COURT OF APPEALS DECISION DATED AND FILED

April 10, 2018

Sheila T. Reiff
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. 2017AP737-CR

Cir. Ct. No. 2013CF5372

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERONE L. BURESS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS J. McADAMS, Judge. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Terone L. Buress appeals a judgment of conviction entered upon his guilty plea to possessing a firearm as a felon and to possessing tetrahydrocannibols as a second or subsequent offense. The sole issue is whether the circuit court erroneously denied his motion to suppress evidence found in his home following a warrantless entry. We affirm.

Background

¶2 The State charged Buress with three felonies. He moved to suppress the handgun police found during a search of his home.[1]

¶3 The evidence developed at the suppression hearing is not disputed. At approximately 3:11 a.m. on November 21, 2013, four police officers were dispatched to a Milwaukee, Wisconsin duplex in response to a call about a possible burglary in progress. The caller, Ms. T., identified herself and said she was a resident in the upper unit of the building. She reported that she could hear people in the lower unit yelling and throwing things. She said she had made a telephone call to the residents in the lower unit, but no one answered. She believed someone had unlawfully entered the first-floor apartment.

¶4 The police spoke to Ms. T. by telephone as they drove towards her home. She reported that she was continuing to hear noises from the first-floor apartment that sounded like "people throwing items around."

[1] Buress was not in the home when police searched it. He conceded in his moving papers that he was a resident of the home at the time of the search.

¶5 When the police arrived at the duplex, they discovered that the exterior back door was unattended and was standing open by approximately two feet. Given the time of night and the information from Ms. T., the police believed that the open door signaled that someone might have unlawfully invaded the building.

¶6 The officers loudly announced their presence but received no response. They entered through the open door and went downstairs to the basement where they remained for about forty-five seconds. Finding nothing unusual, they returned to the first floor, where they discovered that the interior door to the first-floor apartment was also open. The officers viewed the circumstances as "very suspicious" of a possible burglary in progress.

¶7 The officers shouted "police. Announce yourself." No one responded. They continued to announce their presence as they entered the lower unit "to search[] for hidden confederates" and to make sure that the apartment's residents were safe. In one of the bedrooms, the police discovered a man, later identified as Latrice Bell, who appeared to have just awakened. The officers detained Bell and continued checking for possible hidden confederates. In a second bedroom, police observed a pistol on top of a dresser.

¶8 After deeming the scene secure, the police spoke to Ms. T. She identified Bell as one of the residents of the first-floor apartment.

¶9 The circuit court denied Buress's suppression motion, concluding that police acted lawfully when they entered the duplex and searched the first-floor apartment. Buress proceeded to trial, but on the second day of that proceeding he

decided to accept a plea bargain and plead guilty. He now appeals, challenging only the denial of his suppression motion.[2]

Discussion

¶10 "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. Wisconsin courts normally "construe[] the protections of these [constitutional] provisions coextensively." ***Id.*** The usual remedy for a violation of these protections is suppression of the evidence found as a result of the unreasonable intrusion. *See* ***State v. Ferguson***, 2009 WI 50, ¶21, 317 Wis. 2d 586, 767 N.W.2d 187.

¶11 The determination of whether a warrantless search and seizure is constitutionally reasonable presents a question of constitutional fact. *See* ***State v. Denk***, 2008 WI 130, ¶30, 315 Wis. 2d 5, 758 N.W.2d 775. Accordingly, when we review a suppression order, we uphold the findings of fact made by the circuit court unless they are clearly erroneous. *See* ***id.*** Buress does not challenge the circuit court's findings here. Whether a given set of facts supports a constitutionally permissible search presents a question of law that we review *de novo*. *See* ***id.***

[2] In an appeal from a judgment of conviction, we may review a circuit court's order denying a motion to suppress evidence notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶12 “Warrantless searches are *per se* unreasonable under the Fourth Amendment subject to certain exceptions that are ‘jealously and carefully drawn.’” ***State v. Payano-Roman***, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548 (citations omitted). The State has the burden of proving that an exception exists. *See* ***id.*** One such exception arises “where the government can show both probable cause and exigent circumstances that overcome the individual’s right to be free from government interference.” ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. The circuit court concluded that this exception applies here, and we agree.

¶13 We first consider whether the State demonstrated probable cause to search Buress’s apartment. “Probable cause is a flexible, commonsense standard,” *see* ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125, and “[t]he quantum of evidence required to establish probable cause to search is a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place,” ***Hughes***, 233 Wis. 2d 280, ¶21 (citation omitted). We assess that probability by considering the historical facts “viewed from the standpoint of an objectively reasonable police officer.” *See* ***Ornelas v. United States***, 517 U.S. 690, 696 (1996).

¶14 Here, the police had information from an identified informant, Ms. T., who reported hearing what sounded like a burglary underway in the lower flat of the Milwaukee duplex where she was the upstairs tenant. The police may reasonably deem information reliable when a citizen identifies himself or herself and reports a crime. *See* ***State v. Sisk***, 2001 WI App 182, ¶9, 247 Wis. 2d 443, 634 N.W.2d 877. Here, Ms. T.’s report included contemporaneous descriptions of sounds that are reasonably associated with criminal activity, and she further described circumstances suggesting ongoing risk, namely, her unanswered

telephone call to the residents of the lower unit. *See* ***State v. Rutzinski***, 2001 WI 22, ¶34, 241 Wis. 2d 729, 623 N.W.2d 516 (reasonableness of relying on an informant's tip increased where the information suggests an imminent threat to safety).

¶15 When police arrived at the duplex, they observed that the back door of the building was open. As the officers testified, and as the circuit court found, Milwaukee residents normally do not leave the doors of their homes standing open, particularly not at three o'clock in the morning. In the officers' view, the open door was consistent with the unlawful entry that Ms. T. believed she had heard. *See* ***State v. Boggess***, 115 Wis. 2d 443, 455-56, 340 N.W.2d 516 (1983) (corroborating portions of informant's report are relevant to assessing probable cause).

¶16 Other factors also contributed to probable cause. The hour was late and, as the circuit court found, crimes frequently occur under cover of darkness. Further, no one responded to the officers' shouts identifying themselves and calling for the residents to announce themselves in turn. *See* ***State v. Londo***, 2002 WI App 90, ¶9, 252 Wis. 2d 731, 643 N.W.2d 869 (lack of response to officer's knock is a factor in assessing probable cause).

¶17 Buress disputes the existence of probable cause and seeks to analogize his case to the facts in ***State v. Paterson***, 220 Wis. 2d 526, 583 N.W.2d 190 (Ct. App. 1998). In ***Paterson***, a citizen reported to police that lights were going on and off in a neighboring residence consistent with movement from room to room, the homeowner did not answer the neighbor's telephone call, and the garage doors of the residence were open. *See* ***id.*** at 528-29. The citizen believed that a burglary might be in progress. *See* ***id.*** at 529. We concluded that the

community caretaker doctrine did not authorize the police to effect a warrantless entry of the home. ***Id.*** at 529. We are unpersuaded, however, that the circumstances in ***Paterson*** are similar to those in the instant case.

¶18 First, in ***Paterson***, a neighbor reported concerns about another residence at 5:30 p.m., which we observed "was not a time of the day when a residential burglary would normally occur." ***Id.*** at 535. By contrast, Ms. T. called police at approximately 3:00 a.m., that is, in the dead of night when, as the circuit court found, many crimes take place. Second, the ***Paterson*** informant observed lights going on and off, which we stated "does not suggest criminal activity." *See* ***id.*** at 534. By contrast, Ms. T. reported a disturbance, including loud noises and things being thrown around, such as might occur during a violent crime. Third, in ***Paterson*** the garage doors were open, *see* ***id.*** at 529, but here the rear entrance to the home itself was standing open by several feet. We are not the first court to observe that an open garage door is simply not the same as an open door to a house, *see* ***State v. Hawkins,*** 86 N.E.3d 102, 107 (Ohio Ct. App. 2017), or that an open door to a house is particularly unusual during November in the midwest, *see* ***People v. Lemons***, 830 N.W.2d 794, 798 (Mich. Ct. App. 2013).

¶19 A common sense assessment of the facts in the instant case leads us to the conclusion that a reasonable officer could believe, based on the totality of the circumstances, that the duplex was the scene of an ongoing home invasion. In light of the open door, the informant's report, the late hour, and the lack of response when police announced their presence, the officers could reasonably conclude that someone had fled from the home, or that someone was hiding inside, or that the lawful residents were unable to respond because an intruder was preventing them from doing so. *See* ***Londo***, 252 Wis. 2d 731, ¶10. Accordingly,

the officers had probable cause to enter the home and search for a suspect or evidence of the burglary. *See* ***id.***, ¶9.

¶20 We must next consider whether, in addition to probable cause, the State met its burden to demonstrate the existence of exigent circumstances justifying police entry into the apartment without obtaining a search warrant. *See* ***Hughes***, 233 Wis. 2d 280, ¶24. To satisfy this burden, the State is required to show that "a police officer, under the facts as they were known at the time, 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.*** The test is an objective one. *See* ***id.***

¶21 We have previously held categorically that "[h]ousehold burglaries present real and grave risks." ***Londo***, 252 Wis. 2d 731, ¶10. In ***Londo***, we recognized not only that millions of violent crimes are committed in the course of burglaries, but also that '"even if a particular burglary ... does not involve physical harm to others, the 'harsh potentialities for violence' inherent in the forced entry into a home preclude characterization of the crime as innocuous, inconsequential, minor or nonviolent.'" ***Id.*** (citations and some quotation marks omitted). Accordingly, in ***Londo***, where—as here—police had probable cause to believe they were at the scene of a household burglary in progress, we concluded that police properly entered the home without waiting for a warrant. ***Id.*** Here too we are satisfied that the potentially grave danger faced by the residents of the duplex constituted an exigency necessitating immediate warrantless entry. "[O]bjectively, a reasonable officer would have been aware of the danger and the need to immediately go into the house to ensure that no one was in jeopardy." ***Id.***

¶22 Last we consider whether the officers exceeded the permissible scope of their search. *See* ***id.***, ¶11. Officers may conduct warrantless protective sweeps where necessary to guarantee officer and bystander safety. *See* ***Maryland v. Buie***, 494 U.S. 325, 333 (1990). A permissible sweep, however, "must be 'narrowly confined to a cursory visual inspection of those places in which a person might be hiding.'" ***Londo***, 252 Wis. 2d 731, ¶11 (some quotations marks omitted) (quoting, *inter alia*, ***Buie***, 494 U.S. at 327).

¶23 Here, the evidence is uncontroverted that the officers merely opened doors and looked in rooms. They did not poke into containers or pry into drawers. Accordingly, the record shows that the officers did only what was required to ensure that no hostile intruder was hidden in the apartment.

¶24 Buress disagrees, arguing that the need to conduct any search evaporated after the officers encountered Bell asleep in a bedroom. The contention is wholly illogical. Even assuming, as Buress does, that the police should have quickly determined that Bell was lawfully present in the apartment, his lawful presence did not eliminate the possibilities that an intruder had entered the home while Bell slept, that the intruder remained secreted inside, and that Bell—and the police on the scene—were at risk as a result. *Cf.* ***Leaf v. Shelnutt***, 400 F.3d 1070, 1087-88 (7th Cir. 2005) (protective sweep reasonable where police entered home to determine if a burglary had occurred; officers not required first to waken and question an occupant they observed in bed). We conclude that the police reasonably and properly addressed the risk they faced by conducting a protective sweep that did no more than look into places where a person could hide. *See* ***Londo***, 252 Wis. 2d 731, ¶11.

¶25 Because the police lawfully entered the duplex and properly conducted a protective sweep, the evidence they found during that procedure need not be suppressed. *See* ***id.***, ¶12. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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