STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 18 AP 637 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JORDAN B. MICKLEVITZ,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

APPEALED FROM MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 15 CF 2777 THE HONORABLE CAROLINA STARK AND FREDERICK ROSA, PRESIDING

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I. OFFICERS DID NOT HAVE ARTICULABLE FACTS TO SUPPORT A PROTECTIVE SWEEP.

On appeal the State now seeks to create a new reason why a protective sweep could have been justified, when the circuit court already made its determination. Response at 12-18.

In coming to its decision, the circuit court listed only four reasons to justify officers entering Micklevitz's apartment to perform a protective sweep. First, the odor of fresh marijuana. Second, the defendant's resistive behavior. Third, officers viewing a spent bullet casing and other ammunition, and fourth, officers finding a loaded firearm on Micklevitz. R.94 at 9-10.

Now, the State appears to claim that the smell of marijuana creates that assumption that other individuals were within Micklevitz's apartment. Based upon the smell of marijuana, officers "could reasonably believe that a drug operation was taking place and that they could be in danger from another armed person in the apartment." Response at 12.

Officer Zaworksi never testified to the State's new assumption, that the smell of marijuana must mean that a drug

operation was taking place, and therefore other people must be in the apartment. R.93. Moreover, even if officers believed that others were in the apartment, there was no evidence presented as to why these individuals may pose a danger to officers. *See Generally State v. Kruse*, 175 Wis. 2d 89, 97, 499 N.W.2d 185 (1993) ("The police had no information that the [roommate] had engaged in any threatening or illegal activity, was armed or would engage in violent conduct.")

Further, this new theory contradicts the facts. The photograph taken by officers at 7:32 pm on August 20, 2015, shows that Micklevitz answered the door without a shirt and wearing only teal shorts. Even if officers could reasonably assume, by smell alone, that drugs were being sold, Micklevitz attire makes in unreasonable to assume that Micklevitz was conducting a drug operation while shirtless and shoeless.

Additionally, the State's new theory would require a protective sweep whenever officers smelled drugs. This is not what is contemplated under *Buie*, nor what is allowed under the Fourth Amendment. "Subject to a few well-delineated exceptions, warrantless searches are deemed per se

unreasonable. . .” *See State v. Faust*, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. Officers smelling marijuana does not create the “rational inference” that drugs were being sold. Nor does the smell of marijuana create a rational inference that someone in the area swept possess a danger to officers.

Next, Micklevitz having a loaded firearm and ammunition in his own home, is not a reason to believe that others are within Micklevitz’s home. The State attempts to create fear, by repeatedly referencing that a concealed carry permit holder was armed with a loaded firearm and had ammunition in his home. However, “[t]he mere presence of firearms does not create exigent circumstances.”. *State v. Kiekhefer*, 212 Wis. 2d 460, 477, 569 N.W.2d 316 (Ct. App. 1997) (quoting *United States. V. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994)). This is especially true when “there is no indication that [the defendant] was considered dangerous.” *Id*. citing *United States v. Killebrew*, 560 F.2d 729, 733-34 (6th Cir. 1977). Here, officers had no proof that Micklevitz was dangerous. Nor, was Micklevitz a felon in possession of a firearm—in fact, Micklevitz had a valid concealed carry license.

Further, a loaded firearm creates no greater assumption of danger and does not make it more likely that other individuals posing a danger to police were in Micklevitz's home. Officer Zaworski admitted at the suppression hearing that he was trained to carry his firearms with a round in the chamber. R.93:33.[1] The State's repeated mentions of a firearm and ammunition are simply to artificially create fear.

Finally, the loaded firearm was taken from Micklevitz at the time of his arrest. In passing, the Court of Appeals District I came to same conclusion in unpublished case of *Cervantes*. 2013 WI App. 41, ¶23, 346 Wis. 2d 730, 828 N.W.2d 592 ("Further, if [the defendant] had possessed the shotgun that brought the police to [the defendants'] door, once he was handcuffed the gun would not have been a danger to the police.").

In total, the smell of fresh marijuana and Micklevitz exercising his Second Amendment rights, in his own home, creates no reasonable belief that other individuals in Micklevitz's apartment were a danger to officers.

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[1] As an aside, the United States Concealed Carry Association also trains its members and instructors to always carry their firearm with a round chambered. https://www.youtube.com/watch?v=U3SdVJ5Tzx4

[2] The officer claims to have smelled 41.3 grams (1.456 ounces)

II. THE ALLEGED PROTECTIVE SWEEP EXTENDED FURTHER THAN ALLOWED UNDER RELEVANT CASE LAW.

The State asserts that "[t]he protective sweep included only Zaworski's visual inspection of areas large enough for a person to hide" and "[t]he photographs show that the officers did not move or more thoroughly search anything between 7:02 pm and when the warrant was issued at 11:44 pm." Response at 32. It is unclear where the State reached these conclusions and these conclusions are not supported by the record. Officers clearly move the scale on the table between photographs at 7:38 pm and 8:09pm. Additionally, the photographs actually show officers remaining inside of the apartment. Officers are pictured inside the apartment at 7:52 pm and 7:54 pm.

This contradicts the State's contention that officers secured the door of the apartment and waited for a warrant. The State tenuously cites *La Fournier v. State* for the premise that officers may continually reenter a scene, but the case at hand is clearly distinguishable. 91 Wis.2d 61, 280 N.W.2d 746 (1979). In *La Fournier*, the defendant challenged that

four separate officers entered the scene within short succession, due to an exigent circumstance. *Id*. at 68 (investigating a report of an overdose).

Here, after removing Micklevitz from the scene, officers returned and remained in the apartment taking photographs for more than four hours. They did not secure the outside of the apartment and wait for a warrant as the State attempts to claim. The relevant case law on protective sweeps holds that the sweep "may last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *State v. Sanders*, 2008 WI 85 ¶33. Officer drop receipts show that marijuana, Micklevitz's prescription medication, Micklevitz's ammunition, and containers were dropped off at the Milwaukee Police Department prior to the issuance of a search warrant. R.85. These receipts show Officers Jung and Zaworski dropping off evidence at 9:56:00 pm, 11:02:38 pm, and 11:04:32 pm. R.85.

The State's only reason for officers remaining on the premises is a case that predates the United States Supreme Court's creation of the protective sweep by 11 years. *La*

Fournier, 91 Wis.2d 61, 280 N.W.2d 746 (1979). More recent decisions have commented negatively on officers reentering the scene in protective sweep cases. "After police removed [the defendant] from the apartment, but before obtaining a search warrant, [the officer] went back in and continued searching the apartment." *Kruse*, 175 Wis. 2d at 93. (Evidence suppressed because officers did not have reasonable fear for their safety).

The State's warrant makes clear that officers did collect evidence when their only purpose was to sweep the area for lurking confederates. R.73 at Ex. C.

Had defense counsel reviewed the discovery, effective counsel would have located the photographs in discovery. Effective counsel should have used this evidence to impeach the credibility of officers, and prove to the circuit court that officers remained in the apartment contrary to their testimony. Moreover, the circuit court should have taken this evidence into consideration when determining whether to reopen testimony regarding the suppression of evidence.

III. THE INDEPENDENT SOURCE DOCTRINE DOES NOT APPLY.

The State asserts that the evidence found during the illegal search, could have been recovered by legal means outside of officers' violations.

The State claims without citation, that circuit court noted that the warrant still would have cited "the strong odor of marijuana coming from the apartment, Mickelvitz's attempts to close the door after he realized police were there, the fact that the police believed he was resisting in order to destroy the marijuana, and that they found a handgun in Micklevitz's back pocket after they subdued him." Response at 19.

However, the State fails to notice that the officers created any possible exigent circumstances and that officers were inside the curtilage of Micklevitz's home when the evidence cited in the warrant affidavit was secured.

First, the State conveniently leaves out that Officer Zaworski's warrant affidavit claims that marijuana was not

detected until Micklevitz opened his door.[2] It was four days after the search during a charging conference with an assistant district attorney, when officers changed their story about when marijuana was detected. This conference resulted in the issuance of supplemental report No. 2, which indicated a faint smell of marijuana could be smelled from the hallway. R.75 at Ex. G. This change in story coupled with officers conducting a "quick and limited" four hour protective sweep calls into question the credibility of the officer's testimony.

Second, the officers had to bypass a locked outer door to get to the curtilage of Micklevitz's apartment. Ignoring the change in story about when and where marijuana was smelled, the officers should never have been outside of Micklevitz's apartment door in the first place. If they wished to speak with Micklevitz, officers should have used the intercom like every other member of the public.

These officers did not have license to enter a locked apartment complex and repeatedly knock on a tenant's door. Then, when no one answered, instead of leaving, knock again

[2] The officer claims to have smelled 41.3 grams (1.456 ounces) of fresh marijuana inside plastic bags, inside a container, in the next room. R.75 at Ex. G.

while covering the peephole and claiming to be maintenance.[3] As Justice Scalia wrote, "[t]his implicit license [to enter the curtilage] typically permits the visitor to approach the home by the front path, knock promptly, waiting briefly to be received, and then (absent invitation to linger longer) leave." *Florida v. Jardines*, 133 S.Ct. 1409 (2013). Here the implicit license is not to even approach the door, it is to use the intercom. Federal courts have suppressed evidence when federal agents have attempted similar conduct. *See United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976)("when [] an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed."). *See also United States v. Heath*, 259 F. 3d 522, 534 (6th Cir. 2001)("it was the officers' illegal entry into the common areas of the building that lead them to [the defendant's] door.")

Moreover, Officers' conduct show that they manufactured any arguable exigent circumstance. "[T]he

[3] "Officer Chapman began knocking on the door. He knocked for approximately a minute I would say and we received no answer. Officer Chapman placed his finger on the peephole and continued to knock at which time we were about to leave and I stated maintenance." R.93:10.

government cannot justify a search on the basis of exigent circumstances that are of the officers' own making." *State v. Kiekhefer*, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997). Officers bypassed the locked outer door and repeatedly knocked on Micklevitz's apartment door based upon a misdemeanor want. These officers did not have probable cause to arrest Micklevitz. They were simply investigating a misdemeanor battery complaint.

The court of appeals ordered the suppression of evidence in the similar case of *Kiekhefer*. 212 Wis. 2d at 487. There, officers were surveilling a home they believed contained a large amount of marijuana and guns. *Id*. at 465-6. The officers decided to seek consent to search the home, and were granted access to the home by the defendant's mother. *Id*. Once at the defendant's bedroom door officers smelled marijuana. *Id*. at 483. The officers discussed getting a warrant based upon the smell of marijuana, but instead decided to enter the room. *Id*. The court held that the evidence must be suppressed because the officers' conduct had a "quality of purposefulness" to it. *Id*. at 483, 485.

Officers here, purposely ignored the locked apartment complex, remained at the precipice of Micklevitz's door

(touching the door to avoid detection), and once inside, officers remained for more than four hours before a warrant was granted. These purposeful violations should justify the suppression of evidence to deter future police misconduct.

IV. THE POSTCONVICTION MOTION PROVIDED ENOUGH EVIDENCE SHOWING THAT COUNSEL WAS INEFFECTIVE IN REVIEWING DISCOVERY AND CHALLENGING THE SEARCHES.

The postconviction motion and reply brief in the circuit court contained sufficient facts showing that trial counsel was ineffective. R.73-75, 84. The who, what, when, where, why, and how of trial counsel's ineffective performance was documented. R.73:6-15, R.84:4-6. *See Generally State v. Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433.

Simply reviewing discovery and interview Micklevitz would have shown trial counsel that officers entered the curtilage of Micklevitz's home. Further, the photographs overlooked by trial counsel contain undeniable fact the officers entered and remained in Micklevitz's apartment for four hours prior to the issuance of the search warrant. This

evidence was crucial to the suppression claim. Additionally, effective counsel would have used this evidence to impeach officers claims that they entered the apartment only three times prior to the issuance of a search warrant. R.93:50-52.

Even when confronted by the fact that officers were in the apartment for four hours and had to bypass a locked outer door, the circuit court refused to reopen the suppression testimony. This was all evidence trial counsel should have found in the discovery, and should have been presented to the court. At the very least, these omissions show the circuit court abused its discretion in not reopening the suppression testimony.

CONCLUSION

This Court should reverse the circuit court's decision denying the suppression of evidence, because the decision did not follow case law regarding protective sweeps.

In the alternative, this Court should order the case remanded, the judgment of conviction vacated, and the suppression hearing reopened, due to the circuit courts abuse of discretion on not reopening testimony regarding suppression, when there is photographic proof the circuit court relied on incorrect testimony and evidence that the officers entered the curtilage of Mickelvitz's apartment.

Finally, in the alternative, this Court should remand the case for a *Machner* hearing to gather evidence regarding the deficient performance of trial counsel in not reviewing discovery and not properly investigating possible defenses.

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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 2,332 words.

Dated this 4 day of October, 2018.

Signed:

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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 4 day of October, 2018.

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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; and (3) 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.

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I hereby certify this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on **October 4, 2018**, I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

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