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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT III

Case No. 2019AP1486 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE A. ROGALLA

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Marathon County Circuit Court,
the Honorable Gregory Huber, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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**CONSTITUTIONAL PROVISIONS
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Fourth Amendment 5, 10

Wisconsin Constitution

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752.31(2)(f) 1

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ISSUE PRESENTED

Did the state meet its burden to show that life was gravely endangered and therefore exigent circumstances allowed an officer to enter Mr. Rogalla's home without a warrant when the officer could hear two people arguing and a slapping sound?

The circuit court concluded that there was a "real and significant threat to the physical safety of the woman" and that the officer had an "appropriate concern" for her safety. (32:28-29; App. 105-106). Ultimately, the court concluded exigent circumstances justified the warrantless entry. *Id.*

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2)(f) and (3), making publication inappropriate. Wis. Stat. § 809.23(1)(b)4. Oral argument is not requested because it is anticipated that the briefs will adequately address all relevant issues.

STATEMENT OF THE CASE

On July 3, 2017, the state filed a criminal complaint charging Jesse Rogalla with one count of disorderly conduct as an act of domestic abuse contrary to Wis. Stat. § 947.01(1) & Wis. Stat. § 968.075(1)(a). (1).

Mr. Rogalla moved to suppress the evidence stemming from the entry of his home, arguing that it was illegal and any evidence of his statements, arguing that they were obtained while he was in custody but without *Miranda* warnings. (32:3). The state conceded that Mr. Rogalla was in custody and not Mirandized. (32:3). The court granted the motion to suppress Mr. Rogalla's statements. (32:4).

The court then heard testimony regarding the officer's entry of the home. (32:9-23). The court found that there was a "very real and significant threat to the physical safety" of the woman in the home and that there was "appropriate concern" for her safety. (32:28-29; App. 105-106). Thus, the court ruled that exigent circumstances justified the warrantless entry of the home.¹ (32:28-29; App. 105-106).

Ultimately, Mr. Rogalla entered a no contest plea to the single count in the complaint. The court sentenced him to pay court costs. Mr. Rogalla now appeals. (26).

¹ The Honorable Greg Grau heard and decided the suppression hearing. The Honorable Gregory Huber accepted Mr. Rogalla's plea and sentenced him.

STATEMENT OF THE FACTS

On a July night in 2017, it was still light out when Officer Mitchell Klieforth responded to a home in Rothschild, Wisconsin. (32:9-10,16). Officer Klieforth went to the home after receiving a call reporting that a party could hear noise coming from a home that sounded like a male yelling at a female. (32:10).

Officer Klieforth pulled up and parked on the street in front of the home. (32:11). Officer Klieforth did not know who lived at the home and had not been called to the house before. (32:14).

Officer Klieforth stood on the sidewalk, about 15 to 20 feet from the home. (32:11). He could hear a male and a female yelling and swearing. (32:11). Officer Klieforth estimated he stood on the sidewalk for about three minutes, during which time he called in a license plate. (32:15).

As he got closer to the home, he heard what he believed was an argument over a phone log. (32:12). Officer Klieforth could hear both parties yelling and swearing. (32:17). He heard the male call the female a name and heard the female voice say, "You don't have to do this." (32:12).

Now standing on the porch, Officer Klieforth could see into the home through a crack in a window shade. (32:16). Officer Klieforth could see a male and a female in the house. (32:12). He thought the male was standing and the female was crouched down. (32:12). He heard the male say "wrong answer"

and then heard a slapping sound. (32:12). Officer Klieforth believed that the male slapped the female. (32:12).

After hearing the slapping sound, Officer Klieforth heard the female continue to yell. (32:18). He could hear that she was using words, but could not make out what she was saying. (32:18). He did not hear the female cry for help. (32:18).

At that point, Officer Klieforth decided he needed to enter the home to “make sure that she was okay.” (32:13). He did not knock on the door or announce that police were present. He did not wait for an additional officer who was en route to the home. (32:18).

Instead, he left the porch and entered the house through the garage. (32:18). A side door to the garage was unlocked. (32:19). Once in the garage, Officer Klieforth entered the north side of the house – the opposite end of the home from where he had heard the yelling. (32:13).

Officer Klieforth entered the home with his firearm drawn. (32:20). He did not announce his presence while he walked the length of the home toward where he had earlier heard yelling. (32:20). On his way through the home he encountered Mr. Rogalla coming out of a bedroom. (32:13). Officer Klieforth then detained him. (32:13).

ARGUMENT

Exigent Circumstances Did Not Justify the Warrantless Entry into Mr. Rogalla's Residence.

A. Introduction and Standard of Review.

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." The Wisconsin Constitution contains an identically worded provision. Wis. Const. art. I § 11. In reviewing the legality of a search or seizure, this court considers the question to be one of "constitutional fact." *State v. Pallone*, 2000 WI 77, ¶ 26, 236 Wis. 2d 162, 613 N.W.2d 536. It applies a deferential standard to the circuit court's finding of facts. *Id.* However, it independently applies constitutional principles to the facts. *Id.*

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *State v. Richter*, 2000 WI 58, ¶ 28, 235 Wis. 2d 524, 612 N.W.2d 29 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984)). Therefore, "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980).

The prohibition on warrantless entries into the home is subject to only a few well-delineated exceptions which are "carefully and jealously drawn." *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984). The

state bears the burden of proving the existence of one of these exceptions. *See State v. Ferguson*, 2009 WI 50, ¶ 20, 317 Wis. 2d 586, 767 N.W.2d 187.

Here, an officer entered Mr. Rogalla's home armed and unannounced without a warrant or consent and placed him under arrest. The state has exclusively argued that exigent circumstances justified the warrantless entry.

B. The Exigent Circumstances Exception to the Warrant Requirement

There are four categories of exigent circumstances that courts have held authorize a law enforcement officer's warrantless entry into a home. *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29. The four categories are 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee. *Id.*

Here, the only applicable potential exigency, and the only exigency that the state has argued, is that there was a threat to the safety of a suspect or others.

The test for this category of exigency is "whether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life." *Id.*, ¶ 30.

C. It Was Not Reasonable to Believe that
The Time Needed to Obtain a Warrant
Would Have Gravely Endangered Life

Here, the circuit court ruled that the warrantless entry was justified. However, it did so without concluding that life was gravely endangered. Instead, the circuit court stated “that a reasonable officer could very well perceive at that moment that there was a very real and significant threat to the physical safety of the woman that was slapped under these circumstances.” (32:28; App. 105). The court further stated that “there was an appropriate concern for the safety of the woman who had been slapped.” (32:29; App. 106).

Neither a “real and significant threat” to physical safety” nor an “appropriate concern” for someone’s safety are the standard for exigent circumstances. Rather, the standard requires a reasonable belief that delay will “gravely endanger life.” *Richter*, 2000 WI 58, ¶ 30.

It makes sense that the circuit court did not go as far as to conclude that a life was gravely endangered. Here, the facts of case suggest an argument between partners that may have had a physical component. But yelling and swearing between two members of a household does not indicate life is gravely endangered. Even if one assumes the slapping sound that the officer heard was the man slapping the woman, despite the officer not witnessing that, a slap does not rise to the level of gravely endangering life. This is especially true in this case, where the officer was within inches of the

home in order to hear the slap. (32:16). Additionally, even after the officer heard the slapping noise, he continued to hear the parties yelling. (32:16). He clarified that that the two people yelling were using words and that he did not hear a cry for help. (32:16, 18). This suggests that even if one party had been slapped, neither party was incapacitated and the argument continued. While an argument between partners may be cause for “appropriate concern” it does not demonstrate that a life was gravely endangered and justify warrantless entry of a home.

This court previously concluded that entry of a home was illegal and not justified by exigent circumstances when the circuit court applied the wrong standard for whether there was a threat to the safety of the suspect or others. In *State v. Durham*, police were dispatched to a “possible domestic incident” after a neighbor reported hearing yelling and banging coming from a nearby apartment. *State v. Durham*, No. 15AP1978-CR, ¶ 3, unpublished slip op. (WI App June 1, 2016). Officers arrived at the apartment, knocked and announced they were police, but got no response. *Id.*, ¶ 4. The officers entered the garage and then the residence where they eventually encountered Durham who was coming down the stairs. *Id.*, ¶ 5-6.

This court noted that the circuit court in *Durham* applied the wrong legal standard when determining whether exigent circumstances existed. *Id.*, ¶ 44. It did so when it stated that “it was reasonable to believe that someone inside the residence was in danger.” *Id.* This court pointed out that the standard the circuit court articulated was

not the same as making a determination that the delay in procuring a warrant would gravely endanger the life of someone inside the residence. *Id.* Similarly, in this case, this court should not rely on the circuit court's determination that the officer was appropriately concerned or thought there was a significant threat to safety as that is not the standard that the exigent circumstances exception requires the state to meet.

Ultimately this court concluded that the facts of *Durham* did not rise to the level of exigent circumstances. The officers had a report that there was yelling, banging and a shaking wall, but when they arrived at the home they did not hear cries for help or observe other evidence that someone inside was in need of help. *Id.*, ¶ 45.

Durham is persuasive because the officer in this case also arrived to a home where there was a report of yelling. Although he did hear yelling and a slapping sound, he heard no cries for help and the argument continued demonstrating that neither party was incapacitated. The officer could have sought a warrant without gravely endangering life.

The state also provided no testimony indicating that obtaining a warrant would have been burdensome. The state did not argue that a telephonic warrant would have been unavailable or that the time it would have taken to obtain warrant would have caused an unreasonable delay. It is the state's burden to prove that life would have been gravely endangered by pausing to procure a warrant. *See State v. Ferguson*, 2009 WI 50, ¶ 20.

Seeking a warrant was also not the only option the officer had in this case besides entering the home with his firearm drawn and traveling the length of the home without announcing his presence. The officer could have knocked on the door to see if that would have disrupted the argument. The officer also could have loudly announced the presence of police or used his sirens to do so. The officer could have called out to see if everyone was alright and to ask if anyone needed help. The officer also could have waited for an additional officer to arrive before doing any of these things. It would have been reasonable to attempt any of these alternatives before entering the home.

It is also not reasonable for the officer to assume that the exigency was any greater simply because this call could be categorized as a “domestic” dispute. As the Tenth Circuit recognized in *U.S. v. Davis*, “granting unfettered permission to officers to enter homes, based only upon a general assumption domestic calls are *always* dangerous, would violate the Fourth Amendment.” *U.S. v. Davis*, 290 F.3d 1239, 1244 (2002).

As Mr. Rogalla explained in the circuit court, this case could be characterized as a “garden variety argument between partners.” (32:24). It is not a location where the police had been called before for loud or violent conduct. And while it may have caused the officer concern, concern is not the standard. Allowing the officer’s warrantless entry in this case would tip the scales too far toward the interests of the state and against Mr. Rogalla’s right to privacy in his own home.

CONCLUSION

For the reasons set forth above, Mr. Rogalla respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence derived from the unlawful entry of his home.

Dated this 24th day of February, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,215 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 24th day of February, 2020.

Signed:

ELLEN J. KRAHN
Assistant State Public Defender

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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 § 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.

Dated this 24th day of February, 2020.

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