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STATE OF WISCONSIN SUPREME COURT

CASE NO. 2016AP2196-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN T. DELAP,

DEFENDANT-APPELLANT-PETITIONER.

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

Whether the doctrine of hot pursuit always justifies a forcible warrantless entry into the residence of one suspected of minor criminal activity.

In the present case, the court of appeals declined to consider Mr. Delap's argument that the conduct of law enforcement in this case, even if justified as legitimate 'hot pursuit' of a fleeing suspect, was nonetheless unreasonable under the Fourth Amendment. Although Mr. Delap's argument presented a chain of reasoning and citation to legal authority, the court of appeals characterized the argument as 'undeveloped' and did not consider it.

The court of appeals was left with an affirmance of the trial court's denial of Mr. Delap's motion to suppress based solely on the argument that law enforcement was in hot pursuit of a fleeing Mr. Delap, and that it was justified in effectuating a forced,

warrantless entry into Mr. Delap's abode for the purpose of arresting him for a minor jailable offense.

STATEMENT OF CRITERIA FOR REVIEW

This case tests the principle of reasonableness as required by the Fourth Amendment. This case asks whether a forcible warrantless entry into the residence of a person suspected of a minor jailable offense is always reasonable if the doctrine of hot pursuit applies.

The court of appeals appeared to answer this question in the affirmative by failing to consider the argument that conduct falling under the 'hot pursuit' exception to the warrant requirement may nonetheless be unreasonable.

However, this court has held that there is no bright line rule that all law enforcement conduct that falls under the hot pursuit exception is reasonable. State v. Weber, 2016 WI 96, ¶34 (2016). The standard of reasonableness determines whether police conduct violates the Fourth Amendment.

Further, the United States Supreme Court has specifically held that the presumption of unreasonableness that attaches to warrantless home entries is difficult to overcome when the offense being pursued under the doctrine of hot pursuit is minor. Welsh v. Wisconsin, 466 US 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

The decision of the court appeals is inconsistent with the decision(s) of the U.S. Supreme Court and this court. Wis. Stats. § 809.62(1r)(d).

In addition, this case presents a real and significant question of constitutional law. Wis. Stats. § 809.62(1r)(a). This court should accept Mr. Delap's petition in order to affirm that reasonableness is still the ultimate test for compliance with the Fourth Amendment. Accordingly, police conduct falling under the hot pursuit exception to the warrant requirement is not always reasonable and should be subjected to an independent analysis for reasonableness.

STATEMENT OF THE CASE

On October 15, 2015, a criminal complaint was filed in Dodge County Circuit Court, charging Steven T, Delap with one count of Obstructing an Officer (Repeater), contrary to Wis. Stats. § 946.41(1), a class A misdemeanor, and one count of Possession of Drug Paraphernalia (Repeater), in violation of Wis. Stats. § 961.573(1), an unclassified misdemeanor. [1]

Mr. Delap represented himself in this case, and filed a *pro se* motion to suppress. The motion argued that the arrest and subsequent search of Mr. Delap violated his right to be free from unreasonable searches and seizures.

The court held an evidentiary hearing on the motion. The law enforcement officers involved in the arrest and search of Mr. Delap testified. Mr. Delap testified as well. At the conclusion of the hearing, the

[1] All references to Wisconsin Statutes are to the 2013-2014 Edition.

court indicated that it was not prepared to make a ruling, and requested that the parties submit briefs.

The court subsequently issued a written decision denying Mr. Delap's motion to suppress. (Appendix B).

Mr. Delap subsequently entered pleas of no contest to both offenses charged in the criminal complaint. The court imposed a straight jail sentence. Taking into account the amount of good time and presentence jail credit, the court deemed the sentence served.

Mr. Delap filed a timely Notice of Intent to Seek Postconviction Relief. Pursuant to appellate counsel's motion, the court of appeals issued an order extending the time in which to file a notice of appeal or motion for postconviction relief. Mr. Delap ultimately filed a timely Notice of Appeal.

After consideration of the briefs submitted by the parties, the Wisconsin Court of Appeals District IV

issued a decision and order denying Mr. Delap's appeal. (Appendix A).

ARGUMENT

I. The court should grant review of Mr. Delap's petition and ultimately conclude that the court of appeals erred by affirming the trial court's denial of his motion to suppress by finding law enforcement's warrantless entry into Mr. Delap's abode was reasonable under the Fourth Amendment.

A. Factual background and summary

At approximately 10pm on a September evening in 2015, two law enforcement officers from the Dodge County Sheriff's Department proceeded to an address on Milwaukee Street in Neosho. (Appendix A:¶3). The officers were looking for Steven Delap in order to execute two warrants they had for his arrest. (Appendix A:¶3). The officers had received information that Mr. Delap had been residing at 110 Milwaukee Street, in addition to information that Mr. Delap had fled from officers in the past and that he had a history of resisting. (Appendix A:¶3). As a consequence of their concern

that Mr. Delap might flee, the officers parked their vehicle about a block away and started walking toward 110 Milwaukee Street. (Appendix A:¶3).

As the officers approached what they believed to be the address they were looking for, they observed a man in the driveway of that residence; when the man saw the officers, he turned and began walking back toward the residence. (Appendix A:¶4).

The officers could not positively identify Mr. Delap with certainty (DOC 41:39), but believed the man they observed was Mr. Delap. (Appendix A:¶5). When the officers called for the man to stop, he began running toward the residence. (Appendix A:¶5). The officers gave chase, and caught up with Mr. Delap as he was entering the residence. (Appendix A:¶6). The officers were able to push the door open as Mr. Delap attempted to close it, and Mr. Delap was placed under arrest. (Appendix A:¶6).

Mr. Delap filed a *pro se* motion to suppress arguing that the entry and arrest were unreasonable. The circuit court held a hearing, including testimony from the officers and from Mr. Delap. The circuit court also reviewed briefs submitted by the parties. The circuit court, citing State v. Ferguson, 2009 WI 50, 317 Wis. 2d 586, 767 N.W.2d 187 (2009), denied Mr. Delap's motion in a short written decision and order. (Appendix B). The sole basis set forth in the written decision was that the officers were engaged in hot pursuit of a person suspected of obstructing an officer. (Appendix B:2).

Mr. Delap raised two arguments in his appeal. One, that Mr. Delap had not engaged in obstructing an officer when he fled, and that as a consequence the officers were not engaged in hot pursuit of a fleeing suspect. Second, even if the officers were engaged in hot pursuit, it was unreasonable for them to effectuate a

forced warrantless entry in the residence to arrest Mr. Delap for a minor jailable offense.[2]

The court of appeals rejected Mr. Delap's arguments as to the first issue, and did not consider his argument on the issue of reasonableness, stating that the argument was undeveloped. (Appendix A:¶21).

B. Argument

Mr. Delap submits that this court held in Weber that there was no bright-line rule that all police conduct falling under the hot pursuit exception to the warrant requirement is also necessarily reasonable under the Fourth Amendment. State v. Weber, 2016 WI 96, ¶34 (2016).

Mr. Delap further notes that the US Supreme Court had stated that the presumption of

[2] One of the issues that arose in this case was whether the officers' conduct could be justified by the fact that they were attempting to execute arrest warrants for Mr. Delap. The trial court's decision and order did not mention the issue. However, there is no indication in the underlying record that the officers that went to 110 Milwaukee St. on that September evening had reason to believe that the warrants were for jailable criminal offenses. The record suggests that the officers did not know the circumstances of the warrants.

unreasonableness that attaches to warrantless home entries is difficult to overcome when the underlying offense is minor. Welsh v. Wisconsin, 466 US 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

Mr. Delap acknowledges that obstructing an officer is a jailable offense that would fall under the doctrine of hot pursuit. Mr. Delap further argues that although jailable, the actual conduct constituting the offense for which Mr. Delap was suspected was minor. All the officers knew for certain was that a person who might be the subject of arrest warrants had fled when they had told him to stop.

Those officers had no reason to be concerned with other factors that typically constitute exigent circumstances, such as the destruction of evidence or danger to the public. Although the officers knew that Mr. Delap had in the past resisted officers, they had no reason to think he posed a danger to the public or any potential roommates at 110 Milwaukee Street. The

officers certainly had no reason to fear that Mr. Delap was going to destroy evidence.

In addition, Mr. Delap further notes that the hot pursuit cases relied on by the state did not involve a *forced* warrantless entry, in contrast to the present case. Mr. Delap submits that this type of forceful confrontation is unpredictable and can spill over to the neighbors and public at large. As a matter of public policy, Mr. Delap would submit that the risk posed by unanticipated confrontations outweighs the benefit of apprehending a suspect who did nothing more than flee when police commanded him to stop. Accordingly, public policy does not favor the conduct of law enforcement in this case. State v. Weber, 2016 WI 96, ¶18 (2016).

Mr. Delap would respectfully disagree with the court of appeals that his reasonableness argument was undeveloped per State v. Pettit, 171 Wis. 2d 627, 492 N.W.2d 633, 646 (Ct. App. 1992).(Appendix A, ¶21).

Mr. Delap would respectfully submit that the conduct of law enforcement in this case was unreasonable, and respectfully request this court accept review of this case and reverse the denial of his motion to suppress.

Mr. Delap maintains that the decision of the court of appeals upholding the actions of law enforcement in this case weakens the protections afforded by the Fourth Amendment.

One of the most sacred principles of the Fourth Amendment is the protection of the sanctity of the home against warrantless police entry. Payton v. New York, 445 U.S. 573, 585-586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Arguably, the home more often than any other place requires a judge/court to approve entry by issuing a warrant based on probable cause. When law enforcement rather than the court determines that facts justify a warrantless home entry, the Fourth Amendment protections unfortunately become subject to those who

investigate crime rather than those who interpret and apply the law.

Although there is a public policy that persons who engage in criminal conduct should not be able to flee and retreat to the protections of the home (such as a children's game of 'prisoner's base') State v. Weber, 2016 WI 96, ¶30 (2016), the competing and overarching principle is that all hot pursuit intrusions by police must pass the test of reasonableness. State v. Weber, 2016 WI 96, ¶34 (2016).

The court of appeals' decision in this case functions to apply the type of bright-line rule this court rejected in Weber. This court specifically held that hot pursuit cases must still be judged by reasonableness, the court of appeals specifically declined to subject this hot pursuit case to the test of reasonableness.

Based on its facts, this is the kind of case that this court could have been envisioning when it refused to adopt a bright-line rule of hot pursuit reasonableness.

The officers in this case had warrants for Mr. Delap, but there is no indication in the underlying record that the warrants were for jailable criminal offenses. The one jailable criminal offense for which officers did have arguable probable cause consisted of nothing more than Mr. Delap running away when police said 'stop.'

In determining the seriousness of the underlying jailable offense, the court should go beyond the narrow question of punishment, and consider the underlying conduct and context. See State v. Hughes, 2000 WI 24, ¶34, 233 Wis. 2d 280, 607 N.W.2d 621 (2000). In addition, this case differs from other hot pursuit cases, such as Ferguson relied on by the trial court and court of appeals, in that it involved a forced entry into a residence. In Ferguson, (as well as Santana) police officers appear to have simply walked through an already open door. See State v. Ferguson, 2009 WI 50, ¶4, 317 Wis. 2d 586, 767 N.W.2d 187 (2009); United

States v. Santana, 427 U.S. 38, 40, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

A reasonable inference to be drawn is that the public policy supporting warrantless home entry by law enforcement in hot pursuit of a fleeing suspect may not apply when the entry is forced and the crime is minor.

Mr. Delap respectfully submits that this question is worthy of consideration by this court.

CONCLUSION

Mr. Delap respectfully requests that this court, for all of the above reasons, grant review and reverse the court of appeals' decision affirming the denial of his motion to suppress.

Dated this 18th day of May, 2017.

Respectfully submitted,

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Certification of Petition Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this petition conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this petition is 2273 words.

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Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f)

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the petition.

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Certification of Appendix Compliance with Wis. Stats. § Wis. Stats. 809.19(2)(a)

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an Appendix that complies with Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last initials instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.

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