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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

REPLY BRIEF 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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ARGUMENT

I. VIERCK UNLAWFULLY ENTERED FERRARO'S GARAGE; THUS, FERRARO'S ARREST WAS UNLAWFUL.

A. The police unlawfully arrested Ferraro after entering her garage, and neither *State v. Weber* nor any other authority authorized the warrantless entry.

As elaborated upon in Ferraro's initial brief, when a law enforcement officer enters a person's home to search, the officer needs to be in possession of a warrant based upon probable cause, or the entry can only be made pursuant to an exception to the warrant requirement. The warrant exception at issue here was exigent circumstances based upon the hot pursuit doctrine.[1] When relying on an exigency to enter a person's home without a warrant, the State must 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."[2]

The State cites to ***State v. Weber*** to justify the warrantless entry here.[3] ***Weber*** is a decision without precedential authority. The lead opinion, signed by just three justices, was not signed by a majority of

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[1] ***State v. Richter***, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29.
[2] ***Id.*** ¶ 29.
[3] State's Br., 3; ***State v. Weber***, 2016 WI 96, ¶ 1, 372 Wis. 2d 202, 887 N.W.2d 554.

the Court.[4] Most importantly, there is no agreement on the governing law. In the lead opinion, three justices held that the doctrine of hot pursuit justified the officer entering the defendant's garage without a warrant.[5] In the concurrence, the warrantless entry was justified through the defendant's apparent consent by conduct.[6] The two dissents, cumulatively signed by three justices, did not uphold the officer's entry.[7]

The State asserts that the lead opinion's position, that an officer may enter a person's home without a warrant where the doctrine of hot pursuit applies, is controlling.[8] The State bases this upon Justice Kelly's statement that "if there really is probable cause to believe [a] [jailable] offense occurred," then the hot pursuit doctrine justified the warrantless entry into the garage.[9] The State also relies on ***Howes v. Deere & Co.***[10] Yet the ***Howes*** Court relied on the Georgia Supreme Court case of ***Grantham Transfer Co. v. Hawes***. In the Georgia case, that state supreme court examined a split decision and declared:

> [O]nly five of the nine judges of [the] court concurred . . **with two of these concurring in the judgment only.** Four dissented. **This renders the entire opinion not a ruling by the court but merely the view of only three judges,**

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[4] ***Howes v. Deere & Co.***, 71 Wis. 2d 268, 274, 238 N.W.2d 76 (1976).
[5] ***Weber***, 2016 WI 96, ¶ 1.
[6] ***Id.*** ¶ 46 (Kelly, J., concurring).
[7] ***Id.*** ¶ 83 (Bradley, A.W., J., dissenting); ***Id.*** ¶ 139 (Bradley, R.G., J., dissenting).
[8] State's Br., 3.
[9] ***Weber***, 2016 WI 96, ¶ 54 (Kelly, J., concurring).
[10] 71 Wis. 2d 268, 274, 238 N.W.2d 76 (1976).

> **which is no ruling at all, and hence it cannot constitute the law of the case.**[11]

Thus, guiding caselaw on the issue of whether a decision is binding indicates that where a concurring opinion "concur[s] in the judgment only," there is no precedential weight to an opinion.[12] Therefore, because Justice Kelly's concurrence did not uphold the use of the hot pursuit doctrine, and relied instead on the defendant's *consent* to the warrantless entry, the State may not rely upon ***Weber*** as a binding decision in making its argument.

Regardless of whether ***Weber*** provides binding authority, the doctrine of hot pursuit is not applicable. When examining the issue, the circuit court stated the following:

> It's clear that **once Officer Vierck made contact, he did have continuous contact** . . . until he finally met with Ms. Ferraro in the garage.[13]

In order to qualify as immediate and continuous pursuit, Vierck must have necessarily witnessed the accident or responded contemporaneously to the scene. Under ***State v. Richter***, though the officer does not always need to witness the offense or observe the fleeing suspect to fall under immediate and continuous pursuit, the officer may be informed by an eyewitness of the offense and the

[11] ***Grantham Transfer Co. v. Hawes***, 225 Ga. 436, 439 (1969) (emphasis added).
[12] ***Id.***
[13] R.60 at 13 (emphasis added).

suspect's whereabouts.[14] However, the facts in ***Richter*** were quite specific. Law enforcement responded to a call of a burglary.[15] When the officer arrived, the eyewitness/victim informed the police that the intruder had just left the victim's trailer and had entered his own—which was across the street.[16] In other words, the victim and the intruder were neighbors. No such witness reported to Vierck on the hit-and-run suspect's whereabouts here.

In this case, Vierck did not respond on scene as the police in ***Richter*** did. He overheard a call of a reported hit-and-run and later saw a vehicle fitting that description.[17] The vehicle had not remained on scene, and there had been no way of knowing which direction the vehicle had gone. Vierck testified he essentially took an educated guess.[18] That was not immediate and continuous pursuit.

Even if ***Weber*** provides binding authority, Vierck did not have probable cause to arrest Ferraro for the hit-and-run. He had not spoken with Ferraro to determine her whereabouts that evening or examined her vehicle for damage consistent with a hit-and-run. At best he had some suspicion that her vehicle may have been involved.

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[14] 2000 WI 58, ¶ 33, 235 Wis. 2d 524, 612 N.W.2d 29.
[15] ***Id.*** ¶ 1.
[16] ***Id.***
[17] R.59 at 28.
[18] *Id.*; R.60 at 3.

Nor had there been probable cause to arrest Ferraro for eluding, because there is no evidence Ferraro knowingly eluded by failing to stop her vehicle. The State points out that Ferraro activated her turn signal at an intersection, and instead of turning, went straight.[19] This behavior does not demonstrate Ferraro was eluding.[20]

Moreover, there is nothing in the facts here that indicate Ferraro knew the officer was behind her until he was in her garage. If Ferraro had been fleeing, and this provided probable cause for the warrantless entry into the home, why did Vierck apparently not radio the stop as a stop for fleeing? Why did he not testify that Ferraro increased her speed, or glanced behind while she was driving or as he entered her driveway? The State relies on the fact that Ferraro did not stop to argue she fled from the police.[21] But not stopping for the police, without more, does not demonstrate that the person knowingly eluded the police.[22] Thus, without probable cause for the fleeing offense, along with the necessary hot pursuit showing, there was no basis to enter Ferraro's residence.

Lastly, the State did not demonstrate why obtaining a warrant would have "gravely endanger[ed] safety, risk[ed] the destruction of

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[19] State's Br., 7.
[20] Wis. Stat. § 346.04(3).
[21] State's Br., 7–8.
[22] Wis. Stat. § 346.04(3).

evidence, or enhance[d] the likelihood that the suspect would escape."[23] This is an objective test that examines the reasonableness of the officer's actions in entering the home without a warrant. The State failed to address why Vierck could not have obtained a warrant, though this was its burden. This Court need not search for a reason why the police failed to obtain a warrant in the absence of any such argument by the State. Vierck could not have been concerned with safety, the destruction of evidence, or escape. What he was concerned with was seizing Ferraro. As addressed in Ferraro's brief-in-chief and the next two sections of this brief, Vierck's actions in seizing Ferraro violated her rights.

II. THE POLICE CONDUCT INSIDE THE GARAGE WAS UNLAWFUL AND VIOLATED FERRARO'S RIGHTS.

A. The seizure here was unreasonable and unlawful.

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."[24] It is the State's burden to prove that the seizure at issue was limited in scope and time.[25] A seizure becomes

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[23] ***Richter***, 2000 WI 58, ¶ 29.
[24] ***Florida v. Royer***, 460 U.S. 491, 500 (1983).
[25] ***Id.***

an arrest when a reasonable person in the defendant's position would consider himself or herself to be in police custody.[26] Factors such as the degree of restraint and the police officer's words and actions determine whether a person is in custody.[27]

Factors such as handcuffing, being put in the back of a squad vehicle, or excessive force can render the seizure unreasonable.[28] The reasonableness of the force used to effect a seizure is examined through the lens of a reasonable officer on the scene.[29] A court balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing governmental interests at stake."[30] 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.[31]

The State does not respond to Ferraro's argument that she was unreasonably and unlawfully seized.[32] It does not mention Ferraro's

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[26] ***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)).
[27] ***Id.*** at 447.
[28] ***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).
[29] ***Graham***, 490 U.S. at 396.
[30] ***Tennessee v. Garner***, 471 U.S. 1, 8 (1985) (internal citations omitted).
[31] ***Graham***, 490 U.S. at 396.
[32] State's Br., 3–8.

argument at any point. Because the State has not responded to the argument, the point is conceded.[33]

A review of the factors in Ferraro's case weighs against the reasonableness of Vierck's conduct. The most troubling factor is Ferraro's dislocated shoulder—which the circuit court did not address in its oral ruling.[34] Before Vierck handcuffed her, Ferraro warned him her shoulder dislocated.[35] Nothing in the record indicates Ferraro was not honest about the injury, and the circuit court did not find that it did not happen. Vierck handcuffed Ferraro anyway.[36] It was only after Ferraro asked for the handcuffs to be removed so that she could adjust her dislocated shoulder that Vierck removed them.[37] In addition, there is no evidence in the record that Ferraro resisted Vierck or did not comply with his demands once he was inside Ferraro's garage. In fact, Vierck testified that Ferraro complied with all his requests.[38]

The State cannot rely upon any supposed noncompliance to justify Vierck's conduct inside the garage. There is no evidence in the record that Ferraro knowingly eluded by failing to stop.[39]

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[33] ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 108–09, 297 N.W.2d 493 (Ct. App. 1979).
[34] R.60 at 16–17.
[35] R.59 at 38.
[36] *Id.*
[37] *Id.* at 32.
[38] *Id.* at 46.
[39] R.60 at 16.

Furthermore, there is no evidence in the record that Ferraro knew the police attempted to stop her. Moreover, other factors, such as that the accident Vierck was investigating was a relatively minor offense, weigh against the reasonableness of Vierck's actions.

Nor can the State argue Ferraro posed a threat to officer safety.[40] For most of her contact with the police, she was outnumbered.[41] When it was just her and Vierck in the garage, Vierck had already secured her in an escort hold.[42] She would not have been able to pose a danger to anyone. More importantly, there was no evidence that officers felt unsafe in their interaction with Ferraro.

There was no significant government interest that would have been affected by not handcuffing Ferraro. Had Vierck kept her in the escort hold, or simply ordered her to exit the garage, she would have complied, just as she complied with his other orders.[43] Through his actions, Vierck transformed a routine traffic stop into an unreasonable and unnecessary encounter.

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

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[40] State's Br., 10.
[41] R.59 at 39; 45.
[42] *Id.* at 38.
[43] *Id.* at 46.

unreasonable. The evidence that resulted from the seizure must be suppressed.[44]

III. THE POLICE DID NOT MIRANDIZE FERRARO BEFORE THEY BEGAN INTERROGATING HER.

A. Ferraro's statements must be suppressed because the police did not mirandize her before they began interrogating her.

A person is considered in custody under ***Miranda v. Arizona***, if, under the totality of the circumstances, he or she was unable to leave, or the degree of restraint was great.[45] A reviewing court also considers the purpose, place, and length of custodial interrogation, as well as the number of police officers involved.[46] "Custodial interrogation" refers to police-initiated questioning of a person after that person has been taken into custody.[47] In that situation, the police must advise the person of her rights under ***Miranda v. Arizona***.[48]

The State argues Ferraro was handcuffed for Vierck's safety.[49] The State also argues Vierck did not participate in any questioning.[50] First, there had been no credible officer safety concerns at the time Vierck was in the garage with Ferraro. Vierck did not testify he felt

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[44] R.18 at 2.
[45] ***State v. Morgan,*** 2002 WI App 124, ¶ 11, 254 Wis. 2d 602, 648 N.W.2d 23.
[46] ***Id.***
[47] ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966).
[48] ***Id.***
[49] State's Br., 10.
[50] *Id.*

unsafe interacting with her. She was also not a large woman—she was 5’6” and 135 pounds.[51] Handcuffing Ferraro was therefore unjustified. Vierck had Ferraro in an escort hold early in his contact with her.[52] She would not have been able to attempt much once in this control hold. Moreover, as stated above, during the majority of the time Vierck was in contact with Ferraro, the police outnumbered her nine or ten-to-one.[53] Thus, there could have been no legitimate officer safety concerns.

Second, the State’s assertion that Vierck did not interrogate Ferraro, and that she voluntarily made statements inside the garage, is also incorrect.[54] Vierck himself acknowledged that Ferraro “made statements” to him during his contact with her in the garage.[55] Vierck acknowledged Ferraro discussed details of the alleged accident, including that it occurred at a stop sign.[56] There was no evidence that the statements were not a result of police questioning.

Ferraro responded to these questions even though Vierck informed her he was investigating a hit-and-run.[57] This informed her she was a suspect, and she was being questioned as such. Under these

[51] R.2.
[52] R.59 at 38.
[53] *Id.* at 39; 45.
[54] State’s Br., 10–11.
[55] R.59 at 31.
[56] *Id.*
[57] *Id.*

conditions, she likely believed she must answer questions. Ferraro refused to answer questioning after she was eventually mirandized.[58] Had she been mirandized earlier, she would not have given incriminating statements to the police.

The State does not address Wenger's interrogating Ferraro beyond pointing out that Wenger interacted with her in the driveway, where she performed field sobriety testing.[59] Though she may not have been surrounded by the police while she performed tests, there had been several officers surrounding her while she was handcuffed in her garage.[60] Those officers were not far from Ferraro while she performed tests—they remained in her garage and driveway.[61] The eight or nine squad vehicles remained present.[62]

A reasonable person in Ferraro's position would believe that she was under arrest.[63] Before she had gotten a chance to enter her residence, 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.[64]

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[58] *Id.* at 21–22.
[59] State's Br., 11.
[60] R.59 at 45–46.
[61] *Id.*
[62] *Id.* at 39; 45.
[63] ***Morgan,*** 2002 WI App 124, ¶ 16.
[64] R.59 at 36–37.

She complied with these orders.[65] He then ordered her to exit her vehicle and put her hands behind her back.[66]

When she did not immediately comply, he gripped her bicep and wrist in a hold, and handcuffed her when he felt her tense.[67] This caused Ferraro's shoulder to dislocate.[68] While the handcuffs were on, Vierck yelled at Ferraro to stop resisting—though he testified she complied with every order.[69] In the garage, he questioned her regarding the hit-and-run.[70] As she was handcuffed and escorted outside the garage, multiple deputies arrived.[71] Ferraro remained handcuffed for at least ten minutes.[72]

Ferraro complained that her shoulder hurt.[73] After more than ten minutes, Vierck removed the handcuffs due to her injury.[74] That she was no longer handcuffed when Wenger questioned her is not dispositive.[75] At the time she responded to Vierck's and Wenger's respective questions, she had been followed into her garage, yelled at by Vierck, ordered to obey, handcuffed, and had her shoulder

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[65] *Id.*
[66] *Id.* at 37.
[67] *Id.* at 38–39.
[68] *Id.*
[69] *Id.* at 31; 38; 39; 46.
[70] R.59 at 31.
[71] *Id.* at 39.
[72] *Id.* at 42–43.
[73] *Id.* at 39.
[74] *Id.*
[75] ***Morgan***, 2002 WI App 124, ¶ 21. R.34 at 5.

dislocated.[76] She was likely still in pain. She had also been subjected to an impressive show of force—there were eight to nine officers near her residence, many with their lights flashing, with several officers in her garage at one point.[77]

The factors above would lead a reasonable person in Ferraro's position to believe she was in custody.[78] Therefore, her statements to both Vierck and Wenger were inadmissible and must be suppressed as a violation of ***Miranda***.[79] The State makes the point that the response to the Informing the Accused Form and the blood results would not be suppressed.[80] Ferraro agrees that her response to the question of whether she would submit to the evidentiary test does not implicate ***Miranda***. Thus, all statements made in response to police questioning until she was properly mirandized and refused to answer questions must be suppressed.

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[76] R.59 at 35–39; R.59 at 45–46.
[77] R.59 at 45–46.
[78] ***Swanson***, 164 Wis. 2d at 446–47.
[79] ***Miranda***, 384 U.S. at 444.
[80] State's Br., 11.

CONCLUSION

For the reasons set forth above and in her brief-in-chief, Ferraro requests that this Court reverse the lower court's ruling denying her suppression motions. Had her motions been granted, Ferraro would not have pled guilty.

Dated at Madison, Wisconsin, October 11, 2018.

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