COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 99-0662-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PEGGY A. HAMPTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

ROGGENSACK, J.[1] Peggy A. Hampton appeals from a judgment of conviction for operating a motor vehicle while under the influence of intoxicants (OMVWI), contrary to § 346.63(1)(a), STATS. Hampton claims that the circuit court erred by failing to suppress the results of field sobriety tests given

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

inside her residence because the investigating officer violated her Fourth Amendment rights by entering her home without a warrant. We conclude that Deputy Richard Swenson had sufficient reasonable suspicion to detain, and probable cause to arrest, Hampton for driving under the influence of intoxicants. Further, we also conclude that Swenson's warrantless entry did not violate Hampton's Fourth Amendment rights because exigent circumstances existed: Hampton attempted to defeat an otherwise proper arrest, which had been set in motion in a public place by running into her residence, and there was a threat that Hampton's alcohol content would dissipate before a warrant could be obtained. Accordingly, we affirm.

BACKGROUND

At approximately 3:00 a.m., Swenson of the Richland County Sheriff's Department was on highway patrol when he observed a vehicle driven by Hampton fail to stop at a stop sign. Swenson followed Hampton and subsequently observed her make two left-hand turns without signaling and travel down the wrong side of the road. Swenson activated the red and blue emergency lights of his squad car in an attempt to get Hampton to stop. However, Hampton did not stop until she reached her residence.

Upon exiting her vehicle, Hampton stood in the middle of the street and shouted "[t]his fucking sucks." Hampton then proceeded to run from the scene toward her residence with unsteady gait and balance, swinging from left to right. Swenson repeatedly asked her to stop and identified himself as a Richland County Sheriff's Deputy. When she did not stop, Swenson pursued her and caught up with her on the stairs leading to her second floor residence. Swenson

chose not to try to stop her on the stairs because he feared for her safety as well as his own.

When Hampton entered her residence, Swenson followed her inside. Once inside, he observed that Hampton smelled of intoxicants, her eyes were blood shot and her pupils were dilated. He then requested Hampton to perform field sobriety tests. When she failed several of the tests, Swenson arrested Hampton for operating a motor vehicle while under the influence.

Hampton filed a motion to suppress all evidence obtained following the entry of Swenson into her residence. She claimed that his entry without a warrant violated her Fourth Amendment right to be free from unreasonable searches and seizures. The circuit court denied her motion to suppress, and Hampton was subsequently convicted. She now appeals.

DISCUSSION

Standard of Review.

When a suppression motion is reviewed, the circuit court's findings of historical fact will be sustained unless they are clearly erroneous. *See* ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, whether those facts establish reasonable suspicion to stop or probable cause to arrest are questions of law which we review *de novo*. *See* ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990); ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Probable Cause to Arrest.

The Fourth Amendment prohibits the unreasonable seizure of a person without a warrant supported by probable cause. *See* U.S. CONST. amend. IV. The detention of a motorist by police for a routine traffic stop constitutes a "seizure" within the meaning of the Constitution. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). However, a detention is not "unreasonable" if it is brief in nature, and is justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. *See* ***id.*** at 439.[2]

An officer who has reasonable suspicion that a person has been driving while under the influence of intoxicants is entitled to have the suspect perform tests which would either confirm or dispel the officer's suspicions. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). Under ***Terry***, the reasonable suspicion necessary to detain a suspect for investigative questioning must rest on specific and articulable facts, along with rational inferences drawn from those facts, sufficient to lead a reasonable person to believe that criminal activity may be afoot, and that action would be appropriate. *See* ***id.*** at 21. "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

Furthermore, every warrantless arrest must be supported by probable cause. *See* ***Molina v. State***, 53 Wis.2d 662, 670, 193 N.W.2d 874, 878 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable

[2] The same standards for determining reasonable suspicion that have been established for rights arising from the United States Constitution apply to rights derived from the Wisconsin Constitution. *See* ***State v. Harris***, 206 Wis.2d 243, 259, 557 N.W.2d 245, 252 (1996) (affirming the adoption of federal standards for reasonable suspicion).

cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *See* ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on considerations of everyday life on which reasonable and prudent persons, "not legal technicians," act. *See* ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. *See* ***Richardson***, 156 Wis.2d at 148, 456 N.W.2d at 838.

Hampton does not dispute that Swenson had reasonable suspicion to stop her for the multiple traffic violations. She contends, however, that Swenson did not have probable cause to arrest her for OMVWI prior to his entry into her residence. We disagree. Swenson observed her making multiple traffic violations that included two left-hand turns without using a signal, failure to stop at a stop sign and traveling down the wrong side of the road. Further, these violations occurred at approximately 3:00 a.m., shortly after bars and taverns in Wisconsin stop serving alcohol. At the suppression hearing, Swenson said he had stopped her for "more than" traffic violations. Additionally, when she exited her car, Hampton swore at Swenson. Profanity and belligerence have been linked to excessive drinking. *See, e.g.,* ***State v. Seibel***, 163 Wis.2d 164, 182, 471 N.W.2d 226, 234 (1991) *cert. denied sub nom.*, ***Seibel v. Wisconsin***, 502 U.S. 986 (1991). She also fled from Swenson, despite his repeated requests for her to stop. Finally, when Hampton attempted to run from the scene to her residence, Swenson observed that she ran with an unsteady gait, swinging left to right. "It is common knowledge that unsteadiness is one symptom of intoxication and may impair the capacity to drive safely." ***County of Jefferson v. Renz***, 222 Wis.2d 424, 445, 588

N.W.2d 267, 277 (Ct. App. 1998). Based upon the combination of these facts, Swenson had probable cause to arrest Hampton for operating a motor vehicle while under the influence before his entry into her residence.

Entry Into the Residence.

Even if Swenson had probable cause to arrest Hampton, we must still decide whether his entry into Hampton's residence without a warrant to conduct that arrest was proper. We conclude that it was.

The two cases relied upon by both parties, ***United States v. Santana***, 427 U.S. 38 (1976), and ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), are both instructive regarding under what circumstances an officer may enter a home without a warrant. In ***Welsh***, a man drove his car off the road and into a field but caused no property damage or personal injury. *See* ***Welsh***, 466 U.S. at 742. A witness who stopped to help, called the police. *See* ***id.*** The driver, however, left the scene and proceeded to walk home. *See* ***id.*** After obtaining the driver's address from the motor vehicle registry, the police went to his home, knocked on the door, and entered Welsh's house without a warrant. *See* ***id.*** at 742-43. The police proceeded upstairs and found Welsh lying in bed. *See* ***id.*** at 743. The officer then arrested him.

The Supreme Court held that the warrantless, nighttime entry into Welsh's home to arrest him for driving while under the influence was a violation of the Fourth Amendment. *See* ***id.*** at 754. It stated that warrantless arrests in the home require probable cause and exigent circumstances in order to satisfy the Fourth Amendment. *See* ***id.*** at 749. The Court then noted a few examples of exigent circumstances that might justify warrantless entries into a person's home. *See* ***id.*** at 750. It specified that it had previously allowed a warrantless entry in a case involving hot pursuit of a fleeing felon, *see* ***id.*** (*citing* ***Santana***, 427 U.S. at 42-43), and where an officer had a fear that a suspect would destroy evidence of the crime. *See* ***id.*** (*citing* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966)).

However, the Court in ***Welsh*** expressed concern about finding exigent circumstances in cases where the underlying offense was "relatively minor."[3] *See* ***id.*** In applying this reasoning to Welsh's case, the Court determined that the police's claim of "hot pursuit" was unpersuasive because "there was no immediate or continuous pursuit of the petitioner from the scene of a crime." ***Id.*** at 753. Thus, the Court held that the warrantless entry into Welsh's house violated the Fourth Amendment.

Santana also involved a warrantless entry into a person's house to arrest. *See* ***Santana***, 427 U.S. at 41. In ***Santana***, police officers sought to arrest Santana after an undercover officer made a drug purchase. *See* ***id.*** at 39-40. When the police drove up to her residence, Santana was standing in the doorway. *See* ***id.*** at 40. However, when the police exited the car and shouted "police," Santana ran inside the residence. *See* ***id.*** The officers followed her through the door and caught her in the vestibule. *See* ***id.*** Santana sought to suppress the drugs found on her person on the grounds that the entry into her home was an improper warrantless search in violation of the Fourth Amendment.

The Court framed the issue as whether Santana "could thwart an otherwise proper arrest" by retreating into her house. ***Id.*** at 42. The Court began by stating that a warrantless arrest of an individual in a public place did not violate the Fourth Amendment if there was probable cause. *See* ***id.*** It then reasoned that

[3] Hampton states in her brief that ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), held that exigent circumstances can never exist if the underlying offense is a misdemeanor and not a felony. We do not agree with this reading of ***Welsh***. The ***Welsh*** court specifically stated, "[b]ecause we conclude that, in the circumstances presented by this case, there were no exigent circumstances sufficient to justify a warrantless home entry, *we have no occasion to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses.*" ***Id.*** at 749 n.11 (emphasis added).

the officers did have probable cause and were trying to arrest Santana in a public place. *See* ***id.*** Therefore, absent Santana's flight, the arrest would not have violated her constitutional rights. As a result, the Court concluded that a suspect could not defeat an arrest "which has been set in motion in a public place" by escaping to a private place. ***Id.*** at 43.

We think that ***Santana*** more closely resembles the facts of this case. Here, Swenson had probable cause to arrest Hampton for driving while under the influence before she retreated into her residence. Further, Swenson repeatedly asked Hampton to stop while she was in the street. Had Hampton stopped at his request, Swenson would have never entered her residence and would have made the arrest in a public place. We have previously held that a suspect may not walk away from an officer conducting a ***Terry*** stop, and that the officer may restrain any suspect who attempts to do so. *See* ***State v. Goyer***, 157 Wis.2d 532, 538, 460 N.W.2d 424, 426 (Ct. App. 1990) ("[t]he right to make a ***Terry*** stop would mean little if the officer could not restrain a suspect who attempts to walk away from the investigation").

Furthermore, ***Welsh*** is distinguishable. The Court specifically noted in ***Welsh*** its concern that there was no immediate or continuous pursuit of the suspect. *See* ***Welsh***, 466 U.S. at 753. The officers in ***Welsh*** had no opportunity to arrest Welsh in a public place because he was already in his home when the police arrived at the scene. Further, Welsh had not tried to flee from an officer who was attempting to make an arrest. Here, Hampton was repeatedly told to stop, but she

ran for her residence. This is clearly a case involving a "hot pursuit"[4] which the Supreme Court has recognized as a circumstance that can justify a warrantless entry into a person's residence. *See* ***Santana***, 427 U.S. at 42-43.

In addition to the "hot pursuit" exigent circumstance, another exigent circumstance existed as well: the potential destruction of evidence. In ***State v. Bohling***, 173 Wis.2d 529, 537-38, 494 N.W.2d 399, 401 (1993), the supreme court held that "the threat that evidence will be lost or destroyed if time is taken to obtain a warrant" may also justify a warrantless search. In ***Bohling***, the court considered whether the dissipation of alcohol from a driver's blood stream constituted a sufficient exigent circumstance to justify a warrantless blood draw. *See* ***id.*** at 547-48. It held that it was. The court based its decision, in part, upon Wisconsin's interest in enforcing its drunk driving laws.

The threat that evidence would be lost or destroyed is a concern applicable to Hampton as well. Because the percentage of alcohol in one's body diminishes after drinking stops, the time it takes to secure a warrant could eliminate evidence of Hampton's alcohol content at the time of the stop.

Given Swenson's "hot pursuit" of Hampton and the potential dissipation of the alcohol in Hampton's body, we conclude that there were exigent circumstances sufficient to justify Swenson's warrantless entry into Hampton's residence; and therefore, there was no Fourth Amendment violation.

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[4] The Supreme Court in ***United States v. Santana***, 427 U.S. 38, 42-43 (1976), recognized that "hot pursuit" does not simply mean those cases where there is a chase in the public streets. It noted that "[t]he fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into Santana's house." ***Id.*** at 43.

CONCLUSION

We conclude that Swenson had sufficient reasonable suspicion to detain, and probable cause to arrest, Hampton for OMVWI before he entered her residence. We also conclude that Swenson's warrantless entry did not violate Hampton's Fourth Amendment rights because exigent circumstances existed: Hampton attempted to defeat an otherwise proper arrest, which had been set in motion in a public place, by running into her residence, and there was a threat that Hampton's alcohol content would dissipate before a warrant could be obtained. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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