COURT OF APPEALS
DECISION
DATED AND RELEASED

April 25, 1996

NOTICE

No. 95-2716-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK J. GENIESSE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

VERGERONT, J.[1] Frank Geniesse appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, in violation of § 346.63(1)(a), STATS. He contends that a warrantless entry into his garage violated the Fourth Amendment and, therefore, all the fruits of his arrest should be suppressed. We conclude that the trial court correctly decided that the warrantless entry did not violate the Fourth Amendment. We affirm.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Geniesse was seated in his vehicle, which was parked in a lot behind Charlie Brown's Tavern, at 1:10 a.m. on May 19, 1994. Officer Terrence Gebhardt approached the car, believing that a sick or intoxicated person was in the car. Gebhardt was accompanied by his partner, Officer Cory Johnson. The car engine was running. Geniesse indicated that he was talking to his brother on his cellular phone. Gebhardt noticed that Geniesse had glassy, bloodshot eyes, drastically slurred speech and a strong odor of intoxicants coming from his person or from inside his vehicle. Gebhardt also noticed an open can of beer sitting in a holder inside the vehicle. In response to Gebhardt's questions, Geniesse said he had been drinking beer in the tavern. Gebhardt told Geniesse that he could be arrested for driving while intoxicated and that he should not drive home. Geniesse told Gebhardt that he lived approximately three blocks away. Gebhardt offered to drive him home, but Geniesse declined and said he would walk home. Gebhardt told Geniesse to turn off his car engine, and when the officers left the parking lot, the engine was off. At some point during the stop, Gebhardt administered a portable breath test and received a result of .17.

At approximately 1:30 a.m. the same morning, Gebhardt and Johnson were traveling in their squad car and passed Geniesse's vehicle on the road. Gebhardt turned on his squad's emergency lights and began to pursue Geniesse's car. At the time, Geniesse's car was approximately one-half block or fifty yards from his garage. According to Gebhardt, Geniesse had an opportunity to pull his car over to the side of the road. Geniesse testified that he saw the lights of the squad car when he was about one-half block or fifty yards from his residence. Geniesse did not stop there, but continued driving and drove into his garage. The garage is not an attached garage, but is separated from the house by a six-foot walkway.

When Geniesse pulled into his driveway, he opened the garage door with an electric garage door opener. Gebhardt and Johnson got out of their squad car and entered the garage through the open garage door. They did not have a warrant and they did not have Geniesse's consent. The officers asked or told Geniesse to get out of his car, which he did. The three left the garage. The officers performed field sobriety tests outside the garage. Shortly thereafter, Geniesse was arrested for driving while under the influence of an intoxicant.

Geniesse's motion to suppress challenged: (1) the lawfulness of the first stop in the parking lot because it was not supported by reasonable suspicion; (2) the lawfulness of the second stop because it was not supported by probable cause; and (3) the warrantless entry into the garage.

The trial court concluded the first stop was lawful. The court found that Gebhardt observed Geniesse slumped over towards the middle of the car with the engine running. The court concluded that it therefore was reasonable to inquire whether the person was sick, unconscious or dead. Once the officer observed the odor of alcohol, slurred speech and an open container of beer, the court continued, the officer had reasonable grounds to continue to question Geniesse relative to a possible charge of operating while intoxicated or having a prohibited blood alcohol concentration. The information the officer had, including the admission that Geniesse had been drinking, justified conducting a preliminary breath test, which registered .17. The court concluded there was probable cause to permit the preliminary breath test.

The court also ruled that the second stop was lawful. The court agreed with the district attorney that the fact that the officers did not arrest Geniesse in the parking lot did not prove that they did not have probable cause to arrest him; rather, they were giving him a break because he lived nearby and said he would walk home. The court concluded that when the officers saw Geniesse driving soon thereafter, they had "plenty of grounds on which to suspect" that he was operating a vehicle with a prohibited blood alcohol concentration[2] and operating while intoxicated. Although the trial court uses the term "suspect" in this statement, the court begins its written decision by phrasing the issue as whether the officer had "reasonable grounds, probable cause" to stop Geniesse a second time. Reading the written decision together with the oral rulings made after the hearing on the suppression motion, we understand the trial court to be ruling that when the officers saw Geniesse driving, they had probable cause to arrest him for either driving with a prohibited blood alcohol concentration or driving while intoxicated.

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[2] "Prohibited alcohol concentration" for a person with one or no prior convictions, suspensions or revocations is .1% blood alcohol concentration or more by weight of alcohol in the person's blood or .1 grams or more of alcohol is 210 liters of the person's breath. Section 340.01(46m), STATS.

With respect to the warrantless entry into the garage, the court found that the officer was in continuous hot pursuit from the time he observed Geniesse driving on the street. The court found that Geniesse could have stopped sooner than he did after observing the red lights. The court also found that the officer arrived at the garage a few seconds after Geniesse, entering through the main overhead garage doorway left open by the defendant. The court concluded that the warrantless entry under all the circumstances did not violate the Fourth Amendment.

On appeal, Geniesse challenges only the warrantless entry. It appears that he is not challenging either the trial court's ruling that the initial stop in the parking lot was lawful under ***Terry v. Ohio***, 392 U.S. 1 (1968), or the ruling that the officers had probable cause to arrest when they saw Geniesse driving less than twenty minutes later.

A circuit court's findings of evidentiary and historical fact will not be overturned unless they are clearly erroneous. *See* ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). However, questions of constitutional fact are subject to an independent appellate review, requiring an independent application of the constitutional principles involved to the facts as found by the trial court. ***Id.*** at 344, 401 N.W.2d at 832.

The Fourth Amendment analysis is based on the reasonableness of the governmental intrusion into a citizen's personal security. ***Pennsylvania v. Mimms***, 434 U.S. 106, 109 (1977). A warrantless nonconsensual entry of a home is reasonable under the Fourth Amendment where there is probable cause to arrest coupled with exigent circumstances. ***State v. Smith***, 131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986). An arrest made in "hot pursuit" can constitute the exigent circumstances required for a warrantless entry. ***Id.*** at 229, 388 N.W.2d at 605. Exigent circumstances are reviewed by a flexible test of reasonableness under the totality of the circumstances. ***Id.***

The Fourth Amendment also extends protection to the curtilage of one's home. ***State v. Kennedy***, 193 Wis.2d 578, 584, 535 N.W.2d 43, 45 (Ct. App. 1995). The extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. ***Id.***

Geniesse argues the entry into his garage is no different than entry into his home because the garage is within the curtilage of his home. Relying on ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), Geniesse argues that the officers were not in hot pursuit of him. Alternatively, Geniesse argues that even if they were, the hot pursuit exception applies only in very narrow circumstances in the context of the commission of an ongoing felony where the police do not have the opportunity to get a warrant.

In ***Welsh***, a witness observed the defendant's car swerve off the road and into an open field. ***Welsh***, 466 U.S. at 742. Before police arrived, the defendant left the accident scene. ***Id.*** When the police arrived, the witness told the police about the accident and that the defendant appeared very sick or very intoxicated. Without obtaining a warrant, the police went to the home of the registered owner of the car at 9:00 p.m., gained entry and arrested the defendant who was found lying in his bed. ***Id.*** at 743. The Court rejected the claim of hot pursuit because there was no immediate or continuous pursuit of the defendant from the scene of the crime. ***Id.*** at 753.

The facts in ***Welsh*** are distinguishable from those in this case. In ***Welsh***, the defendant had already left the scene by the time the police arrived. The police did not follow the defendant from the scene of the accident. Here, the trial court found that the officers were in continuous pursuit of Geniesse from the time they observed him driving on the street. This finding is supported by the record. From the time the officers observed Geniesse driving on the street until they entered the garage, they were following him.

Geniesse focuses on the statement in ***Welsh*** that the appropriateness of finding exigent circumstances is affected by the severity of the offense for which there was probable cause to arrest. ***Id.*** at 750. The ***Welsh*** court considered that the offense of driving a motor vehicle while intoxicated was minor because it was a non-jailable traffic offense that constituted only a civil violation under applicable state law. In this case, although Geniesse was charged with driving while under the influence of an intoxicant, second offense, the record does not indicate that the officers knew this was a second offense when they entered the garage. The penalty for a first offense is a fine, § 346.65(2), STATS., while the penalty for a second offense within a five-year period is a fine and imprisonment of not less than five days nor more than six months, ***id.*** We agree with Geniesse that we must consider only what the

record shows the officers knew at the time they entered the garage. Under the ***Welsh*** analysis, the offense the officers knew of would be considered minor because it is punishable only by a fine.

However, ***Welsh*** does not hold that exigent circumstances can never be found when an offense is minor. In this case, there are significant facts, not present in ***Welsh***, that are part of the totality of the circumstances we must examine. The findings of the trial court are that Geniesse could have stopped sooner than he did after observing the red lights. Had he stopped on the street, it is clear that he could have been arrested without a warrant because the officers had reasonable grounds to believe that he had been driving while intoxicated or driving with a prohibited blood-alcohol concentration. Section 345.22, STATS. A suspect may not defeat an arrest which has been set in motion in a public place by the expedient escaping to a private place. ***United States v. Santana***, 427 U.S. 38, 43 (1976).

In ***Santana***, the defendant was standing in the doorway of her house and retreated into her house when she saw several police officers approaching. The officers followed her without a warrant. The Court stated that the threshold of the defendant's dwelling, although private under the common law of property, was nevertheless a public place because she was exposed to public view, speech, hearing and touch as if she had been standing completely outside her house. ***Santana***, 427 U.S. at 42. The Court concluded that the warrantless entry to follow her into the house to effectuate the arrest did not violate the Fourth Amendment. ***Id.*** at 42-43.

When the officers attempted to stop Geniesse on the street, he was in a public place. Under ***Santana***, his retreat to his garage did not defeat the officers' ability to arrest him.

We also agree with the trial court that it is pertinent that the officers did not enter Geniesse's home, but only his garage, through the garage door that Geniesse had just opened and left open, and that they left the garage almost immediately with Geniesse. Assuming that the garage was situated closely enough to the house such that it would be within the curtilage, we do not agree with Geniesse's implicit assumption that the officers' entry involves the same degree of invasion of privacy as did the officers' entry in ***Welsh*** into

the defendant's bedroom. The ultimate determination under the Fourth Amendment is one of reasonableness. *See* ***State v. Jackson***, 147 Wis.2d 824, 833, 434 N.W.2d 386, 390 (1989). We conclude that Geniesse did not have a reasonable expectation that the officers would not follow him into his garage under the circumstances. Considering the totality of the circumstances, we conclude the entry was reasonable and did not violate Geniesse's Fourth Amendment rights.

By the Court.—Judgment affirmed.

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