COURT OF APPEALS
DECISION
DATED AND FILED

FEBRUARY 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2652-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTINE M. HILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Reversed.*

ANDERSON, J. Christine M. Hill appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, in violation of § 346.63(1)(a), STATS. She contends that a warrantless entry of Town of Pewaukee police officers into her home violated the Fourth Amendment, and, therefore, all the fruits of her arrest should be suppressed. The warrantless home invasion to arrest a person who

police believe has violated a traffic regulation is not permitted by the Fourth Amendment; therefore, we reverse Hill's conviction.

Officer Brian Ripplinger was westbound on CTH SS in the Town of Pewaukee when he locked his moving radar on an approaching minivan being driven by Hill at 46 mph in a 35 mph zone. Ripplinger turned the squad car around and caught up to Hill as she was making a left turn into her driveway. Ripplinger immediately turned on his emergency lights and flashing headlights and followed Hill into her driveway. Hill stopped her minivan in her garage and Ripplinger stopped 50 to 60 feet behind her. The officer saw Hill stagger as she exited the minivan and bounce off the rear driver's side quarter panel. He immediately and repeatedly ordered her to remain with her vehicle. Hill responded, "Why? I haven't done anything wrong," and entered her residence. Ripplinger went to the door and through the screen door demanded that Hill return to her vehicle. She responded, "No, I'm home, I'm going to bed," and she slammed the door shut.

Ripplinger had called for backup because he thought he was dealing with an intoxicated driver. The backup unit arrived approximately three minutes after Hill had entered the house. Ripplinger and Officer Kraemer announced themselves at the rear door and entered Hill's residence. After a search of the house, the officers found Hill on a bed in a bedroom on the main level of the residence. After a brief argument, Hill returned to her minivan.

Outside, Hill unsuccessfully performed several field sobriety tests and then became argumentative and refused to do any other tests. Ripplinger arrested Hill for operating a motor vehicle while under the influence of an intoxicant, second offense, in violation of § 346.63(1)(a), STATS.

Hill filed a motion to suppress challenging the warrantless entry into her residence. The court found that Ripplinger was in continuous hot pursuit for the purpose of issuing Hill a citation for traveling 46 mph in a 35 mph zone. The court also found that Hill was uncooperative and refused the orders of the officer to remain with her minivan. The court concluded that under the facts and circumstances there were sufficient exigent circumstances to justify the officers' warrantless entry into Hill's residence. Hill subsequently entered a "no contest" plea to the charge of operating a motor vehicle while intoxicated, second offense. She now appeals the trial court's denial of her motion to suppress.

A circuit court's findings of evidentiary and historical fact will not be overturned unless they are clearly erroneous. *See* ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). However, questions of constitutional fact are subject to an independent appellate review, requiring an independent application of the constitutional principles involved to the facts as found by the trial court. *See* ***id***. at 344, 401 N.W.2d at 832.

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). "'At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" ***Payton v. New York***, 445 U.S. 573, 589-90 (1980) (quoted source omitted). Moreover, the decision of when the right to privacy must reasonably yield to the right to search is, as a rule, to be determined by a judicial officer and not by a policeman or Government enforcement agent who may be caught up in the "competitive enterprise of ferreting out crime." *See* ***Johnson v. United States***,

333 U.S. 10, 14 (1948). Thus, the warrantless search of a house is presumptively unreasonable. *See* ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984).

Although warrantless searches are strongly disfavored, "our laws recognize that, under special 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). Therefore, a handful of exceptions have been "'jealously and carefully drawn'" to balance the interests of the individual with those of the State. *See* ***State v. Monosso***, 103 Wis.2d 368, 372, 308 N.W.2d 891, 893 (Ct. App. 1981) (quoted source omitted). In ***Smith***, 131 Wis.2d at 229, 388 N.W.2d at 605, the supreme court

> identified four factors which, when measured against the time needed to obtain a warrant, would constitute the exigent circumstances required for a warrantless entry: (1) An arrest made in "hot pursuit," (2) a threat to safety of a suspect or others, (3) a risk that evidence would be destroyed, and (4) a likelihood that the suspect would flee. [Citation omitted.]

"Exigent circumstances exist where it is dangerous not to act immediately." ***State v. Drogsvold,*** 104 Wis.2d 247, 264-65, 311 N.W.2d 243, 251 (Ct. App. 1981). "'The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.'" ***Id.*** (quoted source omitted.) Our review of exigent circumstances is directed by a flexible test of reasonableness under the totality of the circumstances. *See* ***Smith***, 131 Wis.2d at 229, 388 N.W.2d at 605**.** The State bears the burden of proving that the warrantless entry into a residence occurred pursuant to probable cause and under exigent circumstances. *See* ***State v. Milashoski***, 159 Wis.2d 99, 111, 464 N.W.2d 21, 25-26 (Ct. App. 1990).

The State argues that a suspect may not defeat an arrest which has been set in motion in a public place by the expedient escaping to a private place. *See* ***United States v. Santana***, 427 U.S. 38, 43 (1976). In ***Santana***, after an undercover officer made a heroin "buy" with marked money (through Patricia McCafferty who was arrested afterwards) from Dominga Santana, police officers went to Santana's house. *See* ***id***. at 39-40. When the officers arrived, Santana was standing in the doorway of the house with a brown paper bag in her hand. *See* ***id***. at 40. The police identified themselves, and as the officers approached, Santana retreated into the vestibule of her house. *See* ***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 with white powder fell out of the bag to the floor. *See* ***id***. Santana was told to empty her pockets revealing $135, $70 of which could be identified as marked money. *See* ***id***. at 41. The powder was later determined to be heroin. *See* ***id***.

Santana was charged with possession of heroin with intent to distribute. *See* ***id***. Santana moved to suppress the heroin and money found during and after her arrest. The district court granted the motion. *See* ***id***. The court held that the police needed either an arrest warrant to arrest Santana or a search warrant to recover the bait money. *See* ***id***. The court of appeals affirmed and the Supreme Court reversed.

The Court stated that the threshold of the defendant'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. *See* ***id.*** at 42. The Court

concluded that the warrantless entry to follow her into the house to effectuate the arrest did not violate the Fourth Amendment. *See* ***id***. at 42-43.

We disagree that ***Santana*** can be applied to criminal traffic offenses and conclude that this case presents circumstances similar to those in ***Welsh*** in which the United States Supreme Court held that police may not enter a suspect's home without a warrant in order to arrest him or her for a civil, nonjailable traffic offense. *See* ***Welsh,*** 466 U.S. at 754. In ***Welsh***, a citizen observed a car being driven erratically and eventually swerving off of the road and into a field. The driver walked away from the scene before police arrived, but the witness told them that the driver was either intoxicated or ill. After obtaining the driver's name from the vehicle registration, police entered his home and arrested him in his bedroom for driving while intoxicated. *See* ***id***. at 742-43. Although probable cause existed to arrest Welsh, the Supreme Court concluded that the warrantless entry into Welsh's home violated the Fourth Amendment because the police did not establish the existence of exigent circumstances. The Court reasoned:

> Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Id. at 750 (citation and footnote omitted).

Welsh limits ***Santana*** to the arrest of fleeing felons. In the context of explaining its decision in ***Payton,*** the United States Supreme Court noted that

"warrantless *felony* arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances." ***Welsh***, 466 U.S. at 749 (emphasis added). The Court emphasized that "exceptions to the warrant requirement are 'few in number and carefully delineated ….'" ***Id.*** (quoted source omitted). The Court noted that ***Santana*** was one of those exceptions to the Fourth Amendment prohibition because it involved the "hot pursuit of a fleeing *felon*." *See* ***id.*** at 750 (emphasis added). Finally the United States Supreme Court plainly states that "allowing warrantless home arrests upon a showing of probable cause and exigent circumstances" is expressly limited to felony arrests. ***Id.*** at 749 n.11. This limitation is also recognized by the three justices who dissented in ***Payton.*** Although believing that warrantless home arrests are permitted under the Fourth Amendment, they observed that "[t]he felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in the case of the most serious crime." ***Payton***, 445 U.S. at 616-17 (White, J., dissenting).

Applying ***Welsh*** to this case, we conclude that Ripplinger was not faced with exigent circumstances as he stood on the threshold of Hill's residence. He only possessed probable cause to believe that Hill had exceeded the posted speed limit, a minor, nonjailable forfeiture traffic offense. Driving 11 mph over the speed limit is significantly less consequential than the drunk driving offense in ***Welsh***. Accordingly, we reverse the court's order denying Hill's motion to suppress and her conviction.

By the Court.—Judgment reversed.

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