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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

In this case, an officer entered Mr. Rogalla's home armed and unannounced without a warrant and placed him under arrest. The officer did so after hearing a slap and an ongoing argument between two people in the home. This warrantless "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, the state has exclusively argued that exigent circumstances, specifically, that there was a threat to the safety of a suspect or others, justified the warrantless entry.

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.” *State v. Richter*, Wis. 2d 524, ¶ 30.

The state argues that this is not the correct standard for this category of exigency. (State’s Brief at 5). Instead the state argues, without citation, that “the actual standard applied by the Courts has been whether there is a threat to physical safety.” (State’s Brief at 5).

The state is wrong. This is demonstrated by the standards the court set out in the three exigent circumstances cases cited in the state’s brief. In *State v. Richter*, the Wisconsin Supreme Court explained that, “[t]he test 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...’” *State v. Richter*, Wis. 2d 524, ¶ 30. Prior to *Richter*, the Wisconsin Supreme Court also recognized in *State v. Smith* that the test for this category of exigent circumstances requires an officer to reasonably believe that “delay in procuring a warrant would gravely endanger life...” 131 Wis. 2d 220, 230, 388 N.W.2d 601, (1986). Finally, most recently in *State v. Subdiaz-Osorio*, The Wisconsin Supreme Court again articulated the standard, saying, “the objective exigent circumstances test asks ‘whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in

procuring a search warrant would gravely endanger life...” 2014 WI 87, ¶ 73, 357 Wis. 2d 41, 849 N.W.2d 748.

This court should not and cannot accept the state’s invitation to adopt a different standard. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (holding “[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.”). Thus, the state’s arguments that this court could find there are exigent circumstances based on some lower level of threat to physical safety or because the officer’s actions were reasonable in general but did not excite a reasonable belief that delay in securing a warrant would gravely endanger life are unpersuasive.

Next, the state discusses *State v. Richter* and its discussion of whether firearms were present. (State’s Brief at 2). The state also seems to argue that the facts of *Richter* show the officer’s actions in this case were reasonable. (State’s Brief at 4). In *Richter*, the court concluded that the officer’s entry of a home was justified by both the hot pursuit and threat to safety exceptions to the warrant requirement. 235 Wis.2d 254, ¶ 2.

In *Richter*, an intruder broke into a trailer in the middle of the night. *Id.*, ¶ 41. When the intruder was discovered, he fled into Richter’s trailer and there were obvious signs of forced entry at that trailer. *Id.* The officer did not know whether the suspect had a firearm. *Id.*, ¶ 40. The court found that

it was reasonable for the officer to believe that life was gravely endangered despite not knowing whether a firearm was present. *Id.*

That does not mean that exigent circumstances justified the entry in the present case. First, the officer in *Richter* was responding to a report of an intruder and saw signs of forced entry but did not witness the intrusion. *Id.*, ¶ 37, 41. Therefore, he had no opportunity to have viewed a weapon. On the other hand, the officer in this case stood outside the home he entered for several minutes before entering. (32:15). He also looked through the window. (32:16). He did not hear mention of a firearm nor did he see one. (32). While the presence of a firearm is not a requirement for exigent circumstances, the lack of evidence that one was present despite the officer's ability to see one or hear the parties mention one does not help the state meet its burden to show that the warrantless entry was justified. The state bears the burden and cannot ask the court to simply assume that a firearm was present.

Finally, the state did not attempt to distinguish the factually similar case of *State v. Durham*. No. 15AP1978-CR, ¶ 3, unpublished slip op. (WI App June 1, 2016). The state made no argument explaining why this authored decision published after 2009 is not persuasive.

Durham was a case in which an officer was called to a home because of a possible domestic disturbance. 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. It is much more factually similar to the present case than *State v. Richter* where officers were pursuing a home intruder. Like in *Durham*, the court in this case should conclude that exigent circumstances were not present and that the circuit court's conclusions did not match the standard that is set out to allow officers to make a warrantless entry into a home.

CONCLUSION

For the reasons set forth above, as well as those in the brief-in-chief, Mr. Rogalla respectfully requests that this court reverse the circuit court's order and remand the case to the circuit court with directions to suppress all evidence derived from the unlawful entry of his home.

Dated and filed by U.S. Mail this 4th day of August, 2020.

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 1,126 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 and filed by U.S. Mail this 4th day of August, 2019.

Signed:

ELLEN J. KRAHN
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