RECEIVED
03-20-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

2016AP002196-CR

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.

---

# REPLY BRIEF AND ARGUMENT OF APPELLANT

---

Michael J. Herbert
Wisconsin State Bar No. 1059100
10 Daystar Ct., Ste. C
Madison, Wisconsin 53704
(608) 249-1211
Attorney for Steven Delap

TABLE OF CONTENTS

Table of Authorities Cited

## ARGUMENT

### I. Mr. Delap respectfully disagrees with the State's argument that law enforcement acted reasonably when they engaged in a warrantless home entry and arrest.

Mr. Delap submits that law enforcement's warrantless home entry and subsequent arrest is contrary to the Fourth Amendment prohibition against unreasonable searches and seizures.[1]

#### A. Law enforcement was not engaged in hot pursuit of Mr. Delap because there was insufficient probable cause that he had engaged in obstructing an officer.

Mr. Delap has argued that he was within the curtilage of the residence when he was first observed by law enforcement. As a consequence, he was under no obligation to obey the commands of law enforcement to stop. Accordingly, his failure to comply did not

[1] Although the state refers to the arrest warrant for Mr. Delap as a factor in determining the reasonableness of the officers' actions (Brief of Respondent, p.4), the state does not argue that the forcible residential entry was justified because they were effectuating an arrest warrant for Mr. Delap. The state appears to adopt Mr. Delap's framing of the issue as one involving a warrantless entry and arrest.

constitute obstructing an officer, and the officers were not engaged in hot pursuit of a fleeing suspect when they forcibly entered the residence to apprehend him.

In its brief, the state disputes Mr. Delap's curtilage argument, but does not address it in substance. The state argues, based on United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976), that since Mr. Delap was in a public place, he was not entitled to the protections of the Fourth Amendment and could not retreat into the residence to thwart an arrest. (Brief of Respondent, p.2-3).

Mr. Delap submits that this case is unlike Santana. In that case, law enforcement observed the defendant engaging in criminal activity while in public view. Although Mr. Delap was in public view when he was observed by law enforcement, he was not observed engaging in criminal activity. The only basis for the alleged hot pursuit is that he did not comply with law enforcement's command to stop.

As he argued, since Mr. Delap was within the residential curtilage (Brief of Appellant, p.20-22), he enjoyed the protection of the Fourth Amendment and was under no obligation to comply with law enforcement's commands. See State v. Weber, 2016 WI 96, ¶71, 372 Wis.2d 202, 887 N.W.2d 55 (2016). Thus, based on Mr. Delap's curtilage argument, unlike the defendant in Santana he had committed no crime for law enforcement to pursue. Accordingly, this case does not present the situation discussed in Santana that a person cannot retreat into a residence in order to thwart an arrest.

Since law enforcement was not engaged in hot pursuit of a suspect fleeing a jailable offense, law enforcement did not have exigent circumstances to conduct a forcible warrantless residential entry and arrest of Mr. Delap.

B. Even if law enforcement had exigent circumstances of hot pursuit, their actions in forcibly entering the residence without a warrant to arrest Mr. Delap were unreasonable.

Even if exigent circumstances were present in this case, the presence of exigent circumstances and probable cause does not always justify a warrantless arrest. See State v. Weber, 2016 WI 96, ¶34, 372 Wis.2d 202, 887 N.W.2d 55 (2016). The underlying Fourth Amendment principle that requires reasonableness is the ultimate standard.

Mr. Delap would respectfully disagree that it was reasonable for law enforcement to forcibly enter a residence to effectuate an arrest for a minor jailable offense. The Weber court's refusal to establish a bright line rule to that effect demonstrates that law enforcement must do more than establish probable cause and exigent circumstances. Law enforcement must have a compelling reason to forcibly enter a person's

residence, even to effectuate an arrest for a jailable offense.

Although Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984), is factually distinguishable, the underlying principles are applicable. The court made it clear in Welsh that there is a presumption against the reasonableness of a warrantless entry when the underlying offense is minor. In this case, the only jailable offense at issue involved Mr. Delap running away after law enforcement told him to stop.[2]

Mr. Delap's argument that in some instances a warrantless arrest will not be justified by probable cause and hot pursuit of a fleeing suspect is consistent with the court's holding in Weber. The court made clear in Weber that the reasonableness of the conduct of law

[2] Although the state does not argue that the entry was justified because the officers were executing an arrest warrant for Mr. Delap, the state submits that the officers acted reasonably in chasing Mr. Delap into a residence. (Brief of Respondent, p.4). However, nothing in the record suggests that the officers had any reason to believe the arrest warrant encompassed serious jailable offenses as opposed to, for example, missed court appearances or DOC obligations.

enforcement must be evaluated based on the totality of the circumstances, not just on whether the offense of pursuit is jailable. State v. Weber, 2016 WI 96, ¶43, 372 Wis.2d 202, 887 N.W.2d 55 (2016).

Since not all cases involving hot pursuit and probable cause justify a warrantless forcible home entry/arrest, there must be some factor that distinguishes those that do from those that do not. Jailability of the offense of pursuit is not a *determining* factor.

Warrantless home entry is permissible only when there is an urgent need to do so. See State v. Weber, 2016 WI 96, ¶113, 372 Wis.2d 202, 887 N.W.2d 55 (2016)(dissenting opinion), citing State v. Smith, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). There was no urgency in this case. Law enforcement had no reason to believe that there was a risk of destruction of evidence or a threat to the safety of others if they did not act. State v. Smith, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). If law enforcement believed the person they

were pursuing had committed the crime of obstructing an officer, there was no reason not to obtain a warrant for that specific offense. See State v. Smith, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986)(warrantless entry is permissible only where there is urgent need to do so, coupled with insufficient time to secure a warrant).

Law enforcement did not have a sufficient basis to think that they were effectuating the arrest warrant for Mr. Delap because they were uncertain of the identity of the person they were pursuing. Furthermore, they had no basis to believe that the warrant was for jailable offenses. When it comes to forcible entry of a residence, Mr. Delap would submit that reasonableness under the Fourth Amendment requires the officers to be sure that they have the right person and the right reasons before engaging in a forcible entry of a home.

Public policy does not favor the actions of law enforcement in this case. Forcible warrantless home entry is contrary to the fundamental underlying principle

embodied in the Fourth Amendment, and that principle should not give way when officers are in pursuit of an individual whose only criminal act consisted of running away when the officers said stop. In addition, forcible entry risks confrontation, and confrontation can easily spill over and affect other members of the public who not involved. Public policy does not favor the creation of unnecessary risks to the public at large in the name of effectuating a warrantless arrest for a minor jailable offense.

The state bears the burden to overcome the presumption of unreasonableness that attaches to warrantless home entries. Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S.Ct. 2091 (1984). In contrast to hot pursuit cases like Santana and Weber, this case involves a *forcible* physical entry into the home – an enhanced version of the "chief evil" against which the words of the Fourth Amendment are directed. Welsh v. Wisconsin, 466 U.S. 740, 748, 104 S.Ct. 2091 (1984).

Mr. Delap would respectfully submit that the state has failed to meet its burden and rebut the presumption of unreasonableness that attaches to the actions of law enforcement in this case. As a consequence, the evidence obtained as a result of the unreasonable seizure and subsequent search must be suppressed in accordance with the exclusionary rule. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407 (1963).

## CONCLUSION TO REPLY BRIEF AND ARGUMENT

For the reasons stated, Mr. Delap submits that the circuit court erred in denying his pretrial motion to suppress based on an unreasonable seizure/arrest and subsequent search. Accordingly, Mr. Delap respectfully requests that this court reverse the denial of his motion to suppress and remand for further proceedings.

Dated this 20th day of March, 2017.

Respectfully submitted,

Michael J. Herbert
Wisconsin State Bar No. 1059100
10 Daystar Ct., Ste. C
Madison, Wisconsin 53704
(608) 249-1211
Attorney for Steven Delap

Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f).

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____

Certification of Brief Compliance 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 1451 words.

_____

Certification of Appendix Compliance 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.

I further certify that if 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 juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.

_____