STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN

Plaintiff-Appellant,

v. **Appeal No.: 2018AP000746 CR**

STEVEN D. PALMERSHEIM,

Defendant-Respondent.

AN APPEAL FROM WAUKESHA COUNTY
CIRCUIT COURT
TRIAL COURT CASE NO. 2017CT001298
HONORABLE MICHAEL J. APRAHAMIAN,
PRESIDING

RESPONDENT'S BRIEF

Pablo Galaviz
Defendant-Respondent's Attorney
State Bar No. 1001293
711 West Moreland Blvd., Suite 205
Waukesha, Wisconsin 53188
(262) 470-0823

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Respondent (Palmersheim) submits that oral argument and publication are unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STANDARD OF REVIEW

The review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Weber*, 2016 WI 96, ¶16, 372 Wis. 2d 202. In reviewing the circuit court's order on a suppression motion, the findings of historical fact will not be overturned unless they are clearly erroneous. *Id*.

ARGUMENT

I. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT OFFICER YOUNG HAD PROBABLE CAUSE TO ARREST PALMERSHEIM FOR OBSTRUCTING AN OFFICER.

Dispatch reported that a citizen-caller was following a vehicle traveling all over the roadway. R. 20, p. 3. The caller described the vehicle and continued to follow the vehicle to a residence where it stopped. R. 20, p. 5. The caller described the driver, who had exited the vehicle. R. 20, p. 3. The caller further reported observing the

driver sway as he stood and urinate on the side of his vehicle. R. 20, p. 3. Office Young responded to the area in a non-emergency fashion with no activation of his squad car's emergency lights. R. 20, p. 13. Upon arriving on the scene, Officer Young observed the suspect vehicle properly parked on the side of the roadway. R. 20, p. 5. Officer Young observed Palmersheim walk away from the suspect vehicle, cross the sidewalk and walk up a driveway towards a residence. R. 20, p. 5. Officer Young did not observe any signs of impairment as the Palmersheim walked up the driveway. R. 20, p. 16. Officer Young did not confirm whether Palmersheim urinated on or near his vehicle. R. 20, p. 19.

As Palmersheim continued to walk up the driveway towards an opened garage door, Officer Young who was walking behind Palmersheim asked him if he could talk with him. R. 20, pp. 5 & 14. Officer Young testified that he presented the question to Palmersheim in a "consensual" manner. R. 20, pp. 5 & 14. Palmersheim did not react to Officer Young's question and continued to walk towards the garage door. R. 20, pp. 5 & 14. There was no evidence presented at the hearing that Palmersheim was aware that Officer Young was walking behind him or heard his

question. As Palmersheim entered, or was about to enter his garage, Officer Young told him to stop. R. 20, pp. 6 & 15 & pp. 23-24. There was no evidence presented at the hearing that Officer Young identified himself as a police officer when he told Palmersheim to stop. Palmersheim looked back towards Officer Young and stopped inside his garage. R. 20, p. 6.

Wisconsin Stat. § 946.41(1) provides that, "whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor." The crime consists of four elements: (1) the defendant obstructed an officer; (2) the officer was doing an act in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew that the officer was acting in an official capacity and with lawful authority and knew that his or her conduct would obstruct the officer. Wis. JI--Criminal 1766.

Again, as Palmersheim walked up the driveway of his residence, Officer Young walked 30 feet behind him. R. 20, pp. 5-6 & 14. There was no evidence presented at the hearing that Palmersheim was aware that Officer Young was walking behind him. Officer Young asked Palmersheim if he could talk with him. R. 20, pp. 5 &

14. There was no evidence presented at the hearing that Palmersheim heard his question. It is when Palmersheim entered, or was about to enter his garage, that Officer Young told him to stop. R. 20, pp. 6 & 15 & pp. 23-24. Again, Palmersheim stopped inside his garage. R. 20, p. 6.

The circuit court held that Officer Young only had reasonable suspicion to contact Palmersheim for a civil law violation of driving his vehicle while under the influence. R. 14, p. 6. See *Welsh v. Wisconsin*, 466 US 740, 746, n. 6, 104 S. Ct. 2091 (1984)(The Supreme Court treated Welsh's OWI charge as a first offense, because the arresting officer was not aware that Welsh had a prior OWI conviction when he entered the residence). On the other hand, Officer Young testified that the citizen-caller reported observing Palmersheim "pissing by his [Palmersheim's] car", so this gave him reason to detain and question Palmersheim for a civil disorderly conduct violation. R. 20, p. 19.

The circuit court further held that Palmersheim obstructed Officer Young when he walked into his garage and stopped. R. 14, p. 6. Again, Officer Young testified that Palmersheim was

approaching the entrance to the garage when he told Palmersheim to stop. R. 20, pp. 6 &15. Palmersheim testified that he had entered his garage when he first heard Officer Young. R. 20, pp. 23-24.

In ruling that Palmersheim committed an "obstruction", the circuit court equated Palmersheim's conduct to that of the defendant in *State v. Young*, 2006 WI 98, 294 Wis. 2d 1. R. 14, p. 7. The defense disagrees with the circuit court's analogy.

In *Young*, the scene began as the defendant sat as a passenger in a vehicle parked at the curb of a public roadway. *Id.*, ¶ 7. The officer parked his marked squad car alongside the vehicle and shined his spot light on the vehicle. *Id.*, ¶ 10. It was not disputed that the defendant was aware that the officer was on the scene. *Id.*, ¶ 11. When the defendant exited the vehicle, he was ordered by the officer several times to get back inside the vehicle. *Id.*, ¶ 11. The defendant obstructed the officer when he ran from the scene. *Id.*, ¶ 11. In addition to other charges, the defendant was arrested and charged with obstructing an officer. *Id.*, ¶ 13.

Here, the scene began on the curtilage of Palmersheim's residence as he walked up his driveway. R. 20, p. 14. Again, there was no evidence presented at the hearing that Palmersheim was

aware that an officer was following him as he walked up his driveway. As Palmersheim entered, or was about to enter his garage, he was told by Officer Young to stop. R. 20, pp. 6 &14 & pp. 23-24. Again, there was no evidence presented at the hearing that Officer Young identified himself as a police officer when he told Palmersheim to stop. In addition, there was no mention of Palmersheim "obstructing" in the police reports; there was no citation issued to Palmersheim for obstructing; and there was no obstruction charge filed against him. The first time the word "obstructing" was ever mentioned in this case was by the prosecutor in his closing argument at the suppression hearing. R. 20, p. 27.

The record demonstrates that Palmersheim did absolutely nothing to obstruct Officer Young, which explains why he was not arrested, cited or charged with obstructing an officer. Consequently, the circuit court's application of the *Young* case to the case at hand lacks rational. Again, Palmersheim was inside or about to cross over the threshold of his garage when he was told to stop. As Officer Young testified, Palmersheim simply walked into his garage. R. 20, p. 15. The fact that Palmersheim was standing inside his garage and Officer Young could not legally enter the garage did not liken the

situation to obstructing. Elements number 1 (did Palmersheim obstruct) and number 4 (did Palmersheim know he obstructed) were never proven at the suppression hearing. Again, even Officer Young did not jump to that conclusion.

As a result, the Defense opines that the circuit court was incorrect when it ruled that Palmersheim committed an obstruction.

II. OFFICER YOUNG HAD NO LEGAL BASIS TO DETAIN PALMERSHEIM ON THE CURTILAGE OF HIS RESIDNECE.

The United States Supreme Court recently stated "[W]hen a law enforcement officer physically intrudes on the curtilage [private driveway] to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Collins v. Virginia*, 584 U. S. ___, p. 5, ___ S. Ct. ___ (2018)(citing *Florida v. Jardines*, 569 U.S. 1, 11, 133 S. Ct. 1409 (2013)). When officers "physically occup[y] private property for the purpose of obtaining information," a search has occurred. *United States v. Jones*, 565 U.S. 400, ___, 132 S. Ct. 945, 949 (2012); *State v. Davis*, 2011 WI App 74, ¶ 12, 33 Wis. 2d 490. Under the Fourth Amendment, police are prohibited from making a warrantless and nonconsensual entry into a suspect's home absent probable cause and exigent circumstances. *State v. Martwick*,

2000 WI 5, ¶26, 231 Wis. 2d 801. This Fourth Amendment protection also extends to the curtilage of a home. *Oliver v. United States***,** 466 U.S. 170, 180, 104 S. Ct. 1735 (1984). Absent consent, or probable cause to arrest for a crime, a warrantless entry onto the curtilage of residence is unlawful. *State v. Dumstrey*, 2016 WI 3, ¶ 31, 366 Wis. 2d 64(citing *State v. Walker*, 154 Wis. 2d 518, 182, 453 N.W.2d 127 (1990)).

Here, Officer Young intruded onto Palmersheim's driveway to detain and question him about a civil law violation. R. 20, p. 19. Officer Young, the prosecutor and the circuit court all agreed that there was only "reasonable suspicion" to believe that Palmersheim committed a civil law violation when Officer Young entered onto Palmersheim's driveway. R. 20, pp. 16 & 25, R. 14, p. 6.

Given these factors, absent consent or probable cause to believe that Palmersheim committed a crime, Officer Young could not legally detain Palmersheim on the curtilage of residence for a civil law violation. Again, Officer Young did not observe Palmersheim drive or operate a vehicle, nor did he observe any evidence that Palmersheim may have urinated on or near his vehicle, nor did he observe any signs of impairment as Palmersheim walked up his

driveway. Officer Young's intention was to question Palmersheim for allegedly committing a civil law violation. First, Officer Young tried to make consensual contact with Palmersheim. When Palmersheim did not react to Officer Young's overture, Officer Young told Palmersheim to stop or detain him. These events all occurred on the curtilage of Palmersheim's residence.

As a result, the Defense opines that Officer Young could not legally detain Palmersheim on the curtilage of his residence for a civil law violation.

III. THE STATE'S RELIANCE ON *WEBER* AND *DELAP* IS COUNTERPRODUCTIVE TO THEIR HOT PURSUIT ARGUMENT.

The State makes convoluted arguments in citing *Weber* and *Delap* to support its application of the "hot pursuit" doctrine to the case at hand. The State's reliance on *Weber* and *Delap* is counterproductive to their argument that is put forth.

In *Weber*, a police officer attempted to stop Weber's vehicle for a defective brake lamp and weaving on the public roadway. *State v. Weber*, 2016 WI 96, ¶ 4, 372 Wis. 2d 202. Weber was about 100 feet from his home when the officer activated his squad emergency lights to conduct a traffic stop. *Id*. Weber continued driving, pulled

into his driveway, and parked his vehicle inside his attached garage. *Id*. The officer pulled into Weber's driveway, exited his squad car, and ultimately entered Weber's garage to apprehend him before Weber could enter his home through a door. *Id.* Four Justices (Chief Justice Roggennsack, Justice Ziegler, Justice Gableman and Justice Kelly) ruled that the officer's warrantless entry into Weber's garage was lawful. *Id*., ¶¶ 3 & 75. Three of the justices (Chief Justice Roggennsack, Justice Ziegler and Justice Gableman) ruled that Weber committed a jailable offense and applied the "hot pursuit" exception. *Id*., ¶ 3. Justice Kelly however, ruled that Weber did not commit a jailable offense, but ruled that Weber implicitly gave the officer consent to enter the garage to complete the traffic stop. *Id*., ¶¶¶ 62, 72 & 82. The three dissenting justices (Justice Ann Bradley, Justice Abrahamson & Justice Rebecca Bradley) ruled that Weber did not commit a jailable offense. *Id*., ¶ 86.

Hence, the majority of the Court ruled that Weber did not commit a jailable offense.

In *Delap,* two police officers were aware that Delap had two outstanding warrants and they knew where he lived. *State v. Delap*,

2018 WI 64, ¶ 15, ___ Wis. 2d ___. As the officers approached Delap's duplex, they observed a male subject walking down the driveway. *Id*., ¶ 16. The subject looked at the officers, turned around and ran behind the duplex. *Id*. One of the officer's "shouted `stop, Police!'". *Id*. As the male subject continued to run away, one of the officers pursued after him. *Id*., ¶¶ 16-17. The officer caught up to the subject as the subject entered the rear door of the duplex and was about to shut the door. *Id*., ¶ 18. With the assistance of the second officer, the door was pushed open, and the subject was arrested and identified as Delap. *Id*., ¶¶ 18-19. Delap was arrested and charged with obstructing an officer and possession of drug paraphernalia. *Id*., ¶ 21.

Delap filed a motion to suppress the evidence on the grounds of an illegal arrest and search. *Id*., ¶ 22. The circuit court denied the motion and the court of appeals affirmed Delap's conviction with both courts relying on the hot pursuit doctrine. *Id*., ¶ 24.

In a unanimous decision, our Supreme Court affirmed the lower courts decisions on other grounds. *Id*., ¶ 5. The Court ruled that the *Delap* case is governed by *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980). The Court citing *Payton*, ruled that police may

lawfully enter a residence if the police reasonably believe that the subject of an arrest warrant resides at the residence and the police reasonably believe that the subject is inside the residence at the time of the entry. *Id*., ¶ 32. In a concurrent opinion, Justice Gableman also affirmed the lower courts decisions under the hot pursuit exception. *Id*., ¶ 51. Justice Gabelman opined that Delap knew he was obstructing the officers when he ran away. *Id*., ¶¶ 54-55.

Consequently, the majority of the Court did not consider the hot pursuit doctrine in affirming Delap' convictions.

IV. THE CIRCUIT COURT CORRECTLY DETERMINED THAT "IT DEFIES CREDULITY" TO CONCLUDE THAT OFFICER YOUNG WAS ENGAGED IN HOT PURSUIT OF PALMERSHEIM.

The United States Supreme Court has defined "hot pursuit" as the "immediate or continuous pursuit of a suspect from the scene of a crime." *United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406 (1976); State v. *Smith*, 131 Wis. 2d 220, 231-32, 388 N.W.2d 601 (1986). It is the continuity of the pursuit that prevails. *Id.*

The circuit court concluded that Officer Young's was not engaged in hot pursuit of Palmersheim when he crossed the threshold of the garage. R. 14, p. 10. The court stated that "it defies

credulity" to argue that Officer Young was engaged in "hot pursuit" of Palmersheim when he crossed the threshold. R. 14, p. 9.

Here, Officer Young testified that he responded to Palmersheim's residence in a nonemergency fashion with no activation of his squad car's emergency lights. R. 20, p. 13. Upon arriving on the scene, Officer Young exited his squad car and walked towards Palmersheim, who was walking up his driveway towards his open garage. R. 20, p. 14. Officer Young decided to attempt to approach Palmersheim and engage in a consensual encounter. R. 20, p. 14. Officer Young's attempt to get Palmersheim's attention was unsuccessful as Palmersheim continued to walk up his driveway towards his garage. R. 20, p. 14. As Palmersheim entered, or was about to enter his garage, Officer Young yelled stop. R. 20, pp. 6 & 14 & pp. 23-24. Officer Young walked up to the threshold of the garage and stopped. R. 20, p. 15. Officer Young testified that when he walked up to the threshold he was in "hot pursuit" of Palmersheim for disorderly conduct. R. 20, pp. 18-19. Officer Young further testified that he passively approached the threshold, because he assumed that Palmersheim was going to come back out and talk with him. R. 20, p. 20.

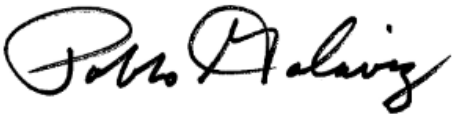
The circuit court correctly found Officer Young's "hot pursuit" testimony as defying credulity.

CONCLUSION

For all the reasons stated above, the Defendant-Respondent respectfully requests that the Court affirm the circuit court's decision that granted the Defense's motion to suppress the evidence based on an unlawful warrantless entry.

Date this 30th day of July 2018.

Respectfully,



Pablo Galaviz
Attorney for Defendant-Appellant
State Bar Number 1001293

CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 2774 words long.

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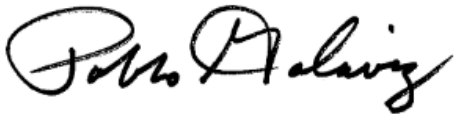

Pablo Galaviz
Attorney for Defendant-Appellant
State Bar Number 1001293

CERTIFICATE OF COMPLIANCE
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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.

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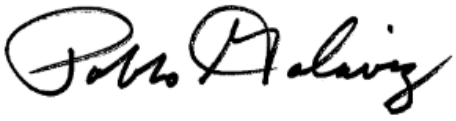

Pablo Galaviz
Attorney for Defendant-Appellant
State Bar Number 1001293