COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP304-CR **Cir. Ct. No. 2012CF274**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. WEBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Reversed and cause remanded with directions*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Richard Weber appeals a judgment of conviction. The issue is whether the circuit court erred in denying his suppression motion. We conclude, based on the arguments that have been presented on appeal, that the court erred. Accordingly, we reverse and remand with directions.

¶2 After Weber's suppression motion was denied, he pled no contest to one felony count of operating with a prohibited alcohol concentration. He may appeal the suppression ruling despite the no contest plea. WIS. STAT. § 971.31(10) (2013-14).[1]

¶3 We provide only a brief outline of the facts, which appear to be undisputed. A sheriff's deputy attempted to pull defendant Weber over for a defective brake light by activating his emergency lights. A few seconds later, Weber turned into a driveway and drove into an attached garage. The officer also turned into the driveway, but stopped short of the garage. When Weber tried to walk from the garage into the attached house, the officer entered the garage and physically moved Weber outside. Weber seeks suppression of evidence that was obtained after the deputy's entry into the garage.

¶4 On appeal, Weber argues that the deputy made a warrantless entry into his home that should lead to suppression of evidence. In Weber's description of applicable law, exigent circumstances allow for warrantless entry when there is danger to life, risk of evidence destruction, or likelihood of escape. *See* ***State v. Smith***, 131 Wis. 2d 220, 231, 388 N.W.2d 601 (1986). An arrest made in "hot pursuit" is a type of circumstance that may qualify as an exigent circumstance, when measured against the time needed to obtain a warrant. ***Id.*** at 229. Thus, as framed by Weber, a hot pursuit does not *always* qualify as an exigent circumstance, but does so only if there is also present one of the above factors that makes it unsound to wait for a warrant.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Weber argues that, in his case, a balancing of the deputy's need to enter quickly against the time needed to obtain a warrant shows that there was no exigent circumstance. Weber notes the offense he was being pursued for, a defective brake light, and argues that the evidence of that offense was not likely to be destroyed, and that flight was implausible for such a minor offense.

¶6 In response, the State argues that other observed violations justified a warrantless entry. Although there was no testimony that the deputy was actually attempting to arrest Weber for failing to stop his car in response to the officer's emergency lights, the State contends there was probable cause to arrest for that offense at the time of the deputy's entry into the garage, and therefore the deputy's entry was legal. More specifically, the State argues that probable cause existed to arrest for either resisting or obstructing under WIS. STAT. § 946.41(1), or failing to stop under the more specific traffic statute, WIS. STAT. § 346.04(2t). As an alternate ground for arrest, the State also argues that Weber failed to obey the deputy's oral command to exit from the garage, and that this failure would also give probable cause to arrest for resisting or obstructing. We note that the State does not argue that there was probable cause to arrest for operating while intoxicated.

¶7 The problem with the State's argument is that it relies on a recitation of applicable law that fails to acknowledge that the exigent circumstances requirement means that there must be a potential for danger to life, risk of evidence destruction, or likelihood of escape. The State cites ***State v. Richter***, 2000 WI 58, ¶32, 235 Wis. 2d 524, 612 N.W.2d 29, for the proposition that "[t]he exigent circumstance of 'hot pursuit' is established" where there is an immediate or continuous pursuit of a suspect from the scene of a crime, but does not acknowledge that ***Richter*** also includes the requirement that the officer reasonably

believes the delay in obtaining a warrant would endanger life, risk destruction of evidence, or greatly enhance the likelihood of the person's escape. ***Id.***, ¶30. The State does not disagree that this requirement exists—it just ignores the topic.

¶8 Moreover, the State does not acknowledge Weber's argument about lack of exigency. The State, thus, offers no explanation as to what circumstance created an exigency justifying an immediate warrantless entry. In essence, the State appears to assume that all hot pursuits qualify as exigent circumstances, but, as we have seen, provides no legal argument to support that assumption.

¶9 Weber's argument about lack of exigency is supported by the law he cites, and required a response from the State. Even if we accept the State's argument that the officer had probable cause to arrest Weber for resisting or obstructing before the deputy entered the garage, rather than merely citing him for the brake light, we fail to discern why an immediate warrantless entry was justified. There would be no physical evidence of obstructing for Weber to destroy in the house. Weber could not readily flee with the officer parked in the driveway. And there is no indication of a threat to safety. Given the State's failure to respond to Weber's argument, to acknowledge seemingly applicable law regarding exigent circumstances, or to explain what exigency existed, we reverse on that basis. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (appellant's argument not refuted is conceded).

¶10 The State does not argue that the suppression error was harmless. For example, the State does not argue that the error was harmless because Weber would still have pled no contest even if the evidence had been suppressed. *See* ***State v. Semrau***, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376.

Therefore, we do not address harmless error. We reverse and remand with directions for the circuit court to vacate the judgment of conviction, allow Weber to withdraw his plea, and grant the suppression motion.

By the Court.—Judgment reversed and cause remanded with directions.

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