

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2005

Cornelia G. Clark
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. 2005AP829

Cir. Ct. No. 2003TR486

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE MATTER OF THE REFUSAL OF
MICHAEL D. DRESCHER:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL D. DRESCHER,

DEFENDANT-APPELLANT.

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

¶1 WEDEMEYER, P.J.¹ Michael D. Drescher appeals from an order determining that he unreasonably refused, pursuant to WIS. STAT. § 343.305(9)

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

(2003-04)² to submit to a chemical test of his breath. He argues that the trial court erred when it concluded that the warrantless arrest in his home was a valid arrest, thus resulting in an unreasonable refusal. Because the trial court erred in concluding that the arrest in this case was valid, this court reverses the order with directions.

BACKGROUND

¶2 On January 15, 2003, at approximately 1:00 a.m., Whitefish Bay Police Officer Thomas Reeves was parked facing northbound in the 4800 block of North Lake Drive watching for vehicles driving in excess of the posted speed limit. According to Reeves, Drescher drove past him traveling southbound at forty-eight miles per hour in a thirty miles per hour zone. Reeves proceeded to turn his squad car around to conduct a traffic stop of Drescher's car. At 4652 North Lake Drive, Drescher pulled into the driveway of his home. The officer pulled in right behind Drescher.

¶3 The officer's and Drescher's recollection of what happened next differ. The officer testified that Drescher approached his vehicle and the officer ordered Drescher to return to his car, which Drescher did. The officer testified that during this encounter, he noticed Drescher had glassy eyes and appeared to lean on the car door for support when exiting his vehicle. The officer then approached Drescher's car and asked for a driver's license. Drescher complied. The officer observed an odor of alcohol coming from Drescher's car.

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

¶4 While the officer went back to the police car to run a check on his driver's license, Drescher exited his vehicle and entered the door of his home, which was approximately eight-to-ten feet from his vehicle. He locked the front door after entering and refused to answer when the police knocked. The officer then called for back-up, and found that Drescher had one previous conviction for operating a vehicle while intoxicated. He testified that when Drescher refused to answer the door, the officers found unlocked garage doors, through which they proceeded to enter, and they then arrested Drescher for obstruction.

¶5 Drescher testified that the officer pulled up quickly behind him and Drescher did not realize at first that the car was a police car. He then approached the officer and asked what the officer was doing. Drescher described the officer as out of control. The officer ordered Drescher back into his car after explaining that he had stopped him for speeding. Drescher complied. Drescher also complied with the officer's request for his driver's license.

¶6 Additionally, Drescher testified that when the officer went back to his car, Drescher felt threatened by the officer's behavior and decided he would be safer in his home. Drescher went into his home, locked the door, and telephoned an attorney. While he was talking to the attorney, the officers were pounding on the door telling Drescher to let them in. Drescher also produced audio recordings from police dispatch left on his answering machine wherein he was told to open the door for the officers or they would break it down. When the officers did enter through the door between the garage and the kitchen, they tackled him, and arrested him for obstruction. Drescher produced pictures showing damage done to the door as a result of the officers breaking through it to enter his home. He also had a repair bill for the damages. Drescher testified that all the doors to his home were locked and in good repair before the officers broke down his door.

¶7 The officers took Drescher to the police station and asked him to take breath and field sobriety tests. According to Officer Reeves, Drescher refused. According to Drescher, he told the officers he wanted to wait to do the tests until his attorney arrived because he did not trust the officers. When Drescher's attorney arrived at the station a short time later, Drescher was told it was too late for him to take the tests and he was being issued a refusal charge.

¶8 In response to the charge, Drescher requested a hearing at which Officer Reeves, Drescher, and his attorney testified. At the conclusion of the hearing and after reviewing further submissions by the parties, the trial court ruled that the arrest was lawful and therefore the refusal was improper. An order was entered to that effect. Drescher now appeals.

DISCUSSION

¶9 The dispositive issue in this case is whether the arrest of Drescher inside his home without a warrant was lawful. This involves a question of law which this court reviews independently. *State v. Bermudez*, 221 Wis. 2d 338, 346, 585 N.W.2d 628 (Ct. App. 1998); *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

¶10 Warrantless arrests in a private home are lawful upon a showing of probable cause and exigent circumstances. *Welsh v. Wisconsin*, 460 U.S. 740, 749-51 (1984). The warrantless entry of a house for purposes of search or arrest is presumptively unreasonable. *Id.* at 750. In order to overcome this presumption, the state must show that the officers had both probable cause to arrest and that exigent circumstances existed. *Id.* at 747.

¶11 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 record reflects that Officer Reeves had probable cause to arrest Drescher for obstruction. Drescher was ordered to sit in his car and he ignored the officer’s instructions. Thus, this court concludes that the first part of the test was satisfied.

¶12 The next issue, however, is whether there was any evidence to uphold the trial court’s determination that exigent circumstances existed. This court concludes that the trial court erred in finding exigent circumstances in this case.

¶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). Here, the officer testified that the exigent circumstances were a concern over dissipation of evidence, or the level of alcohol in Drescher’s blood. Drescher argues that *Welsh* held that the dissipation of blood alcohol was insufficient to constitute exigent circumstances. The State responds that *Welsh* does not control the instant case because the officer in *Welsh* did not know whether the OWI was a first (civil) or second (criminal) offense, whereas the officer here knew that Drescher had one prior OWI conviction.

¶14 This court is not convinced that the officer’s knowledge of a prior OWI created an exigent circumstances situation. Drescher was not pulled over for suspected OWI. He was pulled over for a minor traffic offense—speeding. Drescher was not arrested for OWI, but rather for not listening to the officer. Drescher was not a “fleeing felon” as in the *United States v. Santana*, 427 U.S.

38, 42-43 (1976) case. There was no risk that Drescher was a threat to others. There was no evidence that Drescher's speed resulted in any damage or injury. Whatever risk arose from possible intoxication was substantially reduced when Drescher arrived home. There was no longer any potential emergency. Under these circumstances, this court cannot conclude that dissipation of blood alcohol evidence constituted exigent circumstances.

¶15 As noted in *Welsh*, courts are reluctant to violate the sanctity of one's home without a neutral magistrate objectively assessing whether such intrusion is justified. *Id.* at 750. The warrant requirement balances the need to keep in check zealous police officers who lose objectivity because they are caught up in the moment. The facts in this case involve a police stop for speeding in the driveway of Drescher's home, with some suggestions, *after the stop*, that Drescher had been drinking. Although drinking and driving is not to be taken lightly, even a *second* offense is not treated as a felony in this state. Accordingly, in addressing the gravity of the offense at issue, this case involved speeding, not listening to an officer, and possibly a second OWI. Those facts are balanced against a record that demonstrates Drescher was safely in his home and had not caused any injuries to person or property. He was not armed and not suspected of committing a felony. Once in his home, Drescher received threatening phone calls from the police, heard repeated pounding on his door, and officers breaking down a door to enter his home, eventually tackling him before an arrest for obstruction.

¶16 "This method of law enforcement displays a shocking lack of all sense of proportion." *Id.* at 751 (citation omitted). This case did not involve a violent subject, a felony, a fleeing felon, or hot pursuit. There were no justifiable exigent circumstances for the warrantless arrest. Accordingly, there was no valid arrest and therefore Drescher's refusal to submit to a chemical test was reasonable.

¶17 The trial court's order to the contrary is reversed and the case is remanded with directions that the trial court enter an order finding in favor of Drescher on the refusal.

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

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

