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STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

No Exception to the Warrant Requirement Permitted the Officer's Warrantless Entry into Reed's Apartment. Therefore, the Officer's Entry Was Constitutionally Unreasonable and All Fruits of the Entry Must Be Suppressed.

A. Sullivan did not impliedly consent to the entry into the apartment.

i. If the circuit court found consent in fact for the entry, that finding is contrary to the great weight and clear preponderance of the evidence.

As argued in Reed's brief-in-chief, the great weight and clear preponderance of the evidence establishes that Sullivan did not impliedly consent to the officer's entry into the apartment. (Reed's Brief, 13-16). The state argues otherwise. (State's Brief, 9-10). The state's position is unpersuasive for several reasons. First, it ignores the well-established legal principle that consent must be unequivocal and specific. ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971). Second, it rests on the faulty premise that the officer requested entry into the apartment. (State's Brief, 9-10). Third, it ignores the central fact that Sullivan walked into the apartment and closed the door behind him. With these considerations in mind, the state's reliance on ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), is misplaced, and its attempt to distinguish ***State v. Johnson***, 177 Wis. 2d 224, 501 N.W.2d 876 (Ct. App. 1993), is unconvincing.

As noted in Reed's brief-in-chief, the legal framework by which this court analyzes the issue at bar requires that Sullivan unequivocally and specifically consented to the officer's entry into the apartment. (Reed's Brief, 14-15). The state does not dispute that it must meet this legal standard. It simply neglects to apply it.

Two facts in this case are critical to the issue whether Sullivan unequivocally and specifically consented to the officer's entry into the apartment. The first is that, contrary to the state's assertion, (State's Brief, 9), the officer never requested entry into the apartment. The record is clear on this point: when the officer learned that Harris might be at Sullivan's apartment, he indicated that they should proceed to the apartment in an effort to locate Harris. Specifically, the officer said "let's go look over, see if he's over here. If anything we could just talk to him." (19: at 7:49-7:55). This does not amount to an unambiguous request to enter the apartment such that Sullivan's action in leading the officer to the apartment constituted unequivocal and specific consent to the entry.

Johnson, discussed in Reed's brief-in-chief, (Reed's Brief, 15-16), is instructive on this point. There, the court determined that no evidence at the suppression hearing supported a finding that Johnson consented to the officer's entry into the subject apartment. ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). Notably, the court reached that conclusion even though Johnson had agreed to the officer's suggestion that they proceed to the apartment to find out if Johnson's girlfriend actually lived in the building. *Id.* at 237 (Wedemeyer, P.J., dissenting).[1]

[1] The dissent in ***State v. Johnson***, 177 Wis. 2d 224, 237, 501 N.W.2d 876 (Ct. App. 1993), provides a more detailed discussion of the facts surrounding the entry into the apartment.

Johnson therefore stands for the proposition that there must be an unambiguous request to enter to support a finding of consent in fact under these circumstances.

The officer's interaction with Sullivan in this case is no different than in ***Johnson***. Upon learning of Harris' potential whereabouts, the officer told Sullivan that they should proceed to the apartment to find out if Harris was there. Sullivan then led the way. Per ***Johnson***, the officer's statement was not a request to enter the apartment, and Sullivan's reaction is not evidence that he consented to the officer's warrantless entry into the apartment.

The second critical fact bearing on the issue of unequivocal and specific consent is one that the state ignores altogether: when Sullivan entered the apartment, he closed the door behind him. (19: at 9:17-9:21).[2] By contrast, when Sullivan entered the hallway to the apartment, he held the door open for the officer. (19: at 8:57). In the state's own words, "actions can speak just as loudly as words." (State's Brief, 9). And a reasonable person would have understood Sullivan's actions in this regard to communicate just one thing: the officer was *not* welcome inside the apartment.

Had the state applied the proper legal standard to the facts of this case, it would have recognized that its reliance on ***Phillips*** is misplaced. The issue in ***Phillips*** was whether the defendant consented to the search of his bedroom. ***State v. Phillips***, 218 Wis. 2d 180, 184, 577 N.W.2d 794 (1998). In

[2] The circuit court ruled that it was "not clear to me who closed the door, whether it was someone on the inside or . . . Mr. Sullivan." (20:46). A review of the video reveals that this finding is contrary to the great weight and clear preponderance of the evidence. It is clear that Mr. Sullivan closed the door with his arm. (19: at 9:17-9:21). Indeed, once the officer opens the door, it is evident that the others in the apartment were not in a position to have closed the door. (19: at 9:21-9:25).

upholding the circuit court's finding of consent in fact, the ***Phillips*** court noted that there was an unambiguous request to search the defendant's bedroom. ***Id***. at 197. In response to that unambiguous request, the defendant's actions communicated that he was unequivocally and specifically consenting to the search. Specifically, he "opened the door to and walked into his bedroom, retrieved a small baggie or marijuana, handed the baggie to the agents, and pointed out a number of drug paraphernalia items." ***Id***.

Here, the situation was different. As noted above, there was no unambiguous request to enter the apartment. Moreover, Sullivan's actions communicated that he was not consenting to the officer's entry into the apartment. Thus, ***Phillips*** is readily distinguishable from the facts of this case.

The state's attempt to distinguish ***Johnson*** is equally unavailing. The state argues that "there was no request to enter and no verbal or nonverbal response in ***Johnson***." (State's Brief, 9). Yet, the facts of this case are strikingly similar to those of ***Johnson***: in order to verify the information that Sullivan provided, the officer stated that they should proceed to the apartment, and Sullivan led the way. *See* ***Johnson***, 177 Wis. 2d at 237. Once at the apartment, Sullivan took action to communicate to the officer that he was not welcome inside the apartment. *See* ***Johnson***, 177 Wis. 2d at 227-28. Thus, per ***Johnson***, Sullivan did not consent to the officer's entry into the apartment.

ii. If there was consent in fact for the entry, it was not voluntary.

Even if this court were to find that the great weight and clear preponderance of the evidence establishes consent in fact for the entry, the question remains whether that consent was voluntary. It is the state's burden to show by clear and

convincing evidence that Sullivan's consent was voluntary. ***Phillips***, 218 Wis. 2d at 197. That means the state must provide evidence indicating that it is "highly probable or reasonably certain" that consent was given voluntarily under the circumstances. *See* ***State v. Harris***, 2010 WI 79, ¶35, 326 Wis. 2d 685, 786 N.W.2d 409 (defining "clear and convincing evidence" in the context of a criminal case).

Courts are required to determine voluntariness based on the totality of the circumstances. ***State v. Artic***, 2010 WI 83, ¶33, 327 Wis. 2d 392, 786 N.W.2d 430. In arguing that Sullivan voluntarily consented to the entry, the state recognizes this legal standard. (State's Brief, 10). Yet, its position fails to account for the totality of the circumstances in this case.

For starters, the state does not acknowledge the import of the officer's failure to request permission to enter the apartment. "That which is not asked for cannot be knowingly or voluntarily given." ***State v. Kiekhefer***, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997). That is because consent must be the product of a free and unconstrained *choice* to waive a constitutional right. *See* ***Artic***, 327 Wis. 2d 392, ¶32. Sullivan was never given the opportunity to make that choice.

Moreover, the state does not address how a variety of Sullivan's actions during his encounter with the officer affect the case for voluntary consent. Significantly, a "defendant's cooperation and assistance evince both the non-threatening nature of the encounter and the voluntariness of his consent." ***Phillips***, 218 Wis. 2d at 201. In this regard, it is noteworthy that Sullivan initially tried to walk away from the officer and

was instructed not to leave. (19: at 1:17-1:19; 20:10, 19-20).[3] He later led the officer to the apartment, but only after the officer requested that he do so. (19: at 7:49-7:55). And when he got to the apartment, Sullivan walked in and closed the door behind him, to which the officer stated "hey, don't just walk in there." (19: at 9:17-9:22). These facts all undermine the state's contention that Sullivan was voluntarily assisting the officer with his investigation. (State's Brief, 10).

The bottom line is that the state must show that it is highly probable or reasonably certain that Sullivan voluntarily consented to the officer's entry into the apartment. The totality of the circumstances of this case prevents it from doing so. Thus, for all of the above reasons, implied consent did not permit the officer's warrantless entry into the apartment.

B. Exigent circumstances did not justify the entry.

As argued in Reed's brief-in-chief, exigent circumstances did not permit the officer's warrantless entry into the apartment. (Reed's Brief, 16-21). The state does not argue otherwise. The issue is therefore conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (1979) (unrefuted arguments are deemed admitted).

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[3] The circuit court concluded that "it was pretty obvious the officer was not ordering him to come back. . . . I don't think that placed him under any particular compulsion since he was not a suspect. . . ." (20:41-42). Reed submits that this finding of fact is contrary to the great weight and clear preponderance of the evidence. The evidence shows that the officer told Sullivan not to leave. Specifically, he stated "hey, why don't you come back here. Don't just leave." (19: at 1:17-1:19). Moreover, the officer testified at the suppression hearing that Sullivan was not free to leave. (20:20).

As neither implied consent nor exigent circumstances permitted the officer's warrantless entry into the apartment, the entry was constitutionally unreasonable.

C. The fruits of the unlawful entry—including the pill—must be suppressed.

Having established the illegality of the officer's entry, the remaining question is: what evidence must be suppressed? As set forth in Reed's brief-in-chief, the following evidence must be suppressed: (1) the marijuana found on the kitchen table; (2) Reed's statements pertaining to the marijuana; and (3) the pill found in Reed's sock. (Reed's Brief, 21-22). The state concedes that if the officer's entry was illegal, the marijuana and Reed's statements concerning the marijuana must be suppressed. (State's Brief, 11). However, with respect to the pill, the state contends that Reed forfeited any argument as to its suppression. (State's Brief, 11-12).

The state is wrong. The issue was preserved at the circuit court. Reed's motion to suppress seeks suppression of "all evidence and *derivative* evidence police collected as a result of their unconstitutional entry and subject warrantless search of the defendant's apartment on December 13, 2015." (16:1) (Emphasis added.) Both of Reed's briefs in support of her motion seek suppression of "all evidence and *derivative* evidence police collected as a result of their unconstitutional entry. . . ." (17:1; 18:1) (Emphasis added.) And at the motion hearing, the state sought clarification of the issue, to which defense counsel explained that the pill would be fruit of the poisonous tree. (20:3-4).

Therefore, the state was clearly put on notice that Reed sought suppression of the pill. The state complains that there is "no record of the circumstances surrounding the discovery of the pill and thus no legal theories can be applied to

determine whether suppression of it is appropriate." (State's Brief, 12). The state faults Reed for this alleged deficiency. (State's Brief, 12). Yet, is the *state's burden* to "show a sufficient break in the casual chain between the illegality and the seizure of evidence." ***Phillips***, 218 Wis. 2d at 204-05 (citing ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963)). So it is the state—not Reed—that forfeited any argument as to suppression of the pill.

As the state has failed to show a sufficient break in the causal chain between the officer's illegal entry and the seizure of the pill in Reed's sock, the evidence must also be suppressed.

CONCLUSION

For the reasons stated in this brief, as well as those set forth in the brief-in-chief, Reed respectfully requests that the court reverse her convictions and remand the case to the circuit court with instructions to permit her to withdraw her no-contest pleas.

Dated this 28th day of February, 2017.

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 2,175 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 28th day of February, 2017.

Signed:

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