STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. **Appeal Nos. 22-AP-1855**
22-AP-1856
22-AP-1857

RICHARD QUINLAN,

Defendant-Appellant.

ON APPEAL FROM THE DENIAL OF A MOTION TO SUPPRESS EVIDENCE AND A FINDING OF GUILT IN THE CIRCUIT COURT FOR JACKSON COUNTY ON SEPTEMBER 3, 2022, CASE NOS. 19-FO-20-, 19-FO-21, 19-FO-22, THE HONORABLE ANNA BECKER PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. A Knock And Talk Investigation Does Not Eviscerate The Valid Consent Required To Enter The Quinlan Cabin.

A. "Knock and Talk" Investigation.

The State argues that Warden Haas testified that the reason he sought to enter the Quinlan cabin was to conduct a "knock and talk interview." Curiously it cites pages 22 and 23 of Appellant's Brief for this proposition, however at no time did Warden Haas ever testify that this was a "knock and talk" interview. The State never argued at the motion hearing that it was a "knock and talk" interview and never argued that knock and talk law was the appropriate legal standard for the trial court to consider.

Consent searches were approved by the United Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) as "a constitutionally permissible and wholly legitimate aspect of effective police activity." "Consent searches are part of the standard investigatory techniques of law enforcement agencies." Id. at 231-232. "A warrantless entry into one's home by police is presumptively prohibited by both the United States and Wisconsin Constitutions." State v. Phillips, 2009 WI App. 179 ¶7 citing State v. Hughes, 2000 WI 24 ¶17. The police do not need probable cause or a warrant to conduct a knock and talk at a residence. Even though the State now argues for the first time that the Warden's knock on the door of the Quinlan cabin was a knock and talk investigation, even assuming arguendo that it was, it was not a valid "knock and talk." A "knock and talk" encounter is a powerful investigative technique often used to obtain consent to enter a residence, it does not eviscerate the consent required for a warrantless entry. It allows law enforcement to enter an area of the home, the curtilage, that is open to visitors. In

Florida v. Jardines, 569 U.S. 1 (2013), the Court held that the knock and talk is constitutionally permissible as an exception to the warrant requirement. Jardines recognized that an "implicit license" exists which allows visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. at 8. However, in this case the area of the curtilage upon which law enforcement intruded was not implicitly open to use by the public. In fact, the initial entry into the driveway area of the Quinlan property was posted with no trespassing signs. (R. 36-38) (R. 43; p. 28-31) (A-39-42). There was no implicit license for visitors or the public to enter onto the Quinlan property in the first instance as the trespassing signs acted as an affirmative revocation of any "implicit license" to enter. The State never argued at the motion hearing that law enforcement entry onto the Quinlan property was a "knock and talk" instead arguing "there was no search or seizure as a result of the entry into the residence." (R. 43; p. 9) (A. 20). Contrary to the State's argument the entry into the cabin implicated the Fourth Amendment and was in fact a search. The term "knock and talk" never appears in the transcript of the motion hearing. By failing to argue that this was a "knock and talk" investigation the State has effectively waived the argument on appeal.

In State v. Holt, 128 Wis.2d 110, 125 (Ct. App. 1985) the court held that a party seeking reversal cannot advance arguments on appeal that were not initially presented to the trial court. While Holt recognized that the rule seemed to disadvantage criminal defendants, since they are most likely to challenge court rulings, it cautioned that "[w]e will without hesitation apply the waiver rule against the state where the issue was not first raised by it at the trial court." Id. at 125; State v. Rogers, 539 N.W. 2d 897, 900 (Ct. App. 1995). By failing to raise the knock and

talk argument in the trial court Quinlan was prejudiced because he did not argue that the "knock and talk" investigation was invalid because law enforcement trespassed upon the curtilage. Here, the no trespassing signs were intended to keep the public and visitors off the Quinlan property. There was no implicit license for visitors or others to enter the curtilage, to the contrary they were warned that they were trespassing and effectively told to stay off of the property. This court should apply the Holt rule and conclude that the State has waived the "knock and talk" argument on appeal and analyze whether it met its burden of proving that valid consent existed to enter the cabin.

B. Valid Consent Was Required to Enter the Cabin.

Consent to enter a home is only valid when it is given freely and voluntarily by a person with authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). The State has the burden of proving consent by clear and convincing evidence. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Valid consent was required for the wardens to enter the Quinlan cabin, yet the court never addressed the consent issue and whether Heather Bolin had actual or apparent authority to consent to the entry. Instead, the court only determined whether Quinlan was in custody and whether his statements were voluntary or not. He never argued that his statements were involuntarily made. The State asserts that the trial court did not analyze the motion to suppress by applying the reasonable person standard for arrest, but it later contradicts this argument when it states:

> "The trial court stated that the issue was whether the person who was being asked questions would feel free to leave."
>
> State's Brief at 6.

That is indeed the legal standard for custody which triggers Miranda. A suspect is in custody

when the suspect is "deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Put another way, custody is the equivalent of "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Thompson v. Keohene, 516 U.S. 99, 112 (1995); State v. Lonkoski, 2013 WI 30, ¶6. In considering the totality of the circumstances, "if a reasonable person would not feel free to terminate the interview and leave the scene," that suspect is in custody. Lonkoski at ¶6. Thus, the court's analysis hinged on whether Quinlan was in custody, not whether valid consent to enter existed. Its analysis was mistaken, and it applied the wrong legal standard.

The State further contends that no search occurred, and Warden Haas had no intent to search the premises. State's Brief at 7. However, there was a search since law enforcement's entry into a home is a search implicating the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. State v. Boggess, 115 Wis.2d 443, 449 (1983). The warrantless intrusion into Quinlan's cabin can be challenged as a violation of the Fourth Amendment. Illinois v. Rodriguez, 497 U.S. 177, 194 (1990) (dissenting opinion).

C. Erroneous Exercise of Discretion.

Even if this court finds that Warden Haas was engaged in a "knock and talk," and that the State has not waived the argument the trial court still erred by not addressing whether Heather Bolin had either actual or apparent authority to consent to the entry and whether a valid exception to the warrant requirement existed allowing lawful access by law enforcement. The record does not establish Bolin's mutual use of the property or "common authority" over it. The only possible connection to the property that the State established at the motion hearing was that

Haas recognized her, after they entered the premises, as Quinlan's girlfriend. That is insufficient and Illinois v. Rodriguez required more. The police are not entitled to simply accept at face value every third-party assertion of authority, instead they must make further inquiries where a reasonable person would question the validity of the assertion of authority. Here, Warden Haas made no inquiries nor did the court determine whether his reliance on the minimal information he knew about Heather Bolin's relationship to the property at the time of entry was reasonable. Illinois v. Rodriguez at 188. In Illinois v. Rodriguez, 497 U.S. 181-82 (1990) the Court determined that a girlfriend who previously lived in the defendant's apartment, had a key and would occasionally spend overnights there did not have actual authority to consent to a search of the apartment. The former girlfriend in Rodriguez had more significant connections to the residence then Bolin did in this case. Like the father-in-law in State v. Kieffer, 217 Wis.2d 531 (1998) Haas made insufficient inquiry into Bolin's connection to the property and therefore could not reasonably rely upon her having actual or apparent authority to consent to enter. While both Rodriguez and Kieffer involved an actual search of the premises, the focal point of the Kieffer analysis, like Rodriguez, was that the police made insufficient inquiries to establish lawful consent to enter. Here, the trial court failed to determine whether the facts known to Haas at the time would warrant him to reasonably rely on Heather Bolin's common authority over the property at the time he entered the cabin. The trial court failed to make any factual findings regarding third party consent and failed to apply the facts adduced at the hearing to an objective standard under the totality of the circumstances. It failed to determine whether either actual or apparent authority existed or whether the State had met that burden of lawful consent by clear and convincing evidence. Illinois v. Rodriguez at 181. It further failed to address any

of the factors set forth in State v. Sobzak, 2013 WI 52, ¶20 to determine whether actual or apparent authority existed.

CONCLUSION

The State bears the burden of establishing clearly and convincingly that third party consent existed for the entry into the Quinlan cabin. The record in this case fails to establish that Heather Bolin had "common authority" over the property and either actual or apparent authority to allow entry into the cabin. The trial court erroneously exercised its discretion when it failed to apply the facts in the record to the correct legal standard of consent, instead focusing on whether Richard Quinlan was free to leave once the wardens entered the home and whether his statements were voluntary or not. Despite the State's argument to the contrary the court applied the legal standard for custody, i.e. arrest, in determining the voluntariness of Quinlan's statements. Respectfully, the court failed to engage in a rational reasoning process using the correct standard of law regarding consent and therefore erroneously exercised its discretion.

For the first time on appeal the State argues that Warden Haas was engaged in a "knock and talk" interview. The failure of the State to raise this argument in the trial court disadvantaged the defendant because he did not argue that the "knock and talk" investigation was invalid because the trespassing signs prohibited visitors and the public from entering the curtilage of the property and revoked any implicit license to enter. Parties must raise issues for the first time before the trial court and by failing to present the argument or issue before the court the party waives the right to assert the argument on appeal. Principles of efficient judicial administration support the application of this waiver rule against the State in its "knock and talk" argument. In the trial court the State argued that none of the case law cited in the defendant's

motion applied and that analyzing the issue under search and seizure law was the wrong legal analysis. This court should determine whether the trial court appropriately applied the facts adduced at the suppression hearing to the correct legal standard of consent.

The decision of the trial court denying the defendant's motion to suppress evidence should be reversed.

Respectfully submitted this 31st day of May, 2023.

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CERTIFICATION

Undersigned counsel hereby certifies that this appellate brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with the proportional serif font. The length of this brief is 2,585 words.

Electronically signed by:

Patrick J. Stangl

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 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 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.

Electronically signed by:

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