COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP411-CR **Cir. Ct. No. 2005CM159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONOVAN MICHAEL BENDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.[1] Donovan Bender appeals a judgment of conviction for misdemeanor possession of marijuana and an order denying suppression of

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

evidence. Bender argues the warrantless entry into his home was unconstitutional because the exigent circumstances exception to the warrant requirement does not apply to misdemeanor offenses. Bender also argues the police impermissibly created the exigency by knocking on his door.[2] While a misdemeanor offense can justify warrantless entry due to exigent circumstances, the exigent circumstances in this case were impermissibly created by the police. Therefore, this court reverses the judgment of conviction and order denying the motion to suppress. This case is remanded with directions that all evidence obtained in, and derived from, the unlawful search of Bender's home be ordered suppressed, and Bender's guilty plea be withdrawn.

BACKGROUND

¶2 On April 6, 2005, a Mr. Androsky called the City of Superior Police Department to report the smell of marijuana coming from another unit in his apartment building. When police arrived at the building, Androsky told them the marijuana smoking was "going on right now." Police officers walked through the apartment building and located "a very strong odor of marijuana" coming from apartment 12. Officer Adam Poskozim then knocked on the apartment door. Donovan Bender, the occupant of apartment 12, asked who was at the door. The

[2] The State argues we should not address this issue because Bender waived his objection to a constitutional violation by not addressing this issue in the trial court. However, Bender's motion to suppress is on the grounds of a Fourth Amendment violation due to lack of a warrant. In addition, counsel stated at trial, "if the person knows that the police are there, the police cannot create there [sic] own exigency then. Even by announcing, without kicking on the door, they are certainly letting the person know that they are there and thereby created an exigency …." Further, this court may address "a constitutional question not raised below if it appears in the interests of justice to do so and where there are no factual issues that need resolution." ***Bradley v. State***, 36 Wis. 2d 345, 359-59a, 153 N.W.2d 38 (1967) (citations omitted); ***Maclin v. State***, 92 Wis. 2d 323, 328-29, 284 N.W.2d 661 (1979).

officers failed to identify themselves and knocked again. Bender again asked who was at the door. Poskozim responded "the police department" and ordered Bender to "[o]pen the door."

¶3 Bender then asked "Police? You're the police?" The officers answered in the affirmative and again told Bender to "[o]pen the door." Bender kept asking whether they were really the police. Poskozim heard noises that sounded like things being moved in the apartment and believed the noises were Bender's attempts to "hide or destroy evidence of smoking marijuana inside the room." Poskozim kicked at the door shouting, "[t]his is the police department. Open the door." After another attempt to kick in the door, Bender opened the door.

¶4 Once the door was open, Poskozim could see controlled substances in plain view. Poskozim saw a tray with some dried plant stems and several Baggies containing marijuana. Poskozim arrested and handcuffed Bender.

¶5 Bender filed a motion to suppress the physical evidence and certain statements he made before being administered his Miranda warnings. The State conceded the statements were not admissible and the trial court correctly suppressed evidence found as a result of the statements. Bender conceded that the officers had probable cause at the time they first made contact with him. However, the parties disagreed on whether the initial entry and search of Bender's apartment without a search warrant was justified by exigent circumstances.

¶6 On August 4, 2005, the court filed a written decision denying Bender's motion to suppress. The court acknowledged the exigency did not exist until after the police knocked on the door. However, the court did not agree that the police created the exigency. Rather, the court held, "the exigency was created

by the Defendant's words and conduct after the officers knocked on [his] door and identified themselves."

DISCUSSION

Exigent Circumstances: Introduction and Standard of Review

¶7 A warrantless entry into one's home by police is presumptively prohibited by both the United States and Wisconsin Constitutions. ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. However, there are exceptions to the warrant requirement, including when the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference. ***Id.*** The government bears the burden of establishing an exception to the warrant requirement. ***State v. Leutenegger***, 2004 WI App 127, ¶12, 275 Wis. 2d 512, 685 N.W.2d 536. There are four exigent circumstances which may justify a warrantless search: "(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." ***State v. Kiekhefer***, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997) (citations omitted). However, "the government cannot justify a search on the basis of exigent circumstances that are of the officers' own making." ***Id.***; *see also* ***Hughes***, 233 Wis. 2d 280, ¶24 n.7. Here, the State relies solely on the third exception for a warrantless entry, namely the risk the unlawful substance will be destroyed.

¶8 Whether a warrantless entry into a home is justified by exigent circumstances is a mixed question of fact and law. ***Leutenegger***, 275 Wis. 2d 512, ¶13. The trial court's findings of fact will be upheld unless they are clearly erroneous. ***Id.*** However, this court will determine whether the facts establish

exigent circumstances sufficient to justify a warrantless entry as a question of law. ***Id.***

Exigent Circumstance Exception: Misdemeanor Offense

¶9 Bender argues the exigent circumstances exception to warrantless entry does not apply to misdemeanors. He cites ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), as support for this claim. ***Welsh*** is not applicable in this case. ***Welsh*** involved a warrantless arrest for "a non-criminal, civil forfeiture offense for which no imprisonment is possible." ***Id.*** at 754. The Court stated it would not "consider whether the Fourth amendment may impose an absolute ban on warrantless home arrests for certain minor offenses." ***Id.*** at 754 n.11.

¶10 In ***Illinois v. McArthur***, 531 U.S. 326, 336 (2001), the Court clarified the holding in ***Welsh*** by distinguishing between "jailable" and "nonjailable" offenses. The Court held the police officers' actions did not violate the fourth amendment when the officers refused to allow a suspect to enter his home until they could gain a search warrant to search for illegal drugs. ***Id.*** at 335-36. Further, the Wisconsin Supreme Court has addressed this issue and held exigent circumstances could justify a warrantless entry in a misdemeanor possession of marijuana case. ***Hughes***, 233 Wis. 2d 280, ¶39. Therefore, misdemeanor possession of marijuana could justify a warrantless entry under exigent circumstances.

Police Created Exigency

¶11 Alternatively, Bender argues the police impermissibly created the exigency used to justify the warrantless search in this case by knocking on his door. The trial court held the exigency did not exist until after the police knocked

on the door. However, the court did not agree that the police created the exigency. Rather, the court held, "the exigency was created by the Defendant's words and conduct after the officers knocked on [his] door and identified themselves."

¶12 Our supreme court has held police may not benefit from exigent circumstances they themselves create. ***Id.***, ¶28 n.7. However, no Wisconsin court has addressed whether police can in some cases create exigent circumstances by knocking on a person's door. In addition, the United States Supreme Court has not addressed this issue.

¶13 The State relies on ***Hughes*** to support its argument that the police did not create the exigency. In ***Hughes*** the police were in a hallway by the defendant's apartment door when the door unexpectedly opened. ***Id.***, ¶1. The defendant's sister saw two uniformed police officers. ***Id.*** The officers smelled a strong odor of marijuana and then blocked the woman from closing the apartment door. ***Id.***, ¶5. The court noted, "this is not a situation in which the exigency was created by the police themselves, which would generally not justify a warrantless search …." ***Id.***, ¶28 n.7. Bender's case is distinguishable from ***Hughes*** because here the police knocked on the door and announced themselves.

¶14 The United States Courts of Appeals are divided over whether a police officer impermissibly creates exigent circumstances by knocking on a suspect's door. The Second Circuit holds police do not impermissibly create exigent circumstances by knocking on a suspect's door reasoning, "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." ***United States v. MacDonald***, 916 F.2d 766, 772 (2nd Cir. 1990). However, the Third and Fifth Circuits hold police impermissibly create exigent circumstances by knocking on a suspect's door. *See* ***United States***

v. Coles, 437 F.3d 361 (3rd Cir. 2006); ***United States v. Richard***, 994 F.2d 244 (5th Cir. 1993). Given the importance of the warrant requirement, this court views the approach of the Third and Fifth Circuits persuasive.[3]

¶15 In a case similar to Bender's, the Third Circuit found police impermissibly created the exigency and therefore could not rely on exigency to justify a warrantless search. *See* ***Coles***, 437 F.3d 361. In ***Coles***, a hotel manager let himself into a guest's room and observed what he believed were drugs. ***Id.*** at 362-63. The hotel manager called the FBI to report his observation. ***Id.*** at 363. The hotel manager allowed officers to use the room across the hall from Coles's room for covert surveillance. ***Id.*** After observing two men enter Coles's room, officers decided to enter the room. ***Id.*** Police first attempted to trick the men into opening the door, and when that failed announced "open the door, this is the police." ***Id.*** Officers then heard the sounds of rustling, running footsteps, a toilet flushing and water running. ***Id.*** at 364. Officers used a passkey to attempt to gain entry but a bar latch prevented their attempts. ***Id.*** Coles eventually opened the door for the officers. ***Id.*** The officers discovered crack cocaine and a firearm in the room. ***Id.*** The court held "[w]hatever exigencies might have arisen after the police announced their presence at the door cannot excuse their failure to first obtain a search warrant." ***Id.*** at 367.

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[3] In ***Johnson v. United States***, 333 U.S. 10, 13-14 (1948), the Court stated,

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

¶16 The Fifth Circuit also generally requires exigent circumstances exist before police knock and announce themselves. *See* ***Richard***, 994 F.2d 244. In deciding whether exigent circumstances justify a warrantless entry, the Fifth Circuit examines

> first whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement, and second, even if they did not do so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement.

United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004).

¶17 The police officers in this case gave no reason why they could not secure a warrant before entering Bender's apartment. Police had a tip from a reliable informant that Bender often smoked marijuana and was currently doing so. Police smelled marijuana when they arrived at the apartment. The police knew what they would find behind Bender's door. Their knock cannot be viewed as a legitimate investigative technique. Before the police knocked on the door, there was no threat of destruction of the evidence. As in ***Johnson*** "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate." ***Johnson v. United States***, 333 U.S. 10, 15 (1948). In this case, the police impermissibly created an exigency and then used that exigency to justify their warrantless entry. This action runs directly contrary to the intent of the Fourth Amendment.

Exigent Circumstances: Viewing a Crime in Progress, Burning Marijuana

¶18 Finally, the State argues the officers' entry was reasonable due to "exigent circumstances that a crime was being committed in the officers'

presence." For support, the State cites WIS. STAT. § 968.07(1)(d), which allows a law enforcement officer to arrest a person when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime." This statute applies to arrest and not to warrantless entry. If Bender were smoking marijuana in the hallway of his apartment building, this statute would apply. As noted in ***Welsh***, **"**[b]efore government agents may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." ***Welsh***, 466 U.S. at 740.

¶19 In a related argument, the State claims exigent circumstances existed before police knocked on the door because the smell of burning marijuana indicated a destruction of evidence. However, this argument is not supported by case law. In ***Kiekhefer***, the court stated "[a]lthough the agents smelled an odor of burning marijuana, this does not justify the warrantless entry either. Rather, the agents had probable cause to secure a search warrant, but they had no right to make a warrantless entry into Kiekhefer's room." ***Kiekhefer***, 212 Wis. 2d at 479; *see also* ***Johnson***, 333 U.S. 13; ***Hughes***, 233 Wis. 2d at 293-94 (distinguishing ***Kiekhefer*** because officers entered the room based on odor of marijuana alone with no other facts to support exigency).

By the Court.—Judgment and order reversed and cause remanded with directions.

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