COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2947-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAVERNE H. BARREAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed.*

EICH, J.[1] Laverne Barreau appeals from a judgment convicting him of driving with a prohibited blood alcohol concentration (second offense). The only issue is whether two police officers—who had seen him driving erratically and had been pursuing him with sirens operating and lights flashing—violated

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

Barreau's Fourth Amendment rights when, following him into his driveway, they confronted him in his garage. We see no such violation and affirm the judgment.

The facts are not in dispute. After being charged with driving while intoxicated and driving with a prohibited blood alcohol content (second offense), Barreau moved, alternatively, to dismiss the charges or to suppress evidence of his arrest. The circuit court denied the motion and Barreau pled no contest to the blood-alcohol charge, reserving his challenge to his arrest.

One of the arresting officers, Baraboo Police Officer Hal Hempel, testified at the hearing on Barreau's motions. Hempel, who had eighteen years' experience with the department, testified that he saw fellow officer Richard Weinke, also in a marked squad car, following a white van (which later turned out to be driven by Barreau). Following them, Hempel noticed that the van was traveling "extremely slow"—much slower than the twenty-five-mile-per-hour speed limit in the area. Hempel saw the van drift over the centerline of the roadway, and then back again.[2] At about this time, according to Hempel, Officer Weinke activated his "emergency top lights," which Hempel described as "a bar stretching across the width of the vehicle's roof, with rotating flashing red and blue lights." Hempel then saw the van cross the centerline two more times, to the point where half of the vehicle was in the other lane, driving in that position for approximately half to two-thirds of a city block. He said the van never attempted to pull over in response to Weinke's flashing lights, so he put on his own lights and, at the same time, Weinke activated his siren. According to Hempel, the van still made no move to pull over, but continued down the street for several more

[2] Hempel did not recall whether the line was marked with a stripe in this area.

blocks and then turned into a driveway. Seeing the garage door open as the car was entering the driveway, Hempel parked in front of the house and ran to the garage, where he saw Barreau sitting the driver's seat of the van with the door still closed.

At this point in the testimony, Barreau's counsel objected to any further questions, stating that his motion challenged only Hempel's entry in to Barreau's garage. He went on to argue that because there was no "emergency" or other exigent circumstances present, there could be no justification for Hempel's "warrantless entry" into Barreau's garage, and the charges should be dismissed. The circuit court concluded that the officers had probable cause to believe that Barreau had committed one or more traffic offenses and that Hempel's testimony established that "exigent circumstances" existed which authorized his entry into Barreau's garage.

While the circuit court's findings of historical fact will not be upset on appeal unless they are clearly erroneous, its rulings on matters of constitutional fact and law are subject to *de novo* review and require an independent application of constitutional principles to the facts found by the trial court. ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). The question on this appeal is whether, based on the facts of record, the Fourth Amendment protects Barreau from arrest;[3] and we conclude that it does not.

[3] The State argues that Barreau is not entitled to raise a Fourth Amendment defense because his garage must be considered a "public place" in which he could have no reasonable expectation of privacy. We will accept the proposition that a garage—especially an attached garage, as this one appears to be—may be considered part of the curtilage of a home and thus subject to the search-and-seizure provisions of the Fourth Amendment. *See* ***Los Angeles Police Protective League v. Gates***, 907 F.2d 879, 884-85 (9th Cir. 1990).

Barreau bases his appeal largely on ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), where the United States Supreme Court held that searching or arresting a person without a warrant in the person's own home is "presumptively unreasonable" absent some "exigent circumstance" that would justify the officer's action. In ***Welsh***, the defendant, alone in his car, was seen by one or more citizens driving erratically down a highway, eventually swerving off the road into a field. The two motorists who had witnessed the defendant's driving pulled over, one blocking his car from re-entering the roadway, and the other telephoning the police. The defendant left the scene, walked to his nearby home, and went to bed. In response to the motorist's call, police officers soon arrived at the scene and, eventually learning the defendant's address from his automobile registration documents, went to his home and gained entry. Finding the defendant unclothed in his bed, they arrested him for driving while intoxicated. The Supreme Court concluded that, because none of the circumstances it had previously recognized as sufficiently "exigent" to permit entry into a residence without a warrant—the "hot pursuit" of a fleeing criminal, the possible destruction of evidence or a danger to the public—had been shown to exist, the officers' "nighttime entry into the petitioner's home to arrest him for a civil traffic offense" was prohibited by the Fourth Amendment. ***Id.*** at 753-54. With particular reference to the "hot pursuit" rule, the Court stated that, on the facts of record, any such claim was "unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." ***Id.*** at 753 (internal quotation marks omitted).

We believe ***Welsh*** is distinguishable. In that case, as we have noted, there was no immediate or continuous pursuit of the defendant; he had abandoned his car at the scene and was arrested sometime later in the evening in the privacy

of his bedroom. Here, two police cars were pursuing Barreau for several blocks with lights flashing and sirens blaring; and, based on their observations, he had not only committed one or more traffic offenses, but may have been attempting to elude or evade the officers and might well have been driving while intoxicated.[4] Indeed, the officers pursued him into his driveway, confronting him in his open garage before he even had the opportunity to get out of his car or press the button to close the garage door. The basic test for the validity of a warrantless search or arrest is its reasonableness—the reasonableness of the government's intrusion on a citizen's personal security. ***Pennsylvania v. Mimms***, 434 U.S. 106, 109 (1977). We conclude that an arrest made in an open garage to which police have hotly pursued the defendant[5] after observing him or her commit one or more traffic or criminal-law violations[6] is not unreasonable under the "hot pursuit"/"exigent circumstances" rule.[7] As the Supreme Court stated in ***United States v. Santana***,

---

[4] Barreau does not argue that the officers lacked probable cause to arrest him for these or other offenses. He argues only that "[a]lthough probable cause for arrest is present, absent a showing of exigent circumstances or consent, a warrantless entry into the home for purpose of search, seizure and arrest violates [the Fourth Amendment]."

[5] In ***United States v. Santana***, 427 U.S. 38, 42 (1976), the Supreme Court stated that, while the term "hot pursuit" means "some sort of chase," it need not be "an extended hue and cry 'in and about (the) public streets,'" and the fact that it "ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the [officers'] warrantless entry into [the defendant]'s house."

[6] Eluding an officer is, in certain circumstances, a crime, as is second-offense driving while intoxicated. *See* §§ 346.04, 346.17(3)(a), 346.63 and 346.65(2), STATS.

[7] As the Wisconsin Supreme Court noted in ***State v. Smith***, 131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986):

> Although warrantless arrest in the home is deemed to be presumptively unreasonable, our laws recognize that, under special circumstances, it would be unrealistic and contrary to public policy to bar law enforcement officials at the doorstep…. If [exigent] circumstances arise, the individual's substantial right to privacy in the home must reasonably yield to the compelling public need to permit effective law enforcement.

427 U.S 38, 43 (1976): "[A] suspect may not defeat an arrest which has been set in motion in a public place … by the expedient of escaping to a private place."

By the Court.—Judgment affirmed.

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