COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2249-CR **Cir. Ct. No. 2008CF182**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE E. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Terrance E. Harris appeals from a judgment of conviction, entered upon his guilty plea, to one count of possession of tetrahydrocannabinols (THC), as a second or greater offense. Harris also appeals from an order denying his postconviction motion to withdraw his guilty plea.

Harris complains he should have been allowed to withdraw his plea because the circuit court erroneously denied his suppression motion. We reject Harris's arguments and affirm the judgment and order.

BACKGROUND

¶2 According to the circuit court's factual findings following a suppression hearing, some time prior to January 7, 2008, City of Milwaukee Police Officer Nathan Neibauer received an anonymous tip that a subject had moved into a duplex at 2230 West Brown Street in Milwaukee and marijuana sales were occurring at that residence. On January 7, Neibauer was on patrol and recovered marijuana in the street in front of the residence. He made contact with one of the lower unit's occupants, who identified himself as Harris. Harris advised that he lived in the unit with his girlfriend, Camille Davis. No arrests were made for the marijuana recovered on January 7.

¶3 On January 10, 2008, Neibauer was again on patrol near 2230 West Brown Street. He observed three or four individuals outside the residence, one of whom was Harris. Neibauer watched as Tarun Smith approached another individual in the group and engaged in what appeared to be a hand-to-hand drug transaction. Neibauer and his partner, Officer Eric Rom, approached in their unmarked squad car. They got out, in full uniform, and identified themselves as police. Smith fled towards the duplex.

¶4 Neibauer pursued Smith, apprehending him in the foyer just inside the lower unit. Neibauer conducted a pat-down search of Smith, finding no drugs, but handcuffing him and arresting him for loitering, flight from a police officer, and suspicion of being involved in a drug transaction.

¶5 While conducting the pat-down, Neibauer observed a subject on the living room couch and asked if Davis was home. The subject advised she was in the bedroom. With Smith secured, Neibauer called out Davis's name, identifying himself as "the police." She responded, "I'm in here." Neibauer then proceeded to the bedroom, based on Davis's response and the fact that she did not come out to make contact with him.

¶6 Davis was on the bed. Neibauer explained that there had been complaints of drug dealing associated with the residence, and asked for permission to search for drugs, drug paraphernalia, and weapons. Davis replied, "Go ahead. Search." Neibauer asked if he could start in the bedroom. Davis agreed and left the bedroom; Neibauer found marijuana under the mattress.

¶7 It appears from the criminal complaint that officers spoke with Harris after the discovery of marijuana. After being advised of his rights, Harris agreed to speak with police, admitting the marijuana was his and telling them that Davis may not have known it was in the home. As a result, Harris was arrested and later charged with possession of THC as a second or subsequent offense. Smith, on the other hand, was ultimately not charged or cited, as it appears that no drug transaction had actually occurred.

¶8 Harris moved to suppress all physical evidence and his statements, alleging there had been no probable cause to pursue Smith, so there were insufficient exigent circumstances to justify the warrantless entry into the home. Harris further alleged that there was insufficient attenuation between the unlawful entry and Davis's consent to search, rendering the consent invalid. The circuit court granted a suppression hearing, at which only Neibauer testified. The court ultimately rejected the motion on the grounds that the record established probable

cause, exigent circumstances justified the entry into the residence, and Davis gave valid consent to search the home. Upon denial of the motion, Harris asked to have the matter set for a plea hearing.

¶9 Harris subsequently pled guilty. On October 28, 2008, he was sentenced to 101 days in the House of Correction with 101 days' sentence credit, and a six-month driver's license suspension. On August 5, 2009, Harris filed a postconviction motion to withdraw his guilty plea, alleging the plea was obtained through an erroneous ruling on the suppression motion. Harris offered summaries, prepared by an investigator, of testimony that would be offered by Davis and Smith.[1] The circuit court rejected Harris's motion, noting its opinion that it had properly decided the suppression motion. In a footnote, the court rejected Harris's attempt to re-open the record for the taking of new evidence. Harris now appeals.

STANDARDS OF REVIEW

¶10 Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrowly crafted exception to this rule exists in WIS. STAT.

[1] On appeal, Harris represented more than once that the interviews were attached to his motion. This implies the presence of transcripts. However, the documents attached to the motion were only summaries of the interviews.

§ 971.31(10) (2007-08),[2] which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. We review the denial of a motion to suppress under a two-part standard of review, upholding the circuit court's factual findings unless clearly erroneous but reviewing *de novo* whether those facts warrant suppression. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

¶11 Here, Harris also sought to withdraw his plea, arguing it was obtained only because of the improperly denied suppression motion. A defendant who seeks to withdraw a plea after sentencing has a heavy burden of establishing, by clear and convincing evidence, that the court should permit the withdrawal to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (citation omitted). Examples of manifest injustice include ineffective assistance of counsel, defendant's failure to personally ratify the plea, and breach of the plea agreement by the State. *See* ***State v. Krieger***, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991).

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

DISCUSSION

¶12 Harris's fundamental argument for suppression is that the officers' entry into his home was unlawful.[3] A police officer's warrantless entry into a home is presumptively prohibited by the Fourth Amendment. ***State v. Sanders***, 2007 WI App 174, ¶10, 304 Wis. 2d 159, 737 N.W.2d 44.

¶13 However, a warrantless entry is lawful if exigent circumstances exist. ***State v. Ferguson***, 2009 WI 50, ¶19, 317 Wis. 2d 586, 767 N.W.2d 187. "Exigent circumstances exist when 'it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.'" ***Id.*** (citation omitted). There are four well-recognized categories of exigent circumstances: (1) hot pursuit of a suspect; (2) a threat to the safety of the suspect or others; (3) risk that evidence will be destroyed; and (4) likelihood that the suspect will flee. ***Id.***, ¶20. A review of whether exigent circumstances existed requires us to review whether police had probable cause to arrest Smith. *See* ***id.***, ¶19.

¶14 "Probable cause to arrest exists when, at the time of the arrest, an officer has within his or her knowledge reasonably trustworthy facts and

[3] Despite the fact that Harris's brief is certified as only 6,491 words long when up to 11,000 may be used, *see* WIS. STAT. RULE 809.19(8)(c)1., he "adopts the motion to suppress and brief in support of motion to reconsider motion to suppress evidence filed by trial counsel, and incorporates those arguments herein by reference." This is an insufficient means of presenting an argument. *See* ***Calaway v. Brown County***, 202 Wis. 2d 736, 750-51, 553 N.W.2d 809 (Ct. App. 1996); *see also* ***DeSilva v. DiLeonardi***, 181 F.3d 865, 867 (7th Cir. 1999) ("A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.").

The insufficiency is exacerbated by Harris's failure to even include the brief or the motion in his appendix. *See* ***State v. Bons***, 2007 WI App 124, ¶21, 301 Wis. 2d 227, 731 N.W.2d 367 ("'The volume of work to be done by this court does not leave time for the [judges] to search the original record for each one to discover, if he [or she] can, whether appellant should prevail.'") (citation omitted; second set of brackets in ***Bons***).

circumstances sufficient to warrant a reasonably prudent person's belief that the suspect has committed or is committing a crime." ***Sanders***, 304 Wis. 2d 159, ¶11. We agree with the circuit court that probable cause existed. Neibauer knew that there had been complaints of drug dealing at the residence, and he had personally discovered marijuana outside the home three days earlier. While observing the individuals in front of the home, Neibauer observed what appeared to be a hand-to-hand transaction consistent with a drug sale, and only Smith fled upon the officers' approach. Although Smith evidently had not completed a sale, the facts available at the time were "sufficient to warrant" a belief that a drug transaction had occurred.

¶15 The circuit court also ruled that exigent circumstances of all four types existed. Harris nevertheless challenges those findings, particularly the finding of hot pursuit, because Smith's crimes were not serious felonies. *See* ***State v. Kryzaniak***, 2001 WI App 44, ¶22, 241 Wis. 2d 358, 624 N.W.2d 389 (nature of underlying offenses relevant to exigent circumstances calculus).

¶16 "Hot pursuit is that circumstance where there is an 'immediate or continuous pursuit of [a suspect] from the scene of a crime.'" ***Sanders***, 304 Wis. 2d 159, ¶13 (brackets in ***Sanders***). In particular, it has been held that "the misdemeanor crime of obstructing an officer [by fleeing] cannot justify the warrantless entry by the police into a residence under the exigent circumstance of hot pursuit." ***Id.***, ¶33.

¶17 Smith, though, was not just fleeing but was suspected of a drug crime, something significantly more serious than flight from police. *Cf.* ***State v. Hughes***, 2000 WI 24, ¶36, 233 Wis. 2d 280, 607 N.W.2d 621 (escalating scale of

penalties reveals "legislature's view of the seriousness of marijuana-related offenses"). Thus, we think Neibauer's "hot pursuit" of Smith was fairly justified.

¶18 Even if hot pursuit were not a justified exigent circumstance, the other three categories apply here. Neibauer knew the only residents of the lower unit were Harris and Davis, yet Smith was attempting to flee into the home. Neibauer's concern that potential harm might befall Davis justifies his pursuit of Smith into the residence. Additionally, officers believed they had observed a drug transaction. Smith's attempt to enter the home and flee from police could have resulted in destruction or disposal of evidence of the sale. Finally, there existed a possibility that, should he have taken refuge in Harris's home, Smith would have fled from another door or window before police could secure the home and obtain a warrant. Pursuit of Smith into the threshold of Harris's home was amply justified by exigent circumstances.

¶19 This conclusion is important for two reasons. First, because entry into the home was justified, it negates a presumptive claim that evidence seized from the house was obtained unlawfully. Further, existence of exigent circumstances is relevant to the discussion on consent.

¶20 Even if police had unlawfully entered Harris and Davis's home, Neibauer requested and obtained Davis's consent before beginning the search that uncovered evidence leading to Harris's arrest. Consent is a valid exception to the warrant requirement. ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). On appeal, Harris does not claim that Davis's consent was involuntary. Instead, he asserts that her consent is insufficiently attenuated from the officers' unlawful entry. This argument obviously fails upon determination that the entry was lawful.

¶21 In any event, there is a three-factor test for determining whether consent to search obtained after an illegal entry is sufficiently attenuated from the entry so as to purge the taint. *See* ***State v. Richter***, 2000 WI 58, ¶45, 235 Wis. 2d 524, 612 N.W.2d 29. These factors are: the temporal proximity of the official misconduct and seizure of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. ***Id.***; *see also* ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975).

¶22 Harris's challenge to Davis's consent still fails when we apply this test. The "purpose and flagrancy" of the official misconduct—the warrantless entry—was not meant to target Harris or Davis, but occurred in pursuit of a suspect who was not a resident of the home. This fact, in our view, weighs in favor of attenuation.

¶23 After the entry to secure Smith, Neibauer called for Davis. She did not come out to see what was happening in the front of her home, but responded, "I'm in here," essentially inviting Neibauer further into the home. He entered the bedroom and explained why he was there before requesting consent to search. This intervening action, shifting the focus away from the point of entry and location of the original suspect and advancing into the home by invitation, weighs in favor of attenuation.

¶24 Further, while there is temporal proximity between the entry and Davis's consent to search, we note that non-threatening, non-custodial conditions surrounding a search lean toward a finding that any taint created by unlawful police entry had dissipated upon consent. *See* ***Richter***, 235 Wis. 2d 524, ¶46. Neither Davis nor Harris was taken into custody prior to the search, and the circuit court found there was no evidence to suggest "duress or coercion, … express or

implied, in obtaining consent to search." Thus, even if the original entry had been unlawful, the circumstances surrounding the request for consent and the search suggest Davis's permission was untainted by that entry.

¶25 It is at this point in the analysis where Harris's postconviction plea withdrawal motion comes into play. Harris asserts that his motion contains facts which, if true, entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). These "facts" come from the summaries of information Davis and Smith allegedly gave the investigator.[4]

¶26 Notably, Harris latches on to Davis's purported statement that police entered her bedroom, guns drawn, demanding to know where the guns and marijuana were. Harris argues this shows Davis's consent was coerced. We disagree.

¶27 According to the summary, Davis was asked specifically about Neibauer's conduct in having his weapon drawn. Davis told the investigator that "she believes he was trying to protect himself because he had no idea if there were people or guns in the room he was searching, and he was acting cautiously." In order words, while Harris argues Neibauer's actions permit an inference of threatening behavior, Davis's own statement appears to counter such a claim.[5] Because of the non-threatening, non-custodial situation, we conclude there was

[4] We have doubts over whether such summaries are sufficient to show Harris is entitled to relief, given that both Davis and Smith could have testified at the suppression hearing and that the summaries by the third-party investigator, as opposed to sworn statements by the witnesses themselves, appear conclusory and self-serving.

[5] Additionally, nothing about the summary of Smith's statement warrants relief. At best, Smith disavows any illegal activity on his part—which is, of course, confirmed. However, this does not negate the probable cause created by Neibauer's observations.

sufficient attenuation between the entry and consent. Thus, the search was valid even if the entry was not.

¶28 Officers had probable cause to believe that Smith had committed a drug crime. Their entry into Harris's home was justified by exigent circumstances in pursuit of Smith. Because the entry was justified, there was no taint to purge when seeking Davis's consent to search the home, although Davis's consent was sufficiently attenuated from the entry to make her consent to search valid in any event. The suppression motion was, therefore, properly denied.

¶29 Because the motion was properly denied, Harris's plea was not based on a faulty premise. We therefore reject Harris's contention that his postconviction plea withdrawal motion alleges sufficient facts entitling him to relief: there is no fundamental flaw in the plea's integrity.[6] The circuit court properly denied the postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

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

[6] Further, we note, as the circuit court did, that the appropriate time for Harris to present Davis's and Smith's testimony was at the original hearing. Harris offers no authority for his implicit proposition that the evidentiary record of a suppression hearing can be supplemented in postconviction proceedings. Indeed, because Davis and Smith cannot be said to have "newly discovered evidence," it would be patently unfair to the circuit court to reverse its suppression decision based on evidence not presented at the time it was asked to rule on the motion.