COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1381-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARIAN L. HALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed.*

ROGGENSACK, J.[1] Darian L. Hall appeals his misdemeanor conviction for possession of marijuana. He claims the circuit court erred when it denied his motion to suppress evidence gathered during a warrantless search of his father's house, because the police lacked probable cause to believe that a crime

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

was being committed at the time they entered the house, and no exigent circumstances existed. We agree that the facts found by the circuit court relating to the officers' original suspicions that a burglary may have been in progress do not in and of themselves support the conclusion that exigent circumstances existed. However, because we conclude that the officers had independent probable cause to believe that criminal drug activity was going on inside the house, and that evidence either was being, or was about to be, destroyed, we affirm the conviction.

BACKGROUND

In the early morning hours of May 26, 1996, police received a report that a neighbor had seen three people enter Darian Hall, Sr.'s home while Hall, Sr. and his wife were away. The neighbor thought one of the three may have been Hall, Sr.'s son, Darian Hall, Jr., the defendant in this action.[2] Monroe County Police Officer Mark Nicholson went to investigate, and he observed three people in a car in the driveway. The driver identified herself as Hall's girlfriend, and indicated that she had permission to use the car whenever she wished. She told Nicholson that no one was in the Hall residence at that time. Nicholson discovered that one of the passengers had an outstanding warrant, and after arresting him, the officer recovered a small amount of marijuana from his pocket.

Meanwhile, two backup officers arrived and observed someone running around in the house. Based on the neighbor's and the girlfriend's statements, the officers were concerned that a burglary might be in progress. The police contained the scene, covering both the front and back entrances to the

[2] Hall, Jr. will be referred to hereinafter simply as "Hall".

house. One of the officers opened the door to a glass porch at the back of the house and called for the occupant to come out. With the door open, the officer could smell a strong odor of burned marijuana. Before proceeding further, the officer shouted a warning that a canine search would be conducted if no one responded to his call.

When there was no response, the officers conducted a canine search of the house. They found Hall under a blanket on a bed in the basement. Hall's friend, Mattson, was found slumped unconscious over a toilet, covered with vomit and urine. While in the house, the officers also observed marijuana plant material on the kitchen table. A pat down search of Mattson revealed another small bag of marijuana.

After the police cited Hall for underage drinking and transported Mattson to a local hospital, they obtained a search warrant to explore the rest of the house for drug evidence. Hall was eventually charged with several misdemeanors, including possession of THC, contrary to § 161.41(3r), STATS.,[3] to which he pleaded no contest after his suppression motion was denied. On appeal, Hall renews his challenge to the warrantless search of his father's home.

DISCUSSION

Standard of Review.

When reviewing the denial of a motion to suppress evidence obtained as a result of an allegedly unlawful search, the circuit court's findings of

[3] This section was amended and moved to § 961.41(3g)(e), STATS., by 1995 Wis. Act 448, § 243 to 266, effective July 9, 1996.

fact will be upheld unless they are clearly erroneous. Section 805.17(2), STATS.; ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the existence of probable cause and exigent circumstances sufficient to justify a warrantless entry into a home are questions of law subject to independent appellate review. ***State v. Drogsvold***, 104 Wis.2d 247, 262, 267, 311 N.W.2d 243, 250, 253 (Ct. App. 1981).

Warrantless Search.

The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***Drogsvold***, 104 Wis.2d at 264, 311 N.W.2d at 251. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home[4] and there be free from unreasonable governmental intrusion." ***Payton v. New York***, 445 U.S. 573, 589-90 (1980) (citation omitted). "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent" who may be caught up in the "competitive enterprise of ferreting out crime." ***Johnson v. United States***, 333 U.S. 10, 14 (1948). Thus, the warrantless search of a house is presumptively unreasonable. ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984).

Although warrantless searches are strongly disfavored, "our laws recognize that, under special circumstances, it would be unrealistic and contrary to public policy to bar law enforcement officials at the doorstep." ***State v. Smith***,

[4] An overnight guest also has a reasonable expectation of privacy in the home in which he is staying, even if he has no legal interest in the premises. ***Minnesota v. Olson***, 495 U.S. 91, 96-97 (1990). Accordingly, the State does not contest that Hall has standing to raise Fourth Amendment claims.

131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986). Therefore, a handful of exceptions have been "jealously and carefully drawn," to balance the interests of the individual with those of the State. ***State v. Gonzalez***, 147 Wis.2d 165, 168, 432 N.W.2d 651, 652 (Ct. App. 1988) (citation omitted). The exceptions to the requirement that a search be conducted with a warrant includes, among others, instances where probable cause for a search is attended by exigent circumstances. ***State v. Milashoski***, 159 Wis.2d 99, 111, 464 N.W.2d 21, 26 (Ct. App. 1990). Therefore, the State bears the burden of proving that the search of the house and seizure of Hall and the other evidence occurred pursuant to probable cause under and exigent circumstances. *See* ***id***.

The probable cause standard is a familiar one. A police officer has probable cause to seize a person when the totality of the circumstances within that officer's knowledge would lead a reasonable police officer to believe that the person probably committed a crime. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Drogsvold***, 104 Wis.2d at 254, 311 N.W.2d at 247 (citation omitted). The objective facts before the police officer need only lead to the conclusion that "guilt is more than a possibility." ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990) (citation omitted).

The test for exigent circumstances is also an objective one. Before entering a home without a search warrant, a police officer must have knowledge of circumstances which have reasonably led him or her to believe that the delay

caused by obtaining the warrant "would gravely endanger life[5] or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape."[6] ***Smith***, 131 Wis.2d at 230, 388 N.W.2d at 606.

Exigent circumstances have been held to exist when firefighters needed to check the spread of flames in a burning building, ***Gonzalez***, 147 Wis.2d 165, 432 N.W.2d 651; when police had traced footsteps in the snow from a burglary scene to the defendant's house and were concerned that boots would dry off if not recovered immediately, ***State v. Amos***, 153 Wis.2d 257, 270, 450 N.W.2d 503, 508 (Ct. App. 1989); and when police knew a murder suspect whose house they had surrounded was armed and had a history of resisting arrest. ***Drogsvold***, 104 Wis.2d at 268, 311 N.W.2d at 253. Conversely, situations which have been determined not to rise to the level of exigency include police hearing the snorings from the open door of a suspected felon's home and had the personnel available to stake out the premises and cover all exits, ***Smith***, 131 Wis.2d at 225, 388 N.W.2d at 604; and police at the home of a drunk driving suspect, whose blood alcohol level they thought would dissipate before they could get a warrant. ***Welsh,*** 466 U.S. at 754**.**

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[5] For instance, when a suspect is known to be armed, "[t]he passage of time may enhance the ability of those inside to make an effective forcible resistance when the police ultimately make their entry to arrest. And if the police are required to stake out the premises while a warrant is obtained, this may cause curious bystanders to gather in the immediate vicinity, where they might well be harmed in the event of forcible resistance to the police entry." ***State v. Drogsvold***, 104 Wis.2d 247, 268-69, 311 N.W.2d 243, 253 (Ct. App. 1981) (citing 2 LaFave, SEARCH AND SEIZURE § 6.1 at 394 (1978)).

[6] This formulation of the exigent circumstances test is based on four situations which have been identified in federal case law as satisfying the reasonableness requirement: (1) when officers have been in "hot pursuit" of a suspect; (2) when there is a threat to safety of the suspect or others; (3) when there is a risk of evidence being destroyed; or (4) when there is a likelihood that a suspect will flee. ***State v. Smith***, 131 Wis.2d 220, 229, 388 N.W.2d 601, 605 (1986).

On appeal, the State argues that the officers had probable cause to believe that "criminal drug activity of some kind was taking place," and that they entered the house under exigent circumstances "to prevent the destruction of contraband." The State's contentions raise several additional issues. First, the factual assertion that the officers entered the house to investigate drug activity is different from the finding of the circuit court that the officers entered the house to investigate a possible ongoing burglary. Second, the smell of burning marijuana was not noted until after the officers had opened the door to the glass enclosed back porch, raising the question of when the actual "entry" into the home occurred. Third, the cases upon which the State relies for the proposition that the potential destruction of drug evidence constitutes an exigent circumstance all dealt with felonies, whereas the possession conviction here was for a misdemeanor. Wisconsin has not directly decided, and other jurisdictions are split, on the issue of whether the destruction of evidence relating to a misdemeanor can create an exigent circumstance sufficient to make a warrantless entry reasonable; however, we note that the officers could not know whether a felony or a misdemeanor was at issue until they had searched the house. Each of these questions will be addressed in turn.

The record shows that the police responded to a report of a possible burglary at Hall, Sr.'s residence. They were told by Hall's girlfriend that no one was in the house, but they observed lights on and an individual running around in the house. Furthermore, that individual did not respond to officer's calls to come out. Two officers testified at the suppression hearing that these facts caused them to be concerned about burglary. Based on the officers' testimony, the circuit court made a specific finding of fact that the entry into the house was done based on the fact at that time that the officers observed the unusual circumstance of someone

that was running throughout the house at three o'clock in the morning when they had been told no one was home. The circuit court further concluded that the officers had probable cause to believe that a burglary was in progress, although it failed to explain what if any exigent circumstances existed to justify the failure to obtain a warrant.

We need not conclude that the officers' subjective belief that they were entering the house to search for a burglar is dispositive. *See* ***State v. Buchanan***, 178 Wis.2d 441, 447 n.2, 504 N.W.2d 400, 403 n.2 (Ct. App. 1993) (holding reasonable suspicion existed to believe suspect was involved in drug activity despite officer's testimony that he saw nothing to indicate the defendant was involved in selling drugs). Rather, we objectively determine whether probable cause and exigent circumstances existed, based upon the facts which the record demonstrates were within the officer's knowledge at the time of the search. ***Amos***, 153 Wis.2d at 270, 450 N.W.2d at 507.

Here, the police officers on the scene could smell burning marijuana from the back porch door. The defendant claims that entry into Hall, Sr.'s residence occurred when the officers opened the door to the glass-enclosed porch. However, law enforcement officials do not invade the privacy of a home when they use normal means of access to and from the residence. ***State v. Edgeberg***, 188 Wis.2d 339, 347, 524 N.W.2d 911, 915 (Ct. App. 1994). Therefore, entry onto a glass-enclosed porch does not constitute entry into a home when there is another inside door to the actual living quarters. ***Id***. In addition, the officers had observed the house's occupant peering outside, running through the house and refusing to answer their calls to come out. Based on all of the facts of record, we conclude that the totality of the circumstances faced by the Monroe police officers would lead a reasonable police officer to believe that there was illegal drug

activity going on in the house and that the occupant might be destroying evidence because he had been alerted to the officers' presence. And finally, we conclude that the warrantless entry into the house was constitutionally reasonable under these circumstances and the suppression motion was properly denied.

CONCLUSION

The assertions by Hall's friends that no one was in the house, combined with the officers' observations of an unidentified person running through the house and the strong smell of burning marijuana coming from the house, were sufficient facts for the officers to conclude that a crime had been committed and someone was in the process of covering up the evidence of it. The aggregation of those circumstances created the probable cause and exigent circumstances necessary to enable the officers to lawfully enter the house without a warrant.

By the Court.—Judgment affirmed.

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