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.

REPLY BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT-PETITIONER

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

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS CITED

ARGUMENT

I. Mr. Delap respectfully disagrees that the officers were justified in a warrantless entry of 110 Milwaukee St. for the purpose of arresting Mr. Delap for the outstanding arrest warrants.

In its brief, the state submits that the officers in this case were authorized to enter 110 Milwaukee St. without a warrant authorizing the entry in order to arrest Mr. Delap on the two outstanding arrest warrants. (State's Brief, p.13-14). Mr. Delap disagrees.

The state argues that such an entry is supported by Payton v. New York, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980):

> Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. (Emphasis added).

As an initial matter, Mr. Delap would submit that the rule from Payton does not apply to the present case. The principle set forth in Payton is based on the prerequisite that a magistrate has found sufficient probable cause to conclude that the subject of the warrant has participated in a crime, and has accordingly issued a warrant for the

subject's arrest. See Payton v. New York, 445 U.S. 573, 602, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

In the present case, the officers were aware of two arrest warrants for Mr. Delap – one was a probation and parole warrant, the other was a warrant through Jefferson County. (DOC 41:9,13; Appendix A:9.13). Contrary to the standard set forth in Payton, the officers in the present case had no basis to believe that a magistrate had found probable cause that Mr. Delap had committed a crime, and had accordingly issued arrest warrants.

The basis for the Court's conclusion in Payton was that if a magistrate has found probable cause that a suspect has participated in the commission of a felony, and has issued a warrant for his arrest, it is constitutionally reasonable to require him to open his doors to the officers of the law. Payton v. New York, 445 U.S. 573, 602- 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The current record does not indicate that the requisite findings were made by a magistrate.

A. The officers in this case were not authorized to enter 110 Milwaukee St. without a warrant for the purpose of arresting Mr. Delap pursuant to outstanding arrest warrants because the officers did not have probable cause to believe that Mr. Delap resided there.

The state further argues (State's Brief p.14) that officers may enter a residence with only an arrest warrant if:

> (1) the facts and circumstances present the police with a reasonable belief that the subject of the arrest warrant resides in the home; and (2) the facts and circumstances present the police with a reasonable belief that the subject of the arrest warrant is present in the home at the time entry is effected. State v. Blanco, 2000 WI App 119, ¶16, 237 Wis. 2d 395, 614 N.W.2d 512 (Ct. App. 2000)(Emphasis added).

However, in State v. Kiper, 193 Wis. 2d 69, 83-84, 532 N.W.2d 698 (1995), the Wisconsin supreme court held that in order for police to enter a residence with only an arrest warrant, the police must have *probable cause* to believe that the subject of the arrest warrant resides at the premises. A subsequent court of appeals decision also applied the probable cause standard to the level of certainty police must have prior to entering a residence with only an arrest warrant. See State v. Robinson, 2009 WI App 97, ¶13, ¶18,320 Wis. 2d 689, 770 N.W.2d 721 (Ct. App. 2009).

The supreme court, unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court. In Re the Marriage of Cook v. Cook, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997).The supreme court is the only state court

with the power to overrule, modify or withdraw language from a previous supreme court case. In Re the Marriage of Cook v. Cook, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997).

Mr. Delap would accordingly submit that the applicable standard for determining whether police may enter a residence possessing only an arrest warrant requires probable cause to believe that the subject of the warrant resides at the premises.

In the present case, the information possessed by the officers did not rise to the level of probable cause that Mr. Delap was living at 110 Milwaukee St. Sgt. Willmann testified that approximately one month prior, he "overheard" Deputy Gallenbeck conduct a traffic stop, and the subject fled. (DOC 41:8; Appendix A:8). According to Sgt. Willmann's testimony, "through their investigation they determined that the individual was Steven Delap and that he was living at 110 Milwaukee St. in Neosho." (DOC 41:8; Appendix A:8).

Sgt. Willmann further testified that about a week before his contact with Mr. Delap, they had received teletype correspondence from the Walworth County Sheriff's Office indicating that Mr. Delap had been involved in a similar incident in which he fled from a traffic stop. (DOC 41:8-9; Appendix A:8-9). Sgt. Willmann testified that he "believed" that the teletype

had indicated that Mr. Delap was living at the 110 Milwaukee St. address. (DOC 41:13; Appendix A:13).

It appears that the information from Deputy Gallenbeck was approximately one month old by the time Sgt. Willmann acted on it. The state notes that the teletype, received only a week prior to the incident at 110 Milwaukee St., provided "fresh" information, (State's Brief, p.19), and that it "corroborated" what had been previously learned. (State's Brief, p.17). Mr. Delap disagrees.

The teletype on which the state relies is not part of the current record. It is unknown exactly what the teletype says. Indeed, there is no way to know whether the week old teletype merely relayed the month old information that Deputy Gallenbeck had previously determined. Sgt. Willmann could not say with certainty that the teletype contained information regarding Mr. Delap's potential whereabouts.

The state compares the present case to Blanco, noting that in Blanco there was only one tip indicating where the suspect lived, while in the present case there are two tips. (State's Brief, p.17). However, the officers in Blanco had more substantive information that the officers in the present case. The officers in Blanco had brought a photograph of the suspect with them, and showed the photograph to the apartment manager who

confirmed that the suspect might be staying in one of the apartments. One of the occupants of the apartment building told them they had seen the suspect enter one of the units prior to the arrival of the officers.

The information in Blanco was contemporaneous to the entry, and was provided by the apartment manager who was shown a photograph of the suspect. In the present case, the initial information was dated rather than contemporaneous. The source of the information is unclear, other than that it was evidently obtained in Deputy Gallenbeck's investigation. The only reference to the one week old teletype comes from Sgt. Willmann, who could only state that he believed it indicated Mr. Delap's residence. Although the teletype was received from the Walworth County Sheriff, the specific information it contained, as well as the source of that information, remains unknown.

Although the officers in this case may have had a belief that Mr. Delap was residing at 110 Milwaukee St., the information they had at the time was insufficient to establish the requisite probable cause that Mr. Delap was living there. Accordingly, the officers' warrantless entry into 110 Milwaukee St. is not authorized by the rule from Payton.

B. Even if Payton authorized the officers' warrantless entry into 110 Milwaukee St. for the purpose of arresting Mr. Delap on outstanding warrants, the forceful entry and display of weapons renders the seizure unreasonable under the Fourth Amendment.

The ultimate touchstone of the Fourth Amendment is reasonableness. State v. Weber, 2016 WI 96, ¶30, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). Thus, even if the officers were justified in a warrantless residential entry in order to effectuate an arrest warrant, the entry and resulting seizure must be reasonable.

In Blanco, the officers entered the residence without a warrant by using an apartment key provided by the building manager. In Kiper, the officer simply walked through an already open door after seeing the suspect within. In Robinson, the officer kicked the door open because he was concerned that the subject was escaping or destroying evidence.

In Payton, the officers used crowbars to force open the door of the residence. No physical force was used against the subject, and no weapons were drawn in order to subdue the subject they intended to arrest.

Mr. Delap would submit that the conduct of the officers in forcing their way into 110 Milwaukee St. in order to arrest him for outstanding warrants was unreasonable. The officers in this case had no basis to

conclude that the warrants were issued by magistrates who had found probable cause that Mr. Delap had committed a felony (or any criminal offense). Although the officers in Payton used force to gain entry, no resistance was offered, no weapons were drawn, and no suspect was physically subdued. All of those things occurred in the present case.

The public policy question at the heart of warrantless residential entries presents itself here. See State v. Weber, 2016 WI 96, ¶18, 372 Wis. 2d 202, 887 N.W.2d 554 (2016). Does public policy favor officers using force to overcome resistance in order to enter a subject's residence in order to arrest him on outstanding warrants that, as far as the officers know, were not issued by a magistrate based on a finding of probable cause that the subject had committed a felony or any other crime? Mr. Delap would answer the question in the negative.

II. Mr. Delap respectfully disagrees that the officers acted reasonably in hotly pursuing Mr. Delap into 110 Milwaukee St.

The state argues that the officers acted reasonably in hotly pursuing Mr. Delap into 110 Milwaukee St. because they only used force that was

necessary, and the offense for which he was being pursued was jailable. (State's Brief, p. 28). Mr. Delap disagrees.

When it comes to warrantless entries of a residence in the name of exigent circumstances, the presumption of unreasonableness is difficult to rebut when the underlying crime is relatively minor. Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). Hot pursuit is a category of exigent circumstances, and the nature of the underlying conduct is an important part of the calculation of reasonableness. Welsh v. Wisconsin, 466 U.S. 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

For the reasons previously set forth, Mr. Delap submits that the fact that the underlying offense is a jailable offense does not justify the conduct of the officers as reasonable when they are engaged in hot pursuit of a suspect. The reasonableness of the officers' actions is based in part on the nature of the underlying conduct, not just on whether the offense is jailable.

Mr. Delap also disagrees with the state's argument that the officers used force because it was necessary, and that the entry was appropriately limited. (State's Brief, p. 26, 28).

Mr. Delap disagrees with the notion that because he fled into 110 Milwaukee St., the pursuing officers

were "forced" into entering the residence in the manner in which they did. To the contrary, the officers made a choice, perhaps an impulsive one, to force their way into 110 Milwaukee St. They could have chosen an alternate course of action, such as surrounding the premises, seeking a warrant authorizing their entry, and attempting to resolve the situation in a peaceful non-confrontational manner.

To suggest that anytime a suspect flees he is "forcing" the pursuing officers to engage in a forcible entry of his residence and use weapons to subdue him is contrary to the Weber rejection of a bright line rule that authorizes such an entry in all cases of hot pursuit.

The state also argues that Mr. Delap's "violent tendencies" made it reasonable for Sgt. Willmann to use force to prevent Mr. Delap from closing the residential door. (State's Brief, p. 27). It is not evident why a suspect's alleged "violent tendencies" would make a confrontation impulsively initiated by law enforcement reasonable. The state suggests that Mr. Delap could have grabbed a weapon; however, there is nothing in the record that indicates the officers had any reason to think that Mr. Delap had ever used a weapon in the commission of a crime, or that weapons were present at the premises located at 110 Milwaukee St. Nothing in the record, including the testimony of Sgt. Willmann,

suggests that the reason the officers forced their way into the residence was due to their concern over a possible "ambush" if they delayed. (See State's Brief, p.27).

The conduct of the officers in this case was not a measured, calculated response to Mr. Delap's flight. The officers were not sure if the fleeing suspect was Mr. Delap, and they had gathered little information prior to arriving at 110 Milwaukee St. It appears that the reason the officers chased Mr. Delap was because he ran, and the reason they aggressively forced their way into the residence was that they were acting in the heat of the moment. At no point did the officers indicate that they were *concerned* about Mr. Delap's "violent tendencies" or possible access to a weapon inside the residence.

Accordingly, based on the totality of the circumstances present, the officers in this case acted unreasonably in hotly pursuing Mr. Delap into 110 Milwaukee St.

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 19th day of October, 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
Defendant-Appellant-Petitioner

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 2345 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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