STATE OF WISCONSIN

C O U R T O F A P P E A L S

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Deputy Dorshorst Did Not Have Exigent Circumstances to Enter the Curtilage 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.

The state agrees Deputy Dorshorst could not enter Mr. Weber's attached garage without a warrant, unless he was pursuing Mr. Weber for a jailable offense. The state also agrees the reason for Mr. Weber's stop, a defective brake light, is not a jailable offense. (State's Brief, 6). However, the state argues the deputy was in "hot pursuit" of two jailable offenses: knowingly resisting a traffic stop, contrary to Wis. Stat. § 346.04(2t), and obstruction, contrary to Wis. Stat. § 946.41(1). Not surprisingly, Deputy Dorshorst never claimed either as justification for his pursuit. As will be explained herein, these after-the-fact attempts at justifying the deputy's warrantless entry are without merit.

Both of the statutes relied on by the state allow for the pursuit itself to justify the deputy's "hot pursuit." In other words, the exigency was created because the officer was in pursuit. As explained in Mr. Weber's brief-in-chief, this would eliminate the longstanding rule that exigent circumstances cannot justify a warrantless entry if the offense is minor. *See* ***Welsh v. Wisconsin***, 466 U.S. 740 (1984); ***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)[1]; ***State v. Ferguson***, 2009 WI 50, ¶ 29, 317 Wis. 2d 586, 767 N.W.2d 187. Since the state did not address this argument it will not repeated herein.

Mr. Weber has the same Fourth Amendment protections in the curtilage of his home (his attached garage) and his home. ***State v. Davis***, 2011 WI App 74, ¶¶ 9, 12, 333 Wis. 2d 490, 498, 798 N.W.2d 902. Therefore, if Deputy Dorshorst is permitted to enter Mr. Weber's attached garage because he was pursuing him for a broken brake lamp, then Deputy Dorshorst would also be able to forcibly enter Mr. Weber's home for the same reason. Since the delay in procuring a warrant in the circumstance here does not raise any concerns "with danger to life, risk of evidence destruction, or likelihood of escape," the entry is not justified. ***Smith***, 131 Wis. 2d at 231. Indeed, the stop involved fixing a brake light.

Additionally, as to Wis. Stat. § 346.04(2t), failing to submit to a traffic stop, Deputy Dorshorst did not have probable cause to believe Mr. Weber violated this statute. Significantly, the deputy never testified that this was the reason he pursued Mr. Weber. Rather, he testified he wanted to tell Mr. Weber about his broken brake lamp. (34:10-11). At no point, prior to the state's response, did the deputy or state even suggest this was the reason Deputy Dorshorst felt he could pursue Mr. Weber into the curtilage of his home. This supports the conclusion that the officer did not actually have probable cause to believe Mr. Weber violated this statute.

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[1] ***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.

Section 346.04(2t) states, "[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 promptly as safety reasonably permits." (Emphasis added).

Deputy Dorshorst did not have probable cause to believe Mr. Weber "knowingly resist[ed]" him by not stopping. The deputy did not activate his lights until Mr. Weber was "maybe 100 feet prior to his driveway." (34:5; App. 107). Thus, Mr. Weber was seconds from pulling into his driveway as the deputy turned on his lights. Mr. Weber did not have enough time to see and react to the deputy's lights before he entered his private property. After all, a driver about to turn would have his attention focused forward on the turn and not behind him. As such, the driver would not have the opportunity to see the officer's lights behind him. This is especially true when the officer turned on his lights, at best, seconds before the turn. Only an inattentive driver, not focused on the turn, would be able to see the officer's lights turned on just before the driver made the turn onto his private property.

Additionally, Deputy Dorshorst never testified he turned on a siren to alert Mr. Weber to the lights. (34:5, 7; App. 107, 109). Thus, it is evident from the facts that Mr. Weber did not "knowingly resist" the deputy. Rather, he did not see the lights because there was not enough time to draw his attention to the lights. This is likely why the deputy wanted to speak with Mr. Weber about the brake light and never suggested he was pursuing Mr. Weber because he violated § 346.04(2t).

The state next contends that Deputy Dorshorst's entry into Mr. Weber's attached garage, without a warrant, was justified because he was pursuing Mr. Weber for obstructing an officer, contrary to Wis. Stat. § 946.41(1). The state argues this violation occurred when Mr. Weber disregarded the deputy's command to stop and speak with him. (State's Brief, 7).

As explained in Mr. Weber's brief-in-chief, this alleged obstruction occurred *after* Mr. Weber entered his garage. At that point, Mr. Weber had the same Fourth Amendment protections he has in his house. ***Davis***, 333 Wis. 2d 490, ¶¶ 9, 12. The deputy cannot order Mr. Weber to leave the curtilage of his home to discuss a nonjailable offense, and then if he does not comply, make a warrantless entry. If this were allowed then there would be no rule regarding nonjailable offenses. An officer could always order the person to come outside to discuss the nonjailable offense. Then, anytime the person did not comply, the officer could enter without a warrant, arguing the person obstructed the officer's order. Such a rule is wholly inconsistent with the longstanding rule that an officer cannot enter without a warrant in hot pursuit of a nonjailable offense. ***Welsh***, 466 U.S. 740; ***Smith***, 131 Wis. 2d at 228; ***Ferguson***, 317 Wis. 2d 586, ¶ 29.

In sum, Deputy Dorshorst pursued Mr. Weber because he had a broken brake light. However, he did not attempt to stop Mr. Weber until Mr. Weber was pulling into his private driveway, not allowing Mr. Weber enough time to see and react to the deputy's actions. By the time the deputy made contact with Mr. Weber, Mr. Weber was already in his attached garage. At that point, Deputy Dorshorst did not have the authority to order Mr. Weber to come out of his home. Likewise, Deputy Dorshorst was not permitted to enter

the garage because to do so would violate the Fourth Amendment. Since Deputy Dorshorst did enter Mr. Weber's garage, without exigent circumstances, all the fruits of that entry must be suppressed.

CONCLUSION

For all of the reasons stated above, and in his brief-in-chief, 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 13th day of August, 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 1,257 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 13th day of August, 2014.

Signed:

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