COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP381-CR **Cir. Ct. No. 2004CM1637**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. DYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN F. FOLEY, Reserve Judge. *Reversed and cause remanded with directions*.

¶1 WEDEMEYER, P.J.[1] Michael J. Dyer appeals from a judgment entered after he pled guilty to operating a vehicle while intoxicated, contrary to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

WIS. STAT. § 346.63(1)(a) (2003-04).[2] He claims the trial court erred in denying his motion seeking to suppress evidence based on lack of probable cause and exigent circumstances. Because there were no exigent circumstances to support the warrantless arrest in the curtilage of Dyer's home, this court reverses and remands with directions to the trial court to enter an order granting the motion to suppress.

BACKGROUND

¶2 On March 7, 2004, at approximately 9:49 p.m., Dyer was driving his vehicle home. Off-duty Milwaukee Police Officer Dan Zielinski, who was driving his own personal vehicle, observed Dyer commit some traffic offenses, including deviating from his designated lane, failing to use his turn signal, and driving in the gore area of the freeway.

¶3 Zielinski followed Dyer three or four miles and observed him park his car in his garage. During the pursuit, Zielinski called "911" and reported the erratic driver. Police dispatch sent Police Officer Sandra Welsher to the scene in her squad car. She arrived shortly after Dyer had closed his garage and walked up the sidewalk to the patio area leading to the back door of his home. Zielinski yelled to Welsher, "white male in red sweatshirt" and pointed in the direction of the sidewalk. Welsher parked the squad, jumped out, and took off running. She spotted Dyer walking on the patio area toward the back door and yelled "Stop." She identified herself and explained that there was a report about him driving erratically.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 In response to Welsher, Dyer, who had just reached his back door, turned and indicated he just got home. Welsher asked Dyer to accompany her back to the alley, where Zielinski confirmed that Dyer was the driver he had followed. Welsher noted that Dyer smelled of alcohol and had bloodshot eyes. Dyer refused to perform field sobriety tests. He was arrested for operating a vehicle while intoxicated and transported for blood tests.

¶5 He subsequently filed a motion seeking to suppress evidence based on an illegal arrest. At the suppression hearing, both Welsher and Zielinski testified. Based on their testimony, the trial court found probable cause existed. Although there was little discussion, it appears from the record that the trial court also found the State proved that exigent circumstances existed—specifically, a concern for "quickly dissipating evidence." After the trial court's ruling, Dyer pled guilty and judgment was entered. He now appeals.

DISCUSSION

¶6 The issue in this case is whether the trial court properly denied the motion seeking to suppress evidence. This issue presents a question of constitutional fact requiring independent appellate review and application of constitutional principles to the trial court's findings. *See* ***State v. Bermudez***, 221 Wis. 2d 338, 346, 585 N.W.2d 628 (Ct. App. 1998). This court will not reverse a trial court's finding unless they are clearly erroneous. ***Id.*** at 345. This court then independently applies those facts to the constitutional standard. ***Id.***

¶7 Dyer argues that his warrantless arrest violated the Fourth Amendment and, therefore, any evidence generated therefrom should have been suppressed. The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution prohibits unreasonable searches and seizures.

See ***State v. Gonzalez***, 147 Wis. 2d 165, 167, 432 N.W.2d 651 (Ct. App. 1988). The warrantless entry of a house for purposes of search or arrest is presumptively unreasonable. *See* ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984). The presumption applies to the curtilage of a person's home. ***State v. Walker***, 154 Wis. 2d 158, 184, 453 N.W.2d 127 (1990).

¶8 In order to overcome the presumption of the unreasonableness of the seizure, the record must reflect both that the officers had probable cause to arrest and that exigent circumstances existed. ***Welsh***, 466 U.S. at 747. Thus, we turn to the trial court's findings with respect to those findings.

¶9 The trial court found that the officers were working as a team and that there was sufficient evidence to establish probable cause existed to arrest Dyer. This court cannot conclude that the trial court's probable cause finding was clearly erroneous.

¶10 Probable cause in the context of an arrest is well defined in the case law. It refers to that quantum of evidence that would lead a reasonable police officer to believe that a person probably committed a crime. ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). The evidence does not have to be sufficient to prove guilt beyond a reasonable doubt; rather, it must only convince a reasonable officer that guilt is more than a possibility. ***Id.*** at 625.

¶11 Here, Dyer was observed committing repeated traffic violations for several miles and Zielinski was concerned that he was intoxicated. Zielinski saw him unsteady on his feet when he exited his car. Welsher observed the odor of alcohol and bloodshot eyes. The officers' combined information is sufficient to sustain the trial court's finding that probable cause existed.

¶12 The next issue, however, is whether there was any evidence to uphold the trial court's finding that exigent circumstances existed. This court concludes that the trial court's finding that the exigency of quickly dissipating evidence was clearly erroneous.

¶13 This court reviews exigent circumstances using a flexible test of reasonableness under the totality of the circumstances. ***State v. Smith***, 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986). One factor this court considers when determining whether any exigency exists is the gravity of the offense for which an arrest is being made. ***Welsh***, 466 U.S. at 750. The state bears the burden of proving that the warrantless entry into a residence or its curtilage occurred under exigent circumstances. *See* ***State v. Milashoski***, 159 Wis. 2d 99, 110-11, 464 N.W.2d 21 (Ct. App. 1990).

¶14 At trial, the State argued that the exigency was "quickly dissipating evidence." The trial court agreed. The law, however, does not support this finding. In ***Welsh***, the Supreme Court held that

> a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

Id. at 754. The violation of the sanctity of one's home is "the chief evil against which the wording of the Fourth Amendment is directed." ***Id.*** at 748 (citation omitted). Clearly then, "quickly dissipating evidence" cannot constitute the exigent circumstance in the instant case.

¶15 Although this arrest occurred just outside Dyer's home, the same principles apply to the "curtilage" of one's home. Dyer was in his backyard, just about to enter his back door, when Welsher ordered him to "Stop." The State does not address, and apparently concedes, that Dyer was within the curtilage of his home. Accordingly, this court concludes that Dyer was within the curtilage of his home.

¶16 The State, perhaps recognizing the invalidity of the dissipating evidence exigency, raises a different exigent circumstances argument on appeal—that the exigent circumstance in this case was "hot pursuit." This court cannot agree with the State's characterization. In ***Welsh***, the Supreme Court held that "the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." ***Id.*** at 753. The facts in the instant case are slightly different; nevertheless, this too, was not a "hot pursuit" case.

¶17 Although the record reflects that off-duty officer Zielinski followed Dyer home after observing him driving erratically, Zielinski's pursuit cannot be characterized as "hot pursuit." Zielinski was in his own personal vehicle and testified at the suppression hearing that Dyer did not appear to know that he was being followed. This was not a situation where a squad car, with sirens activated, was chasing down a suspect who had just committed a crime. This is not a case where a suspect was fleeing from the officers.

¶18 In concluding that this case does not involve "hot pursuit," this court also notes that the underlying offense for which the officers had probable cause was a civil forfeiture violation. Although this court does not condone driving while intoxicated, the offense at issue here was a non-criminal, traffic offense.

There is no evidence that injuries resulted from Dyer's erratic driving, or that he was armed or dangerous. When Dyer arrived at his home, whatever risk arose from his apparent intoxication was substantially reduced. There was little remaining threat to the public safety. There was no longer any potential emergency.

¶19 Based on the foregoing, this court cannot conclude that the State has proven the existence of any exigent circumstances. Absent that proof, the warrantless arrest of Dyer in the curtilage of his home was unreasonable under the Fourth Amendment to the United States Constitution. Accordingly, the trial court should have granted Dyer's motion to suppress.

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

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