COURT OF APPEALS DECISION DATED AND FILED

July 5, 2007

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. 2006AP3059-CR

Cir. Ct. No. 2005CT645

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK H. LINDERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Mark Lindert appeals the circuit court's judgment convicting him of operating a motor vehicle while under the influence of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

an intoxicant, second offense. He challenges the circuit court's decision denying his motion to suppress all evidence obtained as a result of a warrantless entry into his home. The circuit court concluded that the exigent circumstances and community caretaker exceptions to the warrant requirement justified the warrantless entry. We agree with the circuit court that the officer's entry into Lindert's residence was justified by the exigent circumstances exception, and affirm the judgment.

Background

¶2 On November 12, 2005, at 1:35 a.m., a vehicle struck a utility pole in a 25-mile-per-hour speed zone. A nearby resident heard the crash and saw the driver leave the scene on foot heading north. An officer dispatched to the scene summoned emergency medical services (EMS) and a fire truck after observing the damage to the vehicle. The officer photographed the accident and, with the assistance of the EMS team and fire department, searched for the vehicle's driver. The officer learned that the vehicle was registered to Lindert and that Lindert lived less than one block north of the accident scene.

¶3 The officer proceeded to Lindert's residence. He knocked on windows and called out to Lindert, attempting to get the attention of anyone that might be inside. As time went by with no response, the officer's attempts became more aggressive. Eventually, the officer knocked hard enough on the front door to, inadvertently it seems, force it open. Accompanied by the EMS team, the officer entered Lindert's residence without a warrant. He found Lindert covered in blankets in a bedroom. The EMS evaluated Lindert, and the officer asked Lindert some questions. Lindert, apparently uninjured, stated that he had stopped at a bar before the accident and consumed soda and beer.

¶4 The State charged Lindert with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(a) and (b). Lindert moved to suppress all evidence obtained as a result of the officer's warrantless entry into his residence. The circuit court denied the motion, concluding that entry into Lindert's home was justified under both the exigent circumstances and community caretaker exceptions to the warrant requirement. Lindert subsequently entered a no-contest plea to the charge of operating a motor vehicle while under the influence of an intoxicant. The State dismissed the other charge.

¶5 We reference additional facts below.

Discussion

¶6 Lindert asserts that the circuit court erred in concluding that the officer's actions were justified by the exigent circumstances and community caretaker exceptions to the warrant requirement. Because we agree with the circuit court that the exigent circumstances exception applies, we need not address whether the officer's entry into Lindert's home might also be justified by the community caretaker exception.

¶7 The framework for our analysis is as follows:

> The trial court's findings of evidentiary or historical fact will not be overturned unless they are clearly erroneous. We independently determine whether the historical or evidentiary facts establish exigent circumstances sufficient to justify the warrantless entry into the defendant's home.
>
> ….
>
> A warrantless search of a home is presumptively unreasonable under the Fourth Amendment. Indeed, "[i]t is

> axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" However, the Fourth Amendment is not an absolute bar to warrantless, nonconsensual entries into private residences. Following United States Supreme Court precedent, we have recognized that in certain circumstances it would be unreasonable and contrary to public policy to bar law enforcement officers at the door. In such circumstances, we weigh the urgency of the officer's need to enter against the time needed to obtain a warrant.
>
> 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.
>
> As in other Fourth Amendment cases, the determination of whether exigent circumstances are present turns on considerations of reasonableness, and we apply an objective test. The test is "[w]hether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape."

State v. Richter, 2000 WI 58, ¶¶26, 28-30, 235 Wis. 2d 524, 612 N.W.2d 29 (citations omitted).

¶8 Here, the operative category of exigent circumstances is the second one—whether there was a threat to the safety of a suspect or others. More specifically, the operative question is "[w]hether [the] police officer under the circumstances known to the officer at the time … reasonably believe[d] that delay in procuring a warrant would gravely endanger [Lindert]'s life." *See* ***id.***, ¶30. We agree with the circuit court that the answer to this question is yes.

¶9 The circuit court's oral and written decisions contain detailed findings of fact that were based on the officer's testimony and the photographs of

Lindert's vehicle taken at the accident scene. The court's oral decision includes the following findings:

> [O]n Saturday, November 12 at 1:35 a.m. an accident occurred … involving the defendant's truck …. The defendant was the driver. At 1:35 the defendant's vehicle struck a utility pole with sufficient force to cause the vehicle in effect to be impaled on the pole, both air bags deployed. There was sufficient noise for an adjoining residence, resident, Mr. Pedersen, to hear the crash. He looked out and saw the driver of the vehicle heading north [on foot] away from the vehicle, leaving the scene….
>
> … Officer Trunkel has been a police officer with Mayville for approximately nine years, he has experience with investigating motor vehicle accidents. He did come to the scene, observed what he believed was substantial damage to the vehicle, resulting in air bags being deployed. By reason of the substantial damage he was concerned that serious injuries could have been caused to the driver. He, therefore, called the EMS and also the Mayville Fire Department.
>
> He took pictures of … the vehicle, and the pole. He did not observe any signs of blood, either on or anywhere near the scene, did not talk to Mr. Pedersen. He and the EMS squad and the responding fire department searched the scene in an attempt to find the driver.
>
> I do believe from watching Officer Trunkel and listening to his testimony, that his concern at this point was as to whether or not the driver was potentially seriously injured. He believed that an individual who could be seriously injured could in fact still walk away from the vehicle. He was concerned about liability in the event the driver was injured and they did not find the driver.
>
> He learned from dispatch that the owner of the vehicle was the defendant, and the defendant lived only a short distance from the accident, and also lived to the north, which was consistent with the direction that the witness saw the driver walking. He … went to the residence about 40 minutes after responding, and for about 13 minutes made an effort to get a response from somebody inside the residence. He knocked on windows, calling out to Mark Lindert, asking if he was okay. At that time, subjectively, his principal purpose was to obtain a response so that they

> would know that in fact Mark Lindert had not sustained serious injury.
>
> As the time went on with no response, his attempt to get a response from somebody inside became more aggressive. He did go to the front door, where he knocked hard enough to cause the door in effect to split so that he could gain access to the door, into the residence. He entered the residence without a warrant. He entered the residence with three EMS ….
>
> Concerning his observations of the vehicle, he did not observe any blood in the vehicle, did not observe any injury to the, or damage to the windshield. He did not examine the steering wheel to determine if it was bent. He does have experience with individuals who, although injured, are able to walk, and walk after a serious injury, including a recent injury to himself in which that very same thing occurred.
>
> Concerning the house, both doors to the house were locked. He acknowledges that that would be inconsistent with somebody entering the house when they were seriously injured.
>
> ….
>
> … [T]he officer indicate[d] that he did see a sign [at the residence], that there was Mark and Jamie Lindert. He did not know who Jamie Lindert was. They did attempt several times to call the residence to get a response. There was no response. They did attempt to search in the neighborhood to determine if the driver perhaps was located somewhere other than in the house.

¶10 Based on these facts, the circuit court concluded that the exigent circumstances exception applied. It reasoned as follows:

> The Court of Appeals has applied this test to uphold an officer's warrantless entry into a garage where the elderly defendant—who a witness had reported as being highly intoxicated—sat in his vehicle for two to three minutes after parking it without getting out. *See* ***State v. Leutenegger***, 2004 WI App 127, 275 Wis. 2d 512, 685 N.W.2d 536. The court held that the defendant's age, combined with the evidence of intoxication, and the delay in exiting the vehicle, "would lead a reasonable officer to be concerned about Leutenegger's health." *See* ***id.*** at Par.

> 28. In the instant case, concern over the driver's health would if anything be greater. Whoever had driven this pick-up had experienced a crash serious enough to impale the vehicle on a utility pole and trigger the airbags. Although the driver was able to walk away from the crash site, and no blood was found in the vehicle, those facts alone do not rule out the strong possibility of injury, a concussion and/or internal bleeding being examples that come quickly to mind. Officer Trunkel, for his part, testified that he has had experience with individuals (including himself) who are able to walk around (and may even appear unhurt) after suffering a serious injury.

(Footnote omitted.)

¶11 We agree with the circuit court and adopt its reasoning and conclusion. We recognize that there are differences between Lindert's case and ***State v. Leutenegger***, 2004 WI App 127, 275 Wis. 2d 512, 685 N.W.2d 536. For example, there was no question in ***Leutenegger*** that the defendant was located in the place of entry. *See* ***id.***, ¶26. Still, as the circuit court recognized, the concern for Lindert's safety would, if anything, be greater than the concern for the defendant's safety in ***Leutenegger***, thus justifying the more intrusive entry present here. And, the officer who found Lindert had ample justification to reasonably believe that Lindert was inside his residence at the time the officer entered.[2]

¶12 Moreover, there is other case law that supports the circuit court's decision. *See* ***State v. Mielke***, 2002 WI App 251, ¶¶2-3, 7-8, 10, 257 Wis. 2d 876, 653 N.W.2d 316 (exigent circumstances justified warrantless entry into residence to prevent possible domestic violence where police received a domestic violence report for a residence with previous domestic abuse calls, and the officers, upon responding, had observed the alleged victim crying, shaking, and cowering in a

---

[2] Lindert does not argue otherwise.

corner, even though the victim told the officers nothing was wrong); ***State v. Londo***, 2002 WI App 90, ¶¶3-5, 10-12, 252 Wis. 2d 731, 643 N.W.2d 869 (exigent circumstances justified warrantless entry to intervene in possible burglary where citizen informed police that she heard glass breaking at the rear of a house, one of the glass panels in the window was broken, glass was on the ground near a still-locked door, officers found no one in a four-block radius around the house, and the officers noticed when they returned approximately five minutes later that a seven-foot high window that had been previously closed was open). Although each situation is different and depends on the totality of its facts, we are satisfied based on the facts here and the cases cited that the warrantless entry into Lindert's residence was reasonable under the exigent circumstances exception.

¶13 Lindert argues that, other than "the fact of an accident," the record lacks objective evidence to suggest that he was injured. He characterizes the accident as consisting of "considerable property damage, but deceptive insofar as establishing injury." He argues that the circuit court "failed to address the facts that are prominent in this case." We disagree.

¶14 The officer's testimony and the photographs of Lindert's vehicle taken at the accident scene support the circuit court's view that it was reasonable for the officer to believe that Lindert had suffered some serious internal injury. Additionally, the officer had ample reason to believe that Lindert left the scene and entered his residence, yet Lindert did not answer when the officer knocked loudly. It is true that one reasonable inference from the facts is that Lindert was uninjured and seeking to avoid detection or arrest. But another reasonable inference is that Lindert was disoriented or otherwise suffering from a serious injury that caused him to wander home from the accident scene and fall unconscious. "When a police officer is confronted with two reasonable competing

inferences, one that would justify the search and another that would not, the officer is entitled to rely on the reasonable inference justifying the search." ***Mielke***, 257 Wis. 2d 876, ¶8.

¶15 Lindert also argues that the officer's testimony betrayed his true motivation—to apprehend and arrest a drunk driver. However, the officer's subjective motives are not relevant. ***Brigham City, Utah v. Stuart***, 126 S. Ct. 1943, 1948 (2006).

¶16 In a related vein, Lindert suggests that the officer's testimony was evasive or otherwise lacking in credibility. Any such argument lacks merit. It is plain from the circuit court's decision that the court determined the officer's testimony was credible, and we defer to that determination. *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 389-90, 588 N.W.2d 67 (Ct. App. 1998).

¶17 Finally, we observe that Lindert's arguments fail to address the flip side of the situation. That is, Lindert fails to give much if any weight to the government's side of the delicate Fourth Amendment balance that must be struck in situations like these. As part of this balance, we must consider the potential consequences had the officer taken additional time to obtain a warrant, or simply given up and walked away, only to later discover that Lindert had suffered a life-threatening injury.

By the Court.—Judgment affirmed.

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