COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2289-CR

Cir. Ct. No. 2008CT4324

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL JOHN O'CONNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Reversed and cause remanded with directions*.

¶1 KESSLER, J.[1] Michael John O'Connell appeals from a judgment of conviction for operating while under the influence of an intoxicant, third

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08).

offense, contrary to WIS. STAT. § 346.63(1)(a) (2007-08).[2] O'Connell, who pled guilty after the trial court[3] denied his suppression motion, argues that his suppression motion should have been granted. The State concedes that the trial court erred in denying O'Connell's motion, and, although we are not bound by the State's concession, *see* ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987), we agree. Accordingly, we reverse.

BACKGROUND

¶2 O'Connell was charged with operating while under the influence of an intoxicant, third offense.[4] He moved to suppress evidence obtained after the police took him into custody inside his home without having first obtained an arrest warrant and where there were no exigent circumstances.

¶3 According to testimony at the suppression hearing, West Allis Police Officer Christopher Randlett was dispatched to a duplex in West Allis after a citizen witness called to report a suspected intoxicated driver. Randlett testified that when he arrived at the duplex, he spoke with the witness, who told Randlett that he saw his upstairs neighbor, O'Connell, driving his truck. The citizen said he saw O'Connell's truck strike several vehicles as O'Connell tried to park. The

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[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] The Honorable Russsell W. Stamper decided the suppression motion. The Honorable Ellen R. Brostrom accepted O'Connell's guilty plea and sentenced him.

[4] O'Connell was also charged with operating with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b). This charge was ultimately dismissed on the State's motion and will not be addressed.

citizen told Randlett that it appeared O'Connell was intoxicated. The citizen said he confronted O'Connell about the damage and O'Connell walked away.

¶4 While Randlett was interviewing the witness, another officer, Philip Russell, arrived on the scene and listened as Randlett spoke with the witness. Russell testified that the witness described the driver as an older gentleman who was wearing a baseball cap and carrying a pizza box. Russell said the witness told him that O'Connell had gone up a stairway that led to O'Connell's apartment in the upper unit of the duplex.

¶5 Russell testified that he went to the entrance to the stairway to O'Connell's apartment and looked through a storm door. Russell said the main door was open and he could see through the storm door up the stairway, where he saw O'Connell standing by his door leading into his apartment, using his key to unlock the apartment door. Russell said he opened the storm door and called out to O'Connell, who did not respond. Russell said he went up the stairs to talk with O'Connell; Randlett soon followed. Ultimately, the officers arrested O'Connell for operating while intoxicated.

¶6 At the suppression hearing, the State argued that O'Connell had no expectation of privacy in the stairway leading to his apartment and that exigent circumstances justified entry to the residence so that officers could conduct field sobriety tests and collect evidence of intoxication. In contrast, O'Connell argued that he had an expectation of privacy in the stairway that leads exclusively to his apartment, and that there were no exigent circumstances because there was no hot pursuit, the officers did not know whether O'Connell had prior convictions for operating while intoxicated (such that a subsequent offense would be a crime,

rather than a civil forfeiture), and the alleged damage to parked vehicles was not a criminal offense.

¶7 The trial court denied O'Connell's motion to suppress. O'Connell subsequently pled guilty and was sentenced. This appeal follows.

DISCUSSION

¶8 On appeal of a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous, and we review the application of constitutional principles to those facts *de novo*. ***State v. Grady***, 2009 WI 47, ¶13, 317 Wis. 2d 344, 766 N.W.2d 729. In this case, the trial court implicitly accepted the testimony of the two officers, which O'Connell does not challenge on appeal. Thus, the issue before us is whether the motion to suppress should have been granted, given the officers' testimony about what occurred.

¶9 On appeal, the State has taken the position that the suppression motion should have been granted. The State explains:

> In these particularized circumstances, the officers' entry into the stairwell was a warrantless entry into an area in which Mr. O'Connell had an actual and subjective expectation of privacy. Thus, the officers can only justify the warrantless entry into the stairwell by exigent circumstances. However, the officers entered into this protected area without knowing whether Mr. O'Connell's actions rose to the level of a jailable offense. Therefore, exigency cannot justify the intrusion, and the entry into Mr. O'Connell's stairwell violated his Fourth Amendment rights.

We agree.

¶10 We begin with the issue of whether O'Connell had an expectation of privacy in the stairwell leading to his apartment. We apply a two-part test to

determine "whether an individual has a reasonable expectation of privacy in an area." ***State v. Fox***, 2008 WI App 136, ¶16, 314 Wis. 2d 84, 758 N.W.2d 790. "The first part of this test asks whether the individual has demonstrated an actual, subjective expectation of privacy in the area searched and in the item seized. The second part addresses 'whether society is willing to recognize such an expectation of privacy as reasonable.'" ***Id.*** (citation omitted). With respect to the second inquiry, we consider the following factors in determining whether society is willing to recognize an expectation of privacy as reasonable:

> 1. Whether the person had a property interest in the premises;
>
> 2. Whether the person was legitimately on the premises;
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> 3. Whether the person had complete dominion and control and the right to exclude others;
>
> 4. Whether the person took precautions customarily taken by those seeking privacy;
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> 5. Whether the person put the property to some private use; and
>
> 6. Whether the claim of privacy is consistent with historical notions of privacy.

State v. Orta, 2003 WI App 93, ¶14, 264 Wis. 2d 765, 663 N.W.2d 358. "This list of factors is neither controlling nor exclusive; rather, the totality of the circumstances is the controlling standard." ***Id.***

¶11 The State concedes O'Connell had an actual, subjective expectation of privacy in the stairwell leading to his apartment, and that this expectation was reasonable. It explains:

> When Officer Russell and Officer Randlett entered into the stairwell leading to Mr. O'Connell's residence, the officers entered into a protected zone of privacy. Although the main door leading to the stairwell to Mr. O'Connell's

> apartment was not locked or closed, the question becomes whether the stairwell was either directly part of his residence or so closely associated with the residence as to be afforded Fourth Amendment protection.
>
> An analysis of the testimony at the motion hearing … shows that the State did not disprove that Mr. O'Connell had an expectation of privacy in the stairwell. The State does not dispute that Mr. O'Connell had a property interest in the upper apartment and that he was legitimately in his own stairwell. Neither does the State dispute that Mr. O'Connell had dominion and control of the premises or that the area was put to private use.
>
> Ultimately, at the hearing, the State failed to show whether Mr. O'Connell took precautions to protect his privacy in the stairwell, or whether his claim of privacy there is inconsistent with historical notions of privacy. First, the stairwell led directly to and only to Mr. O'Connell's apartment. It was not a common entrance to a multi-unit apartment building. Second, the State failed to demonstrate that Mr. O'Connell had not taken precautions customarily taken by those seeking privacy. The officers were unable to recount whether the mailbox was outside the outer door or at the top of the stairs, whether there was a doorbell outside the lower, outer door, or whether there was a lock on the lower door. The absence of such items would suggest that the occupant had not taken precautions to protect his privacy, but rather expected someone to enter the stairwell at will. Without this information, the State failed to establish that Mr. O'Connell did not have an expectation of privacy in the stairwell.

(Record citations omitted.) We agree with the State's analysis of the facts and accept its concession that O'Connell had a reasonable expectation of privacy in his stairwell.

¶12 Next, we consider whether exigent circumstances existed that would justify the officers' warrantless entry.

> There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a

> likelihood that the suspect will flee. The State bears the burden of proving the existence of exigent circumstances.

State v. Richter, 2000 WI 58, ¶29, 235 Wis. 2d 524, 612 N.W.2d 29 (citation omitted). In a Wisconsin case involving facts similar to those presented here—a citizen reports a suspected intoxicated driver, the police go the person's home and enter without a warrant—the United States Supreme Court discussed the determination of exigent circumstances. *See* ***Welsh v. Wisconsin***, 466 U.S. 740, 742-43, 748-753 (1984). Ultimately, the Court held that:

> an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Id. at 753.

¶13 Subsequently, the Wisconsin Court of Appeals interpreted ***Welsh*** and another case as imposing "a bright-line rule that police are justified in making a warrantless entry into a home only where the legislature had labeled the underlying offense as a felony." ***State v. Ferguson***, 2009 WI 50, ¶26, 317 Wis. 2d 586, 767 N.W.2d 187 (discussing the Wisconsin Court of Appeals' decision in ***Mikkelson***, 2002 WI App 152, ¶17, 256 Wis. 2d 132, 647 N.W.2d 421). ***Ferguson*** overruled ***Mikkelson***, concluding that the appropriate analysis is as follows: "[C]ourts, in evaluating whether a warrantless entry is justified by exigent circumstances, should consider whether the underlying offense is a jailable or nonjailable offense, rather than whether the legislature has labeled that offense a felony or a misdemeanor." ***Ferguson***, 317 Wis. 2d 586, ¶29.

¶14 Applying ***Ferguson***'s test here, the State concedes, and we agree, that the officers' warrantless entry into O'Connell's stairwell was not justified by exigent circumstances because at the time of the entry, the officers had no basis to believe the underlying offense was a jailable offense.

¶15 The State acknowledges that exigency existed at the time Russell saw O'Connell, who fit the description of an alleged intoxicated driver who struck several unattended and parked vehicles and who was about to enter his apartment. It explains: "The exigency of the situation was that Officer Russell intended to prevent Mr. O'Connell from escaping responsibility for the alleged criminal activity and prevent the destruction of evidence of the alleged crime." But exigency is not enough, as the State explains:

> [T]he intrusion into Mr. O'Connell's residence constitutionally fails because Officer Russell and Officer Randlett entered the stairwell leading to Mr. O'Connell's residence without knowing whether Mr. O'Connell's alleged behavior would subject him to a jailable or a non-jailable offense. Prior to entry into Mr. O'Connell's residence, the officers failed to obtain the essential information: whether the alleged intoxicated driver had previously been convicted of any operating while intoxicated offenses. Without this pertinent information, officers were unable to make a determination whether the offense committed by Mr. O'Connell rose to the level of a jailable offense. Mr. O'Connell's driving while intoxicated could have been a first offense operating while intoxicated and thus subject to nonjailable civil penalties. [WIS. STAT.] §§ 346.63(1)(a) and 346.65(2)(am). Similarly, the property damage caused Mr. O'Connell's striking of unattended, parked vehicles is penalized civilly and without any potential for jail. [WIS. STAT.] §§ 346.68 and 346.74. Therefore, because Officer Russell and Officer Randlett entered into Mr. O'Connell's residence prior to the determination of whether Mr. O'Connell's actions were subject to the penalty of jail, the warrantless entry into the residence was unconstitutional.

¶16 Once again, we agree with the State's analysis. Because there is no evidence that the officers had any information that would lead them to believe O'Connell had committed a jailable offense, the warrantless entry was unconstitutional. The motion to suppress should have been granted.

¶17 For the foregoing reasons, we conclude that the trial court erred in denying O'Connell's motion to suppress. We therefore reverse the judgment of conviction and remand to the trial court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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