STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 18 AP 498 CR

JONALLE L. FERRARO,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

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

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE AND FACTS

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. The State will present additional facts, if necessary, in the argument portion of its brief.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED FERRARO'S MOTION TO SUPPRESS.

On January 10, 2018, the Defendant-appellant, Jonalle L. Ferraro, entered a no-contest plea to a charge of operating while intoxicated, third offense. Ferraro now appeals from the judgment of conviction, asserting that the circuit court erred in denying her pre-plea motions to suppress evidence. Ferraro argues that an officer entered into her garage and detained her without a warrant and that the officer's actions

were unreasonable, the circuit court erred in determining that the officer acted under exigent circumstances as an exception the warrant requirement. In addition, Ferraro argues that she was subjected to custodial interrogation therefore her statements to the officers should be suppressed, the circuit court erred in determining that her statements were given voluntarily in a non-custodial status.

Ferraro's argument, that the officer acted unlawfully and unreasonably, fails because it is based on a misreading of the law. The argument, that she was subjected to custodial interrogation without being informed of her rights, fails because it disregards pertinent facts and law. The circuit court soundly denied Ferraro's motion to suppress, and this court should affirm the judgment of conviction.

II. FERRARO'S ARREST WAS LAWFUL

A. Standard of Review

When reviewing the circuit court's denial of a motion to suppress evidence, this court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo.

State v. Stout, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474.

B. THE OFFICER ACTED REASONABLY AND WITH LAWFUL AUTHORITY WHEN HE ENTERED FERRARO'S GARAGE.

Lieutenant Vierck's entry into the Ferraro's garage was lawful under the hot pursuit doctrine. (R.34 at 1) When an officer has probable cause to believe that a suspect has committed a jailable offense and attempted to evade lawful arrest, entry into a garage is permissible under the hot pursuit exigency exception to the Fourth Amendment. *State v. Weber*, 2016 WI 96,¶ 45, 372 Wis. 2d 202, 233, 887 N.W.2d 554, 569-70. (R.34 at 1) The State acknowledges the Defense assertion that the *Weber* decision was reached by a fractured Court, but disagrees that this particular point of law is not merely persuasive, but is controlling. (R.34 at 1)

When a majority of justices agree on a particular point, it becomes the opinion of the court. *State v. Dowe*, 120 Wis.2d 192, 194, 352 N.W.2d 660, 662 (1984). (R.34 at 1) Thus a lead opinion's position on a point of law is controlling when that point is joined by a concurrence. (R.34 at 1) It is the State's position that Justice Kelly's concurrence did join

the majority's position on the law of the hot pursuit exigency exception, but disagreed on whether the facts of the case satisfied that exception. (R.34 at 1-2) Therefore, the lead opinion's statement that the exigent circumstances of hot pursuit of a fleeing suspect who had committed a jailable offense is a recognized exception to the Fourth Amendment's warrant requirement. *Weber*, 2016 WI 96 at ¶ 45. (R.34 at 2)

Justice Kelly wrote in his *Weber* concurrence that "if there really is probable cause to believe this offense [a violation of Wis. Stat. § 346.04(2t), a jailable offense] occurred, then it is also right that the hot pursuit doctrine allowed Deputy Dorshorst to enter the garage and conduct the search and arrest of Mr. Weber." *Id*. at ¶ 54. (R.34 at 2) Thus, the particular point that the concurrence joined and therefore made controlling law, is the legal conclusion that when an officer has probable cause to support an arrest for a violation of a jailable offense, the hot pursuit exigency exception applies. (R.34 at 2) Moreover, a fifth Justice, R.G. Bradley in dissent, acknowledged that hot pursuit for a jailable offense is an exigency that allows for warrantless entry into a garage. *Id*. at ¶ 139 (citing *State v. Ferguson*,

2009 WI 50, ¶¶ 19-20, 26-30, 317 Wis.2d 586, 767 N.W2d 187). (R.34 at 2)

In *Weber*, a deputy attempted to pullover a driver he suspected of committing a minor traffic violation, a defective brake lamp. *Id*. at ¶ 4. (R.34 at 2) He turned on his emergency lights, but did not activate his siren. *Id*. at ¶ 90 (A.W. Bradley, J., dissenting). (R.34 at 2) The driver continued for a mere 100 feet before turning off the road into his driveway and entering his garage. *Id*. at ¶ 4. (R.34 at 2) The deputy then exited his vehicle and entered the garage. (R.34 at 2)

As indicated above, the lead opinion found that the facts as outlined above constituted probable cause that a violation of Wis. Stat. § 346.04(2t) had occurred, a jailable offense under Wis. Stat. § 346.67(1), and found the entry lawful. *Id*. at ¶¶ 21-26. (R.34 at 2-3)

The facts of the case at bar differ from *Weber* in two respects: 1) the underlying offense of Wis. Stat. § 346.67(1), hit and run, was in itself a jailable offense which the officer had probable cause to believe Ferraro committed, and 2) there

were sufficient facts establishing probable cause that Ferraro violated Wis. Stat. § 346.04 (2t). (R.34 at 3)

First, Lieutenant Vierck had been told that a vehicle matching the make, model, and color of Ferraro's had recently been involved in a hit and run. Mot. Hr'g 5/21/17 at 28. (R.34 at 3) He was told that the vehicle had a trailer hitch and was driven by a white female. *Id.* (R.34 at 3) He was told it was traveling north from the accident scene in his direction. *Id*. (R.34 at 3) He then observed a vehicle matching all of the characteristic relayed to him and initiated a traffic stop. *Id*. at 29. (R.34 at 3) He did so by turning on his emergency lights. *Id.* (R.34 at 3) The exigency of an officer's pursuit of a suspect may be just as great when the officer is told of the crime and the whereabouts of the suspect just after it's commission as when he observes it himself. *State v. Richter*, 2000 WI 58, ¶ 33, 239 Wis.2d 524, 612 N.W.2d 29. To allow a warrantless entry when an officer personally observes a crime and pursues the suspect, but disallow it when the officer immediately responds to an eyewitness report and pursues the suspect would be arbitrary indeed. *Id*. When addressing whether Lieutenant Vierck had

established probable cause to arrest Ferraro for a jailable offense, the court stated:

> That is particularly specific information. Black BMW SUV, not a very common vehicle in this area. It's coming from the location of the accident. And the information that he receives is confirmed in terms of who's operating the vehicle and, furthermore, another distinction of the vehicle is that it has a trailer hitch. So at that point, I think he has probable cause to arrest Ms. Ferraro. (R.60 at 12-13)

The driver, later identified as Ferraro, did not pull over but continued driving, eventually stopping at an intersection. Mot. Hr'g 5/21/17 at 29. (R.34 at 3) At this intersection, Ferraro indicated with a left turn signal, but instead of turning proceeded straight through the intersection. *Id*. (R.34 at 3) This caused Lieutenant Vierck to turn on his siren in addition to his emergency lights, but Ferraro continued to flee for approximately 1/10 of a mile before eventually turning into a driveway and pulling into a garage. *Id*. at 29-30, 34-35. (R.34 at 3) Notably, this distance is approximately five (5) times greater than the one-hundred (100) feet traveled by the defendant in *Weber*, and does not include the distance traveled prior to the siren being activated. (R.34 at 4) A siren was never activated in *Weber* as it was in the case at bar. (R.34 at 4) Finally, as Lieutenant Vierck attempted to make

contact with the vehicle, and pulled into the driveway with lights and sirens still active, Ferraro attempted to avoid interacting with the officer by shutting the garage door on him. (R.34 at 3) These facts show that Lieutenant Vierck had the requisite probable cause to believe that Ferraro had committed a violation of Wis. Stat. § 346.04 (2t). (R.34 at 3) In oral ruling, the court concluded:

> Lieutenant Vierck turns on his lights. The vehicle continues. The vehicle stops at the 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, and I think that is present here as well…which make the seizure in the garage constitutional. (R.60 at 14)

C. FERRARO'S TEMPORARY DETAINMENT DID NOT TRIGGER MIRANDA WARNINGS

Ferraro was not subjected to a restraint on her freedom to a degree associated with formal arrest and therefore her *Miranda* rights were not implicated. (R.34 at 4) To determine whether a suspect is in custody under *Miranda*, courts must ask whether there is a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest.

Stansbury v. California, 511 U.S. 318, 322 (1994). (R.34 at 4) A person is in "custody" if, under the totality of the circumstances, a reasonable person would not feel free to terminate the interview and leave the scene. *State v. Lonkoski*, 2013 WI 30, 6, 346 Wis. 2d 523, 828 N.W.2d 552. (R.34 at 4-5)

Courts have identified several factors relevant to the totality of the circumstances analysis, such as the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. *Stansbury*, 511 U.S. at 322. (R.34 at 5) While restraint on freedom of movement is a factor in this analysis, not all restraints on freedom of movement amount to custody for purposes of *Miranda*. *Howes v. Fields*, 565 U.S. 499, 509 (2012). (R.34 at 5) Furthermore, "the use of handcuffs does not in all cases render a suspect in custody for *Miranda* purposes." *State v. Martin*, 2012 WI 96, H 34, 343 Wis.2d 278, 298, 816 N.W.2d 270, 280; *See also State v. Pickens*, 2010 WI App 5, 1J 32,323 Wis. 2d 226, 242, 779 N.W.2d 1, 8 ("The use of handcuffs or other restrictive measures does not necessarily

render a temporary detention unreasonable, nor does it necessarily convert that detention into an arrest."). (R.34 at 5)

Ferraro's temporary detention prior to her arrest did not rise to level associated with formal arrest. (R.34 at 5) Although she was handcuffed in her garage, this was not done incident to arrest but to restrain her after she became resistive. Mot. Hr'g at 39. (R.34 at 5) The Court concluded that Ferraro was handcuffed for officer's safety when it stated:

> 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. Ms. Ferraro has attempted to close the garage door. That was eventually opened . And the defendant had not been compliant. I know that the defendant in her brief writes that she was compliant, but I don't think that's the case. I think that noncompliance states 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 immediate – well, she doesn't follow the directions immediately when he finally gets to her in the vehicle. She doesn't get out right away, she's resistive when he tries to escort her out of the garage. Furthermore, she's yelling. And then we have the situation where her husband comes out and it's a chaotic scene. She not willing to be – she's not voluntarily leaving the garage. So we have a situation 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. It's a chaotic situation. And I think it is a safety measure. (R.60 at 15-16)

These handcuffs were removed by Lt. Vierck, who did not participate in any questioning of the Defendant, prior to

her being turned over to Deputy Wenger. *Id.* at 39-40. (R.34 at 5)

The statements made by Ferraro in the garage were voluntary, the court stated:

> I will note that the statements that Ms. Ferraro made in the garage in response to her husband's question 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 the stop sign, that was a voluntary, non-interrogational response. So that I don't believe, is covered by Miranda. (R.60 at 17)

Furthermore, while there were multiple officers present at the scene, Ferraro was moved away from the scene to do field sobriety tests on a flat, level area. *Id.* at 43. (R.34 at 5) Ferraro's statements made in response to being asked to submit to a chemical test by Deputy Wenger and the results of the chemical test are not subject to suppression. (R.34 at 6) This is because they were given validly after being read the Informing the Accused form, which by its language applies after arrest yet still does not implicate *Miranda. See State v. Reitter*, 227 Wis. 2d 213, 225, 595 N.W.2d 646, 652-53 (1999) ("Officers who administer a test under the implied consent statute are not required to advise defendants about *Miranda* rights"); *see also State v. Bunders*, 68 Wis.2d 129,

133, 227 N.W.2d 727 (1975) (*Miranda* rules do not apply because request to submit to a chemical test does not implicate testimonial utterances). (R.34 at 6)

CONCLUSION

For the foregoing reasons, the State respectfully request that this court affirm the circuit court's denial of Jonalle L. Ferraro's motions to suppress and the judgment of conviction.

Dated this 14th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,637 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of September, 2018.

_____
Cheniqua L White
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