STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP000304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD L. WEBER,

Defendant-Appellant.

On Appeal From a Pretrial Order Denying
Defendant's Motion to Suppress Evidence
Entered in the Circuit Court for Wood County,
the Honorable Gregory J. Potter Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Seconds before Mr. Weber entered his driveway, Deputy Dorshorst turned on his lights to stop Mr. Weber for a defective brake light. The deputy then followed Mr. Weber into his driveway as Mr. Weber parked in his attached garage. When Mr. Weber went towards the door to his house instead of towards the squad car, was the deputy's subsequent warrantless entry into the curtilage of Mr. Weber's home - the attached garage - justified by exigent circumstances?

The circuit court concluded because Mr. Weber failed to comply with the stop for the brake light, there was probable cause for an obstruction and that was the offense the court relied on to conclude the entry was reasonable because it was a "hot pursuit."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither argument nor publication is requested. While undersigned counsel believes that the parties' briefs will be adequate to address the issues, if this court would find oral argument helpful, counsel would welcome the opportunity to present argument.

STATEMENT OF THE CASE AND FACTS

Wood County charged Richard L. Weber with operating while intoxicated - tenth offense, possession of THC, possession of drug paraphernalia, and resisting an officer. (1). Mr. Weber filed a motion to suppress evidence based on an unlawful arrest (12) and a motion to collaterally attack a prior operating while intoxicated conviction (11). The court granted the collateral attack motion but denied the motion to suppress. (35; App. 137-142). The court's denial of the motion to suppress is the subject of this appeal.

After the court denied Mr. Weber's suppression motion, he entered no contest pleas to operating while intoxicated - ninth offense, possession of THC, and resisting.[1] (36:22). The court gave Mr. Weber a prison sentence for the operating while intoxicated, consisting of four years initial confinement and four years extended supervision. (37:12). On the remaining misdemeanor counts the court ordered costs only. (37:12). Mr. Weber subsequently filed a postconviction motion alleging the court did not exercise its discretion when it ordered a $250 DNA surcharge. (26). The court granted the motion and deleted the surcharge. (29). Mr. Weber then filed a notice of appeal to address the court's denial of his suppression motion. (28).

Suppression Hearing

On April 20, 2012, Deputy Calvin Dorshorst saw Mr. Weber driving with a "defective high mounted brake light." (34:4; App. 106). It is the brake light in the rear

[1] When compiling the appendix, counsel realized she did not have a judgment of conviction for the misdemeanor offenses. The court faxed a judgment of conviction signed on April 28, 2014. It is included in the appendix.

window. (34:4-5; App. 106-107). Deputy Dorshorst activated his emergency lights when Mr. Weber was "maybe 100 feet prior to his driveway." (34:5; App. 107). Mr. Weber turned into his driveway and drove into his garage, which is attached to his house. (34:5, 10; App. 107, 112). The deputy followed Mr. Weber and parked his vehicle about 15 to 20 feet behind Mr. Weber's car. (34:6-7; App. 108-109).

As Deputy Dorshorst was getting out of his car, Mr. Weber exited his vehicle. (34:7; App. 109). When Deputy Dorshorst first exited he did not say anything to Mr. Weber. (34:7; App. 109). Instead, he ran to Mr. Weber's garage door so he could see Mr. Weber. (34:8; App. 110). Deputy Dorshorst saw Mr. Weber walk towards the door to his house, which is at the top of a set of steps. (34:8, 16; App. 110, 118).

When Deputy Dorshorst saw Mr. Weber going towards the door, he entered the garage and told Mr. Weber he needed to speak with him. (34:8-9; App. 110-111). The deputy entered the garage as he was telling Mr. Weber he needed to speak with him. (34:9; App. 111). At that point, Mr. Weber was nearing the top of the steps to his house. (34:16; App. 118). When Mr. Weber reached the top and began opening the door, the deputy made physical contact with Mr. Weber and prevented him from entering his house. (34:8-10; App. 110-112). Deputy Dorshorst secured Mr. Weber's arm as Mr. Weber stepped in the doorway. (34:17-18; App. 119-120). Mr. Weber ended up entirely in the house. (34:18; App. 120).

When Deputy Dorshorst made contact with Mr. Weber he told Mr. Weber the reason he was stopping him was for his high mounted brake lamp. (34:10-11; App. 112-113). He then told Mr. Weber again that is why he needed to speak with him and asked him to go to the car so he "could point out exactly

the reason from the stop and which light was defective." (34:11; App. 113).

When the prosecutor asked Deputy Dorshorst if he observed anything before he entered the garage that would suggest Mr. Weber was driving while intoxicated, the deputy stated Mr. Weber drove over the white fog line. (34:11; App. 113). When Mr. Weber was in the garage, the deputy noticed him walking slowly and somewhat staggering. (34:11-12; App. 113-114). It was only after the deputy entered the garage that he noticed slurred speech, an odor of intoxicants, and glassy, bloodshot eyes. (34:12, 20; App. 114, 122). Mr. Weber also admitted to drinking after the deputy entered the garage. (34:12; App. 114). When Deputy Dorshorst told Mr. Weber he was not free to leave Mr. Weber pushed his head into the deputy's chest. (34:13-14; App. 115-116). The officer secured his arm but Mr. Weber continued to resist. (34:14; App. 116).

Deputy Dorshorst then asked for consent to search Mr. Weber's car and he consented. (34:14; App. 116). The deputy found a tinfoil square with a green leafy substance that tested positive for THC and a metal pipe. (34:14-15; App. 116-117).

However, Deputy Dorshorst testified that he would not have noticed glassy eyes, slurred speech, or an odor of intoxicants if he had not entered the garage. (34:20; App. 122). He also testified that he would not have been able to obtain consent for the search had he not entered the garage. (34:21; App. 123).

When the state made its arguments at the suppression hearing, it conceded that the garage is considered part of the home for Fourth Amendment purposes. (34:28; App. 130). The state argued Deputy Dorshorst was in "hot pursuit" of

Mr. Weber and that satisfied the exigent circumstances requirement, justifying the warrantless entry. (34:23; App. 125). However, the state admitted for the warrantless entry to be constitutionally sound, the deputy needed to be pursuing Mr. Weber for a "jailable" offense. (34:25; App. 127). The state conceded a defective brake light is not a jailable offense but then argued when the officer had his lights on and stated he needed to talk to Mr. Weber, it turned into an obstruction, which is a jailable offense. (34:26; App. 128).

The defense argued the only reason for the stop was because of a defective brake light and that did not justify Deputy Dorshorst's entry into the attached garage because the traffic stop did not create exigent circumstances. (34:28-29; App. 130-131). Defense counsel also pointed out that not coming out of someone's home at an officer's direction is not obstruction. (34:33; App. 135). "If they want to go and get him, they must have a warrant to do so." (34:33; App. 135).

The court concluded the deputy had probable cause for a stop because of the defective brake light and weaving over the fog line. (35:9; App. 140). It concluded that the deputy also had probable cause to arrest Mr. Weber for obstruction based upon his noncompliance with the deputy's visual and verbal commands. (35:10-11; App. 141-142). The court explained its decision to deny the motion as follows:

> I find that the deputy had probable cause and authority to stop the defendant; that when the defendant failed to comply, the basis of a crime occurred giving the deputy probable cause that a crime was being committed and that resulted in exigent circumstances arising to hot and fresh pursuit which allowed the deputy to perform a warrantless search.

(35:11; App. 142).

ARGUMENT

I. Deputy Dorshorst Did Not Have Exigent Circumstances to Enter the Curtliage of Mr. Weber's Home Without a Warrant Because He Was Not Pursuing Mr. Weber for a Jailable Offense, Therefore, the Deputy's Entry Was Constitutionally Unreasonable and All Fruits of the Entry Should Be Suppressed.

A. Introduction and Standard of Review.

Seconds before Mr. Weber entered his driveway, Deputy Dorshorst turned on his lights to stop Mr. Weber for a defective brake light. Mr. Weber turned into his driveway and pulled into the attached garage. When Mr. Weber went towards the door to his house rather than towards the squad car, Deputy Dorshorst entered the garage, which was within the curtilage of Mr. Weber's home, and physically pulled Mr. Weber from the doorway of his house. Since Deputy Dorshorst entered the curtilage of Mr. Weber's home, without a warrant, his entry can only be justified if he had exigent circumstances related to a jailable offense. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986) (abrogated in part by ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775)[2]; ***State v. Ferguson***, 2009 WI 50, ¶ 29, 317 Wis. 2d 586, 767 N.W.2d 187.

As will be seen herein, Deputy Dorshorst pursued Mr. Weber because of a defective brake light, a nonjailable offense. The state's claim that Deputy Dorshorst pursued

[2] ***Felix*** abrogated ***Smith*** only as it relates to the fruits of the unconstitutional arrest. ***Felix*** held an arrest violating the Fourth Amendment did not warrant exclusion of a signed written statement or buccal swab given at the police station following the arrest.

Mr. Weber for an obstruction, even though the deputy never made such an allegation, cannot save the deputy's constitutionally invalid entry because the pursuit was the alleged obstruction. If the state's reasoning was true, any pursuit for a nonjailable offense would qualify as a "hot pursuit." That is not the case. When balancing the urgency of Deputy Dorshorst's need to enter because of a defective brake light against the time needed to obtain a warrant (or in this case mail a citation or warning), it is clear no exigent circumstances exist. Thus, the state cannot overcome the presumption that a warrantless entry is constitutionally unreasonable.

The issue here: whether the officer violated Mr. Weber's Fourth Amendment rights when he entered Mr. Weber's attached garage, without a warrant, and physically prevented Mr. Weber from entering his home, is a mixed question of law and fact. ***State v. Rodriquez***, 2001 WI App 206, ¶ 6, 247 Wis. 2d 734, 634 N.W.2d 844. The circuit court's factual findings can only be overturned if they are clearly erroneous. ***Id.*** However, the reviewing court independently determines whether the historical or evidentiary facts justify a warrantless entry. ***Id.***

B. Relevant Law.

The Fourth Amendment's warrant requirement, for searches and seizures, is a "fundamental safeguard" against unnecessary invasions into people's homes. ***Id.*** at ¶ 8. "The Fourth Amendment stands for the right of a person to retreat into his/her own home and there be free from unreasonable governmental intrusion." ***Id.*** (*citing* ***Payton v. New York***, 445 U.S. 573, 589-90 (1980)).

As the state conceded at the suppression hearing (34:28; App. 130), an attached garage is within the curtilage of the home. ***State v. Davis***, 2011 WI App 74, ¶ 12, 333 Wis. 2d 490, 498, 798 N.W.2d 902. Therefore, an individual is afforded the same Fourth Amendment protections in his home and the attached garage. ***Id.*** at ¶ 9 (*citing* ***Oliver v. United States,*** 466 U.S. 170 (1984)).

"[A]ll warrantless searches and seizures within the home are presumptively unreasonable." ***State v. Kryzaniak***, 2001 WI App 44, ¶ 15, 241 Wis. 2d 358, 624 N.W.2d 389 (*citing* ***Welsh v. Wisconsin***, 466 U.S. 740, 748-49 (1984)). They are "'per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions' that are 'jealously and carefully drawn.'" ***Rodriquez***, 247 Wis. 2d 734, ¶ 8 (*quoting* ***Kryzaniak***, 241 Wis. 2d 358, ¶ 14). "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***Id.*** (*quoting* ***Welsh***, 466 U.S. at 748).

Accordingly, a warrantless entry into someone's home or its curtilage can only be considered reasonable under the Fourth Amendment if the state proves there was (1) probable cause to arrest and (2) exigent circumstances. ***Smith***, 131 Wis. 2d at 228. The state bears "a heavy burden" of trying to demonstrate exigent circumstances to overcome the presumption of unreasonableness. ***Kryzaniak***, 241 Wis. 2d 358, ¶ 16 (citation omitted).

1. Hot Pursuit.

At the suppression hearing, the state argued "hot pursuit" as justification for Deputy Dorshorst's warrantless entry. As will be explained below, "hot pursuit" is part of the exigent circumstances analysis. In this case it is best to start

the analysis with the origin of the "hot pursuit" and "exigent circumstances" doctrines.

The United States Supreme Court first recognized "hot pursuit" as an exception to the warrant requirement in ***Warden v. Hayden***, 387 U.S. 294 (1967). In ***Hayden***, an armed man robbed a cab company. ***Id.*** at 297. Two cab drivers followed him and called the police. ***Id.*** They told the police which home the person entered. ***Id.*** The police arrived in less than five minutes and entered after a knock and announce.[3] ***Id.*** at 297-98. The officers found the suspect, weapons, and clothing similar to what the perpetrator was wearing. ***Id.*** at 298. The Court concluded,

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would *gravely endanger their lives or the lives of others*. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-99 (emphasis added).

The Supreme Court continued the "hot pursuit" doctrine in ***United States v. Santana***, 427 U.S. 38 (1976). In ***Santana***, an undercover officer arranged a heroin "buy" with Patricia McCafferty. ***Id.*** at 39. McCafferty and the undercover officer drove to Santana's residence and McCafferty went inside. ***Id.*** at 40. When she returned to the car and gave the undercover officer the heroin, he arrested her. ***Id.*** She told the

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[3] The woman who answered did not object to the officers searching, however, the court did not resolve whether consent justified the search because it concluded the officers were justified in entering on other grounds. ***Id.*** at fn 4.

officers Santana had the money so the officers went back to Santana's residence. ***Id.*** Upon arrival, Santana was at the door. ***Id.*** The police got out yelled police and Santana went into the vestibule of her house. ***Id.*** The officers entered, arrested her and found the marked money. ***Id.*** at 40-41.

The Court concluded the case involved a "true 'hot pursuit'" and the need to act quickly was greater than ***Hayden***. ***Id.*** at 42. "Once Santana saw the police, there was likewise a realistic expectation that any delay would *result in destruction of evidence*." ***Id.*** at 43 (emphasis added).

However, in ***Welsh v. Wisconsin***, the court concluded "hot pursuit" did not justify the warrantless entry. 466 U.S. 740 (1984). In ***Welsh***, the officer entered Welsh's home to arrest him minutes after a witness observed him in an intoxicated condition flee from a car he had been driving erratically. ***Id.*** at 742-43. The Court concluded "the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." ***Id.*** at 753.

As these early hot pursuit cases illustrate, the pursuit must provide a justification for overcoming the presumption of unreasonableness. In ***Hayden***, the pursuit was necessary for officer and public safety. In ***Santana***, the pursuit was necessary to prevent evidence destruction. On the other hand, in ***Welsh*** hot pursuit did not apply because the officers were not pursuing the defendant from the scene of a crime.

As such, "hot pursuit" is defined as an "immediate or continuous pursuit of [a suspect] from the scene of a crime." ***Kryzaniak***, 241 Wis. 2d 358, ¶ 17 (citation omitted). There must be continuity of the pursuit. ***Id.***

2. Exigent Circumstances.

Hot pursuit is among the factors considered in determining whether "exigent circumstances" justify a warrantless entry. ***Smith***, 131 Wis. 2d at 229. Exigent circumstances should be evaluated based on "a flexible test of reasonableness under the totality of the circumstances." ***Id.***

The exigent circumstances exception to the warrant requirement considers "[u]ndue delay in procuring a warrant in conjunction with *danger to life, risk of evidence destruction, or likelihood of escape*." ***Smith***, 131 Wis. 2d at 231 (emphasis added). The urgency of an officer's need to enter is balanced against the time needed to obtain a warrant. ***Rodriquez***, 247 Wis. 2d 734, ¶ 17.

There are four factors that have been identified that, when weighed against the time needed to obtain a warrant, constitute exigent circumstances required for a warrantless entry. These factors are:

> (1) an arrest made in "hot pursuit"; (2) a threat to the safety of a suspect or others; (3) a risk that evidence would be destroyed; and (4) a likelihood that the suspect would flee.

Id. at ¶ 9 (*quoting* ***Smith***, 131 Wis. 2d at 229).

Therefore, before an officer can enter someone's home or its curtilage without a warrant, the officer must have probable cause and exigent circumstances. ***Smith***, 131 Wis. 2d at 228.

3. Jailable Offense.

Exigent circumstance can justify a warrantless entry only if it is the result of an alleged illegal act. The question becomes what type of offense is serious enough to allow the government to intrude upon the sanctity of someone's home and its curtilage. As will be seen herein, the police cannot use exigent circumstances to justify a warrantless entry for all law violations. It has long been established that if the government's interest is only to arrest for a minor offense, then the presumption of unreasonableness is difficult to rebut. ***Kryzaniak***, 241 Wis. 2d 358, ¶ 21.

Previously, courts permitted warrantless home arrests for "major felonies" if there were exigent circumstances. ***Welsh***, 466 U.S. at 752. The ***Welsh*** Court aptly explained why a finding of exigent circumstances justifying a warrantless home entry should be "severely restricted" when only a minor offense has been committed:

> Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it… *It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicions police officer engaged in following up offenses that involved no violence or threats of it.* While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats of crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime … I do not think … suppression is more important to society than the security of the people against unreasonable searches and seizures. When an

> officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some *real immediate and serious consequence* if he postponed action to get a warrant.

Id. at 750-51 (emphasis added).

Admittedly, Wisconsin has taken a broad view when deciding what constitutes a minor offense under ***Welsh***. The Wisconsin Supreme Court, in ***Ferguson***, concluded ***Welsh*** did not create a felony/misdemeanor distinction for finding exigent circumstances. 317 Wis. 2d 586, ¶ 28. It concluded the penalty was the critical factor in determining whether the underlying offense could support a finding of exigency. ***Id.*** Therefore, it concluded in evaluating whether a warrantless entry is justified by exigent circumstances, courts should consider whether the underlying offense is "jailable or nonjailable." ***Id.*** at ¶ 29.

Therefore, the issue here is whether Deputy Dorshorst's warrantless entry can be justified due to exigent circumstances related to a jailable offense.

C. Application of Facts.

The state alleged "hot pursuit" as justification for Deputy Dorshorst's warrantless entry.[4] (34:26; App. 128). It never argued the remaining three factors listed in ***Smith*** (safety risk, destruction of evidence, or fleeing) applied, nor could it. Deputy Dorshorst attempted to stop Mr. Weber because he had a defective brake light. (34:4; App. 106). As the state conceded, a nonjailable traffic violation, like this, cannot justify a governmental intrusion into someone's home or its curtilage. (34:26; App. 128).

[4] The state conceded that the attached garage was part of the home's curtilage. (34:28; App. 130).

When balancing Deputy Dorshorst's need to enter quickly against the time needed to obtain a warrant (or in this case mail a citation or warning), there is simply no reason he needed to enter at that moment. ***Rodriquez***, 247 Wis. 2d 734, ¶ 17. The officer knew Mr. Weber's location. He certainly was not going to flee the country because of a defective brake light. The "evidence" that could be destroyed would be the defective brake light, which means, the evidence would only be "destroyed" if it was fixed. Of course, if Mr. Weber fixed the light, it is hard to believe any prosecution would continue. After all, such minor mechanical issues are most often addressed by issuing a warning with a deadline for fixing it. The "destruction of evidence" here would actually be a better result.

Additionally, this is not a situation where Deputy Dorshorst was left without recourse. He could have knocked on the door. He also could have mailed Mr. Weber a citation or warning. If he wanted to save a stamp, he could have left a citation or warning at Mr. Weber's home. Put simply, time was not of the essence and there was no reason Deputy Dorshorst needed to act immediately. *See* ***Smith***, 131 Wis. 2d at 231.

Of course, the state understood that a jailable offense was required here, and a defective brake light is not a jailable offense, therefore, it attempted an end run around the Fourth Amendment by arguing the jailable offense was an obstruction. (34:26; App. 128). There are several problems with the state's rationale.

First, the state's argument eliminates the longstanding rule that exigent circumstances cannot justify a warrantless entry if the offense is minor. According to the state, the exigency was created because the officer was in pursuit.

Thus, causing the pursuit becomes the crime for which the officer is pursuing. The state's logic is circular and is difficult to conceptualize. At first glance, it appears to be like trying to decide which came first, the chicken or the egg.

But actually, causing the pursuit must come first. Without the pursuit, there is no alleged obstruction. In other words, in this situation there cannot be an obstruction without the pursuit. Thus, permitting the state's reasoning would eliminate the requirement that the offense be jailable, because the pursuit for a nonjailable offense could always become the jailable offense.

In reality, Deputy Dorshorst's alleged pursuit was due to a defective brake light. Notably, Deputy Dorshorst never testified that he was pursing Mr. Weber because of an alleged obstruction. (34:3-21; App. 105-123). Rather, he testified that he told Mr. Weber in the garage that he was stopping Mr. Weber because of his high mounted brake lamp, a nonjailable offense. (34:10-11; App. 112-113). The brake light was the deputy's first concern when he made contact with Mr. Weber. (Id.) The state also never charged Mr. Weber with obstruction, even though it argued the obstruction was serious enough to warrant exigent circumstances.[5]

If the state's rationale was permitted then every time there was a pursuit for a nonjailable offense the state could argue obstruction – regardless of the severity of the original offense – obviating the constitutional requirement that a

[5] The state did charge Mr. Weber with resisting, which is covered by the same section as obstruction, § 946.41. However, the complaint charged "resisting an officer" and alleged Mr. Weber "did knowingly resist an officer…" (1:3). The only opportunity Mr. Weber had to resist an officer was after Deputy Dorshorst entered the garage.

warrantless entry cannot be justified when the offense is minor. That means, an officer could enter someone's home, without a warrant, if a person walked, jogged, or ran, into his home after an officer tried to stop him for jaywalking, not shoveling his or her sidewalk, riding a bicycle on the sidewalk, or other similar nonjailable offenses. Allowing such actions by the police would entirely undercut the exigent circumstances doctrine.

Second, the police cannot create the exigency by merely conducting an investigation. ***Kryzaniak***, 241 Wis. 2d 358, ¶ 19. "If they could, then any time an investigation is conducted the police would 'obviate the need for a warrant. Such a broad construction of this exigency does not recognize the urgent-need rationale underlying this exception to the warrant requirement.'" ***Id.*** (*quoting* ***Smith***, 131 Wis. 2d at 234).

The state is trying to create an after-the-fact exigency here. The deputy did not enter because he was pursuing Mr. Weber for an obstruction. He entered to talk about the brake light. (34:10-11; App. 112-113).

Third, Deputy Dorshorst testified he turned on his lights "maybe 100 feet prior to [Mr. Weber's] driveway." (34:5; App. 107). Given the proximity to Mr. Weber's driveway, it would have been mere seconds[6] after the lights went on before Mr. Weber entered his driveway. Deputy Dorshorst never testified he turned on a siren to alert Mr. Weber to the lights. (34:5, 7; App. 107, 109). Therefore, it is likely Mr. Weber did not see the lights before he entered

[6] There is no testimony regarding Mr. Weber's speed. He would have been slowing down before his driveway. Assuming 100 feet as the deputy estimated, if Mr. Weber was going 20 mph it would have been 3.4 seconds, if 15 mph, 4.5 seconds, and if 10 mph, 6.8 seconds.

his driveway and then his garage, which would not be an obstruction.

Furthermore, if Mr. Weber was able to stop on the road within 100 feet, which would be difficult due to the short distance, that certainly would not be considered an obstruction. In reality, Deputy Dorhorst was not in pursuit of Mr. Weber because he had probable cause for an obstruction. He was stopping him for a minor traffic violation which cannot justify the warrantless entry.

Additionally, the state cannot justify the warrantless entry by pointing to Mr. Weber's conduct after he entered his attached garage. At that point, he had the same Fourth Amendment protections he has in his house. ***Davis***, 333 Wis. 2d 490, ¶¶ 9, 12. Therefore, the officer could not order him to come out without a warrant. The offense for which the deputy is pursuing the suspect must occur before entering the home's curtilage. Allowing otherwise would thwart any Fourth Amendment protections in the home.

In sum, Deputy Dorshorst entered the curtilage of Mr. Weber's home, without a warrant, because Mr. Weber had a defective brake light on his car. This is not a jailable offense. Therefore it cannot support a conclusion that exigent circumstances existed. As a result, the state cannot overcome the presumption that the deputy's warrantless entry was unreasonable under the Fourth Amendment.

D. All the fruits of the unlawful entry should be suppressed.

The exclusionary rule applies to Fourth Amendment violations. ***Ferguson***, 317 Wis. 2d 586, ¶ 21. Any evidence related to the operating while intoxicated offense was a direct result of the deputy's warrantless entry. Deputy Dorshorst

testified he would not have noticed glassy eyes, slurred speech, or an odor of intoxicants if he had not entered the garage. (34:20; App. 122).

Additionally, the evidence obtained after the search of Mr. Weber's car should also be suppressed as a fruit of warrantless entry. A "fruit of the poisonous tree" inquiry focuses on whether the discovery of the tainted evidence was sufficiently attenuated to dissipate the taint caused by the prior police activity. ***State v. Trecroci***, 2001 WI App 126, ¶ 46, 246 Wis. 2d 261, 630 N.W.2d 555. "The mere fact that consent to search is voluntary … does not mean that it is untainted by prior illegal conduct." ***Id.*** at ¶ 47 (*quoting* ***State v. Phillips***, 218 Wis. 2d 180, 204, 577 N.W.2d 794 (1998)). There are three factors to examine to determine whether the taint has been sufficiently attenuated: "(1) the temporal proximity of the official misconduct and the seizure of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." ***Id.*** (*citing* ***Phillips***, 218 Wis. 2d at 205).

Here, the taint was not sufficiently attenuated. First, Deputy Dorshorst testified that he would not have been able to obtain consent for the search had he not entered the garage. (34:21; App. 123). The search occurred shortly after the entry during the same interaction. There were no intervening circumstances. Therefore, all the fruits of the warrantless entry and subsequent search should be suppressed.

CONCLUSION

For all of the reasons stated above, Mr. Weber contends the circuit court improperly denied his pretrial motion to suppress evidence based upon an unreasonable warrantless entry into the curtilage of his home. Mr. Weber requests that the Court of Appeals enter an order reversing that ruling on the merits, and remanding to the trial court for further proceedings.

Dated this 28th day of April, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,774 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of April, 2014.

Signed:

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A P P E N D I X

I N D E X
T O
A P P E N D I X

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of April, 2014.

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