COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3529-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JOHN EDWARD ROCHON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Reversed.*

HOOVER, J. The State appeals an order suppressing evidence obtained during John Rochon's warrantless arrest in his garage. The trial court found that it was unreasonable because the officer lacked exigent circumstances. On appeal, the State contends that the trial court erred by relying on an unpublished decision to determine that exigent circumstances did not exist. It also asserts that the arrest was legal because it was supported by probable cause and

justified by exigent circumstances. This court agrees with the State that: (1) the trial court may not rely on an unpublished decision as legal authority; (2) probable cause supported the arrest; and (3) the warrantless arrest was justified because the officer's hot pursuit and Rochon's attempt to flee from a public place to a private place were exigent circumstances. Accordingly, the trial court's order is reversed.

On May 22, 1998, at 3:54 a.m., Superior police officer Bradley Esler was on duty in a marked patrol vehicle. He noticed a small red truck traveling in excess of the speed limit and that its tires squealed when the vehicle turned. Esler activated his emergency lights and followed the truck. It ran one stop sign, slowing down slightly and then speeding up again, before stopping at another intersection. As Esler began to exit his squad, the truck proceeded into the intersection. Before pulling away, the driver looked in his rear view mirror and made eye contact with Esler.

After the truck crossed the intersection, it turned right into an alley and then into a garage. The garage door was still opening as the truck entered. Esler parked in the alley, exited his squad and approached the truck. Esler testified that the garage door was still open at his eye level when he reached the threshold. He reached up, stopped the door and entered the garage. Rochon exited his vehicle, and Esler ordered him to stop and put his hands on the truck's box, but Rochon did not. Rochon started toward a service door and pulled away several times as Esler attempted to grasp his wrist. Esler finally restrained Rochon and took him into custody. Esler noticed signs of intoxication during the arrest.

Rochon was charged with third offense operating a motor vehicle while under the influence of intoxicants and resisting arrest.[1] He moved to suppress the evidence obtained as a result of the allegedly unlawful arrest. The circuit court initially ruled that exigent circumstances justified the warrantless arrest, but on a motion for reconsideration, the court reversed its exigent circumstances finding and suppressed all evidence resulting from the arrest. This appeal ensued.

The decision to suppress evidence obtained in violation of the Fourth Amendment is a question of constitutional fact requiring independent appellate review and application of constitutional principles to the trial court's factual findings. *See* ***State v. Bermudez***, 221 Wis.2d 338, 346, 585 N.W.2d 628, 632 (Ct. App. 1998). This court will uphold a circuit court's findings of fact unless they are clearly erroneous. ***Id***. at 345, 585 N.W.2d at 631. This court then independently applies those facts to the constitutional standard. ***Id***.

In its initial decision, the circuit court found that Esler had probable cause to believe Rochon knowingly fled an officer. The court, relying on ***United States vs. Santana***, 427 U.S. 38 (1976),[2] also found exigent circumstances justifying the warrantless arrest based on: (1) Esler's reasonable belief that Rochon's driving was creating a dangerous situation and that it was necessary to stop him to protect the public; (2) Esler's view of Rochon and his vehicle in the garage; (3) Rochon's awareness of the pursuit and that he hurried into the garage

[1] Rochon was not charged with knowingly fleeing an officer, speeding or failure to stop at a stop sign.

[2] ***United States v. Santana***, 427 U.S. 38 (1976), held that a suspect may not defeat an arrest that has been set in motion in a public place by the expedient of escaping to a private place while the police are in hot pursuit.

to evade the officer. On reconsideration, the court reversed its earlier exigent circumstances finding and suppressed the evidence resulting from the arrest. It did not modify its earlier factual findings. The court also did not amend its earlier finding of probable cause to arrest for fleeing an officer, although it indicated that the evidence was weak. Its decision rested upon an unpublished opinion holding that this court disfavors using the ***Santana*** rationale in "criminal traffic offenses."

The State contends that the trial court erred by considering an unpublished decision as a basis for rejecting application of ***Santana*** and reversing its earlier determination that the arrest was legal. Rochon contends that the State waived any argument regarding the unpublished decision because it was not raised in the trial court. He also contends that the court had reason to rely on the unpublished decision because of its factual and legal similarities to this case.[3]

The trial court erred by relying on an unpublished decision to conclude that this court would not apply the ***Santana*** rationale to criminal traffic offenses. That conclusion is not well-founded. First, the unpublished decision involved speeding, not a "criminal traffic offense." Second, that case's reliance on ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), does not further consideration of the issue before this court because ***Welsh*** also involved a civil forfeiture action. ***Id***. at 753. ***Welsh*** is also distinguishable because a citizen reported Welsh's erratic driving to the police some time after it happened, ***id***. at 742, and the officers

[3] Rochon also states, without analysis, that § 809.23, STATS., unconstitutionally impairs the separation of powers between the legislative and judicial branches by constraining the judiciary's scope of interpretation of the Wisconsin Constitution. This court does not understand how this rule, adopted by our supreme court, *see* SCR 809.23(2) (83 Callaghan 1978), and implemented by the court of appeals constrains our scope of interpretation of the Wisconsin Constitution. This court declines to address this issue because it is inadequately developed. *See* ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989).

entered Welsh's home, not his open garage. ***Id***. at 753. Here, the officer observed Rochon driving and was in hot pursuit. Most importantly, the trial court may not rely on an unpublished decision, regardless how similar that case is to its own, nor may Rochon cite it as authority. *See* § 809.23(3), STATS.;[4] ***Tamminen v. Aetna Casualty & Surety Co.***, 109 Wis.2d 536, 563, 327 N.W.2d 55, 67 (1982); ***Kuhn v. Allstate Ins. Co.***, 181 Wis.2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993). Rochon's waiver argument is also without merit. An unpublished opinion is of no precedential value in this state. ***Id***. A party's failure to object to its use does not confer precedential value on an unpublished opinion.

This court now considers whether the officer had probable cause to arrest Rochon. The State argues that Esler had probable cause to arrest Rochon for knowingly fleeing an officer. Rochon contends that the State had only probable cause for a civil ordinance violation.[5]

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. 836, 839 (1971), or, as here, violated § 346.04(3), STATS.[6] The evidence giving rise to probable cause need not be sufficient to prove

[4] Section 809.23(3), STATS., provides:

> (3) Unpublished opinions not cited. An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

[5] This is significant for purposes of analyzing whether the warrantless arrest is justifiable because ***Welsh*** held that when the State's interest is only to arrest for a minor offense, the Fourth Amendment presumption of unreasonableness of a warrantless arrest in the suspect's home is difficult to rebut. ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984).

[6] Section 346.04(3), STATS., provides:

(continued)

guilt beyond a reasonable doubt or that guilt is more probable than not; it is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility. ***Paszek***, 50 Wis.2d at 625, 184 N.W.2d at 839-40. It is immaterial whether the defendant is ultimately charged with the specific offense.

Under § 346.04(3), STATS., there are two elements of knowingly fleeing an officer. First, the defendant operated a motor vehicle on a highway after receiving a visual signal from a marked police vehicle. ***State v. Van Meter***, 72 Wis.2d 754, 759, 242 N.W.2d 206, 209(1976); *see also* WIS J I—CRIMINAL 2630. Second, the defendant knowingly fled the officer in willful or wanton disregard of the traffic signal so as to endanger other vehicles or by increasing speed in an attempt to elude the officer. ***Id***.

Esler had adequate information to believe that Rochon's guilt was more than a possibility. The trial court found that Rochon was aware of Esler's signal to stop and that Esler had a reasonable belief that it was necessary to stop Rochon to protect him as well as the public. Those findings are not clearly erroneous. *See* § 805.17(2), STATS. Esler activated his lights and made eye contact with Rochon while Rochon was stopped at a stop sign. In addition, because Rochon ran a stop sign and sped up after that intersection, Esler expressed concern that Rochon was endangering the public. This court affirms the trial court's unmodified finding that Esler had probable cause to arrest Rochon for knowingly fleeing an officer.

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by wilful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

This leaves the reasonableness of the warrantless arrest. The State contends that because Esler was in hot pursuit of Rochon when the officer observed him in the garage and arrested him, the arrest violated no Fourth Amendment rights. It relies on the ***Santana*** rationale that a suspect may not defeat arrest by escaping from a public place to a private place. Rochon contends that the garage is within the curtilage of his home and that the State cannot justify pursuit into his garage to arrest him for a civil offense under ***Welsh***.[7]

The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution prohibit unreasonable searches and seizures. *See* ***State v. Gonzalez***, 147 Wis.2d 165, 167, 432 N.W.2d 651, 652 (Ct. App. 1988). The warrantless entry of a house for purposes of search or arrest is presumptively unreasonable. *See* ***Welsh***, 466 U.S. at 750. Although warrantless seizures are strongly disfavored, our laws recognize that, under exigent circumstances, it would be unrealistic and contrary to public policy to bar law enforcement officials at the doorstep. ***State v. Smith***, 131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986). This court reviews exigent circumstances using a flexible test of reasonableness under the totality of the circumstances. *See* ***id***. at 229, 388 N.W.2d at 605. One factor this court considers when determining whether any exigency exists is the gravity of the offense for which an arrest is being made. ***Welsh***, 466 U.S. at 750. The State bears the burden of proving that the warrantless entry into a residence occurred under exigent circumstances. *See* ***State v. Milashoski***, 159 Wis.2d 99, 110-11, 464 N.W.2d 21, 25-26 (Ct. App. 1990).

[7] Rochon rejects the notion that there was probable cause to arrest for fleeing as a "Red Herring," and therefore does not address the gravity of the fleeing offense in connection with his discussion of the arrest's reasonableness.

This court rejects Rochon's argument that ***Welsh*** does not permit use of exigent circumstances to justify the arrest. As noted earlier, ***Welsh*** is distinguishable on several grounds, not the least of which is the gravity of the offense. ***Welsh*** involved a traffic forfeiture. In contrast, knowingly fleeing an officer is a felony with a fine of not less than $600 nor more than $10,000 and possible imprisonment for not more than two years. *See* §§ 346.17(3), 939.60, and 973.02, STATS.

This court agrees with the State that Rochon may not defeat an arrest that has been set in motion in a public place by escaping to a private place while the officer is in hot pursuit. *See* ***Santana***. In ***Santana***, after an undercover officer made a heroin "buy" from Santana with marked money, police officers went to Santana's house. ***Id***. at 39-40. When the officers arrived, she was standing in the doorway holding a brown paper bag. ***Id***. at 40. The police identified themselves and, as the officers approached, Santana retreated into the vestibule. ***Id***. The officers followed through the open door, catching her in the vestibule. As she tried to pull away, two bundles of glazed paper packets containing white powder fell out of the bag to the floor. *See* ***id***. Santana was told to empty her pockets, revealing $135, of which $70 was marked money. *See* ***id***. at 41. The powder was later determined to be heroin. ***Id***.

Santana was charged with possession of heroin with intent to distribute. ***Id***. She moved to suppress the heroin and money found during and after her arrest. The district court granted the motion. ***Id***. The Supreme Court reversed, stating that the threshold of Santana'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. ***Id***. at 42. The Court concluded that the warrantless

entry into her house to effectuate an arrest did not violate the Fourth Amendment. ***Id***. at 42-43.

This situation is analogous to ***Santana***, and Rochon's warrantless arrest was reasonable under the circumstances. The officer had probable cause to arrest Rochon for knowingly fleeing an officer, a felony. Esler was also in hot pursuit of Rochon because he had followed Rochon's vehicle for several blocks with his lights activated. Rochon drove into his garage, activated the garage door to close it, and ignored Esler's commands, all in an attempt to elude Esler. Rochon and his vehicle were in view when Esler initiated the arrest. The garage door was still open, at Esler's eye level. Rochon was first in a public place, a public street, and attempted to escape to a private place by closing the garage door for the sole purpose of eluding arrest.

By the Court.—Order reversed.

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