

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP350-CR

Cir. Ct. No. 2010CF1603

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE A. BRIDGES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE and WILLIAM POCAN, Judges.¹ *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¹ The Hon. Michael Guolee presided over this case through the judgment; the Hon. William Pocan handled the second suppression hearing that we ordered on remand.

¶1 CANE, Reserve Judge. Andre A. Bridges appeals a judgment of conviction for possession with intent to distribute heroin, possession with intent to distribute cocaine, possession with intent to distribute ecstasy, and felon in possession of a firearm. Bridges argues the trial court erred by denying his suppression motion. He asserts that: he had standing to challenge the search of his friend's apartment and basement, the police did not have exigent circumstances to enter the apartment without a warrant, the apartment resident did not give voluntary consent to search the apartment, and the subsequent consent to search the basement of the apartment was not sufficiently attenuated from the initial illegal entry. We affirm.

BACKGROUND

¶2 In February and March 2010, Milwaukee police officers were conducting surveillance on a duplex-apartment building at 7146 West Appleton Avenue. A confidential informant had told the police that a man was selling ecstasy for someone in the building. During the surveillance in February, the police saw a man park his car, enter the apartment door leading to apartments one and two, and then leave a short time later. After the police followed the man in his car, they conducted a traffic stop and the man told them he had bought cocaine at apartment one from a man called Dre, who shares the apartment with his Uncle Fred. He told police that Dre drives a burgundy-colored Buick Roadmaster. When the officers saw the Buick parked behind the apartment building, they ran its license plate, which showed the car as registered to Bridges with an address on North 7th street. The police had observed the Buick parked by the apartment building on several occasions during the surveillance. A few weeks after the February traffic stop, an informant told the police that on March 4, 2010, a man

named Raymond Golden would be leaving the apartment with a large amount of ecstasy pills.

¶3 The police set up surveillance in the afternoon on March 4, 2010, and saw Golden arrive, enter the outer door for apartments one and two, and leave a short time later. When Golden saw the police, he fled. During the foot-chase, Golden dropped a bag filled with twenty-five ecstasy pills. The police eventually caught Golden, who told them he bought the pills from a man in the hallway of the apartment building. The police returned to the apartment building. The tenant in apartment two let the officers into the building and allowed officers to search his apartment to rule out apartment two as the source of the drugs. Then the police went to apartment one, knocked loudly and yelled “Milwaukee Police.” No one answered the door but the officers could hear movement inside like “someone walking and moving items around.” The officers knocked loudly again and yelled “Milwaukee police.” Still, no one answered. The officers continued to hear movement from inside. At this point, the police believed that “someone was either destroying potential evidence or narcotics or arming themselves” so the officers kicked in the door and entered the apartment with guns drawn.

¶4 After entering the apartment, the police saw Bridges standing near the couch, and they did a protective sweep of the apartment for their safety. They found Frederick Mallory, the resident of the apartment, in his bedroom. Officer Dean Newport explained to Mallory what the police were doing and Mallory gave permission for the officers to search the apartment for drugs and guns. In the kitchen, the police found corner-cut baggies, a scale and a measuring cup with white residue on it later identified as cocaine powder. After searching the apartment, the officers also asked Mallory for consent to search the basement, which was accessed by a locked door in the hallway outside the apartment.

Mallory, who normally had a key to the basement because he did maintenance in the building for the landlord, told the police he had lost the key but they could do whatever they needed to do in order to open the door. The police were able to pry the door open without damaging it. In the basement, the police found a toolbox containing 341 pills of ecstasy, 48.74 grams of heroin and 22.72 grams of cocaine as well as two loaded guns and ammunition. A fingerprint on the toolbox was later identified as Bridges' fingerprint.²

¶5 The police arrested Bridges and he was charged with possession with intent to deliver heroin (ten to fifty grams), possession with intent to deliver cocaine (fifteen to forty grams), possession with intent to deliver MDMA (ecstasy more than fifty grams) all as a second or subsequent offense, and possession of a firearm by a felon, contrary to WIS. STAT. §§ 961.41(1m)(d)3., 961.41(1m)(cm)3., 961.41(1m)(hm)4., 941.29(2) and 961.48(1)(a) & (b). Mallory was not charged with any crimes. Bridges filed a motion to suppress all the items found in Mallory's kitchen and the basement, claiming that the police did not have exigent circumstances to enter the apartment, and that Mallory did not voluntarily consent to the search of the apartment or the basement. In response, the State contended that Bridges did not have standing to challenge the search as he did not have a reasonable expectation of privacy in Mallory's apartment or basement.

¶6 After the first suppression hearing, the trial court found that Bridges did not have a reasonable expectation of privacy in Mallory's apartment because:

² When the police asked Bridges where he lived, he told them he lived with his mother at the North 7th street address. When the police arrived at that address, Bridges' mother consented to a search of her home. In Bridges' bedroom, police found a loaded firearm magazine and unfired cartridges of the same brand and manufacturer of the firearm found in the basement at Mallory's apartment building. Bridges does not challenge the search at his mother's apartment.

(1) Bridges was paroled to his mother's house and could not live at Mallory's; (2) Bridges was "just doing guy things" at Mallory's; it was a "place of leisure, not a residence, no real property interest"; (3) even though he had a key to the apartment "[h]e really had no dominance or control over that property"; and (4) the basement door was locked, requiring a separate key that Bridges did not have and Bridges had no control over the basement. As a result, the trial court ruled that because Bridges was in violation of his parole, he did not have standing to challenge the search. Therefore, the trial court did not fully address the remaining issue of the alleged exigent circumstances leading to entering Mallory's apartment and his consent to the search. The case was then tried to a jury. At the end of the trial, the jury found Bridges guilty of all three drug crimes and the felon in possession of a firearm charge.

¶7 After judgment was entered, Bridges appealed, but before hearing the appeal, we remanded the matter for another suppression hearing on the additional issues Bridges raised on appeal, including whether the police had exigent circumstances to enter the apartment and whether Mallory's consent to search was valid. The postconviction court conducted the second suppression hearing where it found that Bridges, as Mallory's overnight guest, had standing to challenge the search of the apartment based on the factors discussed in *State v. Rewolinski*, 159 Wis. 2d 1, 464 N.W.2d 401 (1990). However, it found that Bridges did not have standing to challenge the search of the basement. It also ruled that the police had probable cause and exigent circumstances to enter the apartment and that Mallory voluntarily consented to search both the apartment and the basement. The postconviction court further found that even if the entry into the apartment was not legal, the consent to search the basement was sufficiently

attenuated from the entry and therefore legal. Bridges appeals the trial courts' suppression rulings.

DISCUSSION

¶8 When reviewing an order denying a motion to suppress as a result of an alleged unlawful entry, we shall sustain the trial court's findings of fact unless such findings are clearly erroneous. *See State v. King*, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). Whether any constitutional violation took place, however, is a question of law we review *de novo*. *Id.*

A. *Exigent Circumstances.*

¶9 We have elected to assume, without deciding, that Bridges had standing to challenge the search and therefore turn directly to whether the police had exigent circumstances to enter and search Mallory's apartment without a warrant. The trial court found that the police had both probable cause and exigent circumstances permitting the forced entry into Mallory's apartment.³

¶10 A warrantless entry into a home by the police is presumptively prohibited by both the United States and Wisconsin Constitutions. *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. A warrantless search may be upheld, however, when the State proves the police had both probable cause and exigent circumstances. Probable cause to search exists when

³ The trial court found that the police had probable cause and exigent circumstances to enter the apartment without a warrant. Bridges concedes that the police had probable cause and he only argues a lack of exigent circumstances. We are not obligated to address issues that are conceded on appeal. *Charolais v. Breeding Ranches, Ltd. v. Wiegel*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

there is a “‘fair probability’ that contraband or evidence of a crime will be found in a particular place.” *Id.*, ¶21 (citation omitted). There are four exigent circumstances that may justify a warrantless search: “(1) an arrest made in ‘hot pursuit,’ (2) a threat to safety or a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee.” *Id.*, ¶25. The police, however, may not create their own exigent circumstances to justify a search. *State v. Kiekhefer*, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997).

¶11 Bridges makes two arguments on exigent circumstances. First, he argues that what the officers heard while knocking on the apartment door was insufficient to create exigent circumstances. Second, he argues that the police created the exigent circumstances by knocking on the door. We reject both contentions.

¶12 The police testified at the suppression hearing that they knocked loudly on the door and yelled “Milwaukee police.” They did this repeatedly, but got no answer from inside the apartment. Based on their loud banging and yelling, the police testified they had “no doubt” the occupants inside knew they were outside the door, but no one answered the door. The officers also testified that after their banging and yelling, they heard shuffling and sounds of movement coming from inside that apartment, like things were being moved around. The evidence shows all this happened just moments after the police chased down and caught Golden, who had just come from the apartment building and fled when he saw police. During the chase, Golden dropped a bag of ecstasy pills. The police testified at the suppression hearing that ecstasy pills can be easily destroyed by flushing, crushing or being consumed. The trial court properly found that under these circumstances, the officers could reasonably believe destruction of evidence

was taking place inside, thereby creating exigent circumstances to forcibly enter the apartment. *See Hughes*, 233 Wis. 2d 280, ¶¶24-26.

¶13 Bridges argues, however, that by knocking on the apartment door, the police created the exigent circumstances. Our supreme court rejected a similar argument in *State v. Robinson*, 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463, where it held that the police who “knock and announce” are not impermissibly creating exigent circumstances because knocking on someone’s door is entirely lawful. *Id.*, ¶32. The actions of those behind the door and how they choose to respond to the “knock and announce” was what created the exigent circumstances, not the police action of knocking. *Id.*

¶14 Here, the police lawfully entered the apartment building when the tenant from apartment two let them into the building. The police chose to do a “knock and talk” at apartment one which is a proper investigative technique. *See State v. Phillips*, 2009 WI App 179, ¶11 n.6, 322 Wis. 2d 576, 778 N.W.2d 157. When doing so, the police heard the occupants moving, shuffling, and something that sounded like things were being moved around. This caused the police to reasonably believe that the occupants were destroying evidence. Drugs, especially ecstasy, can be quickly and easily destroyed. The police actions here did not create the exigent circumstances. Rather, the occupants’ response to the knocking did.

¶15 Thus, we agree with the trial court that the police decision to enter the apartment was reasonable. After repeatedly knocking, announcing, and not getting an answer, the noises and movement the police heard coming from inside justified the forced entry without a warrant on the basis that the occupants might be destroying evidence.

B. *Consent to Search Apartment and Basement.*

¶16 The next issue is whether Mallory's consent to the search of the apartment and basement was voluntary. Bridges does not argue that Mallory's consent was insufficient to apply to Bridges, and, of course, even if Bridges made that argument, we would reject it because "one who possesses common authority over premises or effects with another may give valid consent to the authorities to search those premises or effects, even though the other person does not consent." See *State v. West*, 185 Wis. 2d 68, 93, 517 N.W.2d 482 (1994). Thus, Mallory's consent, if voluntary, would allow the police to legally search the apartment shared by Bridges. Consent that is freely and voluntarily given is a valid exception to a warrantless search. *State v. Bermudez*, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998). *Bermudez* recognized that the: "proper test for voluntariness of consent under the fourth amendment is whether under the totality of the circumstances it was coerced.' If consent is granted only in acquiescence to an unlawful assertion of authority, the consent is invalid." *Id.* (citations omitted). Here, the trial court found that Mallory voluntarily consented to the search of the apartment.

¶17 The trial court's finding is supported by the testimony of both Mallory and Officer Dean Newport. Mallory testified that the officer was nice, cordial, and did not threaten him. Mallory said he gave the officer consent to search his apartment and the basement, and he signed the written consent the officer wrote out. Mallory's testimony was consistent with Newport's. Newport testified that he explained to Mallory that they were doing a narcotics investigation, that the drugs had been traced to his apartment, that Mallory told Newport he does not have any narcotics in his apartment and that the police could "search his place for that stuff." Newport also testified that Mallory verbally

consented to a search of the apartment and basement and later signed the written consent. The written consent signed by Mallory stated: “I gave the Milwaukee Police Department Officer consent to not only search my apartment, but to search the basement too for contraband to include drugs and weapons. I signed this in absence of coercion (threats or promises).” Newport testified that the conversation with Mallory was normal, “jovial, informative, somewhat caring” and that Mallory was helpful. Further, Newport said Mallory was not confined to his room or guarded by an officer. The trial court found Newport especially credible based on the detail of his suppression hearing testimony.

¶18 Thus, the record supports the trial court’s finding that Mallory voluntarily consented to the search of his apartment and basement, both verbally and in writing. Bridges’ claim that Mallory did not consent, but only *acquiesced*, is not supported by officer Newport’s or the other officers’ testimony, which the trial court found to be very credible. We defer to the trial court on credibility determinations “because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” *See State v. Carnemolla*, 229 Wis.2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Accordingly, we affirm the rulings on the suppression issues.

By the Court.—Judgment affirmed.

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