

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 14, 2007**

A. John Voelker  
Acting 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. 2006AP2317-CR**

**Cir. Ct. No. 2005CT2621**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID J. DEDERICH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
KATHRYN W. FOSTER, Judge. *Affirmed.*

¶1 ANDERSON, J.<sup>1</sup> David J. Dederich appeals from a judgment of conviction for drunk driving. Dederich argues the trial court erred in denying his

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

motion to suppress all evidence obtained in an investigation of a hit-and-run incident. Finding no constitutional violation, we affirm.

### **Facts**

¶2 The following facts flow from the hearing on Dederich's motion to suppress. On November 25, 2005, Jason Ziminski, a police officer with the city of Muskego, was dispatched to investigate a hit-and-run. The victim had followed the alleged offending vehicle and provided dispatch with a Wisconsin license plate number. Dispatch traced the vehicle to the last name Dederich and directed Ziminski to Dederich's residence. From a distance, Ziminski observed a vehicle parked in Dederich's driveway that matched the description provided by the victim. Once closer, Ziminski confirmed the license plate number and vehicle description and observed damage to the vehicle consistent with the alleged hit-and-run. Ziminski walked up to the door of the residence in order to make contact with the alleged driver of the vehicle and waited for backup.

¶3 Ziminski noted two doors—an interior door and a screen door. From his vantage point, Ziminski saw a man and a woman in the living room. When the backup officer arrived, Ziminski heard the female, later identified as Dederich's wife, Lynn, yell out something like, "Dave, the police are here. You better come and explain what you did." Lynn admitted saying something to the effect of, "[Y]ou better find out what they want because I know it isn't about me." After the officers knocked, Lynn opened the interior door. The officers identified themselves as Muskego police and asked to talk to the person who was driving the subject vehicle. At this point, the officers entered the home. Ziminski testified that Lynn invited them in. Lynn testified that she never gave the officers consent to enter the home. According to Lynn, she opened the interior door and then she

and Dederich took their two dogs and let them out the back door and when they returned, the officers were already in the home.

¶4 The officers made contact with Dederich, who verbally acknowledged his name, and then informed him that his vehicle bore the same plate and description as one reported in a hit-and-run accident. Dederich told the officers that he had just returned home from work and had not been involved in any accidents. Ziminski noticed that Dederich's balance was unsteady and his speech was slightly slurred. Lynn also testified that Dederich's speech was slurred.

¶5 Ziminski testified that he then asked Dederich to step outside so he could show him the damage to the truck. Dederich agreed and put on his shoes and went outside with the officers. Lynn, however, testified that Dederich did not think he had an option except to go outside with the officers. According to Lynn, one of the officers said, "We need to talk with you right now. Put your shoes on and let's go." Regardless, Ziminski testified that as Dederich approached the door, he detected a strong odor of intoxicants emanating from Dederich's breath. Based on his observations, Ziminski concluded that Dederich was intoxicated. Ziminski asked Dederich if he had consumed any intoxicants that evening and Dederich replied that he had not.

¶6 Once outside, Ziminski showed Dederich the damage and asked him if he had accidentally struck a vehicle. Dederich admitted to driving on the road where the accident occurred, but he did not remember hitting a car. Dederich informed Ziminski that he did remember "someone following him[,] a car, following him to Open Pantry and somebody yelling at him."

¶7 Based on Dederich's admission that he had been driving, the odor of intoxicants, the disoriented balance and slurred speech, Ziminski determined that Dederich had been operating a motor vehicle while intoxicated and asked Dederich to perform field sobriety tests. Dederich initially became very angry, but eventually agreed to complete the tests. Ziminski began explaining the alphabet test, but before he could finish with the instructions, Dederich started reciting the alphabet. Ziminski stopped Dederich and asked him to wait until he had finished with the instructions. Dederich again began the test before Ziminski had finished delivering the instructions and Ziminski again asked him to stop. Dederich became agitated and angry and refused to complete any other test. Ziminski asked Dederich to perform a preliminary breath test and he refused. Ziminski arrested Dederich for operating a motor vehicle while intoxicated.

¶8 Following the hearing, the court denied the motion to suppress. The court issued no findings concerning the question of the consensual entry into the home. Rather, the court determined that Ziminski did not take Dederich into custody until he was out in public, on the driveway, and at that time Ziminski possessed the necessary probable cause to arrest Dederich for operating a motor vehicle while intoxicated.

### **Standard of Review**

¶9 We employ a two-step standard when reviewing a trial court's conclusions concerning constitutional challenges. *See State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794 (1998). We will not upset a trial court's findings of evidentiary or historical facts unless they are contrary to the great weight and clear preponderance of the evidence. *Id.* Our review of a

constitutional fact on the grounds of established historical fact, however, is de novo. *State v. Turner*, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987).

### Discussion

¶10 Dederich maintains that after the police officers entered his residence without consent or a warrant, “he had no choice but to leave the house with the officers to examine the vehicle.” Dederich further claims that the officers did not “possess probable cause to enter [his] residence and arrest him.” He cites *State v. Larson*, 2003 WI App 150, ¶¶7, 14, 266 Wis. 2d 236, 668 N.W.2d 338, and *Welsh v. Wisconsin*, 466 U.S. 740, 742-743 (1984), two cases in which the officers entered the defendant’s home without a warrant or consent and unlawfully proceeded to arrest the defendant.

¶11 Generally speaking, a warrantless, nonconsensual entry of a home or curtilage and warrantless arrest thereon are reasonable under the Fourth Amendment *only* where there is probable cause coupled with exigent circumstances. *See State v. Smith*, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986); *see also State v. Walker*, 154 Wis. 2d 158, 183, 453 N.W.2d 127 (1990). However, the warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment. *United States v. Santana*, 427 U.S. 38, 42 (1976). An individual is under arrest when, given the degree of restraint under the circumstances, a reasonable person in the defendant’s position would have considered himself or herself to be in custody. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

¶12 We conclude that, unlike in *Welsh* and *Larson*, the officers did not arrest Dederich inside his home. Rather, the officers arrested him in his driveway, a public place.<sup>2</sup> While inside the home, Ziminski told Dederich he was investigating a hit-and-run accident and that there was damage to Dederich's vehicle. Ziminski testified that he asked if Dederich would step outside so he could show Dederich the damage. Dederich agreed and put on his shoes. Dederich asserts his wife's testimony shows that he did not have an option, he had to go with the officers to look at the vehicle. However, the trial court obviously rejected this assertion. The court noted that although people oftentimes feel they should do whatever an officer asks them to do, Dederich did not have to comply with Ziminski's request and was not in custody at that time. Further, at no time during this encounter was Dederich placed in handcuffs, told he was under arrest, physically escorted out of his home, or coerced into leaving his home. There is no indication that Dederich or his wife asked the officers to leave the residence, nor did Dederich state that he did not want to speak with the officers. Under the totality of the circumstances, a reasonable person would not have considered himself or herself to be in custody.

¶13 We also conclude that Ziminski possessed probable cause to arrest Dederich for operating a motor vehicle while under the influence of an intoxicant when he arrested him in the driveway and Dederich offers no argument in opposition. Probable cause exists if the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while

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<sup>2</sup> Dederich does not challenge the State's assertion that his driveway is a public place for Fourth Amendment purposes.

under the influence of an intoxicant. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Ziminski observed Dederich's slurred speech and imbalance and smelled an odor of intoxicants on his breath. Dederich's wife confirmed that Dederich was slurring his speech. Dederich admitted that he had been driving the vehicle parked in his driveway. The vehicle matched the description of a vehicle involved in the hit-and-run accident. Further, after a few unsuccessful attempts at properly completing the alphabet test, Dederich became uncooperative and angry and refused to comply with Ziminski's request to complete any other field sobriety tests. It was not until this point that Ziminski placed Dederich under arrest. Measuring Ziminski's conduct by an objective standard and using the totality of the circumstances test, a reasonable officer could conclude that there was probable cause to believe Dederich was driving while under the influence of an intoxicant. Therefore, we affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

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

