COURT OF APPEALS DECISION DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2010AP1061-CR

Cir. Ct. No. 2008CF3216

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. TOWNSELL,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Michael D. Townsell appeals from a judgment of conviction entered upon his guilty plea to one count of possessing with intent to deliver more than five grams of cocaine but not more than fifteen grams of cocaine as a second or subsequent offense. The issue is whether the circuit court erred by

denying his motion to suppress the cocaine that police found in a tavern's public toilet. Because we conclude that Townsell lacks standing to challenge the search in this case, we affirm.

¶2 Officer Jeffrey Krueger testified at the suppression hearing that early in the morning of June 28, 2008, he was patrolling a Milwaukee neighborhood in an unmarked squad car. Several marked squad cars followed close behind. Krueger saw a man standing on the street corner who began running as the police cars approached. Krueger transmitted a "subject running" alert over his police radio.

¶3 Sergeant Jason Mucha testified that he was driving the last car in the police caravan when he heard a fellow officer shout "he's running." Mucha then saw a man wearing one shoe run down the sidewalk and into a tavern. Mucha followed the man into the tavern, where someone called out: "they ran in [the] bathroom."

¶4 Mucha entered the tavern's bathroom, which had one stall. The stall door was open by more than twelve inches. Mucha testified that he saw a man, subsequently identified as Townsell, wearing one shoe and kneeling in the stall with "his right hand in the toilet." Mucha pushed the stall door open further and observed that Townsell's hand "was shoved way in the toilet, all the way into the hole where the water leaves the toilet." Mucha testified that his observations led him to believe that Townsell was trying to hide a gun. Mucha placed his hands on Townsell's shirt and Townsell stood up, dropping a baggie containing a substance that appeared to be crack cocaine into the toilet. Mucha then arrested Townsell.

Another officer searched the toilet and retrieved the baggie. The baggie contained cocaine.[1]

¶5 The circuit court denied Townsell's motion to suppress the cocaine found in the toilet. As relevant here, the circuit court concluded that Townsell did not have a reasonable expectation of privacy in the toilet stall, and therefore he lacked standing to challenge the search. Townsell then resolved the case with a guilty plea, and he now appeals.[2]

¶6 Townsell claims that the search violated his constitutional rights under the Fourth Amendment to the United States Constitution. When we review a circuit court's order resolving a Fourth Amendment challenge to a search, we accept the circuit court's factual findings unless they are clearly erroneous, but we resolve the legal questions *de novo*. ***State v. Neitzel***, 2008 WI App 143, ¶13, 314 Wis. 2d 209, 758 N.W.2d 159. "Whether a defendant has standing to raise a Fourth Amendment claim ... presents a question of law." ***State v. Orta***, 2003 WI App 93, ¶10, 264 Wis. 2d 765, 663 N.W.2d 358.

¶7 We assess a person's standing to challenge a search under the Fourth Amendment by considering "'whether the person ... has a legitimate expectation of privacy in the invaded place.' A defendant bears the burden of establishing his or

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[1] Testimony at the preliminary examination established that the substance in the baggie was cocaine. We may consider that testimony here. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106 n.1, 539 N.W.2d 723 (Ct. App. 1995) (appellate court may consider testimony given during a preliminary examination when reviewing a suppression order).

[2] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

her reasonable expectation of privacy by a preponderance of the evidence." ***Id.***, ¶11 (citation omitted, ellipsis in ***Orta***). The defendant must show both that: (1) he or she "has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized; and (2) society is willing to recognize such an expectation of privacy as reasonable." *See* ***id.*** A defendant who fails to make both showings does not have standing. *See* ***id.***, ¶¶13-14 (additional analysis unnecessary when defendant fails to demonstrate a subjective expectation of privacy by a preponderance of the evidence).

¶8 When we consider whether a defendant has standing to raise a Fourth Amendment challenge, we "may look to facts discovered after the intrusion to determine if a defendant has a reasonable expectation of privacy." ***Id.***, ¶7. Thus, our analysis of whether Townsell has standing in this case includes consideration of the facts uncovered after the police entered the bathroom stall. *See* ***id.***, ¶9.

¶9 In ***Orta***, three factors led to our determination that the defendant did not exhibit an actual expectation of privacy: (1) the defendant conducted criminal activity in a restroom stall available for use by the public; (2) the defendant failed to latch or lock the stall door or to ensure that it was closed; and (3) an observer could conclude that the stall was not being used as intended. ***Id.***, ¶13. Those same factors demonstrate that Townsell did not exhibit an expectation of privacy here.

¶10 First, Townsell, like the defendant in ***Orta***, conducted criminal activity in the restroom stall of a public building. *See* ***id.***, ¶13. Such an area is one that "any member of the public might try to enter." ***Id.*** Second, Townsell, like the defendant in ***Orta***, did not ensure that the stall door latched, locked, or fully closed. *See* ***id.*** Indeed, in this case, the stall door stood open by more than twelve

inches when Mucha entered the bathroom. Finally, Townsell, like the defendant in ***Orta***, positioned himself "in such a manner that an observer such as [a police officer] would conclude that the stall was not being used as intended." ***Id.***

¶11 Townsell disputes the conclusion that his position in the toilet stall would appear out-of-the-ordinary to an observer. He argues that he was kneeling in front of the toilet bowl, a normal position for vomiting. His argument is unavailing.

¶12 The circuit court determined that a police officer observing the scene would conclude "that Townsell was attempting to conceal or flush a gun or contraband." This factual determination is not clearly erroneous. To the contrary, it is supported by Mucha's testimony. Moreover, the analysis of standing in this case properly includes consideration of "the observations and discoveries made by [the officer] when he entered the restroom stall." *See* ***id.***, ¶9. Here, the circuit court found that when Mucha entered the open stall, he "observ[ed] Townsell with his hand down the hole of the toilet bowl." Townsell thus was not in the normal position assumed by people who are vomiting. To the contrary, the position of his hand was completely inconsistent with the normal use of a toilet.

¶13 Under these circumstances, Townsell did not exhibit an actual expectation of privacy in the public toilet stall. *See* ***id.***, ¶13. Accordingly, Townsell lacks standing to challenge the search of the area. *See* ***id.***, ¶¶11-14. No

further analysis is necessary.[3] *See* ***id.***, ¶14. Therefore, we do not consider the second prong of the test for standing, nor do we consider the other issues briefed by the parties.

By the Court.—Judgment affirmed.

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

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[3] In his reply brief, Townsell asserts that he was improperly seized in the toilet stall and that the cocaine found in the toilet constituted the fruit of an unlawful seizure. He acknowledges, however, that he "did not raise the issue in his brief that this immediate seizure in the bathroom was a ***Terry*** violation." *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). We do not, as a rule, address issues raised for the first time in a reply brief. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188. Townsell attempts to avoid application of that rule by requesting the opportunity to submit an additional brief. The request is also contained in his reply brief and is denied. Requests for procedural orders should be proffered in a motion under WIS. STAT. RULE 809.14(1), to permit the opposing party an opportunity to respond. Moreover, we anticipate that parties will fully address necessary aspects of their claims under the briefing procedures set forth in WIS. STAT. RULE 809.19.