STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP1808-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC D. BOURGEOIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE LAURA F. LAU PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Where the State relies on exigent circumstances to justify a warrantless entry, it must show that 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. The exigent circumstances cannot be of the officer's own making. Police entered Defendant-Appellant Eric Bourgeois's locked hotel room without a warrant after he refused to open the door. They did so because they had information that he had PTSD and "issues with drug use" and was possibly in possession of a stolen handgun. Did exigent circumstances not of the officer's making exist to support the entry?

The circuit court answered yes.

This court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The issue is adequately addressed by the briefs and can be resolved by the application of well-settled law.

STATEMENT OF THE CASE

Mukwonago police asked West Milwaukee police to attempt to locate Bourgeois.

On July 10, 2016, the West Milwaukee Police Department received a request from the Village of Mukwonago Police Department to "look for [Bourgeois]" at the hotel and "attempt to locate, stop, [and] hold" him because he "may be in possession" of a stolen gun.[1] (R. 101:6.) Officers

[1] The date of this request was not specified in the motion hearing testimony; a trial witness testified that it was July 10, 2016. (R. 112:147.)

were also informed that Bourgeois "has PTSD and issues with drug use." (R. 101:7.)

Police went to Bourgeois's hotel room in the early morning hours of July 12, 2016, and took him into custody.

West Milwaukee police officers went to the Best Western hotel shortly before 2 a.m. on July 12, 2016, and took Bourgeois into custody in his hotel room. (R. 2:4.) They searched the room and recovered the stolen pistol. (R. 2:4.) Police took Bourgeois to the VA Hospital and the county mental health facility; both facilities cleared him for discharge and he was returned to his home. (R. 2:4.)

As relevant to this appeal, Bourgeois was charged with one felony count for the theft of the handgun recovered in the hotel room, and one felony count of threatening a law enforcement officer, related to conduct that occurred at Bourgeois's Mukwonago residence later in the day on July 12, 2016. (R. 2:1–3.)

Bourgeois moved to suppress the evidence obtained in the search of his hotel room.

Bourgeois moved to suppress evidence recovered in the search of the hotel room on the grounds that it was obtained in violation of the Fourth Amendment because officers had forcibly entered without first obtaining a search warrant.[2] (R. 24:2, 4.)

The testimony concerning the entry and search.

At the suppression motion hearing, Lieutenant Joseph Vanderlinden, the West Milwaukee Police Department officer in charge during the entry and search, testified about the events leading up to the discovery of the handgun. (R. 101:6–

[2] The motion also asserted a separate Fourth Amendment violation with regard to photo evidence; that claim was abandoned and is not relevant to this appeal. (R. 24:3.)

14.) Vanderlinden testified that the information West Milwaukee Police had about Bourgeois at the time of entry was that "he may be in possession of a stolen 9-millimeter handgun and that he has PTSD and issues with drug use." (R. 101:7.) He testified that officers arrived at the hotel at "like 1:40 in the morning" on July 12, 2016, learned that Bourgeois had checked in, and went to his room with a key card provided by the front desk. (R. 101:8, 9, 10.) The key card did not open the door because it was locked with a deadbolt. (R. 101:9, 21.)

Vanderlinden testified that the officers "decided to start knocking on the door and identifying [themselves]." (R. 101:9.) Officers knocked for "several minutes" and were "louder and louder" until a person in a neighboring hotel room came into the hallway to complain about the noise. (R. 101:9–10.) When Bourgeois did not respond, Vanderlinden returned to the front desk and told hotel staff he was "worried something might be wrong with [Bourgeois] because there's no response." (R. 101:10.) Officers obtained a master key. (R. 101:10.) With the master key, officers were able to open the door to the room a few inches, but a chain lock prevented the door from opening further. (R. 101:10.) Vanderlinden testified that, using a flashlight, he could see Bourgeois with "his eyes open, just staring towards the door" while lying on the bed. (R. 101:11.)

He testified that Bourgeois "finally answered" the police, asking what they wanted and why they were there. (R. 101:11.) Vanderlinden testified that they "talked him into coming to the door" and asked him "numerous times" to open the door. (R. 101:11.) He responded by asking what they needed and telling them to leave. (R. 101:11.) When Vanderlinden told him, "just open the door and talk to us," Bourgeois answered, "that's not going to happen" and walked away from the door. (R. 101:12.)

Vanderlinden testified, "At this point I decided we're going in. I didn't know if he was going to retrieve the gun. . . . I was worried about him and us, so I shouldered the door

open." (R. 101:12.) The officers then "got a hold" of Bourgeois, who was "struggling." (R. 101:12.) Vanderlinden testified that "it took the 3 of [them] to get handcuffs on him." (R. 101:12.) After Bourgeois was handcuffed, the officers searched for the gun and found it in the sheets on the bed. (R. 101:14.)

On cross-examination by counsel for Bourgeois, Vanderlinden agreed that Bourgeois had nothing in his hands when he came to the door and that until Bourgeois turned away from the door, he "hadn't done anything . . . that would sort of alarm [the officers]." (R. 101:23.)

The parties' arguments.

At the close of the evidence, the State argued that the "the information that [officers] had is that Mr. Bourgeois was possibly armed with a stolen handgun, that he was suffering from PTSD, and also, was apparently, abusing drugs or having some issue with drugs." (R. 101:31.) The State argued that it was relying on the exigent circumstances exception to the warrant requirement, which was satisfied here because the known information "caus[ed] concern for Lieutenant Vanderlinden when he arrived at the hotel as to his safety and the safety of Mr. Bourgeois." (R. 101:31.) The State argued that the fact that "there was no response whatsoever from the room," caused more concern that "something was amiss, and that perhaps Mr. Bourgeois was in some type of medical or mental health distress, and possibly, presenting a safety issue for himself or others." (R. 101:32.) The State argued that when Bourgeois "turn[ed] around and start[ed] retreating back into the room," Vanderlinden did not know where Bourgeois was going or what he was going to do, and "obviously, [had] concerns for his safety . . . and the safety of Mr. Bourgeois, knowing that there was a gun reportedly in the room." (R. 101:32–33.)

Bourgeois argued that "it was the police that created those exigent circumstances, if any in fact existed."

(R. 101:34.) He noted that when police arrived, "there's a Do Not Disturb sign on the door. The room is dark. It's quiet." (R. 101:35.) He argued that the failure to answer the door to police under those circumstances "doesn't somehow create an exigent circumstance" that would justify forced entry, physical restraint, and a search of the room and his belongings. (R. 101:35–36.)

The parties submitted supplemental briefing following the hearing. (R. 25–27.)

The circuit court's denial of the motion.

At a decision hearing, the circuit court made the following findings of fact relevant to the suppression issue. The circuit court first reviewed the information shared by the Mukwonago police and the events leading up to and including the entry, arrest and search. (R. 102:2–6.) The circuit court found that in the presence of the police, Bourgeois "didn't do anything overt" and there was "no testimony that he threatened the police or . . . threatened harm to himself at that time." (R. 102:7.)

As for the application of the legal standard for exigent circumstances, the circuit court first considered whether the circumstances presented a threat to the safety of a suspect or others. (R. 102:10.) The court concluded that they did:

> [T]he information [police] had was that – one, that he was suffering from mental health issues, PTSD, potentially depression, that he had drugs, that though may be appropriate to treat the conditions, can also be subject to abuse. . . . And most importantly, that [he] may have had a stolen firearm which creates a very real risk of danger, both to him, as well as . . . the law enforcement . . . that were able to look in the room and were simply outside the door.

(R. 102:10.)

The circuit court concluded that "given all of that," as well as the fact that the gun was ultimately found in the bed

where Bourgeois had been lying, "exigent circumstances did exist." (R. 102:10–11.)

The circuit court next concluded that the exigent circumstances "were not created by the West Milwaukee Police Department." (R. 102:11.) The circuit court concluded that the police "reacted" to information they had been given and, in large part, confirmed. (R. 102:11.) The circuit court reasoned that "[u]nder the circumstances, their choice would have been either to have left . . . or . . . they could have requested a warrant which would take some time to get. Or react as they did, out of concern for either the safety of Mr. Bourgeois or themselves." (R. 102:11.) The circuit court concluded that taking the time to obtain a search warrant "would have certainly, allowed for Mr. Bourgeois to have done any number of things, including potentially, harm them, potentially harm himself." (R. 102:12.) Accordingly, the circuit court denied the motion to suppress. (R. 102:13.)

A jury found Bourgeois guilty on two counts.

Following a two-day trial, a jury found Bourgeois guilty of threatening a law enforcement officer and theft of the gun. (R. 51; 53.) The jury found Bourgeois not guilty of seven other charges. (R. 52; 54–59.) For Count 1, threatening a law enforcement officer, the circuit court withheld sentence and imposed four years' probation, with 90 days of imposed and stayed condition time. (R. 67:1.) For Count 3, the gun theft, the circuit court imposed a fine of five dollars and court costs. (R. 114:20.)

Bourgeois moved for postconviction relief.

Bourgeois moved for postconviction relief. (R. 76.) He argued that the circuit court had erred in denying the pretrial suppression motion because it had applied the wrong legal test and "clearly based [its] decision to deny the motion to suppress . . . on the emergency assistance test" rather than the test for exigent circumstances. (R. 76:10.) He argued that

the circuit court's findings indicated that there was neither an "immediate need to assist Bourgeois" nor any evidence justifying "an immediate entry" and therefore the warrantless entry was unjustified. (R. 76:10–11.) He asked the postconviction court to grant the suppression motion and exclude all evidence obtained in the search "from . . . a new trial on Count 3," the gun theft charge.[3] (R. 76:16.)

The circuit court denied Bourgeois' motion. (R. 81:1–2.)

This appeal follows. (R. 82:1.)

ARGUMENT

The circuit court correctly concluded that exigent circumstances not of the officers' making existed to justify the warrantless search.

A. Standard of review.

When a defendant appeals an order denying a motion to suppress, a question of constitutional fact is presented. *State v. Hughes*, 2000 WI 24, ¶ 15, 233 Wis. 2d 280, 607 N.W.2d 621. The reviewing court must "uphold a circuit court's findings of fact unless they are clearly erroneous" but "then independently apply the law to those facts *de novo*." *Id.*

B. Principles of law.

Warrantless entry.

"A police officer's warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution." *Hughes*, 233 Wis. 2d 280, ¶ 17 (footnote omitted). "The protection afforded

[3] He also sought to vacate the conviction on Count 1, threatening a law enforcement officer, on the grounds that it was not supported by sufficient evidence. (R. 76:14–15.) He has not pursued that claim on appeal.

by these provisions extends to hotels and motels as well as to homes." *State v. Munroe*, 2001 WI App 104, ¶ 7, 244 Wis. 2d 1, 630 N.W.2d 223.

The exigent circumstances exception.

However, "[a] warrantless search does not violate the Fourth Amendment of the United States Constitution or Article I, Section 11 of the Wisconsin Constitution if the search is conducted with consent or is justified by exigent circumstances." *State v. Reed*, 2018 WI 109, ¶ 7, 384 Wis. 2d 469, 920 N.W.2d 56 (footnotes omitted). "[U]nder the exception for exigent circumstances, a warrantless search is allowed when 'there is compelling need for official action and no time to secure a warrant.'" *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019) (citation omitted).

A situation where there is "a threat to the safety of a suspect or others" is one of the "four well-recognized categories of exigent circumstances that have been held to 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 State bears the burden of proving the existence of exigent circumstances." *Id.*

"The exigent circumstances inquiry is limited to the objective facts reasonably known to, or discoverable by, the officers at the time of the entry." *State v. Kiekhefer*, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997). "When a police officer is confronted with two reasonable competing inferences, one that would justify the search and another that would not, the officer is entitled to rely on the reasonable inference justifying the search." *State v. Mielke*, 2002 WI App 251, ¶ 8, 257 Wis. 2d 876, 653 N.W.2d 316.

A reviewing court "do[es] not apply hindsight to the exigency analysis; [it] consider[s] only the circumstances known to the officer at the time he made the entry and

evaluate[s] the reasonableness of the officer's action in light of those circumstances." *Richter*, 235 Wis. 2d 524, ¶ 43.

"[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant . . . or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

C. The warrantless entry was justified by the exigency of a threat to the safety of Bourgeois or others.

The warrantless entry into Bourgeois's hotel room was justified by the circumstances because there was "a threat to the safety of a suspect or others." *See Richter*, 235 Wis. 2d 524, ¶ 29. The "objective facts reasonably known to" Vanderlinden were that Bourgeois was a military veteran who had PTSD and "issues with drug use," and that he "may be in possession of a stolen 9-millimeter handgun." (R. 101:7.) *See Kiekhefer*, 212 Wis. 2d at 476. In addition, Vanderlinden had been informed that Bourgeois was staying at the Best Western near the VA Hospital even though he did not have an appointment there for two weeks. When Vanderlinden was asked to explain his thinking going into the situation, he answered, "I was a little worried about officer safety when knocking on the door right away. . . . If he was in possession of a stolen weapon, didn't have an appointment at the V.A. for 2 weeks and had PTS and drug issues, kind of wondered why he was in there with a weapon." (R. 101:9.)

This Court "consider[s] only the circumstances known to the officer at the time he made the entry and evaluate[s] the reasonableness of the officer's action in light of those circumstances." *Richter*, 235 Wis. 2d 524, ¶ 43. The possibility that Bourgeois may not have harmed anyone including

himself if the police had delayed their entry does not defeat the reasonableness of the officer's actions. Here, the inference that there was a threat to Bourgeois's safety or the safety of others in the hotel—including the police themselves—is a reasonable one regardless of how the situation looks in hindsight. *See Rodriguez*, 497 U.S. at 185. Vanderlinden was thus entitled to rely on the inference to support the search. *See Mielke*, 257 Wis. 2d 876, ¶ 8.

Our supreme court has affirmed warrantless entries based on such inferences, recognizing that "[i]n the course of investigating crimes in progress and pursuing fleeing suspects, police officers are often called upon to make judgments based upon incomplete information." *Richter*, 235 Wis. 2d 524, ¶ 40. Where "[t]he exigency at issue . . . is the threat to physical safety," police officers are not bound to wait for perfect information:

> To require a police officer in this situation to have affirmative evidence of the presence of firearms or known violent tendencies on the part of the suspect before acting to protect the safety of others is arbitrary and unrealistic and unreasonably handicaps the officer in the performance of one of his [or her] core responsibilities.

Id. ¶ 40.

The exigent circumstances warrant exception is thus intended to give officers authority to "act[ ] to protect the safety of others" in certain cases even before they have all the "affirmative evidence." *Richter*, 235 Wis. 2d 524, ¶ 40.

Similarly, in *State v. Kirby*, 2014 WI App 74, ¶ 18, 355 Wis. 2d 423, 851 N.W.2d 796, this Court considered an officer's warrantless entry into an apartment during an investigation of a fight. While in the apartment talking with five men, the officer received a phone call informing her that there was a sawed-off shotgun and a handgun inside a black backpack in the apartment, and she noticed the backpack on

a loveseat. *Id.* ¶ 9. Kirby challenged the warrantless search of the apartment, but this Court concluded that "exigent circumstances that developed during this investigation justified the warrantless search and seizure of the backpack with the sawed-off shotgun in it." *Id.* ¶ 18. This Court added, "Importantly, even had the officer been *outside* the threshold of the apartment instead of having crossed over it, this new information *would have created the same exigent circumstances justifying entry into the apartment* to see if there was a black backpack . . . like the one described." *Id.* ¶ 18 (emphasis added).

The holdings and reasoning in *Kirby* and *Richter* support the conclusion that Vanderlinden's decision to cross the threshold into Bourgeois's hotel room without first obtaining a warrant was supported by exigent circumstances.

D. Bourgeois's arguments are unpersuasive because they fail to apply the relevant law.

Bourgeois argues that the circuit court's conclusion that exigent circumstances existed was "not justified or supported by the evidence or the relevant law." (Bourgeois' Br. 12.) His arguments are unpersuasive because they are based on cases that deal with warrant exceptions that are not applicable to these facts.

First, he relies on *Mitchell* and *Richards*, both OWI warrantless blood draw cases in which the exigent circumstances are caused by the risk of destruction of evidence, namely the dissipation of alcohol in the bloodstream over time. *See Mitchell*, 139 S. Ct. at 2536; *State v. Richards*, 2020 WI App 48, ¶ 20, 393 Wis. 2d 772, 948 N.W.2d 359. Comparing the facts here to those cases, he argues that "[t]here was no injured party for the police to deal with at the Best Western." (Bourgeois's Br. 13.) True; the exigent circumstances here were caused by other facts.

He also relies on *Boggess*, an "emergency assistance" or "emergency aid" warrant exception case that involved an intervention to rescue severely abused children. *State v. Boggess*, 115 Wis. 2d 443, 447, 340 N.W.2d 516 (1983) (applying "the emergency rule exception" to the warrant requirement). In that case our supreme court upheld an officer's warrantless entry to a home on the grounds that "a reasonable person would have believed that there was an immediate need to render aid or assistance to the children due to actual or threatened physical injury, and that there was an immediate need for entry into the home to provide aid or assistance to them." *Id.* at 445.

Those cases bear no resemblance to a threat-to-safety exigent circumstances analysis. The State has never argued that the warrantless entry was justified by the destruction-of-the-evidence exigency or the emergency rule exception. This is a threat-to-safety exigent circumstances case, but Bourgeois makes no attempt to address cases such as *Richter* and *Kirby* that apply a threat-to-safety exigency analysis.

Finally, Bourgeois erroneously states that the circuit court "was presented with three, limited facts about what officers knew before they forcibly entered," and the three facts were Bourgeois's PTSD diagnosis, the fact that he might possess a stolen gun, and "that at some unknown time in the past he had expressed suicidal thoughts." (Bourgeois's Br. 15.) That is not true. The transcript of the suppression motion hearing makes no mention whatsoever that officers were aware of prior reports of suicidal ideation or threats. The third fact known to officers was that Bourgeois had "issues with drug use." Contrary to Bourgeois's argument, there is no evidence in the record that at the time of the warrantless entry, the officers knew Bourgeois had a history of suicidal ideation or relied on that. Bourgeois's efforts to distinguish *State v. Horngren*, 2000 WI App 177, 238 Wis. 2d 347, 617 N.W.2d 508 (applying the community caretaker doctrine in a

suicide threat case), are without relevance because that case is also inapposite.

E. Any remedy is limited to a new trial on Count 3, the gun theft charge.

In his brief to this Court, Bourgeois states without explanation that if he prevails on his suppression motion argument, his "*convictions* should be vacated" and asks that this Court direct that "all fruits of the illegal entry and arrest and seizures be excluded from evidence, if there is a new trial on either or *both counts*." (Bourgeois's Br. 17 (emphasis added).)

If this Court concludes that the warrantless entry was not justified by exigent circumstances, Bourgeois is entitled to remand with an order to grant the suppression motion and a new trial on the gun theft charge without the unlawfully obtained (as alleged) evidence. Because Bourgeois abandoned his challenge to his conviction on the charge of threatening a law enforcement officer, that conviction is unaffected by any decision on exigent circumstances. He has forfeited any relief from that conviction on direct appeal.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Bourgeois' postconviction motion.

Dated this 8th day of April 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,682 words.

Dated this 8th day of April 2021.

Electronically signed by:

s/ Sonya K. Bice
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 8th day of April 2021.

Electronically signed by:

s/ Sonya K. Bice
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