RECEIVED
03-03-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2016AP002196-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEVEN T. DELAP,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, BRANCH 4,
THE HONORABLE STEVEN G. BAUER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

JAMES T. SEMPF
State Bar #1054891
Attorney for Plaintiff-Respondent

DODGE COUNTY DISTRICT ATTORNEY
Dodge County Justice Facility
210 W. Center Street, 3rd Floor
Juneau, WI 53039
(920) 386-3610

TABLE OF CONTENTS

TABLE OF AUTHORITIES ……. ii

STATEMENT ON ORAL ARGUMENT AND PUBLICATION …… 1

ARGUMENT ……. 1-6

CONCLUSION ……. 6

CERTIFICATION

CERTIFICATION OF ELECTRONIC FILED

TABLE OF AUTHORITIES

United States Supreme Court Cases

Hester v. United States, 265 U.S. 57
44 S.Ct. 445, 68 L.Ed. 898 (1924)…… 2

Katz v. United States, 389 U.S. 347
88 S.Ct. 507, 19 L.Ed.2d 576 (1967)…… 2

United States v. Santana, 427 U.S. 38
96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)…… 2,3

United States v. Watson, 423 U.S. 411
96 S.Ct. 820, 46 L.Ed.2d 598 (1976)…… 2

Welsh v. Wisconsin, 466 U.S. 740
104 S.Ct. 2091, 80 L.Ed. 2d 732(1984)…… 4

Wisconsin Cases

State v. Ferguson, 317 Wis.2d 586
767 N.W.2d 187 (Wis. 2009)…… 3

State v. Richter, 235 Wis.2d 524
612 N.W.2d 29 (Wis. 2000)…… 3

State v. Weber, 372 Wis.2d 202
887 N.W.2d 554 (Wis. 2016)……5,6

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2016AP002196-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEVEN T. DELAP,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, BRANCH 4, THE HONORABLE STEVEN G. BAUER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested.

ARGUMENT

A WARRANTLESS ENTRY INTO A HOME IS LAWFUL WHEN AN OFFICER IS ENGAGED IN HOT PURSUIT OF A SUSPECT WHO COMMITS THE CRIME OF OBSTRUCTING AN OFFICER IN FULL VIEW OF THE OFFICER

Mr. Delap's first argument is that he did not commit the crime of obstructing an officer because he was within the residence's curtilage at the time that Sgt. Willman ordered him to stop.

The facts as stated in the defendant's brief are largely accurate. When officers came to 110 Neosho Street, with the intention of locating and arresting Mr. Delap, they saw an individual standing in the driveway outside of the house matching the description of what they knew of Mr. Delap. The fact that the individual was outside of the house is important because what an individual knowingly exposes to the public is not subject to the protections of the 4th amendment. *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d. 300 (1976). In *Santana*, the United States Supreme Court held that an individual who was standing in the doorway of her own home, was in a public place for purposes of the Fourth Amendment since she was not in an area where she had any expectation of privacy and was not merely visible to the public, but was exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. When the police sought to arrest her, they merely intended to make a warrantless arrest in a public place and did not violate the fourth amendment. *Id* at 42. The Court also held that Santana could not defeat that arrest by retreating into a private place. *Id* at 42-43.

> In *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), we held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment. Thus the first question we must decide is whether, when the police first sought to arrest Santana, she was in a public place. While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment, Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a

> function which we have approved in *Watson*. The only remaining question is whether her act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not. *Santana at 42-43.*

Like the defendant in *Santana*, Mr . Delap was located in a public place for Fourth Amendment purposes. Like the defendant in *Santana*, he was not in an area where he had any expectation of privacy. As in *Santana*, he was not merely visible to the public, but was exposed to public view, speech, hearing, and touch since he was standing completely outside of his house. When the police approached Mr. Delap in that public place and Mr. Delap turned and saw officers, he began moving away from them. Mr. Delap's " moving away" turned into a dead run once Sgt. Willman yelled "Stop, Police!". The police had probable cause at that point to arrest Mr. Delap for obstruction. The only remaining question is whether his act of retreating into his house could thwart that arrest. As in *Santana*, the answer to that question should be no.

Mr. Delap's second argument is that even if he did commit the crime of obstructing an officer, the Court should not find that exigent circumstances existed to enter the home because the underlying offense of obstructing an officer was a minor one. The State's response is that a law enforcement officer in hot pursuit of a fleeing jailable misdemeanor suspect is faced with exigent circumstances allowing the officer to follow a suspect into his home to effectuate an arrest. *State v. Ferguson*, 2009 WI 50 para 28-30, 317 Wis.2d 586. Exigent circumstances exist when "it would be unreasonable and contrary to public policy to bar law enforcement officers at the door", *State v. Richter*, 235 Wis.2d 524 paragraph 28 (WI 2000).

Obstructing an officer is a jailable misdemeanor offense. This Court could conclude, therefore, that the officers were faced with exigent circumstances when, in hot pursuit, they followed the defendant into his home to arrest him. However, there are more facts here which illustrate why it would be unreasonable and contrary to public policy to bar law enforcement at the door in this situation. Officers went to 110 Milwaukee Street in the Village of Neosho that evening because they were looking for Mr. Delap with the intention of arresting him on several warrants. (R.41:8-9). Sgt. Willman was provided information that Mr. Delap was a white male approximately 25-30 years old. (R.1:3). Sgt. Willman testified that Mr. Delap had a warrant though Jefferson County and that he had a warrant through the Wisconsin DOC. (R.41:8-9). Willman was also aware of two prior incidents when law enforcement had

attempted to stop Mr. Delap and he ran from law enforcement. (R.41:8-9). Willman was also aware that Mr. Delap had a history of resisting and assaulting law enforcement officers. (R.1:2).

When Willman observed the individual who fit the description of Mr. Delap and then that individual ran after being told to stop, consistent with Mr. Delap's modus operandi, Sgt. Willman held the reasonable belief that the individual that he was chasing was Mr. Delap. Sgt. Willman conceded that he wasn't 100% certain that he was chasing Mr. Delap, but the crux of the 4th amendment is reasonableness and Willman was behaving reasonably. The enforcement of our criminal laws should not be treated as a game where law enforcement officers are 'it' and one is 'safe' if one reaches 'home' before being tagged.

Mr. Delap urges this Court to find that exigent circumstances were not present in the present situation because he argues that the offense for which he was being pursued was relatively minor. His sole authority on this point is *Welsh vs. Wisconsin*, 466 US 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). I have reprinted Mr. Delap's reliance on that point below:

> Although it was not a hot pursuit case, the Supreme Court (referring to the United States 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.

While Mr. Delap correctly notes that *Welsh* was not a hot pursuit case, he misstates the actual holding. *Welsh* held that a warrantless, nighttime entry of petitioner's home to arrest him for a civil, nonjailable traffic offense, was prohibited by the special protection afforded the individual in his home by the Fourth Amendment. *Id*. at 754-755. Mr. Delap was not arrested for a civil, nonjailable traffic offense; he was arrested for a criminal and jailable obstructing offense. *Welsh* does not provide him with any sanctuary.

The only remaining argument that Mr. Delap makes is as follows:

> …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.

Mr. Delap cites *State v. Weber,* 372 Wis.2d 202, 887 N.W.2d 554 (WI 2016) as his sole authority for the above proposition. Weber held that:

> We conclude that the deputy's warrantless entry into Weber's garage and subsequent arrest of Weber were constitutional because they were justified by the exigent circumstance of hot pursuit of a fleeing suspect who had committed jailable offenses. *Id* at 208.

The holding in Weber is contrary to Mr. Delap's position. While this was the Court's holding, a majority of the Justices did not agree on a rationale. The lead opinion, however, addresses whether this case represents "one of those cases" for which the Court should not allow the officer to penetrate the home.

> Before we conclude, we acknowledge the concern that applying the hot pursuit doctrine to uphold a warrantless entry in a case where fleeing law enforcement was itself the violation giving rise to the pursuit will lead to the application of the hot pursuit doctrine in every case involving a fleeing suspect, no matter the gravity of the first offense committed, since flight itself can constitute a jailable offense. The objection is a legitimate one, but it fails to persuade for several reasons. First, the State will not always be able to establish probable cause that the suspect was knowingly fleeing. Second, as stated above, we decline to adopt the per se rule set forth by the State. The "touchstone of the Fourth Amendment is reasonableness," and "[r]easonableness ... is measured in objective terms by examining the totality of the circumstances." Third, application of the hot pursuit doctrine in this scenario is not circular (i.e., the pursuit justifying the pursuit) because the legislature did not have to make knowingly fleeing a traffic stop a jailable offense, either at all or in all circumstances. That it has chosen to do so means that this court must treat it with the seriousness that it does other jailable offenses. And fourth, a contrary holding would lead to the opposite problem: in every case involving a nonjailable offense,

> suspects would have an incentive to flee law enforcement because flight itself would not justify application of the hot pursuit doctrine. *Id* at 232.

The State disagrees with Mr. Delap that "this is one of those cases". First the State can establish that Mr. Delap was knowingly fleeing. Mr. Delap himself testified at the motion hearing that he suspected the individuals who were chasing him were police officers and he was running from them because he did not want to go to jail. R. 41:33. Second, the officers acted reasonably in their pursuit of Mr. Delap for the reasons stated earlier in this brief.

CONCLUSION

On September 6, 2015, officers went to 110 Milwaukee Street in Neosho, WI in order to locate Steven Delap. Mr. Delap had multiple warrants for his arrest, had a history of fleeing law enforcement, and had a history of resisting and assaulting law enforcement. Sgt. Willman located an individual standing in a public place. That individual turned toward Sgt. Willman, saw him, and then began moving away. When Sgt. Willman yelled for that individual to stop, he broke into a dead run. Willman pursued, believing (but not completely certain that) the individual to be Mr. Delap. Willman pursued the individual to a private residence where the individual sought to retreat inside in order to avoid arrest. A short struggle then occurred with Mr. Delap trying to complete the process of closing the door and officers pushing the door back open. Once the officers succeeded in the struggle, the individual was positively identified as Steven Delap, and arrested. When Mr. Delap chose to run from the officers, he committed the crime of obstructing an officer. Obstructing an officer is a misdemeanor jailable offense and the officers were engaged in hot pursuit of Mr. Delap when they entered his residence to apprehend him. Mr. Delap knowingly fled officers and the officers acted reasonably under the circumstances. This Court should affirm the ruling of the trial court.

Dated this the 28th day of February, 2017.

James T. Sempf, #1054891
Attorney for Plaintiff-Respondent
Dodge County Assistant District Attorney
210 West Center Street, 3rd Floor
Juneau, WI 53039
(920)-386-3610

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 2103 words.

Dated this the 28th day of February, 2017.

Signed:

_____

James T. Sempf, #1054891
Attorney for Plaintiff-Respondent
Dodge County District Attorney's Office
Dodge County Justice Facility
210 West Center Street, 3rd Floor
Juneau, WI 53039
(920)386-3610

CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 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 28th day of February, 2017.

James T. Sempf, #1054891
Attorney for Plaintiff-Respondent
Dodge County District Attorney's Office
Dodge County Justice Facility
210 West Center Street, 3rd Floor
Juneau, WI 53039
(920)386-3610