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DISTRICT II

August 9, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Waukesha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1527-CR State of Wisconsin v. Debra J. Lemmen (L.C. #2021CF859)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The State appeals the circuit court's order granting Debra J. Lemmen's motion to suppress evidence obtained after her warrantless arrest in her home. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] Because binding case law supports admission of evidence obtained outside the home if there was probable cause to arrest before an

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

unlawful entry into the home and because police had probable cause to arrest before entering Lemmen's home under the totality of the circumstances, we reverse and remand.

The sole witness at Lemmen's suppression hearing was Officer Ryan Crouse, one of the police officers who arrested Lemmen in connection with this case. According to Crouse, he was dispatched to investigate a hit-and-run incident at about 3:45 p.m. one afternoon after a witness called to report that a blue Jeep had hit multiple parked vehicles and continued to travel down the street before stopping in a parking lot near an apartment complex. Crouse spoke with the caller, who identified the Jeep for him and said that she saw the Jeep strike three different cars before parking. The witness also said that she checked on the woman driving the Jeep and that the driver told her "something to the effect of, I'm a little drunk, other than that I'm all right."

Crouse inspected the Jeep, finding scuff and scrape marks and a broken mirror on the passenger side, which corroborated the witness's account of the collisions she had observed. Crouse noticed "a strong odor of intoxicants emanating from the vehicle" through its open windows. Upon running the Jeep's license plate, Crouse learned that the Jeep was registered to Lemmen, who lived in an apartment in the nearby apartment complex. He also learned that Lemmen had five prior operating while intoxicated (OWI) convictions.

Crouse requested a deputy to accompany him in an attempt to contact Lemmen. Crouse knocked on Lemmen's door, identifying himself as a police officer. Lemmen did not respond or open the door, but Crouse could hear what "sounded like somebody rubbing up against the inside door." After Lemmen did not respond to repeated knocking, Crouse joined the deputy who was then speaking to Lemmen from the other side of the apartment through her patio screen door. Lemmen "appeared to have urinated herself and she had very slurred speech … and very slow

movements, pacing back and forth in the living room area" of her apartment. Crouse explained that he was investigating a complaint that a Jeep had struck some parked vehicles. Lemmen admitted that she had a Jeep but denied hitting any vehicles and refused to exit the apartment or talk to the officers. She also said that she had been at a bar drinking beer earlier, that she drove her Jeep home, and that she did not have more drinks since arriving home. At this point, Crouse learned from dispatch that Lemmen was subject to a 0.02 blood alcohol concentration (BAC) restriction due to her prior OWI convictions.

The officers continued speaking with Lemmen. She eventually sat on her couch, apparently searching her purse for an insurance card, and then "fell off the couch onto her right side and did not get up right away." After receiving no response to their inquiries if Lemmen was all right, the officers entered Lemmen's apartment through her screen door, which she had opened earlier to give them her driver's license. They arrested her for OWI sixth offense in her apartment, escorted her outside to Crouse's squad car, and drove her to a hospital for a blood draw (for which the officers obtained a warrant). The State charged Lemmen with both OWI and operating with a prohibited BAC, each as sixth offense.

The circuit court granted Lemmen's motion to suppress "all evidence obtained in a violation of her constitutional rights," including "any derivative evidence that was derived after she was taken out of the house and tested" based on the police officers' unlawful entry of Lemmen's home and the warrantless arrest. The court acknowledged ***New York v. Harris***, 495 U.S. 14 (1990), and ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775, which hold that the exclusionary rule does not apply to evidence obtained *outside* the home after an unlawful entry and warrantless arrest made inside the home—so long as there was probable cause for arrest *before* the unlawful entry. The court determined, however, that the ***Harris***/***Felix*** rule did

not apply to Lemmen's case because the officers lacked probable cause to arrest Lemmen before they entered her home. In explaining that conclusion, the court stated that the officers had no "real person-to-person contact with [Lemmen] and no way to make the judgment about her." In particular, there was no "odor of alcohol from the defendant, they didn't have that." The court further stated that its review of case law showed "the odor of intoxicants as being a major aspect of [officers'] knowledge at the time" and that "[w]e don't have that in th[is] case." The State appeals.

We review a circuit court's ruling on a motion to suppress in two steps. ***Felix***, 339 Wis. 2d 670, ¶22. First, we review the facts found by the circuit court and uphold them unless they are clearly erroneous. ***Id.*** We then apply those facts to constitutional principles de novo. ***Id.***

The State does not assert that any facts found by the circuit court are clearly erroneous or that entry into Lemmen's house was lawful. Instead, it argues that the circuit court erred by determining that the ***Harris/Felix*** rule was inapplicable based on its conclusion that there was no probable cause to arrest Lemmen prior to the officers' entry into her home. The State asserts that the court's probable cause analysis was improperly based on the fact that the officers did not smell an odor of intoxicants coming from Lemmen's person instead of on the totality of the circumstances as required. For her part, Lemmen argues that the police lacked probable cause, having only the evidence from the person who called the police, Lemmen's statement to that witness that she was "a little drunk," and the smell of alcohol coming from Lemmen's Jeep. Apparently failing to appreciate that the State concedes that entry into Lemmen's home was unlawful, she further argues that "[e]ven if probable cause to arrest did exist in this matter, the State must still demonstrate that exigent circumstances were present that would justify a

warrantless entry." We agree with the State that probable cause to arrest is crucial to the suppression issue and that, under the totality of the circumstances, probable cause to arrest existed prior to entry into Lemmen's home.

"Police have probable cause to arrest if they have 'information which would lead a reasonable police officer to believe that the defendant probably committed a crime.'" ***Felix***, 339 Wis. 2d 670, ¶28 (citation omitted). While there must be more than a possibility or mere suspicion that the defendant committed a crime, the police do not need proof beyond a reasonable doubt or even evidence that guilt is more likely than not. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). In the OWI context relevant to Lemmen's case, the circuit court must consider whether "the totality of the circumstances within the arresting officer's knowledge … would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Our supreme court has recognized that "[a]lthough evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test." ***State v. Lange***, 2009 WI 49, ¶37, 317 Wis. 2d 383, 766 N.W.2d 551.

Here, Lemmen acknowledges that prior to entry into her home, the police knew that a caller had alleged that Lemmen had struck three parked vehicles while driving her Jeep down the street, that Lemmen had told this caller she was "a little drunk," and that Lemmen's Jeep smelled of alcohol. Notably, Crouse's observations of damage on the Jeep corroborated the caller's

allegations. Before entering the home, officers also observed Lemmen's slurred speech and slow movements and the fact that she appeared to have urinated in her clothing.[2] And they had Lemmen's admission that she had been drinking alcohol at a bar before driving home and knowledge that Lemmen had multiple prior OWI convictions and was subject to a lower BAC restriction. *See* ***Lange***, 317 Wis. 2d 383, ¶33 (determining that a prior OWI conviction was a legitimate factor in probable cause analysis).

We conclude that these facts would lead a reasonable officer to believe that Lemmen had committed a crime. They are far more suggestive of driving under the influence than the facts in ***State v. Larson***, 2003 WI App 150, ¶16, 266 Wis. 2d 236, 668 N.W.2d 338, the case Lemmen cites in which this court determined there was no probable cause for arrest when the sum total of officers' knowledge came from two tipsters alleging that the driver of the truck parked outside the defendant's apartment building was driving while intoxicated. We agree with the State that the circuit court erred in concluding that "person-to-person" contact with Lemmen was necessary to obtain additional evidence, namely the detection of odor from her person. Although that may be a common piece of evidence leading to arrests for OWI, it is not necessary when the totality of the circumstances points to a reasonable inference that the defendant was impaired while driving, as it does in this case. *See* ***Lange***, 317 Wis. 2d 383, ¶37.

Having concluded that the officers had probable cause to arrest Lemmen for driving under the influence or with a prohibited BAC, we must determine whether the evidence at issue

[2] The officers made these observations from Lemmen's patio, which Lemmon argued before the circuit court was part of the curtilage of her property and that police "should not have been there." Lemmen did not make that argument on appeal and argues only that evidence gathered "after police illegally entered her apartment" must be suppressed.

was properly suppressed under the controlling cases of ***Harris*** and ***Felix***. A police officer's warrantless entry into a private residence to make an arrest is presumptively unreasonable under ***Payton v. New York***, 445 U.S. 573, 586 (1980). Evidence gathered as a result of an illegal entry into an individual's residence is generally subject to the exclusionary rule. ***Wong Sun v. United States***, 371 U.S. 471, 484, 488 (1963). But in ***Harris***, the United States Supreme Court declined to apply the exclusionary rule to evidence gathered outside of the home after a ***Payton*** violation, holding that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of [evidence from] outside of [a defendant's] home, even though [the evidence is obtained] after an arrest made in the home in violation of ***Payton***." ***Harris***, 495 U.S. at 21. Our supreme court adopted the ***Harris*** rule in ***Felix***, concluding that the rule "appropriately balances the purposes of the exclusionary rule and the ***Payton*** rule with the social costs associated with suppressing evidence." ***Felix***, 339 Wis. 2d 670, ¶¶38-39.

Harris and ***Felix*** are clearly applicable to this case, where there was probable cause to arrest prior to an unlawful entry into Lemmen's home. Evidence obtained while officers were inside her home, including any statements she made there or any observed conduct, must be excluded. But Lemmen's blood test results—which were obtained outside her home after her arrest and pursuant to a warrant—along with any other evidence obtained when she was outside her home, are admissible. Accordingly,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause is remanded. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals