COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP927-CR **Cir. Ct. No. 2013CF1736**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIE C. PHILLIPS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: MARC A. HAMMER, Judge. *Reversed*.

¶1 HRUZ, J.[1] Julie Phillips appeals a judgment convicting her of one count of possession of tetrahydrocannabinols (THC) and one count of possession

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

of drug paraphernalia, both counts as a party to a crime. Phillips argues the circuit court erred by denying her motion to suppress evidence seized following police officers' warrantless entry into her residence. The circuit court concluded the warrantless entry was constitutionally permissible under the exigent circumstances exception to the warrant requirement. We conclude the evidence introduced at the suppression hearing was insufficient to establish exigent circumstances necessary to excuse the presumptively unconstitutional, warrantless entry into Phillips' home. We therefore reverse.

BACKGROUND

¶2 At the suppression hearing, officer Michael Haines testified he had been employed as a public safety officer for the Village of Ashwaubenon for eighteen years. On November 26, 2013, at approximately 4:00 p.m., Haines was dispatched to a residence on Marlee Lane following a complaint that a dog had been left outside without food or water. When Haines arrived and knocked on the door of the residence, a woman, later identified as Phillips, answered.

¶3 Haines testified Phillips opened the door, "almost … slid out and immediately closed the door behind her." While the door was open, Haines could smell "a pungent, strong odor of non-burnt marijuana coming from the residence." He noticed the same odor emanating from Phillips' clothes. When asked to describe his training and experience with respect to detecting the odor of marijuana, Haines stated:

> I've been through several different types of training through technical colleges, through the Drug Task Force. I was also involved, I believe it was, 2 years ago [in] assisting in taking down probably one of the largest marijuana grows in Marinette County, and on that date, when we went to the grow, we could smell that from about 100 yards away of the raw smell of marijuana. That was a

> very similar smell that I smelled when Ms. Phillips opened the door.

¶4 After detecting the odor of marijuana coming from Phillips and her residence, Haines immediately called for backup. He then talked to Phillips about a dog that was tied up outside her residence. Once Haines knew that his colleague, commander Thomas Rolling, was nearby, he confronted Phillips about the marijuana odor. He asked Phillips if she would consent to a search of her residence. She refused, telling him he would need to get a warrant.[2]

¶5 Haines testified he then told Phillips that, based on his training and experience, the pungent odor of marijuana "created exigent circumstances [for him] to go in and secure the residence." At some point during this conversation, Phillips informed Haines that her daughter was inside the residence and was afraid of the police, due to a previous incident with Ashwaubenon police officers. Haines testified he could see Phillips' daughter inside the residence. He allowed the child to leave the home and go to a neighbor's house.[3]

¶6 As Phillips' daughter was leaving the residence, or shortly thereafter, Haines, Rolling, and Phillips went inside, still without Phillips' consent. Rolling stood in the living room with Phillips while Haines "did a quick protective sweep

[2] Phillips testified she agreed to wait outside while Haines obtained a warrant. Haines could not recall whether Phillips agreed to wait outside. We agree with the circuit court that the issue of whether Phillips agreed to wait outside while a warrant was obtained is not material to our decision. What is material is that, at all relevant times, Phillips' presence outside the residence eliminated her as a possible unknown threat to safety or someone who could destroy any evidence within the residence.

[3] The suppression hearing transcript does not indicate the age of Phillips' daughter. However, Phillips testified her daughter had just gotten home from school when Haines arrived. In addition, Haines referred to Phillips' daughter as a "child" during his testimony, and Rolling referred to Phillips' daughter as a "small child."

just checking for other people within the residence." During the sweep, Haines observed drug paraphernalia and jars containing green plant material. Phillips and her husband—who arrived at the residence after the officers had entered it and performed the sweep—subsequently signed a consent form allowing police to conduct a full search of the premises.[4]

¶7 When asked why he believed there was an exigency necessitating a warrantless entry into Phillips' residence, Haines testified:

> Well, based upon that—it was just an overpowering pungent smell of fresh marijuana, based upon my training and experience, that would be—wouldn't be a personal type use of smell, from a multitude of people with personal use marijuana, and this was just that pungent that I believe it that there could be potential of possession with intent to deliver of marijuana. It was just that much of a smell coming from that residence.

Haines was also asked by the prosecution whether, in his training and experience, there was a "dangerous element" to cases involving possession of marijuana with intent to deliver. He responded, "Absolutely. Those that have possession with intent to deliver try to protect their assets, and by protecting their assets sometimes they have guns, they will flush their—try to get rid of their marijuana."

[4] According to the criminal complaint, police discovered 245.16 grams of raw marijuana and marijuana stems, 1.77 grams of "mushrooms," and numerous items of drug paraphernalia during the search of Phillips' residence.

On appeal, Phillips argues all of the evidence police found in her home should be suppressed based on the officers' initial warrantless entry. The State does not develop any argument in response that, even if the warrantless entry was impermissible, the evidence is nevertheless admissible based on Phillips' consent to the subsequent search. The State also does not claim any other exception to the exclusionary rule is applicable in this case.

¶8 On cross-examination, Haines conceded Phillips never indicated that anyone other than her daughter was inside the residence, and there was no other indication anyone else was inside. Phillips testified she specifically told Haines her daughter was the only person inside the residence. Haines further conceded on cross-examination that he did not hear a toilet flushing, a garbage disposal running, or anything else that might have indicated evidence was being destroyed.

¶9 Rolling testified he did not consider Phillips' neighborhood to be a high-crime area, although he was aware drug activity had been reported at some residences in the area. He acknowledged he was not aware of any prior reports of drug activity concerning Phillips' residence.

¶10 The circuit court denied Phillips' suppression motion, concluding the officers' warrantless entry into her home was permissible under the exigent circumstances exception to the warrant requirements of the federal and Wisconsin constitutions. First, the court concluded the overpowering smell of marijuana coming from Phillips' clothing and residence provided probable cause to believe the residence contained evidence of a crime. Second, the court concluded exigent circumstances justified the warrantless entry.

¶11 With respect to exigent circumstances, the circuit court reasoned Haines could have reasonably concluded a delay in procuring a warrant would gravely endanger life or risk the destruction of evidence. The court stated the strong odor of marijuana Haines observed suggested a large volume of marijuana was present inside Phillips' residence, which "affects the officer's perception of risks involved in being at the place, standing outside of the place, going into the place, entering with or without a warrant." The court also stated the "overpowering smell … directly affects whether or not it's likely that the evidence

[will] be destroyed." The court explained, "When you're dealing with this much volume, I think it's reasonable to assume that there is more than one actor involved. … I think it's reasonable to assume that it is more likely for marijuana to be destroyed if it is of a high volume." The court further noted Phillips' neighborhood was "not a high crime area, but not necessarily a low crime area." On these facts, the court stated there was a "sufficient minimum exigency so as to justify the protective search based upon a fear of destruction of evidence and law enforcement safety."

¶12 Phillips subsequently pleaded no contest to one count of possession of THC and one count of possession of drug paraphernalia, both counts as a party to a crime.[5] This appeal follows. *See* WIS. STAT. § 971.31(10) (permitting a defendant to challenge the denial of a suppression motion on appeal despite having entered a plea of guilty or no contest).

DISCUSSION

¶13 "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, which we review under two different standards." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, the application of the law to those facts presents a

[5] Phillips also pleaded no contest to a third count—maintaining a drug trafficking place, as a party to a crime. However, she entered into a deferred entry of judgment agreement regarding that count, under which she agreed to comply with certain conditions, and, in exchange, the State agreed to move for dismissal of the charge at the end of a twelve-month period. CCAP records reflect that Phillips fulfilled the conditions of the deferred entry of judgment agreement, and the charge of maintaining a drug trafficking place was dismissed on March 18, 2016.

question of law that we review independently. ***Id.*** In our review in this appeal, we do not find any of the circuit court's findings of fact to be clearly erroneous.

¶14 Warrantless entries by police into private residences are presumptively prohibited by both the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution. ***Id.***, ¶17. "The home occupies a special place in Fourth Amendment jurisprudence." ***State v. Robinson***, 2010 WI 80, ¶48, 327 Wis. 2d 302, 786 N.W.2d 463. "Indeed, '[i]t is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***State v. Richter***, 2000 WI 58, ¶28, 235 Wis. 2d 524, 612 N.W.2d 29 (internal quotation marks omitted; quoting ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984)). Consistent with this principle, we have previously stated that the Fourth Amendment "accords the highest degree of protection to a person's home." ***State v. Trecroci***, 2001 WI App 126, ¶41, 246 Wis. 2d 261, 630 N.W.2d 555.

¶15 "The Fourth Amendment is not, however, an absolute bar to warrantless, nonconsensual entries into private residences." ***State v. Lee***, 2009 WI App 96, ¶7, 320 Wis. 2d 536, 771 N.W.2d 373. There is an exception to the warrant requirement "where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." ***Hughes***, 233 Wis. 2d 280, ¶17. Here, Phillips concedes—and we agree—the officers had probable cause to believe her home contained evidence of a crime, based on the odor of marijuana Haines detected. *See* ***id.***, ¶¶21-23 (unmistakable odor of marijuana coming from defendant's apartment provided probable cause to believe evidence of a crime would be found inside). The disputed issue is whether the State met its burden to demonstrate that exigent circumstances justified the warrantless entry. *See* ***Richter***, 235 Wis. 2d

524, ¶29 ("The State bears the burden of proving the existence of exigent circumstances.").

¶16 Wisconsin courts have recognized four circumstances that, when measured against the time required to procure a warrant, constitute exigent circumstances justifying a warrantless entry: (1) an arrest made in "hot pursuit;" (2) a threat to safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) a likelihood that the suspect will flee. ***Hughes***, 233 Wis. 2d 280, ¶25. To determine whether any of these exigent circumstances were present, we apply an objective test, considering whether, under the facts as they were known at the time, an officer "would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape." ***Id.***, ¶24.

¶17 The State concedes the odor of marijuana detected by Haines was insufficient, in and of itself, to create an exigency allowing the officers to enter Phillips' residence without a warrant. *See* ***id.***, ¶¶27-28 (citing ***Johnson v. United States***, 333 U.S. 10 (1948); ***State v. Kiekhefer***, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997)). However, the State argues the strong odor of marijuana, in combination with other factors, permitted the officers to reasonably conclude the delay required to procure a search warrant would gravely endanger life or risk the destruction of evidence. We disagree in both respects.

¶18 With respect to the safety consideration, the State argues Haines "believed that a protective sweep of the residence was necessary to ensure the

safety of all involved, particularly if there were more children in the residence."[6] In support of this contention, the State cites Haines' testimony that the odor of raw marijuana emanating from Phillips' residence was similar to the odor he observed when investigating a large marijuana grow in Marinette County. The State also relies on Haines' testimony that, based on his training and experience: (1) the odor he observed was consistent with possession of marijuana with intent to deliver, rather than possession for personal use; and (2) there is a "dangerous element" to cases involving possession of marijuana with intent to deliver because perpetrators of that crime "try to protect their assets, and by protecting their assets

[6] Throughout its brief, the State refers to the initial search of Phillips' residence as a "protective sweep." "The protective sweep doctrine applies once law enforcement officers are inside an area, including a home." ***State v. Sanders***, 2008 WI 85, ¶32, 311 Wis. 2d 257, 752 N.W.2d 713. The term "protective sweep" typically refers to "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." ***Id.*** (quoting ***Maryland v. Buie***, 494 U.S. 325, 327 (1990)). However, protective sweeps can also occur in other contexts, for instance, when officers have entered a home pursuant to an exception to the warrant requirement. *See* ***State v. Horngren***, 2000 WI App 177, ¶20, 238 Wis. 2d 347, 617 N.W.2d 508 (community caretaker exception); ***State v. Lee***, 2009 WI App 96, ¶¶9-11, 320 Wis. 2d 536, 771 N.W.2d 373 (exigent circumstances exception).

The standard for determining the constitutionality of a protective sweep is different from the standard for determining whether a warrantless entry was permissible under the exigent circumstances exception. An officer may perform a protective sweep when he or she possesses "a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." ***Sanders***, 311 Wis. 2d 257, ¶32 (quoting ***Buie***, 494 U.S. at 327). In contrast, as noted above, the exigent circumstances exception applies when an officer could reasonably believe delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape. ***State v. Hughes***, 2000 WI 24, ¶24, 233 Wis. 2d 280, 607 N.W.2d 621.

On appeal, Phillips challenges the initial, warrantless entry into her home. She does not challenge—at least not directly—the subsequent protective sweep the officers conducted once in the home. Although the State uses the term "protective sweep" throughout its brief, it does not cite the standard for determining the constitutionality of a protective sweep; it cites and applies only the exigent circumstances standard. Because the State apparently concedes the disposition of this case is governed by the exigent circumstances test as applied to the officers' initial entry into the home, we apply that standard to determine whether police could enter Phillips' residence without a warrant.

sometimes they have guns." Finally, the State notes Haines was aware there was at least one child in the residence.[7]

¶19 The problem with the State's argument is that there were no facts indicating that a child, or anyone else, was actually inside Phillips' residence at the time the officers entered without a warrant. Haines testified he could see Phillips' daughter inside the residence before the warrantless entry. However, the child left the residence either just before or just as the officers were entering. Importantly, Haines conceded there was no indication anyone else was inside the residence. Thus, even if Haines could have reasonably concluded, based on his training and experience, that the odor of marijuana coming from the residence was consistent with possession with intent to deliver and that such cases are dangerous because the perpetrators try to protect their assets, there was no basis for Haines to conclude there actually were any individuals inside the residence who might pose such a threat. Haines' testimony regarding his training and experience in such matters stopped short of him stating that, in the presence of all the factors to which he testified, multiple people are present around the drug supply at all, or even most, times.

¶20 A comparison of this case with ***Lee*** is instructive. In ***Lee***, officers went to the upper unit of a duplex on the north side of Milwaukee to investigate complaints of drug dealing. ***Lee***, 320 Wis. 2d 536, ¶2. When they arrived, they

[7] To the extent the State is attempting to support its exigent circumstances argument with the fact Phillips' child was present in the house, that argument is undeveloped in its brief. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments). Furthermore, the record shows Haines told Phillips of his conclusion that an exigency existed for him to enter the home based solely on the pungent odor of marijuana he smelled, without reference to the child's presence. Finally, it is undisputed that Phillips' child was allowed to leave the residence either just before or concurrently with the officers' warrantless entry into the home.

received permission from the resident of the lower unit to enter a common hallway containing a stairway to the upper unit. ***Id.*** At the top of the stairs, the officers found the door to the upper unit wide open. ***Id.*** From outside the door, they observed what appeared to be marijuana and cocaine, along with a scale, a razor blade, and a box of baggies. ***Id.*** There were no occupants in view, and the officers received no response when they announced their presence. ***Id.***

¶21 On these facts, we concluded the officers' subsequent warrantless entry into the unit satisfied the exigent circumstances exception because the officers could have reasonably concluded the entry was necessary to ensure their own safety. ***Id.***, ¶¶8-10, 13-16. We explained that, in light of the open door, the officers could reasonably believe someone was inside the residence because "[p]eople do not customarily leave the front door to their residences open when they leave, especially when illegal narcotics are easily seen through the open door." ***Id.***, ¶14. We further concluded that, because the officers announced their presence and received no response, they could reasonably believe the occupants of the unit "were aware that police officers were outside the open door, that controlled substances and other evidence of criminal activity were visible to the officers, that the occupants were the subject of police suspicion, and that a raid may be imminent." ***Id.*** Finally, we stated the officers "could reasonably believe that the occupants were connected with drug activity and may be dangerous," in that "[f]elony drug investigations may frequently involve a threat of physical violence." ***Id.***, ¶15.

¶22 There are important distinctions between this case and ***Lee***. As an initial matter, Haines was at the Phillips residence to investigate a report of an unattended dog, not complaints of drug activity. More important is that, in ***Lee***, the open door provided a basis for the officers to reasonably conclude there was

someone inside the unit, who thereby could pose the type of grave danger to the officers or others that the exigent circumstances doctrine seeks to avert. *See* ***Hughes***, 233 Wis. 2d 280, ¶24. Here, in contrast, there were no facts indicating anyone was inside Phillips' residence when the officers entered without a warrant.

¶23 We also find persuasive a portion of the Iowa Supreme Court's reasoning in ***State v. Watts***, 801 N.W.2d 845 (Iowa 2011), a case with somewhat similar facts. In ***Watts***, police received information that "a subject" residing at a particular address had a large quantity of marijuana inside his apartment. ***Id.*** at 848. An officer knocked on the apartment door, and when Watts answered, an "overpowering odor of raw marijuana wafted out of the apartment." ***Id.*** at 849. When the officer identified himself as a police officer, Watts attempted to shut the door. ***Id.*** Watts was then detained, and officers entered the apartment without a warrant and performed a "protective sweep." ***Id.***

¶24 On appeal, the State argued the officers "needed to enter and clear the apartment because of the possibility of others in the apartment who might either pose a threat to the officers or destroy evidence." ***Id.*** at 851. The Iowa Supreme Court rejected that argument, reasoning, "The problem with an exigent circumstances theory here … is the absence of facts that would have justified a reasonably prudent officer in believing anyone else might be in the apartment." ***Id.*** The court explained:

> In short, the State's exigent circumstances claim boils down to an argument that "we didn't know if there were any other individuals inside the residence," …. But of course, when a suspect is detained outside his or her residence, it is normally *possible* there could be other individuals inside. If this mere possibility, without more, constituted exigent circumstances, it would be tantamount to holding that a warrantless "sweep" of a person's residence could regularly be conducted whenever that

> person was apprehended at his or her residence. The Fourth Amendment, we believe, requires more.

Id. at 852.[8]

¶25 The State contends it is offering that "more" in the form of Haines' testimony regarding his training and experience, from which he could have reasonably concluded there were other individuals inside Phillips' residence. Specifically, the State argues Haines, "in his training and experience, was aware that the pungent smell of raw marijuana coming from Ms. Phillips and her home was often associated with drug operations which include more than one individual working to package and distribute the drugs." However, the State provides no record citation in support of this assertion. Our review of the suppression hearing transcript indicates that Haines testified the odor emanating from Phillips' home was consistent with possession of marijuana with intent to deliver, and he further testified perpetrators of that offense "try to protect their assets, and by protecting their assets sometimes they have guns." Contrary to the State's assertion, Haines never testified that, in his training and experience, such cases involve multiple individuals working to package and distribute drugs.

[8] We also find persuasive ***State v. Schwartz***, No. 2013AP1868, unpublished slip op. (WI App July 30, 2014), an authored, unpublished Wisconsin Court of Appeals decision addressing the constitutionality of a warrantless entry "pursuant to the 'community caretaker' and/or 'protective sweep' exceptions to the Fourth Amendment's warrant requirement." ***Id.***, ¶4; *see also* WIS. STAT. RULE 809.23(3)(b) (permitting citation of authored, unpublished opinions issued after July 1, 2009, as persuasive authority). In ***Schwartz***, we concluded neither the community caretaker nor the protective sweep exception applied because the State could not "point to any objectively reasonable basis for the police to believe that there was another individual in Schwartz's residence." ***Schwartz***, No. 2013AP1868, ¶8. Although the State contended there was no evidence "to preclude the existence of such a person," we stated the "absence of contrary evidence alone" did not provide an objectively reasonable basis for police to conclude anyone was inside the residence. ***Id.***, ¶9. Further, "[t]he State does not meet this burden for the community caretaker or protective sweep exceptions by showing only the possibility that another person may be present without any facts supporting such an inference." ***Id.***

¶26 Moreover, even if Haines had so testified, that testimony still would not establish that it was reasonable for Haines to conclude anyone was inside Phillips' residence at the time of the warrantless entry. Haines did not, for instance, testify that, in his training and experience, someone is charged with protecting a drug operation's stock at all times. Accepting the State's argument that Haines could reasonably believe there was another person inside Phillips' residence simply because he observed an odor consistent with possession with intent to deliver and he was aware such cases involve multiple individuals who act to protect their stock would, in essence, create a blanket rule allowing warrantless entries in all cases where officers have probable cause to believe a residence contains evidence of possession with intent to deliver. *Cf.* ***United States v. Ellis***, 499 F.3d 686, 691 (7th Cir. 2007) (stating courts should refrain from "effectively creat[ing] a situation in which the police have no reason to obtain a warrant when they want to search a home with any type of connections to drugs"). Adopting such a rule would turn the "carefully delineated," "jealously and carefully drawn" exigent circumstances exception on its head.[9] *See* ***State v. Rodriguez***, 2001 WI App 206, ¶8, 247 Wis. 2d 734, 634 N.W.2d 844.

[9] Notably, in ***Richards v. Wisconsin***, 520 U.S. 385 (1997), the United States Supreme Court rejected the Wisconsin Supreme Court's conclusion that police officers are never required to knock and announce their presence when executing search warrants in felony drug investigations. ***Id.*** at 387-88. The Wisconsin Supreme Court had concluded it was reasonable to assume all felony drug crimes involve an extremely high risk of serious injury to police, and, accordingly, police do not need specific information about dangerousness in order to dispense with the knock-and-announce requirement in felony drug cases. ***Id.*** at 390.

(continued)

¶27 Having rejected the State's argument that exigent circumstances were present because waiting to obtain a warrant before entering Phillips' residence would have "gravely endangered" life, we now turn to the State's alternative rationale that the delay associated with obtaining a warrant would have risked the destruction of evidence. *See* ***Hughes***, 233 Wis. 2d 280, ¶24. The State cites ***Hughes*** in support of its position.

¶28 In ***Hughes***, two police officers responded to a report of trespassing at a Milwaukee apartment complex known to be "an area of heavy drug activity." ***Id.***, ¶2. No one responded when the officers knocked on the door of the apartment in question, although the officers could hear loud music and many voices inside. ***Id.***, ¶4. The officers decided to call for backup and await its arrival before knocking again. ***Id.*** While the officers were waiting in the hallway, an individual suddenly opened the door of the apartment, and the officers immediately smelled a strong odor of marijuana. ***Id.***, ¶5. The individual attempted to slam the door shut. ***Id.*** The officers prevented that from happening, and then, based on the circumstances, entered the apartment. ***Id.***

In a unanimous decision, the United States Supreme Court rejected this blanket rule, reasoning that "while drug investigation frequently does pose special risks to officer safety … not every drug investigation will pose these risks to a substantial degree." ***Id.*** at 393. The Court also noted, "A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others." ***Id.*** at 393-94. The court concluded, "[T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case." ***Id.*** at 394.

Richards did not involve the exigent circumstances exception to the warrant requirement. However, the Court's reasons for declining to adopt a blanket rule in ***Richards*** equally support declining to adopt a blanket rule allowing warrantless entries based on exigent circumstances in cases where officers have probable cause to believe a residence contains evidence of possession with intent to deliver.

¶29 On appeal, the State argued the officers' warrantless entry into the apartment was permissible under the exigent circumstances exception because the officers could reasonably conclude the delay required to obtain a warrant would risk the destruction of evidence.[10] ***Id.***, ¶26. Our supreme court agreed, stating the "strong odor of marijuana … gave rise to a reasonable belief that the drug—the evidence—was likely being consumed by the occupants and consequently destroyed." ***Id.*** The court further stated the "greater exigency" was the "possibility of the intentional and organized destruction of the drug by the apartment occupants once they were aware of the police presence outside the door." ***Id.***

¶30 ***Hughes*** differs from this case in two respects. First, the officers in ***Hughes*** could reasonably conclude, based on the number of voices they heard, that there were multiple people inside the apartment who might destroy evidence if the officers attempted to obtain a warrant before entering. In contrast, as discussed above, there were no facts in this case that would have allowed an officer to reasonably conclude anyone was inside Phillips' residence at the time of the warrantless entry. *See infra* ¶¶19-25. If no one was inside the residence, there was no possibility any evidence inside would be destroyed. Second, the officers in ***Hughes*** smelled burnt marijuana, which suggested someone inside the residence was actively destroying the evidence by consuming it. Here, Haines detected the odor of raw marijuana, so he had no basis to conclude evidence was being destroyed via consumption. Thus, unlike the officers in ***Hughes***, the officers in this case could not reasonably conclude the delay associated with obtaining a

[10] The State in ***Hughes*** did not argue the threat-to-safety exigent circumstance as an alternative basis for the officers' warrantless entry.

warrant would risk the destruction of evidence. Indeed, post-***Hughes***, cases that have found the totality of the circumstances objectively supported an officer's reasonable belief that someone inside a residence was involved in the destruction of evidence have required more facts than present in this case. *See, e.g.*, ***Lee***, 320 Wis. 2d 536, ¶16; ***State v. Garrett***, 2001 WI App 240, ¶¶13, 17, 248 Wis. 2d 61, 635 N.W.2d 615.

By the Court.—Judgment reversed.

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