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STATE OF WISCONSIN

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

D I S T R I C T II

Case No. 2020AP001808-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC D. BOURGEOIS,

Defendant-Appellant.

Appeal of Final Order Entered October 26, 2020 Denying Motion for Postconviction Relief, the Honorable Laura Lau Presiding, in Waukesha County Circuit Court Case No. 16-CF-929

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Introduction

Whichever exigent circumstances theory is advanced by the State to justify the warrantless, police entry into Bourgeois' hotel room -- whether it be an emergency-assistance theory or a threat-to-safety theory, the facts simply did not support the circuit court's ruling in this case. The prosecution did not meet its "heavy burden" to prove "by clear and convincing evidence" that it was reasonable for the police to have made the unilateral decision to not request a search warrant. *State v. Kennedy*, 2014 WI 132, ¶ 34, 359 Wis.2d 454, 856 N.W.2d 834; *State v. Hay*, 2020 WI App 35, ¶ 11, 946 N.W.2d 190. The circuit court's ruling was inconsistent with the Fourth Amendment standard quoted in *State v. Smith*, 131 Wis. 2d 220, 234-35, 388 N.W.2d 601, 607-08 (1986), as stated in *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984): "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant."

The State cannot convincingly argue now, and could have not proved in the circuit court, that officers faced "real immediate and serious consequences," *as they stood outside Bourgeois' hotel room door*, and decided more than a half hour later to break down the door and enter, without first contacting a night-duty judge to get a warrant. Indeed, the facts show that there was no real, or immediate threat to officer safety, or to Bourgeois' safety, and there was no real, or immediate need to provide Bourgeois with emergency assistance. The officer who made the decision to forcibly enter the hotel room admitted in his testimony that, even up to the point in time when he was able to use a master key to

open the door and look inside the room, Bourgeois "*real*ly hadn't done anything in [his] presence that would sort of alarm [him]." (R. 101: 25). (Emphasis added).

Yet the State now overreaches when it argues that, by breaking into the hotel room, police had reasonably reacted to a "threat to Bourgeois' safety or the safety of others." (State's Response Br. 10). To the contrary, the evidence *clearly and convincingly* showed that there was no real and immediate threat:

> [*I*]*t's clear* that at least in terms of their presence, he didn't do anything overt. . . . There's no testimony that he threatened the police or even if he necessarily threatened harm to himself at that time. But that he just simply wasn't going to talk to them and wasn't going to release the chain.

(Emphasis added) (A. App. 109).

Lastly, the officer who forced open the hotel room door gave no testimony *at all* about having explored the feasibility of a search warrant. So there simply was no factual foundation for the circuit court to have ruled that the officer acted reasonably when he arrogated to himself the decision to forego a warrant. Instead, the circuit court tersely observed, without stating any objective measure of the duration that likely would have transpired, that obtaining a search warrant "would take some time." (A. App. 113-114).

II. The State's arguments did not mention other relevant principles of law which should have governed the judicial determination of whether exigent circumstances existed and justified a warrantless entry.

While the State refers to federal and state constitutional principles about how the exception to the warrant requirement applies if exigent circumstances exist

(State's Response Br. 7-9),[1] it omits other important principles.

The point of requiring judicial approval before warrantless entries take place is to check against overzealous police speculation that criminality or danger may be occurring in suspicious situations. Hence, our state and federal constitutions generally require that police entries be preceded by warrants where probable cause has been found "only by 'a neutral and detached magistrate … instead of a law enforcement officer who is engaged in the often competitive enterprise of ferreting out crime.'" *State v. Gralinski*, 2007 WI App 233, ¶15, 306 Wis. 2d 101, 113, 743 N.W.2d 448, 454 (citations and internal quotation marks omitted).

While the State's brief acknowledges that the State bears the burden of proving the existence of exigent circumstances (State's Response Br. 8), it does not acknowledge how the "heavy burden" of proof is embodied in the requirement that the prosecution must "show by clear and convincing evidence that exigent circumstances justified the officer's lack of effort to secure a warrant." *State v. Hay*, 2020 WI App 35, at ¶22.

[1]The State also advances its preference that Bourgeois' appeal be decided by consulting "threat-to-safety," exigent circumstances cases rather than "emergency assistance," exigent circumstances cases (State's Response Br. 11-13). Bourgeois acknowledges that the State's preferred approach may be more suitable. But it should be noted that Bourgeois' opening brief discussed the "emergency assistance" line of cases because Bourgeois had not responded to louder and louder knocking and announcements that police were present, and the lead officer testified that "I'm worried something might be wrong with him" and that, given his PTSD, "we were concerned about him." (R. 101: 10-11).

Most importantly, the circuit court itself neglected to mention that the evidence must be clear and convincing. Nowhere in its ruling does the circuit court state that it was applying that standard. Instead, the court overlooked how the lead officer's tentative expressions of "concern" and "worry" undercut whether exigent circumstances existed.

III. Because it was quiet at Bourgeois' hotel room between 1:40 and 2:20 a.m. (except for police activity outside his doorway), the prosecution failed to show by clear and convincing proof that a real and immediate "threat to safety" existed.

A. There was neither testimony, nor documentation, nor even a guestimate as to how long it would have taken to obtain a Milwaukee County court search warrant.

Although it did not say so, the circuit court would have had to find that there was clear and convincing evidence that officers had to enter immediately, or else someone was going to be hurt by Bourgeois. Such a finding would be unfounded because the police had waited outside the door in the hallway for thirty to forty minutes before breaking in (R. 101: 10, 15). The fact that the police could wait that long without incident, in the middle of the night at a hotel with sleeping guests, undercuts the argument that a warrant did not need to be considered because immediate police entry somehow was urgent.

In any event, Wisconsin cases are not very forgiving: the prosecution must make a record and present some evidence to back up a claim that an attempt at getting a search warrant would have taken too long, given the circumstances. See, e.g., *State v. Smith*, 131 Wis. 2d at 234-35 (fact that suspect could not be aroused after police loudly banged on his

apartment door "should have dispelled any fears they might have had that the safety of others was in any way compromised."

A recent noteworthy case where this Court reached a similar conclusion is *State v. Hay*, 2020 WI App 35, where the Court emphasized that the record was devoid of proof about whether a warrant could have been obtained to precede a blood draw from an OWI suspect:

> When questioned by the circuit court, [the officer] provided scant reason why he could not have filled out arrest-related paperwork, such as preparing a warrant affidavit, ... [T]here was no evidence presented that, in this particular instance, the law enforcement investigation would have been compromised in any way . . . .

2020 WI App 35, ¶18. Relying on *Missouri v. McNeely*, 569 U.S. 141 (2013), the Court observed:

> In this day and age, it may well be that [the officer] could have completed his portion of the warrant application process from his squad car via computer or cell phone. *See McNeely*, 569 U.S. at 155 ("[T]echnological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency.").

2020 WI App 35, ¶20. Hence, both the Supreme Court in *McNeely*, and the Wisconsin courts in *Smith* and *Hay* have made it clear that the police and prosecution must show that technological means were not available to get a warrant in timely fashion to justify a warrantless incursion.

In *Smith*, the Court emphasized the efficient availability of electronic warrants in Milwaukee County procedures:[2]

[2] Wis. Stats. § 968.12(3) also provided: "A search warrant may be based upon sworn oral testimony communicated to the judge by

> The concern that there would be undue delay because a warrant would be difficult to obtain on the evening in question has not been demonstrated in the record. According to testimony . . . district attorneys are on call for the police after working hours, and normally they can be reached. During the hours of this investigation until the time of the arrest of Smith at 9:00 p.m., Milwaukee county had administratively designated duty judges who were available for the issuance of warrants.

State v. Smith, 131 Wis. 2d at 231.

In *Hay*, 2020 WI App 35, ¶21 n.4, this Court noted that "the State failed to present evidence as to what steps would have been involved in the warrant application process or how long such steps, including filling out the warrant application, would have taken." Also, in *State v. Guard*, 2012 WI App 8, ¶ 36, 338 Wis.2d 385, 808 N.W.2d 718, this Court noted a similar lack of proof: "The record does not provide any reason why police . . . , could not have obtained a warrant."

Here, when West Milwaukee officers learned of Bourgeois' likely hotel room location, all was quiet at about 1:40 a.m. and all remained quiet (in the room, that is) as time passed to 2:30 a.m. Even then, once he came to the door, Bourgeois was not aggressive or belligerent in word or tone; instead, he just returned to his bed. The teletype that eventually led the police to that location contained no information that expressed an immediate urgency. The lead officer did not testify that officers were on "high alert" because of safety concerns. Rather, he repeatedly described that his focus arose out of a "concern" and "worry" (R. 101: 9, 10, 11, 33), while he also expressed uncertainty, stating Bourgeois "*may* be in possession of a gun." (R. 101: 7, 9, 20).

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telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection."

(Emphasis added.). As the courts in *State v. Smith* and *State v. Guard* pointed out, officers "could have staked out the premises, covering all exits, and then procured a warrant," but the "record does not provide any reason why police. . . , could not have obtained a warrant."

B. The State's cited cases are not persuasive because their facts, which supported findings of a safety exigency, were not present in Bourgeois' case.

The State discusses two cases in particular to argue that a threat-to-safety exigency existed which excused the police entry without a warrant. (States' Response Br. 9-12). The cases are distinguishable for important reasons.

It was the conduct of an intruder in *State v. Richter*, 2000 WI 58, 235 Wis. 2d 524, 612 N.W.2d 29 that provided a sufficient basis for the police to enter a trailer at night with several occupants still sleeping. *Richter* is primarily based on the theory that "hot pursuit" created an exigency for immediate entry. It was fact that the intruder had been followed from an unlawful entry crime scene and had apparently entered another, where unsuspecting people were sleeping, that created "a situation fraught with potential for physical harm if something was not immediately done to apprehend the suspect." *Richter*, 2000 WI 58, ¶ 41. "In any break-in situation involving an occupied home there is potential for harm to the intruder as well as the occupants of the home." *Id*. at n.7.

In *State v. Kirby*, 2014 WI App 74, 355 Wis. 2d 423, 851 N.W.2d 796, while she was questioning several men at an apartment door about a fight, a police officer received information that a shotgun was hidden in a backpack in the

apartment where most of the men still were inside. This Court found her entry and seizure of the weapon were constitutional because officer safety, an exigent circumstance, gave justification for the officer to locate the backpack in the apartment. . . . " *Id.* at ¶1.

The key facts in those two cases simply were not present in Bourgeois' case. Here, the police had not continuously tracked Bourgeois in hot pursuit from a crime scene into a private living area occupied by others, as in *Richter*, and the police had not been given firm information that a firearm would be found in the room before they broke into it, as in *Kirby*.

IV. The firearm that was illegally seized from Bourgeois' hotel room was the precipitating fact that led to Bourgeois' second arrest, and to the filing of Count 3; on remand, the circuit court will need to determine whether the second arrest was tainted by the prior seizure.

Should this Court conclude that the record in the circuit court is insufficient to support the finding that exigent circumstances existed, it will be appropriate to remand this case for further proceedings consistent with this Court's opinion. See, e.g., *State v. Edler*, 2013 WI 73, ¶1, 350 Wis. 2d 1, 4, 833 N.W.2d 564, 565 ("The statements Edler made . . . must be suppressed. We remand to the circuit court for further proceedings consistent with this decision."); *State v. Ultsch*, 2011 WI App 17, ¶30, 331 Wis. 2d 242, 254-55, 793 N.W.2d 505, 511 ("[W]e reverse the decision of the circuit court denying Ultsch's motion to suppress evidence and remand to the circuit court for further proceedings.").

On remand, the prosecution no doubt will likely dismiss that Count 3 because the firearm evidence must be

suppressed. It remains to be decided whether the gun evidence tainted the basis for Bourgeois' second arrest and Count 1 (as to which there was proof that he threatened the arresting officer).[3] See, *Ultsch*, 2011 WI App 17, ¶30 n.6 ("The parties did not brief and we do not address the precise consequences of reversing the circuit court's suppression decision.").

The State contends that any relief from this Court should be limited to Count 3 because "Bourgeois abandoned his challenge to his conviction [on Count 1] . . . and has forfeited any relief from that conviction on direct appeal." (States' Response Br. 13). This is surprising given that the preceding paragraph noted how Bourgeois had requested that *both* convictions be vacated because he sought suppression of the gun evidence and "all fruits." Indeed, Bourgeois' filings in the circuit court (R. 24 and 25) made it clear in the concluding requests for relief that he sought to suppress any derivative evidence for use "in this matter," which necessarily included both counts.[4] The State's contention that Bourgeois forfeited, on remand, his right to challenge his second arrest, because it was derived from and arguably tainted by the prior gun seizure, is meritless.

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[3] The exclusionary the rule "applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the State shows sufficient attenuation from the original unlawful search to dissipate that taint. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1.

[4] The State (States' Response Br. 7, n. 3) misinterprets the requested relief in Bourgeois' inartful postconviction motion request for relief: to clarify, Bourgeois meant to ask that Count 1 "be vacated" because of the illegal police entry and seizure, and then to ask, once suppression relief is applied on remand, that there be a dismissal of Count 1 due to a lack of untainted evidence.

CONCLUSION

Bourgeois therefore respectfully requests that this Court declare that: (1) the record did not support an exigent circumstances finding; (2) evidence obtained from the hotel room entry should therefore be suppressed; and (3) the convictions on both counts should be vacated and the case remand for further proceedings consistent with this Court's opinion.

Dated at Milwaukee, Wisconsin, May 3, 2021.

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) for a brief produced with proportional serif font. The length of the brief is 2,473 words.

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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 the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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

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