STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1014-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER D. WILSON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, Affirming a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable David Borowski, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

DAVID MALKUS
Assistant State Public Defender
State Bar No. 1094027

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
malkusd@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. Police did not have implicit license to enter Mr. Wilson's backyard through the gate of his tall, solid privacy fence in order to conduct a knock and talk investigation.

Police violated Mr. Wilson's Fourth Amendment rights when they entered the curtilage of his home without a warrant through the gate of a tall, solid privacy fence that surrounded the perimeter of his backyard. By entering the fenced-in backyard, police did not use a pathway that a private citizen would customarily use to approach a stranger's home and, accordingly, they did not have implicit license to enter for the purpose of conducting a "knock and talk" investigation. *See Florida v. Jardines*, 569 U.S. 1, 8 (2013). As this Court has recognized, a fenced-in backyard "must be regarded as curtilage." *State v. Artic*, 2010 WI 83, ¶ 94, 327 Wis. 2d 392, 786 N.W.2d 430.

In response, the State first claims that there is "no authority" for the argument that the tall, solid privacy fence surrounding the perimeter of Mr. Wilson's backyard clearly indicated that the backyard was not held open to the public. (State's Br. at 18). The State is wrong. First, uncontroverted testimony at the suppression motion hearing established that the fence kept the backyard "private." (42:21). Moreover, the very existence of the fence—and the fact that it was tall, solid, and surrounded the perimeter of the yard—

clearly supports a finding that Mr. Wilson's backyard was not held open to the public. (*See* 42:21-22).

The State also asserts that "Wilson's claim that it was not 'common practice' to approach the garage side door through the backyard gate and that the officers only had an implicit license to approach by the front door is unsupported." (State's Br. at 19). However, this assertion misstates Mr. Wilson's argument, which was in reference to the court of appeals' holding in *State v. Edgeberg*, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994). In *Edgeberg*, the court concluded that police had implicit license to enter the porch of Edgeberg's home pursuant to "the community practice of entering the porch to knock" on the inner front door of the home, which suggested "no expectation of privacy" inside the porch. *Id.* at 346-347. By contrast, in Mr. Wilson's case there is no evidence in the record that it was common practice for members of the public to enter his residence through his gated privacy fence, as the police did. (43:1-22).

Additionally, the State incorrectly claims that Mr. Wilson "ignores the findings of fact that the gate was open with no attempt to exclude the public from entering and that the police were following Wilson's path through the open gate to the side garage door just as a member of the public could do." (State's Br. at 19-20). To begin with, the circuit court never made a factual finding that there was "no attempt to exclude the public," nor did it find that the "police were entering the backyard just as any member of the public could do." (43:1-22). Furthermore, while the gate was open, a garbage can blocked entry through

the gate such that police needed to physically remove the garbage can in order to enter the backyard. (42:31). The fact that the gate happened to be open did not authorize police to remove the garbage can obstructing entry and intrude upon the curtilage of Mr. Wilson's home without a warrant. *See State v. Davis*, 2011 WI App 74, ¶ 14, n.6, 333 Wis. 2d 490, 798 N.W.2d 902 ("[l]eaving a garage door open might reduce the resident's privacy interest and permit plain view observations from outside the garage, but that is a matter distinct from physical intrusion.")

Finally, the State contends that Mr. Wilson was not seized until after he left his backyard and returned to his car. (State's Br. at 21). This argument is misguided because it does not resolve the central issue of whether police violated Mr. Wilson's Fourth Amendment rights by entering his fenced-in backyard. As Mr. Wilson noted in his initial brief, when police obtain information through an unlicensed physical intrusion, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *Jardines*, 569 U.S. at 5 (*quoting United States v. Jones*, 565 U.S. 400, 406, n.3 (2012)). Here, police obtained information by questioning Mr. Wilson in his fenced-in backyard following an unlicensed physical intrusion into the yard. Accordingly, police violated Mr. Wilson's Fourth Amendment rights by conducting an unreasonable search that subsequently resulted in his seizure.

II. The State forfeited its arguments on probable cause and the exigent circumstance of hot pursuit by failing to raise this issue in its response to the petition for review.

As noted in his initial brief, because the court of appeals did not address the issue of probable cause and exigent circumstances as determined by the circuit court, Mr. Wilson did not raise this issue in his petition for review. "In cases where this [C]ourt reverses the court of appeals and the court of appeals did not reach an issue, [this Court] will often remand the case for consideration of the issue not reached." *State v. Wilson*, 2015 WI 48, ¶ 86, n.15, 362 Wis. 2d 193, 864 N.W.2d 52.

In response, the State refers to Wis. Stat. § 809.62(3m)(b) and claims that it can defend the court of appeals' ultimate result on any ground as long as this Court's acceptance of that ground does not change the outcome of the appeal. (State's Br. at 26-27). The State is wrong. Wis. Stat. 809.62(3m)(b) "clarifies that a respondent need not file *a petition for cross-review* to raise alternative issues or grounds in support of either (1) the court of appeals' ultimate result or (2) a judgment less favorable than that granted by the court of appeals but more favorable to the respondent than might be granted for the petitioner." Judicial Council Committee Note, 2008, Wis. Stat. § 809.62 (emphasis added). Nonetheless, "*[a]ny such alternative grounds for affirmance or lesser relief should, however, be*

identified in the response [to the petition for review]." *Id.* (emphasis added).[1]

Additionally, in *State v. Sholar*, 2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89, this Court noted the following:

> The forfeiture rule has also been applied when a party asserts new issues before this court that were not raised in a petition for review, a response to a petition for review, or a cross-petition. *See, e.g., State v. Smith*, 2016 WI 23, ¶ 41, 367 Wis. 2d 483, 878 N.W.2d 135; *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659. The purpose for forfeiture in *Smith* and *Sulla*, however, arose from the general rule that an issue not raised in the petition for review, response, or cross-petition is not properly before us.

Sholar, 2018 WI 53, ¶ 49.[2,3]

---

[1] Judicial Council Committee's Notes are not controlling authority, but are persuasive authority for understanding the meaning of procedural rules. *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 47 n.25, 274 Wis. 2d 220, 682 N.W.2d 405.

[2] In *Sholar*, the Court held that the State did not forfeit its argument on the prejudice prong of an ineffective assistance of counsel claim because the State could not have raised this issue in a petition for review, a response, or a cross-petition. *See Sholar*, 2018 WI 53, ¶¶ 1-2.

[3] *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985) ("Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived.").

Here, the Court entered an order on August 12, 2021, requiring the State to file a response to Mr. Wilson's petition for review. The State failed to file a response, and on September 1, 2021, the Court entered a second order, again requiring the State to file a response. Subsequently, the State filed a response that exclusively addressed whether police had implicit license to enter Mr. Wilson's fenced-in backyard in order to conduct a knock and talk investigation. The State failed to present any argument in regards to probable cause and exigent circumstances; therefore, the State's arguments on those points are not properly before this Court.

III. Police did not have probable cause and the exigent circumstance of hot pursuit to justify entry into the curtilage of Mr. Wilson's home.

A. At the moment police entered the curtilage of Mr. Wilson's home, there was no probable cause to arrest Mr. Wilson for a jailable offense.

1. The OWI cannot justify warrantless entry.

Where an underlying offense is a noncriminal, civil forfeiture offense for which no imprisonment is possible, exigent circumstances will rarely, if ever, be present. *State v. Ferguson*, 2009 WI 50, ¶ 27, 317 Wis. 2d 586, 767 N.W.2d 187 (*citing Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984)). Therefore, in order to justify a warrantless entry into the curtilage of the home for the

purposes of a probable cause arrest, the arrest must be for a jailable offense. *See id.*, ¶ 30.

According to the circuit court and the State, police had probable cause to believe Mr. Wilson had committed an OWI. (42:15; State's Br. at 26). However, at the suppression motion hearing, the officer testified that he did not know anything regarding Mr. Wilson's driving record before entering the backyard. (42:27). Therefore, he did not know whether the OWI he was investigating was a civil, nonjailable first offense OWI or a jailable subsequent OWI.

The above facts mirror those presented in *Welsh*, wherein "the police conducting the warrantless entry of [the petitioner's] home did not know that the petitioner had ever been charged with, or much less convicted of, a prior violation for driving while intoxicated." *Welsh*, 466 U.S. at 747, n.6. Therefore, as in *Welsh*, it must be assumed that "at the time of the [entry] the police were acting as if they were investigating and eventually arresting for a nonjailable traffic offense that constituted only a civil violation under the applicable state law." *Id.* Thus, even if police had probable cause to believe that Mr. Wilson committed an OWI, this belief could not justify entry into the curtilage of his home because it did not amount to probable cause of a crime.

2. The facts do not support a finding of probable cause for trespass or burglary.

According to the circuit court and the State, police also had probable cause that Mr. Wilson was

committing trespass and burglary. (42:13; State's Br. at 26). However, the evidence presented at the suppression motion hearing was inadequate to establish probable cause to arrest for these charges. The shortcoming of evidence is most clear when one engages in a simple thought experiment: if the officers simply stood in the alley behind Mr. Wilson's home until he came out and gathered no more evidence, could they arrest him for trespass or burglary? The answer, clearly, is "no," because the level of evidence available to the officers at the time of the intrusion could not, on its own, sustain a valid arrest.

The circuit court's probable cause finding relied on the following evidence: "[t]he SUV is parked on this parking slab," it is "parallel with the garage," the "tailgate is open," the "car is running," the caller said the driver "jumped the locked fence to enter the rear gate," and the "SUV [was] listed to someone who did not live at that address." (43:13).

First, the court's findings that the gate was locked and that the driver jumped the fence were not correct. There was no evidence presented that the gate was ever locked, only that it was latched. (42:29). Additionally, according to the officer, the 911 caller said the driver "had to climb onto the fence to open the fence," but did not say that he picked a lock or jumped the fence. (42:14). The fact that Mr. Wilson reached over the fence to unlatch the gate in fact indicates that he was familiar with the latch, not that he was illegally breaking into the fenced-in yard.

The court also relied on the fact that the car was parked parallel with the garage. (43:13). However, the manner in which the car was parked does not support a finding of probable cause—the officer's body cam clearly shows that there are other cars parked in the alleyway that are next to, rather than inside of, their garages, either parallel to the garage or the garage door, depending on what the home's space permits. (*See*, *e.g.*, 50 at 17:00-17:15).

This left the officer with three concerns, none of which support probable cause to *arrest* for trespass or burglary: possible OWI based on the driving, the car listing to a different address, and that the car's tailgate was left open and its engine left running. The intoxicated driving does not add to the probability that Mr. Wilson was engaged in a trespass or burglary. Additionally, it's clear that the officer did not know what to think of the other two facts. Once he arrived at the residence, he "observed the back fence of this residence was also ajar," looked inside the car, and "called the caller back with the information that our dispatch center provided." (42:13). The officer did not testify that he was concerned for anyone's safety and did not hear any sounds coming from the garage that would indicate an ongoing burglary. Moreover, the overhead door of the garage was closed, which weighs against the belief that a burglary was ongoing.

Again, if police had waited for Mr. Wilson to return to his car, they could not have arrested him for trespass or burglary based on the above facts because the facts do not establish probable cause to arrest. Therefore, police did not have probable cause to enter

the curtilage of Mr. Wilson's home in order to place him under arrest.

B. Even if police had probable cause to arrest, the exigent circumstance of hot pursuit did not justify police entry into the curtilage of Mr. Wilson's home.

With regards to warrantless entry of a home, exigent circumstances do not exist merely because there is probable cause to believe that a crime has been committed. *Welsh*, 466 U.S. at 753. The Fourth Amendment also requires proof of exigent circumstances. *State v. Weber*, 2016 WI 96, ¶ 19, 372 Wis. 2d 202, 887 N.W.2d 554. The basic test to determine whether exigent circumstances exist is an objective one based on the circumstances known to the officer at the time of the warrantless entry. *State v. Smith*, 131 Wis. 2d 220, 230, 388 N.W.2d 601 (1986). "The State bears the burden of proving that a warrantless home entry is justified by exigent circumstances." *Ferguson*, 2009 WI 50, ¶ 20.

According to the circuit court and the State, police entry into the curtilage of Mr. Wilson's home was justified by the exigent circumstance of hot pursuit. (43:8; State's Br. at 26). "[H]ot pursuit means some sort of a chase, but it need not be an extended hue and cry in and about (the) public streets." *U.S. v. Santana*, 427 U.S. 38, 42-43 (1976) (internal quotation omitted). When in hot pursuit of a fleeing suspect, police may make a warrantless entry onto private property to pursue the suspect. *Weber*, 2016 WI 96, ¶ 28. The basic ingredient of the exigency of hot pursuit

is immediate or continuous pursuit of a suspect from the scene of a crime. *Id.*

In support of its argument that police were in immediate or continuous pursuit of Mr. Wilson, the State relies solely on the fact that police arrived at the scene within minutes of Mr. Wilson's arrival. (State's Br. at 27).[4,5] However, this argument ignores a key piece of the officer's testimony, which is that following his arrival on the scene, he paused to perform a registration check on Mr. Wilson's car and subsequently "called the [911] caller back" in order to gather more information. (42:12-13). During this investigative pause, the officer discussed with the caller which streets Mr. Wilson had driven on, how many miles he had driven, details on his erratic driving, a description of his shoes, and his entry into his backyard. (42:13). It was only after this pause to investigate that the officer proceeded to enter Mr. Wilson's backyard and knocked on his side garage door. (42:14). If police were genuinely in "hot pursuit" of a suspect, they would not have engaged in these minutes-long delays before entering the curtilage to pursue the suspect. Consequently, the officer's

[4] The State also refers to Mr. Wilson's driving, parking, and entry into his backyard (State's Br. at 27), but these facts relate to whether probable cause existed for an arrest, not whether police immediately and continuously pursued Mr. Wilson from the scene of a crime.

[5] *Cf. Welsh*, where police entered the petitioner's home minutes after a witness observed him flee from his car, and the Court held that "the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Welsh*, 466 U.S. 740, 742-743, 753.

testimony does not support the State's argument that police immediately or continuously pursued Mr. Wilson from the scene of a crime.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Wilson respectfully requests that this Court reverse the court of appeals' decision and remand for that court to address Mr. Wilson's unresolved arguments. If this Court reaches the issue of probable cause and the exigent circumstance of hot pursuit, Mr. Wilson requests that the Court remand to circuit court with instructions to reverse its denial of Mr. Wilson's suppression motion and to vacate his judgment of conviction.

Dated this 28th day of February, 2022.

Respectfully submitted,

DAVID MALKUS
Assistant State Public Defender
State Bar No. 1094027

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
malkusd@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including 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 28th day of February, 2022.

Signed:

_____

DAVID MALKUS
Assistant State Public Defender