COURT OF APPEALS DECISION DATED AND FILED

May 19, 2010

David R. Schanker
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. 2009AP2918-CR

Cir. Ct. No. 2009CT126

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE W. JENKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Dale W. Jenkins insists that there were no exigent circumstances that supported the warrantless entry of two Fond du Lac county

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

sheriff's deputies onto the curtilage of his residence. We reject his argument. We conclude that a deputy would reasonably believe, under the facts known when he entered the curtilage without a warrant, that Jenkins was injured in an earlier accident and his health was endangered. Consequently, we affirm the denial of his suppression motion.

¶2 After being charged with four counts: (1) operating after revocation, first offense; (2) operating a motor vehicle while intoxicated (OMVWI), third offense; (3) hit-and-run to an attended vehicle; and (4) operating a motor vehicle with prohibited alcohol concentration, third offense, Jenkins filed a motion to suppress. He asserted that law enforcement officers impermissibly searched the curtilage of his residence when they looked in the windows while walking around the residence.[2]

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[2] Jenkins' motion papers were inadequate and the circuit court would have been correct in denying him an evidentiary hearing. All Jenkins filed was a one-page motion with the assertion the officers had looked inside his windows; the motion was not supported by an evidentiary affidavit based upon an affiant's personal knowledge. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and ***State v. Garner***, 207 Wis. 2d 520, 532-33, 558 N.W.2d 916 (1996), require that a defendant must allege facts in a suppression motion which would entitle him to relief. A court addressing a pretrial suppression motion must

> provide the defendant the opportunity to develop the factual record where the motion, alleged facts, inferences fairly drawn from the alleged facts, offers of proof, and defense counsel's legal theory satisfy the court of a reasonable possibility that an evidentiary hearing will establish the factual basis on which the defendant's motion may prevail.

Garner, 207 Wis. 2d at 533. Although we could affirm on the grounds that Jenkins was not entitled to an evidentiary hearing, we choose to address the merits because the parties have not briefed the adequacy of Jenkins' motion.

For the benefit of the bench and bar, we point out that scarce judicial resources can be saved by close scrutiny of a defendant's pretrial motions to ensure that they meet the threshold requirements of ***Nelson*** and ***Garner***.

¶3 The uncontradicted testimony at the suppression hearing established that Fond du Lac County Sheriff's Deputies Michael Norton and Trevor Driscoll were dispatched to the scene of a hit-and-run accident on U.S. 151, north of the city of Fond du Lac, on January 8, 2009, at 9:30 p.m. The only vehicle at the scene was a red, four-door SUV, driven by Bradley Behringer. The deputies observed the SUV with heavy front-end damage stopped at a driveway entrance with accident debris scattered on the shoulder and driveway area. After describing how he was hit by a black Ford F150 pickup truck with an extended cab, Behringer told the deputies:

> [T]he [driver] stared at him and then took off to the south through a field and then onto another driveway just south of the driveway [Behringer] was sitting in and went up the driveway and shut the lights off and that's the last [Behringer] seen of it.

¶4 Behringer described the driver of the F150 as a male with longer, messed-up hair and either a goatee or full beard. He told the deputies that the driver appeared "wasted." He pointed out tire tracks in the snow from the accident scene through the field to the other driveway, up that driveway to a residence on top of a ledge. The deputies satisfied themselves that Behringer was not injured before proceeding with their investigation.

¶5 Norton and Driscoll followed the tire tracks through the field to the other driveway where the tracks went up the driveway and ended where a black F150 was parked next to another vehicle that was snow covered. The deputies ran the registration and it came back to Jenkins at the address of the residence; additional information established that Jenkins' driving privileges were revoked. They saw one set of footprints from the driver's side door of the truck leading to the residence. Before following the footprints, the deputies inspected the truck

and found damage on the passenger side rear bumper consistent with Behringer's version of the accident. The deputies shined their flashlights into the interior to make sure there was no one inside.

¶6 After inspecting the truck, the deputies were concerned about both the welfare of the driver and that the driver may have committed a crime because Behringer had told them the driver appeared wasted, they had information he was driving while revoked, they suspected he was driving under the influence, and they thought he could be injured as a result of the accident. They followed the footprints to the front door and knocked several times, identifying themselves as sheriff's officers. After no one responded to their knocking, the deputies had dispatch call the residence but no one answered the telephone. The deputies then started to walk around the house looking in the windows to see if anyone was inside. On the south side, they looked through a large bedroom window and saw a person underneath a blanket; they also saw wet cowboy boots and a pair of pants lying on the floor. They tapped on the window until eventually a man, later identified as Jenkins, put his head up and asked what they wanted. He directed them to go to the front door where he met them without any clothes on.

¶7 At the conclusion of the hearing, the circuit court denied Jenkins' motion to suppress because of the deputies' impermissible search of the curtilage of his residence. The court found that the deputies had probable cause to believe one or more crimes had been committed and the warrantless search of the curtilage was supported by the "hot pursuit" exception to the warrant requirement. The circuit court also found that the deputies' concerns about Jenkins' condition provided reasonable grounds for a warrantless search under the "health and safety" exigent circumstance. Finally, the court was not convinced that there was a substantial risk that evidence would be destroyed. The defendant entered a plea to

the charge of OMVWI, third offense, and hit-and-run to an attended vehicle and, after a judgment of conviction was entered, he brought this appeal.

¶8 "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984) (citation omitted). A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all governmental agents who seek to enter the home for purposes of search or arrest. ***Welsh***, 466 U.S. at 748. It is not surprising, then, that the United States Supreme Court has recognized that all warrantless searches and seizures inside a home are presumptively unreasonable. ***Id.*** at 748-49.

¶9 A person generally is entitled to the same Fourth Amendment protection in the curtilage of his or her home as if he or she were inside the home. ***United States v. Dunn***, 480 U.S. 294, 300, (1987). Curtilage means "the area to which extends the intimate activity associated with the 'sanctity of a man's [or woman's] home and the privacies of life.'" ***Oliver v. United States***, 466 U.S. 170, 180 (1984) (citation omitted).

¶10 Warrantless entry into one's home by police is presumptively prohibited by both the United States and Wisconsin Constitutions. ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. However, there is a recognized exception to the warrant requirement when the State can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference. ***Id.*** In this case, Jenkins does not appear to contest that police had probable cause to search his home.

¶11 We therefore examine whether exigent circumstances justified the warrantless entry. Whether a warrantless entry is justified by exigent circumstances is a mixed question of fact and law. ***State v. Leutenegger***, 2004 WI App 127, ¶13, 275 Wis. 2d 512, 685 N.W.2d 536. We uphold the trial court's findings of evidentiary or historical fact unless clearly erroneous. ***Id.*** However, we independently examine whether those facts establish "exigent circumstances sufficient to justify a warrantless entry." ***Id.***

¶12 In ***State v. Richter***, 2000 WI 58, ¶29, 235 Wis. 2d 524, 612 N.W.2d 29, the supreme court explained:

> There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee. The State bears the burden of proving the existence of exigent circumstances. (Citations omitted.)

¶13 ***Leutenegger*** controls the result in this case and ordains our conclusion that the State has proven the warrantless entry into the curtilage of Jenkins' residence was under the exigent circumstance of there being "a threat to the safety of a suspect."[3] *See* ***Richter***, 235 Wis. 2d 524, ¶29. In ***Leutenegger***, the police received a call from a citizen on a mobile phone who related that the caller was observing an old and drunk person leaving a bar and trying to drive a car; the caller provided a running narrative until Leutenegger parked his car in his garage.

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[3] Because, as we explain, the deputies' concerns about the safety of Jenkins were reasonable and fall under a recognized exception to the warrant requirement, we do not consider any of the three remaining exigent circumstances. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (An appellate court should decide cases on the narrowest possible grounds.).

Leutenegger, 275 Wis. 2d 512, ¶¶22-26. A police officer arrived on the scene and was able to observe Leutenegger's car through an open garage door and she became concerned when he did not immediately exit his car. ***Id.***, ¶¶26-27.

¶14 In ***Leutenegger***, the court took the opportunity to review Fourth Amendment law as it has developed in curtilage cases. ***Leutenegger***, 275 Wis. 2d 512, ¶¶4-18. It zeroed in on ***Richter*** as the most recent supreme court pronouncement of the law in curtilage cases. ***Leutenegger***, 275 Wis. 2d 512, ¶10. ***Leutenegger*** adopted ***Richter***'s objective test to be applied to the particular facts of a case:

> As in other Fourth Amendment cases, the determination of whether exigent circumstances are present turns on considerations of reasonableness, and we apply an objective test. The test is "[w]hether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape.

Leutenegger, 275 Wis. 2d 512, ¶11 (citing ***Richter***, 235 Wis. 2d 524, ¶30).

¶15 ***Leutenegger*** pointed out that "evidence of an officer's subjective belief" is relevant "because such evidence may assist a court in analyzing whether facts known to an officer meet the objective standard." ***Leutenegger***, 275 Wis. 2d 512, ¶14.

¶16 We will now apply the objective exigent circumstances test to the facts in this case. Unlike the court in ***Leutenegger***, we do not find this to be a difficult case. *See* ***id.***, ¶21. During their investigation, the deputies learned from Behringer that, as he traveled northbound on U.S. 151, he saw a stationary vehicle in the southbound lane, at an angle with the rear wheels on the shoulder and the headlights near the center line. All of a sudden, the vehicle accelerated and

crossed in front of Behringer, spinning him into the driveway and spinning the truck around. Behringer related that the driver of the truck just stared at him, that he had messed-up long hair and appeared "wasted." Behringer went on to tell the deputies that the driver "took off to the south through a field and then onto another driveway … went up the driveway and shut the lights off."

¶17 Armed with this information, the deputies followed the tire tracks up the driveway to where they ended at the parked truck. After making sure no one was in the truck, they followed footprints, from the driver's side to the front door of the residence. At the front door, the deputies knocked and identified themselves but there was no response from inside; then they had dispatch call the number of the residence, but there was no answer. After there was no response to the attempts at the front door, the deputies walked around to the rear and, looking through a window, they saw a person under a blanket. At first, their tapping on the window did not rouse whoever was on the bed.

¶18 These facts would have led reasonable deputies to conclude that, at a minimum, Jenkins had been injured when he struck Behringer's vehicle on U.S. 151. A reasonable deputy could believe that Jenkins sustained a head injury, after hitting Behringer, he just stared at him, his hair was messed up and he appeared "wasted." Jenkins left the scene by driving through a field to the next driveway. At the house, he was unresponsive to knocking at his front door and to a phone call.

¶19 We also credit Deputy Driscoll's testimony that he was subjectively motivated, in part, by a concern for Jenkins' health:

> Well, we're always concerned about people involved in an accident where there's damage like there was. That was one of our concerns. If—whenever somebody is involved

> in a crash, you know, if they don't have like dripping blood that would indicate that they bumped their head, you know, we ask them if they're injured or anything because we're not sure. If they did bump their head on the side of the window or something, they could have a problem internally.

¶20 The officer's testimony reflects his subjective beliefs, based on investigating vehicular accidents he said were "[t]oo numerous to count,"—well in excess of one hundred in his fourteen-year career. We conclude that this circumstance, combined with information that Jenkins' appeared "wasted" and was unresponsive to the announced presence of deputies, suggest a head-injury-related health problem and justified the deputies warrantless entry onto the curtilage of Jenkins' residence. Accordingly, we affirm the denial of Jenkins' suppression motion.

By the Court.—Judgment affirmed.

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