STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP002196-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

V.

STEVEN T. DELAP,
DEFENDANT-APPELLANT-PETITIONER

On review of a Decision of the Court of Appeals, District IV, affirming the Order of the Circuit Court Denying a Motion to Suppress the Evidence, entered in Dodge County Circuit Court, the Honorable Steven G. Bauer, Presiding.

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED FOR REVIEW

Whether the doctrine of hot pursuit always justifies a forcible warrantless entry into the residence of one suspected of minor criminal activity.

As it applies to the present facts, this case presents the question of whether the arrest and subsequent search of Mr. Delap, effectuated by a forcible warrantless residential entry by police officers in hot pursuit, violates the Fourth Amendment requirement of reasonableness.

Mr. Delap raised this issue in a *pro se* pretrial motion to suppress. The court issued a written decision denying Mr. Delap's motion, finding that the officers were faced with exigent circumstances and acted in hot pursuit.

In a one-judge decision affirming the decision of the circuit court, the court of appeals declined to consider Mr. Delap's argument that the officers acted unreasonably, finding the argument undeveloped.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

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. The state submitted a written memorandum in opposition to Mr. Delap's motion.

The court subsequently issued a written decision denying Mr. Delap's motion to suppress. The written decision concluded that the conduct of the officers was

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

reasonable due to exigent circumstances. (DOC 21:1-2; Appendix F:1-2).

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.

In a one judge decision, the court of appeals denied Mr. Delap's appeal. Mr. Delap raised two issues in his appeal – that police officers did not have probable cause that he had resisted or obstructed in officer in violation of Wis. Stats. § 946.41 and that as a consequence the officers were not in hot pursuit; and that even if the officers were in hot pursuit their conduct in entering the residence without a warrant in pursuit of Mr. Delap violated the Fourth Amendment's guarantee against unreasonable searches and seizures.

In its decision, the court of appeals declined to consider Mr. Delap's argument that the officers acted

unreasonably, finding the argument to have been undeveloped. (Decision of Court of Appeals; Appendix G:¶21).

Mr. Delap has twice raised the argument that the officers in this case acted unreasonably. Neither the circuit court nor the court of appeals substantively or directly addressed the argument.

STATEMENT OF FACTS

According to the criminal complaint, on September 8, 2015, at approximately 9:53pm, Sgt. Michael Willmann and Deputy Dustin Waas 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 was aware that Steven T. Delap was the subject of arrest warrants. (DOC 1:2; Appendix B:2). According to the complaint, Deputy Gallenbeck "was able to get information that Steven was living at 110 Milwaukee Street in the village of Neosho." (DOC 1:2; Appendix B:2).[2]

[2] At the motion hearing, Mr. Delap testified that 110 Milwaukee St. was not his permanent address, but that he had been living there temporarily. (DOC 41:5-6; Appendix D:5-6). Accordingly, the circuit court found that Mr. Delap had standing to raise the Fourth Amendment issue. (DOC 41:6; Appendix D:6).

At the motion hearing, Sgt. Willmann stated that he "believed" that Deputy Gallenbeck had learned that Mr. Delap was living at 110 Milwaukee St. from an individual who was a passenger in a vehicle that was involved in a traffic stop the month prior. (DOC 41:13; Appendix D:13). Sgt. Willmann was aware that Mr. Delap had been the driver of the vehicle involved in the traffic stop and had fled on foot. (DOC 41:8; Appendix D:8). Sgt. Willmann further testified that he "believed" that a teletype from Walworth County "had also indicated he was living at that residence." (DOC 41:13; Appendix D:13).

Sgt. Willmann had confirmed that the one of the warrants was a probation and parole warrant. (DOC 41:9,13; Appendix D:9,13). According to the criminal complaint, the second warrant was a felony arrest warrant "through Jefferson County." (DOC 1:2; Appendix B:2).

Sgt. Willmann and Deputy Waas 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. Willmann and Deputy Waas 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). According to Sgt. Willmann, they were attempting to determine which duplex was the one they were looking for. (DOC 41:14; Appendix D:14). As they approached, they did not know the exact location. (DOC 41:14; Appendix D:14).

Deputy Waas noticed a male individual standing next to a vehicle, and discussed with Sgt. Willmann whether that individual could be Mr. Delap. (DOC 41:52; Appendix D:52). 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).

Sgt. Willmann observed that the individual who fled "did appear to be a white male with an approximate age of 25-30 years old." (DOC 1:3; Appendix B:3). Sgt. Willmann believed that the individual was Steven Delap. (DOC 1:3; Appendix B:3).[3] At the motion hearing, Sgt. Willmann testified that he "didn't know

[3] Deputy Waas testified at the motion hearing that the reason the officers concluded that the first individual they observed was not Mr. Delap was because "he didn't take off running." (DOC 41:56; Appendix D:56).

100 percent" that the individual who ran was Mr. Delap. (DOC 41:37; Appendix D; 37).

Sgt. Willmann 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. Willmann began pursuing the individual, and observed the individual slip and fall. (DOC 1:3; Appendix B:3). According to the complaint, Sgt. Willmann stated that he observed the individual enter a rear door at 110 Milwaukee St. (DOC 1:3; Appendix B:3).

At the motion hearing, Sgt. Willmann testified with respect to the location entered by the fleeing individual - "I couldn't say 100 percent that I knew that was 110." (DOC 41:39; Appendix D:39). Sgt. Willmann testified that the last address they had noticed prior to chasing the individual was 120 Milwaukee St. (DOC 41:38; Appendix D:38).

Sgt. Willmann reached the door before the individual was able to close it. (DOC 1:3; Appendix B:3). Deputy Waas 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. Willmann, 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 doctrine of hot pursuit always justifies a forcible warrantless entry into the residence of one suspected of minor criminal activity.

A. Summary of the Argument

The doctrine of hot pursuit does not always justify the forcible warrantless entry into the residence of one suspected of minor criminal activity. There is no per se rule that it is reasonable for police to enter a residence without a warrant when they are engaged in hot pursuit of a fleeing suspect.

In the present case, the forcible warrantless entry into the residence by police officers in hot pursuit of Mr. Delap is contrary to the Fourth Amendment guarantee against unreasonable searches and seizures.

Warrantless residential entries by law enforcement are presumptively unreasonable. In some instances, a warrantless residential entry may be justified by exigent circumstances, such as law enforcement in hot pursuit of a fleeing suspect. However, the presumption of unreasonableness is difficult to overcome when the officers are pursuing an individual suspected of only a minor non-violent criminal offense.

The question of reasonableness is a public policy question, asking whether public policy favors the conduct of law enforcement in a particular case. The question is resolved by considering the totality of the circumstances.

The totality of the circumstances in this case does not support the actions of law enforcement as reasonable. In the present case, law enforcement pursued an individual whom they believed to be Mr. Delap into his residence. The officers used force to gain entry and apprehend Mr. Delap after pursuing him for running away when they told him to stop. The pursuing officers faced no underlying urgency or danger to the public that precluded them from seeking the consent of an impartial magistrate prior to forcibly entering a residence. Obtaining that consent (in the form of a

warrant) would not have defeated the apprehension and/or conviction of Mr. Delap.

The policy argument that supports hot pursuit as an exception to the warrant requirement arises from a principle that suspects should not be encouraged to flee from law enforcement in hopes that they will safely reach 'home base'. However, the public policy that respects the home and protects it from warrantless governmental intrusions is constitutional and foundational, and should not yield to law enforcement conduct that is unnecessary to protect the public, prevent the destruction of evidence, or keep the suspect from escaping. Law enforcement should not be encouraged to pursue suspects into their abodes to arrest them for minor non-violent crimes when there is no urgent need to do so without first obtaining a warrant

Mr. Delap would respectfully submit that under the totality of circumstances, the seizure, arrest, and subsequent search by law enforcement in this case were unreasonable under the Fourth Amendment.

B. Standard of Review

Whether the conduct of police in entering Mr. Delap's residence without a warrant is reasonable under the Fourth Amendment and Article I, section 11 of the Wisconsin Constitution is a question of constitutional fact. State v. Richter, 2000 WI 58, ¶26, 235 Wis. 2d

524, 612 N.W.2d 29 (2000). 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, ¶18, 372 Wis. 2d 202, 887 N.W.2d 554 (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, 372 Wis. 2d 202, 887 N.W.2d 554 (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, 372 Wis. 2d 202, 887 N.W.2d 554 (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, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). However, the confluence of probable cause and exigent circumstances does not always justify a warrantless entry. State v. Weber, 2016 WI 96, ¶34, 372 Wis. 2d 202, 887 N.W.2d 554 (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, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

D. Argument

This case presents an opportunity for this court to reaffirm the principle that there is no per se rule that warrantless home entries by law enforcement engaged in hot pursuit of a fleeing suspect are always reasonable under the Fourth Amendment and Article I, section 11 of the Wisconsin Constitution.

Mr. Delap would further submit that the principle needs reaffirmation in light of the fact that both the circuit court and court of appeals declined to address the reasonableness issue.

Although hot pursuit falls under one of the categories of exigent circumstances that may justify a warrantless home entry as reasonable, standing alone it provides a non-compelling argument in favor of reasonableness.

As this court observed in Weber, 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, 372 Wis. 2d 202, 887 N.W.2d 554 (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, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

In some instances, a warrantless search/seizure within the home may be justified (and considered reasonable) due to the existence of exigent circumstances. State v. Ferguson, 2009 WI 50, ¶19, 317 Wis. 2d 586, 767 N.W.2d 187 (2009).

In determining whether exigent circumstances are present, the court applies an objective test asking "whether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly

enhance the likelihood of the suspect's escape." State v. Richter, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29 (2000). 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).

1. The Fourth Amendment protects the sanctity of the home by prohibiting unreasonable government intrusions; accordingly, the government is required to show a compelling need to enter a home without first obtaining a warrant that authorizes the entry.

The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Accordingly, "the Fourth Amendment draws a firm line at the entrance to the house." Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

As a consequence, it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The warrant

procedure minimizes the danger of *needless intrusions* of that sort. Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)(Emphasis added).

The Fourth Amendment protects both invasions of privacy as well as invasions that could be characterized as trespass. See for example, United States v. Jones, 132 S. Ct. 945, 949-50, 565 U.S. 400, 181 L. Ed. 2d 911 (2012)(Fourth Amendment encompasses both common law trespass and individual expectations of privacy); see also State v. Weber, 2016 WI 96, ¶128, 372 Wis. 2d 202, 887 N.W.2d 554 (2016)("the Katz reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test")(Justice Ann Walsh Bradley dissenting opinion, emphasis in original).

In limited instances, these principles yield to the urgency of exigent circumstances. A warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant. Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). Accordingly, a warrantless entry is permissible only where there is urgent need to do so, coupled with insufficient time to secure a warrant. State v. Smith, 131 Wis.2d 220, 228, 388 N.W.2d 601 (1986). The police

bear a heavy burden in attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Welsh v. Wisconsin, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

The warrant requirement functions not only to ensure that probable cause exists prior to any intrusion into the home that infringes on either privacy or property interests, but that the determination is ultimately made by a neutral and detached magistrate.

For example, the U.S. Supreme Court observed in Johnson v. United States, 33 U.S. 10, 14 (1948), that "the right of law enforcement officers to thrust themselves into a home is of grave concern," and that when the right of privacy must yield to the right of law enforcement to search "is to be decided by a judicial officer, not by a policeman or government enforcement agent." Johnson v. United States, 33 U.S. 10, 14 (1948); see also Welsh v. Wisconsin, 466 U.S. 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); State v. Weber, 2016 WI 96, ¶121, 372 Wis. 2d 202, 887 N.W.2d 554 (2016)(Justice Ann Walsh Bradley dissenting opinion).

From these cases, we can draw some conclusions that apply to the present case. In order to protect privacy and property/trespass interests, the Fourth Amendment draws a line at the entrance to the house. The general rule is that the line can only be crossed by law

enforcement when it is authorized by a neutral and detached magistrate. A presumptively unreasonable warrantless entry may be justified when exigent circumstances exist. In order to justify a warrantless entry as reasonable due to exigent circumstances, there must be some urgency or emergency that makes it necessary for police to bypass the warrant requirement.

2. In limited instances, exigent circumstances justify a warrantless home entry by police officers; however the public policy advanced by permitting warrantless home entries by officers in hot pursuit of a fleeing suspect is not compelling.

In some limited exigent circumstances, it would be contrary to public policy to require law enforcement to obtain a warrant before effectuating entry into a residence.

There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee. State v. Weber, 2016 WI 96, ¶18, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

The fact that circumstances falling within one of the four categories exist in a particular case does not, however, automatically eliminate the requirement that law enforcement obtain a warrant. This court recently (and specifically) noted that cases in which law enforcement has probable cause and acts in hot pursuit for a jailable offense do not always justify a warrantless entry into the home. State v. Weber, 2016 WI 96, ¶34, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). Even when law enforcement acts in hot pursuit based on probable cause for a jailable offense, its conduct must still pass the test of reasonableness based on a *totality* of the circumstances. State v. Weber, 2016 WI 96, ¶34, 372 Wis. 2d 202, 887 N.W.2d 554 (2016)(Emphasis added).

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, 372 Wis. 2d 202, 887 N.W.2d 554 (2016); State v. Richter, 2000 WI 58, ¶32, 235 Wis. 2d 524, 612 N.W.2d 29 (2000). The stated principle underlying the hot pursuit exception to the requirement of a warrant is that a suspect should not be able to defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place. United States v. Santana, 427 U.S. 38, 43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

This court has expanded on that underlying principle in Sanders and Weber. Permitting law enforcement to bypass the warrant requirement when in hot pursuit of a fleeing suspect avoids creating an incentive for suspects to flee to the home to escape lawful arrest; the home should not be viewed as a sanctuary or safe zone. State v. Sanders, 2008 WI 85, ¶133, 311 Wis. 2d 257, 752 N.W.2d 713 (2008)(Justice Prosser concurring opinion). And most recently in Weber, the lead opinion of this court quoted familiar language:

> Law enforcement is not a child's game of prisoner[']s base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot. A police officer in continuous pursuit of a perpetrator of a crime committed in the officer's presence... must be allowed to follow the suspect into a private place, or the suspect's home if he chooses to flee there, and effect the arrest without a warrant. State v. Weber, 2016 WI 96, ¶30, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

This court further stated in Weber that law enforcement "should not be penalized for completing a lawful attempt to apprehend a suspect, who, by his own actions, has drawn the police into his home." State v. Weber, 2016 WI 96, ¶30, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

Based on these principles, the lead opinion of this court concluded in Weber that it was reasonable for officers to pursue a fleeing suspect by entering through an open garage door and apprehending the suspect at the threshold of his residence. State v. Weber, 2016 WI 96, ¶44, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

In some other cases, courts have found law enforcement conduct to be reasonable when, in hot pursuit of a fleeing suspect, law enforcement enters the suspect's home without a warrant.

In Warden v. Hayden, 387 U.S. 294 (1967), law enforcement pursued an armed robbery suspect to a residence, and without first obtaining a warrant, entered the residence in order to search for and apprehend the suspect. The U.S. Supreme Court concluded that the warrantless entry was not invalid, finding that "the exigencies of the situation" made the actions of law enforcement imperative. Warden v. Hayden, 387 U.S. 294, 298 (1967). Officers had been warned that the suspect had weapons, and the Court concluded that "speed was essential" and that the Fourth Amendment does not require police to delay an investigation when doing so would "gravely endanger their lives or the lives of others." Warden v. Hayden, 387 U.S. 294, 298-99 (1967). The Court further asserted that only a prompt response by law enforcement "could have insured that

Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." Warden v. Hayden, 387 U.S. 294, 299 (1967).

In United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976), law enforcement engaged in a drug investigation proceeded to a residence. There they observed the suspect standing in the doorway of the house holding a brown paper bag. As the officers identified themselves and approached, the suspect retreated into the vestibule of the residence. Police entered through the open door and apprehended the suspect.

The Court concluded that the suspect had been observed in a public place, and that the suspect could not retreat into the home in order to thwart an otherwise lawful arrest. United States v. Santana, 427 U.S. 38, 42, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). The Court went on to conclude that the exigencies of that case were even greater than those in Warden v. Hayden – the need to act quickly was greater due to concerns over possible destruction of evidence, and the intrusion much less. United States v. Santana, 427 U.S. 38, 43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

In West v. State, 74 Wis.2d 390, 246 N.W.2d 675 (1976), police entered a home without force or

resistance in pursuit of armed robbery suspects. The court concluded that the officer's actions were reasonable due to the exigencies of the situation – "the safety of other possible occupants of the house and the need to minimize the possibility of flight or armed resistance justified the undelayed entry in the case before us." West v. State, 74 Wis.2d 390, 400, 246 N.W.2d 675 (1976).

In State v. Richter, 2000 WI 58, 235 Wis. 2d 524, 612 N.W.2d 29 (2000), law enforcement responded to a report of a burglary in progress at a trailer park. When police arrived, the victim advised that she had observed the intruder fleeing her trailer and entering the defendant's trailer across the street. Police proceeded to the trailer and looked through the window (which showed signs of a forced entry), observing two individuals. Police then opened the door and entered the trailer, asking the defendant for permission to search for the burglary suspect. In the course of that search, police found marijuana and arrested the defendant.

The court concluded that the officer's entry was justified by exigent circumstances - the deputy's hot pursuit of the burglary suspect and his need to protect the safety of those inside the trailer. State v. Richter, 2000 WI 58, ¶2, 235 Wis. 2d 524, 612 N.W.2d 29 (2000). In considering whether exigent circumstances

justified the warrantless entry into the defendant's trailer, the court employed an objective test – "whether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." State v. Richter, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29 (2000).

The court compared the deputy's actions to those of law enforcement in Warden – based on an eyewitness account, the deputy had picked up the trail of a fleeing suspect. The court concluded that the deputy had reasonably believed that the intruder posed a threat to the occupants of the defendant's trailer; thus "the exigency at issue here is the threat to physical safety." State v. Richter, 2000 WI 58, ¶40-41, 235 Wis. 2d 524, 612 N.W.2d 29 (2000).

In State v. Ferguson, 2009 WI 50, 317 Wis. 2d 586, 767 N.W.2d 187 (2009), law enforcement responded to a report of an attempted break-in at a residence. Officers arrived at the apartment building and proceeded to the defendant's unit. The officers knocked and the defendant answered; during the interaction the defendant became belligerent and shoved her nephew (also a resident of the apartment) while directing

profanities at him. Officers then walked through the open door of the defendant's apartment without a warrant, and arrested her for disorderly conduct, and after she physically resisted, obstructing an officer.

The court concluded that exigent circumstances may justify a warrantless home entry even if the suspected offense is not a felony. State v. Ferguson, 2009 WI 50, ¶27, 317 Wis. 2d 586, 767 N.W.2d 187 (2009). Instead, the relevant question is whether the underlying offense is a jailable offense. State v. Ferguson, 2009 WI 50, ¶29, 317 Wis. 2d 586, 767 N.W.2d 187 (2009).

Most recently, in State v. Weber, 2016 WI 96, 372 Wis. 2d 202, 887 N.W.2d 554 (2016), law enforcement observed the defendant's vehicle operating with a brake lamp not functioning properly. The officer also observed the defendant's vehicle weave from its lane of traffic over the white fog line. When the officer activated his emergency lights in order to effectuate a traffic stop, the defendant did not immediately stop his vehicle. The defendant drove about 100 feet and pulled into his driveway and attached garage. The officer followed, parking his vehicle 15-20 feet behind the defendant. The officer exited his vehicle and began running toward the defendant, telling him to stop. The officer entered the garage through the open door, and

grabbed the defendant by the arm just as he was entering his house.

The lead opinion of this court ultimately concluded that the actions of law enforcement acting in hot pursuit and entering the defendant's garage without a warrant in order to apprehend him were reasonable. State v. Weber, 2016 WI 96, ¶39, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).The opinion noted that the officer's intrusion was "appropriately limited," as he "did not damage any property, open any doors or windows, or pull out any weapons." State v. Weber, 2016 WI 96, ¶38, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). The opinion further observed that the warrantless entry was a "last resort," as the officer had tried to stop the defendant and only entered the garage due to the defendant's own actions. State v. Weber, 2016 WI 96, ¶38, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). Finally, the opinion stated that "this is not the type of conduct that the Fourth Amendment brands "unreasonable"; the Fourth Amendment does not dictate that officers who fail to outpace suspects on their way to a residence are unable to act." State v. Weber, 2016 WI 96, ¶39, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

Overall, we can say that the cases in which officers acting in hot pursuit have been found to be acting reasonably involved non-forceful entries. They

tend to be characterized by officers either walking through an already open door, or opening a door without any resistance. With Weber as an exception, they tend to involve law enforcement pursuing an underlying crime distinct from the act of the flight that prompted the pursuit. Similarly, the reasonableness of the officers' hot pursuit was highlighted by an additional concern, such as protecting the public or preventing the destruction of evidence.

Mr. Delap would additionally submit that the policy arguments in favor of hot pursuit as a stand-alone exigent circumstance/exception to the warrant requirement are not compelling.

Requiring law enforcement to obtain a warrant prior to entering a residence for the purposes of arresting or searching for a suspect does not allow the suspect to "defeat" apprehension or conviction. It does not penalize law enforcement attempting to effectuate a lawful arrest that was initiated in public, or reward the fleetest of foot. Any delay that is created by seeking the authorization of a judge prior to entering a private residence does not thwart the efforts of law enforcement to complete a lawful arrest. As a consequence of the flight the suspect would face the additional charge of obstructing an officer; arguably most suspects would not

find the likelihood of more jail time as an incentive to flee.

Allowing law enforcement to enter a residence without a warrant that authorizes the entry based solely on the fact that they are hotly pursuing a suspect does not appear to advance a compelling policy interest.

Since the test of reasonableness asks whether public policy favors the conduct of law enforcement, it is reasonable to conclude that public policy would tend to bar law enforcement at the line drawn at the door when they are acting solely on the basis of hot pursuit of a fleeing suspect.

3. Application of the law to the facts of the present case leads to the conclusion that based on the totality of the circumstances, the officers acted unreasonably in forcibly entering Mr. Delap's residence without first obtaining a warrant authorizing entry into 110 Milwaukee St.

The constitutional legal principles and public policy considerations applicable to exigent circumstances, and specifically hot pursuit, support the conclusion that warrantless entry into a residence is reasonable when there is an urgency that requires police to act without a warrant, or when the delay in obtaining a warrant would endanger the public, risk the destruction of evidence, or greatly enhance the

likelihood that the suspect will escape. Absent those considerations, the Fourth Amendment requires (and public policy agrees) that police officers obtain a warrant prior to entering a residence in order to search for or apprehend a suspect.

Applying those principles to the facts of this case leads to the conclusion that police acted unreasonably when they pursued Mr. Delap into the residence located at 110 Milwaukee St. without first obtaining a warrant to authorize the entry. At no point did the officers express or explain the urgency that required them to enter that address without first obtaining a warrant that authorized the entry. At no point did the officers claim that a delay in obtaining such a warrant would have endangered the public, risked the destruction of evidence, or allowed Mr. Delap to escape.

In addition, the other relevant factors weigh against a conclusion of reasonableness. First, the underlying offense, the flight itself, was non-violent and minor – Mr. Delap ran away from the officers when they told him to stop. Second, the warrantless intrusion was not limited – entry was forced, weapons were drawn, the line of the residence was aggressively crossed. There was no urgency or emergency that made the warrantless entry necessary.

The argument that the entry was reasonable because it was effectuated in hot pursuit of a fleeing Mr. Delap, in contrast, is unconvincing. The officers knew where the suspect had fled, and there was no escape. There were no concerns about public safety or the destruction of evidence. Accordingly, the fact that the officers were acting in hot pursuit in this case is insufficient to overcome the presumption that the warrantless entry into 110 Milwaukee St. was unreasonable.

a. Hot pursuit standing alone does not justify the actions of law enforcement in this case as reasonable.

The primary argument supporting the concept of hot pursuit as an exception to the warrant requirement is that arrest and conviction should not be defeated by a defendant who can outrun the police, and reach "homebase" before police can catch him.

Mr. Delap would respectfully submit that this argument fails to justify the actions of law enforcement in this case as reasonable. There is no indication in the record that the officers in this case were concerned about Mr. Delap as a threat to public safety, that he might destroy evidence, or that he might escape altogether.

Had the officers taken the time to obtain a warrant that authorized them to enter the residence located at 110 Milwaukee St., Mr. Delap would not have defeated their plans to arrest him, or avoided the state's efforts to prosecute and convict him. The officers could have secured the location to prevent Mr. Delap's escape while a warrant was obtained.

When it comes to the question of reasonableness, there is nothing about the concept of hot pursuit standing alone that by its nature makes it necessary for police to bypass the warrant requirement. As a stand-alone exigent circumstance, it provides a non-compelling justification for the actions of the officers in this case.

b. The gravity of the underlying jailable offense for which Mr. Delap was being pursued was nonviolent and minor.

In State v. Ferguson, 2009 WI 50, ¶27-29, 317 Wis. 2d 586, 767 N.W.2d 187 (2009), the court determined that in Wisconsin, hot pursuit is not confined to felony offenses but can apply to any jailable offense. However, as the U.S. Supreme Court observed in another Wisconsin case, when the government's interest is to arrest for a minor offense, the presumption of unreasonableness that attaches to all warrantless home entries is "difficult to rebut." Welsh v. Wisconsin,

466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

In State v. Weber, 2016 WI 96, ¶37, 372 Wis. 2d 202, 887 N.W.2d 554 (2016), the lead opinion of this court concluded that a violation of Wis. Stats. § 946.41(1) - the offense for which Mr. Delap was being pursued - is a jailable offense, "and thus significantly grave."

An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). Although the potential period of confinement for an offense might indicate the level of the state's interest in arresting individuals who commit that offense, Welsh v. Wisconsin, 466 U.S. 740, 754, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984), Mr. Delap would submit that the gravity of the offense itself is more precisely measured by considering the conduct rather than by limiting the consideration to the general range of punishment.[4]

[4] The argument that the gravity of the offense is best measured by considering the underlying conduct is consistent with Wisconsin law; in sentencing decisions, the sentencing court looks to the underlying facts to determine the gravity of the offense of conviction, and what specific sentence within the range of potential punishment is appropriate. See State v. Gallion, 2004 WI 42, 678 N.W.2d 197, 270 Wis. 2d 535 (2004).

Focusing on whether and how much jail might be imposed for the violation of a particular statute does not, in itself, tell us much about the actual underlying conduct/crime. And those specific facts should be the focus of the inquiry into whether police are reasonable when chasing a fleeing suspect into a home.

Here, Mr. Delap's conduct was not the type of conduct that created an urgent need for the police to engage in a warrantless home entry in order to arrest him for that conduct. The jailable conduct for which he was being pursued consisted solely of his flight when police ordered him to stop.

The officers knew that one of the arrest warrants that prompted them to look for Mr. Delap was a probation/parole warrant; the officers were unware of the underlying specifics of the second warrant other than that it was a felony arrest warrant through Jefferson County. (DOC 1:2; Appendix B:2), (DOC 41:13)(Appendix D:13). Thus, the officers knew that one of the warrants was not for a jailable offense, and were unaware of the underlying details of the second warrant. The current record does not clarify the underlying details of that warrant, so the gravity of the underlying conduct which caused the warrant to be issued remains unknown.

When answering the public policy question of whether the police should be barred at the door, we need to know why it is necessary for them to cross that line. That requires a consideration of the nature of the underlying conduct that is being relied on to support hot pursuit, and not just a consideration of the potential period of confinement set by the legislature.

In a concurring opinion in McDonald v. United States, 335 U. S. 451, 459 (1948), Justice Jackson observed that the method of law enforcement should display a sense of proportion. When following up on an underlying offense that involves no violence or threats of it, "it is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded by suspicious police officers." McDonald v. United States, 335 U. S. 451, 459 (1948).

The officers pursuing Mr. Delap in this case knew that they were hotly pursuing a suspect of an offense that consisted of conduct involving no violence or threats. Accordingly, Mr. Delap would submit that the jailable conduct for which he was being pursued was so minor in nature that it does not provide the basis for a reasonable warrantless home entry by the officers in this case.

c. The entry into Mr. Delap's residence was not limited, but involved a forceful entry in which weapons were displayed and which crossed the threshold of the residence.

This court's lead opinion in State v. Weber, 2016 WI 96, ¶45, 372 Wis. 2d 202, 887 N.W.2d 554 (2016), concluded that the officer's hot pursuit into the defendant's garage was reasonable, noting that the warrantless entry was "limited." In determining that the intrusion was limited, the lead opinion observed that the officer stepped through an open garage door, and did not draw any weapons. State v. Weber, 2016 WI 96, ¶38, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

Those facts differ from the present case. The entry into 110 Milwaukee St. was not limited. Rather than step through an open door, the officers in the present case forced their way into the residence as Mr. Delap attempted to close the door. (DOC 1:3)(Appendix B:3). Sgt. Willmann drew his taser, and apparently pointed it at Mr. Delap to get him to comply. (DOC 1:3; Appendix B:3)("I was able to reach inside and order Steven away from the door with my taser"). After the officer entered the residence, a struggle ensued as they attempted to place Mr. Delap in handcuffs. (DOC 1:3; Appendix B:3).

These facts are a far cry from the limited entry described in Weber. Indeed, the facts of this case are notably different than in any of the hot pursuit cases in which Wisconsin courts have found the police conduct to be reasonable. In West, the police were granted entry to the home by a child. In Richter, police opened a door without resistance. In Ferguson, police walked through an already open apartment door. Neither of the two U.S. Supreme Court cases – Warren/Hayden and Santana - involved police forcing their way into a residence by overcoming physical resistance.

Most notably, none of those cases involved weapons that were drawn and used to obtain compliance by the suspect being pursued. In contrast to Weber, the intrusion in this case was not "peaceful." See State v. Weber, 2016 WI 96, ¶38, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

Finally, the officers in this case cannot be said to have effectuated a warrantless residential entry as a "last resort." See State v. Weber, 2016 WI 96, ¶38, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). To the contrary, the conduct of the officers in chasing Mr. Delap into 110 Milwaukee St. and forcing their way in to arrest him for running away appears to be more impulsive than planned.

As a logical matter, when officers do not attempt to *first* obtain a warrant, the warrantless entry cannot be said to be their *last* resort.

As a practical matter, there is no compelling reason why the officers proceeded in the manner in which they did other than the impulse to pursue Mr. Delap when he turned and started running away.

The entry by police into 110 Milwaukee St. in pursuit of Mr. Delap was not limited. In addition to the lack of necessity, force was used and weapons were drawn. The officers did not merely enter a garage or encroach on the curtilage of the premises, the officers forced their way across the "firm line at the entrance to the house" that is drawn by the Fourth Amendment. Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

Mr. Delap would submit that the forceful entry with weapons was not limited, and accordingly, does not add an element of reasonableness to the conduct of the officers in this case.

d. The entry into 110 Milwaukee St. without a warrant to authorize the entry was not necessary; there was no urgency that made any delay in obtaining a warrant unreasonable.

As the court observed in Richter, in order to

determine whether exigent circumstances exist, the court should apply an objective test. State v. Richter, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29 (2000). The straightforward focus of the inquiry asks whether at the time of the entry, officers reasonably believed that the corresponding delay would "gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." State v. Richter, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29 (2000).

Mr. Delap would note that this inquiry is not a "hot pursuit plus" approach. See State v. Weber, 2016 WI 96, ¶41, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). It is not contrary to the argument that hot pursuit can function as a stand-alone exigent circumstance. See State v. Sanders, 2008 WI 85, ¶ 153, 311 Wis.2d 257, 752 N.W.2d 713 (Justice Butler concurring opinion).

As discussed, *infra*, hot pursuit without something more is a recognized exigent circumstance, but it typically provides a less than compelling basis for a warrantless entry into a residence because it offers no reason why the intrusion is *necessary*.

Necessity is an aspect of reasonableness. Warrantless home entries are reasonable only when there is a compelling need and urgency. Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486

(1978); State v. Smith, 131 Wis.2d 220, 228, 388 N.W.2d 601 (1986). The warrant requirement minimizes the danger of *needless* intrusions into the home. Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)(Emphasis added).

Standing alone as a recognized exigent circumstance, hot pursuit addresses no urgency. When police enter a home without a warrant, they must have a need and urgency that requires such action. That urgency and necessity can be measured by answering the question posed in Richter – were the officers reasonably concerned that Mr. Delap was a grave danger to the public, that Mr. Delap was going to destroy evidence, or that Mr. Delap would escape?

There is nothing in the record of this case to suggest that Sgt. Willmann or Deputy Waas had those concerns about Mr. Delap. There is no basis in the record for any objective conclusion that those concerns were relevant in this case.

In Weber, the lead opinion noted that in Richter, the court ultimately held that the warrantless entry was justified by the exigent circumstance of hot pursuit. State v. Weber, 2016 WI 96, ¶42, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). The opinion further stated that concerns in Richter about safety of the occupants of the residence were independent justifications. State v.

Weber, 2016 WI 96, ¶42, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

Mr. Delap would submit that if those considerations are not necessary to make a warrantless home entry reasonable when the justification is hot pursuit, the resulting rule approaches the functional equivalent of the per se rule the lead opinion expressly rejected. State v. Weber, 2016 WI 96, ¶34, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

By logical implication, the court's rejection of a per se rule of hot pursuit reasonableness recognizes that certain factors or considerations will sometimes render the hot pursuit conduct of law enforcement unreasonable. The lead opinion further noted that reasonableness is based on the totality of the circumstances. State v. Weber, 2016 WI 96, ¶34, 372 Wis. 2d 202, 887 N.W.2d 554 (2016).

Mr. Delap would respectfully submit that in addition to considerations such as the gravity of the offense or whether the warrantless intrusion is limited, the totality of circumstances test should also encompass whether the suspect is dangerous to the public, whether the suspect might destroy evidence, and whether the suspect might escape. Those considerations best measure the urgency of the situation and whether there is time to get a warrant. As the court held prior to its

decisions in Richter and Weber, a warrantless entry is permissible only when there an urgent need to do so and insufficient time to secure a warrant. See State v. Smith, 131 Wis.2d 220, 228, 388 N.W.2d 601 (1986).

Indeed, it is difficult to imagine an analysis based on the totality of circumstances that says some circumstances are not really relevant or necessary to the analysis. The seriousness of the offense and the level of intrusion are important considerations, but they do not measure urgency or whether there is time to get a warrant – the basic key criteria for determining reasonableness.

Mr. Delap would submit that nothing in the record in this case supports a finding that the officers acted out of necessity or urgency because there was insufficient time to obtain a warrant. Without such urgency, the officers' warrantless entry in pursuit of Mr. Delap is inconsistent with his right to be free from unreasonable searches and seizures.

e. Warrantless home entries infringe on the rights of homeowners and endanger the officers themselves, and are inconsistent with the basic principle that law enforcement officers should not act as their own magistrates.

"The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law." McDonald v. United States, 335 U. S. 451, 455 (1948).

The Fourth Amendment required the officers in this case to obtain a warrant prior to entering 110 Milwaukee St. in pursuit of Mr. Delap. Although the officers did have warrants for the arrest of Mr. Delap, the arrest warrants did not provide the officers with *carte blanche*. [5]

Public policy does not favor police officers acting as their own magistrates, even when they are in hot pursuit of a fleeing suspect. Whether or not a

[5] Nor did the arrest warrants provide legal authority for the officers to enter 110 Milwaukee St. for the purpose of arresting Mr. Delap on the warrants. The officers in this case did not have probable cause to believe that Mr. Delap was living at that address; Sgt. Willmann testified that he simply "believed" that information had been obtained to that effect; some of the information was at least a month old. (DOC 41:13; Appendix D:13). The officers could not use the arrest warrants as legal authority to enter 110 Milwaukee St. based on the simple belief that Mr. Delap might be living there; such a "belief" must be "subjected to the neutral and detached scrutiny of a judicial officer." See State v. Kiper, 193 Wis. 2d 69, 89, 532 N.W.2d 698 (1995).

residential entry should be effectuated is a decision best left up to objective impartial judges who know the law, and can rationally and calmly assess whether such an action should be undertaken based on the totality of the circumstances.

Given the inherent unpredictability of the situation, coupled with the inherent unknowns involved when police act without adequate preparation, one can easily imagine spontaneous home entries going awry and adversely affecting innocent citizens.

In the present case, the officers themselves testified at the motion hearing that they weren't quite sure where 110 Milwaukee St. was, or whether the person they were chasing was actually Mr. Delap. When they set out to find Mr. Delap in the darkness of a late-summer night, they knew virtually nothing about the location where they thought he might be living. They did not know what he looked like so that they could recognize him on sight.

As in this case, hot pursuit of a suspect is a spontaneous, impulsive act that by its nature tends to rule out planning ahead. Chasing individuals who attempt to avoid police officers is bound to lead to situations that adversely affect innocent citizens. Based on the minimal information they had, the officers in this

case could have easily pursued the wrong person into the wrong location.

Requiring a warrant in all but the most urgent of situations benefits everyone. It functions to protect police officers who, acting on impulse in a heated chase, might be putting themselves in a dangerous situation without adequate planning or preparation. Expanding the scope of permissible hot pursuit conduct only makes it more likely that such chases will occur, and that unwanted outcomes will follow.

Requiring a warrant also protects the innocent homeowner from having their residence invaded by police. The other individuals living at 110 Milwaukee St. also have privacy interests and rights against trespass by law enforcement. And that can be said for all citizens – not just the ones living at 110 Milwaukee St. One can easily imagine a homeowner unaware that police are about to burst into the home in pursuit of a fleeing suspect. Absent an emergency, the rights and interests of the homeowner should not yield to the police chase unless a judge or magistrate determines it is appropriate. [6]

[6] These concerns animate a recent decision from the Florida Supreme Court in a case involving hot pursuit. In State v. Markus, No. SC15-801, p.31 (Fla. Jan. 31, 2017), the court observed that, "the potential danger that accompanies an officer's entry into the private dwelling of an individual is not to be taken lightly." The court further observed that consideration of those concerns is "critical to promote homeowner and

"When it comes to the Fourth Amendment, the home is first among equals." Florida v. Jardines, 133 S. Ct. 1409, 1414, 569 U.S. 1, 185 L. Ed. 2d 495 (2013). At the very core of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Florida v. Jardines, 133 S. Ct. 1409, 1414, 569 U.S. 1, 185 L. Ed. 2d 495 (2013).

The warrant requirement functions to protect that basic right from arbitrary or impulsive infringement by police officers, reserving that judgment for judges and magistrates. It not only safeguards the rights of the suspect being pursued, but also the rights of citizens and homeowners who have not consented to government trespass. See United States v. Jones, 132 S. Ct. 945, 949, 565 U.S. 400, 181 L. Ed. 2d 911 (2012):

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. Entick v. Carrington, 95 Eng. Rep. 807, 817 (C.P. 1765).

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public safety, as well as officer safety" State v. Markus, No. SC15-801, p.31 (Fla. Jan. 31, 2017). The court noted the interest in promoting safety over the "impulsive and needlessly risky behavior" of the officers, and rejected as reasonable the conduct of the officers in entering the defendant's residence in pursuit of him for a non-violent misdemeanor offense (possession of a marijuana cigarette). State v. Markus, No. SC15-801, p.33,36 (Fla. Jan. 31, 2017).

It is doubtful that a warrantless home entry can be justified by law as reasonable when the only basis for it is that police officers are hotly pursuing a fleeing suspect for a minor offense. The societal interests advanced by recognizing such an exception to the warrant requirement pale in comparison to the sacred, common law values of privacy and property that all citizens enjoy and are embodied in the Fourth Amendment.

In addition to legal principles, public policy would favor that Sgt. Willmann and Dep. Waas should have been barred at the door of 110 Milwaukee St. when chasing Mr. Delap. Requiring officers to obtain a warrant to enter a residence in all but the most urgent circumstances protects the officers from dangerous situations and protects innocent homeowners from unwanted government trespass. It is consistent with the idea that judge and magistrates, not law enforcement officers, should decide when circumstances justify entering a private residence.

II. 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.

CONCLUSION TO BRIEF AND ARGUMENT

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

Dated this 16th day of August, 2017.

Respectfully submitted,

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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 9739 words.

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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.

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