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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS D. DOWLING,

Defendant-Appellant.

Appeal No. 2016AP000838-CR

Trial Case No. 2013CM000630

STATE'S RESPONSE ON DEFENDANT'S APPEAL FROM OZAUKEE COUNTY CASE NO. 2013CM000630
HONORABLE PAUL V. MALLOY
CIRCUIT COURT JUDGE PRESIDING
OZAUKEE COUNTY, WISCONSIN

Respectfully submitted,

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent requests neither oral argument nor publication in this case.

STATEMENT OF THE CASE

The State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

I. The Officers Were Not Required To Leave The Apartment After An Entry By Consent

A. Consent To Enter Not Withdrawn Before Entry

The defense argues that the Defendant withdrew the consent given by his wife Brooke Dowling and at that point the officers were legally obligated to leave. When the officers did not leave, the defense argument is that any evidence gathered after that point should be suppressed.

For this proposition, the defense relies primarily on the cases of *Georgia v. Randolph*, 547 U.S. 103 (2006) and *State v. Wantland*, 2014 WI 58, 355 Wis.2d 135, 848 N.W.2d 810. The reliance on those cases is misplaced.

One distinction from the present case is the nature of the consent being sought. In *Randolph*, the officers sought consent to search. *Id.*, 547 U.S. at 107, 126 S.Ct. 1515. In the present case before this court, the consent sought was to enter the apartment.

The second distinction is the timing of the conflicting responses to the question of consent. In *Randolph*, an estranged married couple, Scott and Janet Randolph, were fighting over the custody of their son. *Id.*, 547 U.S. at 106–107, 126 S.Ct. 1515. Although Mrs. Randolph consented to the police to search their home for illegal drugs, Mr. Randolph refused to give the police his permission. *Id.*, 547 U.S. at 107, 126 S.Ct. 1515. *Randolph* held that in co-habitation cases, where

both are present, a search is unlawful when one consents but the other expressly refuses to consent. *Id.*, 547 U.S. at 122–123, 126 S.Ct. 1515.

Unlike the situation in *Randolph*, in the present case Defendant Dowling did not initially object to the police entering the home. Mrs. Dowling consented, the officers entered and only then did the Defendant become involved.

Although under the Fourth Amendment, "[w]arrantless searches are 'per se' unreasonable*," State v. Kieffer*, 217 Wis.2d 531, 541, 577 N.W.2d 352, 357 (1998) (quoted source omitted), consent is an exception to this general rule. *Id.*, 217 Wis.2d at 541, 577 N.W.2d at 357.

In this case, the officers were only presented with consent to enter by Brooke Dowling. Once the officers entered by consent from Brooke, they were lawfully inside the apartment. In this appeal, the Defendant is not challenging that consent to enter was given. However, the defense argues that after the officers were inside the apartment by virtue of Brooke's consent, the Defendant withdrew the consent given by his wife Brooke. *Wantland* is cited as authority for this claimed withdrawal of consent,

In *Wantland*, the driver of a vehicle consented to the search of the vehicle in which a briefcase was located. The briefcase was not excluded from that consent. Wantland was a passenger in the vehicle. Before the search was conducted, Wantland asked the officer whether he had a warrant. The issue in *Wantland* was whether Wantland's asking about a warrant amounted to a

withdrawal of the driver's consent. The Court concluded that Wantland did not effectively withdraw the driver's consent when he asked "Got a warrant for that?" *Id.* at ¶ 2 – 5

An important distinction is that *Wantland* dealt with a consent to search. The present case is not about a consent to search; it is about consent to enter into the apartment. The Defendant is seeking to have this Court hold that he could legally withdraw a consent to enter after the entry was completed.

The only way *Wantland* could provide authority applicable to the present situation is if the Court in *Wantland* found that Wantland could withdraw a consent to search **after** the search was completed.

The Defendant has provided no authority to support his argument that he could somehow withdraw a consent to enter *nunc pro tunc* or after the entry was completed.

The appropriate issue/question here is whether officers investigating a report of domestic violence must leave a place in which they are legally present when the likely perpetrator of the violence tells them to leave.

B. Wisconsin Domestic Violence Laws

In 1989, Wisconsin implemented its mandatory arrest law for domestic abuse crimes.

Domestic abuse is defined in section 968.075(1) of the Wisconsin Statutes

968.075 Domestic abuse incidents; arrest and prosecution.

(1) Definitions. In this section:

(a) "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.

2. Intentional impairment of physical condition.

3. A violation of s. 940.225 (1), (2) or (3).

4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Section 968.075(2) of the Wisconsin Statutes defines the circumstances requiring an arrest.

(2) Circumstances requiring arrest; presumption against certain arrests.

(a) Notwithstanding s. 968.07 (1) and except as provided in pars. (am) and (b), a law enforcement officer shall arrest and take a person into custody if:

1. The officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime; and

2. Any of the following apply:

a. The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely.

b. There is evidence of physical injury to the alleged victim.

c. The person is the predominant aggressor.

Domestic violence is a very serious problem for our society. Even the Court in *Randolph* recognized this problem. And in so doing, addressed a situation present in this case; where the officers are lawfully on the premises.

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. **(And since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause, see Texas v. Brown, 460 U. S. 730, 737-739 (1983) (plurality opinion).)** Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. See 4 LaFave § 8.3(d), at 161 ("[E]ven when . . . two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other. . . . [W]here the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections" (internal quotation marks omitted; third omission in original)). The undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent.
> (Emphasis added)

Randolph, 547 U.S. at 118-119

Prior to the actual entry into the apartment, the officers collectively possessed the following knowledge and experience related to domestic violence situations:

1. They have more than one officer respond to a domestic violence call both for safety reasons and for the ability to separate the parties involved. (75: 5) [1]

[1] Please note that in his brief, the Defendant-Appellant has a footnote on page 2 stating that the record compilation did not assign record numbers for the transcripts. The record compilation does have record numbers assigned for all the transcripts. The assigned record numbers are different from those used by the Defendant-Appellant in his brief. This writer will use the record numbers assigned in the compilation together with the pages of the Appellant's Appendix where applicable.

2. The standard investigation procedure in a domestic violence situation is to split up the parties so that they can be spoken to without the other hearing what is said. (75:14)

3. The officers' job is to investigate the possible domestic disturbance and to make sure everything is okay. (75:24)

4. Officer Cline specifically stated that "a lot of times the wife could be a victim, says everything is fine, nothing happened, when in fact something really did. So we just had to confirm." (75:24)

5. Officer Cline also testified that he had previous experience where a wife had said everything was fine but something had actually occurred. He said that was not an unusual event. (75:24)

6. When asked why the officers did not just leave after they met Mrs. Dowling and she speared uninjured, Officer Brock testified:

> We're duty-bound in case this is a domestic violence situation to make sure no further domestic violence issues occur once we leave. There have been cases in the past that we're trained on that once the police officers leave, the primary aggressor may be more agitated that the police were there and cause additional problems within the inside of the residence if intervention doesn't occur.

(79:72) (Appellant Appendix 120)

C. Officers Lawfully On Premises Can Take Further Action

The Supreme Court in *Randolph* specifically noted that once officers are lawfully on the premises, " there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause"

Id. at 118. In the present case, the officers took further action supported by the existing and consequent probable cause.

1. Probable Cause Prior To The Entry

Prior to the actual entry into the apartment, the officers collectively possessed the following information:

1. Before being dispatched for the 911 call, Officer Gehm had been alerted about a vehicle being operated without its headlights. The plate given for that vehicle listed to the Defendant at the same apartment building. It was approximately 17 minutes later that the officers were dispatched on the 911 call to the Dowling apartment. (79: 128-129) (Appellant Appendix 176-177)
2. The officers were dispatched on a 911 call from a neighbor who reported that there was family trouble or domestic violence taking place. The caller heard slamming doors, yelling and screaming. The caller specifically requested a welfare check on the wife to make sure she was OK. (75:4-5, 8, 18)
3. The officers knew the Defendant was intoxicated. While in the apartment hallway, they met a different neighbor at the Defendant's door. That neighbor told the officers that the defendant had too many "Long Islands" alcoholic drinks and that he, the neighbor, was there to calm the Defendant down. (75: 7-10)

4. Officer Cline testified that the neighbor they met at the Dowling's apartment door told him "that Mr. Dowling had too many Long Island Iced Teas, he was yelling and out of control and he was there to try to calm him down and get him to go to bed." (79:107) (Appellant Appendix 155)

5. The officers then knew that the Defendant was likely the person causing the disturbance that had been reported. (75: 12)

6. When the officers arrived, there was no yelling or screaming heard (79:108-109) (Appellant Appendix 156-157) When asked why the officers did not just leave at that point, Officer Cline testified:

> Because at that time we're still investigating what's called a family trouble or domestic violence incident. Specifically the neighbor requested that we check on the welfare of the wife. She wasn't the one that was yelling and slamming doors. The neighbor told us it was Mr. Dowling. Brooke told us it was Mr. Dowling. We had to confirm and make sure there was no domestic violence situation taking place.

(79:109) (Appellant Appendix 157)

2. Probable Cause After The Legal Entry

Within seconds of entering the apartment, the officers are located just inside the doorway of the apartment (75:13) and collectively observed the following to occur:

1. Officer Gehm testified:

> Q At that point do you yet see Mr. Dowling?
>
> A As I enter the apartment, I call out by his first name.

Q And what do you call out?

A "Tom."

Q What do you say, just "Tom" or "Tom, can you come out here?"

A "Tom."

Q All right, just "Tom." Do you say you are a police officer or anything?

A No.

Q And you can see Tom at some point?

A Yes. A short time later, Mr. Dowling emerged from a room that was down the hall and began to walk slowly toward me.

Q And what was his demeanor?

A His speech was slurred, and he appeared unsteady on his feet, staggering; and all he said was he had too many Long Island Iced Teas.

Q Was he agitated at that point?

A At that point, no.

Q So when he initially comes out, he does not appear to be?

A No.

Q Does he become agitated?

A Yes.

Q What point?

A He began to thank us officers and wanted us to leave, and that's when he became agitated.

Q And how soon after he came out till that?

A Matter of seconds.

Q And when you say he became agitated, what did you observe?

A His voice began to get louder, and he began to basically ignore any questions or commands that we had for him.

(79: 132-133) (Appellant Appendix 180-181)

2. It was immediately apparent to Officer Cline that the Defendant was intoxicated based on his poor balance while he was walking (he was stumbling) and his slurred speech. At that time, the Defendant was yelling and swearing. (75:16)

3. Officer Brock testified that once they go inside the residence, the officers are met by the Defendant in the apartment hallway. (79:72) (Appellant Appendix 120)

4. Officer Brock testified that the Defendant appeared agitated when he first saw him and that the defendant was yelling at that point. (79:73) (Appellant Appendix 121)

5. When asked why the officers did not leave when the Defendant told them to leave, Officer Cline testified:

> Q You said he was immediately agitated because you were there. Did he say that?
>
> A You could just tell by his demeanor, how he spoke. I think he probably told us to leave immediately.
>
> Q And now from the information you had now, you're in his apartment, he asks you to leave; and why don't you leave?
>
> A Well, we were allowed in by Brooke. At that time we were still investigating if, in fact, a family trouble or domestic violence related incident happened.
>
> Q Did his demeanor as you observed him alleviate any concerns about domestic violence?
>
> A No, not at all.
>
> Q Did it change your concerns at all?

A It confirmed the fact that we needed to perform the investigation.

(79:110-111) (Appellant Appendix 158-159)

6. When asked why the officers did not take Brooke Dowling down the hallway of the apartment building, just close the apartment door and leave the Defendant in his agitated state in the apartment alone, Officer Cline testified:

> Well, at that point we know he's our suspect, so we don't want to leave him. That could cause other potential issues on what if we all leave the apartment, and he closes the door and locks it and we can't get back in, or what if he continues to get agitated. It's just a safety thing. You always want to be in contact with everybody involved so you can always see what they're doing.

(79: 123-124)(Appellant Appendix 171-172)

7. When asked why the officers did not just arrest the Defendant immediately, Officer Cline testified:

A Because you always want -- there's always everybody's side of the story. We always want, even if they're doing something technically, you know, that could be illegal or against the law, we always want to talk to them about -- find out why. Maybe there's a legitimate reason why he's upset. You know, there's lots of variables about why he's mad or what's going on.

Q Do you arrest everyone in the past that you found to be mad or agitated?

A No.

Q Do you use that investigation to make that determination?

A Yes. I mean, technically we knew of the noise complaint or a disorderly conduct situation before we got there, but we just don't show up and arrest people. We need to talk to them about the reason behind the anger, what happened earlier, like just in general what happened.

(79: 125) (Appellant Appendix 173)

In the present case, within seconds after entering by consent, the officers are faced with additional probable cause as an offense is being committed in their presence. The actions then taken by the officers was entirely reasonable.

II. Evidence Of New Crime Committed After The Entry

In addition to the authority in *Randolph* for consequent probable cause following a lawful entry, even an unlawful entry would not bar evidence of the Defendant's new crime.

> [W]hen a defendant commits a new and distinct crime during an unlawful detention, the Fourth Amendment's exclusionary rule does not bar evidence of the new crime. See *United States v. Sprinkle*, 106 F.3d 613, 619 & n. 4 (4th Cir.1997); *United States v. Garcia-Jordan*, 860 F.2d 159, 161 (5th Cir.1988); *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir.1983); see also *United States v. Udey*, 748 F.2d 1231, 1240 (8th Cir.1984).

United States v. Hunt, 372 F.3d 1010, 1012 (8th Cir., 2004)

In the present case, the defendant committed the crime of Disorderly Conduct after the officers entered the residence. Therefore, even if the officers had illegally remained, the evidence of the commission of the new crime would not be suppressed.

III. Trial Counsel Was Not Ineffective

Because the officers were not required to leave the apartment, trial counsel was not ineffective for railing to raise this argument in the trial court.

CONCLUSION

The trial court made the correct ruling that the evidence of the Defendant's conduct after the officers entered the apartment should not be suppressed. Therefore, trial counsel was not ineffective.

The trial court's order denying the Motion should be affirmed.

Dated this _____ day of_____, 2016.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. State § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,276 words.

Dated this ____ day of September, 2016.

_____
Jeffrey A. Sisley
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 ____ day of September, 2016.

_____
Jeffrey A. Sisley
Assistant District Attorney

APPENDIX

The State will not be submitting an appendix.

Index to Appendix.

The State has not submitted an appendix.