STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v WILLIAM JOHN KUCHARSKI, SR., Defendant-Appellant.	UNPUBLISHED September 30, 2004 No. 246791 St. Clair Circuit Court LC No. 01-002289-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v WILLIAM JOHN KUCHARSKI, JR., Defendant-Appellant.	No. 246841 St. Clair Circuit Court LC No. 01-002290-FH

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Following a joint jury trial, defendant William John Kucharski, Sr. (Kucharski Sr.), was convicted of aiding and abetting the operation of a motor vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1)(a) and (8)(c), and resisting or obstructing a police officer in the discharge of his duty, MCL 750.479. He was sentenced to probation for twenty-four months, with the first thirty days to be served in jail, plus fines and costs. Defendant William John Kucharski, Jr. (Kucharski Jr.), was convicted of two counts of OUIL, third offense, along with resisting or obstructing a police officer in the discharge of his duty, and failure to report an accident, MCL 257.622. He was sentenced to probation for twenty-four months, with the first 120 days to be served in jail, and to pay a fine of $100 for failure to report an accident, along with other fines and costs. Kucharski Sr. appeals as of right in Docket No. 246791. Kucharski Jr. appeals as of right in Docket No. 246841. We vacate Kucharski Sr.'s OUIL conviction, but affirm his conviction of resisting or obstructing a police officer. We vacate Kucharski Jr.'s convictions of OUIL and resisting or obstructing a police officer, but

affirm his conviction of failure to report. The case is remanded for further proceedings not inconsistent with this opinion.

This case began with a single motor vehicle accident that occurred on March 24, 2001. According to eyewitnesses, at approximately 5:05 p.m. on that date, Kucharski Jr. was erratically driving a white jeep that went off the road and crashed into a ditch. Shortly afterward, two trucks appeared at the scene, including a green Dodge from which Kucharski Sr. emerged. The latter and another man first attempted to right the jeep, which had ended up on its side, but were unable to do so. The men then opened the jeep's door atop the wreck and pulled out Kucharski Jr. With Kucharski Sr.'s help, Kucharski Jr. staggered into the driver's seat of the green truck and drove away. Kucharski Jr.'s appearance was described as "glassy"-eyed and "zombied." Two empty beer containers were found in the jeep.

The police traced the jeep to an address where they found Kucharski Jr. and arrested him. The police arrested Kucharski Sr. outside the house. Both were uncooperative and resistant. The police obtained a warrant for a sample of Kucharski Jr.'s blood, subsequent testing of which revealed an alcohol level of 0.20 grams per 100 milliliters. At trial, defense counsel stipulated to the test results and stipulated that this constituted double the legal limit for driving.[1]

I. Warrantless Search

Defendants argue that the trial court erred in failing to suppress evidence obtained as the result of the warrantless search of the home where Kucharski Jr. was found. We agree. This Court reviews de novo a trial court's ultimate decision on a motion to suppress," but reviews for clear error "the trial court's underlying findings of fact. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). See also *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

Evidence obtained in the course of a violation of a suspect's rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997); see also Const 1963, art 1, § 11. Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. *United States v United States Dist Court*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

The arresting police officer confirmed that he entered the home in question without a warrant, and testified that upon arrival at the residence that he learned from other police officers that the owner, Kucharski Sr.'s wife and Kucharski Jr.'s mother, was not cooperating with them. The arresting officer approached Mrs. Kucharski and explained that he believed defendants to be on the property and wanted to speak with them, in response to which Mrs. Kucharski replied, "I don't think I want you to come in." The officer recounted, "I explained to her at that point in time that we had probable cause to believe that they were on the property and that we wanted to

[1] At the time in question, MCL 257.625(1)(b) prohibited operation of a motor vehicle with "an alcohol content of 0.10 grams or more per 100 milliliters of blood . . . ." The Legislature has since reduced this limit to 0.8. 2003 PA 61.

talk to them and that she could be in violation of obstructing justice if she did not allow us to see the Defendants." According to the officer, Mrs. Kucharski then said he "could come in and that she wanted me to enter only just past the door and stay there." The officer did as she said, but when she started to move out of his sight he explained that, for safety reasons, he could not let her leave his field of view, and that he would have to follow her. According to the officer, Mrs. Kucharski "just—she said: Yeah." The two of them then walked to the back bedroom where Kucharski Jr. was found asleep in his street clothes.

The officer further stated that he had investigated the accident site, and had obtained information from the LEIN system about whose vehicle was involved. The officer explained that he understood from witnesses that the driver had appeared intoxicated, and from the LEIN system that the owner had several OUIL convictions. The officer added that he thus had probable cause that what he was investigating was a third OUIL incident, which would be a felony. The officer further testified that the discovery of a cracked windshield raised the concern "if there's injuries," and that the suspect's having fled the scene raised the concern that he would need to be found in order to "obtain a blood alcohol level."

The prosecutor argued that the arresting officer obtained consent from Mrs. Kucharski to enter the residence and, alternatively, that the unwarranted search was proper because the officer was investigating a felony. The trial court entertained some argument, then ended the discussion and stated, "I rule that the entry was not unlawful and the arrest that resulted as a result of that was also lawful." The court gave no indication whether it found the search lawful because of consent, or probable cause, the two bases argued at trial.

"Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999). Among these "is a search conducted pursuant to consent." *Id.* at 294. A court deciding the question of consent must consider all the circumstances to determine whether consent was freely given. *Id.* "The presence of coercion or duress normally militates against a finding of voluntariness." *Id.* A person consenting to a search may limit the scope of that consent. *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001). An objective standard governs the inquiry. *Id.*

The prosecutor's argument notwithstanding, the arresting officer nowhere indicated that he felt that he had been given permission to enter and search the house. Instead, he relied exclusively on his having had probable cause to believe that Kucharski Jr. had committed a felony. Even in arguing consent on appeal, plaintiff characterizes Mrs. Kucharski as having, "however, reluctantly, consented to . . . entry into the home." All indications in the record are that Mrs. Kucharski plainly stated that she did not wish the police to enter, but that the police persisted, even telling her that she might be in "violation of obstructing justice" if she did not permit access to defendants. It was only then that Mrs. Kucharski allowed the officer to come just inside the door, but the officer then persuaded her to allow him to follow her about the house by explaining that, for safety reasons, he was obliged as a matter of policy to keep her within his field of view. We conclude that this evidence cannot be interpreted as indicating that Mrs. Kucharski freely consented to the officer's entry. Instead, she submitted to the officer's requests under real duress. Because we cannot conclude that the search was consensual, we must consider the question of probable cause.

One of the exceptions to the warrant requirement is the exigent-circumstances exception. *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). According to this doctrine, the police must have "probable cause that the premises to be searched contains evidence or suspects and that the circumstances constituted an emergency leaving no time for a warrant." *People v Davis*, 442 Mich 1, 24; 497 NW2d 910 (1993). The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993). This involves more than the mere possibility that evidence will be destroyed. *People v Blasius*, 435 Mich 573, 595; 459 NW2d 906 (1990). Instead, the police must produce specific facts supporting a reasonable and objective belief that there is an imminent risk of removal of evidence. *Id*. at 595.[2]

In this case, the trial court was free to believe the arresting officer's testimony that he went to the house in question with knowledge that Kucharski Jr. had a string of OUILs such that the instant one constituted a felony. However, we conclude that the court lacked a competent evidentiary basis for concluding that any of the exigent circumstances presented justified the warrantless search.

On appeal, plaintiff argues that the warrantless search was justified on the ground that the police needed "evidence of Defendant's bodily alcohol level before it had significantly changed due to further lapse of time." However, taking this argument at face value would mean that the police would never need a warrant when conducting a timely investigation of an intoxication-based offense. Plaintiff relies on a Wisconsin case, wherein that state's highest court held that the need to obtain a timely blood-alcohol test on a suspect constituted exigent circumstances justifying a warrantless search. *State v Welsh*, 108 Wis 2d 319, 336-338; 321 NW2d 245 (1982), rev'd sub nom *Welsh v Wisconsin*, 466 US 740; 104 S Ct 1091; 80 L Ed 2d 732 (1984). As the subsequent history with our citation indicates, however, the United States Supreme Court thought otherwise.

In reversing the Wisconsin Supreme Court, the United States Supreme Court stated that "a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id.* at 754. Although the Supreme Court stressed that at issue in that case was a misdemeanor, "a noncriminal, civil forfeiture offense for which no imprisonment is possible," *id.*, whereas defendant in this case was under investigation for a felony, plaintiff has not cited any competent authority that stands for the proposition that where intoxication is an element of a suspected crime, and the police are in a position to take the suspect into custody while still intoxicated in connection with that alleged crime, the police are excused from endeavoring to obtain a warrant before entering the suspect's home to seize his or her person. Because there was no evidence to suggest that Kucharski Jr. posed an unusual flight risk, and because a police officer should know that alcohol

[2] Indeed, "To validate searches of a residence on the basis of hypothetical possibilities of destruction or removal [of evidence] would essentially nullify Fourth Amendment protections." *Blasius*, *supra* at 594.

lingers in the system for hours, and that medical science provides methods for calculating earlier alcohol levels on the basis of later-existing ones, we cannot accept plaintiff's reasoning.

Plaintiff also suggests that public safety justified the warrantless search, on the ground that the police needed to prevent defendant from engaging in still further driving while intoxicated. See *People v Oliver*, 417 Mich 366, 384; 338 NW2d 167 (1983) (exigencies justifying a warrantless search include "ensuring the safety of citizens"), rejected in part on other grounds in *People v Williams*, 422 Mich 381, 387-388; 373 NW2d 567 (1985). Plaintiff again relies on *Welsh*, wherein the Wisconsin Supreme Court also concluded that preventing an apparently intoxicated driver from endangering the public by returning to the road constituted an exigent circumstance justifying a warrantless search. *Welsh*, *supra* at 108 Wis 2d at 337-338. But, again, the United States Supreme Court threw that proposition into doubt. Nearly on point with the instant case, the Court stated that "because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety." *Welsh*, *supra* at 466 US 753. Although defendant drove away in a separate vehicle after having abandoned the jeep, he was indeed at home when the police came looking for him. Plaintiff cites no good law that stands for the proposition that whenever the police understand that a citizen is intoxicated, they are entitled to force their way into that person's home in order to prevent him or her from endangering the general public by doing something that is especially dangerous for an intoxicated person to do. It is also well to note that the police in this case expressed no such concern while attempting to justify the search.

Finally, plaintiff hints that the police were justified in acting without a warrant because of concerns for Kucharski Jr.'s own safety, in that he might have suffered an injury in the crash. See *Oliver*, *supra* at 384. The arresting officer testified that, in light of the damage to the abandoned jeep, "we don't know if there's injuries." This falls far short from indicating that the police acted out of a genuine concern for Kucharski Jr.'s safety. Indeed, any such suggestion on appeal is especially difficult to credit, given that the police entered what was apparently the suspect's home, over the protestations of his mother, in order to continue the investigation. Plaintiff cites no authority for the proposition that whenever the police are able to imagine that a suspect has been injured, they are therefore entitled to enter that person's home without warrant ostensibly to provide aid and comfort to that suspect.

For these reasons, we hold that the search of the home in question was unconstitutional, and that evidence obtained as a result should have been suppressed as the fruit of the poisonous tree. See *People v Hill*, 192 Mich App 54, 56; 480 NW2d 594 (1991). This leaves the question of identifying, and assessing the consequences of, that tainted evidence.

Where a defendant shows preserved, constitutional error, "[I]f the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (appendix), citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

Kucharski Jr. was taken into custody, and subjected to a blood-alcohol test under warrant, as the result of the illegal search. Accordingly, the evidence concerning the condition the police found him in, and the results of the blood-alcohol test, were the fruit of the poisonous tree. Lacking that, the prosecutor had the eyewitness testimony concerning Kucharski Jr.'s erratic

driving leading up to the accident, and his behavior upon moving from the jeep to the truck, and also the circumstantial evidence of empty alcohol containers found in the jeep. Although the latter might have been sufficient by itself to establish his guilt of OUIL, the blood-alcohol test was the most damaging evidence on this matter,[3] and the police testimony concerning the condition the police found him in greatly underscored the testimony of the witnesses at the scene of the accident. We conclude that there is a reasonable doubt whether Kucharski Jr. would have been convicted of OUIL had the results of the illegal search been suppressed. Kucharski Jr.'s two convictions of OUIL are therefore vacated.[4]

Kucharski Sr. argues that the search of the home, and subsequent discovery of Kucharski Jr., was unlawful, but he does not specifically argue that the seizure of his own person was the fruit of the poisonous tree. And rightly so, in that the evidence suggests that Kucharski Sr. came forward, accompanied by his wife, while the police were dealing with Kucharski Jr. Moreover, Kucharski Sr.'s role in delivering the drive-away vehicle to his son, and assisting the latter in getting out of the wrecked jeep and into the other vehicle, was wholly a function of eyewitness testimony, not the result of the challenged search. Accordingly, the validity of Kucharski Sr.'s conviction of aiding and abetting OUIL depends on the validity Kucharski Jr.'s conviction stemming from his having driven from the accident scene while intoxicated.

Because there is a reasonable doubt whether Kucharski Jr. would have been convicted of the second instance of OUIL without the evidence stemming from the improper residential search, plaintiff likewise cannot show that Kucharski Sr.'s derivative conviction was not similarly tainted. For these reasons, Kucharski Sr.'s conviction of aiding and abetting OUIL is also vacated.

This analysis does not apply to Kucharski Jr.'s conviction of failure to report an accident, however. The evidence against him in connection with that offense was wholly a matter of eyewitness testimony and identification stemming from the scene of the accident. The conviction of failure to report is thus not impugned by the unconstitutional search. Accordingly, we affirm Kucharski Jr.'s conviction of failure to report.

This leaves the question of the impact of the illegal search on defendants' respective convictions of resisting or obstructing a police officer. The briefs do not address this question, and thus do not assert that where probable cause to arrest a suspected felon exists, that arrest is nonetheless unlawful, for purposes of triggering the right to resist arrest, if it follows from an improper search.

Defendants were charged with violating MCL 750.479, which at the time in question forbade resisting or opposing "persons authorized by law to maintain and preserve the peace, *in their lawful acts . . .*" (emphasis added). This language was interpreted to require that an arrest

[3] It is apparent that defense counsel would not have stipulated to the high blood-alcohol level at the time of Kucharski Jr.'s test had the test itself been suppressed.

[4] Without the blood alcohol content test results, defendant cannot be tried under MCL 257.625(1)(b) for unlawful blood alcohol level.

being resisted be a lawful one.[5] See *People v Rice*, 192 Mich App 240, 243; 481 NW2d 10 (1991); *People v Reed*, 43 Mich App 51, 53-54; 203 NW2d 756 (1972). "[U]nlawful arrest is nothing more than an assault and battery against which the person sought to be restrained may defend himself as he would against any other unlawful intrusion upon his person or liberty." *People v Eisenberg*, 72 Mich App 106, 111; 249 NW2d 313 (1976).

Because Kucharski Jr.'s arrest was the result of an illegal search, the arrest was unlawful and thus triggered the right to resist. Accordingly, Kucharski Jr.'s conviction of resisting or obstructing a police officer in connection with that arrest must be vacated.

As discussed above, Kucharski Sr.'s arrest took place when he chose to approach the police outside the house. His arrest was thus not the direct result of the unconstitutional search within the house. Accordingly, he had no right to resist. Therefore, Kucharski Sr.'s conviction of resisting or obstructing an officer is affirmed.

II. Double Jeopardy

Kucharski Jr. argues that double jeopardy prohibits two OUIL charges because the charges stemmed from the same transaction.

The Double Jeopardy Clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994), citing US Const, Ams V and XIV, Const 1963, art 1, § 15, and *People v Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988).

Plaintiff cites the same transaction test of *People v White*, 390 Mich 245; 212 NW2d 222 (1973). However, our Supreme Court recently overruled *White* in this regard, and reinstated the same elements test established by federal precedent. *People v Nutt*, 469 Mich 565, 568, 592; 677 NW2d 1 (2004), citing *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). The rule reestablished in *Nutt* is that double jeopardy principles "preclude serial prosecutions only of crimes sharing identical elements" arising from a single criminal episode. *Nutt*, *supra* at 567-568. The present case, however, involves a single prosecution, not serial ones, and so the distinction between *White* and *Blockburger* does not come into play.

Defendant states that "the law is silent as to whether the legislature authorized or intended multiple punishment from two drinking and driving offenses occurring consecutively or continuously and display a single criminal intent or objective." However, defendant does not otherwise suggest that the Legislature envisioned any limitation at all on how soon after one act of drunk driving a subsequent one may be separately charged. At issue here is whether a person

[5] Since defendants' arrests, the statute has been substantially recast, effective in 2002, and no longer includes the words, "authorized by law." We express no opinion whether this legislative revision has removed the illegality of the arrest as a defense to a charge of resisting arrest. We note, however, that MCL 750.479(1) continues to prohibit interference with a "duly authorized" officer "acting in the performance of his or her duties," and that subsection (8)(a) specifies that "obstruct" includes the "knowing failure to comply with a lawful command."

who drives one vehicle while intoxicated until a mishap renders it inoperable, then immediately drives away in a second vehicle while still intoxicated, has committed one or two acts of OUIL.

At trial, defense counsel likened the multiple charges in this case to charging separately in connection with each of several pills involved in an illegal drug sale. The prosecutor likened the situation to selling illegal drugs at one house, then walking next door and conducting a second such sale. We find that the prosecutor's analogy is the more apt. This case concerns one act of drunk driving that began and ended in a white jeep, and a wholly separate one that began and ended in a green truck. Defendant's conduct thus stemmed from two separate decisions to begin driving. As the trial court observed, in this instance the prosecutor was obliged to prove all elements separately in connection with each driving episode. This is a case of separate acts, involving separate vehicles, that happened to occur in sequence, not a single act that persisted despite a minor interruption.[6]

III. Juror Irregularity

Kucharski Jr. argues that the trial court erred in declining to adjourn sentencing in light of indications that one of the jurors might have been biased against him, and asks this Court to reverse for that reason. We conclude that defendant abandoned this issue before each tribunal, and thus that no relief is warranted.

At the start of sentencing, the trial court reported that there had been some telephone calls from defense counsel's office "in the nature of suggestion that there may have been difficulties with in some way with the jury," and that defense counsel was seeking an adjournment of sentencing proceedings in order to allow time for further investigation. The court further reported receiving a message from one juror who was expressing dismay at having been contacted by an investigator. The court stated, "I instructed my assignment clerk when I learned about [defense counsel's] prayer for hearing that it would have to come on by the usual course. A motion, filed motion, stipulation or whatever. So, I don't think that I've seen that. It's not on my docket." The court continued, "I don't have anything in writing, so . . . I'm not probably going to listen to . . . any sort of a suggestion for a motion." However, the court allowed defense counsel to speak to his concern, as a courtesy. Defense counsel's response included the following:

> I'm not going to go through the context of the motion, but I was approached on the 22nd of January, which was a period of time that would not allow me to schedule up a regularly noticed motion for a motion Friday. I was approached by a woman . . .. And . . . I'd like to . . . show you an Affidavit that she has executed relative to a juror who had prior knowledge of the litigant, William Kucharski, Jr., and in a very negative sense.

[6] That the first driving incident ended with the vehicle's leaving the road and becoming inoperable well punctuates the separateness of that motoring endeavor from the one that followed.

Defense counsel protested that "there may be a tainted jury." The trial court refused to look at the affidavit, and reiterated, "I'm going to require that you file a motion." The court proceeded with sentencing. The lower court record includes no written motion concerning juror bias, and no copy of the affidavit of which defense counsel spoke.

In his brief on appeal, defendant states, "A juror gave to trial counsel EXHIBIT 1, which appellate counsel will immediately provide when she receives the same from trial counsel, who has not yet responded to her repeated requests for the same." Defendant further reports, "Appellate counsel did not bring a motion in the trial court within the statutory 56 days and has filed a Motion for Remand to permit the defendant-appellant to hold an evidentiary hearing."

An appellant may move this Court to remand a case to the trial court, if the appellant acts within the time provided for filing a brief on appeal. MCR 7.211(C)(1)(a). In this case, this Court granted defendant's motion to extend the time allowed for filing his brief, setting forth a deadline of November 7, 2003. However, defendant did not file his brief and motion to remand until December 3, 2003. Even then, the motion was not properly supported. This Court denied the motion on February 4, 2004.

Because trial counsel failed to file a formal motion in the matter as directed by the trial court, and because appellate counsel failed to move this Court for a remand in timely fashion or properly support the motion, we deem this issue abandoned.

In light of our disposition of this case stemming from the issues discussed above, we need not reach Kucharski Jr.'s remaining issues on appeal.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey