No. 2-07-0553

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	**Appeal from the**
Respondent-Appellee,	)	**17th Judicial Circuit,**
	)	**Boone County, Illinois.**
-vs-	)	
BENJAMIN FERRAL	)	**No. 05 CF 198.**
Defendant-Appellant.	)	**Honorable**
	)	**Gerald F. Grubb,**
	)	**Judge Presiding.**
	)	

REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

ARGUMENT

I.

The police violated the defendant's Fourth Amendment rights by making a warrantless entry into a private residence where the defendant was staying at the tenant's invitation. The police did this without probable cause or exigent circumstances. Even assuming that the police's entry was constitutional, their custodial arrest of the defendant inside the apartment was not constitutional because the arrest lacked probable cause. Further, even assuming that this custodial arrest was constitutional, the police had neither probable cause nor any other justification that would have allowed them to search inside the box where the defendant's identification was. Wherefore, the defendant requests that this Honorable Court reverse the trial court's order denying his motion to suppress, and to reverse his convictions.

A.

The defendant had standing to challenge the police's warrantless entry into the apartment in which he was living as a guest. Furthermore, the State demonstrated neither probable cause nor exigent circumstances for this warrantless entry.

The defendant had an expectation of privacy, and he was not a trespasser

At the outset of its brief on the above point, the State argues that "an apartment guest or visitor in a home does not have standing to challenge a warrantless entry to the apartment or home. In support, the State cites *City of Champaign v. Torres*, 214 Ill.2d 234, 244, 824 N.E.2d 624 (2005) and *People v. Brown*, 277 Ill.App.3d 989, 994-995, 661 N.E.2d 533 (1st Dist. 1996).

Contrary to the State's assertion, the United States Supreme Court has never categorically said that guests or visitors lack standing to challenge a warrantless search. A guest can challenge a warrantless entry provided that he has a sufficient relationship with the residence such that one can reasonably conclude that the guest has a reasonable expectation of privacy in the residence. On the one hand, an overnight guest has such

standing, which is to say that he has a reasonable expectation of privacy in the residence. *Minnesota v. Olson*, 495 U.S. 91, 98, 110 S.Ct. 1684, 109 L. Ed2d 85 (1990; *People v. Parker*, 312 Ill.App.3d 607, 614, 728 N.E.2d 588 (1st Dist. 2000); *People v. Olson*, 198 Ill.App.3d 675, 556 N.E.2d 273 (2d Dist. 1990); *People v. Bookout*, 241 Ill.App.3d 72, 78, 608 N.E.2d 598 (5th Dist. 1993).

On the other hand, a temporary guest present in a residence only to conduct business does not have a reasonable expectation of privacy and thus, does not have standing to challenge a warrantless search. *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L. Ed2d 373 (1998) Writing for the majority, Justice Rehnquist emphasized the invitees lack of ties to the residence and the purpose of their visit denied them a reasonable expectation of privacy: "Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with [the homeowner], or that there was any other purpose to their visit." *Carter*, 525 U.S. at 90.

This case resembles *Olson* far more than *Carter*. According to Jaime Condon--- the apartment manager --- Antonio Ferral was the lessee on June 24, 2005. (R101) After the defendant's arrest, Pollock confirmed that the lawful tenant had invited the defendant to stay with him. (R69-70) Indeed, Antonio testified that Benjamin had been at the residence even before he, Antonio, had moved in. (R72, 75) The State presented no testimony to refute the assertion that the defendant had lived in Apartment 4 for some time with Antonio's blessing.

Neither case cited by the State gainsays this point. In *Torres*, the Court rejected the defendant's motion to suppress by noting that he was only a guest at the residence for purposes of attending a party, *as opposed to being an overnight guest*. In *Brown*, the Court found that the defendant had not established a sufficient interest in the residence such that he could be said to have a reasonable expectation of privacy in the residence. The *Brown* Court noted that the defendant never indicated how long he intended to stay at the residence, how readily accessible it had been to him in the past, or the frequency of his visits there. However, far more evidence was presented here than in *Brown*.

In the Original Brief, the defendant challenged any argument that he lacked a reasonable expectation of privacy in the residence because he had been "banned" from the apartment complex by the manager and the Belvidere police. Indeed, he asserted that there was no provision in the lease giving anyone authority to ban the defendant.

In response, the State points to paragraph 4 of the apartment lease:

> Use of apartment …. Tenant acknowledges that Landlord has the right to require any Tenant's guest to leave the premises or be banned from the premises if non-resident's guests are deemed by the landlord to be disruptive in any way or violating any condition of this Agreement. (C62)

The defendant concedes that such a paragraph exists in the lease, and he apologizes to this Court and to counsel for the State for any misunderstanding. Nonetheless, the existence of such a paragraph was not sufficient to defeat the defendant's reasonable expectation of privacy.

First, it is not clear that this aspect of the contract was ever invoked at any point. Paragraph 4 vests the right to ban guests in the Landlord. While there was testimony that the Belvidere police had banned the defendant from the complex, there was no testimony that the Landlord or the company owning the Courtyard Apartments banned the defendant from the premises. And, although there was testimony that Jaime Condon, an apartment manager, had banned the defendant from the complex, there was no testimony that she had authority to do this. Certainly, she was not the landlord inasmuch as she was not an owner of the building.

Yet, even if this aspect of the contract was properly invoked, it could not defeat the defendant's reasonable expectation of privacy. In concurrence in *Carter*, Justice Kennedy expressed his concern that the defendant was using the premises for illegal activity. Even if the apartment owners had banned the defendant from staying in the residence, that did not implicate him in criminal activity because, at common law, a guest invited by a lawful tenant could not be prosecuted for trespass, regardless of the landlord's wishes. *People v Flanagan*, 133 Ill.App.3d 1, 8, 478 N.E.2d 666 (4th Dist. 1985); Accord *City of Quincy v. Daniels,* 246 Ill.App.3d 792, 615 N.E.2d 839 (4th Dist. 1993).

In his Original Brief, the defendant discussed *Williams v. Nagel,* 162 Ill.2d 542, 643 N.E.2d 816 (1994). *Williams* suggests that a defendant can be prosecuted when the landlord contractually reserves for himself the right **to ban** certain individuals. Affirming the summary dismissal of a civil rights lawsuit, *Williams* observed that the defendant had been banned from the residence, and that the lessee had signed a lease that had an explicit provision allowing the apartment owners to ban certain individuals ---

such as Williams --- from the complex: "“Management has the right to bar individuals from the property. You must inform your guests of all [Parkside and Mansard Square Apartments] rules and regulations. If rules and regulations are broken by your guests, they may be barred and/or arrested for criminal trespassing. If the rules and regulations are broken by a resident, it is grounds for termination of tenancy." *Williams*, 162 Ill.2d at 555.

Williams is distinguishable. In *Williams*, the tenants agreed to allow the management to ban certain invitees, and that further gave the management the right to call for banned invitee to be arrested for criminal trespassing. In this case, subparagraph 4 contained no provision of any newly created right of the police to arrest individuals for criminal trespass to property. (C62-64)

Most importantly, in this case, Antonio Ferral and the defendant both testified that the defendant was more than an invitee --- he **lived in the premises**, albeit perhaps without the approval of the owners. This too makes *Williams* distinguishable. In fact, the Appellate Court in *Williams* specifically noted that its holding did not apply to situations in which the invitee was living in the premises, as in *Flanagan: Williams v. Nagel*, 251 Ill.App.3d 176, 180, 620 N.E.2d 1376 (4th Dist. 1993) .

The defendant also reminds this Court of *Wright v. Boggs Management, Inc.,* 2000 U.S. Dist. Lexis 17837 (N.D. Ill. 2000), which he cited in his Original Brief. In *Wright*, the landlord had Lansing police arrest the defendant, an invitee in an apartment, for trespass. Under 42 U.S.C. §. 1983, Wright argued that the defendants violated his Fourth and Fourteenth Amendment rights. In denying the defendant's motion for summary

judgment, the District Court noted that, although the apartment had a contractual clause allowing it to ban certain invitees, that Wright lived in the complex, unlike the defendant in *Williams* who merely sought to visit persons there. *Wright*, 2000 U.S. Dist. Lexis at 47.

In light of the arguments in this Reply Brief and in the defendant's Original Brief and Argument, he asks this Court to find that he had an expectation of privacy in the residence; he can now argue that the police lacked both probable cause to enter the residence, and exigent circumstances that would justify a warrantless entry.

The police lacked probable cause to enter the apartment

In its brief, the State briefly notes that "when someone calls the police to request police assistance because a crime is occurring, the police do not determine the credibility of the person requesting such assistance before responding to the request. Police officers have a duty to enforce the law." (St. br. at 7). The State cites *Clark v. Board of Fire and Police Commissioners of Village of Bradley*, 245 Ill.App.3d 385, 613 N.E.2d 826 (3d Dist. 1993).

As the defendant explained in his Original Brief, the question here is not the authority of the police to respond to a call for assistance, but rather the authority of the police to make a warrantless entry into a private home without probable cause. Cases like *Clark* do not speak to that argument. Accordingly, this Court should dismiss the State's argument and find, for the reasons stated in this Reply Brief and in the defendant's Original Brief and Argument, that the Belvidere Police lacked probable cause to enter in to the defendant's residence.

The police lacked exigent circumstances to enter the apartment

In his Original Brief, the defendant pointed out that the police lacked exigent circumstances to make a warrantless entry into the apartment. In response, the State first cites cases giving the general rules surrounding the doctrine of exigent circumstances, including *People v. Wear*, 229 Ill.2d 545, 893 N.E.2d 631 (2008), and *People v. Henderson*, 96 Ill.App.3d 232, 421 N.E.2d 219 (1st Dist. 1981). Then, the State recites the facts surrounding the Belvidere police's warrantless entry into the apartment, and concludes without analysis that this constituted exigent circumstances and without citing any cases that are factually similar.

Under Supreme Court Rule 341(e)(7), a party must cite to relevant case law in order to support its argument. Because the State did not do this in this portion of its brief, the defendant asks that this portion of the brief be stricken.

Continuing his argument, the defendant concedes that in *Wear*, the Illinois Supreme Court amplified the doctrine of exigent circumstances. In *Wear*, a police officer followed a driver believing that he was drunk based on his erratic driving, including swerving and rolling through stop sign. When the car stopped, the policeman followed the driver, who stumbled and swayed on his way to private residence. Although the police officer commanded him to stop, the driver did not do so. At the threshold of his home, the defendant told the policeman, "I made it home." Nonetheless, the policeman arrested the defendant in a private home without a warrant. *Wear*, 229 Ill.2d at 548-554.

In part, *Wear* affirmed the warrantless arrest on grounds of exigent circumstances. Citing *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the

Wear majority found that warrantless arrest was proper because the police had probable cause to arrest the defendant in public, and he could not defeat this probable cause by retreating to a private place. See, *Wear*, 229 Ill.2d at 567-569 (discussing *Santana*).

In addition, the *Wear* majority noted that the police were in hot pursuit of the defendant, noting that the policeman had told the defendant to stop several times. Additionally, the *Wear* Court dismissed the argument that the police did not arrest the defendant for a serious offense, and in so holding, the *Wear* majority distinguished *Welsh v. Wisconsin*, 466 U.S. 740 (1984), because in that case, DUI was a nonjailable, civil offense and there was not hot pursuit. However, in Illinois, DUI is a Class A misdemeanor punishable by up to 364 days in jail, and here there was hot pursuit. *Wear*, 229 Ill.2d at 569-570.

Wear does not support the State's position in this case. In *Wear*, the police developed probable cause for arresting the defendant for DUI. However, in this case, the police were forbidden under Illinois common law from arresting the defendant for criminal trespass to land. Thus, unlike in *Wear*, it was unclear what offense the defendant had committed.

Moreover, as the defendant discussed in his Original Brief, *Santana* is irrelevant to the disposition of that case. *Santana* speaks to instances where a defendant moves from a public to a private place in order to defeat an arrest. However, in this case, unlike in *Santana* and *Wear*, the Belvidere police in this case did not first glimpse defendant Benjamin Ferral in a public place, nor did he run inside to defeat arrest. More

importantly, unlike in *Santana* and *Wear*, it is not even clear in this case for what offense the Belvidere police had probable cause to arrest the defendant.

B.

Even if the police could lawfully enter the apartment, they had no probable cause to arrest the defendant.

As an initial matter, the defendant notes in his Original Brief that he argued that, in placing the defendant into handcuffs, the Belvidere police had to be considered to be making a full custodial arrest because *Terry*-stops cannot be conducted in the home. The State argues that whether the handcuffing of a defendant in the home converts the seizure from a *Terry*-stop to an arrest "is an open question." (St. br. at 9) No longer. Recently, *Wear* held emphatically that *Terry*-stops cannot be conducted in the home, "we reiterate that the language of the fourth amendment itself explicitly prohibits entry into the home absent probable cause. Hence, were objective indicia of probable cause absent in this case, Officer Dawdy's entry into the residence to merely conduct an investigatory *Terry* stop would have violated the fourth amendment." *Wear*, 229 Ill.2d at 566 (citations omitted).

Then, after quoting a lengthy passage from *Wear* regarding the doctrine of probable cause, the State asserts that the police had probable cause to arrest the defendant for burglary: "Detective Dammon and the apartment manager told Moore that the defendant had broken into the apartment and the door to the apartment was standing open with a broken door frame. Thus, probable cause existed to arrest the defendant for burglary." (St. br. at 10) Citing *People v. Belton*, 257 Ill.App.3d 1, 628 N.E.2d 287 (1st Dist. 1993), the State further asserts that the defendant acted in an evasive manner, thereby augmenting the police's probable cause. Finally, citing *People v. Flores*, 371 Ill.App.3d 212, 862 N.E.2d

619 (2d Dist. 2007), the State further asserts that officers are not required to verify that a burglary has occurred before arresting a defendant.

To the contrary, with a bit of further investigation, the police could have dispelled any notion that the defendant was burglarizing the premises. Belvidere police officer Mark Pollock said that the learned that the tenant in apartment 4 had given both Julio and Benjamin Ferral permission in his apartment. (R69) However, by this time, Moore had already arrested the men. (R70) Had this simple bit of questioning been done before the arrest, the police would have known that there was no burglary afoot. Verification was not required so much as a fairly thorough police examination. Here, the investigation before the arrest of the defendant was absolutely cursory at best.

C.

Even if the police had probable cause to arrest the defendant, they had no probable cause nor any independent basis for searching the box where the defendant kept his wallet and identification.

The defendant had a reasonable expectation of privacy in the box

On this point, the defendant stands on the arguments that he made in his Original Brief and Argument.

The police could not access the box as part of a search incident to arrest

On this point, the defendant stands on the arguments that he made in his Original Brief and Argument.

The police lacked voluntary consent to search the box

On this point, the defendant stands on the arguments that he made in his Original Brief and Argument.

II.

Under 725 ILCS 5/110-14 (2003), this Court Should Order that the Defendant's Fines Be Reduced by $5 a Day for Each of the 7 Days That He Spent in Custody Prior to Sentencing.

On this point, the defendant stands on the arguments that he made in his Original Brief and Argument.

CONCLUSION

For the reasons requested in Argument I of this Reply Brief and the defendant's Original Brief and Argument, Benjamin Ferral, the defendant-appellant, respectfully requests that this Honorable Court reverse the trial court's order denying the defendant's pre-trial motion and order that the defendant's identification be suppressed. Moreover, because the State cannot meet it burden of proof without this identification, the defendant requests that this Honorable Court reverse his convictions. Additionally, for the reasons in Argument II, the defendant respectfully requests that this Honorable Court modify his sentence and lower his fines by $35.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rule 341. Excluding the cover, the statement of points and authorities, and the appendix, this brief is ____ pages.

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