint of drug activity in a hotel, and could smell the odor of burning opium. *Johnson v. U.S.*, 333 U.S. at 12. Because of the odor, police entered the room in order to ‘stop the destruction of evidence’. *Id.* The Supreme Court, in holding entry by police was unlawful, emphasized the importance of knowledge of police presence by the occupant(s) of the residence. *Id.* at 15-16. The present case is distinguished from *Johnson* in that Officer Haines did not simply smell the odor of *burning* marijuana, instead he testified that he smelled the overwhelming, pungent smell of *raw* marijuana and that it was similar to the smell of one of the largest marijuana grow investigations that he had worked on during his assignment to the Drug Task Force. Officer Haines was aware that the overwhelming smell of raw marijuana is associated with illegal drug distribution organizations or grow operations which often involve many

individuals working in concert to distribute illegal drugs. Officer Haines was also aware that individuals involved in this illegal activity will take action to protect their assets when confronted by law enforcement and that such action often involves the use of firearms. Based on the totality of the circumstances Officer Haines entry to perform a very brief protective sweep was exigent based on the need to locate any other individuals within the residence, to prevent destruction of evidence and most importantly to ensure the safety of any and all involved.

Fourth, *State v. Hughes*, provides an example of when all of the factors which create an exigent circumstance are present, justifying a warrantless entry. In *Hughes*, officers were responding to a complaint regarding trespassers in the apartment complex. *State v. Hughes*, 2000 WI 24, ¶3. While approaching the residence, officers heard multiple people in the residence, causing the officers to request backup and wait to contact the occupants of the apartment. *Id.* ¶4. While officers were waiting in the apartment hallway for backup to arrive, Hughes opened the door to the apartment in order to go to a convenience store. *Id.* ¶5. At this time, the Officers were hit with an odor of burning marijuana and the occupants of the residence became aware of the police presence. *Id.* Thus an exigency was created due to the presence of drug activity combined with the occupants' knowledge of police presence. *Id.* ¶26. The Court reasoned that the likelihood of the occupants attempting to destroy evidence or confront or run from police was extremely high once the occupants became aware of the police presence. *Id.* ¶26, 27.

Applying the holdings of the aforementioned cases to the instant case, The State argues an exigency did exist which allowed Officer Haines to enter Ms. Phillips' residence to do a brief protective sweep without a warrant. Officer Haines was lawfully on Ms. Phillips' property responding to an unrelated issue. At the moment of contact with Ms. Phillips, Officer Haines noticed that she slyly slipped through the door

and closing it immediately behind her. It was at this time Officer Haines was hit with an overwhelming odor of raw marijuana from Ms. Phillips and her residence. Officer Haines had the training and experience to recognize the strong odor of raw marijuana as being associated with distribution rather than personal use and immediately called for back-up before any confrontation was made. Once back-up was present Officer Haines advised Ms. Phillips of what he smelled and Ms. Phillips denied Officer Haines' request for consent to search and asked for a search warrant. Officer Haines intended to apply for a search warrant. However, Officer Haines became aware of the presence of at least one individual, a young child, who was in the residence. Officer Haines and Commander Rolling testified that a discussion was had over the child leaving the residence before officers entered. That child was allowed to leave. It was a reasonable belief, given Officer Haines' eighteen years as a police officer and experience dealing with drug related crimes, that due to the overwhelming odor of raw marijuana coming from the house and that law enforcement and Ms. Phillips were discussing police entering the residence and allowing her child to leave, that individuals inside would have been aware of police presence and could either destroy evidence, flee or create a situation which would pose a safety risk to the parties or any innocent children still within the residence.

The State asserts it would be *unreasonable* for Officer Haines, as argued by Ms. Phillips, to wait to secure the home until he hears sounds consistent with the destruction of evidence. If this were the standard, it would mandate that police wait until suspects are *actively* destroying evidence before they could enter a residence to ensure no other individuals are present. Finally, it is also unreasonable to believe an officer with 18 years of experience, who knows a warrant would likely be granted given these circumstances,

would jeopardize such an investigation in order to hasten the discovery of evidence.³

CONCLUSION

For the aforementioned reasons, the State asserts that this Court should affirm the trial court's denial of Ms. Phillips' Motion to Suppress Evidence.

³ While an officer's subjective intent is not relevant to the determination of whether an exigent circumstance exists, in the present case the State is arguing that the Officers experience with these types of investigations should factor into the objective review of the facts. See *Ky. v. King*, 563U.S. at 1859.

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19 (8)(b) in that it is: that the text is Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, and 11 point text for quotes and footnotes. The Statement of Facts, Argument, and Conclusion Sections of this brief are ten pages and 2,961 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 14th day of October, 2015.

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