COURT OF APPEALS DECISION DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

No. 01-0237-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN H. CUTSFORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT WING, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Dean Cutsforth appeals a judgment convicting him of operating while intoxicated, second offense, contrary to WIS. STAT. § 346.63(1)(a).[2] He also appeals an order denying postconviction relief. He

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version.

[2] WISCONSIN STAT. § 346.63(1)(a) provides in part:

(continued)

contends that his warrantless arrest violated his Fourth Amendment rights, requiring the suppression of all evidence taken incident to the unlawful arrest. He contends that no exigent circumstances allowed the police to enter his home to arrest him. This court disagrees and affirms.

BACKGROUND

¶2 On November 24, 1999, at approximately 11:20 p.m., Elmwood, Wisconsin, police officer Jeffrey Krisik was driving his squad car when it was nearly struck by a pickup truck turning right from Main Street onto Race Avenue in Elmwood. Krisik had to swerve to avoid a collision.

¶3 Krisik activated his radar and clocked the truck as its speed was increasing, locking in the truck's speed at thirty-seven miles per hour. Krisik immediately pursued the truck with his lights flashing as the truck traveled out of Pierce County into Dunn County at a high rate of speed. With his lights and siren on, Krisik reached speeds nearing ninety miles per hour while slowly closing the distance between his squad car and the pickup truck.

¶4 Ultimately, the truck pulled into a driveway on County Highway C in Dunn County. Cutsforth, the only person in the truck, exited the vehicle as Krisik got out of his squad car, and Krisik attempted to arrest Cutsforth by

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> No person may drive or operate a motor vehicle while:
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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving ….

ordering him to stop. Krisik testified that Cutsforth did not stop, but Cutsforth gave him "the finger," proceeded to enter the residence, close the door and turn out the lights.

¶5 Krisik and Cutsforth had arrived at the residence at approximately 11:30 p.m. Krisik called for back-up, and two officers arrived sometime between 11:40 p.m. and midnight. The back-up officers were briefed, and then went to the residence to attempt to contact Cutsforth.

¶6 After a few minutes, Cutsforth opened the door and spoke with the officers. Officer David Arras advised Cutsforth that he was under arrest for knowingly fleeing an officer, a felony under WIS. STAT. §§ 346.04(3) and 346.17(3)(a). Cutsforth attempted to shut the door to avoid arrest. The officers pursued him into the house and physically placed him under arrest. It took the officers approximately ten minutes to get Cutsforth under control.

¶7 Cutsforth was too combative for the officers to attempt field sobriety tests at the residence. Field tests were requested at the Pierce County jail where Cutsforth was taken, but he refused. Cutsforth was arrested at the jail for operating under the influence. His arrest was based upon his erratic driving, the smell of intoxicants and his combative attitude.

¶8 An Intoximeter test was administered to Cutsforth approximately two hours after his driving. The result of the test was 0.10%.

¶9 Cutsforth was convicted of operating while intoxicated in violation of WIS. STAT. § 346.63(1)(a) and operating with a prohibited blood alcohol concentration in violation of WIS. STAT. § 346.63(1)(b).

¶10 Cutsforth filed a motion to suppress all evidence procured after the officers entered his house. It was denied. The trial court found that the officers acted in "hot pursuit." It erroneously found that Cutsforth had stepped out of his door at the time he was arrested.

¶11 Cutsforth filed a postconviction motion that was also denied. The court ruled that it had erred in believing that Cutsforth had stepped out of his residence, but concluded that the entry into the house was justified. Cutsforth now appeals both the conviction and the denial of the postconviction motion.

DISCUSSION

¶12 Cutsforth argues that the police violated his Fourth Amendment rights when they entered his home and arrested him without a warrant or exigent circumstances. He argues that all evidence taken incident to that arrest, including the Intoximeter results, should therefore have been suppressed. The State responds that the police were in hot pursuit of a felon, constituting an exigent circumstance. The State contends that the arrest was lawful and all evidence taken incident to the arrest, including the Intoximeter results, were properly admitted at trial. We agree with the State.

¶13 Whether the officers' warrantless entry into Cutsforth's house was justified by exigent circumstances is a mixed question of constitutional fact that we review under two separate standards. *See* ***State v. Richter***, 2000 WI 58, ¶26, 235 Wis. 2d 524, 612 N.W.2d 29. The trial court's findings of evidentiary or historical facts will not be overturned unless they are clearly erroneous. ***Id.*** However, we independently determine whether the historical or evidentiary facts establish exigent circumstances sufficient to satisfy the warrantless entry. ***Id.***

¶14 The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV. The Wisconsin Constitution is essentially the same. WIS. CONST. ART. I, § 11; ***State v. Bohling***, 173 Wis. 2d 529, 536 n.7, 494 N.W.2d 399 (1993).

¶15 "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." ***Payton v. New York***, 445 U.S. 573, 586 (1980). However, the Fourth Amendment does not proscribe all State-initiated searches and seizures, only unreasonable ones. ***Florida v. Jimeno***, 500 U.S. 248 (1991). Officers who enter a home or dwelling without consent to make a warrantless arrest may do so only when they have probable cause to believe the suspect has committed a felony and exigent circumstances exist. ***Payton***, 445 U.S. at 587-88. The burden to justify warrantless in-home entry is on the State, which must prove that there was probable cause to arrest, and exigent circumstances that could not brook the delay incident to obtaining a warrant. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). The test is whether the police were unreasonable for not obtaining a warrant under the circumstances. ***Reardon v. Wroan***, 811 F.2d 1025, 1029 (7th Cir. 1987) (per curium).

¶16 Exigent circumstances include the hot pursuit of a fleeing felon. ***United States v. Santana***, 427 U.S. 38, 42-43 (1976); ***Smith***, 131 Wis. 2d at 229. The United States Supreme Court has defined "hot pursuit" as the "immediate or

continuous pursuit of a suspect from the scene of a crime." ***Smith***, 131 Wis. 2d at 231-32 (citation omitted). It is the continuity of the pursuit that prevails. ***Id.***

¶17 In ***Santana***, the police arrived at the Santana house to find Santana standing on the threshold of her door. ***Id.*** at 40. The police announced themselves, and Santana retreated into the vestibule of her house. ***Id.*** The police knew that minutes earlier she was paid in marked bait money for drugs. ***Id.*** They pursued Santana into her house and arrested her. ***Id.*** The Supreme Court concluded that "'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry 'in and about [the] public streets.' The fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into Santana's house." ***Id.*** at 43. The court concluded that the police realistically expected that any delay would result in destruction of evidence. ***Id.***

¶18 Cutsforth argues that the police in his case were not in hot pursuit because they delayed between twenty and thirty minutes before knocking on his door. The courts have provided limited guidance in determining how long a delay must be before a pursuit is no longer continuous. In ***Warden v. Hayden***, 387 U.S. 294, 299 (1967), a delay of five minutes did not interrupt the hot pursuit of a felon. In contrast, in ***State v. Kryzaniak***, 2001 WI App 44, ¶18, ___ Wis. 2d ___, 624 N.W.2d 389, a delay of one day was too long.

¶19 The State urges us to apply a reasonableness standard contending that it was reasonable for Krisik to call for backup before pursuing his arrest of Cutsforth. Cutsforth does not deny that calling for backup was a reasonable response. He contends, however, that his case is distinguished from ***Santana*** because he was not standing on the threshold of his doorway. Instead, he was

standing in his house. The State responds that Cutsforth was exposed to the public when he stood where he did in the doorway, citing two "doorway arrest" cases. This court concludes that it was reasonable to pursue a warrantless arrest.

¶20 In ***McKinnon v. Carr***, 103 F.3d 934, 935-36 (10th Cir. 1996) (per curium), the police knocked on the defendant's door. When McKinnon opened the door, the officers identified themselves and informed him that he was under arrest for a felony. ***Id.*** When McKinnon asked if he could get dressed, the police followed him into his apartment to ensure that he did not attempt to escape. ***Id.***

¶21 The tenth circuit concluded:

> The suspect was visible, standing in the threshold of his doorway, open to public view. He was in a place sufficiently public that he had no legitimate expectation of privacy. ... ***Payton*** contains language that describes the Fourth Amendment as drawing a firm line at the entrance to one's house, but, on its facts, it has no application to a doorway arrest made in the circumstances of the present case.

Id.[3]

¶22 LaFave's treatise on search and seizure cautions that ***Santana*** should not be interpreted as a blanket validation of all doorway arrests. 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 6.1(e) (3d ed. 1996). A case where an individual was standing on the inside of the threshold as the result of the police knocking on the door would not, absent exigent circumstances, permit a warrantless entry. ***Id.***

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[3] The other case the State cites is distinguished from the present case. In ***Joyce v. Town of Tewksbury***, 112 F.3d 19, 20 (1st Cir. 1997), the police knocked on the door of Joyce's parents' house, and Joyce answered the door. The police informed Joyce that he was under arrest, and he retorted, "ya right" and retreated into the interior of the house. ***Id.*** The police opened the screen door and followed Joyce into the house. ***Id.*** The court upheld the arrest. ***Joyce*** is distinguished because the police had an arrest warrant.

at 258. "[I]f in a particular case in which there were no exigent circumstances to start with the intended arrestee at the door elects to exercise the security of the premises by not submitting to the arrest, then it is hardly unfair that the police should be required to withdraw and return another time with a warrant." ***Id.*** at 258-59.

¶23 We direct our attention then to whether the officers' suspicions regarding Cutsforth's blood alcohol level were sufficient to constitute an exigent circumstance. In ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), a witness observed a man driving erratically. ***Id.*** at 742. The man swerved off the road and the car came to a stop in a field. ***Id.*** No damage to any property or persons occurred. ***Id.*** Instead of waiting for the police, who had been called, he abandoned the scene. ***Id.*** Once the police arrived, the officer checked the vehicle registration and discovered that the owner lived nearby. ***Id.*** The police went to the home and knocked on the door. ***Id.*** at 743. The individual who answered the door may have given proper consent, but the Court resolved the case on whether exigent circumstances existed. ***Id.*** at 743 n.1. Without securing a warrant, the police entered the residence and located Welsh in his bedroom. ***Id.*** at 743. They placed him under arrest for driving or operating a motor vehicle while under the influence of an intoxicant, in violation of WIS. STAT. § 346.63(1). ***Id.***

¶24 The Supreme Court concluded that the gravity of the offense was an important factor to be considered when determining whether exigency exists. ***Id.*** at 752. Exigency is not created just because a serious crime has been committed. ***Id.*** The court stated that applying an exception for exigent circumstances "should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed." ***Id.*** at 753.

¶25 The Court reasoned that hot pursuit did not apply because there was no immediate or continuous pursuit of Welsh from the scene of the crime. ***Id.*** Additionally, it concluded that Welsh had already arrived home and had abandoned his car at the scene of the accident leaving little remaining threat to public safety. ***Id.***

¶26 "Even assuming, however, that the underlying facts would support a finding of this exigent circumstance [referring to the emergency need to determine Welsh's blood-alcohol level], mere similarity to other cases involving the imminent destruction of evidence is not sufficient." ***Id.*** at 754. The Court determined that Wisconsin classified a first offense for driving while intoxicated as a noncriminal, civil forfeiture offense with no possibility of imprisonment. ***Id.*** The Court reasoned that this indicated the State's interest in precipitating an arrest and concluded that dissipation of blood alcohol level was insufficient to demonstrate an exigent circumstance. ***Id.*** "To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction." ***Id.***

¶27 This court concludes that Cutsforth's case is different. Here, Cutsforth was arrested for fleeing, a felony punishable by up to three years in prison, and convicted of a second offense operating while intoxicated, *see* WIS. STAT. § 346.63(1)(a), punishable by up to one year in jail. In contrast to ***Welsh***, these offenses constitute one felony and one misdemeanor. Cutsforth concedes that the police had probable cause to arrest him for the felonious fleeing of an officer. Krisik pursued him to his house. After backup arrived, the officers knocked on his door and, without any display or threat of violence, identified themselves and informed him that he was under arrest.

¶28 Krisik testified that he suspected Cutsforth had been driving under the influence because of his erratic and reckless driving, his belligerence and profanity, and his fleeing. *See* ***State v. Seibel***, 163 Wis. 2d 164, 182, 471 N.W.2d 226 (1991) (belligerence has been linked to excessive drinking). Alcohol dissipates from the bloodstream "shortly after drinking stops." ***Schmerber v. California***, 384 U.S. 757, 770 (1966); *see also* ***Bohling***, 173 Wis. 2d at 533 (the dissipation of alcohol from a person's bloodstream constitutes an exigency). The officers reasonably concluded that delay would destroy this evidence. Welsh did not commit felony fleeing in police presence as Cutsforth did. Welsh's violation was a forfeiture, not punishable with jail time, as Cutsforth's violation was. This case is thus distinguished from ***Welsh***.

By the Court.—Judgment and order affirmed.

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