COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1283-CR **Cir. Ct. No. 01 CF 531**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOMINIC MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Dominic Moore appeals from a judgment of conviction. The issue is whether the court properly denied his suppression motion. We affirm.

¶2 Moore was charged with controlled substance and weapons counts based on evidence taken from his residence in January 2001. He moved to suppress the evidence, the trial court denied the motion, and Moore pleaded guilty. This appeal from the judgment addresses the denial of the suppression motion, as provided in WIS. STAT. § 971.31(10) (1999-2000).[1]

¶3 The main facts are not in dispute. In the early morning hours, police were sent to a building in Milwaukee in response to a phone call saying that a woman was heard screaming, or was being beaten, in a certain apartment. Upon entering the building and arriving in front of that apartment, police heard a female moan. They knocked and announced their purpose. They heard somebody approach the door inside, and then walk away. The police then forcibly entered the residence. One man was visible, but he attempted to leave the area, and police restrained him. The police then entered the south bedroom, where they found a naked female, and also firearms and possible controlled substances in plain view. Police also entered the north bedroom, which belonged to Moore, and took him into custody. He and the other male occupant were then held in police cars for approximately ninety minutes before a detective arrived. The detective spoke to each of them in the rear of the police cars and obtained consent to search the apartment. The search found additional evidence.

¶4 Moore argues that the warrantless police entry into the apartment was not lawful. The State responds that the entry was permitted under the emergency doctrine. Moore replies that the State waived this argument by not

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

raising it in circuit court. We disagree. A respondent on appeal may defend the judgment appealed from with arguments not presented to the circuit court. ***State v. Holt***, 128 Wis. 2d 110, 124-26, 382 N.W.2d 679 (Ct. App. 1985). Moore's argument might have some force if he were to claim that he did not fully develop an evidentiary record to rebut the State's theory, because that was not the theory the State relied on at the time of the evidentiary hearing. However, he makes no such claim here, and it is not apparent to us what additional evidence relevant to the emergency doctrine might have been developed that was not already developed on the theories that were argued.

¶5 We conclude that the emergency doctrine applies. Police may enter without a warrant if the searching officer is actually motivated by a perceived need to render aid or assistance and, under the circumstances, a reasonable person would have thought an emergency existed. ***State v. Rome***, 2000 WI App 243, ¶¶ 12-13, 239 Wis. 2d 491, 620 N.W.2d 225, *rev. denied*, 2001 WI 43, 242 Wis. 2d 546, 629 N.W.2d 785 (Wis. Apr. 5, 2001) (No. 00-0796-CR). In this case, police testified that they entered the apartment due to concern for a possibly injured female. We agree that, in light of the call to police and the moan heard outside the apartment, a reasonable person would have thought an emergency existed.

¶6 Moore next argues that the search of his bedroom exceeded the permissible scope of the emergency doctrine or of a precautionary search of the premises for officer safety. However, Moore's brief and the record are both vague on the facts of that portion of the event. It is not clear whether police entered Moore's room after they entered the south bedroom, or at the same time. The circuit court found that after the police entered Moore's room "they then observed another weapon and other contraband that they believed to be drugs." However,

there was no testimony that a weapon was in plain view in Moore's room. There was some testimony that could support an inference that marijuana and cocaine were found in plain view during the initial entry. Moore has not argued that this finding was clearly erroneous, and we do not pursue that point further.

¶7 We conclude that the initial entry into Moore's room was lawful under the emergency doctrine and as a precautionary sweep. Although police had discovered one female, there was no reason for them to be certain they had found the female they believed was in need of assistance. Moore concedes that officers may make a precautionary search of the premises near the arrest, but he argues that there was no reasonable suspicion that the officers' safety was endangered, and that his room was not a place immediately adjoining the place of arrest from which an attack could be launched. We disagree. The officers' descriptions make it clear that the two bedrooms shared a common hallway.

¶8 Finally, Moore argues that his consent to search was not valid because it was not given voluntarily. He argues that the circumstances of his giving consent in the back of the police car were excessively coercive. He relies primarily on ***State v. Kiekhefer***, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997). In that case, we held that consent was not voluntary where the defendant was interrogated by four officers while handcuffed in his residence, was not given a ***Miranda*** warning or informed that he could refuse consent to search, and initially declined consent to search, and the officers "postured about obtaining or seeking a search warrant" and wrongfully conveyed the impression that they would be allowed to occupy his residence while the warrant was obtained. ***Id.*** at 470-74.

¶9 The State does not discuss ***Kiekhefer*** in any way, and presents no case law of its own applying relevant law to analogous facts. However, we conclude that Moore's situation was significantly different. Moore's case does include some of the facts present in ***Kiekhefer***, including lack of ***Miranda*** warnings and interrogation in a confined space while under police control. However, other elements are missing. The detective testified that when Moore gave consent, there was only a detective and one officer present. He testified that he told Moore he could refuse consent. There is no evidence that the detective threatened to obtain a warrant. The detective testified that Moore promptly gave consent without much discussion.

By the Court.—Judgment affirmed.

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