

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2015

Diane M. Fremgen
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. 2014AP2604-CR

Cir. Ct. No. 2013CM2127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY F. SMART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Jeffrey Smart appeals his conviction for OWI—second offense with a passenger under sixteen years old and domestic abuse as a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

repeater. The arrest stemmed from an altercation between Smart and his live-in girlfriend. After a physical fight ensued, an intoxicated Smart left the home with his two young children. Smart drove to a nearby hotel and, after police officers determined which room he had checked into, refused to open the door or speak with anyone. Smart argues that police officers violated the Fourth Amendment when they entered his hotel room to arrest him without first obtaining a warrant. However, we hold that the need for the police officers to enter the room and assess the well-being of Smart's two children constituted exigent circumstances to overcome applying for a warrant. Affirmed.

Facts

¶2 On November 30th, 2013, on a cold night, at about 4:55 a.m., Smart's live-in girlfriend called the police to report a physical altercation that had occurred between herself and Smart. Smart's girlfriend told police that Smart left in his vehicle with his two sons, who were five and nine years old. She also told the police that Smart was intoxicated.

¶3 The police began searching for Smart's vehicle. Two officers found it in a hotel parking lot. The vehicle was empty. The officers contacted the hotel's night auditor to see if Smart had recently checked in. When they found out that Smart had not checked in, they contacted the hotel directly across the street and found out he had checked in there.

¶4 By this time, forty-five minutes had elapsed since Smart's girlfriend called the police. The hotel worker who had spoken with Smart said he was alone when he entered the hotel. The officers went to Smart's hotel room, knocked on the door, and identified themselves as police officers, but he did not answer. After a couple minutes, they called the hotel room and heard the phone ringing through

the door, but no one answered. The officers then obtained a room key and entered the hotel room, where they found Smart awake and his two children asleep in one of the beds. The officers detained and handcuffed Smart before officially placing him under arrest.

¶5 The State charged Smart with OWI—second offense, domestic abuse, intimidation of a victim, operating a motor vehicle while revoked, and operating a vehicle with a prohibited alcohol concentration. Smart filed a motion to suppress, challenging his arrest because it was made in a hotel room he occupied without a warrant. The circuit court denied the motion, and Smart pled guilty to OWI and no contest to domestic abuse while the other charges were dismissed and read in at sentencing. He now appeals.

Analysis

¶6 A review of an order denying a motion to suppress presents a question of constitutional fact. *State v. Robinson*, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463. We uphold the circuit court’s findings of fact unless they are clearly erroneous. *Id.* However, we review whether the findings of fact support the denial of a motion to dismiss de novo. *Id.*

¶7 The United States Constitution protects against illegal searches and seizures in hotels when police officers do not first obtain a warrant to enter the suspect’s room. *See Stoner v. California*, 376 U.S. 483, 486 (1964). Therefore, such warrantless entry is valid only if it falls under one of the exceptions to the general prohibition. *See id.* One exception to the warrant requirement is when entry is supported by both probable cause and exigent circumstances. *Robinson*, 327 Wis. 2d 302, ¶24. Exigent circumstances include a threat to the safety of the suspect or other individuals. *Id.*, ¶30. We apply an objective test to determine

whether it was reasonable for the police officers to believe that someone's safety was at risk. *See State v. Richter*, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29. The Constitution does not require officers to delay their investigation if doing so could endanger the lives of the suspect or others. *See id.*, ¶37.

¶8 In this case, the exigent circumstances test supports the officers' entry into Smart's hotel room without obtaining a warrant. Smart's girlfriend called the police in the middle of a cold, November night. She told them that an intoxicated Smart left the home in a vehicle with his two children. When police found the vehicle the children were not inside it. And, the night duty attendant did not see the children when Smart checked in. By the time officers located Smart's hotel room, a significant amount of time had elapsed and there was still no sign of the children. The safety of Smart's children was paramount, and it was reasonable for the officers to enter the hotel room as quickly as possible to ensure their well-being. Therefore, we hold that the police officers did not violate the Constitution's warrant requirement given the exigent circumstances present in this case.

By the Court.—Judgment affirmed.

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

