COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1026-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RODNEY F. VOLDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Rodney Volden appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to WIS. STAT. § 346.63(1)(a). Volden claims that the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

court erred by failing to suppress evidence obtained as a result of the investigating officer's warrantless entry into his residence, in violation of his Fourth Amendment rights. We conclude that the officer's warrantless entry did not violate Volden's Fourth Amendment rights because (1) the officer had probable cause to arrest him for criminal OMVWI, and (2) exigent circumstances existed, specifically, the rapidly dissipating level of alcohol in Volden's blood, a key item of evidence in an OMVWI prosecution. Accordingly, we affirm the conviction.

BACKGROUND

¶2 Shortly before noon, Volden drove his car out of a tavern parking lot onto the roadway, failed to yield to oncoming traffic, and collided with another car. Volden and the other driver in the accident moved their cars to a nearby store parking lot. Volden gave her his name, and she obtained the license plate number of the car Volden was driving. The other driver told Volden to stay while she went into the store to call the police, but he drove away.

¶3 A Town of Campbell police officer responded to the call regarding the traffic accident. At the accident scene, he observed damage to the front of the other driver's vehicle. She informed the officer that Volden "was intoxicated, that he had smelled of an intoxicant, and she felt that he shouldn't be driving." A search of DOT records, communicated to the investigating officer, revealed the following: (1) Volden's father was the registered owner of the vehicle Volden was driving; (2) Volden's license was "revoked, [or] suspended"; and (3) if Volden was driving while intoxicated, it would be his fourth offense.

¶4 The officer then went to Volden's father's residence in search of the vehicle. Volden's mother informed the officer that her son had the vehicle at his apartment, and provided the officer with the address. The officer went to

Volden's residence, scanned the parking lot for the vehicle without success, and knocked on Volden's apartment door, receiving no response. The officer returned to the parking lot where he saw Volden's father arrive and enter the apartment building. The officer knocked again on Volden's door, Volden's father answered, and he informed the officer that Volden was in the apartment. Volden's father said, "let's go look at the car." They went to the garage, where Volden's father unlocked the door. Prior to following Volden's father into the garage, the officer noted that the car had the same license plate number as previously reported to him. The officer observed damage to the car consistent with the other driver's description of the accident. Then the two men returned to Volden's apartment.

¶5 After entering the apartment, the officer asked Volden's father to get his son because the officer needed to speak with Volden about the accident. Volden's father went to his son's bedroom, and eventually, Volden emerged. The officer testified that Volden "staggered a little bit" and "his balance was poor." When the officer said that he would like to talk to Volden about what had just happened, Volden said, "I hit someone." The officer "could smell an odor of intoxicant about him, [and] his words were slurred." The officer informed Volden that "based upon him being involved in this accident and that I believed that he had been drinking and was intoxicated … he'd have to come with me." Although Volden at first refused, the officer told him that "you are going to have to go with me because we have to get this taken care of." Volden then agreed to go with the officer.

¶6 The State charged Volden with fourth-offense OMVWI and with hit and run of an attended vehicle, both traffic crimes, carrying potential jail sentences

of sixty days to one year, and six-months, respectively.[2] Volden moved to suppress all evidence obtained following the officer's entry into his apartment. He claimed that the officer's warrantless entry violated his Fourth Amendment right to be free from unreasonable searches and seizures. The circuit court denied the motion to suppress, concluding that the officer had probable cause to arrest Volden for the traffic crimes and that exigent circumstances existed.[3] Volden then pled no contest to OMVWI as a fourth offense, and he now appeals.[4]

ANALYSIS

¶7 A circuit court's ruling on a motion to suppress evidence presents a mixed question of fact and law. We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). However, whether those facts warrant suppression of the evidence is a question of law which we review de novo. ***State v. Guzy***, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987).

¶8 The warrantless, nonconsensual entry of a home to effect an arrest is reasonable under the Fourth Amendment only where there is probable cause coupled with exigent circumstances. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986); *see also* ***State v. Kennedy***, 193 Wis. 2d 578, 583, 535 N.W.2d 43 (Ct. App. 1995); ***State v. Walker***, 154 Wis. 2d 158, 183, 453 N.W.2d 127

---

[2] See WIS. STAT. §§ 346.65(2)(d) and 346.74(5)(a).

[3] The circuit court also determined that the State had not established that Volden's father had either actual or apparent authority to consent to the officer's entry to the apartment. The State does not argue otherwise on appeal.

[4] In criminal cases, a defendant may appeal the denial of an evidence suppression motion following conviction on a plea of guilty or no contest. WIS. STAT. § 971.31(10).

(1990). Volden claims that, prior to the officer's entry of his apartment, there was neither probable cause to arrest him for OMVWI nor sufficient exigent circumstances to justify the warrantless entry. The State claims that both requirements were present. We agree with the State.

¶9 We first address probable cause. Every warrantless arrest must be supported by probable cause. ***Molina v. State***, 53 Wis. 2d 662, 670, 193 N.W.2d 874 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable cause to arrest when the totality of the circumstances within the officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). This is a practical test, based on considerations of everyday life on which reasonable and prudent persons, "not legal technicians," act. ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981). The objective facts known to the officer need only lead to a conclusion that guilt is more than a possibility. ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990). Finally, probable cause to arrest is a constitutional question, which we review de novo. ***State v. Koch***, 175 Wis. 2d at 700; ***State v. Babbitt***, 188 Wis. 2d 349, 356-57, 525 N.W.2d 102 (Ct. App. 1994).

¶10 Volden claims that probable cause did not exist to arrest him for OMVWI at the time of the officer's entry. We conclude, however, that based on the evidence in the record, the officer did have probable cause to arrest Volden on the OMVWI charge prior to entering his residence. At that point, the officer knew the following: While Volden was leaving the parking lot of a tavern, he pulled into oncoming traffic and failed to yield, thereby causing an accident. An identified witness (the other driver) told the officer that Volden smelled of intoxicants and appeared to be intoxicated. Volden left when the other driver said

she was calling the police, and he had three prior OMVWI convictions. In total, we are satisfied that this evidence amounts to "more than a possibility" that Volden was OMVWI.

¶11 Volden claims, however, that the facts known to the officer were insufficient to establish probable cause because the other driver had just been involved in a "violent car accident", and thus she is "more biased and less reliable than the ordinary citizen witness." However, there is nothing in the record which challenges the reliability of either her observations or her statements to the officer. *See* ***State v. Cheers***, 102 Wis. 2d 367, 395-96, 306 N.W.2d 676 (1981) ("'A citizen who purports to be a victim of or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.'" (citation omitted)).

¶12 Volden also argues that this case is similar to ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). In ***Swanson***, the supreme court suggested that the following indicators are not sufficient to show probable cause to arrest for OMVWI: (1) erratic driving, (2) an odor of intoxicants emanating from a defendant while he speaks, and (3) an incident occurring approximately at the time when bars close in Wisconsin. ***Id.*** at 453-54 n.6. We note first that the ***Swanson*** court expressly declined to address whether probable cause existed to arrest Swanson for other than possession of a controlled substance, commenting only that the officers "arguably lacked probable cause to arrest Swanson at the time of the search." ***Id***. at 453 n.6. Moreover, we conclude that the facts of this case go beyond those of ***Swanson*** in establishing probable cause that Volden was OMVWI.

¶13 Here, Volden was not observed to be merely driving erratically, he caused, in the words of his appellate counsel, a "violent car accident," actually colliding with another car in the middle of the day. Moreover, the record contains more than a mention of an odor of intoxicants emanating from Volden. The citizen-witness told the officer that Volden "was intoxicated, that he had smelled of an intoxicant, and … that he shouldn't be driving." Finally, Volden fled the scene when he was told the police were being called. A defendant's "immediate retreat from the scene … at the mention of police officers [] clearly 'constitutes evidence of consciousness of guilt' …." ***State v. Welsh***, 108 Wis. 2d 319, 321 N.W.2d 245 (1982), *vacated on other grounds and remanded*, 466 U.S. 740 (1984). Volden's flight is thus "'a factor to be considered in determining whether probable cause exists.'" *See* ***State v. Cheers***, 102 Wis. 2d 367, 391, 306 N.W.2d 676 (1981) (citation omitted). Like the defendant's statement in ***State v. Wille***, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994), that he had "to quit doing this," we conclude that Volden's flight "provides evidence of his consciousness of guilt." ***Id.***[5]

[5] We summarized the facts adding up to probable cause in ***Wille*** as follows:

> An officer in Deputy Hoium's position could reasonably conclude that Wille had probably committed an offense. Hoium smelled intoxicants coming from Wille at the hospital. He knew that a fire fighter had smelled intoxicants on Wille, and that another officer, Check, had smelled intoxicants when near Wille. Hoium knew that Wille had driven his car into the rear end of the Oldsmobile which was parked alongside the highway on the shoulder. Furthermore, upon entering Wille's room at the hospital in Rock County, Hoium heard Wille say that he had "to quit doing this." Wille's statement provides evidence of his consciousness of guilt.

State v. Wille, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994) (footnote omitted).

¶14 The threshold for probable cause is low. The evidence need not reach the level that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). In sum, we conclude that the officer had probable cause to arrest Volden for OMVWI.[6]

¶15 We next address whether there were exigent circumstances present to justify the officer's warrantless entry into Volden's apartment to effect an arrest for OMVWI. The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. "'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***State v. Douglas***, 123 Wis. 2d 13, 17, 365 N.W.2d 580 (1985) (citation omitted). The warrantless entry of a home to effect a search or arrest is presumptively unreasonable. ***Welsh v. Wisconsin***, 466 U.S. 740, 748-49 (1984). Evidence seized during a warrantless search of one's home is inadmissible unless there is a well-delineated, judicially recognized exception to the warrant requirement. ***State v. Johnson***, 177 Wis. 2d 224, 231, 501 N.W.2d 876 (Ct. App. 1993). One recognized exception to this rule is the presence of "probable cause and exigent circumstances." *See* ***Welsh***, 477 U.S. at 749.

¶16 The basic test to determine whether exigent circumstances exist is an objective one: "Whether a police officer under the circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the

[6] The State also argues that there was probable cause to arrest Volden for hit and run, but its argument regarding exigent circumstances is based on the need for an immediate arrest and blood-alcohol testing on the OMVWI offense. Accordingly, we do not specifically address whether the officer also had probable cause to arrest Volden for hit and run prior to entering his apartment.

likelihood of the suspect's escape." ***State v. Smith***, 131 Wis. 2d 220, 230, 388 N.W.2d 601 (1986). In this case, we conclude that there were exigent circumstances justifying the warrantless entry into the home. Evidence of intoxication is essential to the prosecution of OMVWI. As we recently stated in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, 2000 WI 121, __ Wis. 2d __, 618 N.W.2d 240 (Wis. Oct. 17, 2000), the Wisconsin Supreme Court has specifically noted that "the rapid dissolution of alcohol from the bloodstream constitutes exigent circumstances." ***Id.*** at ¶6 (citing ***State v. Bohling***, 173 Wis. 2d 529, 539-40, 494 N.W.2d 399 (1993)).

¶17 Volden argues, however, that the "warrantless invasion of the home to investigate a misdemeanor offense is not reasonable under the Fourth Amendment when the sole rationale for the entry is dissipation of evidence." He acknowledges that dissipation of alcohol from one's blood can constitute exigent circumstances, but contends that it is an insufficient justification for a warrantless home entry when the alleged offense is a misdemeanor. He bases his argument on ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), where the Supreme Court concluded that the dissipation of evidence is not a sufficient exigent circumstance when the offense is relatively minor. *See* ***id***. at 750. Volden argues for a bright-line rule that *all* misdemeanors are "minor" offenses. We agree with the State, however, that there is no bright-line rule, and the offense at issue here is distinguishable from the "minor offense" at issue in ***Welsh***.

¶18 In ***Welsh***, the Supreme Court did not create a bright-line rule between felonies and misdemeanors for purposes of evaluating the exigent circumstances which would justify a warrantless home entry to effect an arrest. Rather, 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." ***Id***. at 753. The offense at issue in ***Welsh*** was a "noncriminal, civil forfeiture offense" (first-offense OMVWI) "for which no imprisonment is possible." ***Id***. at 754. The Court concluded that "the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." ***Id.*** at 754 n.14. By contrast, the arresting officer in this case was aware that, if Volden was OMVWI, it would be a fourth offense, which is a crime with significant penalties, including jail time of at least sixty days and as much as one year. WIS. STAT. § 346.65(2)(d).[7]

¶19 The Court also emphasized in ***Welsh*** that the defendant there had gone home after he "had abandoned his car at the scene of the accident" and there was thus "little remaining threat to public safety." ***Id***. at 753. Volden, however, had not abandoned his vehicle, but driven it to his apartment, where it would have remained accessible to him had he not been taken into custody. This court has previously noted that OMVWI "is an activity which threatens public security and involves violence" and that "[t]hose who drive under the influence put their own lives plus the lives of those they encounter on the road in serious danger." ***City of Waukesha v. Gorz***, 166 Wis. 2d 243, 247, 479 N.W.2d 221 (Ct. App. 1991). The supreme court has reached a similar conclusion: "[OMVWI] is an inherently dangerous activity in which it is reasonably foreseeable that driving while intoxicated may result in the death of an individual." ***State v. Caibaiosai***, 122 Wis. 2d 587, 594, 363 N.W.2d 574 (1985). The present facts therefore also

[7] On the hit and run charge, Volden faced an additional jail sentence of not more than six months. WIS. STAT. § 346.74(5)(a). Although the exigency created by the dissipation of blood-alcohol evidence does not relate to that charge, we note that "the underlying offenses" of which Volden was suspected included not just the crime of fourth offense OMVWI, but also criminal hit and run.

suggest a potential "public safety" exigency which was absent in ***Welsh***, in addition to the dissipation of evidence exigency, which Volden has conceded.

¶20 In sum, we, like the trial court, conclude that both probable cause and exigent circumstances existed which justify the officer's actions in this case.

CONCLUSION

¶21 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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