STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2016AP838-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS D. DOWLING,

Defendant-Appellant.

On Appeal From a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Ozaukee County Circuit Court, the Honorable Paul V. Malloy, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Any Evidence Obtained After Mr. Dowling Told Police to Leave His Home Must Be Suppressed Because He Effectively Revoked the Consent to Enter, and They Were Required to Leave.

Mr. Dowling told the police to leave as soon as he saw them in his home, and before he engaged in any disorderly conduct. (79:110, 133, 140-41; App. 140, 181, 188-89). At that point, even though Brooke Dowling let the police in, they were required to leave. ***Georgia v. Randolph***, 547 U.S. 103, 122-23 (2006). When two present co-occupants disagree about whether police can enter, the Fourth Amendment requires that police honor the refusal. ***Id.*** Mr. Dowling's instruction that police leave also acted to withdraw any consent that had previously been given. ***State v. Wantland***, 2014 WI 58, ¶¶ 21, 33, 335 Wis. 2d 135, 848 N.W.2d 810. Therefore, any evidence obtained after Mr. Dowling told police to leave must be suppressed because it was obtained while police were illegally in the home.

The State begins by arguing that ***Randolph*** does not apply here because Mr. Dowling was not standing in the threshold as Brooke let police in. (Respondent's Brief at 3). Instead, Mr. Dowling's refusal came a moment or two *after* she consented. But there is no requirement that Mr. Dowling be standing in the doorway with Brooke. All ***Randolph*** requires is that Mr. Dowling be "physically present" and object to the entry. 547 U.S. at 106 ("a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."). Here, Mr. Dowling did exactly what ***Randolph*** requires, he was in the home, and he told police to leave as

soon as he saw them. It does not matter that he was just inside the home, and not standing on the threshold. ***Randolph*** did not establish such an inflexible standard. Mr. Dowling refused consent to the entry as soon as he saw the police, and the police were required to honor that refusal. (79:110, 133, 140-41; App. 140, 181, 188-89).

Next, the State argues that once police were in the home, there was nothing Mr. Dowling could do to make them leave. (Respondent's Brief at 3-4). The State argues that once police enter pursuant to consent, that consent cannot be withdrawn. This is plainly inaccurate. "A consent to *enter* or to search, once given, can be withdrawn or limited at any time prior to the completion of the search by some verbal or physical act indicating that the consent has been withdrawn." ***State v. Reagan***, 209 A.2d 839, 845 (Conn. 1988) (internal citations omitted) (emphasis added); ***People v. Hamilton***, 168 Cal. App. 3d 1058, 1068 (1985). If the State's position were adopted, no homeowner would ever be able to compel police to leave his or her home after consenting to an entry. The police could rely on the consent to remain indefinitely. The State cites no authority to support this obvious Fourth Amendment violation.

Here, Mr. Dowling effectively revoked any consent police had to be in the home when he told them to leave. To withdraw consent, Mr. Dowling was merely required to say or do something conveying his intent to withdraw the consent. ***Wantland***, 2014 WI 58, ¶¶ 33. And that's just what he did. Officer Gehm testified that Mr. Dowling said "it's time to go," and Officer Cline testified that Mr. Dowling told them to leave "immediately." (79:110, 133, 140-41; App. 158, 181, 188-89). The only reasonable interpretation of these statements is as a withdrawal of consent to be in the home.

Therefore, police were required to honor that withdrawal of consent and leave.

The State argues that police were allowed to ignore Mr. Dowling's instruction that they leave because this was a domestic abuse situation. But this argument is contradicted by the officers' own testimony. Even the circuit court found there was insufficient evidence to justify the police entry on any basis other than consent. (76:19; App. 107). There were no exigent circumstances, and there was no probable cause for a warrantless entry. Police were responding to a call about someone slamming doors and yelling; there was no reported evidence of actual abuse. (79:66). All of the officers testified that Brooke appeared safe, sober, and unharmed when she answered the door. (75:8, 18-19; 76:89, 118, 139; App. 107-08, 137, 166, 187). And any suspicion of a domestic abuse situation was dispelled when Brooke and her neighbor told police that Mr. Dowling was just drunk, and they already got him into bed. (75:7-8, 10). The State cannot use the pretext of a domestic abuse situation to ignore Mr. Dowling's Fourth Amendment rights.

And no probable cause existed for police to remain after Mr. Dowling told them to leave. As the officers' testimony makes clear, Mr. Dowling told them to leave *before* he did anything disorderly. (79:110, 133, 140-41; App. 158, 181, 188-89). It was only *after* they refused to leave that he became agitated. But by that point, police were illegally in the home, so any evidence collected was directly the result of their illegal conduct, and must be suppressed.

Finally, the State makes an undeveloped claim that the court should not suppress any evidence police observed as a result of their unlawful entry because Mr. Dowling committed a new crime *after* the police illegally remained in his home.

(Respondent's Brief at 13). This court should refuse to consider this undeveloped argument. ***State v. Butler***, 2009 WI App 52, ¶ 17, 317 Wis. 2d 515, 768 N.W.2d 46.

In support of its argument, the State cites to one Eighth Circuit case that is wholly unlike the circumstances here. ***United States v. Hunt***, 372 F.3d 1010 (8th Cir. 2004). There, the defendant was stopped for speeding and police subsequently found drugs in his car. ***Id.*** at 1012. After the defendant was transported to the police station, he asked two officers how much money it would take for them to let him go home. ***Id.*** The drugs were eventually suppressed as the result of an illegal search, but the appellate court did not suppress evidence of the bribery, finding it was part of a "new and distinct crime," so the exclusionary rule would not apply. ***Id.*** at 1012.

There was no "new and distinct crime" in the present case. Police were investigating disorderly conduct and only found evidence of disorderly conduct. And the only disorderliness police observed stemmed from their illegal presence in the Dowlings' home. Thus, there was no "new and distinct crime." There was one crime being investigated, and police found evidence of that crime solely as a result of their Fourth Amendment violation. Therefore, the State's appeal to this non-binding case should be rejected and this court should reverse and order the evidence suppressed.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Dowling asks that this court reverse the decision of the circuit court, and remand with instructions to vacate the judgment of conviction and suppress all evidence obtained after Mr. Dowling told police to leave.

Dated this 23rd day of September, 2016.

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 1,177 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 23rd day of September, 2016.

Signed:

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