

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 8, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0832-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY F. BOETTCHER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County:
MARIANNE E. BECKER, Judge. *Affirmed.*

BROWN, J. Gary F. Boettcher appeals an order declaring that his warrantless arrest for intoxicated driving did not violate the Fourth Amendment. In particular, Boettcher relies upon *Welsh v. Wisconsin*, 466 U.S. 740 (1984), which held that police officers do not have the right to enter a suspected intoxicated driver's home without consent unless exigent circumstances are present. We hold that this is not a *Welsh* case since Boettcher gave police consent to enter. We affirm.

At about 10:00 a.m. on August 17, 1994, a citizen approached a Waukesha police officer, Officer Fletcher, and indicated that the driver of a black Cadillac with license plate "BOSS2" was possibly intoxicated. Just as Fletcher broadcast the report by radio, Officer Frea spotted that same car passing him. The driver, whom Frea recognized as Boettcher from previous contacts, pulled into a private driveway, and Frea made a U-turn in order to enter the driveway and contact Boettcher. As Frea waited for traffic to clear, the same citizen witness approached his squad car and told him that Boettcher had nearly fallen over the hood of his vehicle when leaving a nearby tavern. As the witness spoke, Frea observed Boettcher exiting his car and walking very unsteadily to his residence. Frea pulled into the driveway when traffic cleared, just as Boettcher entered the residence and shut the door.

Frea knocked at Boettcher's door and Boettcher himself answered. Frea told Boettcher that police had received a report of a car with a description matching Boettcher's auto being driven by an intoxicated driver. Boettcher asked whether Frea wished to come in or whether the officer preferred to talk outside. Frea entered the kitchen area of the house and the conversation continued. He asked to see Boettcher's driver's license. Boettcher replied that it was in his car. As Boettcher spoke, Frea noted a strong odor of intoxicants on his breath, his bloodshot and glassy eyes, and his tendency to spit as he spoke. Frea asked Boettcher to retrieve his license from the car, and he did so. As Boettcher walked to the car, he had difficulty maintaining his balance and could do so only by bracing himself against the building and the squad car. Frea then

asked Boettcher if he had been drinking, and he admitted to having two drinks and two coffees.

Fletcher, who had made the radio report, arrived and together the officers administered field sobriety tests, including a preliminary breath test. After an unsatisfactory performance on the finger-to-nose test and a positive breath test result, the officers arrested Boettcher for driving while under the influence of intoxicants.

Before trial, Boettcher moved for dismissal of the charge on the grounds that his arrest was invalid under the Fourth Amendment because the officers had no warrant and because there were no exigent circumstances to justify the officer's warrantless entry into his home. The trial court denied his motion, and we granted leave to appeal this nonfinal order. We now affirm.

Questions regarding the constitutional propriety of stops and seizures are questions of law, which this court examines without deference to the trial court's findings. *State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990). Boettcher contends that this case presents circumstances similar to *Welsh*, in which the United States Supreme Court held that police may not enter a suspect's home without a warrant in order to arrest him or her for a civil, nonjailable traffic offense. *Welsh*, 466 U.S. at 754. In *Welsh*, a citizen observed a car being driven erratically and eventually swerving off of the road and into a field. The driver walked away from the scene before police arrived, but the witness told them that the driver was either intoxicated or ill. After obtaining the driver's name from the vehicle registration, police

entered his home and arrested him in his bedroom for driving while intoxicated. *Id.* at 742-43.

Physical entry of the home is the chief evil against which the Fourth Amendment is directed, and warrantless seizures inside a home are presumptively unreasonable. *Id.* at 748-49. The *Welsh* Court reasoned that before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances which overcome that presumption, such as the preservation of public safety or the need to prevent the destruction of evidence. *Id.* at 750. Boettcher contends that no such exigent circumstances existed and that the officer was therefore not entitled to enter his home.

The State argues, on the other hand, that there is no necessity to demonstrate exigent circumstances because Boettcher consented to the police entry of his home. We agree.¹ In fact, the *Welsh* Court assumed that the police in that case had not received consent to enter Welsh's home. *Id.* at 743 n.1. In this case, the trial court noted Boettcher's consent in its ruling. Our examination of the testimony at the motion hearing confirms that finding. Boettcher testified as follows:

¹ Boettcher asserts that because the State failed to argue consent before the trial court, it is now precluded from making that argument on appeal. He relies upon certain language in *State v. Brown*, 118 Wis.2d 377, 381-82, 348 N.W.2d 593, 596 (Ct. App. 1984), for this proposition. However, in *State v. Holt*, 128 Wis.2d 110, 122-23, 382 N.W.2d 679, 686 (Ct. App. 1985), we dismissed the language relied upon by Boettcher as dicta and held that we may affirm a trial court's ruling on grounds other than those presented to the trial court whether raised by the State at trial or not. A petition for review of this decision was denied by our supreme court and the *Holt* rule has been the law in Wisconsin for the past ten years.

Q: Will you state whether or not the police officer came through that door into the kitchen?

A: Yes, I told him to come in, or did he wish to talk outside.

Boettcher added that the officer's entry into his home was very brief, saying, "Nothing happened inside the kitchen. He just stepped in and he went outside."

Boettcher also asserts that Frea did not inform him of his reason for contacting him. This is in direct conflict with the officer's earlier testimony. The trial court noted in its ruling on the motion to dismiss that it found Frea to be credible, and Boettcher to be not credible. Although we review the legal issues in this case independently, we give deference to the trial court on factual findings, such as the credibility of witnesses, unless they are clearly erroneous. *See State v. Rohl*, 104 Wis.2d 77, 90, 310 N.W.2d 631, 638 (Ct. App. 1981). Our review of the testimony satisfies us that the trial court's findings regarding credibility assessments were not clearly erroneous.

Boettcher's arrest, then, is not in violation of the Fourth Amendment under *Welsh*. The information provided by the citizen witness was sufficient when combined with the officers' corroboration of important elements of the information, such as the make, model and license plate of the car, and the unsteady gait of the driver as he walked, to allow the officer to investigate further. *See State v. Krier*, 165 Wis.2d 673, 676-77, 478 N.W.2d 63, 65 (Ct. App. 1991).

Moreover, the officers' observation of Boettcher and their administration of sobriety tests after they contacted him provided them with probable cause for his arrest. The officers, considering the facts and circumstances within their knowledge, reasonably believed that an offense had been committed. *State v. Koch*, 175 Wis.2d 684, 700-01, 499 N.W.2d 152, 161 (1993).

Frea's own observations, combined with the witness' report, provided him with a reasonable suspicion which justified contacting Boettcher. Boettcher then consented to Frea's entry of his home and voluntarily cooperated with Frea and Fletcher as they administered sobriety tests. This, in turn, allowed the officers to develop probable cause for his arrest. We therefore hold that the arrest was valid and affirm the order of the trial court.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.