STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMION L.BROWN,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Appeal No. 2015AP002029 CR

Trial Case No. 2012CF3142 (Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE FILED JANUARYY 2, 2015 THE HONORABLE CLARE L. FIORENZA, PRESIDING

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STATEMENT OF ISSUES

1. Should the evidence seized during the warrantless search of the appellant's residence have been suppressed?

The trial court denied the defendant's motion to suppress.

STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

Respondent-appellant does not request oral argument. The issues presented can be fully argued in the parties' briefs.

STATEMENT OF THE CASE

The defendant, Damion Brown, was convicted of one count of possession of heroin with intent to deliver; the amount possessed being greater than 50 grams (R.50).

On June 20, 2012 a car driven by Mr. Donta Williams, with Mr. Brown as a passenger, was stopped. The vehicle was searched, however nothing of evidentiary value was found; nevertheless, both Brown and Williams were arrested. After Williams was arrested an officer requested consent to search the residence shared by Williams and Brown. After initially declining, Williams ultimately gave consent. The search followed promptly thereafter without a warrant.

The defense sought to suppress the evidence seized as a result of the search. A suppression hearing was held on Feb. 8, 2013. After hearing testimony and after considering written arguments, the trial court denied the motion (R.77). The defendant submits that the denial of the motion was error because the State did not establish at the suppression hearing that the search was a valid consent search. The defendant is appealing the denial of his motion and from the judgment of conviction.

STATEMENT OF FACTS

At the suppression hearing the first witness to testify was Mr. Donta Williams. He was called by the defense to establish Mr. Brown's standing to challenge the seizure of the evidence. Mr. Williams testified to being Mr. Brown's roommate at the address where the search occurred (R.73:19-23).

Mr. Williams also testified to relevant facts concerning the search. He testified that he was arrested on June 20, 2012 at around 1:00 o'clock in the afternoon. At that time he was driving his cousin's car with Mr. Brown as a passenger (R.73:24,25). Mr. Williams and Mr. Brown were

coming from their residence and going to the courthouse. As they approached the intersection of 52nd street and Capitol Drive, they were stopped by a number of squads. Mr. Williams was taken to an alley behind a Walgreen's drugstore. He testified that he was handcuffed and under arrest at that time. He knew that Mr. Brown had also been taken somewhere by the officers, but he didn't know where (R.73: 26,27).

Mr. Williams testified that while he was in the alley, a police officer came to talk to him. He knew the officer by the name of "Bodo" (R.73:27). He testified that he was asked a number of times by the officer "Where was the drugs at?" He indicated that the officer said the officer was supposed to be meeting Mr. Brown for drugs. Mr. Williams testified that he didn't know what the officer was talking about, and the officer walked off (R.73:28). Mr. Williams also testified that the officer came back to question him a number of times. At all times at least one officer remained with Mr. Williams (R.73:29). Mr. Williams indicated that he had been searched. He testified he repeatedly told the officers he knew nothing about any drugs. He indicated there were no drugs in the car (R.73:29). In one of the conversations with the officer Mr. Williams indicated the

officer told him that there was a buy from Mr. Brown in the vehicle the previous day, and the officer wanted to know where the drugs were. Mr. Williams again insisted he didn't know what he was talking about (R.73:30,31).

Mr. Williams went on to testify that at one point, later in the questioning, the officer asked for permission to go in the house. Mr. Williams told him "no." (R.73:32). The officer asked again, and again Mr. Williams said no (R.73:33). Mr. Williams testified that during the course of the questioning, after Mr. Williams denied permission to enter, the officer inquired into Mr. William's parole status, and asked for the name of his agent (R.73:33,34). He gave the name of his agent but Mr. Williams again denied permission to enter the residence. He testified that he was then told by the officer that he would be going to jail because he was on "paper." (R.73:35).

Mr. Williams went on to testify that he saw the officer with a phone in his hand and after thinking of "the consequences", he gave permission to search. He testified he was afraid of going to jail and getting revoked for not cooperating (R.73:35,36,37).

On cross examination Mr. Williams testified that he was with Mr. Brown the day before at Walgreens and that he

was driving (R.73:38,39). He testified that Mr. Brown got out of the car but Mr. Williams didn't know what Mr. Brown did (R.73:39). Regarding the day of the stop, he testified that he felt he was in handcuffs for about 45 minutes before he gave consent to search the house (R.73:44). Mr. Williams reiterated that he gave consent to enter after he was told he was going to jail (R.73:57).

After Mr. Williams, Mr. Brown testified. Mr. Brown's testimony primarily addressed the standing issue, and where he was living at the time of his arrest. (R.73:74-104).

After Mr. Brown testified, the defense called Mr. Daniel Isaacson. He was a field supervisor for the Department of Corrections (R.73:104). Mr. Isaacson testified that on June 20th he was riding along with officers who received a call to assist in a traffic stop (R.73:107). He testified that the squad he was in pulled up behind the stopped vehicle. He believed an unmarked squad came on the scene and another marked squad (R.73:108). At one point he got out of the squad. An officer Farina waived him over because one of the men was on supervision. Mr. Isaacson got some identifying information from Mr. Williams and then returned to the squad (R.73:110). He testified that he saw officer "Bodo" talking with Mr. Williams

(R.73:111). Mr. Isaacson indicated that he heard officer Bodo tell Mr. Williams that they suspected there were drugs at his residence and that he could either give consent to search or the officer would apply for a search warrant (R.73:113).

On cross by the State Mr. Isaacson testified that the information he obtained from Mr. Williams was his name, his home address, his phone number, his then current employer and the name of his agent. He testified that it does happen that a person is taken into custody if they have police contact (R.73:117). Mr. Isaacson also testified that he told Mr. Williams that he would be communicating with Mr. William's agent regarding what happened. He testified that he saw Mr. Williams in handcuffs and in custody (R.73: 118, 119).

After Mr. Isaacson testified, the State called Officer Bodo Gajevic to testify. Officer Gajevic testified that he first became involved in this matter when, working on a separate investigation, he heard an officer ask for assistance stopping a vehicle. He was in the area and saw the vehicle stopped so he pulled over to help (R.73: 142,143). That was June 19th. That stop resulted in a heroin arrest, and he later was in touch with one of the

officers involved. As a result of that contact the next day, June 20th, he parked his undercover car where he could observe Mr. Brown's residence. He saw Mr. Brown and Mr. Williams leave and get into the silver Infinity. He testified that ultimately he was made aware that Mr. Brown had been taken into custody. Uniformed squads had stopped the car he saw Mr. Brown get into (R.73:148, 149).

The officer testified that after the stop he had contact with Mr. Williams. He estimated that his first contact with Mr. Williams occurred 15 to 20 minutes after the Infinity was stopped. Before talking to Mr. Williams he testified that he was assisting in the search of the car and talking to Mr. Brown (R.73:150).

The officer indicated that when he talked to Mr. Williams he was asked by Mr. Williams if he was under arrest. He indicated that he told Mr. Williams that he was. He told him he was arrested for dealing heroin the day before, and on the day of the stop (R.73: 154,155). Officer Gajevic testified that Mr. Williams denied any involvement in the sale of drugs (R.73:156).

Officer Gajevic went on to testify that the officer told Mr. Williams that there would be heroin at his apartment. Mr. Williams denied that there was (R.73:158).

The officer testified that he asked Mr. Williams for consent to search his apartment. The officer said that he wanted Mr. Williams to consent willingly, but that if he did not, he would apply for a search warrant (R.73:161). The officer testified then that Mr. Williams said "(g)o ahead and search it. There's not going to be any heroin in my room." (R.73:162).

On cross examination Officer Gajevic reiterated that he was not present on the 19th when a sale of heroin allegedly occurred (R.73:183). Regarding the 20th, he indicated that Mr. William's car had already been stopped when he arrived (R.73:199). He indicated that Mr. Williams was placed in an alley and Mr. Brown was sitting down outside the car (R.73: 199,200). Nothing was found when the car was searched by himself and two other officers (R.73:200). He testified that it was supposed to be a controlled buy but there was nothing to buy (R.73:202). He indicated that he had one conversation with Mr. Williams regarding the search of his residence, and that the issue of consent came up several times, the last time after he advised Mr. Williams that he was going to jail (R.73:205).

Officer Gajevic was then questioned regarding his basis for claiming he would apply for a search warrant for

Mr. Williams' residence given the facts known at that time. Officer Gajevic admitted that at the time he did not believe Mr. Brown lived at Mr. Williams' residence (R.73: 208). He also indicated that he knew nothing about Mr. Williams. When asked what he would have put in an affidavit to search Mr. Williams' house, Officer Gajevic testified that he would have put in the affidavit what he knew about Mr. Brown, and the fact that two subjects were observed driving to where a transaction was to occur (R.73:210). He also indicated that he believed a canine dog sniff at the door of the residence would have resulted in a positive alert for a controlled substance at the residence. This in spite of the fact that the officer admitted that no dog sniff had occurred (R.73:211).

Additional facts as necessary shall be stated in the argument.

ARGUMENT

The defendant argues that the warrantless search of his residence violated his Fourth Amendment rights. The State did not establish that Mr. Williams' consent to search the home he shared with Mr. Brown was voluntary.

I. THE DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

Because the State failed to satisfy its burden, the defendant's motion to suppress should have been granted.

A. Applicable Law

A warrantless entry to conduct a search, seizure or arrest, absent a showing of exigent circumstances or consent, violates a person's Fourth Amendment right against unlawful searches and seizures. See ***State v. Smith***, 131 Wis. 2d 220, 226-7, 388 N.W. 2d 601, 604 (1986).

"Warrantless searches 'are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions' that are 'jealously and carefully drawn.'" ***State v. Kryzaniak***, 2001 WI App 44, ¶ 14, 241 Wis. 2d 358, 624 N.W.2d 389 (citations omitted). "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***Welsh v. Wisconsin,*** 466 U.S. 740, 748 (1984) (citation omitted). A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all governmental agents who

seek to enter the home for purposes of search or arrest. ***Id.*** The Fourth Amendment stands for the right of a person to retreat into his/her own home and there be free from unreasonable governmental intrusion. ***Payton v. New York***, 445 U.S. 573, 589-90 (1980). "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer; not by a policeman or Government enforcement agent who may be caught up in the competitive enterprise of ferreting out crime. ***Johnson v. United States***, 333 U.S. 10, 14 (1948).

If the police do not have a warrant, they bear the heavy burden of trying to demonstrate exigent circumstances to overcome the presumption of unreasonableness. ***Welsh***, 466 U.S. at 750. Four factors have been identified that, when measured against the time needed to obtain a warrant, constitute the exigent circumstances required for a warrantless entry: (1) an arrest made in "hot pursuit"; (2) a threat to the safety of a suspect or others; (3) a risk that evidence would be destroyed; and (4) a likelihood that the suspect would flee. ***State v. Smith,*** 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986). See ***State v. Rodriguez***, 2001 WI App 206 at ¶¶ 8,9, 247 Wis. 2d 734, 741-42, 634 N.W.2d 844, (Ct. App. 2001).

Consent also is a valid exception to a warrantless search, however, in order to satisfy this exception to the warrant requirement the government must prove that said consent was freely and voluntarily given. ***State v. Rodgers***, 119 Wis. 2d 102, 349 N.W.2d 453 (1984); ***State v. Xiong***, 178 Wis. 2d 525, 532, 504 N.W.2d 428 (Ct. App. 1993).

Evidence obtained pursuant to a consent search following an arrest lacking probable cause must be suppressed. **State v. Vorburger**, 2001 WI APP 32, ¶12, 241 Wis. 2d 481, 490,624 N.W. 2d 398.

Additionally, the government bears "the burden of proving by clear and positive evidence the search was the result of free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W. 2d 876 (Ct. App. 1993). On review, a trial court's findings of historical fact will be upheld unless clearly erroneous. Whether said facts satisfy the constitutional requirement of voluntary consent is a question of law subject to independent review. ***Xiong*** at 531.

If consent is given in submission or acquiescence to an unlawful assertion of authority, the consent is invalid. ***Bumper v. North Carolina***, 391 U.S. 543, 548-549 (1968).

The question of whether consent was voluntary is a question of fact to be determined from the totality of all the circumstances. **Schneckloth v. Bustamonte**, 412 U.S. 218, 222, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

B. The State failed to establish that consent to search was freely and voluntarily given.

As the law cited above makes clear, a warrantless entry into a home is the chief evil against which the Fourth Amendment is directed. In this case, the State failed to satisfy its burden of proof that the entry into the appellant's residence was proper.

A review of the record in this case establishes that the totality of the circumstances indicate that Williams' consent to search was not the product of a free and unconstrained choice. See **State v. Kiekhefer**, 212 Wis. 2d 460, 471. In **Kiekhefer** the court of appeals weighed a number of factors and determined that the defendant's consent to search in that case was not voluntary. As in **Kiekhefer**, we believe a number of factors weigh against a determination of voluntariness in this case; (1) Mr. Williams was arrested, in handcuffs, and confronted with his probationary status when he purportedly gave consent;

(2) there was no probable cause to arrest him at that time; (3) As in **Kiekhefer**, the officers claimed they could get a search warrant; (4) Mr. Williams initially denied consent to search.

Whether a person is in custody is a factor to consider when determining whether consent to search is voluntary **Kiekheffer** at 471. In this case, upon the stop of Mr. Williams' vehicle he and Mr. Brown were immediately separated and arrested. A number of squads were on hand. Mr. Williams' car was thoroughly searched. Even though nothing was found, a probation and parole supervisor took information from Mr. Williams and indicated that he would be contacting his agent. Under these circumstances, the custodial nature of his detention certainly weighs against a finding of consent.

Furthermore, not only had Mr. Williams been arrested, the record does not show that there was probable cause to arrest him. That alone invalidates the consent.

Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a defendant committed a crime. **State v. Mitchell**, 167 Wis. 2d 672, 681, 482 N.W. 2d 364 (1992).

Officer Bodo Gajevic was the only witness called by the State at the suppression hearing. He testified that he became involved in the investigation of Mr. Brown because on the 19th, the day before the stop of Mr. Williams' vehicle, the officer was involved in another investigation when he heard a radio transmission asking that a vehicle be stopped (R.73:142,143). He testified that the stop on the 19th resulted in a heroin arrest. The following day he was provided with the name Damion Brown, an address and a vehicle description. He testified he was asked to place his undercover vehicle in a position where he could monitor the building and vehicle for Mr. Brown. He therefore went to the residence and conducted surveillance. He testified that he saw Mr. Brown and another subject leave the residence. He saw them get into a silver Infinity car and proceed in a northeasterly direction (R.73:144). He testified that he ultimately became aware that Mr. Brown was taken into custody (R.73:148). He testified that uniformed squads stopped the car. He indicated that the person in the car with Mr. Brown was Mr. Williams (R.73 149). He indicated that fifteen to twenty minutes after the stop of the vehicle he went to talk to Mr. Williams. He indicated that prior to that he participated in the search of the car

(R.73:150,154). He testified that nothing was found in the car. (R.73:200). The officer indicated that he first talked with Mr. Brown after the search of the car. At that time another officer and a probation and parole supervisor were with Mr. Williams. The officer indicated that when he began talking to Williams, Williams asked him if he was under arrest and what was going on (R.73:154). Officer Gajevic testified that he explained the nature of the investigation and that Mr. Williams was under arrest for being party to a crime for dealing heroin the day before, and the day of the stop (R.73:154). He indicated that Mr. Williams denied being involved in heroin dealing, and that he didn't know anything about it (R.73:156). Officer Gajevic admitted that he was not involved in the investigation the day before and knew nothing about Mr. Williams (R.73:207).

It is clear from the above that the State failed to prove that the consent to search obtained from Mr. Williams was not tainted by an illegal arrest. There is nothing in the facts testified to by the officer that establish that at the time Mr. Williams was arrested he was doing anything that would lead a reasonable officer to believe he was committing a crime. While the officer said Mr. Williams was being arrested for dealing heroin the day before and on the

day of the stop, no testimony was adduced establishing Mr. Williams' involvement in any crime. The officer admitted he knew nothing about Mr. Williams before the stop on the 20th. Clearly, probable cause for the arrest of Mr. Williams was not established. This alone vitiates the State's reliance on his consent for the search.

In addition, the testimony of Officer Gajevic indicates that the officer had threatened to get a search warrant if he could not obtain Mr. Williams' consent. This also weighs against a finding of consent. Police may not threaten to get a warrant when there are no grounds for a valid warrant. See **Kiekhefer** at 473.

One of the witnesses at the hearing was Mr. Daniel Isaacson, who was a field supervisor with the State of Wisconsin Department of Corrections (R.73:104). He was riding in a squad at the time of the stop and arrest of Mr. Williams and Mr. Brown (R.73:107, 108). At one point he was waived over to Mr. Williams by an officer because Mr. Williams was on probation (R.73:109-114). He testified that he heard "officer Bodo" give Mr. Williams a couple of options, i.e. that, number one, the officer could get consent from Williams to search the residence, or he would apply through the court system to get a search warrant for

the residence (R.73:113). Following that statement Mr. Isaacson was asked: "(w)ell, the option would be that Bodo would apply for a search warrant to the court; so he could give consent right now?" Mr. Isaacson responded: That's correct." (R.73:131,132).

Officer Gajevic confirmed that he told Mr. Williams that, as an alternative to Mr. Williams giving consent, the officer would apply for a search warrant (R.73:161), although the officer did not characterize his statement as a "threat" to get a warrant (R.73:163).

When questioned by defense counsel as to the basis the officer might have for requesting a search warrant, officer Gajevic admitted that no drugs had been found at the scene. (R.73:206). He admitted that he did not know Williams and had not seen him before that day. He also admitted that at the time he thought Mr. Williams lived at the house, but Mr. Brown did not. When asked what grounds he had for a warrant that he could have put in an affidavit, he detailed information he had been told about Mr. Brown, not Mr. Williams. At one point the officer testified:

> Let's just say whether or not heroin was recovered on that particular date and time, discarded, or that I can't tie in to either Mr. Williams or Mr. Brown, I was firm in the belief that if I take that information, coupled with a canine narcotics dog sniff at the front door, that I would have received a

> positive alert for an odor of a controlled substance at that residence, which would be the total basis of my application for the search warrant (R.73:211).

After making the above statement, the officer admitted that no dog had been used. There was no indication given at the hearing that any drugs had been discarded. The officer reluctantly admitted that no drugs had been found in the car, although he insisted that there could have been drugs in the car, asking defense counsel if counsel had " ... ever come across a trap compartment that's hydraulically mechanized so only a certain individual knows how to get in. (R.73:212)." There was no testimony regarding any "hydraulically mechanized" compartment being found in the car.

It is clear from the officer's testimony that there were no grounds to obtain a search warrant of Mr. Williams' home. The officer's attempt to characterize his threat to get a warrant as something other than a threat is irrelevant. Whether it is called a threat or something else, it is obvious that, as testified to by Mr. Isaacson, he gave Mr. Williams the option of consenting, or having his house searched after the officer obtained a warrant. Given that there were no grounds for obtaining a warrant,

this factor and circumstance clearly weighs against a finding of voluntariness. See **Kiekhefer** at 473.

Finally, the fact that Mr. Williams initially denied consent to search weighs against a finding of voluntariness. As stated in **Kiekhefer**, "(t)he fact that **Kiekhefer** initially refused to consent to a search of his room also militates against a finding of voluntariness." **Kiekhefer** at 472.

Mr. Williams' testimony indicates that he denied entry a number of times before giving consent (R.73: 32,33,34). Although Officer Gajevic testified that he only asked Mr. Williams once whether he would give consent, when he was questioned about that on cross, the following exchange took place:

> Q: Okay. You're saying that you just asked Williams one time for consent to search the residence?
>
> A: I had one conversation with him regarding the search of the residence. Contained within that one conversation that I had with Mr. Williams the issue of consent came up several times. I asked him several times in that conversation, the last time being after I advised him he was still going to jail.

(R.73:205).

The officer's testimony is consistent with Mr. Williams' testimony that he denied consent a number of times. The particulars of whether it was in one continuous

conversation or more than one are not dispositive. The fact that there was a discussion of getting a search warrant for Mr. Williams' house supports Mr. Williams' testimony that he initially denied access. There would be no need to threaten him with a search warrant if he immediately gave consent. The alternative explanation that the officer, prior to being denied entry, told Mr. Williams that the officer wanted consent, or he would get a warrant, would clearly be coercive under these facts, given that there was no basis for a search warrant.

CONCLUSION

The State has the burden to show that Mr. Williams' consent to search his home was voluntary. For the reasons stated herein the State failed to carry its burden, and the trial court erred when it denied the defendant's motion to suppress. We ask therefore that the defendant's judgment of conviction be vacated.

Dated: _____, 2016.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 22 pages long including this page.

Dated: _____, 2016.

GRAU LAW OFFICE

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat § 809.19(12).

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____, 2016.

GRAU LAW OFFICE

_____
John J. Grau

APPELLANT'S BRIEF APPENDIX CERTIFICATION

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 s. 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 Wis. Stat. § 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 decision showing the circuit court's reasoning regarding those issues.

I 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: _____, 2016.

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