

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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.

Appeal No. 2009AP2552-CR

Cir. Ct. No. 2004CF16

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD M. JANIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
MICHAEL T. JUDGE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Todd Janiak appeals a judgment of conviction for burglary and second-degree recklessly endangering safety. Janiak argues the circuit court should have suppressed evidence because police entered his home

and arrested him without probable cause or exigent circumstances. We reject Janiak's arguments and affirm.

BACKGROUND

¶2 This is the second appeal in Janiak's case. In the first, we reversed an order denying Janiak's motion to suppress physical evidence obtained incident to arrest in his home.¹ After Janiak's case was remanded, his trial counsel again moved to suppress evidence, this time on different grounds. This time, Janiak moved to suppress all evidence, particularly statements, obtained from the police officers' warrantless entry into Janiak's home.

¶3 Deputy Keven Thomson testified that on January 31, 2004, at approximately 6:26 p.m., he received a dispatch that "there was a disturbance call at the James Sylvester residence on Kowalczyk Lane." Kowalczyk Lane is a dead-end road in a rural area outside of Lena. There are only three homes on the road, including the Sylvester home. Explaining the area's layout, Thomson indicated Porcupine Lake Road runs north from County Highway A. After about one or two miles on Porcupine, there is a church and two or three houses. "Shortly past that little enclave," Kowalczyk Lane abuts on the right, or to the east. When proceeding east down Kowalczyk Lane, Sylvester's house is first. Janiak's house is next, another "couple of hundred yards" down. Approximately two to three times that distance, the road ends at a farm.

¶4 Dispatch informed Thomson "that a neighbor was at the residence with a gun and a child was requesting an ambulance for unknown spray in his

¹ *State v. Janiak*, No. 2007AP1371-CR, unpublished slip op. (WI App Jan. 8, 2008).

eyes.”² Dispatch never named the neighbor. Thomson confirmed, however, that dispatch indicated it was the *next-door* neighbor who was in Sylvester’s garage and had sprayed something. Thomson thought the neighbor dispatch referred to was Janiak because of “prior calls to the residence in the past. Mr. Janiak had been a suspect in other criminal activity at that residence. There was kind of an ongoing thing between Mr. Janiak and Mr. Sylvester which involved Mr. Janiak’s ex-wife.”

¶5 Lieutenant Matt Morrissey, who knew Janiak personally and also responded to the dispatch, testified he too believed the neighbor was Janiak, based on an “ongoing dispute” between Sylvester and Janiak, and because Janiak’s house was the closest house to Sylvester’s.

¶6 While Thomson was en route “with lights and siren,” when he was “almost to the residence,” dispatch relayed that a shot had been fired and that the neighbor was “now walking down the road back to his residence.” It took Thomson “[n]ot very long, a few minutes” to arrive after the first dispatch. Thomson testified:

I came from the south on Porcupine Lake Road. There was no one on the road there. I turned on Kowalczyk Lane. There was no one on the road between Porcupine Lake Road and Mr. Sylvester’s residence. ... I was shining the spotlight back and forth in the ditches and the fields. I did

² A significant number of Janiak’s record citations are inaccurate. Janiak frequently cites to “*id.*,” but the actual page numbers of the cited information then do not correspond to the most recent page cited in the respective record. This not only violates the rules of appellate procedure, but it hinders our ability to efficiently and accurately resolve appeals. *See* WIS. STAT. RULES 809.19(1)(d), (1)(e). Janiak’s appellate counsel is cautioned that future violations may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

not encounter him at the Sylvester residence so I continued down the road. And the first person I saw walking or outside was Mr. Janiak at his door.

¶7 As Thomson entered the driveway and shined the spotlight on Janiak, it appeared he was trying to get into the house. Thomson explained, “[H]e was working the door, and it appeared that he was having trouble getting in.” There were no lights on at the house. Thomson exited his car and, from about thirty feet away, ordered Janiak to stop in a loud voice. Janiak entered the home, and when Thomson arrived at the door seconds later, the outside storm door had not yet closed. Thomson ordered Janiak to come out three times. Janiak responded that he was coming, but did not appear. After about ten to fifteen seconds at the door, Thomson entered the home along with Morrissey, who had arrived at the home moments behind him. Janiak was then arrested. He told the officers he was bloody because he was angry at Sylvester, went to his house to talk with him, and Sylvester struck him with a shovel.

¶8 The circuit court denied Janiak’s suppression motion despite the lack of a warrant. The court concluded the officers had probable cause and that exigent circumstances—both hot pursuit and officer safety—permitted entry. Janiak subsequently pled no contest and now appeals.

DISCUSSION

¶9 “A police officer’s warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution.” *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. Police may, however, enter a home without a warrant when there is both probable cause and exigent circumstances. *State v. Smith*, 131 Wis. 2d 220, 229, 388 N.W.2d 601

(1986). In the case of entry for an arrest, police must have probable cause that the person sought committed a crime. *Hughes*, 233 Wis. 2d 280, ¶20 (citing *State v. Kiper*, 193 Wis. 2d 69, 82, 532 N.W.2d 698 (1995)).

¶10 The quantum of evidence needed to establish probable cause must constitute more than mere suspicion. *Kiper*, 193 Wis. 2d at 81. To determine if probable cause exists, a court must consider whether the totality of the circumstances within the arresting officers' knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant had committed a crime. *State v. Larson*, 2003 WI App 150, ¶16, 266 Wis. 2d 236, 668 N.W.2d 338. On review of an order denying a motion to suppress evidence, we uphold a circuit court's findings of fact unless they are clearly erroneous, but independently apply the law to the facts. *Hughes*, 233 Wis. 2d 280, ¶15.

¶11 Janiak argues the police lacked probable cause to believe that he was the neighbor who was at Sylvester's home.³ He contends they acted on nothing more than a hunch, based solely on the "bad blood" between Janiak and Sylvester. Janiak further asserts we should disregard the facts that police observed Janiak enter his home and he ignored their commands, because the police already intended to arrest him prior to that point. However, he cites no law in support of this position, which is contrary to the requirement that we consider the "totality of the circumstances within the arresting officer[s'] knowledge at the time of the arrest." See *Larson*, 266 Wis. 2d 236, ¶16. We discern no reason to ignore any facts known to the officers prior to their warrantless entry into the home.

³ Janiak does not dispute that police had probable cause to believe the unidentified neighbor referenced by dispatch had committed a crime.

¶12 Further, we disagree with Janiak’s characterization of the facts supporting a finding of probable cause to believe he was the person at Sylvester’s home. In fact, knowledge of the bad blood was a comparatively minor additional factor supplementing the police’s belief that Janiak was the perpetrator. Importantly, Janiak fails to acknowledge that dispatch reported it was the *next-door* neighbor who had a gun and had sprayed something.⁴ In light of the geography of the area around Sylvester’s home, Janiak was the person most likely to be described as a next-door neighbor. Indeed, he is arguably the only person to fit that description. This alone was strong evidence suggesting it was Janiak at the Sylvester residence.

¶13 This belief was further strengthened when Thomson, shortly before arriving, learned the neighbor had left Sylvester’s residence and “was walking *down the road* back to his residence.” Thomson then did not observe anybody out on Porcupine Lake Road or after he turned down Kowalczyk Lane and proceeded past Sylvester’s home. Rather, the first person Thomson encountered was Janiak, who was attempting to enter the home nearest Sylvester’s. Janiak’s home was also unlit, suggesting Janiak had not recently been inside. Finally, when ordered to stop, Janiak ignored the command and disappeared inside.⁵ Considering all of

⁴ Only in his reply brief does Janiak tacitly acknowledge that dispatch referred to the next-door neighbor. He then merely suggests, unconvincingly, that the difference is insignificant.

⁵ Janiak argues this was not a flight from police but more akin to:

(continued)

these factors, we comfortably conclude the police had probable cause to believe it was Janiak who committed the crimes reported at Sylvester's home.

¶14 Thus, we must next determine whether exigent circumstances permitted the police to enter Janiak's home. "Exigent circumstances exist when 'it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.'" *State v. Ferguson*, 2009 WI 50, ¶19, 317 Wis. 2d 586, 767 N.W.2d 187 (quoting *State v. Richter*, 2000 WI 58, ¶28, 235 Wis. 2d 524, 612 N.W.2d 29). There are four well-recognized situations that may constitute exigent circumstances: an arrest made in hot pursuit, a threat to the safety of a suspect or others, a risk of destruction of evidence, and a likelihood of flight by a suspect. *Richter*, 235 Wis. 2d 524, ¶29.

¶15 The determination of whether exigent circumstances are present turns on reasonableness, and the court applies an objective test. *Id.*, ¶30. The exigent circumstance of hot pursuit is established when there is an immediate or continuous pursuit of the suspect from the scene of a crime. *Id.*, ¶32. Additionally, in determining whether a warrantless entry is justified by exigent circumstances, a court must consider the seriousness of the suspected underlying

the framework outlined in *Florida v. Royer*, 460 U.S. 491 (1983). The Court there observed that the police may approach an individual in a public place and ask that individual if he is willing to answer some questions. *Id.* at 497. "The person approached, however, need not answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way." *Id.* at 498. "He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Id.*

Royer is inapposite. There is no disputing that Thomson already had *reasonable suspicion* that Janiak had committed a crime when he ordered Janiak to stop. *See id.* at 502.

offense—particularly when considering hot pursuit. See *Ferguson*, 317 Wis. 2d 586, ¶¶24-29; *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (“application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed”).

¶16 Janiak primarily contends there was no link between him and the disturbance call at the Sylvester residence. Thus, Janiak’s challenge to the hot-pursuit exigency largely rises or falls with his probable cause argument. Because we have already concluded the police had probable cause to believe Janiak committed crimes at Sylvester’s residence, which Janiak concedes were serious, we need only address whether the facts demonstrate an immediate or continuous pursuit of the suspect from the scene of the crime.

¶17 Janiak argues this is not a hot pursuit case because the police did not pursue Janiak from the scene of the crime. He stresses that the scene of the crime was Sylvester’s house, but that officers did not go there. However, officers do not have to see the suspect leave the scene of the crime for their pursuit of the suspect to constitute hot pursuit.

¶18 In *Richter*, 235 Wis. 2d 524, ¶¶3-4, 36, the Wisconsin supreme court held that a deputy was in hot pursuit of a suspect even though the deputy did not see the suspect or even arrive at the area until after the suspect had left the scene. The deputy there responded to a trailer park to investigate a burglary in progress. *Id.*, ¶3. When the deputy arrived, he was flagged down by the victim, who stated the intruder had fled into the trailer across the street. *Id.* The court rejected the idea that the officer himself must see the suspect flee the scene of the crime. *Id.*, ¶¶32-36. Instead, the court concluded the deputy was in hot pursuit because he:

responded to a dispatch and picked up the trail of a fleeing suspect from an eyewitness account. His response to the scene of the crime was immediate, and his pursuit of the suspect was immediate and continuous upon his arrival on the scene and rapid collection of information regarding the whereabouts of the suspect.

Id., ¶36.

¶19 Janiak attempts to distinguish this case from *Richter*, emphasizing the one apparent factual difference: here the police did not stop first to question the complaining witness. However, this serves to strengthen, not weaken, the immediacy and continuity of pursuit. In this case, police already had fresh information that the suspect just fled the scene. It would have been pointless to pursue him there, and they already had significant reason to believe he was proceeding to the next house over.

¶20 In *Richter*, the court observed, “To allow a warrantless entry when an officer personally observes a crime and pursues the suspect, but disallow it when he immediately responds to an eyewitness report and pursues the suspect would be arbitrary indeed.” *Id.*, ¶33. It would be equally arbitrary to require that police stop at the scene when they already know the suspect has departed and where he might presently be located. When police responded and spotted Janiak outside his home, he disobeyed a command to stop, and the police followed after he retreated inside the home, there was a hot pursuit.⁶ *Cf. U.S. v. Santana*, 427 U.S. 38, 40, 43 (1976) (defendant standing in doorway of house retreated inside when officers arrived and shouted “police;” “The fact that the pursuit here ended

⁶ Because we conclude the hot-pursuit exigency applies, we need not address whether there was also an officer-safety exigency. *See State v. Castillo*, 213 Wis.2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

almost as soon as it began did not render it any the less a ‘hot pursuit’ sufficient to justify the warrantless entry[.]”)

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

