STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 00-1079-CR, 00-1080-CR, 00-1081-CR,
00-1082-CR, & 00-1083-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MATTHEW TRECROCI, RYAN J. FRAYER,
RONNIE J. FRAYER, SCOTT E. OBERST, and
AMY L. WICKS,

Defendants-~~Appellees~~ Respondent

**Appeal From an Order Entered In The
Circuit Court For Kenosha County, The Honorable
David M. Bastianelli, Circuit Judge, Presiding**

BRIEF OF DEFENDANTS-~~APPELLEES~~ Respondent

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ISSUES PRESENTED FOR REVIEW

1. Did the warrantless, non-consensual police intrusion into the upper unit of the duplex and subsequent entry into the attic violate the defendants' rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution?

The circuit court held that both the initial police intrusion into the upper unit and the subsequent entry into the attic portion of that unit were unconstitutional.

2. Did the state meet its burden of establishing that Matt Trecroci freely and voluntarily consented to the warrantless police search of the second floor portion of his apartment and that the consent was not tainted by the prior unlawful intrusions?

The circuit court found under the totality of the circumstances that the state failed to meet its burden of showing that Trecroci voluntarily consented to the entry. It did not address the issue of taint.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendants anticipate that the briefs will fully present and meet the issues on appeal. Absent something new or unexpected in the state's reply, therefore, oral argument likely is not necessary in this case. Wis. Stat. (Rule) 809.22.

The defendants do not seek publication under Wis. Stat. (Rule) 809.23.

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BRIEF OF DEFENDANTS-APPELLEES

SUPPLEMENTAL STATEMENT OF THE CASE

The state's appeals in this case were taken solely from the original decision and order dated March 2, 2000 (R49; 00-1080-CR:80; 00-1081-CR:52; 00-1082-CR:60; 00-1083-CR:54).[1]

[1] Throughout this brief, references to the record in Appeal No. 00-1079-CR will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appellant's (continued...)

The state first raised its "exigent circumstances" claim in its motion for reconsideration filed March 21, 2000 (R41; R45:2). The circuit court denied that motion following a hearing on May 26, 2000 (R52:28; App. 144). Although the circuit court entered orders reflecting that denial (R48; 00-1080-CR:79; 00-1081-CR:51; 00-1082-CR:59; 00-1083-CR:53), and the state previously sought a stay of this appeal pending resolution of that motion, it failed to appeal from denial of its reconsideration motion.

SUPPLEMENTAL STATEMENT OF FACTS

Although the state omits several facts supporting the circuit court's order, the defendants will address those omissions in the argument.

ARGUMENT

I.

THE WARRANTLESS POLICE ENTRIES INTO THE UPPER UNIT AND ATTIC VIOLATED THE DEFENDANTS' CONSTITUTIONAL RIGHTS

Officers Davison and Clelland had no warrant when they barged past Ryan Frayer into the upper unit of the duplex at 2510 48th Street in Kenosha in search of either marijuana or information regarding the driver involved in a hit-and-run property damage accident. Nor did they have a warrant when they subsequently opened the door to the attic area of that unit and entered. As the circuit court found, and the state does not here contest, they likewise did not have consent.

The state nonetheless claims that the police intrusions were justified on the grounds that none of the defendants had a reasonable

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[1](...continued)
Appendix, it will be further identified by Appendix page number as App. __.

expectation of privacy in the hall or stairway of the upper unit, and that only three of them had such an expectation of privacy in the attic. That claim, however, is based on a misunderstanding of the law and the facts.

The state also claims that each of the warrantless entries somehow were justified by a combination of probable cause and exigent circumstances. Because the state failed to raise this claim until its motion for reconsideration, and because it chose not to appeal the orders denying that motion, this Court has no jurisdiction to consider that claim which, in any event, must be deemed waived.

Even on the merits of that claim, however, the state must lose. The state failed to establish the existence of probable cause. The circuit court also was correct that no exigency justified the intrusions since the only occupant of the premises with any knowledge of the police presence was outside with them. Accordingly, nothing would have prevented the officers from securing the premises while they sought a search warrant.

Finally, although not addressed by the court below, the officers had no right even to enter the fenced backyard or back porch of the premises. Accordingly, these were not legitimately in a position to perceive the odor of marijuana which, the state claims, provided probable cause for the entry.

"The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), overruled on other grounds, *Mapp v. Ohio*, 367 U.S. 643 (1961). Given the constitutional preference for assessment of probable cause by a neutral and detached magistrate, warrantless searches are "per se" unreasonable, subject to only a few limited exceptions. *See Katz v. United States*, 389 U.S. 347, 357 (1967). The state has the burden of proving by clear and convincing evidence that a warrantless search was reasonable and in compliance with constitutional requirements. *State v. Kieffer*, 217 Wis.2d 531, 577 N.W.2d 352, 357 (1998).

"The question of whether a search or seizure is reasonable under

the Fourth Amendment is a question of constitutional fact. Appellate courts decide constitutional questions independently, benefiting [sic] from the analysis of the circuit court." *Kieffer*, 577 N.W.2d at 356-57 (citations omitted). Circuit court findings of fact are upheld unless clearly erroneous. *Id.* at 357.

A. The Circuit Court Properly Concluded That the Police Intruded Into Areas in Which the Defendants Had a Reasonable Expectation Of Privacy

A preliminary consideration in assessing whether a police intrusion or search violates a defendant's rights under the Fourth Amendment to the United States Constitution or Article I, Section 11 of the Wisconsin Constitution is whether the defendant had a protected interest in the thing or place searched. *Rakas v. Illinois*, 439 U.S. 128 (1978); *State v. Fillyaw*, 104 Wis.2d 700, 312 N.W.2d 795 (1981). "Capacity to claim the protection of the fourth amendment depends 'not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" *State v. Whitrock*, 161 Wis.2d 960, 468 N.W.2d 696, 701 (1991), quoting *Rakas*, 439 U.S. at 143. "[T]his expectation of privacy must not only be actual (subjective), but also 'one that society is prepared to recognize as "reasonable."'" *Whitrock*, 468 N.W.2d at 702 (citation omitted).

The proponent of a suppression motion has the burden of proving facts establishing his or her reasonable expectation of privacy. On appellate review, this Court must uphold the circuit court's factual findings unless clearly erroneous, but the question whether these facts satisfy the constitutional requirements is reviewed *de novo*. *Id.* at 701.

The facts found by the circuit court, and not contested by the state, demonstrate that Mr. Trecroci owned the duplex at 2510 48th Street and occupied the upper unit of that property. The Frayers and Mr. Oberst rented the attic portion of that unit from him to provide a place for them both to socialize and to dry and clean marijuana. Amy Wicks was a social guest on the night of the police entry, and had

previously been a guest in the upper unit.

The state below attempted to argue that none of the defendants had a reasonable expectation of privacy intruded upon by the warrantless entries in this case. The circuit court found to the contrary (R38:8-12; App. 129-33). On appeal, the state has abandoned much of this argument, but still claims that none of the defendants had a reasonable expectation of privacy in the stairway portion of the upper unit, State's Brief at 27-30, and that neither Wicks nor Mr. Trecroci had such an expectation in the attic, *id.* at 12-19. The state is wrong on all counts.

1. Hall and stairway portion of upper unit

The state claims that none of the parties had a reasonable expectation of privacy in the hall and stairway area of the upper unit. State's Brief at 27-30. The state does not dispute that the defendants had a subjective expectation of privacy in this part of the building, *id.* at 28, but instead labels this a "common area" similar to common hallways in a multifamily apartment building in which, it argues, no expectation of privacy is reasonable. *Id.*

The authorities are split regarding whether tenants in an apartment building have a reasonable expectation of privacy from police intrusions in the secured hallways of such a building, *compare United States v. Nohara*, 3 F.3d 1239, 1240, 1242 (9th Cir. 1993) (no legitimate expectation of privacy); *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977) (same); *with McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring) ("it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry," including unauthorized entry by police officers); *United States v. Carriger*, 541 F.2d 545, 549-52 (6th Cir. 1976) ("when, as here, an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed); and

the Wisconsin courts have not addressed the issue in a published decision.

The rationale of Justice Jackson and the *Carriger* court are much more reasonable than that of the cases cited by the state. The relevant issue is not whether a particular area will remain wholly private from any and all comers and under all circumstances, but whether it will remain private from the prying eyes of uninvited police officers. To hold otherwise, as the state requests, would render unreasonable any expectation of privacy within a home occupied by more than one person.

While the state's argument fails on this ground alone, the Court need not go so far as to hold that apartment dwellers necessarily have a reasonable expectation of privacy in locked common hallways. This is because the home at 2510 48th Street was not a multifamily apartment building; it was a duplex with one lower unit and one upper unit.

As the Ninth Circuit has explained, the distinction is critical:

> We begin with the fact that this building was not one containing many individual apartment units, but rather was comprised of only two apartments on the basement level and the landlord's living quarters on the upper floor. Thus, the entry way was one to which access was clearly limited as a matter of right to the occupants of the two basement apartments, and it is undisputed that the outer doorway was always locked and that only the occupants of the two apartments and the landlord had keys thereto. In light of the size of the building then, we find significant the fact that the door to the hallway giving access to the two apartments was locked; the two lower-level tenants thus exercised considerably more control over access to that portion of the building than would be true in a multi-unit complex, and hence could reasonably be said to have a greater reasonable expectation of privacy than would be true of occupants of large apartment buildings.

United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) (citation omitted). Significantly, the Ninth Circuit decision relied upon by the state distinguished *Fluker* on exactly these grounds. *See Nohara*, 3

F.3d at 1242.

In *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974), the court similarly upheld a tenant's privacy interest in the fenced in back yard of a small, four-unit apartment building:

> While the enjoyment of his backyard is not as exclusive as the backyard of a purely private residence, this area is not as public and shared as the corridors, yards or other common areas of a large apartment complex or motel. Contemporary concepts of living must not dilute Fixel's right to privacy any more than is absolutely required. We believe that the backyard area of Fixel's home is sufficiently removed and private in character that he could reasonably expect privacy.

Id. at 484.[2]

See also United States v. King, 227 F.3d 732, 747 (6th Cir. 2000) (noting "unique nature of small limited family dwellings as opposed to large multi-unit apartment buildings"); *State v. Reddick*, 541 A.2d 1209, 1214 (Conn. 1988) (finding reasonable expectation of privacy in common basement of two-family house); *People v. Killebrew*, 256 N.W.2d 581, 583 (Mich. App. 1977) (unlike tenants in multi-unit dwelling, occupants of duplex "certainly could expect that a high degree of privacy would be enjoyed in" the common hallway).

Even if the state were correct that duplex tenants lack a reasonable expectation of privacy in a common hallway, however, that still would not help its case here because the underlying assumption of the state's argument is wrong. While the building is a duplex, with an upper unit and a lower unit (R38:1-2; App. 122-23), the evidence at the hearing was clear that the hall and stairway were not accessible from

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[2] The only decision cited by the state which applies the apartment complex holding to a two-unit home is *United States v. Holland*, 755 F.2d 253, 256 (2d Cir. 1985). However, the court there merely concluded without discussion that its "apartment complex" cases controlled, and did not respond to Judge Newman's explanation in dissent of the significant differences between the two types of buildings. *See id.* at 258-59 (Newman, J., dissenting) (locked duplex hallway was "'intimately' associated with Holland's home, . . . far more so than would be true of lobbies and hallways of apartment buildings with numerous apartments").

the lower unit -- only the tenants of the upper unit had access to that area and control over it (R30:53). Accordingly, that was not a "common area" used by both the upper and lower tenants of the duplex.

The state claims, however, that the defendants' occupancy of the attic rendered unreasonable any expectation of privacy in the secured hall and stairway. State's Brief at 27. But, such a claim defies common sense.

There could be no doubt that Mr. Trecroci possessed a reasonable expectation of privacy in the entire upper unit, from the locked door between the hall and the back porch, down to the laundry room in the basement, and all the way to the attic, prior to his agreement to rent out a portion of that unit to the remaining defendants (*see* R30:51-54). The entire unit, of which the stairway was an integral part, was his home, beginning at the ground-level doorway.[3] It did not lose that character merely because he allowed someone else to use a portion of it.

The mere fact that all occupants of the upper unit had access to the stairway and joint control over it does not, as the state suggests, render that area "public" rather than "private." As Justice Scalia has observed, the Fourth Amendment protects "privacy . . . not solitude." *O'Connor v. Oretega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in judgment). Access by others to an area does not nullify one's reasonable expectation of privacy. *E.g.*. *O'Connor*, 480 U.S. at 717 (government employee has reasonable expectation of privacy in his office, even though "it is the nature of government offices that others -- such as fellow employees, supervisors, consensual visitors, and the general public -- may have frequent access to an individual's office"); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (search of house invaded tenant's Fourth Amendment rights even though landlord had authority to enter for some purposes). The underlying rationale for the state's apartment complex cases that "[a]n expectation of privacy

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[3] The circuit court observed that a lock and doorbell at a doorway normally are associated with entry to individualized premises (R27:81).

necessarily implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions," *Eisler*, 567 F.2d at 816 (emphasis in original), thus simply is not accurate.

To accept the state's argument would have disastrous consequences for the concept of personal privacy. Under the state's analysis, whenever someone rents out a room in their home, as Mr. Trecroci did here, they would open to warrantless police intrusion all areas of the home accessible by the boarder. Just like the defendants' expectations regarding the hall and stairway at issue here, neither the home owner nor her tenant could be deemed to have a reasonable expectation of privacy in such "common areas" under the state's argument.

The law does not require such an absurd result, and the state fails to cite a single case supporting it. Indeed, the law is exactly the opposite. *E.g.*, *Chapman*, *supra*. In *Reardon v. Wroan*, 811 F.2d 1025, 1027 n.2 (7th Cir. 1987), for instance, the Court distinguished between the "apartment complex" cases and that involving a fraternity house:

> Although there are certain similarities to the apartment building cases, fraternity residents clearly have a greater expectation of privacy in the common areas of their residence than do tenants of an apartment building. As the district court noted, fraternity members could best be characterized as "roommates in the same house," not simply co-tenants sharing certain common areas.

The state's attempt to apply the "apartment complex" cases also ignores the specific relationship between the defendants in this case. In assessing the reasonableness of a person's expectation of privacy, labels such as "multi-unit dwelling" are not controlling. Rather, it is necessary to consider both the nature of the place and the manner in which the person is using it. *Katz,* 389 U.S. at 351.

The state's authorities base their decisions on the understanding that tenants in separate units in an apartment building may have conflicting interests in the common areas. That is, one tenant's desire to keep the common areas private conflicts with another's desire to invite guests or workmen into those areas. Because neither tenant has

the right to exclude the other, the expectations of the tenant seeking total privacy must give way to the other. *See, e.g.*, *Eisler*, 567 F.2d at 816.

The same analysis does not apply here, however. According to the state, all of the occupants of the upper unit were jointly involved in the marijuana operation, although to differing degrees. Each had the same interest in maintaining the privacy of the upper unit to avoid detection of the operation. *See Minnesota v. Olson*, 495 U.S. 91, 99-100 (1990) (houseguest has reasonable expectation of privacy, even though host has ultimate control, in part because host and guest each more than likely to respect privacy interests of the other).[4] Accordingly, there is no conflict in which one tenant's interest in maintaining the privacy of the stairway must give way to contrary desires of another. *See, e.g. King*, *supra* at 743-50 (defendant had reasonable expectation of privacy in common area of two-family dwelling where tenants all lived as one family with joint interests).

The state's argument that the defendants lacked a reasonable expectation of privacy in the hall and stairway area of the upper unit thus must be rejected.

2. Matt Trecroci

The state also claims that Matt Trecroci, the owner of the duplex and resident of the upper unit had no reasonable expectation of privacy in the attic at the time of the unlawful police entry. State's Brief at 14-16. That likely would be correct if the attic were a separate apartment or building, for the reasons stated in the state's argument. Under those circumstances, Trecroci as landlord would have no direct authority over, or personal expectation of privacy in, the leased premises. *Cf. State v. Kieffer*, 217 Wis.2d 531, 577 N.W.2d 352 (1998) (landlord lacked requisite authority and control over locked garage loft rented by

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[4] A person does not forfeit his reasonable expectation of privacy merely because he is committing a crime or hiding evidence. *E.g.*, *Mincey v. Arizona*, 437 U.S. 385, 391 (1978).

son-in-law).

Here, however, the room at issue was a part of Trecroci's own home. *See, e.g., Mears v. State*, 52 Wis.2d 435, 190 N.W.2d 184 (1971) (mother had authority to consent to search of son's room in her home). Mr. Trecroci had a reasonable expectation of privacy in his entire home before the lease agreement, and there is nothing in the record which demonstrates an intent to give up that interest. While Oberst and the Frayers installed a lock on the attic door, there was no evidence that they had Trecroci's permission to do so, or that he agreed to their exclusive use of that part of his home.

While the state thus is wrong that Trecroci has no protected privacy interest in the attic area of his home, this Court need not even reach that issue. Trecroci had a reasonable expectation of privacy in the hall and stairway areas of his home, *see* Section I, A, 1, *supra,* and the officers' unlawful intrusion into that area directly resulted in the seizure of the evidence in the attic. Any lack of "standing" in the attic thus is irrelevant.

3. Amy Wicks

The state also claims that Amy Wicks lacked a legitimate expectation of privacy in the attic. State's Brief at 16-19. Because Wicks was properly on the premises as a social guest of her fiance, Ronnie Frayer, at the time of the unlawful entry, however, the state is wrong.

While Wicks had no property interest in the premises, the law is clear that, "even where a defendant does not own the property searched he or she may nonetheless have a reasonable expectation of privacy in that place by virtue of his or her relationship with that place." *United States v. Chaves*, 169 F.3d 687, 690 (11th Cir.1999) (citing *Minnesota v. Carter*, 119 S.Ct. 469, 474 (1998)), *cert. denied*, 120 S.Ct. 585 (1999).. A defendant who is merely permitted to enter a residence for purely commercial purposes and holds no relationship with the homeowners, does not hold a legitimate expectation of privacy within that residence. *See Carter*, 119 S.Ct. at 478-79. The Supreme

Court has recognized, however, that overnight guests are treated differently than purely commercial guests when it comes to "standing." *Minnesota v. Olson*, 495 U.S. 91 (1990) (overnight guest has legitimate expectation of privacy in his host's residence).

A majority of that Court in *Carter* likewise recognized that social guests possess a reasonable expectation of privacy even when not spending the night. *See* 119 S.Ct. at 478, 479 (Kennedy, J., concurring) (Court's reasoning consistent with his view that "almost all social guests have a legitimate expectation of privacy, and hence, [are] protect[ed] against unreasonable searches, in their host's home"); *id.* at 480 (Breyer, J., concurring in judgment) (agreeing with dissent on standing issue); *id.* at 481 (Ginsburg, Stevens, & Souter, JJ., dissenting) ("[W]hen a homeowner or lessor personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures").

It is irrelevant that Wicks personally had neither dominion nor control over the premises and that she personally did not arrange the precautions to secure the privacy of the upper unit and attic. Her expectation of privacy is derivative of that of her hosts. *See Olson*, 495 U.S. at 99 ("That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy"). As recognized in *Olson* and by a majority of justices in *Carter*, moreover, historical notions of privacy are fully consistent with a social guest's claim of privacy.

It likewise is irrelevant that Wicks had not previously been to the attic, although she had been to the upper unit before (R30:94). The necessary connection is between the social guest and her host (here, Wicks' fiance), not the particular premises. *See Carter*, 119 S.Ct. at 474 (noting "lack of any previous connection between respondents and the householder" among factors showing lack of "standing"). The Fourth Amendment, after all, "protects people, not places." *Katz*, 389 U.S. at 351. The guest's privacy interests are derived from those of her

host, not a particular physical location. To hold otherwise would deprive a social guest of Fourth Amendment protection in the home of a long-time friend, merely because it was the guest's first visit to that friend's new home.

As found by the circuit court, Wicks was a social guest in the upper unit, invited by her fiance, and accordingly shared his reasonable expectation of privacy in both the stairway and attic portions of that unit (R38:10-12; App. 131-33). She was present not merely for illicit commercial purposes, but to socialize (R30:96) and had a prior relationship with both Frayer and the premises (having visited the upper unit previously (R30:94, 116). The state's challenge to her "standing" accordingly must fail. *See also Bonner v. Anderson*, 81 F.3d 472, 475 (4th Cir. 1996) (social guest with prior relationship with host had reasonable expectation of privacy in host's home); *Overline v. Minnesota Commissioner of Public Safety*, 406 N.W.2d 23, 26-27 (Minn. App. 1987).

B. The Circuit Court Properly Concluded That the Police Entry Into the Upper Unit and Attic and the Seizure of Evidence Were Constitutionally Impermissible

The police intrusions into the backyard and back porch, into the upper unit of the duplex, and into the attic, each built upon the prior intrusion. Intrusion into the upper unit was based upon the claimed detection of an odor of marijuana while on the back porch. Entry into the attic was based upon observations made while in the stairway portion of the upper unit. And seizure of the marijuana was based upon observations made while in the attic.

The state thus is correct that the validity of the seizures of evidence from the attic depends on the validity of each individual police intrusion leading to the ultimate seizures. State's Brief at 19. Only three such intrusions really are critical to this appeal, however, and resolving any of those against the state mandates affirmance of the suppression order.

The first police intrusion addressed by the circuit court consisted of the officers' entry through the door from the back porch into the upper unit of the duplex after Clelland claimed to have smelled marijuana and Ryan Frayer declined to admit them.

The second police intrusion addressed by that court consisted of the officers' opening the door of the attic within the upper unit and entering the attic.

The circuit court resolved both of these issues in favor of the defendants, rejecting the state's claims that the intrusions were justified by consent or plain view (R38:5-8; App. 126-29). The state here abandons the consent argument presented below and relies instead on a theory, first raised in its motion for reconsideration, that the warrantless intrusions were justified by a combination of probable cause and exigent circumstances. State's Brief at 24-27, 32-33. For a number of reasons which follow, the state is wrong.

If and only if the Court concludes that the circuit court was wrong regarding these two issues, then it must address a third police intrusion -- that being the officers' initial entry into the fenced and gated backyard and through the door into the back porch of the premises. Because the circuit court did not address this issue and failed to resolve disputed facts regarding it, however, remand would be required to resolve the factual disputes regarding this issue. *See* Section I,B,3, *infra*.[5]

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[5] The final intrusion identified by the state, the seizure of the defendants and the marijuana in the attic, is not really in dispute. If the circuit court was correct in holding that the officers had no right to be in the position from which they observed the evidence, then it likewise was correct that the plain view doctrine did not permit the warrantless seizure. *See, e.g., State v. Wilson*, 229 Wis.2d 256, 600 N.W.2d 14 (Ct. App. 1999) (officer impermissibly within curtilage of home when he smelled odor of marijuana). If that court was wrong, however, and the officers were entitled to enter the attic, then the seizures can be justified under the plain view doctrine. *See State v. Guy*, 172 Wis.2d 86, 492 N.W.2d 311, 317 (1992) (stating requirements for plain view exception to warrant requirement).

1. Intrusion through ground-level door into upper unit of duplex

The circuit court held that the officers violated the defendants' rights when they barged past Ryan Frayer through the ground-level entrance into the upper unit upon Clelland's smelling the odor of marijuana. That court held that, even if Ryan Frayer had consented to their following him to that point and had authorization to grant such consent, he necessarily withdrew any consent to further intrusion into the unit. (R38:7; App. 128).

The state here abandons its claim below that Ryan consented to the officer's entry. Instead, it now asserts an argument, first raised below in its motion for reconsideration, to the effect that the warrantless intrusion into the upper unit was justified by a combination of probable cause and exigent circumstances. State's Brief at 24-27, citing *State v. Hughes*, 233 Wis.2d 280, 607 N.W.2d 621, 2000 WI 24, *cert. denied*, 121 S.Ct. 138 (2000).

a. Either the Court lacks jurisdiction over the state's belated "exigent circumstances" claim, or the state abandoned or waived that claim

The state's failure to appeal from the circuit court's order rejecting its "exigent circumstances" claim when first made in its motion for reconsideration deprives this Court of jurisdiction to consider it. And, even it the Court had jurisdiction, the state nonetheless waived or abandoned any reliance upon that exception when it chose not to appeal from denial of its motion for reconsideration.

The state's notices of appeal were limited expressly to the circuit court's decision and order entered on March 2, 2000, which granted the defendants' motions to suppress (R49; 00-1080-CR:80; 00-1081-CR:52; 00-1082-CR:60; 00-1083-CR:54). The state did not raise its "exigent circumstances" claim prior to that order and the circuit court's original decision and order accordingly did not address it. Only later, in its motion to reconsider, did the state first suggest that the intrusion

could be justified on those grounds (R41; R42; R45).

The state sought, and apparently received, a stay from this Court pending decision on that motion. Yet, while the circuit court heard and rejected the state's new "exigent circumstances" argument on May 26, 2000 (R52:23-26; App. 139-142), and entered an order reflecting that decision (R48), the state failed to file a notice of appeal from that new order.[6]

Because the state's "exigent circumstances" claim had not even been raised, let alone decided, at the time of the suppression order which is the subject of this appeal, that claim is not properly before this Court. A notice of appeal brings before the court only the final order appealed from and "all *prior* nonfinal judgments, orders and rulings adverse to the appellant . . .." Wis. Stat. (Rule) 809.10(4) (emphasis added).

An appeal cannot be taken, as sought here, from an order before it is entered. *Ramsthal Adv. Agency v. Energy Miser, Inc.*, 90 Wis.2d 74, 279 N.W.2d 491, 492 (Ct. App. 1979). This Court accordingly has no jurisdiction to consider the state's "exigent circumstances" claim. *See also State v. Malone*, 136 Wis.2d 250, 401 N.W.2d 563, 566 (Wis. 1987):

> And since the notice of appeal was taken only from the conviction, we also agree with the court of appeals' determination that it had no jurisdiction to review Malone's ineffective assistance of counsel claim since it was not raised until postconviction motions were made.

The state, in short, cannot challenge here that which it did not appeal. *E.g.*, *Walton v. Blauert*, 256 Wis. 125, 40 N.W.2d 545, 547 (1949).[7]

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[6] The state acknowledged it had not previously raised the "exigent circumstances" claim (R45:2). Because the motion for reconsideration raised new issues and did not merely reargue those already decided in the original suppression order, an appeal from the order denying reconsideration would have been appropriate. *E.g.*, *Ver Hagen v. Gibbons*, 55 Wis.2d 21, 197 N.W.2d 752 (1972).

[7] A separate holding in *Walton* was overruled in *Vandenack v. Crosby*, 275 Wis. 421, 82 N.W.2d 307 (1957).

Even if this Court nonetheless could be deemed to have jurisdiction over the state's claim, the state waived or abandoned that claim when it failed to follow well-established state procedure for raising such a claim on appeal. *See State v. McDonald*, 50 Wis.2d 534, 184 N.W.2d 886, 888 (1971). [T]he failure to follow well-known state practices results in a waiver." *Id.* Where, as here, moreover, the circumstances suggest a deliberate choice not to follow the applicable procedure, the failure "amounts to a waiver binding upon the [party] and this court." *Id.* (citation omitted).

b. The warrantless entry into the upper unit is not excused by "exigent circumstances"

One exception to the general warrant requirement is "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*, 233 Wis.2d 280, 607 N.W.2d 621, 626, 2000 WI 24 ¶17 (2000). Because the state failed to meet its burden on either of the required elements of its "exigent circumstances" claim, however, that claim also must fail on the merits.

In *Hughes*, the Wisconsin Supreme Court held that a strong odor of marijuana coming from an apartment, combined with knowledge on the part of the occupants in the apartment that the police were standing outside, justified the warrantless entry to the apartment to ensure that evidence of the drug is not destroyed. 607 N.W.2d at 623-24 ¶1.

The officers in *Hughes* went to Hughes' apartment investigating a trespass complaint. The officers heard loud music and many voices inside. When the occupants did not respond to their knocks, the officers chose to await arrival of back up before knocking again. While they were waiting, however, Hughes' sister suddenly opened the door but, surprised at seeing the uniformed officers, quickly attempted to close it again. Detecting a very strong odor of marijuana, however, and fearing evidence would be destroyed now that the occupants in the apartment knew of their presence, the officers entered and eventually

found evidence of drug dealing. *Id.* at 625-25, ¶s 4-11.

The state's reliance upon *Hughes* and the "exigent circumstances" exception to the warrant requirement to justify entry into the upper unit must fail for a number of reasons. Although this Court is bound by the Wisconsin Supreme Court's decision in *Hughes* until it is reversed, the extension of the "exigent circumstances" exception in that decision is contrary to controlling United States Supreme Court authority in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), as explained by the *Hughes* dissenters. *See* 607 N.W.2d at 633-36, ¶s 49-72 (Bradley, J., dissenting).

Hughes also is readily distinguishable on its facts.

i. Lack of probable cause

First, the state failed here to meet its burden of demonstrating probable cause at the time of entry that the upper unit contained evidence of a crime. *See State v. McGovern*, 77 Wis.2d 203, 252 N.W.2d 365, 371 (1977) (justification for entry must be based upon information available to police before search). While Officer Clelland stated before the intrusion that he smelled marijuana (R38:3-5; App. 124-26), nothing in the record suggests that he had the training or personal knowledge necessary to make that determination.[8]

Neither one's employment as a police officer nor his claim to have smelled marijuana inherently makes one an expert on the odor of marijuana. *See, e.g., Johnson v. United States*, 333 U.S. 10, 13 (1948) (odor may provide probable cause so long as person is "qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance"); *United States v. Sharpe*, 470 U.S. 675, 687 n.8 (1985) (state patrolman lacked training and experience necessary for narcotics investigation); *United States v. DeLeon*, 979 F.2d 761, 765 (9th Cir. 1992) (search warrant cannot be based on claim of untrained

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[8] While Officer Davison suggested that he had prior experience with the venting of marijuana (R23:12), he denied smelling marijuana before the officers barged past Frayer into the house (R23:13).

or inexperienced person to have smelled marijuana).

The Wisconsin Supreme Court likewise has recognized the importance of the officer's experience to the state's burden of showing probable cause:

> It is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana or some other controlled substance. The extent of the officer's training and experience bears on the officer's credibility in identifying the odor as well as its strength, its recency, and its source.

State v. Secrist, 224 Wis.2d 201, 589 N.W.2d 387, 394, *cert. denied*, 526 U.S. 1140 (1999).

Because the state failed to present evidence establishing that Officer Clelland possessed any level of experience or training in the identification of marijuana odors, his claim to have smelled marijuana thus cannot support a finding of probable cause justifying the entry. *See also State v. Brockman*, 231 Wis. 634, 283 N.W. 338, 342 (1939), holding that the perceptions of those unfamiliar with the odor of fermenting mash would be of little probative value on issue of probable cause, while the same cannot be said of the perceptions of those who are trained and "experienced in the service of enforcing the laws against the manufacture of illicit liquor."

ii. No exigent circumstances

Second, the facts here do not even approach the exigency necessary to justify a warrantless entry.

> Once probable cause to search has been established, the state must also demonstrate exigent circumstances to justify the warrantless entry into the apartment. The objective test for determining whether exigent circumstances exist is whether 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.

Hughes, 607 N.W.2d at 627-28 ¶24.

The state failed to meet its burden of showing exigent circumstances here. "[T]he presence of contraband without more does not give rise to exigent circumstances." *State v. Kiekhefer*, 212 Wis.2d 460, 569 N.W.2d 316, 326 (Ct. App. 1997). Mere inconvenience or delay likewise are not enough. *Johnson v. United States*, 333 U.S. 10, 15 (1948).

The state, however, relies upon *Hughes* to assert that there existed a risk of destruction of evidence because Ryan Frayer knew those in the upper unit of the duplex and knew that the officers were outside believing marijuana was present in that unit. State's Brief at 24-26. According to the state, the officers either had to act without a warrant or risk destruction of evidence. It speculates that Ryan Frayer might have alerted the occupants to destroy the evidence while the officers left to obtain a warrant. State's Brief at 26. As the circuit court held, however, that simply was not a reasonable fear (R52:26; App. 142). As for Frayer, the court explained that the officers "should have stayed with him and not allowed him to go up because it would have been obstruction of justice to go there." (R52:27-28; App. 143-44).

The state thus presents a dilemma which did not in fact exist. The Court in *Hughes* specifically relied on the fact, absent here, that the occupants *within* Hughes' apartment were aware of the officers' presence, creating an imminent risk that evidence would be destroyed if they waited for a warrant. 607 N.W.2d 628 P26-27. The officers here, however, had no evidence that anyone inside had the slightest idea that the officers were outside. While the state clearly has an interest in preventing the destruction of evidence, that interest does not justify a warrantless intrusion in the absence of evidence that those inside know of the police presence. *E.g.*, *Johnson*, 333 U.S. at 13-15.

On the critical facts, therefore, this case is on point with *State v. Kiekhefer*, 212 Wis.2d 460, 569 N.W.2d 316, 326 (Ct. App. 1997), not *Hughes*. In *Kiekhefer*, the police learned that Kiekhefer might be holding a large quantity of drugs for Darryl Wisneski. They later saw

Wisneski leaving and pursued him, but he escaped. The officers then attempted a consensual search of the Kiekhefer home and were admitted by his mother. The door to Kiekhefer's room was closed, however. Smelling the odor of burning marijuana, the officers chose to enter immediately rather than obtain a warrant. 569 N.W.2d at 321.

This Court rejected the state's argument that exigent circumstances justified the warrantless entry, holding that "any reasonable evaluation of the situation should have indicated to experienced officers that immediate action was not required." *Id.* at 325-27. The Court noted that the officers had secured the premises, that there was no indication Kiekhefer was aware of their presence, that the police believed there to be a large amount of marijuana present and thus unlikely to be destroyed quickly, and that the police detected no sounds of destruction emanating from Kiekhefer's room. *Id.* at 326-27. The Court held that, if Wisneski returned, they could have detained him for questioning. *Id.* at 327.

Each of these factors likewise applies here. There was no indication the occupants of the upper unit knew of the police presence. There was no sound of destruction from the unit (R27:53). The professed ability, while outside the closed, ground-level entrance, to smell an odor of marijuana believed to be in the upper unit suggests a larger quantity of marijuana than could be destroyed quickly. And finally, as the circuit court found, the officers could have secured the duplex and prevented Ryan Frayer's entry pending receipt of a warrant (R52:25-28; App. 141-44).

Where officers have probable cause that certain property contains contraband or evidence of a crime, they may seize or secure that property pending issuance of a warrant. *E.g.*, *United States v. Place*, 462 U.S. 696, 701 & n.3 (1983). Even in the absence of probable cause, a temporary detention of person and property is permissible to allow investigation of a reasonable belief the property contains contraband. *Id.* at 700-06 (although 90 minute detention of defendant and his luggage deemed unreasonable on facts of the case absent probable cause, *id.* at 707-10). *See also City of Oak Creek v.*

King, 148 Wis.2d 532, 436 N.W.2d 285, 289 (1989) (noting reasonableness of police securing of crash site and excluding news reporter).

It is well-established in this state that warrantless intrusions are not justified by "exigent circumstances" where, as here, the police may secure the property pending receipt of a warrant. *E.g.*, *Kiekhefer*, *supra*. In *State v. Smith*, 131 Wis.2d 220, 388 N.W.2d 601 (1986), for instance, the Court held that there were no exigent circumstances justifying warrantless entry when the police "could have staked out the premises, covering all exits, and then procured a warrant." *Id.*, 388 N.W.2d at 607-08. The Supreme Court similarly acknowledged in *State v. Guzy*, 139 Wis.2d 663, 407 N.W.2d 548, 554(1987) that "the law must be sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." (Citation omitted).

Because the police legally could have maintained the status quo by barring entry to the upper unit while seeking a warrant, the state failed to meet its burden of proving exigent circumstances. *See also Commonwealth v. Vesilciman*, 550 N.E.2d 378, 383 (Mass 1990) ("It is clear that police officers may secure an area to be searched before a warrant is procured").

The state still complains, however, that Frayer's detention would not have been constitutionally permissible. State's Brief at 26. But, the state has failed to establish that securing the premises necessarily would have required detaining Frayer. This Court found an absence of exigent circumstances in *Kiekhefer*, *supra*, even though Wisneski had eluded the police. The officers here thus only needed to keep Frayer out, not detain him.

Even if detention of Frayer could be deemed necessary in this case, the state has failed to show that detention for the time necessary to obtain a warrant would have been unlawful or unreasonable. *See Kiekhefer*, 569 N.W.2d at 327 (officers could have detained Wisneski had he returned pending receipt of warrant); *cf. Michigan v. Summers*,

452 U.S. 692 (1981) (upholding temporary detention to assure effective execution of search warrant).

Although probable cause did not exist supporting Frayer's arrest at that time, the state failed to establish how long it would have taken to obtain a warrant. It thus cannot factually support its conclusory assertion that any detention long enough to obtain a warrant would constitute an arrest. State's Brief at 26. A warrant can be obtained through expedited telephone procedures, Wis. Stat. §968.12(3), and the state failed to meet its burden of showing that resort to that procedure would have been unreasonable by rendering Frayer's detention an illegal arrest. *See, e.g., State v. Bohling*, 173 Wis.2d 529, 494 N.W.2d 399, 406-07 (1993) (Abrahamson, J., dissenting); *State v. Johnson*, 178 Wis.2d 20, 503 N.W.2d 346, 352 (Ct. App. 1992), *rev'd on other grounds*, 184 Wis.2d 794, 518 N.W.2d 759 (1994).

Even in the absence of probable cause, police may detain someone temporarily based upon an "articulable and reasonable suspicion " of criminal activity as existed here. *See, e.g., United States v. Sharpe*, 470 U.S. 675, 682 (1985). The Supreme Court has declined to impose rigid time limitations on such detentions, assessing instead "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Id.* at 685.

Although the state must bear the burden of proving exigent circumstances, it once again has failed to show that obtaining a telephonic warrant would have taken so long that any detention of Frayer would have been unreasonable under *Sharpe*. *E.g., Bohling, supra* (Abrahamson, J., dissenting) and cases cited.

The state thus failed to carry its burden of proving either requirement for excusing the warrantless entry into the upper unit on exigent circumstances grounds.

2. Intrusion into attic

If the intrusion into the upper unit was legally invalid, then the entry into the attic portion of that unit and seizure of evidence there necessarily falls as well. Those intrusions flowed directly from the

preceding illegal entry, the latter being tainted by the former.

For the reasons already stated, the state's reliance on *Hughes* is misplaced. *See* Section I,B,1, *supra*. Whether or not Officer Davison was properly in the stairway and his observations there gave rise to probable cause, the state has failed to prove exigent circumstances for the entry into the attic.

The fact that the occupants did not respond to the officers' knock on the door did not justify his entry. While the officers' knocking may be deemed to have created a risk of destruction by notifying the occupants of their presence, the police may not create their own exigency in this manner. *E.g.*, *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974); *State v. Schur*, 538 P.2d 689 (Kan. 1975); *see Kiekhefer*, 569 N.W.2d at 325.

The state's suggestion that Davison's opening of the door did not even constitute a "search" because he did not enter the attic, State's Brief at 33-35, "'flies in the face of both precedent and common sense.'" *United States v. Winsor*, 846 F.2d 1569, 1572-73 (9th Cir. 1988) (en banc) (rejecting argument that police conduct no search when they force open door and look inside); *See, e.g.*, *Arizona v. Hicks*, 480 U.S. 321 (1987) (officer's moving of stereo to observe serial number was "search"). *See also Katz*, 389 U.S. at 353 (physical intrusion not required for violation).

Opening the door also was not reasonable because "[a] failure to answer a knock and announcement has long been equated with a refusal to admit the search party," *e.g.*, *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991), not an implicit consent to enter.

Finally, the suggestion that the "commercial" use of the attic excused the warrantless entry overlooks the circuit court's finding that the attic was used for social purposes as well as for processing marijuana (R38:11; App. 132). Also, a warrant or valid exception is required for search of even purely commercial premises. *E.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). While the Fourth Amendment bars only "unreasonable" searches, warrantless searches of commercial premises are *per se* unreasonable, *id.*, and the

state has failed to establish any valid exception to the warrant requirement.

3. Intrusion into the fenced back yard and the back porch

As already noted, the circuit court made neither factual findings nor legal conclusions regarding whether the officers violated the defendants' state and federal constitutional rights by entering the fenced and gated backyard and the back porch. It did not have to do so, having suppressed the fruits of the police intrusions on other, valid grounds.

Should this Court hold otherwise, however, remand would be necessary. The officer's right to be in the place where he makes observations supporting a finding of probable cause is critical to the validity of what follows. *E.g., State v Edgeberg*, 188 Wis.2d 339, 524 N.W.2d 911, 914 (Ct. App. 1994). Although raised by the defendants below (R33:31-37, 40), the circuit court did not make the factual findings required to resolve whether the officers validly entered the backyard and porch, and this Court is not permitted to do so. "When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings." *Wurtz v. Fleischman*, 97 Wis.2d 100, 293 N.W.2d 155, 159 (1980) (citations omitted). *See also Ritt v. Dental Care Associates, S.C.*, 199 Wis.2d 48, 543 N.W.2d 852, 865 (Ct. App. 1995) (refusing to assume circuit court made necessary factual finding when it rested its decision on a different basis and there were conflicting reasonable inferences to be drawn from the evidence).

The material issues which appear to be in dispute are (1) whether the defendants had a reasonable expectation of privacy in the back yard and back porch and (2) whether Ryan Frayer freely and voluntarily consented to the police intrusion into those areas. *See* State's Brief at 20-23.

a. Reasonable expectation of privacy in backyard and back porch

All of the defendants (and especially Trecroci) had a reasonable expectation of privacy in the fenced in backyard and porch of the duplex. *E.g., State v. Wilson*, 229 Wis.2d 256, 600 N.W.2d 14 (Ct. App. 1999) (finding reasonable expectation of privacy; backyard within curtilage even though not fenced).

The state does not challenge the fact that the backyard was within the curtilage of the duplex, and could not reasonably make such an argument given the evidence that the yard was surrounded by a 6-foot high stockade fence and the entrance secured by a gate which was routinely kept closed (R30:75-76).[9] *See Wilson*, 600 N.W.2d at 18 (detailing considerations in assessing extent of curtilage). Instead, it relies upon two purported exceptions to the general rule of privacy within the curtilage, but fails to meet its burden of establishing either of them.

The state claims first that the back porch (and, presumably, the backyard) were common areas shared by the tenants of the duplex. As demonstrated in Section I,A,1, *supra*, however, the rationale of the state's "apartment complex" cases does not apply to the common areas shared by the tenants of a duplex. *E.g.*, *King*, 227 F.3d at 743-50; *Fluker*, *supra*. *See also Fixel*, 492 F.2d at 484 (defendant had reasonable expectation of privacy in fenced backyard of four-unit apartment building).

The state also assumes that the defendants would have no reasonable expectation of privacy in the backyard and back porch even if this were a single family home. State's Brief at 22, citing *Edgeberg*, *supra*. As is clear from the state's own description of that case, however, it does not support the state's argument. The Court found no violation of a reasonable expectation of privacy where the intrusion was into the *front* porch, the primary entryway into the defendant's

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[9] The state below expressly conceded that the fenced-in area would be deemed the curtilage of a single family dwelling (R45:4).

home, pursuant to "the community practice of entering the porch to knock." 524 N.W.2d at 915.

While "[p]olice with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public," *Edgeberg*, 524 N.W.2d at 915 (citations and internal quotations omitted), the entry here was through a gate into the fenced backyard to the rear entrance, even though the circuit court found as fact that there was a front entrance (R38:2; App. 123). The absence of lighting at the rear entrance (R27:100-01; R30:139), moreover, undermines any implicit public invitation to use that entrance, at least at night, as here. *See State v. Grawien*, 123 Wis.2d 428, 367 N.W.2d 816, 820 (Ct. App. 1985) (issue not whether third party can gain access but how possessor holds property out to public).

The police intrusion here thus was more like that in *Bies v. State*, 76 Wis.2d 457, 251 N.W.2d 461, 464 (1977), in which the Court found that a closed garage is "not in any sense a semi-public area." *See also Wilson*, *supra* (officer's approach to back door violated curtilage).

b. Consent to enter

The state also claims that Ryan Frayer consented to the officers following him through the gate of the fenced in backyard and into the back porch. State's Brief at 20-22. The evidence on this point, however, is in dispute.

Officer Davison claimed that they told Frayer they needed to speak with the Pontiac's owner and followed him when Frayer said she was upstairs and walked to the back of the house (R23:8-9, 82, 85-86; R27:87-88).

Ryan Frayer testified that he offered to bring the Pontiac's owner down for them, but they followed him instead. He never told them to do so. Neither officer requested consent to follow him and he did not consent to it (R30:16-17, 42).

Officer Clelland claimed that they asked Frayer to "show us" to the car's owner, at which point they followed him to the back of the house (R30:125-26, 137, 148-49).

Of course, the circuit court already rejected important parts of the officers' testimony and Clelland admitted that evidence that they asked Frayer to "show them" to the driver was absent from his police report (R30:149-50). Indeed, his "show us" claim was the *only* portion of his conversation with Frayer not contained in that report (R30:156-57).

The circuit court found no invitation for the officers to enter (R27:99).

The state has the burden of proving by clear and convincing evidence that Frayer voluntarily consented to the search. *See State v. Phillips*, 218 Wis.2d 180, 577 N.W.2d 794, 802 (1998). While consent may be in the form of words, gestures or conduct, *see id.*, "[t]hat which is not asked for cannot be knowingly and voluntarily given," *Kiekhefer*, 569 N.W.2d at 325. Mere acquiescence to the assertion of police authority does not by itself constitute consent. *See State v. Johnson*, 177 Wis.2d 224, 501 N.W.2d 876, 880 (Ct. App.1993).

Although the ultimate issue of whether a purported consent was freely and voluntarily given is reviewed *de novo*, evaluation of the evidence and the predicate question of whether the individual in fact consented to the search are issues of historical fact to be resolved by the circuit court and reviewed for clear error. *Phillips*, 577 N.W.2d at 802.

The relevant facts regarding whether Frayer consented to the entry into the backyard and porch, or whether he merely acquiesced in the officers' actions, are in dispute. Should this Court determine that the searches and seizures from the attic otherwise were valid, therefore, remand is necessary to resolve this dispute.

II.

THE CIRCUIT COURT PROPERLY SUPPRESSED THE FRUITS OF THE SEARCH OF THE SECOND FLOOR AREA OF TRECROCI'S HOME

Following the entry into the upper unit of the duplex and the seizures and arrests in the attic, the police retrieved Trecroci from the bar where he had been drinking. The state here claims that the circuit court erred in holding that Trecroci's subsequent acquiescence in the officer's desire to search his second floor living quarters did not reflect his free and voluntary consent to the search. State's Brief at 40-44.

The state's argument must fail on two grounds. First, the circuit court was correct in holding that, under the totality of the circumstances, the state had not met its burden of showing a free and voluntarily consent by clear and convincing evidence. Second, although not addressed by the court below, the purported "consent" was the fruit of the unlawful entries into the upper unit and attic.

A. The Circuit Court Properly Held That Trecroci Did Not Freely and Voluntarily Consent To the Search of the Second Floor Area of His Home

The state, once again, has the burden of proving by clear and convincing evidence that, under the totality of the circumstances, Trecroci voluntarily consented to the search. *See Phillips*, 577 N.W.2d at 802. Mere acquiescence to the assertion of police authority does not by itself constitute consent. *See Johnson*, 501 N.W.2d at 880. On review, the circuit court's findings of fact are upheld unless clearly erroneous, while the ultimate issue of whether consent was freely and voluntarily given is reviewed *de novo*. *Phillips*, 577 N.W.2d at 802. Because some of the factors considered within the totality of circumstances are not readily susceptible to interpretation from a printed transcript, however, this Court defers to the trial court's findings on such factors. *See Youngblood v. City of Oak Creek*, 218 Wis.2d 133,

579 N.W.2d 294, 296-97 (Ct. App. 1998).

The state concedes that the circuit court's findings of fact are not clearly erroneous, and that they accordingly must be accepted by this Court. State's Brief at 4. The state's Statement of Facts nonetheless omits reference to the circuit court's findings regarding Trecroci's testimony on the issue of consent. In holding that the state had failed, under the totality of the circumstances, to meet its burden of proving that Trecroci's alleged consent was freely and voluntarily given, that court made the following additional factual findings omitted from the state's brief:

> Matt Trecroci testified that he was 25 years of age at the time in question, had a high school education and a couple of years of college. On that date he had worked and then had been out to bars and had been drinking. He testified that while in Z's parking lot (a tavern), Officer Wilkinson approached him and told him he would have to go with him to his house. Upon arrival at the residence he observed the squads and officers there and was in a kind of shock. He was escorted by Officer Wilkinson and his partner to the rear of the home. While waiting in the rear enclosed porch area, Officer Vieth arrived and went upstairs and then subsequently returned to where Matt Trecroci was located. Matt Trecroci further testified that it was at that point he was informed that they wanted to search his apartment and that either he can give his consent or that they would obtain a warrant. It was at this point that he asked Officer Vieth if he could talk to Officer Wilkinson, and was allowed to do so.
>
> The testimony of Matt Trecroci as to his conversation with Officer Wilkinson was that he asked him what to do and was informed that there was nothing for him to do, that he could either give his consent or they'd get a search warrant. It was at that point that he went back to Officer Vieth and gave his consent to search the apartment.

(R38:14-15; App. 135-36).

In a footnote, the court found that the officers knew that they did

not have sufficient grounds for a warrant to search the apartment at the time they obtained Trecroci's "consent" to search (R38:15 n.24; App. 136).[10] The state appears to question that finding, suggesting that, at the time the officer's gave Trecroci the "choice" between search by consent and search by warrant, the police already had obtained a statement from Oberst that they had given Trecroci a quarter pound of marijuana earlier that night. State's Brief at 43.

The circuit court's finding, however, was not clearly erroneous. The evidence shows that, at the time Trecroci gave his "consent," the remaining defendants (including Oberst) still were in the attic or had just left (R30:63-64). Accordingly, Oberst could not already have given the statement relied upon by the state here regarding Trecroci's involvement. The officers testified that the statement was not given until Oberst was interviewed back at the police station 30 to 45 minutes after the search (R23:22-23). The circuit court was entitled to rely on that testimony in finding that the police in fact did not yet have probable cause at the time they obtained Trecroci's "consent."

It should be clarified that the circuit court's finding was a factual one, entitled to deference, and not a conclusion of law. Although the court did not specifically find that the officers had not yet obtained information from Oberst regarding the transfer to Trecroci, that finding is implicit in its conclusion that the officers "were aware that they lacked sufficient facts to obtain a warrant of the apartment" (R38:15 n.24; App. 136). *See Phillips*, 577 N.W.2d at 803 ("This court may assume that a missing finding was determined in favor of the circuit court's order or judgment" (citation omitted)).

Because the officers knew they had insufficient grounds for a warrant, the circuit court's legal conclusion that the consent was invalid necessarily follows, even under the authorities relied upon by the state. As this Court held in *Kiekhefer*, "'Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant.'" 569 N.W.2d at 324 (citation omitted). *See also* 3 W. LaFave, *Search and*

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[10] The court reaffirmed this finding in rejecting the state's motion for reconsideration (R52:26-27; App. 142-43).

Seizure §8.2(c) at 653-54 (3d ed. 1996).

The totality of the circumstances thus clearly support the circuit court's conclusion that Trecroci's consent was not freely and voluntarily given, but instead was a mere submission to the officers' claim of authority. *Kiekhefer* once again is on point. Trecroci, like Kiekhefer, was surrounded by "a sobering show of force." 569 N.W.2d at 324. Neither Trecroci nor Kiekhefer was informed of his right to withhold consent, even after Trecroci sought advice on his options and indicated his desire not to permit the search. *Id.*[11] Both Trecroci and Kiekhefer, moreover, were falsely informed that they had no choice in the matter; the officers would search his home one way or the other. *Id.* at 323.

Based on these same circumstances, this Court found that Kiekhefer's consent was involuntary. *Id.* at 324.[12] The added factors considered by the circuit court enhance the validity of its finding of involuntariness in this case:

> In this case we have a young individual, who appears to be educated, but does not appear to have had much contact with law enforcement. He is located away from his residence at a tavern where he'd been drinking and was informed that he has to return to his residence by an officer who is a friend of is [sic]. He is placed in the rear of a police vehicle and upon his return in the early morning hours he observes a number of police officers at the scene and is escorted to the rear of the residence and remains there for a period of time until Officer Vieth's arrival. Additionally, although it is not dispositive, it still is a factor for the court's consideration, he was not informed of his right to withhold consent. As Officer Wilkinson testified, Matt Trecroci appeared scarred [sic], and was basically informed that either he gives his

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[11] The written consent form with its advice of rights was not provided Trecroci until *after* the search (R30:66-67).

[12] Trecroci's cooperation after having been told he had no choice in the matter cannot, as the state suggests, render his consent voluntary. *See Kiekhefer*, *supra* (consent involuntary even though, after being told he had no choice, defendant helped officers locate contraband in his room).

> consent to a search of his apartment or they will obtain a warrant and do so anyway. That the officer's [sic] weren't going anywhere even if Trecroci did not want them there.

(R38:15; App. 136).

B. The Consent Was the Tainted Fruit of the Prior Unlawful Entries

"When, as here, consent to search is obtained after a Fourth Amendment violation, evidence seized as a result of that search must be suppressed as 'fruit of the poisonous tree' unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence." *Phillips*, 577 N.W.2d at 805 (citations omitted). The state has failed to meet that burden.

Trecroci was returned to his home by the police only shortly after the unlawful entry and while the officers were still conducting the resulting search. "This fact weighs against finding the consensual search attenuated." *Phillips*, 577 N.W.2d at 806. Trecroci objected to their presence in his home, but was told there was nothing he could do about it. *Compare id.* at 806. (failure to object supports attenuation). Trecroci was not told he could refuse consent, and instead was told his consent was irrelevant -- the police ultimately would search anyway. *Compare id.* at 807 (attenuation less likely where officers told defendant they could not search without his consent). And finally, the official misconduct was purposeful and flagrant. *Compare id.* The officers knew they had no warrant or other basis for the initial entry, and merely barged past Frayer into the unit. They also knew that, contrary to what they told Trecroci, they did not have basis for a warrant should he refuse consent. Yet, they told him they would not leave his home until they had searched it, either by consent or with a warrant.

Under these circumstances, the state cannot meet its burden of proving that Trecroci's consent was not tainted by the prior illegal entry to his home.

CONCLUSION

For these reasons, Defendants ask that the Court affirm the circuit court's order granting their motions to suppress. If and only if the Court does not grant such relief, they ask that the Court remand the case for decision regarding the officers' entry into the fenced backyard and back porch.

Dated at Milwaukee, Wisconsin, November 7, 2000.

Respectfully submitted,

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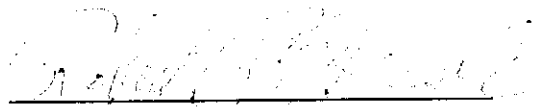

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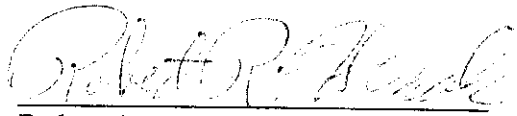
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,998 words.



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