COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1042-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER D. LAURIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

¶1 BROWN, P.J. While there are several issues in this appeal, they all arise out of a police officer pursuing and seizing Christopher D. Laurin from the enclosed but unlocked porch of his house. Both the State and Laurin correctly cite ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), for the proposition that a warrantless nighttime entry into a suspect's home for a civil, nonjailable traffic offense is

prohibited by the Fourth Amendment of the United States Constitution. The parties spend much of their resources arguing about whether Laurin was being pursued for a nonjailable traffic offense or whether he was being pursued for fleeing and eluding—a misdemeanor. Laurin claims that the fleeing and eluding contention of the State is without merit and therefore this is a ***Welsh*** case. The State argues that fleeing and eluding in fact occurred, thus taking this case out of the ***Welsh*** paradigm.

¶2 We decline to answer the issue because the case can be resolved on another basis—one which the trial court touched upon as a ground for denying Laurin's motion to suppress. The officer did not pursue Laurin into his home. He went into Laurin's unlocked porch. Thus, this is not a ***Welsh*** case, there was no Fourth Amendment violation and we affirm the trial court.

¶3 On August 15, 1999, at about 3:00 a.m., an officer with the City of Kenosha Police Department was patrolling in a squad car when he heard a loud muffler from about two blocks away. He then observed that the noise was coming from a motorcycle. He saw the operator of the cycle make an illegal U-turn and come in his direction. He then observed the operator turn the cycle onto and drive on the sidewalk.

¶4 The officer turned on his overhead red and blue lights. The cycle driver passed the squad car going in the opposite direction and went around a house located on a corner and into the backyard of that house. The officer waited, believing that the driver would soon come out from between the backyards of the neighborhood in an effort to get away. But when this did not occur, the officer got out of his squad and went to investigate. He located the motorcycle in the

backyard, touched it and learned that it was warm and then heard some keys jingling. He saw that someone was trying to enter the house.

¶5 The officer went up to the enclosed but unlocked porch and saw Laurin attempting to enter the house. The officer entered the porch area with the intention of questioning Laurin about driving on the sidewalk. At this time, the officer noted an odor of alcohol on Laurin's breath. He asked Laurin to step out of the porch and walk outside. At this point, the officer considered that Laurin was not free to leave. Laurin stumbled while attempting to go down the porch stairs and had to be helped by the officer. When Laurin got to the bottom of the stairs, the officer requested that he lie down on the ground on his belly because he was so intoxicated that the officer believed Laurin could not function properly. The officer then placed Laurin in handcuffs and arrested him for operating a vehicle while intoxicated. Laurin refused to take a chemical test as provided for under Wisconsin's implied consent law. A formal complaint charged Laurin with operating while intoxicated, third offense.

¶6 Laurin pled not guilty and brought a motion to suppress all evidence obtained as a result of an illegal arrest. At the conclusion of the testimony, Laurin argued that the facts leading up to the arrest were governed by ***Welsh***. He asserted that a warrantless entry into his house had occurred solely due to the officer's following up on a traffic offense. Therefore, the "hot pursuit" exception to the rule against warrantless entry did not apply. To the State's contention that the officer was actually following up on a fleeing and eluding—a misdemeanor punishable by a jail term—Laurin replied that there must be some evidence that he "purposely" eluded the officer. Laurin further argued that the porch had a door to it; the officer never knocked—he just went in the door and began to question Laurin. Laurin was not free to leave from that point on.

¶7 Laurin also faulted the probable cause to arrest for operating while intoxicated. He posited that the only evidence of intoxication was the odor on his breath. No field tests were conducted. And the evidence of stumbling was easily explained by the fact that there was no lighting on the stairs.

¶8 The trial court denied the motion. The trial court found that Laurin was aware of the officer's presence as he drove his motorcycle past the squad car. The trial court came to this conclusion after noting that it was 3:00 a.m., there was no other traffic, Laurin knew he was driving his cycle on the sidewalk and he had to know that the red and blue lights were meant for him. Therefore, Laurin was engaged in fleeing and eluding the officer. Because Laurin was fleeing, the officer had a right to pursue and this right included the right to pursue into a home. The trial court further held that, in its opinion, the officer did not even enter the home; the pursuit ended on the porch—which is not the same as culminating inside the home. As for probable cause to arrest for operating while intoxicated, the trial court found that the record supported it. The driving on the sidewalk was evidence of driving in an impaired condition, as was the odor on Laurin's breath and his difficulty in walking. The trial court considered that the lack of field sobriety tests was of no consequence.

¶9 Prior to the trial date, Laurin brought a motion to reopen the suppression hearing. Laurin's basic premise was that new evidence had been discovered which was material to the trial court's earlier credibility assessment of the arresting officer. Laurin noted that, at the suppression hearing, the officer testified how he turned on his red and blue lights as Laurin was going past him on the sidewalk. But, two neighbors had now come forward ready to testify that the officer did not turn on the red and blue lights until the squad parked in Laurin's driveway, after Laurin had pulled into the backyard and turned his lights off.

Laurin claimed that this evidence directly contradicted the officer, went to the heart of the fleeing-and-eluding evidence and therefore warranted a reexamination of the trial court's credibility assessment of the officer.

¶10 Laurin also pointed out that, at the motion hearing, the officer had testified that Laurin's house was on the corner. But at his refusal hearing, the officer changed his story to say that the house was in the middle of the block. Laurin contended that this contradicted the State's fleeing-and-eluding theory because if Laurin did not in fact "go around the corner," then the weight of the fleeing evidence is less.

¶11 The trial court held a nontestimonial hearing and denied the motion to reopen the testimony. The trial court reasoned that, even if the red and blue lights were not turned on until later, it was still convinced that Laurin knew the officer was there, that the squad was the only vehicle on the road at 3:00 a.m., that Laurin had to know the officer observed him driving on the sidewalk and that he fled for that reason.

¶12 Laurin thereafter pled no contest. On appeal, Laurin raises the same arguments that he did before the trial court, both in his motion to suppress and in his motion that the suppression hearing be reopened.

¶13 As we can see from the above detailed background leading to this appeal, the parties spent a lot of time disagreeing about whether a misdemeanor was occurring in the presence of the police instead of merely a traffic offense. But we will not go there. There are two reasons why. First, this court is not convinced that it makes a difference whether the police are pursuing a person for a nonjailable traffic offense or for a misdemeanor. While the United States Supreme Court has expressly left open the question of whether "hot pursuit" of a

person suspected of a misdemeanor comes within the holding announced in ***Welsh***, the Seventh Circuit recently construed ***Welsh*** to imply that exigent circumstances will not allow entry into a person's home even for a misdemeanor. *See* ***Clark v. Henninger***, No. 96-8044, unpublished slip op. at 4 (WL 2000 7th Cir.). We conclude that since the issue of whether a misdemeanor would justify entry into a person's home while in hot pursuit is unsettled, it is best that this error-correcting court not decide the issue if there is another, narrower ground available.

¶14 Another ground exists. "[P]hysical 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 U.S. 297, 313 (1972). It is directed to physical intrusions *into* private dwellings. *See* ***Welsh***, 466 U.S. at 748. The law in Wisconsin is that law enforcement officers do not invade the privacy of a home when they use the normal means of access to and egress from a residence. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994). Entry into a screened but unlocked porch does not constitute entry into a home where there is another door to the actual living quarters. *See* ***id***. Therefore, Laurin was in a "public place" for purposes of the Fourth Amendment. His ***Welsh*** argument fails.

¶15 Laurin also argues that there was no probable cause to arrest him for operating while intoxicated. We disagree. The officer saw Laurin make an illegal U-turn. Then Laurin shot past a police vehicle from fifteen feet away while driving his motorcycle on the sidewalk. We interpret the trial court's oral decision to say that Laurin must have known the police officer was present, but drove on the sidewalk anyway. We read the trial court to have implicitly reasoned that this action could well be the product of an inebriated state of mind. We agree with this

assessment. Also, the officer testified that there was a strong odor of alcohol on Laurin's breath. The three events, taken together, were enough for the officer to have probable cause to arrest for operating while intoxicated. The officer's probable cause was only strengthened when Laurin stumbled so much while coming down the stairs of his porch that the officer had to assist him. The officer further testified that he had Laurin lie down on his stomach because he was concerned that Laurin was too intoxicated to stand. There was no need for the officer to have Laurin perform field sobriety tests. The probable cause argument has no merit. We affirm the trial court.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.