

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2012

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. 2012AP571-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CT460

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. CHRISTOFFERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Reversed and cause remanded for further proceedings.*

¶1 HOOVER, P.J.¹ Michael Christofferson appeals a judgment of conviction for operating while intoxicated, third offense. Christofferson argues

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the circuit court erred by denying his suppression motion because the officer unlawfully arrested him. We agree. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 On July 24, 2010, a citizen witness, subsequently identified as McKinzie Flynn, observed a silver Dodge four-door truck swerve, hit the median several times, and cross the centerline. She followed the vehicle to a gas station. Flynn entered the gas station's convenience store before the driver and told the clerk she believed the driver might be intoxicated. As the driver entered the store, he struggled with the entrance door and Flynn smelled the odor of intoxicants on his person. Flynn then returned to her vehicle and called 911. She reported her observations to dispatch, gave the vehicle's license plate number, and advised that the driver had returned to his vehicle and was heading south on Clairemont Avenue.

¶3 At approximately 9:47 p.m., officer Benjamin Hundt heard a broadcast about an erratic and possibly intoxicated driver. Hundt ran a registration check on the broadcasted license plate number and the owner of the vehicle was identified as Michael Christofferson. Christofferson lived near Clairemont Avenue, and Hundt proceeded to Christofferson's residence.

¶4 When Hundt arrived at Christofferson's residence, he observed the suspect vehicle parked in the residence's attached garage. Hundt believed the vehicle had recently arrived at the residence because the garage door light was illuminated. Hundt then observed a male, subsequently identified as Christofferson, exit the vehicle's driver's side door. Hundt stated it appeared as

though Christofferson had balance problems and, as Christofferson neared the interior garage door, he used the wall for support.

¶5 Hundt entered Christofferson's garage and told Christofferson he would like to talk to him about a driving complaint. Christofferson did not respond to Hundt, and Hundt repeated his request. When Christofferson turned to face Hundt, Hundt observed that Christofferson's eyes were glassy and that Christofferson smelled of intoxicants. Christofferson confirmed that he was the only person at home. Christofferson also told Hundt he had just arrived home, he made it safely, and he "didn't really want to speak to [Hundt]."

¶6 Hundt again advised Christofferson that he wanted to talk to him about the driving complaint. Christofferson told Hundt for a second time he did not want to speak to him. Christofferson then stepped inside his house through the interior garage door. Hundt entered Christofferson's house and arrested Christofferson for operating while intoxicated. The State subsequently charged Christofferson with operating while intoxicated and operating with a prohibited alcohol concentration.

¶7 Christofferson brought a suppression motion, arguing Hundt lacked probable cause and exigent circumstances to arrest him without a warrant. The circuit court denied Christofferson's motion. It reasoned that Hundt had probable cause to arrest Christofferson based on the citizen witness's report, Christofferson's admission that he just arrived home and was alone, and Hundt's observations of Christofferson exiting the driver seat and Christofferson's balance problems, glassy eyes, and odor of intoxicants. The court also determined Hundt was permitted to arrest Christofferson without a warrant because all four exigent

circumstances were present—hot pursuit; a threat to safety of a suspect or others; a risk that evidence will be destroyed; and a likelihood that the suspect will flee.

¶8 A jury subsequently found Christofferson guilty of operating while intoxicated and operating with a prohibited alcohol concentration. The court entered judgment on the operating while intoxicated verdict.

DISCUSSION

¶9 On appeal, Christofferson argues he was unlawfully arrested because Hundt lacked probable cause and exigent circumstances to arrest him without a warrant. When reviewing a circuit court’s determination on a suppression motion, we will uphold the circuit court’s findings of fact unless they are clearly erroneous. *State v. Grady*, 2009 WI 47, ¶13, 317 Wis. 2d 344, 766 N.W.2d 729. However, whether probable cause and exigent circumstances exist are questions of law we review independently. *State v. Phillips*, 2009 WI App 179, ¶6, 322 Wis. 2d 576, 778 N.W.2d 157.

¶10 Under the Fourth Amendment, police are prohibited from making a warrantless and nonconsensual entry into a suspect’s home absent probable cause and exigent circumstances. *State v. Martwick*, 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552. This Fourth Amendment protection also extends to the curtilage of a home. *Oliver v. United States*, 466 U.S. 170, 180 (1984). Curtilage is the area immediately adjacent to a home to which the inhabitants have extended “the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life’” and is considered part of the home for purposes of the Fourth Amendment. *Martwick*, 231 Wis. 2d 801, ¶26 (quoting *Oliver*, 466 U.S. at 180). Attached garages are consistently held to be part of curtilage and are therefore subject to the warrant requirement. *State v. Leutenegger*, 2004 WI App 127, ¶21 n.5, 275

Wis. 2d 512, 685 N.W.2d 536. “The government bears the burden of showing that the warrantless entry was both supported by probable cause and justified by exigent circumstances.” *State v. Robinson*, 2010 WI 80, ¶24, 327 Wis. 2d 302, 320, 786 N.W.2d 463.

¶11 In its brief, the State concedes that “probable cause was not established until Hundt made contact with the defendant” and observed Christofferson’s unsteady balance, glassy eyes, and odor of intoxicants. However, Hundt had already *entered* Christofferson’s attached garage when he made observations about Christofferson’s glassy eyes and odor of intoxicants. *See State v. Davis*, 2011 WI App 74, ¶13, 333 Wis. 2d 490, 798 N.W.2d 902 (“As a general matter, it is unacceptable for a member of the public to enter a home’s attached garage uninvited This premise is true regardless whether an overhead or entry door is open.”).² Because Hundt’s entry into the attached garage was not supported by probable cause to arrest, his entry was unlawful.³

¶12 Further, even if Hundt had probable cause to arrest, the State has not proven Hundt’s warrantless entry was supported by exigent circumstances. There are four exigent circumstances that may justify a warrantless entry: “(1) an arrest

² We recognize that law enforcement officers do not invade the privacy of a home when using the normal means of access to and egress from a residence. *See State v. Edgeberg*, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994). However, the State has not established that, pursuant to *Edgeberg*, it was reasonable for Hundt to enter Christofferson’s attached garage.

³ When arguing Hundt unlawfully entered his house, it is unclear whether Christofferson’s use of the word “house” means the entire structure, which would include the attached garage, or simply Christofferson’s interior living quarters. We conclude this is a distinction without difference because, in either case, Hundt lacked exigent circumstances to make a warrantless arrest. *See infra*, ¶¶12-13; *see also State v. Martwick*, 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552 (officer needs probable cause *and* exigent circumstances for warrantless entry into suspect’s house).

made in ‘hot pursuit,’ (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee.” *State v. Smith*, 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986). Here, the State argues all four exceptions were present.

¶13 We, however, reject the State’s arguments. Hundt was not in “hot pursuit” of Christofferson when he arrived at Christofferson’s residence. *See Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (A claim of hot pursuit was unconvincing because there was no immediate or continuous pursuit from the scene of the crime.). Rather, Hundt came to the residence to investigate the driving complaint. Additionally, there is nothing in the record that suggests Christofferson was a flight risk or that he was a threat to himself or the public after he arrived home. *See Smith*, 131 Wis. 2d at 243 (The flight risk exigency “must arise by clear evidence of a likelihood that the suspect would flee.”); *see also State v. Larson*, 2003 WI App 150, ¶21, 266 Wis. 2d 236, 668 N.W.2d 338 (because impaired defendant had arrived home and parked his car, he was little threat to public safety). Finally, although the State asserts an immediate arrest was necessary to prevent the destruction of blood-alcohol level evidence, in *Welsh*, the United States Supreme Court held that a warrantless arrest cannot be upheld simply because evidence of a defendant’s blood alcohol level might dissipate while police obtain a warrant. *See Welsh*, 466 U.S. at 753; *see also Larson*, 266 Wis. 2d 236, ¶22. The State has not shown exigent circumstances justified Christofferson’s warrantless arrest.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

