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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP001455

In the Matter of the Refusal of Danny L. Waters:
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. WATERS,

Defendant-Appellant.

ON APPEAL FROM A FINDING THAT THE
DEFENDANT UNLAWFULLY REFUSED AN IMPLIED
CONSENT TEST, ENTERED IN THE LA CROSSE
COUNTY CIRCUIT COURT CASE 18-TR-201, THE
HONORABLE SCOTT L. HORNE, PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

Did probable cause exist to arrest the Defendant-Appellant, Mr. Waters for Operating While Intoxicated and to request a blood test?

The trial court found that there was probable cause to arrest Mr. Waters.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request oral argument as the briefs of the parties should sufficiently address the issues.

Publication is unnecessary as the issue involves an application of settled law to an isolated set of facts.

STATEMENT OF THE CASE

The defendant, Mr. Waters, appeals an order finding that he unlawfully refused a blood test under Wisconsin's implied consent statute, Wis. Stat. § 343.305(9)¹.

On January 14th, 2018, Mr. Waters was issued a notice of intent to revoke his operating privileges (App. 28) (1). He timely filed a request for a refusal hearing (App. 30) (2), which was held on July 20th, 2018 (App. 1) (17:1). The only witness called at the hearing, Deputy Daniel Welsch, testified that he went into Mr. Waters home (App. 16) (17:16) at approximately twelve o'clock in the morning to question him about drinking (App. 15) (17:15).

The defendant argued that the Officer did not have the requisite level of suspicion to warrant entering and conducting an investigation at the defendant's home at midnight (App. 23) (17:23). The trial court found that it was "a close call" but that the state established probable cause for the defendant's arrest (App. 24-25) (17:24-25).

¹ Unless specified, all statutory references are to the 2015-2016 Wisconsin Statutes.

STATEMENT OF FACTS

Deputy Daniel Welsch testified that he responded to the Red Pines Bar to investigate a traffic accident. The call came in at around 11:00 p.m. (App. 16) (17:16). He spoke with one of the drivers, Karah Mitchell. Deputy Welsch testified: “[Ms. Mitchell] said she was turning to go out of the – it’s a T shaped parking lot and she was turning right out of one leg of the T and another – and [Mr. Water’s] vehicle was going straight on the other leg of the T. And while she turned he ran into her, I believe” (App. 13) (17:13). Ms. Mitchell told Deputy Welsch she was an employee of Red Pines (App. 5) (17:5). She identified the other driver as Danny Waters, the defendant, and provided his license plate number (App. 5-6) (17:5-6).

There was no evidence entered as to what if any damage either of the vehicles sustained. Ms. Mitchell told Deputy Welsch that she and Mr. Waters exchanged information and agreed to “work it out in the morning” (App. 13) (17:13).

Deputy Welsch recalled that although Ms. Mitchell indicated that she had seen Mr. Waters drinking in the bar, she said nothing about Mr. Waters’s demeanor that would suggest impairment: no balance issues, slurred speech or that he appeared in any way intoxicated (App. 14) (17:14). A bartender told Deputy Welsch he believed Mr. Waters was in the bar for two and a half to three hours, but he didn’t know what Mr. Waters had to drink and offered no indicators that Mr. Waters was intoxicated (App. 14-15) (17:14-15).

At the time of the accident, it was snowy and “definitely winter,” according to Deputy Welsch (App. 14) (17:14). Deputy Welsch admitted that besides the fact there was an accident, there was nothing about the accident that

would suggest Mr. Waters was impaired (App. 15) (17:15). Deputy Welsch admitted that Mr. Waters exchanged information and did not attempt to leave the scene of the accident undetected (App. 15) (17:15).

Deputy Welsch then drove to Mr. Waters' residence and entered his home at approximately midnight, which he recalled as about an hour after the call (App. 15) (17:15). Other than saying, "Danny," when asked who "greeted" him at the residence (App. 6) (17:6), there was no testimony or evidence suggesting that anyone gave Deputy Welsch consent to enter the Waters' home. There was also no testimony establishing the circumstances under which law enforcement gained entry into the home. Deputy Welsch testified that he was wearing a recording device, but stated, "it appears it wasn't functioning during my contact with Danny" (App. 16) (17:16). Deputy Welsch questioned Mr. Waters about the accident and administered standardized field sobriety tests to Mr. Waters inside his home (App. 17-18) (17:17-18). He then placed Mr. Waters under arrest for operating while intoxicated (App. 11-12) (17:11-12). Deputy Welsch issued a Notice of Intent to Revoke Mr. Waters' license (App. 29-30) (1) and Mr. Waters requested a refusal hearing (App. 30) (2).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS PROBABLE CAUSE TO ARREST MR. WATERS FOR OPERATING WHILE INTOXICATED

In order to revoke a driver's license under the implied consent law, the court must find that the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol..." Wis. Stat. §

343.305(9)(a)5.a; *see also State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). “‘Under the influence of an intoxicant’ means that the defendant’s ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.” Wis. JI—CRIMINAL 2663. “Not every person who has consumed alcoholic beverages is ‘under the influence’... What must be established is that the person consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.” *Id.*

At a refusal hearing the defense may also challenge the arrest on the basis of a constitutional violation occurring prior to the instance of arrest. *In re Refusal of Anagnos*, 2012 WI 64, ¶ 42, 341 Wis.2d 576, 815 N.W.2d 675 (2012).

As will be discussed below, in this case the arresting officer’s investigation at the scene of the accident did not establish probable cause to arrest Mr. Waters for operating while intoxicated or to enter his home and investigate whether he was intoxicated. The subsequent arrest, excluding information gained from the unlawful home investigation, was without probable cause.

a. Standard of Review

Whether there was probable cause to arrest is a question of constitutional fact. The trial court’s factual findings are subject to the clearly erroneous standard, but the application of those findings to constitutional principles are subject to de novo review. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634 (2007).

**b. The Investigation at the Scene
of the Accident Did Not
Establish Probable Cause to
Believe Mr. Waters Committed
a Crime or Traffic Violation.**

At the scene of the accident, Deputy Welsch established: (1) Mr. Waters was involved in a traffic accident (App. 6) (17:6); (2) that he had consumed some alcohol while at a bar for two and a half to three hours (App. 14)(17:14); and (3) that after the parties exchanged information Mr. Waters left the scene (App. 13) (17:13).

Evidence of consumption of alcohol even in conjunction with a traffic accident does not yield probable cause to arrest. The Wisconsin Supreme Court has stated “unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest...” *State v. Swanson*, 164 Wis. 2d 437, 453 n. 6, 475 N.W. 2d 148 (1991)(citing *State v. Seibel*, 163 Wis.2d 164, 183 (1991)).

Courts have qualified *Swanson* as not requiring field sobriety tests in all arrests, but not to the extent that an accident and evidence of consumption alone constitute probable cause. *See, i.e., State v. Kasian*, 207 Wis.2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996) (driving into a telephone pole, the strong odor of intoxicants and slurred speech established probable cause); *State v. Babbitt*, 188 Wis.2d 349, 359, 525 N.W.2d 102 (Ct. App. 1994)(report of erratic driving, officer’s observation of crossing a center line multiple times, odor of alcohol, glassy bloodshot eyes, poor balance and uncharacteristic uncooperative attitude establish probable cause); *State v. Wille*, 185 Wis.2d 673, 684, 518

N.W.2d 325 (Ct. App. 1994)(hitting a car parked off the highway, the odor of intoxicants and saying “I’ve got to quit doing this” established probable cause).

Despite the traffic collision in the case at hand there were other facts the trial court recognized that mitigated probable cause (App. 24) (17: 24). After the collision, Mr. Waters stopped and exchanged information with the other driver (App. 15) (17:15). The other driver who interacted with Mr. Waters spoke with Deputy Welsch and did not report any indicators that Mr. Waters appeared intoxicated, such as slurred speech, glassy eyes or poor balance. (App. 14) (17:14). A bartender said he was aware that Mr. Waters was in the bar for two and a half to three hours, but he did not report any belief or indication that Mr. Waters was drinking excessively or that he in any way appeared intoxicated. (App. 15) (17: 15). Deputy Welsch admitted that there was nothing specific about the accident that would suggest Mr. Waters was impaired (App. 15) (17:15). Therefore, at the conclusion of Deputy Welsch’s investigation at the scene he did not have probable cause to believe Mr. Waters was operating while intoxicated.

Because Mr. Waters stopped at the scene and exchanged information with the other driver, there was no probable cause to believe he had illegally left the scene of an accident. When striking an attended vehicle, a driver has a duty to investigate what was struck, determine if there is any injury and provide certain information. Wis. Stat. § 346.67(1). There was no testimony at the hearing to suggest that Deputy Welsch suspected that Mr. Waters was in violation of this statute. Rather he indicated that Mr. Waters conversed with the other driver and exchanged information (App. 14) (17:14). Accidents resulting in injury, over \$200 in damage to government property or over \$1,000 in damage to

any property owned by any one person must be immediately reported to law enforcement. Wis. Stat. § 346.70. There was no evidence at the hearing, however, to raise probable cause to believe that this was an accident that required immediate reporting. Deputy Welsch did not testify that he suspected that Mr. Waters violated these or any other laws at the time that he proceeded to Mr. Water's home at midnight.

**c. Law Enforcement Lacked a
Constitutional Basis to
Subsequently Enter Mr.
Waters' Home at Midnight to
Conduct Further Investigation.**

Despite lacking probable cause to believe Mr. Waters had committed a crime or traffic violation, Deputy Welsch and at least one other officer entered Mr. Waters' home at midnight (App. 16) (17:16), and while inside questioned Mr. Waters (App. 16) (17:16), administered field sobriety tests (App. 17) (17:17) and arrested him (App. 12) (17:12).

“Warrantless searches are per se unreasonable under the Fourth Amendment subject to certain exceptions that are ‘jealously and carefully drawn.’ ... The government bears the burden of proving that a warrantless search falls within one of the narrowly drawn exceptions.” *State v. Payano-Roman*, 2006 WI 47, ¶ 30, 290 Wis. 2d 380, 714 N.W.2d 548 (2006). “It is axiomatic that the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S. Ct. 2091 (1984) (citations omitted).

In order to enter a home without a warrant, police need either probable cause and exigent circumstances or consent. *State v. Rodgers*, 119 Wis.2d 102, 107, 349 N.W.2d 453 (1984). Law enforcement can ask for permission to enter a

residence without probable cause or even reasonable suspicion. *State v. Stout*, 2002 WI App 41, ¶ 18, 250 Wis.2d 768, 641 N.W.2d 474 (2002). However, the request for permission, referred to a “knock and talk,” must not cross the line into a situation of constructive entry that has “lost its consensual nature.” *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 13, 330 Wis. 2d 760, 796 N.W.2d 429 (Ct. App. 2010).

Courts evaluate the totality of circumstances to determine whether law enforcement seeking entry into the home constitutes an unreasonable seizure under the 4th Amendment. *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997). Of particular importance is whether the knocking occurred in the middle of the night: “because our law and legal traditions long have recognized the special vulnerability of those awakened in the night by a police intrusion at their dwelling place, our Fourth Amendment jurisprudence counsels that, when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution.” *Id.* at 690. The court held that due to the midnight hour, just minutes of knocking on the door and window by the officers, coupled with shining a flashlight and “commands and requests to open the door” constituted a warrantless home entry. *Id.* at 692-693.

Likewise, the 10th Circuit Court of Appeals held that opening the door to law enforcement constitutes a seizure if not done voluntarily. *United States v. Reeves*, 524 F.3d 1161, 1168 (Ct. App. 2008). Opening the door is involuntary under the totality of circumstances if a reasonable person would not feel free to ignore the officers. *Id.* at 1168 (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870 (1980)). The court held that three officers pounding on

Reeves' door and window for at least twenty minutes while identifying themselves as officers was a constructive seizure despite never demanding that the occupant open the door. *Reeves*, 524 F.3d at 1168-69.

Distinguishing *Reeves* and *Jerez*, the Wisconsin 2nd District Court of Appeals held that a "knock and talk" is not overly intrusive where (1) the officers arrived at approximately 10:00 p.m. and shortly after Cesar returned home; (2) "only two officers" attempted to make contact with Cesar; and (3) there were no commands by the officers. *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 17, 330 Wis. 2d 760, 796 N.W.2d 429 (Ct. App. 2010).

In the case at hand, the undisputed testimony was that officers entered the defendant's home at midnight to investigate Mr. Waters. (App. 15) (17:15). There was no allegation that entry was with a warrant or with probable cause and exigent circumstances. Likewise, there were no details from which the court could infer that entry was consensual under the totality of circumstances, given the early morning hour or the nature of the efforts used by police to gain entry. The State, therefore, has not established that the entry was reasonable. Because the State has not met the burden of establishing that the warrantless entry of the home was justified, the defendant was not lawfully placed under arrest. Accordingly, he did not unlawfully refuse an implied consent test. Wis. Stat. § 343.305(9)(a)5.a. *See, In re Refusal of Anagnos*, 2012 WI 64, ¶ 42, 341 Wis.2d 576, 815 N.W.2d 675 (Wis. 2012).

CONCLUSION

For the above-stated reasons, the defendant-appellant respectfully requests that the trial court's order finding that he unlawfully refused an implied consent test be REVERSED.

Dated this 19 day of October, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that 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 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3324 words.

Dated this 19 day of October, 2018.

Signed:

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**CERTIFICATE OF COMPLIANCE
WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 19 day of October, 2018.

Signed:

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