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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2014AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD L. WEBER,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION TO
SUPPRESS EVIDENCE, ENTERED IN WOOD
COUNTY CIRCUIT COURT, THE HONORABLE
GREGORY J. POTTER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

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ISSUE PRESENTED

Did the circuit court correctly deny Weber's motion to suppress evidence based on the court's finding that the arresting officer's entry into Weber's garage was justified by probable cause and exigent circumstances?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.¹ Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

In a criminal complaint filed on July 9, 2012, the Wood County District Attorney's Office charged Richard Weber with operating while intoxicated, 10th or subsequent offense, operating with prohibited alcohol concentration, 10th or subsequent offense,² possession of tetrahydrocannabinols, possession of drug paraphernalia, and resisting an officer (1). Weber filed a motion to suppress illegal arrest and fruits of illegal arrest, arguing that Deputy Dorshorst unlawfully entered his garage to detain him (12). The facts pertinent to Weber's claim come from the January 2, 2013, hearing on that motion (34).

On April 20, 2012, Wood County Deputy Sheriff Calvin Dorshorst observed Weber driving a vehicle with a defective brake light (34:4-5). Deputy Dorshorst activated his emergency lights in an attempt to stop Weber, but Weber kept driving for approximately 100 feet and turned into his driveway, continuing all the way down the driveway and into his garage (34:5). Deputy Dorshorst

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

² The operating with a prohibited alcohol concentration charge was later amended to a 9th or subsequent offense (16).

followed behind Weber and saw Weber park in the garage (34:6). Weber immediately got out of his car and started toward the door to his house (34:6).

With his emergency lights still on, Deputy Dorshorst parked outside the garage, behind Weber's vehicle (34:6-7). As he got out of his squad, Deputy Dorshorst lost sight of Weber, so he ran up to the opposite side of the garage door so that he could see him (34:7-8). At that point, Deputy Dorshorst saw Weber walking up the steps to the house door, and Deputy Dorshorst told Weber that he needed to speak to him (34:8). Deputy Dorshorst did not enter the garage before he instructed Weber to stop so he could talk to him (34:8-9). Weber, however, continued up the steps (34:8-9).

Deputy Dorshorst then entered the garage and told Weber again that he needed to speak with him (34:8-9). Weber did not listen and began opening the door to the house (34:8-9). Deputy Dorshorst followed Weber up the stairs, secured Weber's arm, and again explained that he needed to speak to him about the stop for a defective brake lamp (34:9-11). Ultimately, Deputy Dorshorst brought Weber back outside to the garage to talk (34:19). During the encounter, Deputy Dorshorst observed signs that Weber had been drinking, and Weber even said that he "thought he had too much" (34:11-13). Weber tried to end the conversation, and he eventually became physical with Deputy Dorshorst (34:13-14). Weber gave permission to search his vehicle, and that search revealed some marijuana and a pipe (34:14-15).

On February 21, 2013, the circuit court orally denied Weber's motion to suppress based on his allegation that his arrest was unlawful:

Here I disagree with the defendant for the following reasons: First, the deputy observed a high mounted brake light that wasn't working properly. Additionally, he observed the defendant weaving over the fog line, thus he had a basis or probable cause to stop the defendant. Next, when the deputy

activated his emergency lights, rather than pulling over, the defendant drove not only into his driveway but all the way into his garage. Once inside the garage, the defendant did not wait for the deputy to approach. He instead attempted to flee the deputy, even after obtaining verbal commands. It was also at this time that the deputy observed the defendant was walking slowly and staggering. Based upon the defendant's noncompliance, he was obstructing the deputy's attempt to stop him. In other words, now there was probable cause that a crime was being committed and it was being committed by the defendant. Because of the defendant's actions, the deputy took pursuit of the defendant. In this case, the deputy was able to stop the defendant as he was attempting to enter -- attempting to enter or entering into his home. This leads to the issue of whether there was exigent circumstances to perform a warrantless search.

In this case I believe there are. The US Supreme Court has recognized that exigent circumstances may be present in a number of different situations. One of those situations is hot or fresh pursuit. Here Deputy Dorshorst had the authority to stop and detain the defendant not only for the traffic violation but also had the probable cause to arrest the defendant for obstructing based upon his noncompliance with the deputy's visual and verbal commands. The facts also reflect that the defendant was fleeing the deputy in order to avoid the stop. In a case like this, the defendant cannot be rewarded because he is faster on foot than the deputy and get inside his house, thus avoiding the stop. Lastly, the facts show that the deputy's pursuit was promptly made and maintained. Thus, 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. Therefore, the motion to suppress is denied.

(35:9-11.) Weber ultimately pleaded no contest to operating with a prohibited alcohol concentration as a 9th

or subsequent offense, resisting an officer, and possession of marijuana (17; 20; 27; 36:3).

Weber now appeals the circuit court's denial of his motion to suppress.

STANDARD OF REVIEW

Review of a motion to suppress evidence involves a two-step analysis. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463; *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W.2d 189. First, an appellate court evaluates and upholds the circuit court's findings of fact unless they are clearly erroneous. *Id.* Then, the reviewing court independently applies constitutional law to those facts. *Id.*

ARGUMENT

DEPUTY DORSHORST'S ENTRY INTO WEBER'S GARAGE WAS JUSTIFIED BY PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

“[N]ot all warrantless home entries are unlawful. . . . For example, a home entry, though unaccompanied by a warrant, is lawful if ‘exigent circumstances’ are present.” *State v. Ferguson*, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W.2d 187 (citations omitted). “Exigent circumstances exist when ‘it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.’” *Id.* (citations omitted).

The exigent circumstance of “hot pursuit” is established “where there is an immediate or continuous pursuit of [a suspect] from the scene of a crime.” *State v. Richter*, 2000 WI 58, ¶ 32, 235 Wis. 2d 524, 612 N.W.2d 29 (alteration in original) (citations omitted) (internal quotation marks omitted). When determining whether a warrantless entry is justified by exigent circumstances,

courts also should consider whether the underlying offense is a jailable or nonjailable offense. *Ferguson*, 317 Wis. 2d 586, ¶ 29.³ As Weber acknowledges in his brief, the issue in this case “is whether Deputy Dorshorst’s warrantless entry can be justified due to exigent circumstances related to a jailable offense.” (Weber Br. 13).

Weber argues that Deputy Dorshorst’s entry into his garage was unlawful because the deputy “pursued [him] because of a defective brake light, a nonjailable offense” (Weber Br. 6). That is not the case. By the time Deputy Dorshorst set foot into the garage, he had probable cause to believe that Weber was committing a criminal offense, and he was in immediate and continuous pursuit of Weber throughout their entire encounter.

Driving behind Weber on a public road, Deputy Dorshorst activated his emergency lights and tried to stop Weber because of a non-working brake light⁴ (34:4-5). Instead of stopping, Weber kept driving another 100 feet, turned into his driveway, and continued all the way down his driveway and into his garage (34:5). That alone was a jailable offense. Wisconsin Stat. § 346.04(2t) states that “[n]o operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as

³ In *Ferguson*, the supreme court held that “because the disorderly conduct with which Ferguson was charged was a jailable offense, the jury could have been permitted to decide whether exigent circumstances justified the police’s warrantless entry into her home.” *Ferguson*, 317 Wis. 2d 586, ¶ 30.

⁴ See Wis. Stat. §§ 347.06 and 347.14. See also Wis. Admin. Code § Trans 305.15(5)(a) (2014) (“The high-mounted stop lamp of every motor vehicle originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition and may not be covered or obscured by any object or material.”). Deputy Dorshorst’s testimony that the brake lamp was not working is undisputed, and Weber has not argued that the defective light did not provide a lawful basis to stop him.

promptly as safety reasonably permits.” A person who violates that provision “may be fined not more than \$10,000 or imprisoned for not more than 9 months or both.” Wis. Stat. § 346.17(2t). Weber cannot credibly argue that Deputy Dorshorst did not have probable cause to believe that he was violating Wis. Stat. § 346.04(2t).⁵

In addition, as the circuit court found, Weber’s conduct constituted the criminal offense of obstructing an officer (35:9-11). A person commits a Class A misdemeanor when he or she “knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority[.]” Wis. Stat. § 946.41(1). Weber resisted or obstructed Deputy Dorshorst’s lawful effort to conduct a valid traffic stop not only by ignoring the deputy’s emergency lights and driving into his garage, but by disregarding the deputy’s command to stop and speak with him (34:5-9). All of this occurred before Deputy Dorshorst entered Weber’s garage (34:9). Again, Deputy Dorshorst had probable cause to believe that Weber was committing a jailable, criminal offense.

Before he entered Weber’s garage, Deputy Dorshorst had probable cause to believe that Weber was committing a jailable, criminal offense when he disregarded the deputy’s emergency lights, drove all the way into the garage, and then ignored the deputy’s instruction to stop and talk. Wis. Stat. §§ 346.04(2t) and 946.41(1). In addition, there is no question that Deputy Dorshorst was in immediate and continuous pursuit of Weber the entire time. *Richter*, 235 Wis. 2d 524, ¶ 32.

⁵ Although this specific statute was not addressed in the circuit court, the State, as respondent, is not prohibited from citing it now in support of the circuit court’s ruling. *State v. Jensen*, 2011 WI App 3, ¶ 75, 331 Wis. 2d 440, 794 N.W.2d 482; see *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78. It is well-settled that this court may affirm a circuit court decision for reasons not stated or argued below. See *State v. Milashoski*, 159 Wis. 2d 99, 108-09, 464 N.W.2d 21 (Ct. App. 1990); *Kafka v. Pope*, 186 Wis. 2d 472, 476, 521 N.W.2d 174 (Ct. App. 1994).

Police officers are permitted to conduct lawful traffic stops for a variety of reasons, ranging from simple equipment violations to serious felonies. Irrespective of the severity of the violation underlying the stop, however, one thing is clear: When a violation has occurred, an individual cannot refuse to comply with an officer's visual or audible signal to pull over and then disregard the officer's further instruction to stop so that the officer can address the violation. To do so is criminal, and to do so under the facts presented in this case gives rise to exigent circumstances that justify the officer's warrantless entry to detain the individual responsible.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's denial of Richard L. Weber's motion to suppress.

Dated this 29th day of July, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,025 words.

Dated this 29th day of July, 2014.

Nancy A. Noet
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 29th day of July, 2014.

Nancy A. Noet
Assistant Attorney General