



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

December 26, 2019

To:

Hon. Michael J. Piontek
Circuit Court Judge
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Kara L. Mele
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Christopher D. Sobic
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4116

You are hereby notified that the Court has entered the following opinion and order:

2016AP1340-CR

State of Wisconsin v. Timothy L. Gutierrez (L.C. #2013CF579)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy L. Gutierrez appeals from a judgment convicting him of drug-related offenses pursuant to his no-contest pleas entered after the circuit court denied his motion to suppress

marijuana found in a duffel bag without holding an evidentiary hearing.¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Because the circuit court properly exercised its discretion in denying Gutierrez’s suppression motion without taking evidence, we affirm.

Police and firefighters responded to a working fire in the upstairs flat of a home belonging to Gutierrez’s uncle. Gutierrez had “free access” to the upstairs and frequently used the space. According to the complaint, firefighters first on the scene saw “numerous buckets, beakers, and other items that led” them to believe someone was using the home as a lab to manufacture drugs. They told police that the fire appeared to be caused by spilled chemicals. Samples taken from the residence revealed the presence of MDMA, or ecstasy. “Officers advised that there was a full scale drug lab that covered the entire second floor” of the home. The chemicals and items in the home created “a high probability of a toxic release of gases,” as well as “a high probability of a catastrophic event.” The complaint further stated that firefighters “located a large black duffel bag inside of the residence” and that “Officers later examined the duffel bag” after it was “removed from the residence.” Inside the duffel, police found between 2500 and 10,000 grams of marijuana. Gutierrez was charged with multiple offenses including possession with the intent to deliver between 2500 and 10,000 grams of THC as a second or subsequent offense.

¹ This appeal is also taken from an order partially denying Gutierrez’s postconviction motion for sentencing relief. Gutierrez does not challenge the order as part of this appeal. Additionally, this appeal began as a no-merit appeal, *see* WIS. STAT. RULE 809.32 (2017-18), but was converted to a direct appeal on the merits by a February 7, 2018 order of this court. All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Gutierrez moved to suppress the marijuana, alleging that the warrantless search of the duffel bag was improper because it was found by police in the curtilage of the residence and no exception to the warrant requirement existed. His motion alleged that the duffel bag was “blocking the stairwell leading to the upper unit,” that firefighters threw the duffel bag “over the back porch railing as they entered the stairs to the upper unit with their fire hose,” that police “canvassed the area surrounding the home” and found the closed duffel bag in the backyard, and that police opened the bag without obtaining a warrant.

In its response opposing suppression, the prosecution provided additional background facts, including that a lieutenant firefighter noticed that the smoke coming from the house was an unusual color and that firefighters ultimately decided against using water on the fire for fear it would create an unintended chemical reaction. They instead “stamped on the fire” to put it out.

Consistent with the facts in Gutierrez’s motion, the response alleged that the black duffel bag was on the back porch, that the bag kept catching the fire hose as firefighters tried to drag the charged hose up the stairs, and that firefighters threw the bag off of the porch and into the yard to get it out of the way. The prosecution did not dispute that the duffel bag landed in the curtilage, but set forth the facts it believed justified a warrantless search. According to the prosecutor’s response, two police officers canvassing the area saw the large black duffel bag lying just beyond the back porch in the yard and “immediately noted the strong odor of fresh unburned marijuana coming from the bag.” Inside, they found “several large vacuum sealed bags containing” what turned out to be marijuana. Gutierrez filed a reply to the prosecution’s response maintaining his position that he had a reasonable expectation of privacy in the duffel bag.

The circuit court denied the motion to suppress without an evidentiary hearing. Based on the facts “recited in the paperwork[,]” the court reasoned that the duffel bag was “just an extension of events that occurred during the fire[.]” The court noted that “there were chemicals on this property that created a fire risk and a safety risk, enough that they actually had to call in experts to review the chemicals that were utilized here.” It determined that the fire and chemicals, which led firefighters to avoid using water for fear of a chemical reaction, created “an emergency situation” and posed a risk not only to officers and firefighters, but also to the general public such that the needs of society “far outweighed the need for a search warrant under these circumstances.”

Gutierrez pled no contest to (1) possession with intent to deliver between 2500 and 10,000 grams of marijuana, (2) manufacturing or delivering designer drugs, and (3) second-degree recklessly endangering safety. Gutierrez appeals, challenging the circuit court’s denial of his motion to suppress the marijuana found in the black duffel bag,

We conclude that the warrantless search of the duffel bag was justified by the emergency doctrine, which permits “[l]aw enforcement officers [to] enter private premises ... to preserve life or property, to render first aid and assistance, or to conduct general inquiry into an unsolved crime.” *State v. Kraimer*, 99 Wis. 2d 306, 314, 298 N.W.2d 568 (1980) (citations omitted). Officers must possess “reasonable grounds to believe that there is an urgent need for such assistance and protective action.” *Id.* Under this doctrine, warrantless entries may be permissible “to fight fire and investigate its cause.” *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted).

Here, police confronted a classic scenario calling for emergency assistance: a fire-damaged premises and a high risk of explosion. *See Stuart*, 547 U.S. at 406. Given the circumstances, the officers had an objectively reasonable basis for believing the search of the duffel bag constituted necessary protective action. The Fourth Amendment did not require police to wait until the duffel bag emanated toxic fumes, exploded, or caused another fire.

We reject Gutierrez’s argument that firefighters illegally seized the duffel bag by removing it from the house. Gutierrez concedes that firefighters were lawfully present in the residence. It is undisputed that firefighters threw the bag off the porch because it was hampering their efforts to fight the working fire. To the extent the removal of the duffel bag from the porch caused a meaningful interference with Gutierrez’s possessory interest, any “seizure” was reasonable under the circumstances.

Gutierrez also argues that the circuit court erred in denying his suppression motion without taking evidence. We acknowledged this procedure in our order rejecting appellate counsel’s no-merit report and converting the appeal to one on the merits. Thereafter, a decision was released in *State v. Radder*, 2018 WI App 36, 382 Wis. 2d 749, 915 N.W.2d 180. Prior to *Radder*, ample case law made clear that a circuit court had the discretion to deny a motion without an evidentiary hearing if a defendant’s motion failed to allege “facts which, if true, would entitle [him] to relief.” *See, e.g., State v. Velez*, 224 Wis. 2d 1, 11, 589 N.W.2d 9 (1999). *Radder* held that a defendant filing a suppression motion “must satisfy the same pleading standard applicable in all pretrial motions” even though the State has the burden to show the reasonableness of a warrantless search or seizure. *Radder*, 382 Wis. 2d 749, ¶9. To meet this burden, a defendant “must plead specific facts showing that a hearing is necessary to resolve a factual dispute.” *Id.*, ¶8. Stated another way: “An evidentiary hearing exists to expose and

settle factual disputes, and such a hearing is only warranted when a movant can, at the very least, show a reasonable possibility that a hearing is needed to allow the defendant to establish the necessary factual basis to succeed on the motion.” *Id.*, ¶15.

Having considered the circuit court’s decision with the benefit of *Radder* and of the parties’ adversarial briefs, we conclude that the circuit court properly exercised its discretion in denying Gutierrez’s motion to suppress without an evidentiary hearing. Applying the emergency doctrine, police officers were lawfully on the property to determine the cause of the fire and to preserve life and property.² Further, Gutierrez does not suggest any materially disputed fact whose resolution would call into question the legality of the duffel bag search. While the bag’s “plain smell” of marijuana implicates the reporting officers’ credibility, neither the circuit court nor this court relies on this alleged fact in justifying the warrantless search of the duffel bag. Rather, the bag was opened as part of a coordinated emergency response to an ongoing public danger. All that matters is that police found the bag in the yard, lying next to a fire-damaged premises caused by dangerous and toxic chemicals, an abundance of which were still present on the premises. In sum, taking as true that the large duffel bag *was* on the curtilage, that it did *not* emanate a plain smell of marijuana, and that police were *not* on the property at the request of firefighters, Gutierrez has not shown his entitlement to an evidentiary hearing.

² Because we conclude that police were entitled to enter the premises pursuant to the emergency doctrine, we need not address Gutierrez’s argument that under *State v. Gonzalez*, 147 Wis. 2d 165, 172, 432 N.W.2d 651 (Ct. App. 1988), the exigency of a fire justifies a firefighter’s warrantless entry onto endangered premises, while police can enter only with a warrant or at a firefighter’s request. However, we find persuasive the State’s arguments that (1) *Gonzalez* does not necessarily impose a bright-line rule authorizing only firefighters to conduct a warrantless entry of fire-damaged premises and (2) the instant case is materially distinguishable in that here police knew that dangerous and toxic chemicals were on the premises.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals