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WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DODGE COUNTY
HONORABLE STEVEN G. BAUER

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
STEVEN T. DELAP,
DEFENDANT-APPELLANT.

BRIEF AND ARGUMENT OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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ISSUE PRESENTED FOR REVIEW

Whether the arrest and subsequent search of Mr. Delap violates the Fourth Amendment requirement of reasonableness.

Mr. Delap raised this issue in a *pro se* pretrial motion. The court conducted an evidentiary hearing in which testimony was taken from the law enforcement officers involved, as well as Mr. Delap. At the conclusion of the hearing, the court requested that the parties submit briefs/letters/memorandum. Upon consideration, the court issued a written decision denying Mr. Delap's motion to suppress.

STATEMENT OF REASONS FOR ORAL ARGUMENT AND PUBLICATION

Mr. Delap does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE

On October 15, 2015, a criminal complaint was filed in Dodge County Circuit Court, charging Steven T, Delap with one count of Obstructing an Officer

(Repeater), contrary to Wis. Stats. § 946.41(1), a class A misdemeanor, and one count of Possession of Drug Paraphernalia (Repeater), in violation of Wis. Stats. § 961.573(1), an unclassified misdemeanor. [1]

Mr. Delap represented himself in this case, and filed a *pro se* motion to suppress. The motion argued that the arrest and subsequent search of Mr. Delap violated his right to be free from unreasonable searches and seizures.

The court held an evidentiary hearing on the motion. The law enforcement officers involved in the arrest and search of Mr. Delap testified. Mr. Delap testified as well. At the conclusion of the hearing, the court indicated that it was not prepared to make a ruling, and requested that the parties submit briefs.

The court subsequently issued a written decision denying Mr. Delap's motion to suppress.

[1] All references to Wisconsin Statutes are to the 2013-2014 Edition.

Mr. Delap subsequently entered pleas of no contest to both offenses charged in the criminal complaint. The court imposed a straight jail sentence. Taking into account the amount of good time and presentence jail credit, the court deemed the sentence served.

Mr. Delap filed a timely Notice of Intent to Seek Postconviction Relief. Pursuant to appellate counsel's motion, the court of appeals issued an order extending the time in which to file a notice of appeal or motion for postconviction relief. Mr. Delap ultimately filed a timely Notice of Appeal.

STATEMENT OF FACTS

According to the criminal complaint, on September 8, 2015, at approximately 9:53pm, Sgt. Michael Willman and Deputy Dustin Weiss of the Dodge County Sheriff's Department went to a location on Milwaukee St. in Neosho, Wisconsin. (DOC 1:2; Appendix B:2). Sgt. Willmann had learned that Steven

T. Delap was the subject of an arrest warrant and might be living at 110 Milwaukee St. in Neosho. (DOC 1:2-3; Appendix B:2-3). Sgt. Willmann and Deputy Weiss parked their vehicle about a block away, based on prior information that Mr. Delap had fled from police on previous occasions. (DOC 1:2-3; Appendix B:2-3).

According to the criminal complaint, Sgt. Wallmann and Deputy Weiss were walking toward the residence on Milwaukee St., trying to figure out exactly which residence was the one they were looking for. (DOC 1:3; Appendix B:3). Deputy Weiss noticed a male individual standing next to a vehicle; shortly afterward both officers noticed another male individual near a residence, walking toward the vehicle. (DOC 1:3; Appendix B:3). As the officers got closer, "that individual who was walking near the residence turned and looked at us and subsequently came to a slow stop and turned around and began running back towards the rear of the residence." (DOC 1:3; Appendix B:3).

According to the complaint, Sgt. Wallmann believed that the individual was Steven Delap. (DOC 1:3; Appendix B:3). At the evidentiary hearing on Mr. Delap's motion to suppress, Sgt. Wallmann testified that he "didn't know 100 percent" that the individual who ran was Mr. Delap. (DOC 41:37; Appendix D; 37).

Sgt. Wallmann shone his flashlight on the individual "and yelled for him to stop running and shouted that I was the police." (DOC 1:3; Appendix B:3). Sgt. Wallmann began pursuing the individual, and observed the individual slip and fall. (DOC 1:3; Appendix B:3). According to the complaint, Sgt. Wallmann stated that he observed the individual enter a rear door at 110 Milwaukee St. (DOC 1:3; Appendix B:3). At the evidentiary hearing, Sgt. Wallmann testified that he "could not say 100 percent that I knew that was 110." (DOC 41:39; Appendix D:39).

Sgt. Wallmann reached the door before the individual was able to close it. (DOC 1:3; Appendix

B:3). Deputy Weiss arrived at the scene, and together the officers attempted to push the door open. (DOC 1:3; Appendix B:3). The door opened wide enough to allow Sgt. Wallmann, using his taser, to order the individual away from the door. (DOC 1:3; Appendix B:3). The individual complied and lay prone on the ground. (DOC 1:3; Appendix B:3). A struggle ensued as the officers attempted to place the individual in handcuffs. (DOC 1:3; Appendix B:3).

At some point, the officers did confirm that the individual was Steven Delap. He was placed under arrest. (DOC 1:4; Appendix B:4). A search incident to arrest revealed that Mr. Delap was in possession of drug paraphernalia. (DOC 1:4; Appendix B:4)

APPELLANT'S ISSUE ON APPEAL

I. Whether the arrest and search of Mr. Delap is contrary to the Fourth Amendment requirement of reasonableness.

A. Summary of the Argument

The arrest and search of Mr. Delap is contrary to the Fourth Amendment requirement of reasonableness.

Although law enforcement had an arrest warrant for Mr. Delap, at the time the Fourth Amendment seizure was effectuated the officers did not know the identity of the individual they had seized. During the evidentiary hearing, law enforcement testified that the reason Mr.Delap had been pursued when he fled was because the officers believed he was violating Wis. Stats. § 946.41(1), not because they were attempting to arrest Mr. Delap pursuant to the warrant.

Accordingly, at the time Mr. Delap was seized by law enforcement it was effectively a warrantless seizure.

Mr. Delap respectfully disagrees with the conclusion of the circuit court that the seizure was justified by exigent circumstances, specifically that the officers were engaged in "hot pursuit." At the time law enforcement commanded Mr. Delap to stop, he was

within the curtilage of his residence. Although his actions were in public view, he was not obligated to obey Sgt. Wallmann's command. Since Sgt. Wallmann had no lawful authority to command or order Mr. Delap to do anything, Mr. Delap's failure to comply cannot constitute obstructing an officer or a violation of Wis. Stats. § 946.41(1).

Even if the officers were lawfully in 'hot pursuit' of an individual whose identity they had not verified, the seizure was still unreasonable. The reasonableness requirement applies even if the officers acted pursuant to exigent circumstances. In this case, the officers did not simply pursue an individual into his residence; the officers forced their way in and drew a taser on the occupant. It was not necessary to forcibly enter a residence to apprehend an individual for a relatively minor jailable offense, and the gravity of the offense is a factor in determining reasonableness under the totality of the circumstances. All the officers knew when they

forced their way into the residence with taser drawn was that the individual had run away from them.

Mr. Delap would respectfully submit that under the totality of circumstances, the seizure (and subsequent search) by law enforcement was unreasonable under the Fourth Amendment.

B. Standard of Review

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. State v. Weber, 2016 WI 96, ¶16 (2016). The reviewing court reviews the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous, then independently applies constitutional principles to those facts. State v. Weber, 2016 WI 96, ¶16 (2016).

C. Relevant Law

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. State v. Weber,

2016 WI 96, ¶18 (2016). Nevertheless, because the ultimate touchstone of the Fourth Amendment is `reasonableness,' the warrant requirement is subject to certain exceptions. State v. Weber, 2016 WI 96, ¶18 (2016).

A warrantless home entry is lawful if `exigent circumstances' are present. State v. Ferguson, 2009 WI 50, ¶19, 317 Wis. 2d 586, 767 N.W.2d 187 (2009). Exigent circumstances exist when it would be unreasonable and contrary to public policy to bar law enforcement officers at the door. State v. Ferguson, 2009 WI 50, ¶19, 317 Wis. 2d 586, 767 N.W.2d 187 (2009).

One of the recognized exigent circumstances is 'hot pursuit' of a fleeing suspect. State v. Ferguson, 2009 WI 50, ¶20, 317 Wis. 2d 586, 767 N.W.2d 187 (2009). In addition to exigent circumstances, probable cause must also be present. State v. Weber, 2016 WI 96, ¶19 (2016). However, the confluence of probable cause

and exigent circumstances does not always justify a warrantless entry. State v. Weber, 2016 WI 96, ¶34 (2016). The touchstone of the Fourth Amendment is reasonableness, and reasonableness is measured in terms of the totality of the circumstances. State v. Weber, 2016 WI 96, ¶34 (2016).

D. Argument

The underlying argument or principle offered by Mr. Delap in this case is simple – it is unreasonable to pursue an individual whose identity has not been verified into his residence, and then use force to enter the home and threaten with a taser in order to arrest the individual for a minor jailable offense.

One of the threshold facts in this case is that when the officers were pursuing Mr. Delap, they had not verified his identity. Accordingly, they were not sure whether the person they were pursuing was actually the person named in the warrant, or if that person had fled into the last known residence for Mr. Delap. (DOC

41:39; Appendix D:39). At the evidentiary hearing, law enforcement (Deputy Waas) testified that the reason they pursued the individual was because he was obstructing, and that "it wouldn't have mattered if you were Steven Delap or not." (DOC 41:56; Appendix D:56).

In its written argument in opposition to Mr. Delap's motion to suppress, the state did not raise the argument that the arrest and search were valid because law enforcement was in the process of executing the warrant for Mr. Delap. In the written decision denying the motion, the court based its reasoning on its finding that the officers were in hot pursuit. (DOC 21:2; Appendix F:2). The court declined to justify the actions of law enforcement in terms of the arrest warrant for Mr. Delap.

Mr. Delap would submit that the circuit court's implicit finding of historical fact that the officers were

not engaged in executing the arrest warrant for Mr. Delap when they seized him is not clearly erroneous.

1. When law enforcement pursued the individual later identified as Mr. Delap, they were not in hot pursuit, as they lacked probable cause for obstructing an officer.

In denying the motion to suppress, the circuit court found that the law enforcement officers in this case were "faced with exigent circumstances when, in hot pursuit, they followed the defendant into his home to arrest him." (DOC 21:2; Appendix F:2).

The Wisconsin supreme court recently addressed the doctrine of hot pursuit in State v. Weber, 2016 WI 96 (2016). The court noted that the basic ingredient of the exigency of hot pursuit is immediate or continuous pursuit of a suspect from the scene of a crime. State v. Weber, 2016 WI 96, ¶28, (2016). In determining whether a warrantless arrest is justified by the exigency of hot pursuit, the court should consider whether the underlying offense is a jailable offense. State v. Weber,

2016 WI 96, ¶32, (2016); State v. Ferguson, 2009 WI 50, ¶29, 317 Wis. 2d 586, 767 N.W.2d 187 (2009).

In Weber, law enforcement attempted to effectuate a traffic stop for a defective brake light. Law enforcement activated its emergency lights when the defendant was nearing his driveway; the defendant proceeded to pull his vehicle into the driveway, and ultimately into the garage. Without a warrant, law enforcement entered the defendant's garage and arrested him.

The Wisconsin supreme court found that law enforcement had probable cause to believe that the defendant had obstructed an officer by failing to comply with the officer's attempt to effectuate a traffic stop, and with the officer's subsequent verbal command that he needed to speak with the defendant (the exchange had occurred after the defendant had exited his car, but before the officer had entered the garage). Accordingly,

the officer was in hot pursuit of a fleeing suspect when he entered the garage and arrested the defendant.

In a concurring opinion, one of the justices argued that the defendant in Weber had not obstructed an officer by failing to comply with his commands. People inside their homes may ignore officers' requests that they cooperate and choose not to speak with them. State v. Weber, 2016 WI 96, ¶71 (2016); citing City of Sheboyogan v. Cesar, 2010 WI App 170, ¶18, 330 Wis. 2d 760, 796 N.W.2d 429 (Ct.App.2010). Since the defendant in Weber was in his garage and within the protections afforded the home under the Fourth Amendment, the concurring opinion argued that the officer had no lawful authority to command him to comply.

Although Mr. Delap was not inside the residence when Sgt. Wallmann told him to stop, based on the evidence/testimony presented at the evidentiary hearing Mr. Delap was within the residence's curtilage. The

curtilage of a residence is likewise afforded the protections of the home under the Fourth Amendment. See State v. Martwick, 2000 WI 5, ¶26, 231 Wis.2d 801, 604 N.W.2d 552 (2000).

According to the criminal complaint, when the officers first observed Mr. Delap he was "near" the residence. (DOC 1:3; Appendix B:3). During the evidentiary hearing, he was described as "in the driveway" and that he "wasn't near the back of the residence." (DOC 21:35; Appendix D:35). The residence has a sidewalk in front, and Mr. Delap was in the driveway about "three quarters of the way down" to the sidewalk. (DOC 21:54; Appendix D:54). When Mr. Delap noticed the officers, he turned and began walking back toward the residence, covering a few feet before he was commanded to stop. (DOC 21:53; Appendix D:53). When he started running, he was "either in the driveway or the piece of, the grass right next to the house and the

driveway going around the corner." (DOC 21:55; Appendix D:55).

When Sgt. Wallmann yelled out for Mr. Delap to stop, Mr. Delap was in the driveway, possibly near the house, and within the 'boundary' provided by the sidewalk. Arguably he was within the curtilage of the residence. Considering the factors noted in State v. Martwick, 2000 WI 5, ¶26, 231 Wis.2d 801, 604 N.W.2d 552 (2000), Mr. Delap was in proximity to the home, and well within the sidewalk boundary. Although no further steps had been taken to protect the area from view or construct enclosures, the area of one's driveway near the residence is an area where family and personal activities are engaged in. People barbeque, sunbathe, park/wash their car, allow their children to play, among other things, in the area in question.

To the extent that Mr. Delap was on or near a grassy portion of the property, people generally maintain the portion of their yard between the sidewalk

and the residence itself. See State v. Martwick, 2000 WI 5, ¶38, 231 Wis.2d 801, 604 N.W.2d 552 (2000)(the Sixth Circuit found that the curtilage of the home extended to the portion of the property that was maintained as a backyard).

Mr. Delap would submit that when Sgt. Wallmann commanded him to stop, he was within the curtilage of the residence. Since curtilage is considered part of the home for Fourth Amendment purposes, Mr. Delap was under no obligation to comply with Sgt. Wallmann's commands. See City of Sheboyogan v. Cesar, 2010 WI App 170, ¶18, 330 Wis. 2d 760, 796 N.W.2d 429 (Ct.App.2010).

Accordingly, Sgt. Wallmann had no probable cause to believe that the individual he pursued was obstructing an officer under Wis. Stats. § 946.41(1) because he had no lawful authority at that time to order the individual to do anything.

Thus, law enforcement was not engaged in hot pursuit of a fleeing suspect when they entered Mr. Delpa's residence because there was no probable cause to conclude that the individual they were pursuing had committed or was committing a crime in the first place. Since Mr. Delap had not committed a jailable offense and was not being continuously pursued from a crime scene, his seizure/arrest cannot be justified by the exigency of hot pursuit.

2. Even if the officers had probable cause and were engaged in hot pursuit of a fleeing suspect, their seizure of Mr. Delap was unreasonable.

Even if the court finds that there was probable cause that the officers were in hot pursuit of a suspect who had violated Wis. Stats. § 946.01(1), Mr. Delap would respectfully submit that the arrest and search were unreasonable.

The Wisconsin supreme court made it clear in State v. Weber, 2016 WI 96, ¶34 (2016), that not every

case involving both probable cause and hot pursuit will justify a warrantless arrest. The court specifically rejected the state's request to establish a bright line rule to that effect. State v. Weber, 2016 WI 96, ¶34 (2016). The underlying question, as the court observed, is reasonableness. State v. Weber, 2016 WI 96, ¶34 (2016).

One of the cases relied upon by both the state and the trial court to justify the arrest in this case is United States v. Santana, 427 US 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). In Santana, the Supreme Court noted that the underlying principle in support of the exigency of hot pursuit is the notion that a suspect should not be able to thwart a valid arrest by retreating into their residence. United States v. Santana, 427 US 38, 42-43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

The Wisconsin supreme court discussed this principle favorably in State v. Weber, 2016 WI 96, ¶30 (2016). However, as noted *supra*, the court also

recognized a few paragraphs later that in some cases, the overriding requirement of reasonableness in fact might require such a result – not all cases of hot pursuit justify a warrantless entry into the home. In fact, there will be some cases of hot pursuit where the principle of reasonableness functions to permit a person to thwart a valid arrest by retreating into his abode.

Mr. Delap would submit that this is one of those cases. At most, law enforcement believed they were chasing an individual who, instead of complying with a command to stop, had fled on foot. According to the testimony presented at the evidentiary hearing, law enforcement was not aware of any other criminal conduct committed by the fleeing individual. The conduct they had actually witnessed was minor.

Although it was not a hot pursuit case, the Supreme Court in Welsh v. Wisconsin, 466 US 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984), noted its "hesitation" in finding exigent circumstances to justify a

warrantless home arrest when the underlying offense is relatively minor. The Court further noted the burden on the government to overcome the presumption of unreasonableness that attaches to all warrantless home entries. Welsh v. Wisconsin, 466 US 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). Finally, the Court observed that when the government's interest is to arrest for a minor offense, the presumption is "difficult to rebut." Welsh v. Wisconsin, 466 US 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

It is further worth noting that cases upholding the reasonableness of a warrantless home entry in hot pursuit, such as Santana and Weber, did not involve a forcible entry (in both cases, law enforcement officers simply walked through an open door). In the present case, two officers used force to keep the door from being closed, one with his taser drawn (and presumably ready for use).

Other concerns, such as public safety or the destruction of evidence, are not present in this case. There was no reason for law enforcement to believe that the fleeing individual would harm his roommates, and as far as law enforcement was aware there was no evidence or contraband to conceal or destroy.

Recalling the underlying principle of exigent circumstances, the question is whether public policy favors the conduct of law enforcement in this case. Does public policy support police officers forcing their way into a residence in order to arrest a person for disobeying an officer's command to stop? Is it reasonable to allow law enforcement to forcibly violate the sanctity of one's home in order to arrest the person for nothing more than running away from them?

Mr. Delap would respectfully submit that the principle of reasonableness under the Fourth Amendment requires that those questions be answered in the negative.

3. The evidence seized from Mr. Delap must be suppressed pursuant to the exclusionary rule.

The exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407 (1963). This rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the state shows sufficient attenuation from the original illegality to dissipate that taint. State v, Carroll, 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1, ¶19 (2010).

Under the attenuation doctrine, the determinative issue is whether the evidence came about from the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Wong Sun v. United States, 371 U.S. 471, 488.

Based on a consideration of the relevant factors such as the amount of time elapsed, the presence of

intervening circumstances, and the degree of the unlawful conduct, the evidence seized from Mr. Delap should be suppressed. The evidence seized from Mr. Delap came about as a direct exploitation of the illegality (unlawful entry and arrest). There were no intervening factors or attenuation. Accordingly, the evidence should be excluded.

Mr. Delap would further submit that if the court finds that the pursuing officers in this case did not have probable cause to believe that Mr. Delap had violated Wis. Stats. § 946.41(1), the arrest for that offense should be invalidated. See State v. Ferguson, 2009 WI 50, ¶21, 317 Wis. 2d 586, 767 N.W.2d 187 (2009).

CONCLUSION TO BRIEF AND ARGUMENT

Mr. Delap respectfully requests that the court reverse the denial of his motion to suppress, vacate the judgment of conviction and permit the withdrawal of the plea, and remand for further proceedings.

Dated this 30th day of January, 2017.

Respectfully submitted,

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Certification of Brief Complaince with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3811 words.

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Certification of Appendix Complaince with Wis. Stats. § Wis. Stats. 809.19(2)(a).

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 Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the understanding of the issues raised, including oral or written rulings or decisions showing the trial 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.

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