

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2009

David R. Schanker
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. 2009AP833-CR

Cir. Ct. No. 2008CM267

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY A. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Mary Moore appeals a judgment of conviction for possession of tetrahydrocannabinols and for possession of cocaine. Moore argues evidence obtained during a protective sweep of her apartment should have been

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

suppressed because police entered without a warrant or exigent circumstances. We affirm.

BACKGROUND

¶2 On February 7, 2008, officers Adam Christenson and Barbara Gerarden responded to investigate a complaint about the smell of marijuana coming from Moore's apartment. When the officers arrived, Deangelo Chappell answered the door and told the officers Moore was not home. As the officers were talking with Chappell, they noticed the smell of marijuana. The officers informed Chappell of the purpose of their visit, asked his name, and requested permission to enter. Chappell gave them a name and told the officers they could not come in.

¶3 While the officers ran a check on the name, Chappell started to walk back into the apartment, leaving the door open. Christenson testified he and Gerarden thought Chappell might be "going to destroy evidence or possibly arm himself," so they ordered him back to the door. When Chappell did not respond, Christenson ordered Chappell to return once more. Chappell again failed to comply, so the officers entered the apartment, grabbed him by the elbow, and pulled him back toward the doorway. The officers then asked Chappell if he had any identification or weapons on him. Chappell did not say anything, but quickly stuck his hands into his pockets and disregarded Christenson's order to pull them out. The officers attempted to pull Chappell's hands out and wrestled him to the floor when he resisted.

¶4 After handcuffing Chappell, the officers found his driver's license on the floor.² They ran Chappell's identification information, which revealed two outstanding warrants. The officers placed Chappell under arrest and conducted a protective sweep of the apartment. During the sweep, they found marijuana, cocaine, and drug paraphernalia in plain view. Moore arrived at the apartment shortly after. When the officers told her Chappell was under arrest for possession of marijuana and cocaine, Moore told them the drugs were hers.

¶5 Moore moved to suppress all the evidence the officers obtained after entering her apartment, arguing the entry was unlawful. The circuit court denied the motion, concluding exigent circumstances permitted the warrantless entry.

BACKGROUND

¶6 The only issue on appeal is whether the officers' warrantless entry into Moore's apartment was justified. This presents a mixed question of fact and law. *State v. Leutenegger*, 2004 WI App 127, ¶13, 275 Wis. 2d 512, 685 N.W.2d 536. We uphold the circuit court's findings of historical fact unless clearly erroneous. *Id.* However, we decide independently "whether facts establish exigent circumstances sufficient to justify a warrantless entry." *Id.*

¶7 The exigent circumstances doctrine permits police to enter a home without a warrant "where there is an urgent need to do so, coupled with insufficient time to obtain a warrant." *State v. Smith*, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). Our state supreme court "has identified four factors which,

² Christenson's testimony indicated Chappelle's driver's license came out of his pocket while the officers were pulling his hands out.

when measured against the time needed to obtain a warrant, would constitute the “exigent circumstances” required for a warrantless entry” *Id.* at 229. As relevant here, they include “a threat to safety of a suspect or others, [and] a risk that evidence would be destroyed” *Id.*

¶8 The State argues the officers’ warrantless entry of Moore’s apartment was justified by concerns about their safety and the destruction of evidence. Moore concedes the officers had probable cause to believe there were drugs in her apartment, but contends the officers cannot rely on the exigent circumstances doctrine to justify their entry because the officers’ own actions created the exigent circumstances.

¶9 Moore argues the police officers created exigent circumstances because their “investigative strategy of sending two uniformed officers directly to [her] apartment and knocking on the door, increased the risk of destruction of evidence.” Moore contends the officers should have first pursued a less confrontational strategy to investigate the drug complaint before responding directly to her door. For authority, Moore analogizes to two cases involving controlled delivery “stings,” in which courts held the investigatory strategy of delivering to the defendants packages the defendants believed to contain drugs created the circumstances in which they then feared the packages would be destroyed. *See United States v. Johnson*, 12 F.3d 760 (8th Cir. 1993); *United States v. Duchi*, 906 F.2d 1278 (8th Cir. 1990).

¶10 The facts here are nothing like those in *Duchi* and *Johnson*. Here, the officers simply investigated a complaint about the smell of marijuana emanating from Moore’s apartment. The record does not indicate the officers had any previous information that there were illicit drugs in Moore’s apartment.

Without additional information, the officers were not in a position to obtain a warrant prior to responding. Indeed, the record indicates the contrary: the officers testified they did not have probable cause to believe there were drugs inside until after Chappell opened the door. We can conceive of no more reasonable method to investigate the complaint the officers received than responding directly to the site of the complaint.

¶11 To the extent she advances it, we also reject Moore’s argument there were no exigent circumstances justifying their warrantless entry.³ Both officers testified Chappell walked away from the apartment’s door, that he failed to respond to repeated requests to return, and that he would have disappeared from view had they not entered and pulled him back. Because by this time the officers had probable cause to believe there were illegal drugs inside, they could reasonably conclude Chappell was either going to destroy evidence or arm himself. *See State v. Robinson*, 2009 WI App 97, ¶17, 770 N.W.2d 721. The officers’ entry into Moore’s apartment was therefore lawful.⁴

By the Court.—Judgment affirmed.

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

³ Moore’s argument on this issue is difficult to follow. She does not include a clearly delineated section arguing there were no exigent circumstances. Instead, she intersperses claims the officers had no legitimate concern about their safety or the destruction of evidence throughout her primary argument that these exigent circumstances were created by the officers.

⁴ Moore does not challenge the officers’ conduct after they entered. Indeed, she appears to concede Chappell’s continued failure to obey the officers after they entered created a legitimate risk to the officers’ safety, acknowledging, “Although the officers testified that he placed his hands in his pockets, this occurred after the officers entered the apartment.” She also does not challenge the validity of the protective sweep.

