STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 17AP587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANTHONY S TAYLOR,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH #15, THE HONORABLE JUDGE STEPHEN EHLKE, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument in this case. Publication is not warranted because this case is to be decided by a single judge. Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE ISSUES

I. Was the use of a drug dog to sniff the front door of an apartment an unreasonable search? The trial court did not answer this question.

II. If the dog sniff was an unreasonable search, was the later consent to search the apartment voluntary? The trial court ruled that the consent was voluntary.

III. If the dog sniff was an unreasonable search, and if the later consent to search the apartment was voluntary, was the consent sufficiently attenuated from the sniff? The trial court implicitly, but not explicitly, found that the consent was sufficiently attenuated.

STATEMENT OF THE CASE

Moore was charged with Possession of THC (Tetrahydrocannabinols) – (2nd and Subsequent), contrary to Wis. Stat. § 961.41(3g). On May 20, 2016, Taylor filed a Motion to Suppress Fruits of Search of Premises and Brief in Support along with an Affidavit in Support of Motion to Suppress signed by Shataqua Moore, alleging that evidence seized should be suppressed as the fruits of an illegal dog sniff search. A hearing on the motion was held on June 9, 2016, before the Honorable Stephen Ehlke, at which time Officer Jonathan Weaver testified for the State and Shataqua Moore testified for Taylor.

Judge Ehlke denied Taylor's Motion to Suppress at an Oral Ruling on July 12, 2016. (Oral R. Tr. 8:19-21). Judge Ehlke held that under the totality of the circumstances, Moore's consent was voluntarily given and the officers had an exception to the general search warrant requirement. (Oral R. Tr. 8:14-17). After relaying his factual findings, Judge Ehlke found that Moore gave consent "based on her testimony because she didn't want to have it take the three hours it was estimated it would take to obtain the warrant, have to have the duty judge review it, presumably sign it, and then come back." (Oral R. Tr. 7:17-21). In further

finding the consent to have been voluntary, Judge Ehlke emphasized that Moore was never in handcuffs, placed under arrest, threatened “in any way shape or form,” and had family members present with her. (Oral R. Tr. 8:3-6). Judge Ehlke also found that there was “nothing about the conduct of the police officers which would in my view constitute undue pressure or coercion. (Oral R. Tr. 8:6-8). While Judge Ehlke did not explicitly address whether the dog sniff in the case was constitutional or not, and if not, whether Moore’s consent was sufficiently attenuated from the sniff, he implicitly ruled that even if the sniff were an unconstitutional search, he did not “think that would negate [Moore’s] consent to search the apartment.” (Oral R. Tr. 8:10-13).

STATEMENT OF FACTS

On December 21, 2015, at approximately 7:45 p.m., Town of Madison Police Officer Jonathan Weaver arrived at 2709 Pheasant Ridge Trail, Town of Madison, Dane County, Wisconsin, in response to a disturbance. (Mtn. Hrg. Tr. 13:5-12). The disturbance concerned Shataqua Moore, the apartment's primary resident and the Defendant, Anthony S. Taylor's current girlfriend, and Jasmine Crawford, Taylor's ex-girlfriend. (Mtn. Hrg. Tr. 13:23-14:1; 33:2-34:9). Moore was the one who called police. (Mtn. Hrg. Tr. 40:19-21). Officer Weaver spoke with Crawford who informed him that she had observed Taylor carry a bag of marijuana into Moore's apartment that day, that she knew Taylor to transport marijuana from Chicago to Madison, and that she had herself accompanied Taylor on at least one such trip. (Mtn. Hrg. Tr. 14:8-22). Crawford also informed Officer Weaver that Taylor was in possession of a firearm after having been robbed; Officer Weaver knew Taylor had in fact recently been the victim of an armed robbery and that Taylor was precluded from possessing a firearm due to being a convicted felon. (Mtn. Hrg. Tr. 14:3-7, 15:17-18). Law enforcement officers present at the apartment smelled the

odor of marijuana coming from Moore's apartment. (Mtn. Hrg. Tr. 16:1-4, 41:12-15).

Based on all of the information before them, the police decided they wanted to search Moore's apartment. (Mtn. Hrg. Tr. 15:19-23). They confronted Moore with the fact that they had smelled marijuana coming from her apartment and asked her if she would consent to a search; Moore refused. (Mtn. Hrg. Tr. 16:1-6; 41:12-15; 42:7-10). Officers advised Moore that they were prepared to obtain a search warrant and they explained that process to her. (Mtn. Hrg. Tr. 16:7-10). The officer tasked with writing and applying for the search warrant, Detective Mansavage, informed Moore of what he would be doing and then left to begin that process. (Mtn. Hrg. Tr. 16:16-19). After Detective Mansavage left to work on the warrant, a City of Madison K-9 arrived at the apartment, sniffed the first floor hallway, and alerted on Moore's apartment door. (Mtn. Hrg. Tr. 16:11-19).

After the decision was made for officers to seek a search warrant, Moore asked to enter her apartment to attend to her young son and retrieve personal belongings. (Mtn. Hrg. Tr. 19:2-4). Officer Weaver told Moore she could do so, but only if accompanied by an officer. (Mtn. Hrg.

Tr. 19:8-11; 20:7-9; 36:17-19). Moore was then allowed in to her apartment escorted by Officer Weaver. (Mtn. Hrg. Tr. 43:24 – 44:6). Moore's brother was also allowed to enter the apartment escorted by Officer Weaver. (Mtn. Hrg. Tr. 19:18 – 20:6; 44:8-10). While inside the apartment, Officer Weaver observed the odor of marijuana, which was strongest near Moore's bedroom door and in the living room. (Mtn. Hrg. Tr. 20:18-20). Moore was informed she was free to leave. (Mtn. Hrg. Tr. 21:7-8; 24:14). She was never placed in handcuffs and she was never taken to a secluded location. (Mtn. Hrg. Tr. 18:13-18; 44:11-15). Officers never tried to talk her out of refusing consent. (Mtn. Hrg. Tr. 47:3-5).

At some point, Moore's mother arrived on scene. (Mtn. Hrg. Tr. 37:2-5). Moore's mother expressed frustration with Moore, questioning why Moore would cover for Taylor when he was selling drugs in the presence of Moore's child. (Mtn. Hrg. Tr. 22:12-16). Moore's mother told her that she thought Moore should consent to the search. (Mtn. Hrg. Tr. 46:22 – 47:2). Moore expressed concerns to the officers about what all a search warrant would entail. (Mtn. Hrg. Tr. 20:23 – 21:6; 23:14-16; 44:24 – 45:6). Officer Weaver explained that the process of applying for and executing

the search warrant could take as many as three hours. (Mtn. Hrg. Tr. 45:3-6). After speaking with her mother, Moore asked Officer Weaver if consenting to the search would speed up the process. (Mtn. Hrg. Tr. 23:13-16; 45:15-17). He informed her it would. (Mtn. Hrg. Tr. 23:16; 45:18-19). Moore then consented to the search of her apartment and signed a consent form documenting such. (Mtn. Hrg. Tr. 23:19-23; 45:25 – 46:6).

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing the circuit court's denial of a motion to suppress evidence, this Court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo. *See State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474.

II. THE POLICE'S USE OF A DOG TO SNIFF MOORE'S APARTMENT DOOR WAS NOT AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT.

A. No Trespass Occurred Under *Florida v. Jardines.*

A warrantless dog sniff is not per se unreasonable. *Illinois v. Caballes*, 543 U.S. 405 (2005), Caballes, *United States v. Place*, 462 U.S. 696 (1983). In *Caballes,* the United States Supreme upheld a dog sniff of a stopped car, finding it to be a minimally intrusive warrantless search. 543 U.S. at 410. The Court based its finding on the fact that the car had already been legally seized during a traffic stop. *Id.* at 409. The sniff was not unreasonable because the police were not somewhere they were not allowed

to be, were not seizing a vehicle they could not legally seize, and they were not intruding into something they were not allowed to intrude upon.

This is consistent with the Court's property-based, trespass-inspired rationale in *Florida v. Jardines*, 569 U.S. __, 133 S. Ct. 1409 (2013). In that case, the Court found that a warrantless dog sniff conducted on a standalone house's front door was an unreasonable search. 133 S. Ct. at 1417-18. The Court followed its rationale from *United States v. Jones*, which explained that physical police intrusion on persons, houses, papers, or effects for the purpose of obtaining information, constituted a Fourth Amendment search. 565 U.S. __, 132 S.Ct. 945, 950-51, n. 3 (2012). The Court found the area occupied by the dog during the sniff to be curtilage and the dog's presence in the curtilage, for the purpose of sniffing, to be an intrusion. *Jardines*, 133 S. Ct. 1414-17. While a doorbell or doorknocker is an implicit license to the public to approach the front door of the home to deliver mail or sell something, that license is not limitless. *Id.* at 1415-16. "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to

linger longer) leave." *Id.* at 1415. Likewise, this license does not extend to visitors with more intrusive intents, such as those "exploring the front path with a metal detector." *Id.* at 1416. The Court concluded that bringing a police dog into the home's curtilage to sniff for incriminating evidence concealed within the home was a trespass and therefore an unreasonable search. *Id.* at 1417-18.

A finding of an unreasonable search in the present case is not appropriate under *Jardines*, because *Jardines* and the present case are not factually similar. The primary difference between them is that in *Jardines*, the police were not explicitly invited to the home and police did not inform the homeowner of the purpose of their investigation, whereas in the present case, the police were invited to the scene by Moore, and by the time the dog sniffed, Moore knew police smelled marijuana and wanted to search her apartment. Moore called police following the altercation with Crawford. She invited them to her apartment hallway. She requested their services. She herself expanded the license to include police questioning and investigating. Furthermore, Moore was informed that police smelled marijuana and wished to search her apartment. She did not

respond in any way to the sniff. She was able to observe the police expanding upon the license with a dog, and voiced no objection to the sniff. While *Jardines* aptly observed that license to approach a home does not extend to visitors exploring a front path with a metal detector, the same cannot be said about a visitor, invited to a front path by a homeowner, who informs that homeowner of his wish to search for metal on that path, who then proceeds to scan for metal faced with no objection by the homeowner.

B. The Dog Did Not Discover Anything Previously Unknown to Police.

In *United States v. Whitaker*, the Seventh Circuit Court of Appeals held that a warrantless dog sniff of an apartment hallway was an unreasonable search under the Fourth Amendment. 820 F.3d 849 (7th Cir. 2016). Rather than basing the holding on trespass and implicit license grounds, the Seventh Circuit instead relied on privacy rights grounds, adopting Supreme Court Justice Kagan's non-controlling concurrence from *Jardines*. *Id* That concurrence was based on the Court's holding in *Kyllo v. United States* (Noteworthy is the fact that the late Justice Antonin Scalia authored both majority opinions in *Kyllo* and

Jardines, and in writing *Jardines*, deliberately refused to extend his *Kyllo* privacy rights holding to *Jardines*. 569 U.S. __, 133 S. Ct. at 1417.) 569 U.S. __, 133 S. Ct. at 1419-20 (Kagan, J., concurring). In *Kyllo*, the United States Supreme Court held that government use of a thermal imaging device on a house, without a search warrant, is a violation of privacy rights and constitutes an unreasonable Fourth Amendment search. 533 U.S. 27, 40 (2001).

First, it bears noting, that *Whitaker* is not binding precedent on Wisconsin state courts. However, even if *Whitaker* is considered particularly persuasive authority, it still does not demand that the evidence in the present case be excluded on the basis of an unreasonable search. All three cases – *Whitaker*, *Jardines* (Kagan, J., concurring), and *Kyllo* – were based on the fact that police were not able to sense the heat or smell the drugs within the house. *Whitaker* and Justice Kagan's concurrence in *Jardines* both specifically quoted *Kyllo*'s holding that where "the Government uses a device that is not in general public use, to explore *details of the home that would previously have been unknowable without physical intrusion*, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Whitaker,* 820 F.3d at 853;

and *Jardines*, 569 U.S. __, 133 S. Ct. at 1419 (Kagan, J., concurring); *quoting Kyllo*, 533 U.S. at 40 (emphasis added).

In this case, the odor of marijuana emanating from Moore's apartment was already known to police. At least one officer, Detective Mansavage, and possibly two, Officer Knoeck as well, were able to smell the odor of marijuana coming from Moore's apartment. This occurred not only before Detective Mansavage left to begin drafting a search warrant, but also before a dog was even summoned to the scene. (This admittedly begs the question, if police could already smell marijuana, why summon a dog? The record does not answer this question.) Moore was even herself aware that police had smelled marijuana coming from her apartment before the dog arrived; she heard an officer say as much, and she was presented with that information by Officer Weaver when he asked if she would consent to a search of her apartment. Because the police already smelled marijuana coming from Moore's apartment, the dog's sniff did not explore previously unknown details.

III. EVEN IF THE DOG SNIFF WAS AN UNREASONABLE SEARCH, THE EVIDENCE OBTAINED IS ADMISSIBLE UNDER THE INDEPENDENT SOURCE DOCTRINE.

Under the independent source doctrine, when "'challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.'" *Murray v. United States,* 487 U.S. 533, 537 (1988) (quoting *Nix v. Williams,* 467 U.S. 431, 443, (1984)). Applied to circumstances where a search warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant. *See id.* at 542; *State v. O'Brien,* 70 Wis.2d 414, 424, 234 N.W.2d 362 (1975). Courts are to follow a two-pronged test in determining whether lawfully obtained evidence provides an independent source for issuance of a search warrant. First, the court determines whether the officer would have sought the search warrant without the unreasonable search; and second, it determines if information illegally acquired influenced the magistrate's decision to authorize the

warrant. *State v. Lange,* 158 Wis.2d 609, 626, 463 N.W.2d 390 (Ct.App.1990).

To the first prong, the record is clear that the officers in fact began the search warrant process before the dog even arrived at Moore's apartment. Once the officers learned about Taylor's marijuana dealing and recent possession, as well as his possession of a firearm as a convicted felon, and observed the odor of marijuana coming from Moore's apartment, they wanted to search that apartment. They asked for consent, but were denied, so they decided to go about getting a warrant. Only after that did the dog enter the picture.

To the second prong, it is admittedly speculative to consider what information would have influenced a judge's decision whether or not to authorize a warrant in this case. That is precisely what the Appellant is attempting to do, however. He speculates that a search warrant would have been issued solely based on the dog's alert, that that warrant would have been invalidated under *Whitaker* and *Jardines*, and that all evidence seized from the warrant would have been excluded. Putting aside the dog's alert, there was still sufficient probable cause to support a search warrant. Crawford had provided information that

Taylor trafficked marijuana from Chicago to Madison, and that she had accompanied Taylor on at least one such trip. Crawford had provided information that she had observed Taylor with a large bag of marijuana that very day. Crawford had provided information that Taylor was possibly in possession of a firearm on account of having been recently robbed. Crawford's information was corroborated by Officer Weaver's independent knowledge of Taylor having been recently robbed, and officers' observation of the odor of marijuana emanating from Moore's apartment.

Officer Weaver's observation of the odor of marijuana while within Moore's apartment is another independent source. Once officers decided to apply for a search warrant, they secured the residence, seizing it, prohibiting anyone from entering it without a police escort. Securing a residence in this way is lawful under *Illinois v. McArther*, as long as police have probable cause to so seize the residence. 531 U.S. 326 (2001). Based on the above-described information, the State submits that the police in this case had such probable cause. Moore decided she wanted to enter her apartment to check on her son and collect some personal belongings, so she chose to accept Officer Weaver's escort and allowed him to enter her

apartment with her. Officer Weaver then, with Moore's consent to be in her apartment, smelled marijuana coming from her bedroom and the living area. Based on the police's lawful seizure of the apartment and Moore's consent to Officer Weaver accompanying her, his observation of the odor of marijuana provides an additional, lawful source of the odor of marijuana within the apartment, independent of the dog sniff.

IV. EVEN IF THIS COURT FINDS THE DOG SNIFF TO BE AN UNCONSTITUTIONAL SEARCH, MOORE'S CONSENT SHOULD NEVERTHELESS BE UPHELD AS VOLUNTARY AND SUFFICIENTLY ATTENUATED FROM THE DOG SNIFF.

A. **Moore's Consent Was Voluntary.**

The Fourth Amendment to the United State Constitution protects against unreasonable searches. U.S. Const. amend. IV; Wis. Const. art. I, § 11. Warrantless searches are per se unreasonable except for a few limited exceptions. *State v. Faust,* 2004 WI 99, ¶ 11, 274 Wis.2d 183, 682 N.W.2d 371. "One well-established exception to the warrant requirement is a search conducted pursuant to consent." *State v. Artic*,

2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430. The State bears the burden of showing by clear and convincing evidence that the police did in fact obtain consent. *State v. Sobczak*, 2013 WI 53, ¶ 11, 347 Wis. 2d 724, 833 N.W.2d 59.

In analyzing consent, courts review whether consent was given in fact and then whether that consent was voluntary. *Artic*, 2010 WI at ¶ 30. Whether consent was given in fact is a question of historical fact which will be upheld as long as it is not against the great weight and clear preponderance of the evidence in the record. *Id.* Whether consent was voluntary is a mixed question of law and fact. *Id.* ¶ 32.

1. Consent was given in fact.

There is no doubt that consent was given in fact. Moore signed a consent to search form. (Exh. 1). Both Officer Weaver and Moore testified to this fact. (MHT 24:21-25:7; 46:2-8).

2. Consent was given voluntarily.

The State bears the burden of proving by clear and convincing evidence that consent was given freely and

voluntarily. *Artic*, 2010 WI at ¶ 32. Consent given voluntarily must be must be "an essentially free and unconstrained choice," and not "the product of duress or coercion, express or implied," *Schneckcloth v. Bustamonte*, 412 U.S. 218, 225, 227 (1973). This determination is made based on the totality of the circumstances. *Id.* at 226. No single criterion will control that determination. *See Id.*

Courts consider multiple non-exclusive factors to determine whether consent was given voluntarily: (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent. *Artic*, 2010 WI at 33.

(1) Whether officers used any deception, trickery, or misrepresentation in obtaining consent.

In finding consent to have been voluntarily given, the Wisconsin Supreme Court in *State v. Phillips,* focused on the honesty and openness of the officers requesting consent. 218 Wis.2d 180, 198-99, 577 N.W.2d 794 (1998). The court noted that the officers "disclosed to the defendant almost all of the information they possessed concerning their interest in his home," informed the defendant that they did not have a warrant, described their purposes for being in the home, and did not "mask their identities or misrepresent the purpose for being at the defendant's home." *Id.*

The court in *Artic* made similar findings. 2010 WI at ¶ 36. The officers were forthright about their identities and their reasons for being in the house. *Id.* They asked Artic for consent to search only after explaining that officers arrested his son with a large quantity of cocaine after seeing him enter and leave the residence. *Id.* Law enforcement also made clear to Artic that they did not have a search warrant. *Id.*

In this case, as in *Phillips* and *Artic*, the police were open and honest about the investigation with Moore. They were clearly identifiable as police officers. They confronted Moore with the fact that they smelled marijuana coming from the apartment. They never pretended to have a warrant and were honest in telling Moore they wanted to search her apartment. There is nothing in the record to suggest the officers used deception, trickery, or misrepresentation in obtaining consent to search from Moore. Significantly, it was Moore who brought up consent with police after speaking with her mother. When Moore ultimately decided to consent, it was not in response to a request by police, rather, it was after she thought about it and then reinitiated the topic with police. Therefore, this factor weighs in favor of voluntary consent.

(2) Whether officers threatened, intimidated, or in any way "punished" Moore.

In *Phillips*, the court focused on the fact that there was no credible evidence that the police threatened, physically intimidated, or punished the defendant. 218 Wis. 2d 180, 199-200. In doing so, the court noted all the things the police did not do to the defendant:

- The police did not physically subdue or restrain the defendant.
- The police did not brandish their weapons.
- The police did not place the defendant in handcuffs.
- The police did not take the defendant into custody.
- The police did not remove the defendant from the premises.
- The police did not arrest the defendant.
- The police did not deprive the defendant of any necessities.
- The police did not prolong the encounter to wear down the defendant's resistance.
- The police did not employ any coercive interrogation tactics on the defendant.

Id.

The police in this case likewise did not do to Moore what they did not do to Phillips. The record is clear that Moore was not physically subdued, restrained, handcuffed, taken into custody, removed from the premises, arrested, deprived of any necessities, or interrogated whatsoever. The police never drew their firearms, much less brandished them. Furthermore, the police did not prolong the encounter

to wear down Moore's resistance. As noted by the Appellant, the entire encounter appears to have taken about one hour from dispatch to Moore's signing the consent form. During that hour, the police did not try to talk Moore out of refusing to consent to a search of her apartment, and there is no evidence in the record that Detective Mansavage was not diligently drafting the search warrant he left the scene to write.

The Appellant argues that the police coerced Moore into consenting by claiming authority to obtain a search warrant when there were not sufficient grounds to obtain one. First, the Appellant's citation to *Bumper* is not applicable: *Bumper* held that an officer's claim to *possess* a search warrant was coercive; it did not speak to whether a claim that an officer *would obtain* would be coercive. 391 U.S. 543, 550 (1968). The two situations are vastly different. One is a claim of possessed authority, whereas the other is a statement of intent to get authority. Second, an officer's threatening to obtain a search warrant does not vitiate consent if "the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission." *United States v. White,* 979 F.2d 539,

542 (7th Cir.1992); *State v. Kiekhefer,* 212 Wis.2d 460, 473, 569 N.W.2d 316 (Ct.App.1997).

The officers in the present case did not claim to already possess a search warrant. They informed Moore that based on the information before them, they were prepared to get a warrant. This was not a baseless threat as Detective Mansavage did in fact leave to draft a warrant. This was also not merely a pretext to induce submission. Not only did no officer try to talk Moore out of refusing, nearly an hour passed between Moore's refusal and her signature. There is no evidence in the record to support a claim that the police in this case did anything to induce Moore's consent after she refused. While there is evidence to indicated that Moore's mother tried to induce Moore to consent to the search, Ms. Moore's mother is not an agent of the government. This factor weighs in favor of voluntary consent.

(3) Whether the conditions at the time of consent were non-threatening and cooperative.

In examining the conditions surrounding the time of consent, courts consider whether the officers and the defendant "were open and forthright during the encounter,

each posing questions and providing information." *Phillips,* 218 Wis.2d at 200. Courts will also examine whether "the police [made] a show of force at the time the consent [was] sought, or if the surroundings [were] coercive in other respects." *Artic*, 2010 WI at ¶43, quoting 4 Wayne R. LaFave, *Search and Seizure,* § 8.2(b), at 61-62 (4th ed. 2004).

The officers in the present case were open and forthright with Moore, explaining to her the evidence they had and answering questions she asked them. They explained to her the process they were going take to get a search warrant. They explained how long the warrant process could take. They explained the process they would take in photographing her apartment and documenting removed items. (MHT 21:3-6). They told her she was free to leave. Officer Weaver even offered to call Moore and her brother when the search warrant was over to let them know when the apartment would be released back to them. (MHT 21:8-10). Moore and her brother were even allowed to go into their apartment and retrieve belongings, albeit with an officer present. Let us also not forget that Moore called police in the first place and summoned them to her apartment. There is no evidence in the record to suggest the police ever made any

show of force during their interactions with Moore; no guns were drawn, no doors were kicked down. More was not handcuffed or arrested. This factor weighs in favor of voluntary consent.

(4) How Moore responded to officers' request to search.

The fourth factor looks at Moore's response to the police request to search. An initial refusal of a request to search will weigh against a finding of voluntariness. *State v. Kiekhefer,* 212 Wis.2d 460, 472, 569 N.W.2d 316 (1997). Here, there is no question that Moore initially told the officers that she would not consent to a search of her residence. (Appellant argues that Moore refused consent on two separate occasions, once before the dog sniff and once after. The State can only find evidence in the record of one request by police and refusal by Moore. (MHT 16:5-6; 35:14-16). This factor weighs against a finding of voluntariness.

(5) Moore's Characteristics, including youth, lack of education, lack of intelligence, physical and emotional condition, and experience with the police.

In evaluating this factor, courts are to look at whether there was evidence "suggesting that the defendant was *particularly susceptible* to improper influence, duress, intimidation, or trickery." *Artic*, 2010 WI at ¶ 59, quoting *Phillips,* 218 Wis.2d at 202-03 (emphasis added). A person need not possess exceptional intelligence, legal knowledge, or experience with law enforcement to give voluntary consent. *Artic*, 2010 WI at ¶ 59.

In this case, Moore was an adult with a young child for whom she was responsible. She had a job as a Resident Assistant at a nursing home, where she was presumably responsible for caring for other people. It is apparent from the record that Moore is intelligent and well spoken. The Appellant argues that Moore was "particularly susceptible to improper influence, duress, intimidation, or trickery" based on her emotional state of having been in an altercation with Crawford in which her finger was hurt and her son made to cry. No doubt, such an occurrence would be upsetting. However, the evidence in the record does not

suggest that this situation made Moore so emotional as to be particularly vulnerable. First, Moore had the wherewithal to call police. Second, she was able to consider the information presented to her by police and refuse consent when initially asked. Third, she was able to ask questions of police, including whether she could enter her apartment to check on her child and collect belongings. She did not run in, but rather chose to allow Officer Weaver to escort her. Fourth, she had her mother and brother on scene with her, available to emotionally support her. Fifth, she was able to discuss the situation with her mother, consider her options, ask Officer Weaver if consenting would speed things up, and make the rational decision to consent. Based on these characteristics, this factor weighs in favor of voluntariness.

(6) Whether the officers informed Moore that she could refuse to consent.

While not fatal, the police's failure to inform a person of the right to refuse weighs against voluntariness. *Phillips,* 218 Wis.2d at 203. The Wisconsin Supreme Court and the United States Supreme Court have refused to adopt a requirement that officers must advise a person of a right

to refuse consent. In *Schneckloth v. Bustamonte,* the Supreme Court held that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." 412 U.S. 218, 231 (1973). The Wisconsin State Supreme Court applied *Schneckloth* in *Phillips,* holding that the State is not required to demonstrate whether "the defendant knew ... he could refuse consent." 218 Wis.2d at 203.

There is no evidence in the record that the officers here verbally informed Moore that she could refuse to consent. Moore clearly did refuse to consent, however. Under *Artic*, this creates a reasonable inference that Moore was aware she could refuse consent. 2010 WI 83, ¶ 61, 327 Wis. 2d 392, 786 N.W.2d 430. Furthermore, officers never tried to talk her out of refusing, and upon her refusal, informed her they were prepared to obtain a warrant. When Moore said no, they acquiesced and told her they would go down a different road, implicitly validating her decision to refuse. Additionally, on the consent to search form that Moore signed, it states in the middle of the page, “I understand that I have the right to refuse to consent to the search and to refuse to sign this form.” (Exh. 1). Accordingly, although this factor weighs against a finding

of voluntariness, it should not weigh heavily into the court's consideration of the totality of the circumstances in this case, the same as it did not in *Artic*.

B. Moore's Consent Was Sufficiently Attenuated.

The fact that consent to search is voluntary does not necessarily mean that it is untainted by prior illegal conduct (assuming, *arguendo*, the dog sniff was illegal). *See Brown v. Illinois*, 422 U.S. 590, 603 (1975); *State v. Anderson,* 165 Wis. 2d 441, 448, 417 N.W.2d 411 (1991). When consent to search is obtained after a Fourth Amendment violation, evidence seized as a result of that search must be suppressed as "fruit of the poisonous tree" unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence. *Wong Sun v. United States,* 371 U.S. 471, 487-88 (1963); *Brown,* 422 U.S. at 602.

In *Brown,* the United States Supreme Court a three factor analysis for determining whether the causal chain has been sufficiently attenuated: (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,* 422 U.S. at 603-04. The ultimate question, though, is whether the evidence in question has come at the "exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint." *Anderson,* 165 Wis. 2d at 447-48; *see Wong Sun,* 371 U.S. at 488.

Judge Ehlke implicitly, though not explicitly with a specific ruling, found Moore’s consent to be attenuated from the sniff. In his oral ruling on the Appellant’s motion, he found that Moore signed the consent form because she didn’t want to have to wait for the warrant. He did not find that her consent was based on seeing the dog sniff. “Basically, she does so based on her testimony because shes didn’t want to have it take the three hours it was estimated it would take to obtain the warrant, have to have the duty judge review it, presumably sign it, and then come back.” (Oral R. Tr. 7:17-21). Judge Ehlke also stated that, “even if the 7th Circuit decision precluded the officers from doing what they did, I don’t think that would negate her consent to search the apartment.” (Oral R. Tr. 8:10-13).

1. Temporal Proximity

Under this factor, courts are to consider the amount of time between the prior searches and the conditions that existed during that time. *See Rawlings v. Kentucky,* 448 U.S. 98, 107-08 (1980). There is no bright line as to how much is enough time between the prior search and the consent. Rather than simply considering passage of time in a purely numerical sense, courts consider time in conjunction with the attendant conditions. Specifically, much attention is given to whether the consenting person was in custody during the passage of time. Consider the following cases, which all involved an hour or less.

In *Rawlings,* the Court found a confession after a 45-minute illegal detention sufficiently attenuated. 448 U.S. at 107-08. The Court noted that under strictly custodial conditions, the 45-minute time span might not be long enough to purge the initial taint; however, the nonthreatening and congenial conditions outweighed the relatively short period of time. *Id.* During the detention, which occurred in a house, the consenter was free to move about, sit on a sofa, get a cup of coffee, and listen to music. *Id.* at 108.

In *Brown,* the Court did not find sufficient attenuation in a time span of approximately one hour between the defendant's illegal arrest and his incriminating statement. 422 U.S. at 604. During that hour, the defendant was transported to the police station and put into an interrogation room; there was "no intervening event of significance whatsoever." *Id.*

In *United States v. Fazio,* the Court found incriminating statements sufficiently attenuated when they came about an hour after an illegal search of the defendant's restaurant. 914 F.2d 950, 956-57 (7th Cir. 1990). During that hour the defendant was not in custody, and he drove himself to the police station to make the statement. *Id.* at 956.

In *Phillips*, the Wisconsin State Supreme Court found sufficient attenuation in the passage of only a few minutes and illegal entry and a consensual search. 218 Wis.2d 180, 206-07 (1998). The Court noted the defendant was not restrained, arrested, or taken into custody. *Id.* The defendant and police conversed with each other and the defendant did not object to the police’s illegal presence in his basement. *Id.* at 207.

In this case, it is not clear how much time elapsed between the dog's sniff and Moore's consent, but it was clearly less than an hour. Officer Weaver arrived on scene at approximately 7:45 p.m. and Moore signed the consent form at 8:49 p.m. It can be deduced, however, that the dog sniff was not mere minutes before the consent, considering that after the sniff, there was time for Moore and her brother each entered the apartment to gather belongings, and for Moore's mother to discuss with Moore why Moore was not consenting. Regardless how much time elapsed, the circumstances surrounding the consent were nonthreatening and congenial, much as they were in *Rawlings*, *Fazio*, and *Phillips*. Moore was never in custody or restrained in any way. She was free to leave. While she was not free to go in her apartment unescorted, she was allowed to go in to collect belongings. She conversed with her family members as well as Officer Weaver. Moore also neither objected to the police's presence outside her apartment, nor the presence of the dog when it sniffed the apartment door.

2. Intervening Circumstances

The second factor considers whether there was an intervening circumstance between the dog sniff and Moore's consent. In this case, the intervening circumstances are the conversation that Moore had with her mother, Officer Weaver's interjection that the police were not simply going to walk away, Moore's question to Officer Weaver about whether consenting would speed up the process, and Moore's presentation with the paper consent form. (MHT 22:12 – 23:22). These circumstances closely mirror those found sufficiently intervening in *Phillips* and *Anderson*.

In *Anderson*, the defendant's statement and consent to search occurred after he was read his *Miranda* rights and signed a waiver of constitutional rights. 165 Wis. 2d 441, 450-51 (1991). The statement and consent also occurred after the defendant's wife fully informed him of the two, illegal, searches that had previously taken place. *Id.* at 451. In *Phillips*, the intervening circumstance was a short discussion between the officer and the defendant in which the officer explained the purpose of the visit, including the information that the police did not have a search warrant, and answered the defendant's questions. 218 Wis.

2d 180, 208-09 (1998). In both cases, the Wisconsin Supreme Court noted that the information provided to each defendant illustrated that the defendants were not improperly surprised, frightened, or confused when they consented to the searches. *Anderson*, 165 Wis. 2d at 451, *Phillips*, 218 Wis. 2d at 209.

In this case, Moore's consent occurred after she was informed the police were obtaining a search warrant. She signed the consent form knowing she had the right to refuse consent. Her consent also came after her mother questioned why Moore was refusing and therefore covering for Taylor, a man selling drugs out of the apartment where Moore's child lived. While Moore's mother was pressuring Moore to consent to the search, there is no indication that she was doing so at the behest of the police. Further, Moore's ultimate consent also came after Officer Weaver informed her that refusing consent was not going to make the whole situation go away. Moore, sick of waiting and wanting to speed things up, freely decided to consent. She was not surprised, frightened, or confused when she did so.

3. The purpose and flagrancy of the official misconduct

This factor is especially important because it is tied to the rationale of the exclusionary rule itself. *Phillips*, 218 Wis. 2d at 209. "Because the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights." *United States v. Fazio,* 914 F.2d 950, 958 (7th Cir. 1990).

There is no evidence in the record to suggest that the officers' use of a drug-sniffing dog was purposeful or flagrant. First, as the extensive briefing of whether the sniff was an unreasonable search by both parties shows, it was not and still is not well-settled law that there was anything amiss with the dog sniff. Second, there is no evidence that the officers' used the dog sniff as a means to coerce or even obtain consent from Moore. Had that been the motive, we would expect to have a record of requests for consent after the sniff and/or attempts to use the sniff to talk Moore out of refusing. Instead, we have a clear record that that did not happen: "The officers didn't

try to talk you out of refusing; did they? No.” (MHT 47:3-5). Furthermore, while Moore contended at the suppression hearing that her mother focused on the dog sniff as a reason for Moore to consent, there is no evidence that the police asked or demanded that Moore’s mother do that. For the Appellant’s claim that the dog sniff was a means to lean on Moore to be true, considering the evidence that it was Moore’s mother who tried to talk her into consenting, the police would have had to have been in cahoots with Moore’s mother. This is absurd.

The fact of the matter in this case is that Moore got tired of waiting. She wanted to speed things up. After being presented with information by the police and discussing the matter with her mother, Moore decided to go ahead and consent to a search. When she gave that consent, verbally and in writing, she did so freely and voluntarily.

CONCLUSION

For the reasons set forth above, and upon the record in this matter, the State respectfully requests that this Court affirm Judge Ehlke's decision.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: September 29, 2017.

Signed,

_____
Attorney

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Dated this 29th day of September, 2017.

_____

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