COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2019

Diane M. Fremgen
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. 2018AP1455 **Cir. Ct. No. 2018TR201**

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

IN THE MATTER OF THE REFUSAL OF DANNY L. WATERS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY L. WATERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*

¶1 SHERMAN, J.[1] Danny L. Waters appeals a judgment of the circuit court finding that his refusal to submit to a chemical test was unreasonable. Waters contends that his driver's license should not have been revoked because the investigating officer lacked probable cause to believe that he had been operating a vehicle while under the influence of an intoxicant (OWI). For the reasons discussed below, I affirm.

BACKGROUND

¶2 The following facts are taken from the refusal hearing. La Crosse County Deputy Daniel Welsch testified that he was dispatched to the Red Pine Bar in response to a report that a motor vehicle accident had occurred in the parking lot of the Bar and one of the vehicles left the scene. Deputy Welsch testified that after interviewing people at the Bar, he determined that the vehicle which had left the scene was driven by Waters.[2] Deputy Welsch testified that he then went to Waters' residence, where Waters greeted him at the door. Deputy Welsch entered Waters' home,[3] questioned him, and had him perform field sobriety tests. Deputy Welsch testified that Waters refused the breath test. Deputy Welsch ultimately arrested Waters for OWI.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Waters and the other driver stopped, talked, exchanged information and agreed to discuss the matter in the morning. Nothing in the record indicates that this was an accident where immediate reporting was required, nor any other indication that leaving the scene after exchanging information was in violation of any legal requirement.

[3] Nothing in the record provides a basis for concluding that there were exigent circumstances or that the entry was consensual.

¶3 Waters requested and received a refusal hearing. At the hearing, the only issue was whether Deputy Welsch had probable cause to arrest Waters for OWI. The circuit court concluded that there was probable cause[4] to believe that Waters had been operating a motor vehicle while under the influence of an intoxicant and entered a judgment revoking Waters' driver's license. Waters appeals.

DISCUSSION

¶4 A driver who refuses to submit to a chemical test that is required under Wisconsin's implied consent law is subject to penalties that include revocation of the driver's operating privileges. WIS. STAT. § 343.305(9)(a), (9)(d), and (10)(a). The driver may request a hearing on his or her revocation. Sec. 343.305(9)(a)4. At a refusal hearing, the court considers: (1) "[w]hether the officer had probable cause to believe the [defendant] was ... operating a motor vehicle while under the influence of alcohol"; (2) whether the officer properly informed the defendant of his or her rights and responsibilities under the implied consent law; and (3) whether the defendant refused to permit the test. Sec. 343.305(9)(a)5.

¶5 Waters argues on appeal that Deputy Welsch did not have sufficient cause to enter his home without a warrant and the information before Deputy Welsch prior to entering Waters' home did not rise to the level of probable cause to believe that he had been operating while intoxicated. The State concedes that Deputy Welsch did not have probable cause to arrest Waters prior to entering

[4] The circuit court's determination of probable cause included information developed by Deputy Welsch after arriving at Waters' home.

Waters' home. However, the State contends that Waters has forfeited any argument that Deputy Welsch's entry into his home was unconstitutional because Waters "fail[ed] to articulate [that argument] with sufficient clarity" at the refusal hearing. In reply, Waters argues that he adequately raised the issue by: (1) requesting a refusal hearing, where the State had the burden of proving that probable cause existed to arrest Waters for OWI and that the arrest was legal; and (2) specifically raising the issue in his argument at the hearing.

¶6 Determining whether Waters forfeited his right to challenge the lawfulness of Deputy Welsch's entry into his home requires application of the facts to a legal standard, which is an issue of law that I review de novo. ***Bretl v. LIRC***, 204 Wis. 2d 93, 100, 553 N.W.2d 550 (Ct. App. 1996).

¶7 It is a fundamental principle that the party who raises an issue on appeal bears the burden of showing that the issue was preserved by being raised before the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Issues not raised in an earlier proceeding are considered forfeited.[5] ***Id.***, ¶11. The forfeiture rule serves several objectives. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. Requiring that issues be raised before the circuit court allows that court to correct or avoid the alleged error, eliminating the need for appeal. ***Huebner***, 235 Wis. 2d 486, ¶10. It also allows the litigants and the circuit court judge to put on the record the reasoning for their position on the alleged error. ***Id.*** The rule also requires attorneys to

[5] Although the issue is whether Waters forfeited the right to raise the issue on appeal, the rule requiring an appellant to do so is archaically called the waiver rule. The Wisconsin Supreme Court specifically pointed out this anomaly in ***State v. Huebner***, 2000 WI 59, ¶11 n.2, 235 Wis. 2d 486, 611 N.W.2d 727.

diligently prepare for trial and prevents them from strategically refraining from raising the issue at trial and later claiming it as an issue on appeal, a practice known as sandbagging. ***Id.***

¶8 However, the forfeiture rule is a rule of judicial administration, and therefore a reviewing court has the inherent authority to disregard a party's forfeiture of an issue and address the merits of that unpreserved issue. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶3, 273 Wis. 2d 76, 681 N.W.2d 190.

¶9 Waters and the State both refer to the following argument by Waters' trial counsel at the hearing in support of their separate positions that Waters' challenge of the lawfulness of Deputy Welsch's entry into his home was or was not properly raised before the circuit court:

> [Waters' counsel]: Yes, Judge. My argument would be that [Deputy Welsch] had information that there was an accident, that [] Waters did provide the information, did not try to hide who he was or anything to that effect. Then the parties agreed to report the matter the following day. There was really no evidence or indication as to [] Waters being impaired, so I would simply argue that [Deputy Welsch] didn't have the requisite level of suspicion to go to [] Waters' house at that hour and question him about the incident.

¶10 Waters' argument before the circuit court as to Deputy Welsch's entry into his home is fully represented by the following statement: "I would simply argue that [Deputy Welsch] didn't have the requisite level of suspicion to go to [] Waters' house at that hour and question him about the [accident]." If that statement is adequate to provide a reasonable circuit court with notice that Waters was arguing that Deputy Welsch did not have sufficient cause to enter his house and therefore, any evidence obtained after that entry is inadmissible, then the issue has been adequately preserved. However, if the quoted statement is not adequate

to provide the court notice of that argument, or if the statement raises a different argument than the lawfulness of entry into Waters' home, then the statement has not preserved Waters' challenge of the lawfulness of Deputy Welsch's entry for appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826-29, 539 N.W.2d 897 (Ct. App. 1995) (a party seeking reversal may not advance arguments on appeal which were not presented to the trial court).

¶11 I conclude that it is not clear that Waters in fact challenged the lawfulness of Deputy Welsch's entry into his home before the circuit court. A reading of the quoted statement yields mixed conclusions. On the one hand, arguing that there is not sufficient reasonable suspicion to detain a person and ask questions is not the same issue as whether there is sufficient cause to enter a home. The particular language employed by trial counsel: "didn't have the requisite level of suspicion," seems to raise the issue in the investigative questioning context. On the other hand, however, that is not the context in which the statement was made by trial counsel at trial, and it is not the context in which Waters raises his challenge on appeal. Waters was not stopped and questioned. Deputy Welsch entered Waters' house. The "requisite level of suspicion" to do that, in Waters' appellate argument, is probable cause. Waters' counsel never even mentions entry into the home, the crux of the constitutional issue, but rather points to going to the home and questioning Waters, which goes along with the language related to investigative questioning.

¶12 We said in ***Rogers*** that the forfeiture rule:

> is based on a policy of judicial efficiency. By forcing parties to make all of their arguments to the [circuit] court, it prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal (or on remand) should their original

> idea not win favor. We will not, however, blindside [circuit] courts with reversals based on theories which did not originate in their forum.

Id. at 827 (internal citations omitted). It is not clear from the record before me whether the circuit court was presented with the theory upon which this appeal is based. This would seem to be the same problem that we decried in ***Rogers***, stating the argument in such broad, generalized terms that "the details could always be relitigated on appeal," it seems is exactly what Waters seeks to do here. ***Id.***

¶13 As the burden of demonstrating that the issue was adequately preserved for appeal falls upon Waters, it cannot be left to ambiguity whether the circuit court would have perceived the argument made to it as the same argument raised before me on appeal. Waters has not met his burden of showing that he preserved this challenge of Deputy Welsch's entry into his home, and I have to conclude on that basis that the issue had been forfeited, as the State argues.

¶14 It is not without some hesitation that I reach this conclusion. The lawfulness of a law enforcement officer's entry into a citizen's home is a fundamental issue. The United States Supreme Court has said, in circumstances superficially identical to those here, that "[i]t 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) (quoted source omitted). To enter a home without a warrant or consent requires more than probable cause; it requires exigent circumstances. ***Id.*** at 749.

¶15 However, the nature of the alleged violation of Waters' constitutional rights highlights the reason why forfeiture is required here. Waters' failure to fully articulate or develop an argument related to improper entry deprived the circuit court of the opportunity to determine on the record whether or

not there was consent or exigent circumstances justifying Deputy Welsch's entry. Providing the circuit court with the opportunity to avoid error is a primary reason for the forfeiture rule. For this reason, I do not exercise my discretion to ignore Waters' forfeiture and decline to address the merits of Waters' argument.

CONCLUSION

¶16 For the reasons stated above, I affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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