STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 498 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JONALLE L. FERRARO,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
OCTOBER 19, 2017, IN THE CIRCUIT COURT
FOR ROCK COUNTY, BRANCH III,
THE HONORABLE MICHAEL A. HAAKENSON PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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Trial Court Answered: No.

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Trial Court Answered: No.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On November 19, 2015, at approximately 9:27 pm, Lieutenant Vierck (Lt. Vierck) of the Edgerton Police Department overheard a dispatch call to the Rock County Sheriff's Department regarding a hit-and-run incident near Highway 59 and Goede Road in the Newville area.[1] Based on his belief that the suspected vehicle might be coming toward Edgerton at the intersection of Highway 51 and Lake Drive Road, Lt. Vierck headed to that intersection, looking for a black BMW.[2]

He located a car that matched the description of the vehicle involved.[3] After radioing for more information on the vehicle, he turned his squad car around, activated his lights, and pursued the vehicle, which approached the intersection of Blaine Street and Bel Aire Avenue.[4] Ms. Ferraro also apparently signaled to turn east on Bel Aire Avenue while continuing straight.[5] After entering the intersection and only shortly after initiating his lights, Lt. Vierck activated his siren.[6] There is no indication in the record that Ms.

[1] R.59 at 28.
[2] R.59 at 28; R.60 at 3.
[3] R.59 at 29.
[4] R.59 at 28–29.
[5] R.59 at 29.
[6] R.59 at 29.

Ferraro increased her speed once Lt. Vierck turned on his lights and his siren.[7]

One-tenth of a mile later, Ms. Ferraro's vehicle pulled into a residential driveway on Blaine Street.[8] The vehicle then went into the residence's attached garage.[9] There is no indication in the record that Lt. Vierck radioed the stop as one for fleeing or eluding.[10] Lt. Vierck did not testify he believed Ms. Ferraro was fleeing or eluding him.[11] There is no indication in the record that Ms. Ferraro knew Lt. Vierck had pulled into her driveway behind her.[12] Lt. Vierck did not testify he called out after Ms. Ferraro.[13] Lt. Vierck followed on foot as the garage door was closing, making it inside the garage as it was closing.[14] Ms. Ferraro at this time was still in her vehicle.[15]

Once Lt. Vierck fully entered the garage, he ordered Ms. Ferraro to open the garage door and step out of her vehicle.[16] Ms. Ferraro complied with both orders.[17] Lt. Vierck told her she was a

[7] R.59 at 29–31.
[8] R.59 at 30.
[9] R.59 at 30. Though it had not been decisively stated, the circuit court inferred that the garage must have been attached to the residence. R.60 at 13.
[10] R.59 at 34.
[11] R.59 at 29–30.
[12] R.59 at 30.
[13] R.59 at 30.
[14] R.59 at 30.
[15] R.59 at 30–31.
[16] R.59 at 31.
[17] R.59 at 31.

suspect in a hit-and-run accident.[18] He grabbed Ms. Ferraro on the bicep and wrist of the same arm in an escort hold, despite her telling Lt. Vierck she had a bad shoulder that dislocates.[19] During this time, Mr. Ferraro, Ms. Ferraro's husband, entered the garage from the interior of the residence, saw and heard Lt. Vierck command his wife to comply with Lt. Vierck's orders, and asked what was going on.[20]

According to Lt. Vierck's testimony at the motion hearing, Lt. Vierck questioned Ms. Ferraro and received her statements about the alleged hit-and-run.[21] Ms. Ferraro stated that another vehicle had backed into her vehicle at a stop sign on an undisclosed street, and Ms. Ferraro said she did not understand what was going on.[22] Ms. Ferraro was distracted by her husband's presence and did not respond to Lt. Vierck's orders quickly enough to satisfy Lt. Vierck.[23] Lt. Vierck ordered Ms. Ferraro to exit the garage with him.[24] After feeling her "tense up," Lt. Vierck handcuffed Ms. Ferraro.[25] He also yelled at Ms. Ferraro to stop resisting.[26] Ms. Ferraro complied with his order to

[18] R.59 at 31.
[19] R.59 at 38; 46.
[20] R.59 at 31.
[21] R.59 at 31.
[22] R.59 at 31.
[23] R.59 at 38; R.59 at 46.
[24] R.59 at 38.
[25] R.59 at 39.
[26] R.59 at 39.

exit the garage.[27] There is no indication in the record that Ms. Ferraro actually resisted Lt. Vierck—in fact, she complied with every order.[28]

After eight to nine other officers arrived, Ms. Ferraro, handcuffed, continued to be detained for several minutes outside.[29] During this time, Ms. Ferraro's shoulder was dislocated by the handcuffs.[30] After more than ten minutes in handcuffs, when Ms. Ferraro complained of her shoulder, Lt. Vierck removed the handcuffs so Ms. Ferraro could pop her shoulder into place. [31] He then turned Ms. Ferraro over to Deputy Wenger.[32]

Outside the garage, Deputy Wenger interrogated Ms. Ferraro while filling out an accident form.[33] He asked questions in an attempt to gather information about the hit-and-run on Highway 59 and Goede Road.[34] Deputy Wenger then escorted Ms. Ferraro to a space to perform field sobriety testing.[35] After field sobriety testing and after Ms. Ferraro submitted a PBT sample of .065, Deputy Wenger arrested Ms. Ferraro for operating while under the influence of an intoxicant.[36]

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[27] R.59 at 38.
[28] R.59 at 46.
[29] R.59 at 39; 45.
[30] R.59 at 39; R.59 at 42–43.
[31] R.59 at 39; R.59 at 42–43.
[32] R.59 at 13.
[33] R.59 at 19.
[34] R.59 at 13; R.59 at 19.
[35] R.59 at 18 R.59 at 20.
[36] R.59 at 14; R.59 at 43.

After arrest, Deputy Wenger took Ms. Ferraro to the Rock County Jail, where jail staff drew Ms. Ferraro's blood.[37] Eventually, Ms. Ferraro's blood test results came back at a .13 BAC.[38]

On December 17, 2015, the State charged Ms. Ferraro with hit-and-run, operating a motor vehicle while under the influence of an intoxicant, and operating a motor vehicle with a prohibited alcohol concentration.[39]

On February 12, 2016, Ms. Ferraro filed several suppression motions.[40] On May 21, 2017, the circuit court heard testimony and argument on Ms. Ferraro's filed motions.[41] Following the hearing, Ms. Ferraro briefed these motions.[42] In her motion and briefs challenging her detention and arrest, Ms. Ferraro argued that the warrantless police entry into her garage was not supported by probable cause and an exception to the warrant requirement.[43] Because the police entered Ms. Ferraro's garage without probable cause and an exception to the warrant requirement, any evidence

[37] R.59 at 15; 47–48.
[38] R.59 at 15.
[39] R.3.
[40] R.28. Ms. Ferraro does not address several of these motions in this appeal, though they were raised with the circuit court.
[41] R.59.
[42] R.33; R.35.
[43] R.18 at 1; R.33 at 2.

seized after the police's warrantless entry should have been suppressed.[44]

In circuit court, Ms. Ferraro argued no exigency existed that would overcome the presumption of unreasonableness of Lt. Vierck's warrantless entry into Ms. Ferraro's garage.[45] Ms. Ferraro further argued factors such as the relatively minor offense involved and the lack of conclusive evidence tying Ms. Ferraro to the hit-and-run weighed against the reasonableness of the entry.[46]

Moreover, Ms. Ferraro argued ***State v. Weber*** would not control the circuit court's analysis.[47] Because the ***Weber*** decision did not have a majority opinion, the lead opinion's holding that it was reasonable under the hot pursuit theory to follow a person into his or her garage without a warrant is not precedential.[48]

Ms. Ferraro further argued that regardless of whether the ***Weber*** decision presented binding authority, the hot pursuit doctrine would not support the warrantless entry of the police into her garage.[49] She pointed out that because of the lack of probable cause to tie Ms. Ferraro to the hit-and-run, as well as the fact Lt. Vierck did not

[44] R.18 at 2; R.33 at 2.
[45] R.33 at 3–4.
[46] R.33 at 3.
[47] ***State v. Weber***, 2016 WI 96, 372 Wis. 2d 202, 886 N.W.2d 554; R.33 at 4.
[48] R.33 at 4; *see also* ***Weber***, 2016 WI 96, ¶ 45.
[49] R.33 at 3.

observe the accident, hot pursuit would not justify Lt. Vierck's warrantless entry into Ms. Ferraro's garage.[50]

To compound the unreasonableness of Lt. Vierck's actions, Ms. Ferraro argued Lt. Vierck had unreasonably seized Ms. Ferraro when he put her in handcuffs and dislocated her shoulder.[51] This seizure was, in legal effect, an arrest.[52] Because Lt. Vierck demonstrated an unreasonable use of force, the defense argued Ms. Ferraro's arrest was unlawful.[53]

In two related motions, Ms. Ferraro argued that because Lt. Vierck did not mirandize Ms. Ferraro while she was in handcuffs, any statements she made must be suppressed.[54] She also asked the circuit court to determine the admissibility of the statements she made after being handcuffed.[55]

Ms. Ferraro additionally filed three motions to suppress the blood test result in her case.[56] These additional motions are not part of this appeal.

[50] R.33 at 2–3.
[51] R.33 at 2–3.
[52] R.18 at 2.
[53] R.18 at 3.
[54] R.22 at 1.
[55] R.23 at 1.
[56] R.19; R.20; R.21.

On July 27, 2017, the State filed its response.[57] In it, the State first argued Lt. Vierck lawfully entered Ms. Ferraro's garage, based on the hot pursuit doctrine.[58] The State relied upon ***Weber*** to argue that warrantless entry into a person's garage based on hot pursuit was lawful under the Fourth Amendment.[59]

Next, the State argued that when Lt. Vierck grabbed Ms. Ferraro's arm, Ms. Ferraro was not in custody and, therefore, was not under arrest.[60] The State argued that because Ms. Ferraro was not seized, Lt. Vierck did not need to mirandize Ms. Ferraro.[61]

On August 16, 2017, Ms. Ferraro responded to the State's brief.[62] She incorporated the arguments she made in her initial brief.

On November 19, 2017, the circuit court denied Ms. Ferraro's suppression motions.[63] When addressing the unlawful entry and arrest motion, the court stated:

> Well, [Lt. Vierck] is listening to this Rock County communications system[.] He hears a report of a hit and run crash. He knows that a black BMW SUV was involved in the crash, and he starts traveling . . . on a route that is used by many people coming from that area. He sees a black BMW SUV. Thereafter, he calls for more information. He's told that a white female was driving and that it had a trailer hitch on the vehicle. He also was told there might be some

[57] R.34.
[58] R.34 at 1.
[59] R.34 at 1.
[60] R.34 at 6.
[61] R.34 at 6.
[62] R.35.
[63] R.37.

> minor damage. He was not told a license plate. . . He then observes a white female driving the vehicle and a trailer hitch on the vehicle . . . It's coming from the location of the accident . . . So at that point, I think he does have probable cause to arrest[.][64]

Continuing its analysis, when addressing whether exigent circumstances applied in the case, the court stated:

> I already believe that there was probable cause [to arrest for the hit-and-run]. Furthermore, a hit and run in this situation would be a jail able offense[.] Immediate and continuous pursuit, some would say that's easily proven . . . It's clear that once Officer Vierck made contact, he did have continuous contact . . . until he finally met with Ms. Ferraro in the garage. Also have to prove that the operator was attempting to evade lawful arrest, and that's clear as well in this case. Lieutenant Vierck turns on his lights. The vehicle continues. The vehicle stops at an intersection, signals to turn left, and yet continues straight. Lieutenant Vierck then turns on his siren, the vehicle still continues until it pulls into a driveway and pulls into a garage, which to me also . . . appears that Ms. Ferraro was attempting to evade lawful arrest. She ignores the lights, she ignores the sirens, she pulls into a driveway, and then she goes into a garage. And I think that conclusion is further supported by the fact that the garage door came down[.] . . . There is a second exigent circumstance, and that's fleeing[.] . . . Lieutenant Vierck activates his lights, defendant doesn't stop, he activates his siren, the defendant doesn't stop. Instead she pulls into a driveway and enters a garage. So I think there are two exigent circumstances.[65]

The court held that the exigent circumstances of hot pursuit or fleeing, coupled with probable cause that a crime had been committed,

[64] R.60 at 12–13.
[65] R.60 at 13–14.

justified Lt. Vierck's entry into Ms. Ferraro's garage and Ms. Ferraro's subsequent arrest.[66]

Though Ms. Ferraro argued Lt. Vierck unreasonably seized her when he dislocated her shoulder in handcuffing her, the circuit court did not include that fact in its recitation of factual findings.[67] Instead, later in its ruling, the court implied Lt. Vierck's actions were not unreasonable because he ultimately removed the handcuffs:

> The other important part of this is that once Deputy Wenger gets involved, Lieutenant Vierck then takes off those handcuffs. And I think that any belief that the defendant had that she was in custody because of the handcuffs goes away[.] Now it's just your usual initial contact with the police.[68]

In the end, the circuit court denied the motion on the seizure and arrest:

> I think the State has proven that there was probable cause to arrest Ms. Ferraro and that there are exigent circumstances, which make the seizure in the garage constitutional. So I'm going to deny that motion to suppress the evidence.[69]

When addressing the ***Miranda*** motion, the circuit court stated the following with regard to the use of handcuffs:

> Such measures generally are reasonable only when particular facts justify the measure for the state – for officer's safety or for similar concerns. Here there are concerns about the officer's safety. Lieutenant Vierck at the time that he places Ms. Ferraro in the handcuffs, he's in a garage . . . And

[66] R.60 at 14.
[67] R.60 at 17.
[68] R.60 at 17.
[69] R.60 at 14.

> the defendant had not been compliant . . . I think that noncompliance starts all the way back to the time that Lieutenant Vierck is following the defendant. She doesn't stop when he turns his lights on, she doesn't stop when he starts his siren, she doesn't follow . . . the directions immediately when he finally gets to her in the vehicle . . . Furthermore, she's yelling. And then we have the situation where her husband comes out and it's a chaotic scene . . . [S]he's not voluntarily leaving the garage. So we have a situation here where an officer is in a garage with a defendant who's upset and with a husband who wants to know what's going on . . . and I think that it is a safety measure, at least at that point, that Lieutenant Vierck handcuffs the defendant so that he can remove her as easily as possible out of that garage[.] . . . I will note that she was never told she was under arrest, and that the handcuffs were used to remove her from the garage, and she wasn't in the handcuffs for more than 17 minutes. . . [A]ny belief that [Ms. Ferraro] had that she was in custody because of the handcuffs goes away because she's no longer confined by those handcuffs.[70]

After concluding she was no longer in custody, the court continued its ***Miranda*** analysis by examining whether Ms. Ferraro was interrogated:

> I will note that the statements that Ms. Ferraro made in the garage in response to her husband's questions about what's going on were not in response to an interrogation by the police . . . When she responded, I don't know what's going on, someone had backed into me at a stop sign, that was a voluntary, non interrogational response. So that, I don't believe is covered by Miranda.[71]

[70] R.60 at 15–16.
[71] R.60 at 17–18.

While it considered *Deputy Wenger's* questioning outside the garage, the circuit court did not address *Lt. Vierck's* questioning of Ms. Ferraro while in the garage.[72]

The circuit court did not address Lt. Vierck's testimony that he removed Ms. Ferraro's handcuffs only after she asked them to be removed to adjust her dislocated shoulder:

> She complained that her shoulder dislocated, so at her request we removed the handcuffs and allowed her to adjust her shoulder.[73]
>
> . . .
>
> I unhandcuffed her and then allowed her to adjust her shoulder.[74]
>
> . . .
>
> She kind of squatted down and twisted her arm back. I don't remember exactly how she did it but . . . she manipulated her shoulder blade, and then she sighed in relief and stood up and said that it went back in.[75]

In addition, when determining whether Ms. Ferraro had been subject to custodial interrogation, the circuit court did not discuss in detail the number of officers and squad vehicles in Ms. Ferraro's driveway and garage, the prior handcuffing, that Ms. Ferraro warned Lt. Vierck her shoulder dislocates, that handcuffs were removed because of the injury to Ms. Ferraro, that Ms. Ferraro requested that the handcuffs

[72] R.59 at 31.
[73] R.59 at 32.
[74] R.59 at 39–40.
[75] R.59 at 44.

be removed, the length of time in handcuffs, or that Lt. Vierck forcibly moved her once she exited her vehicle by using an escort hold.[76]

Though Ms. Ferraro did not raise an argument on the voluntariness of her statements, the court analyzed the issue:

> I also have to determine whether the statements were made voluntarily . . . [W]hat we're really looking for is whether or not there's been police coercion. And to make that determination, we have to look at the defendant's characteristics versus police pressure[.] . . . [T]here is nothing indicating that Ms. Ferraro has any special disabilities or that she was not able to understand what's going on or that she was vulnerable. Furthermore, there's no testimony that any police pressure was used, any coercive coercion beyond the handcuffs[.] So I will find the statements were made voluntarily despite not being given the Miranda warnings[.][77]

Thus, all motions were denied.[78] On January 10, 2018, Ms. Ferraro pled no contest to operating while under the influence of an intoxicant, third offense and was sentenced.[79]

On January 26, 2018, Ms. Ferraro filed her Notice of Intent to Pursue Post-conviction Relief.[80] On March 12, 2018, Ms. Ferraro appealed the circuit court's denial of her motion to suppress based on the police's unlawful entry into her garage and her subsequent arrest,

[76] R.60 at 16–17; R.59 at 33–46.
[77] R.60 at 16–17.
[78] R.37.
[79] R.40; R.44.
[80] R.45.

her motion to suppress based on a ***Miranda*** violation, and her motion to exclude her statements to this Court.[81]

[81] R.53.

ARGUMENT

I. MS. FERRARO'S ARREST WAS UNLAWFUL BECAUSE THE POLICE UNLAWFULLY ENTERED HER GARAGE.

A. Standard of Review

An appellate court does not defer to a circuit court's rulings on questions of law.[82] A circuit court's findings of fact are upheld on appeal unless they are clearly erroneous.[83] Therefore, this Court reviews *de novo* the rulings of the circuit court, relying on the circuit court's factual findings.

B. Police unlawfully arrested Ms. Ferraro after entering her garage, and neither *State v. Weber* nor any other authority authorized the warrantless entry.

The Fourth Amendment provides for "[t]he right of people to be secure in their . . . houses . . . against *unreasonable* searches and seizures." When a police officer enters a person's home to search, he or she needs a warrant based upon probable cause or an exception to the warrant requirement. One possible exception is probable cause and exigent circumstances.[84] Exigent circumstances may be hot pursuit, a threat to the safety of a person, risk of evidence being destroyed, or the likelihood that the suspect will flee.[85]

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[82] ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).
[83] ***State v. Hintz***, 2007 WI App 113, ¶ 5, 300 Wis. 2d 583, 731 N.W.2d 646.
[84] ***State v. Ferguson***, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W. 2d 187.
[85] ***State v. Richter***, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29.

Hot pursuit requires "some sort of a chase."[86] Hot pursuit also requires "pursuing a suspect who is in the process of fleeing from a recently committed crime."[87] Where the police rely upon hot pursuit, the State must show that the police entry into the residence was supported by probable cause *and* justified by exigent circumstances.[88] There must also necessarily be immediate and continuous pursuit from the scene of the offense.[89] The State must also show why obtaining a warrant would have "gravely endanger[ed] safety, risk[ed] the destruction of evidence, or enhance[d] the likelihood that the suspect would escape."[90]

In circuit court, the State argued the doctrine of hot pursuit under ***State v. Weber*** justified Lt. Vierck's entry into Ms. Ferraro's garage.[91] In ***Weber***, the Wisconsin Supreme Court lead opinion, signed by Justices Ziegler, Roggensack, and Gableman, found that the exigency of hot pursuit allowed the police to enter the defendant's

[86] ***State v. Sanders***, 2008 WI 85, ¶ 109, 311 Wis. 2d 257, 752 N.W.2d 713 (Prosser, J. concurring) (quoting ***United States v. Santana***, 427 U.S. 38, 43 (1976)).
[87] ***State v. Naujoks***, 637 N.W.2d 101, 109 (Iowa 2001) (citing ***Warden v. Hayden***, 387 U.S. 294, 298–99 (1967)).
[88] ***State v. Robinson***, 2010 WI 80, ¶ 24, 327 Wis. 2d 302, 786 N.W.2d 463.
[89] ***Richter***, 2000 WI 58, ¶ 32.
[90] ***Id.*** ¶ 29.
[91] R.34 at 1; ***State v. Weber***, 2016 WI 96, ¶ 1, 372 Wis. 2d 202, 887 N.W.2d 554.

attached garage without a warrant where probable cause to arrest for a crime existed.[92]

Justice Kelly concurred with the lead opinion's result but wrote separately.[93] In his concurrence, he stated that there had been no probable cause to believe that the defendant had probably committed a crime.[94] In order to enter the garage, the police officer must have had probable cause and a warrant or an exception to the warrant requirement.[95] Because there had been no probable cause, the police officer's warrantless entry into the defendant's garage could not be justified under the exigency of hot pursuit, or any other exigency.[96] Ultimately, Justice Kelly agreed with the Court's mandate, however, upholding the defendant's arrest based on the defendant's apparent consent for the officer to enter his garage through his conduct.[97]

Justice A.W. Bradley dissented, in an opinion joined by Justice Abrahamson.[98] In Justice A.W. Bradley's dissent, she stated that she agreed with Justice Kelly that no probable cause existed that the defendant had committed a crime.[99] When addressing whether exigent

[92] ***Weber***, 2016 WI 96, ¶ 1.
[93] ***Id.*** ¶ 46 (Kelly, J., concurring).
[94] ***Id.*** (Kelly, J., concurring).
[95] ***Id.*** (Kelly, J., concurring).
[96] ***Id.*** (Kelly, J., concurring).
[97] ***Id.*** ¶ 73 (Kelly, J., concurring).
[98] ***Weber***, 2016 WI 96**,** ¶ 83 (Bradley, A.W., J., dissenting).
[99] ***Id.*** ¶ 110 (Bradley, A.W., J., dissenting).

circumstances existed, Justice A.W. Bradley stated the facts of the case, including the relatively minor offense and that the officer could have readily obtained a warrant, weighed heavily against the State's argument that exigent circumstances were present.[100] Justice A.W. Bradley would have held that there had been no justification for the officer's entry into the defendant's garage, and would have held that the entry and subsequent arrest of the defendant were unlawful.[101]

Justice R.G. Bradley separately dissented.[102] In her dissent, she stated at the time the officer entered the defendant's garage, neither probable cause nor any exigent circumstances existed in the case.[103] When addressing the exigency of hot pursuit specifically, Justice R.G. Bradley stated no jailable offense had occurred.[104] Given that no probable cause existed to believe a jailable offense had occurred, the officer's warrantless entry into the garage for such a minor offense was unreasonable.[105]

Only three justices signed the lead opinion in ***Weber***.[106] As a lead opinion and not a majority opinion, the opinion holds no

[100] ***Id.*** ¶ 117–22 (Bradley, A.W., J., dissenting).
[101] ***Id.*** ¶ 111(Bradley, A.W., J., dissenting).
[102] ***Id.*** ¶ 139 (Bradley, R.G., J., dissenting).
[103] ***Id.*** ¶ 140 (Bradley, R.G., J., dissenting).
[104] ***Id.*** ¶ 144 (Bradley, R.G., J., dissenting).
[105] ***Id.*** (Bradley, R.G., J., dissenting).
[106] ***Id.***

precedential value.[107] Nor does Justice Kelly's concurrence render the lead opinion one with controlling authority, since his concurrence stated that the defendant's *consent* allowed the police to enter the defendant's garage and eventually arrest him.[108] In other words, Justice Kelly did not believe the hot pursuit doctrine justified the officer's entry into the defendant's garage.[109]

There was thus no majority consensus on the legal reasoning upholding the defendant's arrest in ***Weber***. This means that ***Weber*** upholds that particular defendant's arrest, but not the hot pursuit of a person inside his or her garage without a warrant based on probable cause or an exception to the warrant requirement and probable cause. Moreover, in ***Weber***, a majority of the justices (Justices Kelly, A.W. Bradley, Abrahamson, and R.G. Bradley) agreed that the police officer lacked probable cause to believe the defendant had committed a jailable offense—and that exigent circumstances did not exist.[110]

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[107] ***Howes v. Deere & Co.***, 71 Wis. 2d 268, 274, 238 N.W.2d 76 (1976).
[108] ***Weber***, 2016 WI 96, ¶ 73 (Kelly, J., concurring).
[109] ***Id.*** ¶ 54 (Kelly, J., concurring).
[110] ***Weber***, 2016 WI 96, ¶ 86 (Bradley, A.W., J., dissenting) ("I agree with both Justice Daniel Kelly and Justice Rebecca Grassl Bradley that there was no probable cause to believe that Weber committed a jailable offense. Additionally, I agree that under no reasonable view of the facts of this case was there an emergency justifying an exception to the Fourth Amendment's warrant requirement."); *See* ***State v. Dowe***, 120 Wis. 2d 192, 194–95, 352 N.W.2d 660 (1984).

Should this Court decide that ***Weber*** provides binding authority, the result would conflict with ***Welsh v. Wisconsin***.[111] In ***Welsh***, the United States Supreme Court considered a warrantless entry into the defendant's home for an OWI offense.[112] The Court stated that though probable cause existed, the relatively minor offense made the presumption of unreasonableness of the entry difficult to rebut.[113] Though fleeing and hit-and-run are both jailable offenses here, they are relatively minor offenses. Under ***Welsh***'s reasoning, such a warrantless entry into a defendant's residence, even where probable cause exists, would be more difficult to justify as reasonable.[114]

Moreover, ***Weber,*** if it is read as not requiring a case-by-case analysis of exigency, would also violate United States Supreme Court precedent, most recently in ***Missouri v McNeely***, requiring a case-by-case analysis of exigency.[115] Under the lead opinion in ***Weber***, any jailable offense can create the exigency of hot pursuit—including the pursuit of a fleeing suspect.[116] Federal caselaw requires a reviewing court to carefully and individually determine whether exigent

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[111] ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984).
[112] ***Id.***
[113] ***Id.***
[114] ***Id.***
[115] ***Missouri v McNeely***, 569 U.S. 141, 152 (2013).
[116] ***Weber***, 2016 WI 96, ¶ 123 (Bradley, A.W., J., dissenting).

circumstances exist sufficient to justify the police's warrantless entry into a residence.[117] A *per se* exception to the warrant requirement permitting officers to barge into a person's home because the person did not notice an attempt to stop her is not the case-by-case analysis federal courts require.[118] The police actions in entering Ms. Ferraro's garage to seize her, when they could have easily secured a warrant instead, were unreasonable.

Even if this Court believes that the lead opinion in ***Weber*** provides binding authority, the State runs into problems justifying Lt. Vierck's decision to enter Ms. Ferraro's garage. In circuit court, the judge held the following regarding immediate and continuous pursuit:

> It's clear that once Officer Vierck made contact, he did have continuous contact . . . until he finally met with Ms. Ferraro in the garage.[119]

There are two points to make here. First, there had not been probable cause to arrest for the hit-and-run at the moment Lt. Vierck entered Ms. Ferraro's garage. He had neither spoken with Ms. Ferraro to determine her whereabouts that evening nor examined her vehicle. Because there had been no probable cause for the hit-and-run, the

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[117] *See* ***McNeely***, 569 U.S. at 152 (citing ***McDonald v. United States***, 335 U.S. 451, 456 (1948)).
[118] R.59 at 30.
[119] R.60 at 1.3.

State cannot justify Lt. Vierck's warrantless entry into Ms. Ferraro's garage based on the exigency of hot pursuit.

Second, under Wisconsin caselaw immediate and continuous contact *must* occur from the scene of the crime—not from the point the officer first tries to make contact.[120] Unlike the deputy in ***Weber***, who immediately and continuously pursued the defendant from the scene, Lt. Vierck did not observe the hit-and-run at issue.[121] Though Lt. Vierck testified he traveled to the area he thought the suspected vehicle would pass, he did not observe Ms. Ferraro at the scene, and he encountered Ms. Ferraro's vehicle on different road than the one on which the hit-and-run had occurred.[122]

In addition, Lt. Vierck had not yet interrogated Ms. Ferraro to determine her whereabouts that evening. In addition, he did not know the license plate of the vehicle associated with the hit-and-run.[123] The circuit court's conclusion that probable cause existed to arrest for the hit-and-run before Lt. Vierck initiated the traffic stop was incorrect, and this Court is not bound by that conclusion.[124]

Relatedly, the State cannot rely upon the lead opinion in ***Weber*** to argue probable cause existed that Ms. Ferraro was fleeing Lt.

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[120] ***Richter***, 2000 WI 58, ¶ 32; ***Weber***, 2016 WI 96, ¶ 4.
[121] ***Weber***, 2016 WI 96, ¶ 4; R.59 at 28.
[122] R.59 at 28.
[123] R.59 at 16.
[124] R.60 at 12–13; ***Pitsch***, 124 Wis. 2d at 634.

Vierck, thereby justifying his entry into Ms. Ferraro's garage based upon exigent circumstances.[125] The relevant fleeing statute, Wis. Stat. § 346.04(2t) states:

> No operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer, federal law enforcement officer, or marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer, shall knowingly resist the officer by failing to stop his or her vehicle as promptly as safety reasonably permits.[126]

There is nothing in the record to indicate Ms. Ferraro knowingly resisted Lt. Vierck in failing to stop her vehicle. At the motion hearing, Lt. Vierck did not testify he suspected Ms. Ferraro of fleeing from him.[127] He did not testify that he radioed the stop as a stop for fleeing or eluding.[128] He did not testify that Ms. Ferraro increased her speed once he turned on his lights and eventually his siren.[129] Nor did he testify that Ms. Ferraro glanced behind her while she was driving, as she turned into her driveway, or as she entered her garage.[130]

Moreover, unlike the situation in ***Weber***, where the deputy called out to the defendant once in his driveway and the defendant ignored him, Lt. Vierck did not testify he called out to Ms. Ferraro or

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[125] ***State v. Kiper,*** 193 Wis. 2d 69, 89–90, 532 N.W.2d 698 (1995).
[126] Wis. Stat. § 346.04(2t).
[127] R.59 at 34.
[128] R.59 at 34.
[129] R.59 at 29–31.
[130] R.59 at 30.

that she demonstrated in any way that she knew his vehicle was behind her.[131] The circuit court's conclusion that Lt. Vierck was in hot pursuit of Ms. Ferraro for fleeing or that Ms. Ferraro attempted to flee the police was incorrect.[132] This Court is not bound by it.[133]

By all indications, Lt. Vierck was intent on performing a traffic stop.[134] Accordingly, should this Court believe ***Weber*** is binding authority, the facts here would not support Lt. Vierck pursuing Ms. Ferraro into her garage.

Lastly, the State cannot rely on consent to justify Lt. Vierck's entry into Ms. Ferraro's garage. In ***Weber***, there had been at least some indication that the defendant had consented to the officer's entry into his garage.[135] Ms. Ferraro did not consent to Lt. Vierck entering her garage—either through words, gestures, or conduct.[136] Unlike the defendant in ***Weber***, Ms. Ferraro closed the garage door.[137] Lt. Vierck had to command Ms. Ferraro to open the garage.[138] This was a clear indication that Ms. Ferraro did not want Lt. Vierck inside her garage.

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[131] R.59 at 30; ***Weber***, 2016 WI 96, ¶ 23.
[132] R.60 at 14.
[133] ***Pitsch***, 124 Wis. 2d at 634.
[134] ***Weber***, 2016 WI 96, ¶ 48 (Kelly, J., concurring).
[135] ***Weber***, 2016 WI 96, ¶ 79 (Kelly, J., concurring).
[136] ***Weber***, 2016 WI 96, ¶ 74 (Kelly, J., concurring) (citing ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998)).
[137] ***Weber***, 2016 WI 96, ¶ 75–79; R.59 at 30.
[138] R.59 at 31.

Thus, consent cannot justify Lt. Vierck's entry into Ms. Ferraro's garage.

No exception to the warrant requirement existed at the time Lt. Vierck entered Ms. Ferraro's garage because there was no probable cause to arrest for a jailable offense, and there was no hot pursuit. Under the totality of the circumstances, Lt. Vierck's entry into Ms. Ferraro's garage was unreasonable under the Fourth Amendment.

II. EVEN IF THE INITIAL ENTRY INTO THE GARAGE WAS JUSTIFIED, THE POLICE CONDUCT INSIDE THE GARAGE VIOLATED MS. FERRARO'S FOURTH AMENDMENT RIGHTS.

A. Standard of Review

An appellate court does not defer to the circuit court on questions of law.[139] On appeal, a circuit court's findings of fact are generally entitled to deference unless they are clearly erroneous.[140] This Court reviews *de novo* the rulings of the circuit court, based on the facts as they were found by that court.

[139] ***Pitsch***, 124 Wis. 2d at 634.
[140] ***State v. Hintz***, 2007 WI App 113, ¶ 5, 300 Wis. 2d 583, 731 N.W.2d 646.

B. Police used excessive force seizing Ms. Ferraro. Thus, the seizure was unreasonable and unlawful.

A detention of a person must be justified by reasonable suspicion—a police officer needs specific, articulable facts to detain a person.[141] When the police detain a person for investigation, the detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop."[142] It is the State's burden to prove that the seizure at issue was limited in scope and time.[143]

A seizure effectively becomes an arrest where a reasonable person in the defendant's position would consider himself or herself to be in police custody.[144] Factors such as the degree of restraint and the police officer's words and actions determine whether a person is in custody.[145]

Though the person's detention might be supported by reasonable suspicion, factors such as handcuffing, being put in the back of a squad vehicle, or excessive force can render the seizure unreasonable.[146] The reasonableness of the force used to effect a

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[141] ***Terry v. Ohio***, 392 U.S. 1, 21–22 (1978).
[142] ***Florida v. Royer***, 460 U.S. 491, 500 (1983).
[143] ***Id.***
[144] ***State v. Swanson***, 164 Wis. 2d 437, 446–47, 475 N.W.2d 148 (abrogated on other grounds by ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277)).
[145] ***Id.*** at 447.
[146] ***State v. Pickens***, 2010 WI App 5, ¶ 26, 323 Wis. 2d 226, 779 N.W.2d 1; ***Graham v. Connor***, 490 U.S. 386, 396 (1989).

seizure is examined through the lens of a reasonable officer on the scene.[147]

When determining whether the use of force in seizing a person was reasonable, a court balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing governmental interests at stake."[148] A reviewing court considers factors such as the severity of the offense at issue, whether the suspect poses an immediate threat to officers or others, and whether she is actively resisting arrest or attempting to evade arrest by flight.[149]

After holding Ms. Ferraro in an escort hold, Lt. Vierck handcuffed Ms. Ferraro, which dislocated her shoulder.[150] Her shoulder remained dislocated for over ten minutes before Lt. Vierck removed the handcuffs, allowing her to adjust her shoulder.[151] The handcuffing here was an excessive use of force under the facts of this case.

A review of the factors in Ms. Ferraro's case weighs against the reasonableness of Lt. Vierck's conduct inside the garage. The most troubling factor is Ms. Ferraro's dislocated shoulder—which the

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[147] ***Graham***, 490 U.S. at 396.
[148] ***Tennessee v. Garner***, 471 U.S. 1, 8 (1985) (internal citations omitted).
[149] ***Graham***, 490 U.S. at 396.
[150] R.59 at 38–39; R.59 at 43.
[151] R.18 at 2; R.59 at 38–39; R.59 at 43.

circuit court did not address in its oral ruling.[152] Before Lt. Vierck handcuffed her, Ms. Ferraro warned him her shoulder dislocated.[153] He handcuffed her, anyway.[154] It was only after Ms. Ferraro asked for the handcuffs to be removed that Lt. Vierck removed them.[155] In addition, there is no evidence in the record that Ms. Ferraro actually resisted Lt. Vierck or did not comply with his demands once he was inside Ms. Ferraro's garage. In fact, Lt. Vierck testified that Ms. Ferraro complied with all his requests, albeit slower than he preferred.[156]

Though the circuit court held Ms. Ferraro had not complied with Lt. Vierck, and that the noncompliance began with her not pulling over, there is no evidence in the record to indicate that Ms. Ferraro knew Lt. Vierck was attempting to initiate a stop.[157] Therefore, the State cannot rely upon any supposed noncompliance to justify Lt. Vierck's conduct inside the garage. Moreover, other factors, like that the accident Lt. Vierck was investigating was a relatively minor offense with no injuries, weigh against the reasonableness of Lt. Vierck's actions.

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[152] R.60 at 16–17.
[153] R.59 at 38.
[154] R.59 at 38.
[155] R.59 at 32.
[156] R.59 at 46.
[157] R.60 at 16.

Lastly, Ms. Ferraro did not pose an immediate threat to Lt. Vierck. Even if she had posed a physical threat, Lt. Vierck had already secured her wrist and shoulder in the escort hold.[158] It would have been impossible for Ms. Ferraro to attempt anything after being restrained in this way. Moreover, Rock County Sheriff's deputies and local police officers arrived at Ms. Ferraro's residence shortly after Lt. Vierck.[159] Though she was outnumbered nine or ten-to-one, Lt. Vierck continued to keep Ms. Ferraro handcuffed and in pain.[160]

There was no significant government interest that would have been affected by not handcuffing Ms. Ferraro. Had Lt. Vierck kept Ms. Ferraro in the escort hold, or simply ordered her to exit the garage, she would have complied, just as she complied with his other orders.[161] Through his actions, Lt. Vierck transformed a routine traffic stop into an unreasonable and unnecessary encounter.

Under the totality of the circumstances, Lt. Vierck unreasonably seized Ms. Ferraro. Considering the lack of probable cause to arrest for any offense at that juncture, Ms. Ferraro's seizure was further made unreasonable. As Ms. Ferraro argued in circuit

[158] R.59 at 38.
[159] R.59 at 39.
[160] R.59 at 39; 45.
[161] R.59 at 46.

court, the evidence that resulted from the seizure must be suppressed.[162]

III. MS. FERRARO'S STATEMENTS ELICITED PRIOR TO MIRANDA WARNINGS MUST BE SUPPRESSED.

A. Standard of Review

An appellate court independently determines whether the facts meet the legal standard of violating the constitutional principles of ***Miranda***.[163] An appellate court overturns a circuit court's factual findings where those findings are clearly erroneous.[164]

B. Police did not mirandize Ms. Ferraro before her custodial interrogation, thus, her statements must be suppressed.

A person is in custody for ***Miranda*** purposes, if, under the totality of the circumstances, he or she was unable to leave, or the degree of restraint was great.[165] A reviewing court also considers the purpose, place, and length of custodial interrogation, as well as the number of police officers involved.[166] "Custodial interrogation" refers to police-initiated questioning of a person after that person has been

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[162] R.18 at 2.
[163] ***State v. Armstrong***, 223 Wis. 2d 331, 352, 599 N.W.2d 606 (1999).
[164]***State v. Morgan,*** 2002 WI App 124, ¶ 11, 254 Wis. 2d 602, 648 N.W.2d 23.
[165] ***Id.*** ¶ 12.
[166] ***Id.***

taken into custody.[167] Once a person's "freedom of action is curtailed to a degree associated with formal arrest," the police must advise the person of his or her rights under ***Miranda v. Arizona***.[168]

The issue here is whether a reasonable person in Ms. Ferraro's position would believe that she was under arrest.[169] Before Ms. Ferraro had gotten a chance to enter her residence, Lt. Vierck had ordered her to remain in her car, to open her garage door so he could gain access, and to put her cellphone down.[170] She complied with these orders.[171] He then ordered her to exit her vehicle and put her hands behind her back.[172]

When she did not immediately comply, he gripped her bicep and wrist in a hold, and handcuffed her when he felt her tense.[173] This caused Ms. Ferraro's shoulder to dislocate.[174] While the handcuffs were on, Lt. Vierck yelled at Ms. Ferraro to stop resisting—though he testified she complied with every order.[175] In the garage, he questioned her regarding the hit-and-run.[176] As she was handcuffed

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[167] ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966).
[168] ***Swanson***, 164 Wis. 2d at 449; ***Id.***
[169] ***Morgan***, 2002 WI App 124, ¶ 16.
[170] R.59 at 36–37.
[171] R.59 at 36–37.
[172] R.59 at 37.
[173] R.59 at 38–39.
[174] R.59 at 38–39.
[175] R.59 at 39. R.59 at 31; R.59 at 38; R.59 at 46.
[176] R.59 at 31.

and escorted outside the garage, multiple deputies from the Rock County Sheriff's Department arrived.[177] Ms. Ferraro remained handcuffed for at least ten minutes.[178]

Ms. Ferraro complained that her dislocated shoulder caused her pain.[179] After more than ten minutes, Lt. Vierck removed the handcuffs at Ms. Ferraro's request.[180] The issue of whether Ms. Ferraro was handcuffed when Deputy Wenger questioned her is not dispositive for custodial purposes.[181] Deputy Wenger's questioning was not sufficiently attenuated from Lt. Vierck's unlawful questioning—in fact, it occurred minutes later.[182] Moreover, there is nothing in the record to show Ms. Ferraro was not still in pain once the handcuffs were removed.

In the driveway, Deputy Wenger asked Ms. Ferraro several questions. He asked Ms. Ferraro if she had been driving when the accident had occurred.[183] He also asked if she had been drinking.[184] Had Ms. Ferraro been properly mirandized earlier by Lt. Vierck, she

[177] R.59 at 39.
[178] R.59 at 42–43.
[179] R.59 at 39.
[180] R.59 at 39.
[181] ***Morgan***, 2002 WI App 124, ¶ 21 ("[W]e do not consider one particular factor in isolation; rather, we look at all relevant factors as they together bear on the suspect[.]"). R.34 at 5.
[182] R.59 at 42–43.
[183] R.59 at 39.
[184] R.59 at 19.

likely would have chosen not to give incriminating statements—once Ms. Ferraro was mirandized later at the jail, she refused to answer questions.[185]

At the time Ms. Ferraro responded to Lt. Vierck's and Deputy Wenger's respective questions, she had been followed into her garage, yelled at by Lt. Vierck, ordered to obey his commands, handcuffed, and had her shoulder dislocated.[186] Ms. Ferraro had also been subjected to an impressive show of force—there were eight to nine officers near her residence, many of whom left their lights flashing, with several officers in her garage at one point.[187]

Multiple factors, enumerated above, would lead a reasonable person in Ms. Ferraro's shoes to believe she was in custody.[188] The circuit court, examining these factors, felt compelled to review their voluntariness and whether the police had coerced Ms. Ferraro.[189] It certainly seems *un*reasonable for a person in those circumstances to believe she could walk away. Therefore, the statements Ms. Ferraro made to both Lt. Vierck and Deputy Wenger were inadmissible because she was in custody and she had not been mirandized at the time she gave them.

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[185] R.59 at 21–22.
[186] R.59 at 35–39; R.59 at 45–46.
[187] R.59 at 45–46.
[188] ***Swanson***, 164 Wis. 2d at 446–47.
[189] R.60 at 16–17.

CONCLUSION

For the reasons set forth above, Ms. Ferraro respectfully requests that this Court reverse the lower court's ruling denying her suppression motions. First, Lt. Vierck's warrantless entry into Ms. Ferraro's garage was not justified by any exception to the warrant requirement of the Fourth Amendment. Because Lt. Vierck's entry was unlawful, any subsequent evidence resulting from this entry must be suppressed. Second, Lt. Vierck unreasonably seized Ms. Ferraro when he used excessive force to handcuff her, dislocating her shoulder in the process. Third, at the time the police interrogated her, Ms. Ferraro was in custody and therefore entitled to ***Miranda*** warnings. Had she been mirandized, she would not have given incriminating statements to the police. Any statements Ms. Ferraro made violated her ***Miranda*** rights and are inadmissible against her in any proceeding. Had her motions been granted, Ms. Ferraro would not have pled guilty to the charges. Accordingly, Ms. Ferraro asks this Court to reverse the circuit court's rulings on her motions.

Dated at Madison, Wisconsin, July 19, 2018.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS