

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2001

Cornelia G. Clark
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.

No. 01-0619-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD F. POSIUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded for further proceedings.*

¶1 CANE, C.J.¹ Richard Posius appeals from a judgment convicting him of operating a motor vehicle with a prohibited alcohol content (PAC), second offense, contrary to WIS. STAT. 346.63(1)(b). He argues that the trial court erred

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

by denying his motion to suppress evidence seized subsequent to the police illegally entering his residence without a warrant. This court agrees with Posius and, therefore, reverses the judgment and remands the matter to the trial court for further proceedings.

¶2 The background facts are undisputed. A citizen noticed a driver, later identified as Posius, driving erratically on a state highway. The citizen, using his cell phone, contacted law enforcement and continued to follow Posius to his apartment complex in Grand Chute, where Posius exited the car. When police officers arrived, the citizen met them and identified the car that he had been following. He informed the police officers that he had observed the car swerve in its own lane, strike a barrier, change lanes without signaling and turn without signaling. He said that he followed the car to the apartment complex and confronted the driver, who emanated an odor of alcohol and appeared to be under the influence of an intoxicant. He indicated that he attempted to stall the driver outside the apartment complex until the police arrived, but had been unsuccessful.

¶3 The officers ran a license plate check on the car, which showed that Posius owned the car. The officers then went into the secured apartment complex and knocked on Posius's door. Posius opened the door, but remained inside the doorway while talking to the officers. The officers asked Posius to submit to field sobriety tests in the hallway outside the apartment. It is undisputed that in response, Posius indicated he was not going to leave his apartment to cooperate and that he tried to close the door, but was prevented from doing so when one of the officers placed his foot in the doorway to prevent the door from closing.

¶4 From this point, the officer's version and Posius's version of what happened differ. According to one officer, law enforcement informed Posius that

he was being investigated for operating a motor vehicle while intoxicated (OWI). The officer testified that at first, Posius attempted to shut the door so that the interview would terminate, but later, after the officers and a police supervisor talked to Posius, he “eventually submitted.”

¶5 In contrast, Posius testified that he refused to let the officers into his apartment and told them, “No, I’m not coming out and I’m not letting you in my apartment.” He testified that when he attempted to close the door, one of the officers placed his foot inside the apartment doorway to prevent the door from closing. Posius said that he eventually ended up in the hall after “The officer grabbed me by the arm ... and he said, I’m taking you out and giving you a test. ... just pulled me out my door.”

¶6 The field sobriety tests were performed in the hallway adjacent to the apartment. Ultimately, Posius was charged with OWI and driving with a PAC. He moved to suppress evidence derived from what he termed an illegal detention and arrest.

¶7 At the motion hearing, the trial court did not resolve the conflicting testimony, concluding that because the officers had probable cause to arrest Posius for OWI, they could enter the apartment and arrest him. Thus, the court denied Posius’s motion. Posius pled no contest and was convicted. This appeal followed.

¶8 At issue is whether the circuit court should have denied Posius’s motion to suppress based on the officer’s unlawful entry into Posius’s individual

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

¶9 At the outset, this court notes that even though the trial court did not make findings about precisely what occurred in Posius’s doorway, the undisputed facts support a conclusion that the officer “entered” Posius’s apartment. In *State v. Johnson*, 177 Wis. 2d 224, 231, 501 N.W.2d 876 (Ct. App. 1993), the court concluded in a similar factual situation that when a police officer placed his foot in the doorway to prevent the defendant from closing the door, the act constituted an entry. Thus, even if the circuit court had specifically adopted the officer’s testimony in this case, the fact remains that an police entered Posius’s apartment when he prevented Posius from closing the door.

¶10 Next, this court considers the primary issue presented: whether the police were permitted to enter Posius’s apartment to arrest him for OWI without an arrest warrant. Posius does not dispute that the police had probable cause to

² In addition to objecting to the officer’s entry into his individual apartment, Posius also contends the officers entered the secured apartment complex either by consent of another tenant or some other unknown method and that this entry was possibly an illegal entry that should render inadmissible any evidence gained after the officers entered the complex. Posius cites no authority for this proposition and, therefore, this court need not consider the issue further. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (This court declines to consider arguments that are unexplained, undeveloped, or unsupported by citation to authority.). However, this court briefly notes that it agrees with the trial court that when the officers entered the complex, they entered a common area, in which Posius has no privacy rights under the Fourth Amendment (as opposed to his individual apartment, where he has privacy rights).

arrest him for OWI, but relies upon the United States Supreme Court’s decision in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), for his argument that the police were prohibited by the Fourth Amendment from making a nonconsensual and warrantless entry into his home to arrest him.

¶11 Before this court considers *Welsh*, it is important to review other pertinent case law with respect to warrantless arrests. The United States Supreme Court held in *Payton v. New York*, 445 U.S. 573, 576 (1980), that the Fourth Amendment to the United States Constitution “prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.” Similarly, in *Laasch v. State*, 84 Wis. 2d 587, 596, 267 N.W.2d 278 (1978), the Wisconsin Supreme Court held that “absent exigent circumstances, the entry of one’s dwelling without consent to effect a warrantless felony arrest on probable cause, is unlawful” under art. 1, § 11, of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution.

¶12 Four factors have been identified that constitute 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.” *State v. Smith*, 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986). 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 likelihood of the suspect’s escape.” *Id.* at 230.

¶13 In *Welsh*, 466 U.S. at 742, the United States Supreme Court considered the issue of whether “the Fourth Amendment prohibits the police from

making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense.” The facts revealed that Welsh was observed driving his car erratically, causing it to swerve off the road into a field. Even though a witness suggested that he remain with the car and wait for assistance, Welsh walked away from the scene. Police checked the car's registration and, without obtaining a warrant, proceeded to Welsh's home, where he was arrested for driving a motor vehicle while under the influence of an intoxicant.

¶14 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).

¶15 This court concludes that like the officers in *Welsh*, the police in this case were not faced with exigent circumstances during their encounter with Posius at his apartment. Exigent circumstances may, in some circumstances, arise because of the danger to life if the arrest is not made immediately. Only where a delay in the investigation would gravely endanger lives does this factor in the

exigency formulation come into play. The facts of this case do not present such a situation.

¶16 Additionally, as reasoned in *Welsh*, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of Posius from the scene of the crime. *See id.* at 753. Also, because Posius had already arrived home, and had parked his car, there was little threat to the public safety. *See id.* Thus, the only potential emergency claimed by the State was the need to ascertain Posius's blood alcohol level.

¶17 Arguably, because blood rapidly metabolizes alcohol after a person ceases drinking, an exigent situation may have existed. *See State v. Bentley*, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the State's proof of Posius's alleged violation of WIS. STAT. 346.63(1) would be destroyed. However, as expressed in *Welsh*, a warrantless home arrest cannot be upheld simply because evidence of Posius's blood alcohol level might have dissipated while the police obtained a warrant. *See id.* at 753.

¶18 This court concludes that absent a warrant, consent or exigent circumstances, police entry into Posius's apartment was illegal, and any evidence gained after the entry into his apartment must be suppressed. Accordingly, this court reverses the decision of the circuit court denying Posius's motion to suppress and remands the case to the circuit court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

