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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No.1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 257-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

The Police Violated Ms. Phillips' Fourth Amendment Rights when They Entered Her Home Without a Warrant Because the Odor of Marijuana Alone Does Not Meet the Test for Exigent Circumstances.

The only issue in this case is whether the "exigent circumstances" exception to the warrant requirement applies. It doesn't.

For exigent circumstances to apply, the State must prove that the warrantless entry was: (1) supported by probable cause and (2) justified by exigent circumstances. 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." *State v. Smith*, 131 Wis. 2d 220, 230, 388 N.W.2d 601.

The State cannot meet its burden in this case because there were no facts to suggest that anyone's life was in danger, that anyone was attempting to destroy evidence, or that anyone was trying to escape.

The primary case on exigent circumstances where an odor of marijuana is present is *State v. Hughes*, 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621. In *Hughes*, the Wisconsin Supreme Court found that the odor of marijuana supplied probable cause, but additional facts were necessary for a finding of exigent circumstances. Those other facts were that the occupant slammed the door on police, there were several other individuals inside the residence that the police

heard speaking and moving around, and there were individuals inside who had been banned from the premises due to previous drug activity. The Court stated, “we do not base our finding of exigent circumstances on the marijuana odor alone.” *Id.* ¶27.

Here, the State argues that the warrantless entry was not based on the odor of marijuana alone, but rather “the odor of marijuana combined with another occupant’s knowledge of police presence.” (State’s response at i). There is a major flaw to this argument—there was *absolutely no* evidence that another occupant was present in the home when the police decided to enter.

Ms. Phillips told Officer Haines that the only other person inside the home was a female child. After Ms. Phillips was allowed to escort the child to a neighbor’s house, Officer Haines acknowledged that he did not have any reason to suspect that anyone else was inside.

DEFENSE COUNSEL: Did you ask her who else was in the residence?

OFFICER HAINES: I don’t recall if I asked her. I know she said her child was in the residence.

DEFENSE COUNSEL: So if you were concerned about who might be in the residence, you didn’t ask who was in the residence?

OFFICER HAINES: I don’t recall if I asked her if there was [sic] people in the residence or not other than her child. She mentioned to me her child was in there and was afraid of the police.

DEFENSE COUNSEL: And did she mention that anyone else was in the residence?

OFFICER HAINES: No.

DEFENSE COUNSEL: *Did you have think [sic] indication that anyone else was in the residence.*

OFFICER HAINES: *No.*

(41:27-28). (emphasis added).

The State carries the burden of showing there was an exigency. The question is whether specific articulable facts justified the entry, not whether the entry was justified based on the *absence* of certain facts. If the State's position were correct, anytime there was an odor of marijuana the police could invoke the exigent-circumstances requirement based on hypothetical facts. There was no evidence that anyone else was in the home. But hypothetically, there could have been other people inside—who could know for sure? There was no evidence that a dangerous drug enterprise was taking place; there were no citizen complaints of any suspicious comings or goings, nor were there any sightings of weapons. But hypothetically, any home could contain a weapon—who could know for sure?

This Court should decline the State's invitation to rely on hypothetical facts. The actual facts in this case fall far short of exigent circumstances. It was four in the afternoon. There was a complaint about a dog—no one suggested that a crime was being committed or that any weapons were present. Ms. Phillips and her child were the only people observed at the residence; they were polite and complied with

all of the officers' directions. Ms. Phillips offered to wait on the porch with Officer Haines until a warrant was procured.

The issue in this case is not whether the police had probable cause to obtain a warrant. Assuming there *was* probable cause, nevertheless there was absolutely no excuse for blowing off the warrant requirement under the guise of "exigent circumstances." 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).

CONCLUSION

For the reasons sated above and in Ms. Phillips' brief-in-chief, Ms. Phillips respectfully asks this Court to reverse the circuit court and remand for a *Machner* hearing.

Dated this 30th day of October, 2015.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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 854 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 30th day of October, 2015.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant