COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.**

No. 00-1879-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK L. HOWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

---

[1] Judge Laurence C. Gram presided over Howell's motion to suppress; Judge Lamelas presided over the entry of Howell's guilty plea.

¶1 CURLEY, J. Frederick L. Howell appeals from the judgment of conviction entered after he pled guilty to one count of felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a).[2] Pursuant to WIS. STAT. § 971.31(10), Howell argues that the trial court erred in denying his motion to suppress the handgun discovered in his apartment by the police because: (1) the officers' initial warrantless attempted entry into his apartment violated his constitutional rights against unreasonable searches and seizures; (2) following the illegal attempted entry, any subsequent permission he gave to the officers to search his apartment was involuntary; and (3) if this court concludes that he voluntarily consented to the search of his apartment, the consent was not sufficiently attenuated from the illegal attempted entry to remove the taint. We conclude that the attempted entry into Howell's apartment violated his Fourth Amendment rights. However, we are satisfied that, following the illegal attempted entry, Howell voluntarily consented to the search of his apartment, and that his consent was sufficiently attenuated from the illegal attempted entry so as to remove the taint. Therefore, we affirm the trial court's denial of Howell's motion to suppress.

I. BACKGROUND.

¶2 On January 2, 1999, several Milwaukee police officers were sent to investigate an anonymous tip of drug dealing at the address where Howell lived. The officers were instructed to conduct a "knock and talk" visit at the residence, which was the upper unit of a duplex. Upon arriving at the residence, the officers knocked on the door and rang the doorbell of the upper unit, but no one answered

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the door. The officers then proceeded to the lower unit, where their knocks were answered by the duplex's owner, Donald Whitmore.

¶3 Whitmore informed the officers that Howell was the upstairs tenant and that he believed Howell was home because he recently had heard footsteps. Whitmore permitted the police to enter his apartment and he escorted them to the back hallway, which led to Howell's apartment. The officers proceeded upstairs to Howell's apartment via the back stairway. While what happened next is in dispute, the officers testified that they knocked on the back door and Howell opened it. Howell and the landlord testified that the landlord unlocked the door with a key and opened the door slightly, but a chain lock prevented further entry. It is undisputed that Howell eventually allowed the officers to enter his apartment. Once inside the apartment, the police claim Howell gave them consent to search his home. The police testified that during their search of Howell's apartment for evidence of drugs, drug dealing or weapons, they discovered a handgun in a jacket pocket. Howell was placed under arrest, and subsequently charged with felon in possession of a firearm as a habitual criminal.

¶4 Howell filed a motion to suppress the handgun. He argued that: (1) the officers' attempted entry into his apartment was illegal when the landlord's key was used to open the door; (2) that he did not consent to the search of his apartment; and (3) any consent he may have given was neither voluntary nor sufficiently attenuated from the illegal attempted entry to remove the taint. The State responded that the defendant voluntarily consented to both the entry into his apartment and the search. A hearing was held, at which time two of the officers involved in the search and Howell presented contradictory testimony regarding the events that took place on the date in question. In making its decision upholding the search, the trial court resolved the conflicts by finding the officers' testimony

more credible. Consequently, in denying the motion to suppress, the trial court found that Howell voluntarily consented to the police entry and search of his apartment.

¶5 Later, the trial court granted Howell's motion to reconsider its decision on the grounds that the defense had been unable to present Whitmore's testimony because he could not be located. At the second hearing, Whitmore testified that he opened the back door with his key, but the chain prevented entry. He could not remember if the police asked him to unlock the door or if he simply opened it. He stated that he heard Howell give the police consent to enter the apartment, but he left when the police entered the apartment and he heard nothing more. The trial court again found that Howell consented to the entry and search and denied Howell's suppression motion.

¶6 Following the denial of his suppression motion, Howell pled guilty to the charge of felon in possession of a firearm. Pursuant to the State's motion, the trial court dismissed the habitual criminality penalty enhancer. Howell was sentenced to twenty-two months' imprisonment.

II. ANALYSIS.

¶7 "The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution both protect against unreasonable searches and seizures." ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). Warrantless searches "are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967) (footnotes omitted). Voluntary consent provides one such exception. ***Id.*** at 358 n.22.

¶8 When the defendant's consent allegedly provides the justification for a warrantless entry and search, the State bears the burden of proving by clear and convincing evidence that the defendant voluntarily consented. ***Phillips***, 218 Wis. 2d at 197; *see also* ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971) (The State bears "the burden of proving by clear and positive evidence [that] the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied."). "Whether consent was given and the scope of the consent are questions of fact that we will not overturn unless clearly erroneous." ***State v. Garcia***, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). The legality of a search, including whether the defendant's consent for a warrantless search is voluntary, however, are matters that we review *de novo*. ***Phillips***, 218 Wis. 2d at 191-95.

¶9 Howell claims that he did not voluntarily consent to the initial attempted warrantless entry into his apartment and the subsequent search of it by police. He contends that the trial court erred in denying his motion to suppress the handgun seized pursuant to the search. To determine whether Howell's consent was voluntary, we must engage in a two-step analysis. ***Id.*** at 197. We must initially determine whether Howell consented to the initial attempt at entry into his apartment, and then whether he consented to the search of his apartment. ***Id.*** If Howell consented, then we must examine whether his consent was voluntary. ***Id.*** "The test for voluntariness is whether consent … was given in the absence of duress or coercion, either express or implied." ***Id.***

¶10 At the hearings on Howell's suppression motion, contradictory testimony was presented regarding whether the officers initially attempted to gain entry by having the landlord unlock the back door without Howell's consent.

¶11 At the hearing, Detective Raap testified that he and the other officers ascended the back stairs to Howell's apartment, without Whitmore, and knocked at the back door, which was answered by Howell. Detective Raap related that he informed Howell that the officers were responding to a report of drug dealing at the residence, and he then asked Howell for permission to enter the apartment. According to Detective Raap, Howell was very cooperative and let the officers into the apartment, telling them that a search would be no problem because they would not find anything. Detective Raap then stated that the officers entered Howell's apartment with no objection from Howell. The State also called Officer Ward. Officer Ward asserted that he was one of the officers present during the "knock and talk" investigation at Howell's apartment. His testimony was consistent with Detective Raap's version of the events – Officer Ward stated that Detective Raap did not attempt to unlock and open the door, but simply knocked and Howell answered, admitting the officers into his apartment.

¶12 Howell's testimony was different. He testified that when the officers came to the back door, someone unlocked the door from the outside and opened it approximately three inches until the chain lock prevented it from being opened any farther. Howell stated that only after someone unlocked the door and attempted to gain entry did he open the back door. Howell asserted that after he opened the door, one of the officers asked him if they could step inside the apartment to speak with him regarding complaints of drug dealing. Howell admitted that he agreed to allow the police to enter his apartment, and that he said he had nothing to hide, but Howell denied giving the officers permission to search his apartment.

¶13 At the second hearing, Whitmore testified that he led the officers up the back stairs to Howell's apartment and that he unlocked the back door. He

could not recall whether the police asked him to open the door, or whether he decided on his own to open the door. Whitmore verified that he could not open the door all the way because it was chained. He stated that Howell then came to the back door, slid the chain back and opened the door. He testified that when the police asked if they could enter, Howell allowed the officers into the apartment. Although not specifically stated, the trial court implied that the fact that the landlord may have unlocked the door was irrelevant.[3] We disagree.

¶14 In ***Payton v. New York***, 445 U.S. 573 (1980), the Supreme Court held that "the Fourth Amendment has drawn a firm line at the entrance to the house." ***Id.*** at 590. "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." ***Id.*** We also note that "[t]he [F]ourth [A]mendment applies only to actions of government agents, not to private individuals or actions." ***State v. Rogers***, 148 Wis. 2d 243, 246, 435 N.W.2d 275 (Ct. App. 1988). Nevertheless, here we agree with Howell that "[Whitmore's] conduct … meets the constitutional definition of a government tool or instrument." "For a search to be a private action not covered by the fourth amendment: (1) the police may not initiate, encourage or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purpose; and (3) the private entity must not conduct the search for the purpose of assisting governmental efforts." ***Id.*** In the instant case, the trial court found that "under [Whitmore's] testimony … he's the one who turned the key. And then according to [Howell's] testimony, that allowed the door to be opened about three inches." We accept the trial court's findings as they are not clearly erroneous.

[3] Specifically, the trial court asserted, "[I]t seems that we're making a great deal of who turned the key rather than who permitted entry."

Therefore, given the facts as found by the trial court, the line drawn by the Fourth Amendment at the threshold of Howell's apartment was crossed when Whitmore, accompanied by the police, unlocked the back door and attempted to enter by pushing the door open.

¶15 Therefore, we conclude that the officers' initial attempted entry into Howell's apartment was improper.[4]

¶16 Having concluded that the officers' attempted entry into Howell's apartment was improper, we must now determine whether Howell voluntarily allowed the officers into his apartment. We are satisfied that Howell voluntarily permitted the officers to enter his apartment. The officers testified that after Howell removed the chain lock, they requested permission to enter Howell's apartment and Howell assented. Whitmore's testimony supports the police testimony. Howell also agrees that he permitted the officers to enter. However, he argues that he never consented to the search. Thus, we next must determine if Howell voluntarily consented to the search.

¶17 Again, although contradictory testimony was presented on this issue, the trial court's findings that Howell consented to the search are not clearly erroneous. Detective Raap testified that he requested permission from Howell to search for evidence of drugs or drug dealing, and that Howell agreed. Detective Raap stated that after obtaining Howell's consent, he continued to speak with

[4] Our analysis is bolstered by the Supreme Court's opinion in ***Boyd v. United States***, 116 U.S. 616, in which the Court asserted: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure…." ***Id.*** at 635. The Supreme Court's assertion in ***Boyd*** compels this court to conclude that, in the instant case, Whitmore's intrusion upon the threshold of Howell's apartment, albeit slight, constitutes a violation of Howell's constitutional protection against unreasonable search and seizure.

Howell, while the other officers searched the apartment and one of the officers discovered a gun in a jacket pocket located in Howell's bedroom. Officer Ward testified that Detective Raap asked Howell for permission to search the apartment for evidence of drug dealing, which Howell granted. Howell, on the other hand, testified that after he allowed the officers into his apartment, he walked to the living room with Detective Raap, and that when he reached the living room, he observed the officers already searching his home. Howell testified that although Officer Raap had asked permission to enter the apartment to talk, he never asked for permission to search the apartment, and Howell never gave him permission for the search.

¶18 The trial court resolved the conflicts in the testimony in favor of the State, finding that Howell consented to the search of his apartment. The trial court chose not to believe Howell's account. We are satisfied that the trial court's finding in this regard is not clearly erroneous and, therefore, we conclude that Howell consented to the search of his apartment. We also remain unpersuaded by Howell's argument that any consent to search which he may have given was involuntary and simply "an acquiescence to a show of apparent authority." Our independent review of the record reveals no other evidence of duress or coercion. In particular, the testimony shows no misrepresentation or trickery by the police to entice Howell to consent. ***Phillips***, 218 Wis. 2d at 199-201. Howell never claimed that he was threatened, physically intimidated or punished. ***Id.*** Further, the general conditions surrounding the request to search do not show duress or coercion. ***Id.*** Detective Raap testified that Howell was cooperative and did not

object to the search. ***Id.***[5] Moreover, the mere presence of the officers in Howell's apartment does not support a finding of coercion. ***Id.*** at 201-02 ("'To hold that the mere condition of being upset by the presence at one's home of [] agents is enough to make any consent the product of coercion might effectively foreclose almost all searches conducted pursuant to voluntary consent.'"). Therefore, we conclude that Howell voluntarily consented to the search of his apartment.

¶19 Finally, Howell argues that if we conclude that he voluntarily consented to the search of his apartment, the consent was not sufficiently attenuated from the illegal attempted entry to remove the taint. We disagree. "When applying the attenuation theory, the following must be considered: (1) the temporal proximity of the misconduct and the subsequent consent to search, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct." ***State v. Bermudez***, 221 Wis. 2d 338, 353, 585 N.W.2d 628 (Ct. App. 1998). The first factor supports Howell's argument, as Howell's consent to search followed closely after the door was unlocked; however, the remaining two factors favor the State. We note first that after Howell opened the door, the officers informed him of the reason for their visit and they remained outside the apartment until Howell allowed them to enter. Once inside the apartment, the officers told Howell specifically what they were looking

---

[5] In ***State v. Phillips***, 218 Wis. 2d 180, 202-03, 577 N.W.2d 794 (1998), our supreme court also considered "the character of the defendant," and whether the officers informed the defendant he could withhold consent. In both ***Phillips*** and the case at bar, the record provided little information regarding the defendant's character. Specifically, the court considered the defendant's age, intelligence, education, physical and emotional condition, and prior experience with police. ***Id.*** at 202. Here, there is nothing in the record that would indicate that any of these characteristics would mitigate in favor of concluding that Howell's consent was involuntary. Further, like the court in ***Phillips***, we note that the officers never informed Howell that he could withhold consent. However, in ***Phillips***, the supreme court asserted, "This fact weighs against, but is not fatal to, a determination of voluntary consent." ***Id.*** at 203. Therefore, we are satisfied that neither of these two factors demonstrate that Howell's consent was involuntary.

for and he consented to the search. Further, although we have concluded that when Whitmore unlocked the door the police unwittingly became parties to an improper attempted entry, we are satisfied that the "purpose and flagrancy" of the initial entry is not sufficient to tip the balance of this court's analysis in Howell's favor. The door was opened three inches and was still secured by a chain lock. Thus, after considering these factors, we are satisfied that Howell's consent to search was sufficiently attenuated from the officers' illegal attempted entry so as to remove the taint.

¶20 For these reasons, we are satisfied that the trial court properly denied Howell's motion to suppress and, accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶21 SCHUDSON, J. *(dissenting).* The State concedes, the majority concludes, and I agree that the officers' initial warrantless entry into Howell's apartment violated his constitutional protection against unreasonable searches and seizures.[6] The issue, therefore, is whether, notwithstanding the unlawful entry, Howell consented to the search of his apartment. The facts and law establish that he did not.

I. CLEARLY ERRONEOUS FACTUAL FINDINGS

¶22 The trial court concluded that Howell consented to the search. The court made this finding, however, based on its implicit and unsupportable finding that Detective Raap was credible when he testified that Howell, through the three-inch opening, gave police permission to *search* his apartment. The record establishes that this credibility finding was clearly erroneous.

¶23 First, Detective Raap's testimony was, at the very least, highly suspect. At the first evidentiary hearing, he either forgot, neglected to mention, or intentionally withheld the critical information about Whitmore's involvement in

---

[6] The majority, however, incorrectly refers to the officers' unlawful initial entry as an "attempted entry." Majority at ¶1. Opening the door three inches constituted more than an attempt; it more than "fixed the 'first footing' against which the United States and Wisconsin Supreme Courts warned." *See* ***State v. Johnson***, 171 Wis. 2d 224, 232, 501 N.W.2d 876 (Ct. App. 1993).

opening the door.[7] Thus, when Whitmore's involvement was revealed, a second hearing became necessary. Based on Whitmore's testimony at that second hearing, Detective Raap could only have been considered as a witness who either had not remembered important facts of his encounter with Whitmore and Howell (facts that established the *unlawfulness* of the initial entry), or had neglected to reveal them.

¶24 Second, not only did Detective Raap's testimony conflict with that of Whitmore regarding the circumstances surrounding the police entry, but also with that of Howell and Officer Ward, both of whom said that, at the door, he (Howell) gave the police permission to enter *to talk*, not to search.[8]

¶25 Third, the trial court's rationale for denying Howell's motion to suppress was factually flawed and, ultimately, circular. The court failed to acknowledge that while Detective Raap testified that Howell consented to the *search*, Officer Ward repeatedly testified that Howell, at the door, consented not to the search, but rather, to the police entry to *talk*. The court then lumped the

---

[7] Remarkably, at the first stage of the evidentiary hearing, Detective Raap testified that he did not recall Whitmore accompanying him and the officers to Howell's door, did not recall whether Howell's door was locked, and did not recall whether the door had a chain lock. (Officer Ward, who also testified at the first stage, was never asked whether Whitmore accompanied them upstairs and, if so, whether Whitmore used his key to open the door.)

[8] Howell's testimony, of course, is suspect as well. But Whitmore's and Ward's are not. After all, Whitmore may have realized that unlocking the door was unlawful, but he admitted doing it. And Officer Ward, contradicting Detective Raap, provided testimony that not only conflicted with that of a superior, but also established the unlawfulness of their conduct.

Thus, it is all the more significant that Whitmore's testimony confirmed Howell's account of the initial entry, and that Officer Ward's testimony related that he heard the entire conversation between Howell and Detective Raap at the door, and that Howell did not consent to the search until after they were in the living room.

officers' testimony together and concluded: "They know what's required. They know that it's important that there be consent to the search before the search can take place." Such "reasoning," obviously, would result in judicial approval of virtually every search where consent is at issue.

¶26 Thus, I conclude: (1) the trial court's finding, failing to identify the undisputed disparity between Detective Raap's and Officer Ward's testimony on the critical issue of whether Howell, at the door, consented to the *search* or merely to the *talk*, was clearly erroneous; (2) the trial court's finding that Detective Raap's account was credible—a finding essential to its legal conclusion—was clearly erroneous; and (3) the trial court's "reasoning" was circular, reflecting a failure to carefully recount the testimony and independently evaluate the credibility of the witnesses.

II. COERCED CONSENT

¶27 Howell declined to open the door when the police knocked and rang the doorbell. That was his right. Regardless of whether his subsequent permission was for the police to enter and *search*, or enter and merely *talk*, that permission came only in response to the flagrantly unlawful and coercive police conduct in unlocking the deadbolt and opening the door.

¶28 To suggest otherwise is to accept several of the State's assertions that simply spatter common sense and, along with it, the Fourth Amendment:

- The State argues that "assuming that the partial opening of the back door constituted an illegal entry, there is no evidence that Howell interpreted this act as a 'show of authority' which conveyed the impression that Howell was required to admit the officers." Respondent's brief at 17. How else could

Howell have interpreted the presence of five or six officers at his door,[9] the unlocking of the deadbolt, and the entry to his home? *See* ***State v. Bermudez***, 221 Wis. 2d 338, 356, 585 N.W.2d 628 (Ct. App. 1998) ("It is disingenuous for the officers involved to testify that their only purpose in going to the motel room was to inform [the defendant's wife] that her husband had been arrested. Six officers are not required for such a task.").

- The State argues that "[w]hile the officers should not have permitted the landlord to open the door to Howell's apartment, there is no reason to think the officers' intent was to enter the apartment and conduct a search regardless of whether Howell granted them permission to do so." Respondent's brief at 27. Really? These were police officers investigating suspected drug-dealing at Howell's residence; they were not "Avon calling."

- Most alarmingly, the State argues that "there is *no evidence that the act of partially opening the door caused the atmosphere of the encounter to become any more intimidating than it already was simply by virtue of the officers' presence at his apartment*." Respondent's brief at 17 (emphasis added). Can the State be serious? Police, unlawfully unlocking a deadbolt and opening the door to a residence are not "any more intimidating" than police lawfully standing outside the door?

- And were there any doubt that the State, in this appeal, is taking this grotesquely reckless position, it reiterates, "*It cannot be seriously suggested that the encounter in this case would have transpired differently if the police*

[9] Detective Raap testified that he was accompanied by four officers; Howell testified that a total of five or six officers entered his home.

had not permitted the landlord to partially open the door, and instead spoke to him through a closed door." Respondent's brief at 30 (emphasis added).

¶29 Well, I seriously suggest exactly that. I seriously suggest that millions of slaughtered people and millions of survivors, from Armenia to Cambodia to Chile to Poland to Rwanda, understand that life and death "transpire[] differently" according to whether police lawfully speak from outside our doors, or unlawfully enter inside our homes. Our liberty depends on prosecutorial perception of the difference, and judicial power to uphold it. Shame on any prosecutor who denies the difference! Shame on any judge who fails to draw the constitutional line at our doors.

III. ATTENUATION

¶30 Thus, upon rejecting the trial court's clearly erroneous factual findings and legally unsupportable rationale, and upon rejecting the State's grotesquely dangerous and legally unsupportable arguments, reversal might seem automatic. Here, however, the State, citing ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), argues that the search was lawful because Howell's consent (to search), *even if not given until after the police entered his living room*, was sufficiently attenuated from the unlawful entry and any coerced consent (to enter and talk).

¶31 The majority, relying on ***Phillips***, again embraces the State's position. ***Phillips***, however, is significantly distinguishable.

¶32 In ***Phillips***, the supreme court, in a four-to-three decision, clarified and carried out the attenuation analysis in a case having several striking similarities to this one. But its most critical distinguishing factor, while potentially

arming the dissenting justices with ammunition to renew their earnest debate with the majority, should lead to the unanimous view that, *consistent with **Phillips***, the search in this case cannot stand.

¶33 Although one could analyze all three of the attenuation criteria by dissecting the facts of ***Phillips*** and comparing them to those of the instant case,[10] one distinguishing factor affecting the third and most important criterion is so significant that it surely changes everything. *See* ***State v. Richter***, 2000 WI 58, ¶53, 235 Wis. 2d 524, 551, 612 N.W.2d 29 (quoting ***State v. Phillips***, 218 Wis. 2d at 209) (The "third factor in the attenuation analysis is '"particularly" important' because it is most closely tied to the rationale of the exclusionary rule—to discourage police misconduct.").

¶34 In ***Phillips***, the supreme court declared that under the third factor of the analysis—the purpose and flagrancy of the official conduct—a court:

> must also consider *the manner in which the agents entered* the defendant's basement. The facts of this case show that the agents did not use violence, threats, or physical abuse to gain entry into the defendant's basement. *The agents did not gain entry to the basement by breaking through, unlocking, or even opening a window or door….* [T]he agents, while in eyesight of and in communication with the defendant, *walked through an open door* into the basement where the defendant resided.

[10] The majority correctly notes that the temporal proximity criterion weighs in Howell's favor. The majority, however, also concludes that the intervening circumstances criterion weighs against him. I disagree. In ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), the supreme court commented on both the substance and length of the conversation between Phillips and the police after the police entry and before the search. Here, in contrast to the circumstances in ***Phillips***, the search came almost immediately after the entry with almost no intervening conversation of any significance.

Id. at 211 (citation omitted; emphases added). Thus, the supreme court concluded, although the police entry was unlawful, it "did not rise to a level of 'conscious or flagrant misconduct." ***Id.***[11]

¶35 Here, of course, the police misconduct was conscious and flagrant. Even the State concedes, "It could reasonably be argued that allowing the landlord to open the door to Howell's apartment, even slightly, was 'flagrant' in the sense that it should have been obvious to anyone versed in Fourth Amendment law that the action was illegal." Respondent's brief at 29. Indeed, it should have been. And, indeed, it should be equally obvious to any court well-versed in Fourth Amendment law.

¶36 The police conduct in ***Phillips*** carried the supreme court's four justice majority to the very edge of attenuation analysis, leading to its acceptance of the police conduct precisely because the police "did not gain entry … by breaking through, unlocking, or even opening a window or door." ***Phillips***, 218 Wis. 2d at 211. Here, certainly, the police conduct crashes over the edge. The purpose and flagrancy of the police entry alters the attenuation analysis and establishes that we must reverse.

¶37 Accordingly, for all these reasons, I respectfully dissent.

[11] The supreme court, in ***Phillips***, also emphasized factors that support this opinion's coercion analysis in the preceding section. Concluding that the entry into Phillips' basement was not coercive, the supreme court explained that the search "took place under generally non-threatening, cooperative conditions," and that the officers' "mere presence … in the defendant's basement is insufficient to support a finding of coercion." ***Id.*** at 200, 201. Here, by contrast, Howell declined to respond to the officers' initial knocking and doorbell ringing. The officers then unlocked and opened the door, thus using force to produce their own "mere presence." This, therefore, was anything but a set of "generally non-threatening, cooperative conditions."