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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

08-24-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2018 AP 746-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

STEVEN D. PALMERSHEIM,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE TRIAL COURT SUPPRESSING
EVIDENCE, IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH
9, THE HON. MICHAEL J. APRAHAMIAN, PRESIDING

REPLY OF PLAINTIFF-APPELLANT

Respectfully submitted,

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I. PALMERSHEIM'S ARGUMENT THAT THE CIRCUIT COURT ERRED WHEN IT FOUND OFFICER YOUNG HAD PROBABLE CAUSE TO ARREST PALMERSHEIM FOR OBSTRUCTION IS BASED ON PALMERSHEIM'S ALTERNATIVE VIEW OF THE HISTORICAL FACTS CONTRARY TO THE CIRCUIT COURT'S FINDING AND THE RECORD.

Palmersheim argues that the circuit court erred in determining Officer Young had probable cause to arrest Palmersheim for Obstructing. Reply Brief of Defendant-Respondent, p. 4. In support of this claim, Palmersheim argues there was no evidence Palmersheim knew Officer Young was walking behind him or that he heard Officer Young tell him to stop. Reply Brief of Defendant-Respondent, pp. 5-6. Also, Palmersheim claims that there was no evidence presented that the officer identified himself. Reply Brief of Defendant-Respondent, p. 5. Palmersheim claims that he only noticed that an officer was trying to make contact with him when he got into his garage. Reply Brief of Defendant-Respondent, pp. 5-6.

The State acknowledges that whether or not Officer Young had probable cause to arrest Palmersheim for Obstructing is a question this court must review independently. *State v. Iverson*, 2015 WI 101, ¶17, 365 Wis. 2d 302, 871 N.W.2d 661. However, the State would note that Palmersheim's argument that Officer Young lacked probable cause to arrest him for Obstructing ignores the circuit

court's finding of historical fact and fails to show that finding was erroneous. See *id.* (stating that circuit court's findings of historical fact must be reviewed with deference unless clearly erroneous). Because Palmersheim is applying different facts than what the court used to find Officer Young had probable cause to arrest Palmersheim for Obstructing, Palmersheim's argument is without merit.

In its Decision and Order, the circuit court first described the historical facts of the case, in relevant part, as follows: that when Officer Young arrived at the residence, he observed the driver walking from the vehicle towards the garage. (Pet-App. B:2). Officer Young got out of his squad car and asked to speak with the driver, but the driver ignored him and kept walking to the garage. (Pet-App. B:2). Officer Young told the driver to stop, and the driver looked at Officer Young, turned, and walked into the garage. (Pet-App. B:2). Officer Young asked the driver to come out of the garage, but the driver ignored the request and hit the button to close the garage door. (Pet-App. B:2). At that point, Officer Young put his foot across the safety beam at the bottom of the garage door to prevent it from closing. (Pet-App. B:2).

The circuit court's recitation of the facts contradicts Palmersheim's assertion that he did not hear or

see Officer Young until he was in his garage. The court's use of the word "ignored" to describe Palmersheim's response the first time Officer Young asked to speak with him indicates that the court believed Palmersheim heard Officer Young but chose not to respond. That the court believed Palmersheim heard and saw Officer Young prior to going into the garage was further supported by the court's statement that Palmersheim looked right at Officer Young prior to walking into the garage.

The Court's finding of fact is supported by the facts in the record. Officer Young testified at the suppression hearing that after attempting consensual contact with Palmersheim, Officer Young "yelled stop to him." (R. 5:19-25, Pet-App. A:5). Officer Young stated that Palmersheim then turned around and looked at him. (R. 5:25, Pet-App. A:5). At the time, Officer Young was in full police uniform and was standing near his marked squad car. (R. 5:24-25, 6:1-3, Pet-App. A:5-6). At this point, Palmersheim had not yet gone into garage. (R. 6:16-17, Pet-App. A:6). Palmersheim then continued to walk and entered his garage. (R. 6:16-17, Pet-App. A:6). Contrary to Palmersheim's assertions, the record supports the circuit court's finding that Palmersheim saw and heard Officer Young but chose to ignore him.

As has been illustrated, Palmersheim argued the court made an error of law, but this claimed error was based on Palmersheim's version of the facts, which is not consistent with the circuit court's historical finding of fact or the record. Applying deferential review, Palmersheim has failed to show that the circuit court's findings of fact were erroneous. As such, Palmersheim has failed to establish that the circuit court's comparison of this matter to *Young* and the application of the legal standards set forth in *Young* to support its conclusion Officer Young had probable cause to arrest Palmersheim for Obstructing was in error.

II. PALMERSHEIM'S DISMISSAL OF THE STATE'S DISCUSSION OF *WEBER* AND *DELAP* IS BASED ON A FACILE READING OF THE CASES AND IGNORES WHY THE COURT STRUGGLED TO REACH A MAJORITY CONSENSUS ON THE OUTCOME IN *WEBER*.

In the second section of its brief, the State discussed, as persuasive authority, the cases *State v. Weber*, 2016 WI 96, 372 Wis.2d 202, 887 N.W.2d 554 and *State v. Delap*, 2018 WI 64, which are cases that have similar fact patterns to this one. In *Weber*, the Justices failed to reach a majority consensus on whether the hot pursuit doctrine applied. *See generally Weber*, 2016 WI 96. In *Delap*, all the Justices but one ignored the hot pursuit doctrine in reaching their decision despite the fact that

the doctrine was argued in the lower courts. See generally *Delap*, 2018 WI 64, ¶¶4, 5, 43-56.

Palmersheim dismissed the State's analysis of *Weber* because, "Justice Kelly however, ruled that Weber did not commit a jailable offense The three dissenting justices . . . ruled Weber did not commit a jailable offense. Hence the majority of the Court ruled that Weber did not commit a jailable offense." Reply Brief of Defendant-Respondent, p. 13 (internal citations omitted). However, the State believes, given the lack of majority consensus, *Weber* should be viewed through a more nuanced lens with particular attention paid to why the Justices reached the conclusions they did.

Specifically, the State notes that the only reason Justice Kelly found that the exigent circumstance of hot pursuit did not apply was because the State failed to show Officer Dorshorst had probable cause to arrest Weber for a jailable offense. *Weber*, 2016 WI 96, ¶¶46, 62, 72. Justice Kelly ultimately concurred with the lead opinion to reverse the Court of Appeals but only because he believed that Weber consented to Officer Dorshorst's entry into his garage. *Id.* at ¶¶79-80, 82.

Justice Kelly only addressed the hot pursuit doctrine perfunctorily to say that it did not apply because Officer

Dorshorst did not have probable cause to arrest Weber.

Justice Kelly stated:

I write separately because I do not think there is probable cause to believe Mr. Weber committed jailable offenses before entering his garage, a conclusion that precludes deployment of the "hot pursuit" doctrine. *Id.* at ¶46.

Further on in his opinion, Justice Kelly stated:

If the State is right, if there really is probable cause to believe this 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.

Justice Kelly also found that in order to support the hot pursuit doctrine, the probable cause to arrest must have been formed before Weber entered his garage. *Id.* at ¶67

The State believes Justice Kelly's concurring opinion shows that the Court would have reached a majority consensus that the "hot pursuit" doctrine applied if Justice Kelly found that Officer Dorshorst had probable cause to arrest Weber.

In this matter, the trial court found that Officer Young had probable cause to arrest, and this finding is supported by the record. The State does not believe the facts supporting probable cause in this matter are as "speculative" as dissenting Justice Ann Walsh Bradley described the facts of *Weber*. See *id.* at ¶102. As such, the

State believes that while the facts of *Weber* did not lead to a majority consensus by the Court on the issue of hot pursuit, the facts of this case might have well done so.

The State discussed *State v. Delap* for the purposes of illustrating the Court's discomfort with addressing the issue of "hot pursuit" in cases involving a fleeing suspect and to point out that the one Justice that did choose to address the issue found that the doctrine applied. The facts of *Delap* were addressed in the State's prior brief and shall not be repeated here. However, the State again emphasizes that when the circuit court and Court of Appeals denied Delap's suppression motion, it did so by finding that the hot pursuit doctrine permitted law enforcement to enter the residence to make the arrest. *Delap*, 2018 WI 64, ¶4. The Supreme Court, with the exception of Justice Gableman, chose to affirm this decision on other grounds, which obviated the need for the court to delve into the "hot pursuit" issue. *See id.* at ¶5. *Delap* further shows that the Court's position on this issue is divided.

III. PALMERSHEIM SHOULD NOT BE ALLOWED TO DEFEAT THIS CASE BY CLAIMING HE IS ENTITLED TO HEIGHTENED PROTECTION UNDER THE FOURTH AMENDMENT IN HIS GARAGE WHEN HE ENTERED HIS GARAGE FOR THE SOLE PURPOSE OF AVOIDING ARREST.

Palmersheim argues that the circuit court correctly determined that "it defies credulity" to conclude Officer

Young's entry into Palmersheim's garage was justified by the exigent circumstance of hot pursuit. In support of his position, Palmersheim argues there was no continuity of pursuit from the scene of the crime to Palmersheim's garage as required to justify hot pursuit. Reply Brief of Defendant-Respondent, p. 15. Palmersheim also argues that there were no exigent circumstances present because the officer did not activate his emergency lights, and when Officer Young approached Palmersheim, he did so as a consensual encounter. Reply Brief of Defendant-Respondent, p. 15.

The hot pursuit doctrine does not require that an officer continuously pursue a suspect from the scene of the crime to the place where the arrest occurs. Nor does it require that the arrest be preceded by all the "bells and whistles" such as sirens and emergency lights. For example, in *State v. Richter*, 2000 WI 58, ¶3, 235 Wis.2d 524, 612 N.W.2d 29, a sheriff's deputy was dispatched to a burglary in progress at a trailer park. When the deputy arrived, a citizen reported that someone broke into her mobile home and then fled to the trailer across the street. *Id.* The deputy observed signs of forced entry in the trailer across the street. *Id.* at ¶4. Two occupants let the deputy inside. *Id.* at ¶6. Once inside, the deputy encountered the

defendant, who was the owner of the trailer. *Id.* at ¶¶6-7. The defendant gave consent for the deputy to search the trailer for the burglary suspect. *Id.* at ¶7. While performing a search, the deputy found marijuana, and the defendant was arrested and charged with various drug offenses. *Id.* at ¶¶8-10.

The circuit court granted a motion to suppress, and the Court of Appeals affirmed. *Id.* at ¶¶12, 15. The Court of Appeals rejected the State's argument that the exigent circumstance of hot pursuit justified the warrantless entry because the deputy did not personally observe the crime or fleeing suspect, and his actions did not constitute an "immediate or continuous pursuit of [a suspect] from the scene of a crime." *Id.* at ¶14. (citation omitted). The Wisconsin Supreme Court reversed the Court of Appeals concluding, ". . . 'hot pursuit' does not necessarily require that the officer personally witness the crime or the suspect's flight from the scene." *Id.* at ¶35. In support of its decision, the Court noted that the deputy's response to the scene of the crime was immediate, his pursuit of the suspect was immediate and continuous upon his arrival on scene, and there was nothing that delayed or interrupted the pursuit that dissipated the exigency. *Id.* at ¶¶35-36.

Like *Richter*, Officer Young had not pursued Palmersheim from the time he was reported to law enforcement to the time he entered his garage. Like *Richter*, Officer Young arrived on scene after the fact. At that point, he attempted to make consensual contact with Palmersheim, who ignored him twice. Palmersheim then entered the garage and tried to shut it, at which point, Officer Young prevented Palmersheim from doing so. Like the officer in *Richter*, Officer Young's pursuit of Palmersheim was continuous from the time he arrived on scene until the time he entered the garage. There was nothing that interrupted this pursuit.

Furthermore, like the facts of *Richter*, Officer Young did not accompany his pursuit with the "bells and whistles" of law enforcement. As stated, Officer Young first tried to have a consensual encounter with the defendant. Similarly in *Richter*, the officers first made consensual contact with individuals inside the trailer before he went inside. The individuals allowed him inside, and the officer went.

Probable cause to arrest the defendant for Obstructing came after Officer Young twice asked Palmersheim to stop while he was still in his driveway. Palmersheim turned, saw that it was a police officer making the request, and walked into his garage. Officer Young's investigation started as a

response to a call, developed into reasonable suspicion after speaking with the citizen witness about the defendant's behavior, and matured into probable cause for arrest after the defendant twice ignored Officer Young's request for the defendant to stop and speak with him. Officer Young's pursuit of the defendant was continuous, and the circumstances were exigent. If Palmersheim had made it into the house, he could have stayed there for a period of time, at which point the State would have difficulty proving Palmersheim operated or drove on a highway or premises held open for public use while intoxicated. Palmersheim should not be allowed to escape responsibility for this charge because he went into his garage to avoid Officer Young.

The State maintains that for the reasons stated in its first Brief as well as this Reply Brief, the order of the trial court suppressing evidence should be reversed, and this action should be remanded to that court for further proceedings consistent with the order of this Court.

Dated this 24th day of August, 2018 at Jefferson,
Wisconsin

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced serif font. The length of this brief is 11 pages with 2,346 words.

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