COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2879-CR **Cir. Ct. No. 2003CF5890**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY W. FREEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Anthony Freeman appeals from the judgment of conviction entered against him. He argues that the circuit court erred when it denied his motion to suppress evidence. Because we conclude that the circuit court did not err, we affirm.

¶2 Freeman was charged with one count of possession of more than forty grams of cocaine with intent to deliver, and one count of felony bail jumping. He moved to suppress the evidence the police obtained when they entered his residence, arguing that he did not consent to the entry. The circuit court found that Freeman did not consent but that there were exigent circumstances that justified the police entry. Consequently, the court denied the motion. Freeman then pled guilty to both counts. The court sentenced him to three years' initial confinement and three years' extended supervision on the first count, and one year's initial confinement and one year's extended supervision on the second count, to be served consecutively to each other and to another sentence already imposed.

¶3 At the suppression hearing, one of the police officers who arrested Freeman testified that he was part of a "knock and talk" team. This team investigated claims of suspected drug dealing by going to the homes, knocking on the door, and asking for consent to enter and to search. The officer testified that they had received three complaints about Freeman's home. The officer stated that they went to Freeman's home, knocked, and asked for consent to enter, which Freeman granted. Freeman and another witness testified that Freeman did not consent, and that he asked the police to leave once they had entered. The officer also testified that he smelled burning marijuana from the doorway and when he entered the apartment. Freeman and the other witness testified that they had not been smoking marijuana prior to the police entry. The police searched the residence and found marijuana as well as cocaine. The officers did not find any evidence of burning marijuana. The circuit court ultimately concluded that Freeman did not consent to the search of his home. The court denied the motion to suppress, however, concluding that the officers smelled burning marijuana before they entered. The court found that:

> The suggestion that they had smoked marijuana prior to – shortly before the arrival of the police and it had been consumed is in fact an accurate description of what had occurred, that the officers went to the bathroom immediately to see if any marijuana had been flushed down the toilet, that the smell of marijuana gives rise to exigent circumstances that allowed the officers to enter and not leave when they are asked to leave….

¶4 Freeman now argues that the circuit court erred when it denied his motion. Specifically, he argues that the State did not meet its burden of proving that the exigent circumstances existed. Our review of an order denying a motion to suppress evidence "presents a question of constitutional fact, which we review under two different standards. We uphold a circuit court's findings of fact unless they are clearly erroneous. We then independently apply the law to those facts *de novo*." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621 (citation omitted). To determine whether the warrantless entry into the private residence was lawful, we must answer two questions: "first, did the officers have probable cause to believe that [the] apartment contained evidence of a crime, and second, did exigent circumstances exist at the time of the entry to establish an exception to the warrant requirement?" ***Id.***, ¶18. "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Id.***, ¶21 (citation omitted).

¶5 In ***Hughes***, the supreme court considered a factual situation very similar to the one in this case. Responding to a call about trespassers, officers came to an apartment that they knew to be in an area of heavy drug activity. ***Id.***, ¶2. They were told that the trespassers had entered Apartment 306. ***Id.***, ¶3. They went to that apartment and as they stood outside, the door was opened. ***Id.***, ¶5. They were then confronted with "a very strong odor of marijuana coming from the

apartment," and the defendant's sister, who was surprised to see officers in full uniform standing outside the door. ***Id.*** The court concluded that the officers, at that point, had evidence of illegal activity and knew that their presence had been revealed to those inside the apartment, and consequently "were faced with a changed situation." ***Id.*** Knowing that the evidence might be destroyed, they entered the apartment. ***Id.*** The court concluded that the "unmistakable odor of marijuana coming from [the] apartment" provided the "fair probability" that contraband or evidence of a crime would be found in the apartment. ***Id.***, ¶¶21-22. Under these circumstances, including the officers' knowledge of drug activity in the area, and knowledge that trespassers had been seen entering the apartment, the court concluded that it was entirely reasonable for the officers to conclude "that evidence of illegal drug activity would probably be found in Apartment 306." ***Id.***, ¶23.

¶6 Having determined that the officers had probable cause, the court then considered whether exigent circumstances existed. ***Id.***, ¶24. The court concluded that the smell of marijuana gave rise to a reasonable belief that the drug was being consumed. ***Id.***, ¶26. The exigency then became the "possibility of the intentional and organized destruction of the drug by the apartment occupants once they were aware of the police presence outside the door." ***Id.*** The court concluded that the warrantless entry was valid. ***Id.***, ¶39.

¶7 The police in this case were faced with a similar situation. They came to the residence having received complaints of drug dealing in the building. They knocked on the door and announced themselves as police officers. The circuit court found that they smelled the odor of burning marijuana, and concluded that the officers faced the possibility that the evidence would be destroyed if they left the residence to get a warrant. The circuit court considered the testimony of

the various witnesses and made a credibility determination. We see no basis for disturbing the circuit court's factual findings. Based on these findings, we conclude that the circuit court properly found that there were exigent circumstances justifying the warrantless entry. Consequently, the circuit court properly denied the motion to suppress evidence. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.