COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP343 **Cir. Ct. No. 2004CV569**

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

CITY OF DELAVAN,

PLAINTIFF-RESPONDENT,

V.

ROGER STERKEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 BROWN, J.[1] Roger Sterken appeals from the trial court's judgment on the basis of two theories. First, Sterken argues that the evidence of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

marijuana and drug paraphernalia should have been suppressed because the police lacked probable cause to knock on his door before entering his home. Second, Sterken contends that the City of Delavan is not entitled to a trial de novo because the merits of the instant case were not fully litigated before the municipal court. We reject both arguments. The police officers did not need probable cause to knock on Sterken's door, and when they subsequently entered his apartment, exigent circumstances justified their entry. As to the trial de novo, we find that because the City of Delavan presented its case-in-chief and Sterken had the opportunity for rebuttal, though he chose not to use it, the municipal court had a trial on the merits. We affirm.

¶2 On December 24, 2003, a gas station attendant called the police to report that a customer "reeked of burnt marijuana" and was potentially an intoxicated driver. The police traced the automobile to a Randy Sterken. When they arrived at Randy Sterken's address, they saw the vehicle that the gas station attendant had reported and observed that someone must have recently operated the vehicle because the engine compartment was warm. Once outside of Randy Sterken's apartment, the police could smell "burnt marijuana." When the police officers knocked on the door of Randy Sterken's apartment, Roger Sterken answered and informed the officers that Randy, his brother, was out of town.

¶3 Once Sterken opened the door, the police immediately smelled marijuana on him and noticed that he appeared to be in a "slight stupor." When they asked Sterken to step into the hallway of the apartment complex, he initially agreed but then tried to slam the door on the officers. Believing that Sterken might attempt to destroy any evidence of drugs or drug paraphernalia, one of the officers blocked the door, preventing Sterken from closing the door, and entered the unit.

¶4 Upon entry, one of the officers noticed a "haze … of smoke," which he identified as burnt marijuana smoke, in addition to the strong smell of burnt marijuana. Two officers then conducted a protective sweep of the apartment, checking for people who might have weapons or attempt to destroy evidence. In the meantime, another officer spoke with Sterken. He confronted Sterken with his suspicions, at which point Sterken admitted he had been smoking and voluntarily turned over a bag of marijuana. Upon seeing the bag, the officers began to search the apartment. The search uncovered more marijuana and drug paraphernalia.

¶5 The City charged Sterken with violating two ordinances, one for possessing marijuana and another for possessing drug paraphernalia. On March 26, the municipal court heard and granted Sterken's motion to suppress evidence. Following the hearing, the City called one of the officers to the stand and asked him whether Sterken had admitted to smoking marijuana, and the officer answered that he had not. The prosecutor rested the City's case after that single question, and Sterken moved to dismiss. The municipal court granted the motion.

¶6 On June 9, the City requested a trial de novo in the circuit court, pursuant to WIS. STAT. § 800.14. Sterken moved to suppress evidence and to dismiss the case. The circuit court denied both motions and, after a trial on the merits, found Sterken guilty of both violations. Sterken appeals.

¶7 We first address Sterken's contention that the circuit court should never have granted the City's request for a new trial. He relies on ***Village of Menomonee Falls v. Meyer***, 229 Wis. 2d 811, 601 N.W.2d 666 (Ct. App. 1999), *modified by* ***City of Pewaukee v. Carter***, 2004 WI 136, 276 Wis. 2d 333, 688 N.W.2d 449. In ***Meyer***, this court held that a party could not request a new trial in

the circuit court pursuant to WIS. STAT. § 800.14(4) unless a trial on the merits had occurred in the municipal court. ***Id.*** at 812-13. In other words, a party could not request a new trial unless an earlier trial had occurred. The municipal court had granted Meyer's motion to declare certain evidence inadmissible, and the Village had conceded that it had no case without that evidence. ***Id.*** at 813. As a result, the municipal court granted Meyer's motion to dismiss the case, and no trial occurred. *See* ***id.***

¶8 We hold ***Meyer*** is inapposite here. This case more closely resembles ***Carter***. In that case, the City of Pewaukee presented testimony from three witnesses, who were then subjected to cross-examination, and rested its case. ***Carter***, 276 Wis. 2d 333, ¶¶6-7. The defendant moved to dismiss, and the municipal court granted the motion. ***Id.***, ¶7. ***Carter*** made clear that the proper test was whether a trial occurred, not whether the case was "fully litigated." *See* ***id.***, ¶¶31-36, 38, 40, 46. The supreme court held that a trial had occurred because (1) the City presented its case; (2) the defendant had an opportunity to present evidence, although he decided not to do so, presumably because he thought he could prevail on the merits given the City's evidence; and (3) the court resolved the matter on the merits. ***Id***., ¶¶31-36, 42-43. We have a similar situation here. Even though the City's case consisted of a single question to a single witness, it did present a case. Further, although Sterken presumably declined to cross-examine this witness or to present his own evidence because he deemed the answer insufficient to satisfy the City's burden of proof, he did have the opportunity to do so. The circuit court properly granted the City's motion for a trial de novo.

¶9 We now turn to Sterken's substantive argument, namely that his Fourth Amendment rights were violated because the police did not have the right

to enter and search his home without a warrant. A police officer's entry into a private residence presumptively violates an individual's constitutional rights if the officer has no warrant. ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. Courts will uphold the entry, however, when the government can prove both probable cause for the entry and the existence of exigent circumstances. ***Id.***, ¶¶17, 18. Probable cause exists when the State can show that a "fair probability" exists that contraband, such as drugs or drug paraphernalia, or evidence of a crime will be found in a particular place. *See* ***id.***, ¶¶21-22. In ***Hughes***, the court held that the "unmistakable odor of marijuana coming from Hughes' apartment provided this fair probability." ***Id.***, ¶22.

¶10 Similarly, in this case the officers detected the strong odor of marijuana emanating from Sterken's apartment. Moreover, the officers had other indicia as well. The dwelling in question belonged to the owner of the vehicle the gas station attendant reported as containing a potentially intoxicated driver. When Sterken answered the door, he appeared to be in "a slight stupor." The fact that he tried to slam the door on the police is consistent with consciousness of guilt. These facts in conjunction create more than enough probable cause.

¶11 Next, we determine whether exigent circumstances existed. In ***Hughes***, the Wisconsin Supreme Court identified the four exigent circumstances that would justify a warrantless entry: "(1) an arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee." ***Id.***, ¶25. An officer must reasonably believe, based on what he or she knows at the time, that such circumstances exist. ***Id.***, ¶24.

¶12 The court in ***Hughes*** found that exigent circumstances existed. According to the court:

> The strong odor of marijuana that hit the officers as the door to the defendant's apartment was opened gave rise to a reasonable belief that the drug—the evidence—was likely being consumed by the occupants and consequently destroyed. But the greater exigency in this case is 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. Marijuana and other drugs are highly destructible…. It is not unreasonable to assume that a drug possessor who knows the police are outside waiting for a warrant would use the delay to get rid of the evidence.

Id., ¶26.

¶13 In the instant case, both exigencies existed. First, the officers identified the smell as *burnt* marijuana. Further, when Sterken attempted to slam the door, the police officers feared that he intended to destroy the evidence of any drugs or drug paraphernalia. The officers were justified in entering the apartment, and we note that the visible smoke they detected upon entering the apartment increased the exigency.

¶14 Sterken attempts to distinguish ***Hughes***. He points out that in ***Hughes***, the defendant's sister unexpectedly opened the door to the apartment as she was leaving to go to the store, not in response to a knock. *See* ***id.***, ¶¶4-5. Only then did the officers detect the smell of marijuana. *See* ***id.***, ¶5. Thus, according to Sterken, "[T]he officers, now in possession of evidence of illegal activity beyond a mere trespass, and their presence having been revealed <u>through no fault of their own</u>, were faced with a changed situation." (Emphasis in original.)

¶15 Sterken obviously supposes that the occupant's motivation for opening the door matters: he appears to posit that if the door opens because an

officer summoned the occupant with a knock, the entry is invalid, but if the occupant opens the door for independent reasons, it is valid. We are frankly mystified by this assumption. First, we know of no authority that prohibits a police officer from knocking on a door just like any other citizen. Moreover, we do not see how the occupant's motivation for opening the door has any logical connection to the degree of probable cause or exigencies present. The officers had a right to be where they were and had a right to knock on the door.

¶16 We hold that the proceedings before the municipal court constituted a trial. Thus, ***Carter*** controls this case, not ***Meyer***. As such, the City of Delavan had the right to a trial de novo in front of the county court as afforded by WIS. STAT. § 800.14(4). We also conclude that as a matter of law, probable cause and exigent circumstances justified the search of Sterken's apartment. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.