STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2016AP001609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FAITH N. REED,

Defendant-Appellant.

Appeal from the Judgment of Conviction Entered
in the Monroe County Circuit Court,
the Honorable David J. Rice, Presiding

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Did the investigating officer conduct an unreasonable search in violation of the Fourth Amendment when he pushed open a door to the defendant's apartment, without a valid justification for doing so?

The trial court answered "no" and denied the defendant's motion seeking the suppression of the fruits of this search.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The undersigned attorney believes that the parties' briefs will adequately address the issue presented, and that oral argument will therefore be of only marginal benefit to the court in deciding this appeal. Because this case is to be decided by a single judge, publication is not warranted. Rule § 809.23(1)(b)4.

STATEMENT OF THE CASE AND FACTS

On March 31, 2016, Faith Reed pleaded no-contest to possession of a controlled substance, dextroamphetamine sulfate, without a prescription, an unclassified misdemeanor under Wis. Stat. § 961.41(3g)(b), and to misdemeanor bail jumping, a Class A misdemeanor under Wis. Stat. § 946.49(1)(a). (30:8-9). That same day, Monroe County Circuit Judge David J. Rice followed the parties' joint sentencing recommendation, imposed and stayed consecutive, 20-day jail sentences, and placed Reed on probation for one year. (30:18; 26). Pursuant to Wis. Stat. § 971.31(10), Reed

now appeals from the judgment of conviction, challenging the trial court's denial of her suppression motion.

Reed sought to suppress the fruits of what she contended was an unconstitutional entry and warrantless search of her apartment. (16; 17). The circuit court heard the motion on March 15, 2016. (20). Tomah Police Officer Steven Keller was the only witness to testify at the hearing.

Officer Keller testified that on December 13, 2015, at 1:20 p.m., he was dispatched to the area of 308 Murdock Street, "in reference to an altercation between a couple of subjects in the street." (20:7). Upon his arrival at that location, Keller activated his body camera. (20:13-14). The recording of the entire episode was downloaded to a DVD and admitted as Exhibit 1 at the hearing. (20:14-15; 19).

Daniel Cannon and Kirk Sullivan were standing in the street when Keller arrived. (20:7; 19: at 0:36)[1]. Cannon and Sullivan told Keller that they had attempted to break up a verbal altercation between two brothers, Brandon and Jerome Harris, but that the brothers had since separated and gone to apartments on opposite sides of the street. (20:8-11, 21; 19: at 0:36-0;48).

While Keller spoke with Cannon, Sullivan began to walk away. (20:10). Keller instructed Sullivan to remain so that he could gather more information regarding the altercation, and Sullivan complied. (20:10, 19-20, 29; 19: at 1:18). Sullivan told Keller that Jerome Harris was likely at Sullivan's residence at 940 Grandview Avenue,

[1] The video recording is imprinted with a running clock. References to particular portions of the recording will begin with the document number "19" followed by the time at which the fact appears in the recording.

Apartment 206, as they had planned to watch a football game at the apartment. (20:10-11; 19: at 5:02-5:07). The officer knew that Faith Reed also occupied the apartment. (20:12). Keller learned from dispatch that Sullivan was on probation, and clarified that Sullivan was not forbidden to have physical contact with Reed. (20:21-22; 19: at 5:30-6:18). Keller also learned from dispatch that Jerome Harris had a "body only" warrant for second-offense operating after revocation. (20:11;19: at 7:58-8:24).

Keller suggested that Sullivan take him to the apartment so that the officer could talk with Harris. Sullivan then began walking toward the apartment. (20:11, 24-25; 19: at 7:50-8:01). Sullivan neither gave Keller permission to enter the apartment, nor told him to stay out, but did lead the officer there. (20:11-12, 25, 29).

Apartment 206 is on the second floor of a multi-unit building. (19: at 8:30-9:20). Keller followed as Sullivan entered the building, climbed the stairs, and opened a door to a hallway leading to the individual units. (20:11-12; 19: at 8:30-8:59). Sullivan walked down the hallway to Apartment 206, knocked on the door, entered the apartment, and yelled for Jerome. (20:12, 17; 19: at 9:00-9:20). Keller was a few steps behind, reaching the door just as it was about to close. (20:26; 19: at 9:20). Keller placed his hand on the door to keep the door open. (20:12, 26). He stated that he did so "for safety concerns," explaining:

> I was looking for a subject with a possible warrant and as well as being involved in an altercation. I was concerned about possibly being weapons involved, so for my safety and the destruction of any type of evidence, I kept the door open to visually see inside the residence as he was entering.

(20:13).

As the door opened wider, Keller was able to see another male, later identified as Jerome Harris, standing at a counter just inside the door, and "appearing to conceal something in front of him." (20:12; 19: at 9:24). Keller stepped inside the apartment, and quickly discovered that Harris was in the process of rolling a marijuana joint, that a plastic baggie containing six grams of marijuana was on the counter, and that marijuana residue was on the counter as well. (20:18). Keller seized these items. (1:5) Additional facts pertaining to the entry and seizure will be discussed in the Argument section of this brief.

Keller arrested Reed for possession of the marijuana. (1:5). Reed was transported to jail, and another officer who searched Reed during the booking process seized a dextroamphetamine sulfate pill which had been concealed in Reed's sock. (1:5-6).

Reed's attorney argued that Sullivan had not consented to the officer's warrantless entry of the apartment, and that no exigency justified that entry. (20:35-38, 40). The court rejected the argument and denied the suppression motion from the bench. (20:40-47; App. 101-08).

The court began its ruling by reviewing the pertinent facts, noting that "the facts here come from the video." (20:40; App. 101). The court found that it was not clear from the video who had attempted to close the door, whether it was Sullivan or someone else, but that the officer "held the door partially open for his own safety because he wanted to be sure that there wasn't somebody in the apartment who was going to—to cause a problem to him." (20:44; App. 105). The court further found, "There is no indication that—from

Mr. Sullivan that he had—had objected to the officer opening the door." (*Id.*).

The court concluded that Sullivan's actions in leading Keller to the apartment and telling the officer that it was his apartment "would indicate that he was freely and voluntarily by his conduct implying his consent to the officer going there with him to find this individual." (20:45; App. 106). The court reiterated, "I conclude that by his conduct Mr. Sullivan freely and voluntarily implied that the officer could follow him to this location and that he was going to locate and identify Mr. Harris who was one of the suspects in connection with this altercation so that the officer could talk with him." (20:46; App. 107). The court ruled that "there was nothing about his entry into the room that revoked—revoked that consent that the officer follow him." (*Id.*). The court believed that the circumstances surrounding the closing of the door were "ambiguous," too ambiguous to be interpreted as a revocation of the consent Sullivan had given. (20:46-47; App. 107-08).

The court concluded that the entry was justified for a second reason: "the officer's concerns for his safety under the circumstances were legitimate." (20:45; App. 106). The court noted that Keller was "in a narrow hallway … all alone." (*Id.*). While conceding that "[t]here was nothing about this incident or about the individuals that indicated that there was an immediate threat to the officer," the court concluded:

> I think that when an officer's in a location like that alone and they're isolated and there are other people who are wanted, there's a warrant for their arrest, it's a legitimate concern that the officer makes sure he knows who's doing what right in front of him.

(20:45-46; App. 106-07).

Summarizing its decision, the court reiterated:

> [U]nder the circumstances that the officer was in an isolated location without anyone else there to back him up dealing with individuals one of whom was on probation, had a warrant for his arrest who had just been in an altercation, I think it was reasonable for him to push the door partially open to make sure he knew who was in front of him and what was going on.

(20:47; App. 108).

After the court denied the suppression motion, Reed pleaded no-contest to the possession of the pill, and to bail jumping, a charge which was based on her commission of that crime after having been released on bond in an unrelated case. (1). Reed now argues that the court erred in denying her suppression motion.

ARGUMENT

The Investigating Officer Conducted an Unreasonable Search in Violation of the Fourth Amendment When He Pushed Open the Door to the Defendant's Apartment, Without a Valid Justification for Doing So.

A. Standard of review and applicable constitutional provisions.

Both the Fourth Amendment to the United States Constitution and Art. 1, § 11 of the Wisconsin Constitution specifically prohibit "unreasonable searches and seizures."

Reed contends that Officer Keller unreasonably searched her apartment by entering it without a warrant,

thereby enabling him to view and seize evidence which led to her arrest. Incident to that arrest, the police discovered and seized additional evidence which resulted in Reed being convicted of the instant crimes. All of this evidence was unconstitutionally obtained and should have been suppressed.

In reviewing the denial of a suppression motion, "this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. [citation omitted]. However, whether a seizure or search occurred, and if so, whether it passes statutory and constitutional muster are questions of law subject to de novo review." ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

B. Officer Keller entered the apartment by preventing the apartment door from closing and pushing it open to enhance his view of the apartment's interior.

Officer Keller spotted Jerome Harris attempting to conceal something from the officer. It was this observation which caused Keller to believe that a crime was being committed, to step further into the apartment, and to discover the marijuana on the kitchen counter.

It might be argued that Harris' suspicious activity was in the officer's "plain view." For the officer's actions to be justified by the "plain view" doctrine, however, requires (among other things) that "the officer be lawfully located in a place from which the object can be plainly seen." ***Horton v. California***, 496 U.S. 128, 137 (1990). Thus, the threshold question in this case is whether the officer was lawfully in the position to observe Harris's suspicious activity in the first place.

Officer Keller initially testified that he was not able to see Harris until he had placed his hand on the door to keep it open. As the officer stated:

> At no point did [Sullivan] tell me that I could not follow him into the residence, and while doing so, I placed my hand on the door to keep the door open and I could see *at that time from the doorway* that there was another male subject inside the apartment complex.

(20:12) (emphasis added). The video recording of the encounter confirms that Harris was not visible until after the officer placed his hand on the door to keep it open and thereby widen his viewing angle. (19: at 9:22-9:24).

Keller later testified on cross-examination that he "saw someone inside the apartment" and *then* "put [his] hand on door for safety concerns of who might be in the apartment." (20:26). He conceded that he "pushed [the door] open further to—to see who that other subject was that was standing there." (20:27). Only after doing so did it appear to him "that someone [Harris] was concealing something." (20:27).

Whether or not Officer Keller could actually see Harris before pushing the door open, it is clear from Keller's testimony and from the video recording that the officer was *not* able to observe any *suspicious activity* until he placed his hand on the door and pushed it open to enhance his view. The question then becomes, did Officer Keller under these circumstances have the right to place his hand on the door and to push it open?

By preventing the door from closing, and then pushing it open to enable him to see into the apartment, Officer Keller *entered* Reed's apartment.[2] The door opened inward, (20:27), and despite the officer's testimony to the contrary, (20:26-27), his arm necessarily would have crossed the threshold as he pushed it open, even if only by a few inches.

In ***State v. Johnson***, 177 Wis. 2d 224, 501 N.W.2d 876 (Ct. App. 1993), an officer accompanied Johnson to an apartment where he said his girlfriend lived so that Johnson could obtain his identification and justify his presence in the apartment building. Johnson went into the apartment, and Johnson followed, "right on the threshold … [a]pproximately four to six inches maybe," "so that he couldn't slam the door shut on me." 177 Wis. 2d at 228. This court ruled "as a matter of law, [the officer's] step clearly constituted 'entry.'" 177 Wis. 2d at 231. The court explained:

> Without question, Officer Klug's step into the threshold, preventing Johnson from closing the door, was an entry. As Klug explained, even though his position in the doorway was from just the "toenails to the balls of [the] feet," it was an incursion that "would not have allowed [Johnson] to close the door." Even extending only from the tips of his toes to the balls of his feet, it fixed the

[2] Pushing the door open to expose the apartment's interior to the officer's view could also be viewed as a "search," as the act defeated Reed's reasonable expectation of privacy with respect to the interior of her residence. *See, generally,* ***Katz v. United States***, 389 U.S. 347 (1967). But whether the act is labeled as a "search" or an "entry," the same principles apply in determining its constitutional validity. Thus, for the sake of simplicity, Reed will focus her argument on the unlawful entry of her apartment.

> "first footing" against which the United States and Wisconsin courts warned.[3]

177 Wis. 2d at 232.

Likewise, in ***State v. Larson***, 2003 WI App 150, 266 Wis. 2d 236, 668 N.W.2d 338, an officer investigating a possible OWI went to Larson's apartment and knocked on the door. Larson answered the door. "As part of the procedure to ensure his own safety, [the officer] placed his foot across the threshold of the doorway, so that [Larson] would not be able to slam the door on him." 266 Wis. 2d 236, ¶ 3. Relying on ***Johnson***, this court ruled, "it is without question that [the officer's] step into the threshold, preventing Larson from closing the door, was an entry for Fourth Amendment purposes." ***Id.***, ¶ 11.

While Officer Keller used his hand rather than his foot to prevent the apartment door from closing, the distinction is immaterial. In an unpublished but authored opinion in ***State v. Vanden Heuvel***, Appeal No. 2013AP001107-CR, unpublished slip op. (Wis. Ct. App. Oct. 8, 2013),[4] an officer was investigating an OWI, and spoke to Vanden Heuvel through a partially opened, sliding patio door. When Vanden Heuvel attempted to end the questioning by sliding the patio door closed, the officer "stuck his arm in the door to prevent it from closing, and the door hit him somewhere between his

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[3] The "first footing" reference is to the United States Supreme Court's admonition in ***Boyd v. United States***, 116 U.S. 616, 635 (1886), quoted by our Supreme Court in ***State v. Douglas***, 123 Wis. 2d 13, 21, 365 N.W.2d 580 (1985), to the effect that "illegitimate and unconstitutional practices get their first footing" in their "mildest and least repulsive form." 177 Wis. 2d at 231-32.

[4] The opinion is cited for its persuasive value pursuant to Rule § 809.23(3)(b), and is reprinted in the Appendix at 109-125.

wrist and his elbow." ***Id.***, ¶¶ 9-11. The encounter eventually ended with Vanden Heuvel's arrest.

This court rejected "the State's assertion that the Fourth Amendment warrant requirement is triggered only if the officer crosses the threshold with his foot, as opposed to some other body part." ***Id.***, ¶ 25. Relying on ***Larson***, the court concluded, "when [Officer] Kelley stuck his arm into Vanden Heuvel's home to prevent the sliding door from closing, Kelley entered Vanden Heuvel's cabin for purposes of the Fourth Amendment." ***Id.***

The following observation by the United States Supreme Court is particularly pertinent here:

> In ***Silverman***, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much … and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor.

Kyllo v. United States, 533 U.S. 27, 37 (2001).

It is therefore abundantly clear that Officer Keller entered Reed's apartment. The officer conceded at the suppression hearing that he had no warrant authorizing this entry. (20:28). Thus, the next question is whether this warrantless entry violated the Fourth Amendment.

"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). Consequently, "It is a 'basic principle of Fourth Amendment law' that searches inside a home without a warrant are presumptively unreasonable." ***Payton v. New York***, 445 U.S. 573, 586 (1980).

"[T]his presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness. Accordingly, the warrant requirement is subject to certain reasonable exceptions." ***Kentucky v. King***, 563 U.S. 452, 459 (2011) (citations and internal quotations omitted).

Only two exceptions to the warrant requirement have been recognized to justify entry into a private dwelling. "[A]bsent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant." ***Steagald v. United States***, 451 U.S. 204, 214 n.7 (1981).

The circuit court concluded that both of these exceptions justified the officer's warrantless entry into Reed's apartment. For the reasons which follow, the circuit court erred in reaching these conclusions.

C. Sullivan did not implicitly consent to the entry of the apartment.

The circuit court concluded that Sullivan had implicitly consented "to the officer going [to the apartment] with him to find [Jerome Harris]," and that by his conduct, Sullivan had "implied that the officer could follow him to this location and that he was going to locate and identify Mr. Harris … so that the officer could talk with him." (20:45-46; App. 106-07). The court then concluded that Sullivan had "never revoked that consent that the officer follow him." (20:46; App. 107).

To the extent the court was finding that Sullivan had implicitly consented to the officer *going with him to the apartment*, that finding is clearly supported by the record. Keller testified that after learning that Jerome Harris might be

at Sullivan's apartment, he asked Sullivan "if he could take us to that apartment to try to make contact with the Harris subject involved in the altercation," and Sullivan agreed to do so. (20:11). After reviewing the video recording, Keller testified that he specifically told Sullivan, "Let's go over here to see if we could talk with him." (20:24). Sullivan then led the way.

If, however, the court was finding that Sullivan implicitly consented not only to the officer following him *to* the apartment, but *into* the apartment he shared with Reed, that finding is against the great weight and clear preponderance of the evidence, and this court is not bound by it. *See*, ***State v. Phillips***, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998) (whether one has in fact consented to a search involves a finding of historical fact).[5]

To the extent that the court *was* making such a finding, it would appear to have overlooked the distinction between Sullivan permitting the officer to accompany him to his apartment, and allowing him to *enter* the apartment. That distinction essentially involves the scope of the "consent" Sullivan gave Keller. As the leading commentator regarding the Fourth Amendment has succinctly stated, "When the police are relying upon consent as the basis for their warrantless search, they have no more authority than they

[5] The more basic historical facts in this case—what Sullivan and Keller said and did leading up to the entry of the apartment—are undisputed. Reed believes that under the circumstances of this case, whether Sullivan implicitly consented to the entry actually requires the application of constitutional standards (primarily, those mentioned in ***Jimeno*** and ***Knapp***) to those undisputed facts, in which case, this court would independently review the consent issue. Regardless of the standard of review, however, the court should rule that Sullivan did not consent to the entry.

have apparently been given by the consent." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 22-23 (5th ed. 2012).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991).

Critical to that inquiry in this case is the fact that, as the above-quoted testimony reveals, Keller never asked Sullivan for permission to *enter* his apartment, and never even hinted to him that this was his objective. The stated objective was to *speak with Harris*. That objective did not necessarily require Keller's entry into the apartment. Sullivan did not expressly invite Keller into the apartment, nor did he ever say anything which could be construed as such an invitation. In the words of ***Jimeno***, no reasonable person would have understood the exchange between Keller and Sullivan as an indication that Sullivan had permitted Keller to enter the apartment.

"Where consent is relied upon prior to a warrantless search, the State must prove by 'clear and positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, express or implied.'" ***State v. Knapp***, 2003 WI 121, ¶ 136, 265 Wis. 2d 278, 666 N.W.2d 881.

Under the circumstances, any consent Sullivan could be said to have given Keller to enter the apartment was anything but "unequivocal and specific." To be sure, "Consent to search does not have to be given verbally. Consent may be given in non-verbal form through gestures or conduct." ***State v. Tomlinson***, 2002 WI 91, ¶ 37, 254 Wis. 2d

502, 648 N.W.2d 367. But given the nature of the conversation between Sullivan and Keller prior to the entry, nothing Sullivan did or said suggested "unequivocally and specifically" that he was permitting Keller to enter his apartment. He merely led the officer to the apartment building, up the stairs, and through the hallway to the apartment. He did not invite the officer into the apartment by words or gesture. The video recording reveals that when Sullivan opened the door at the top of the stairs leading to the common hallway, he held it open for Keller (arguably signifying his consent to the officer's entry into the *hallway*), but when he entered his *own apartment*, he did *not* hold the door open for Keller. (19: at 8:57- 9:23). He simply entered the apartment and called for Jerome as the door began to close behind him. (*Id.*; (20:17).

The court's ruling that Sullivan did not "revoke" the consent he had given Keller is misplaced. The question is not whether he *revoked* that consent, but whether he had ever consented to the entry of the apartment in the first place. Likewise, the court's observation that there "was no indication" that Sullivan "had objected to the officer opening the door," (20:44; App. 105), is irrelevant to this issue. As this court held in ***Johnson***, *supra*, 177 Wis. 2d at 233-34, "A person need not protest, however, to gain the Fourth Amendment's protection. Consent 'cannot be found by a showing of mere acquiescence … .'"

Johnson, as was discussed earlier in this brief, involved facts similar to those in the instant case. There, an officer encountered Johnson in an apartment building, and seeking verification of Johnson's identity and his reason for being in the building, the officer accompanied Johnson to the second floor apartment where he said his girlfriend lived. Johnson unlocked the door to the apartment and entered,

indicating that he would look for his identification. The officer stuck his foot in the threshold so that Johnson couldn't slam the door on him. 177 Wis. 2d at 227-28. The officer testified that Johnson had not asked him to enter the apartment, and that he had not asked Johnson for permission to do so. ***Id.***, at 233. This court concluded that to the extent the circuit court had found that Johnson had consented to the officer's entry, "no evidence at the suppression hearing supports such a finding," and "Nothing in the record provides any basis upon which consent reasonably could have been inferred." ***Id.*** at 233-34.

Here, as in ***Johnson***, Sullivan led the officer to the apartment and then entered it himself, but there is nothing in the record to suggest that by doing so, he implicitly consented to the officer's subsequent entry.

By allowing an officer to enter a multi-unit apartment building, one does not implicitly permit that officer to enter an individual unit within that building, anymore than one who permits an officer to enter a residence to conduct an interview implicitly permits that officer to enter any room in that residence. *See*, ***State v. Altenburg***, 150 Wis. 2d 663, 670-71, 442 N.W.2d 526 (Ct. App. 1989) (police officers pursuing an investigation into possible criminal activity should be held to the presumption that their invitation to enter a private home is limited to the room they are brought into).

For these reasons, the state therefore failed to carry its burden of establishing that Sullivan had consented to the entry.

D. Exigent circumstances did not justify the entry.

The circuit court concluded that exigent circumstances justified the officer's entry into the apartment, due to the

officer's isolated position in the narrow hallway and his need to know "who was in front of him and what was going on." (20:45-47; App. 106-08).

"Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." ***King***, *supra*, 563 U.S. at 470. The state bears the burden of proving exigent circumstances. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). "A review of exigent circumstances [should] be directed by a flexible test of reasonableness under the totality of the circumstances." 131 Wis. 2d at 229. As the court elaborated:

> Drawing on our prior decisions, we conclude that the basic test should be an objective one: Whether a police officer under the circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape.

131 Wis. 2d at 230.

Following the federal rule of exigent circumstances, the court in ***Smith*** identified four factors which would constitute the exigent circumstances required for a warrantless entry of a residence:

> (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, and
>
> (4) a likelihood that the suspect would flee.

131 Wis. 2d at 229.

In this case, the circuit court focused on the second factor, suggesting that the officer entered the residence out of a legitimate concern for his own safety. The facts of the case do not support this reasoning.

By the time Officer Keller had arrived at the scene, the two principals in the "altercation" he was dispatched to investigate, Brendan and Jerome Harris, had gone their separate ways. (20:8). The two witnesses to this event repeatedly told the officer that the argument had been "verbal," not physical, and that it was over some shoes. (20:21; 19: at 1:47-1:50, 3:41-3:51, 7:20-7:30). While the officer testified that he was "concerned about possibly being weapons involved," (20:13), there is absolutely nothing in the record to suggest that either of the Harris brothers had been armed. As the circuit court even acknowledged, "There was nothing about this incident or about the individuals that indicated that there was an immediate threat to the officer." (20:45; App. 106). Nor did the officer have any basis for believing that anyone had been injured or that anyone within the apartment was in any type of physical danger.

Dispatch told Keller that Jerome Harris did have an outstanding warrant out of Milwaukee, but that warrant was not for a violent offense, but for second offense operating after revocation. (19: at 7:58-8:24). Harris did not reside at the apartment in question, so Keller could not enter that apartment to execute the warrant without exigent circumstances justifying the entry. ***Steagald v. United States,*** 451 U.S. 204 (1981). In other words, the existence of the warrant itself would not have constituted an exigent circumstance justifying Keller's entry into Reed's apartment.

Keller also testified that his entry was necessary to prevent "the destruction of any type of evidence." (20:13). It

is unclear what "evidence" he was referring to. Certainly there would have been no physical evidence of the purely verbal altercation which he was investigating. At the time he pushed the door open, the officer had no reasonable basis for suspecting that any other crime had been or was being committed. It was only *after* the door was opened further that the officer was able to see that Harris was attempting to conceal something. Of course, it is well-settled that "a search is not to be made legal by what it turns up." ***United States v. Di Re***, 332 U.S. 581, 595 (1948).

The circuit court placed primary emphasis on the fact that the officer was alone, standing in a narrow hallway, and therefore needed to know "who was in front of him and what was going on." However, the recording reveals that Keller had called for a backup officer while still in route to the apartment. (19: at 8:28-8:31). He informed the backup officer by radio that he would be "in Apartment 206" even before Sullivan opened the door to the apartment. (19: at 9:14). The backup officer entered Reed's apartment approximately 35 seconds after Keller's entry. (19: at 9:55). It is unclear why, if the officer was legitimately concerned for his safety, he did not wait for the backup officer to arrive before taking any further action. Moreover, by bursting through the door of an occupied residence, unannounced and uninvited, the officer seemingly did more to endanger himself than if he had merely stayed behind the apartment's closed door.

It is worth emphasizing that the "basic test" announced in ***Smith*** requires that the "delay in procuring a warrant would gravely endanger life." The facts of this case simply fail to demonstrate that the officer's life was "gravely endangered" as he stood in the hallway outside Reed's

apartment. There was, indeed, no reason to believe that it was endangered at all.

The notion advanced by both the officer and the court, that it was desirable for Officer Keller to know who was in the apartment and "what was going on," likewise deserves this court's rejection. The need to know "what's going on" does not come close to meeting the test for exigent circumstances. That same interest could be asserted whenever an officer approaches a residence to speak with a witness or a suspect. If it were deemed an "exigent circumstance" justifying a warrantless entry of a residence, the Fourth Amendment's protection of the sanctity of one's home would be eviscerated. This exception to the warrant requirement would essentially swallow the rule which presumptively requires an officer to obtain a warrant to gain entry to a residence.

This court has implicitly rejected a similar justification in a slightly different context, involving an officer's impermissible entry of a room within a residence. In ***State v. Altenburg***, 150 Wis. 2d 663, 442 N.W.2d 526 (Ct. App. 1989), Altenburg invited officers into his kitchen, but before leaving, one of the officers later instructed Altenburg to go into the living room to turn down the volume on a television set. The officer then followed Altenburg into the living room's entryway, from which he was able to observe marijuana pipes. 150 Wis. 2d at 665-66. The officer later testified that he followed Altenburg to the entryway because he wanted to see whether there was anyone else in the apartment and was "watching what's going on." 150 Wis. 2d at 667.

This court ruled that the trial court erred by holding that the officer had the right to look into the living room for his own safety and protection, because the officer never even mentioned this as his reason for following Altenburg to the living room. 150 Wis. 2d at 672. But had this court concluded that the need to see "who was there" and "what's going on" independently justified the officer's actions (that is, aside from any concern about officer safety), it presumably would not have found that the search was unlawful.

For all of these reasons, neither implied consent nor exigent circumstances justified Officer Keller's entry into the apartment. That entry violated the Fourth Amendment.

E. The fruits of the unlawful entry must be suppressed.

The next question is, what evidence must be suppressed as a result of the unlawful entry of Reed's apartment? The answer to that question depends on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963).

Three factors which have been considered relevant to this determination are: "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975); ***State v. Phillips***, 218 Wis. 2d 180, 205, 577 N.W.2d 794 (1998).

Applying these factors to the instant case, it is readily apparent that the marijuana found on the kitchen counter and any statements made by Reed pertaining to that discovery must be suppressed, as Officer Keller discovered the marijuana within seconds of entering the apartment, there were no intervening circumstances, and the very purpose of the entry was to see what was going on inside the residence.

The discovery of the marijuana led to the almost immediate arrest of Faith Reed. The record does not reveal exactly when she was booked into the jail, but it is only reasonable to assume that she was promptly transported there, and that the trip from her residence in Tomah, to the Tomah police station, and then to the Monroe County Jail in Sparta, all occurred within a very short time-span. The record reveals no intervening circumstances of any sort. When officers booked her into the jail on the marijuana charge, they found the contraband pill in her sock. There was no "break in the causal chain" between the illegal entry and the discovery of this evidence. And as Reed has already discussed, the officer's conduct in this case was both purposeful (in that he intended to enter the apartment without a warrant or other valid justification) and flagrant (in that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"). For these reasons the dextroamphetamine sulfate pill must also be suppressed.

F. Reed's convictions must be reversed, and she must be permitted to withdraw her pleas.

"In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." ***State v. Semrau***, 2000 WI App 54, ¶22,

233 Wis. 2d 508, 608 N.W.2d 376. The erroneous admission of disputed evidence contributed to the conviction if there is a reasonable probability that but for the error, "the defendant would have refused to plead and would have insisted on going to trial." ***State v. Sturgeon***, 231 Wis. 2d 487, 504, 605 N.W.2d 589 (Ct. App. 1999). "Only if the error contributed to the conviction must a reversal…result." ***Semrau***, 233 Wis. 2d 508, ¶21.

Had the contraband pill been suppressed, the state would apparently have had no evidence to support its charge that Reed had unlawfully possessed this pill. Because the misdemeanor bail jumping charge was based on her commission of that crime after having been released on bond, suppression of the pill would have also deprived the state of its only evidence that Reed was guilty of bail jumping. Without any evidence of these two charges, it is extremely unlikely that Reed would have pleaded no-contest to them. Consequently, the error in denying the suppression motion cannot be considered harmless.

CONCLUSION

For the reasons stated in this brief, Faith N. Reed respectfully urges the court to reverse her convictions and to remand the case to the circuit court with instructions to permit her to withdraw her no-contest pleas.

Dated this 26th day of October, 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 6,183 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 26th day of October, 2016.

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CERTIFICATION AS TO APPENDIX

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 § 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 s. 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 decisions showing the circuit court's reasoning regarding those issues.

I further 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, 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.

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