COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP346-CR **Cir. Ct. No. 2007CF659**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIN W. FELIX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: CONRAD A. RICHARDS, Reserve Judge. *Judgment reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Devin Felix appeals a judgment of conviction for second-degree intentional homicide. Felix argues the circuit court erroneously denied his motions to suppress statements and physical evidence obtained after he

was arrested in his home without a warrant and his automobile was seized and searched.[1] As to the warrantless arrest, the State abandons the rationale relied upon in the circuit court. Instead, the State argues that even if Felix's arrest was unconstitutional, federal case law dictates that Felix is not entitled to suppression. We conclude the federal case conflicts with prior and subsequent Wisconsin Supreme Court precedent. Therefore, we reverse and direct the circuit court to suppress the statements and physical evidence obtained following Felix's illegal arrest, except that any evidence obtained from Felix's automobile or pursuant to the consent search of Felix's home shall remain admissible.

BACKGROUND

¶2 Shortly after 1:00 a.m., police responded to a 911 call at 1928 Spring Street in Schofield. They found a male lying in the middle of the street with three stab wounds to his upper torso. Tara Wold, a witness located shortly thereafter, described a large fight between multiple individuals. She also reported that Devin Felix told her he stabbed someone and referenced going to prison. When Wold told Felix he was lying, he replied, "I'm not lying. I've got blood all over me." Wold stated Felix was drunk and left the scene in his car. Other witnesses told a similar account, including Kyle Leder, who stated Felix left in a green Chrysler. In an application for a search warrant for 1928 Spring Street, where the individuals had been partying, Felix was identified as the sole suspect. A search warrant for

[1] Felix also argues his statements were both involuntary and obtained without a valid waiver of his ***Miranda*** rights. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). Because we hold the statements must be suppressed on other grounds, we need not reach these arguments. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

that address was issued at 5:44 a.m. No arrest warrant was sought. No search warrant was sought for Felix's home.

¶3 Police located Felix's residence around 8:00 a.m., observing Felix's mother's green Chrysler parked there. Felix resided in the basement of a house that was divided into several apartments. Eight officers organized a plan to arrest Felix, and established a perimeter around the house. Multiple officers were positioned at the back of the house, where Felix's apartment entrance was located. Detective Dennis Halkoski and officer Daniel Goff approached the door with their weapons drawn.

¶4 Goff opened the storm door and held it while Halkoski knocked hard on the entry door. The knock caused the door to swing completely open and hit the wall. Halkoski and Goff then took aim at Felix, who was sleeping in a recliner at the bottom of steps leading down from the door. They yelled at him to exit with his hands in the air. After taking a moment to wake up, Felix complied and was handcuffed outside on the ground. Meanwhile, as Felix exited, officers had immediately entered the apartment and conducted a protective sweep, removing and handcuffing Felix's mother and younger brother.

¶5 While Felix was still "face down," an officer patted him down for weapons, asking whether Felix had any sharp objects on him. Felix responded he had a knife in his front right pocket. After patting Felix down twice, the officer indicated to another that he did not locate a knife on Felix. Felix stated, "[W]ell, I had a knife on me. I must have gotten rid of it." Felix was taken to the police station and read his ***Miranda*** rights. He provided further incriminating statements. At the end of the interview, Felix consented to a buccal swabbing. Felix was then transported to jail, where Halkoski collected Felix's clothing for evidence.

¶6 Back at the house, officers spoke to another resident, Dean Kudick. Kudick sublet to the Felix family and consented to a search of the house. Officers seized a knife from a shelf near the recliner Felix was sleeping in. They also seized the green Chrysler.

¶7 Felix moved to suppress all evidence derived from his warrantless arrest in his home. Additionally, he asserted all of his statements were obtained without valid ***Miranda*** warnings and were also involuntary. Felix further asserted his vehicle was illegally seized. The State argued the warrantless home arrest was permitted by exigent circumstances.

¶8 The circuit court denied Felix's motion with one exception, holding that, because the entry door had a history of popping open in response to a hard knock:

> The Court is going to find that the arrest was valid finding that the defendant had no reasonable expectation of privacy to be protected by the [F]ourth [A]mendment because there was a voluntary submission to public view placing the recliner that he apparently slept in in a position where it could be seen from the door.

The court ordered Felix's statements to police outside his home suppressed because he had not been given ***Miranda*** warnings. However, the court ruled the statements were voluntary and could therefore be used as impeachment evidence. The court further held that the station house statements were obtained pursuant to a valid ***Miranda*** waiver and were voluntary. Finally, the court ruled Felix's car was legally seized under the automobile exception to the warrant requirement. Felix subsequently pled guilty. He now appeals.

DISCUSSION

¶9 Felix argues that all physical evidence and statements derived from his warrantless arrest in his home should have been suppressed under the federal and state constitutions, pursuant to ***Payton v. New York***, 445 U.S. 573 (1980); ***Brown v. Illinois***, 422 U.S. 590 (1975); and ***Laasch v. State***, 84 Wis. 2d 587, 267 N.W.2d 278 (1978), *modified by* ***State v. Smith***, 131 Wis. 2d 220, 240, 388 N.W.2d 601 (1986).

¶10 ***Payton*** established that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. ***Payton***, 445 U.S. at 576. The court also noted Wisconsin was one of ten states in which the highest court had already held as much, citing ***Laasch***.[2] ***Payton***, 445 U.S. at 575 n.3.

¶11 Because the police arrested Felix in his home without a warrant, he asserts we must apply the attenuation analysis set forth in ***Brown*** to determine whether any evidence derived from his arrest must be suppressed. Under ***Brown***, courts evaluate three factors to determine whether evidence obtained following a constitutional violation is sufficiently attenuated to be removed from the initial taint: (1) the temporal proximity of the evidence and the violation; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. ***Brown***, 422 U.S. at 603-04; ***Smith***, 131 Wis. 2d at 241. Addressing each of these factors, Felix argues application of the ***Brown***

[2] The court also noted ***Laasch v. State***, 84 Wis. 2d 587, 267 N.W.2d 278 (1978), *modified by* ***State v. Smith***, 131 Wis. 2d 220, 240, 388 N.W.2d 601 (1986), had rested on both state and federal constitutional provisions. ***Payton v. New York***, 445 U.S. 573, 575 n.3 (1980). ***Smith*** also rested on both the state and federal constitutions.

attenuation analysis requires suppression of all statements and physical evidence obtained following his arrest.

Whether Brown attenuation analysis applies

¶12 In the circuit court, the State argued Felix's warrantless arrest was permissible due to exigent circumstances. On appeal, it abandons both that rationale and the circuit court's reasoning that Felix had no constitutionally protected right to privacy in his home.[3] Instead, the State now argues, "Assuming that Felix's warrantless arrest was illegal under [***Payton***], neither his statements to police nor evidence derived therefrom need be suppressed as fruits of an illegal arrest," citing ***New York v. Harris***, 495 U.S. 14 (1990); and ***State v. Roberson***, 2005 WI App 195, 287 Wis. 2d 403, 704 N.W.2d 302 (***Roberson I***), *aff'd on other grounds*, 2006 WI 80, 292 Wis. 2d 280, 717 N.W.2d 111 (***Roberson II***).[4]

¶13 In ***Harris***, the court distinguished the facts of that case from prior cases such as ***Brown***, where the warrantless home entries were not based on probable cause. ***Harris***, 495 U.S. at 18-19. Thus, ***Harris*** rejected application of

[3] In a footnote in its response brief, the State asserts it is not conceding either issue and it invites us to affirm on those grounds. However, "[t]he burden to justify warrantless in-home entry is on the [S]tate." ***Smith***, 131 Wis. 2d at 228. Issues raised but not argued are deemed abandoned. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Moreover, Felix addressed both issues in his brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Further, we note the circuit court's reasoning would likely be rejected for the reasons set forth in ***State v. Walker***, 154 Wis. 2d 158, 184 n.16, 453 N.W.2d 127 (1990) (plain view alone can never justify a warrantless seizure). The exigent circumstances argument is also suspect, because police had ample opportunity to have obtained either an arrest or search warrant for Felix or his home. *See* ***Smith***, 131 Wis. 2d at 229-30 (exigent circumstances exception applies only if obtaining warrant would cause undue delay).

[4] As the State emphasizes, we may affirm a circuit court decision on a theory or reasoning not presented to it. ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

the ***Brown*** attenuation analysis to an illegal warrantless arrest in the home based on probable cause but no exigent circumstances. ***Id.*** at 19, 21. Instead, the court created a bright-line rule, holding that the remedy was to exclude all physical evidence and statements obtained from inside the home, but to admit any statements obtained outside the home. ***Id.*** at 19-20. The court stated that once the arrestee is removed from the home, the illegal arrest transforms into legal custody because no arrest warrant would be required to arrest the person in a public place. ***Id.*** at 18. The court reasoned that because police already had probable cause to arrest, "the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into [Harris's] home." ***Id.*** at 19.

¶14 The ***Harris*** rule, however, has not been adopted by the Wisconsin Supreme Court. *See* ***Roberson II***, 292 Wis. 2d 280, ¶81 (Abrahamson, C.J., dissenting) ("[T]his court has never adopted the ***Harris*** exception to the exclusionary rule"). Nonetheless, this court applied the rule in ***Roberson I***, without recognizing or discussing ***Harris***'s apparent conflict with the existing supreme court precedent established by ***Laasch*** and ***Smith***. ***Roberson I***, 287 Wis. 2d 403, ¶¶16-23.[5] On review in ***Roberson II***, however, the supreme court

[5] We have also cited the ***Harris*** rule, ***New York v. Harris***, 495 U.S. 14 (1990), in a number of other cases. *See, e.g.*, ***State v. Cash***, 2004 WI App 63, ¶27 n.10, 271 Wis. 2d 451, 677 N.W.2d 709 (***Harris*** rule would apply, but case resolved on other grounds), *abrogated on other grounds by* ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611; ***State v. Stevens***, 213 Wis. 2d 324, 333-34, 570 N.W.2d 593 (Ct. App. 1997) (distinguishing ***Harris***); ***State v. Anderson***, 160 Wis. 2d 307, 322-23, 466 N.W.2d 201 (Ct. App. 1991) (distinguishing ***Harris***), *rev'd on other grounds*, 165 Wis. 2d 441, 477 N.W.2d (1991) (not citing ***Harris***); ***State v. Ultsch***, 2011 WI App 17, ¶30 n.6 (citing ***Harris*** in a footnote, but not applying); and ***State v. Adams***, 2009 WI App 141, ¶10 n.3, 321 Wis. 2d 475, 774 N.W.2d 475 (unpublished) (***Harris*** rule would apply, but case resolved on other grounds). Additionally, the supreme court cited ***Harris*** recently, but it was not a search or seizure suppression case. *See* ***State v. Ferguson***, 2009 WI 50, ¶39, 317 Wis. 2d 586, 767 N.W.2d 187. No case, however, has recognized or discussed ***Harris***'s conflict with existing Wisconsin Supreme Court precedent.

cited ***Harris*** only in passing, for the proposition that "[i]n general, evidence must be suppressed as fruit of the poisonous tree, if such evidence is obtained by exploitation of that illegality." ***Roberson II***, 292 Wis. 2d 280, ¶32 (citation and quotation omitted). ***Roberson II*** never mentioned ***Brown*** or ***Smith***, resolving the case on other grounds.

¶15 The ***Harris*** rule is contrary to our supreme court's prior holdings in ***Smith***, which was based on ***Laasch***,[6] and in ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990).[7] In ***Smith***, ***Laasch***, and ***Walker***, the police already had probable cause to arrest prior to entering the suspects' homes or curtilage. *See* ***Walker***, 154 Wis. 2d at 184; ***Smith***, 131 Wis. 2d at 226, 232, 235; ***Laasch***, 84 Wis. 2d at 592. Yet, in ***Smith*** our supreme court applied the ***Brown*** attenuation analysis and concluded that a confession obtained several hours after the arrest was tainted by the warrantless arrest. *See* ***Smith***, 131 Wis. 2d at 226, 241-42. In ***Walker***, the court held the ***Brown*** attenuation analysis should apply to lineups as well as confessions. ***Walker***, 154 Wis. 2d at 186-87 (citing 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(g), 433).

¶16 Moreover, after the United States Supreme Court's decision in ***Harris***, our supreme court has continued to apply the ***Brown*** attenuation analysis

[6] Under ***Laasch*** and its progeny, circuit courts could not obtain personal jurisdiction over persons who were illegally arrested in their home with probable cause but without a warrant or exigent circumstances. *See* ***Laasch***, 84 Wis. 2d at 596-97; ***State v. Monje***, 109 Wis. 2d 138, 147, 325 N.W.2d 695 (1982) (reaffirming ***Laasch***), *modified by* ***Smith***, 131 Wis. 2d at 240. In ***Smith***, however, the court held the remedy for such an arrest was application of the exclusionary rule, not a deprivation of personal jurisdiction. ***Smith***, 131 Wis. 2d at 224, 240 ("[W]e withdraw language from our line of cases stating that an unlawful arrest deprives the trial court of personal jurisdiction over the defendant.").

[7] ***Walker*** was decided sixteen days before ***Harris***.

to warrantless home entries—at least those involving searches. Without distinguishing between searches and arrests, in ***State v. Anderson*** the court relied on ***Walker*** and held, "Today we reaffirm that the ***Brown*** analysis is the proper test to follow in attenuation cases." *See* ***State v. Anderson***, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991) (a search case) (citing ***Walker***, 154 Wis. 2d at 186-87). The supreme court was presumably aware of ***Harris*** when it reversed this court's decision and reaffirmed the ***Brown*** analysis, as our decision had discussed ***Harris*** at some length. *See* ***State v. Anderson***, 160 Wis. 2d 307, 322-24, 466 N.W.2d 201 (Ct. App. 1991), *rev'd*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991).

¶17 Our supreme court also subsequently applied the ***Brown*** analysis to a warrantless home entry, where the entry was not for the explicit purpose of either a search or an arrest. *See* ***State v. Phillips***, 218 Wis. 2d 180, ¶¶1, 11, 22, 47 n.13, 577 N.W.2d 794 (1998) (whether consent to search given inside the home was sufficiently attenuated from the officers' illegal entry; the "agents' express purpose ... was not to search, ... but to seek the defendant's permission to search.").

¶18 Thus, application of the ***Harris*** rule would lead to the peculiar result that statements obtained after a warrantless home entry and arrest cannot be suppressed under the ***Brown*** attenuation analysis, while statements obtained following a warrantless home entry and search can. This result appears contrary to ***Laasch***, where our supreme court indicated, "[W]e believe that the warrantless entry of a dwelling is governed by the same constitutional principles, whether the entry is made to effect a search or an arrest." ***Laasch***, 84 Wis. 2d at 595; *see also* ***Smith***, 131 Wis. 2d at 227-28.

¶19 We recognize we typically apply art. I, § 11 of our state constitution in conformity with the United States Supreme Court's application of the Fourth Amendment. *See* ***State v. Fry***, 131 Wis. 2d 153, 388 N.W.2d 565 (1986), *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97.[8] Nonetheless, our supreme court's decisions, particularly ***Smith*** and ***Walker***, mandate that any evidence obtained following a warrantless home entry and arrest based on probable cause but no exigent circumstances be suppressed unless the State can demonstrate the evidence is sufficiently attenuated under ***Brown***. *See* ***Smith***, 131 Wis. 2d at 228 ("The state bears the burden of showing that the confession is admissible."). The supreme court then reaffirmed application of the ***Brown*** attenuation analysis less than two years after the ***Harris***

[8] However, the ***Fry*** court also observed:

> It is always conceivable that the Supreme Court could interpret the [F]ourth [A]mendment in a way that undermines the protection Wisconsin citizens have from unreasonable searches and seizures under [art. I, § 11 of the Wisconsin Constitution]. This would necessitate that we require greater protection to be afforded under the state constitution than is recognized under the [F]ourth [A]mendment. We have not reached that point ....

State v. Fry, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986), *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. Ironically, the dissent's view in ***Fry***, 131 Wis. 2d at 187-88 (Bablitch, J., dissenting), based on providing greater protections under our state constitution, ultimately prevailed at the federal level and led to the overruling of ***Fry***. *See* ***Dearborn***, 327 Wis. 2d 252, ¶¶2-3 (citing ***Arizona v. Gant***, 556 U.S. __, 129 S.Ct. 1710 (2009)).

decision, citing ***Walker***.[9] We have no authority to overrule the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Further, even assuming our ***Roberson I*** decision applying the ***Harris*** rule retains precedential value following the supreme court's decision resolving the case on other grounds, we still would not be bound by ***Roberson I***. "To the extent that a supreme court holding conflicts with a court of appeals holding, we follow the supreme court's pronouncement." ***Cuene v. Hilliard***, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509. We therefore decline to apply ***Harris*** in ***Brown***'s stead.[10]

¶20 Felix's brief applies the three factors of the ***Brown*** attenuation analysis to the various statements and physical evidence he sought to suppress. For the most part, the State chose not to respond to Felix's arguments.[11] The State did, however, address the factors as they related to Kudick's subsequent consent to

[9] As recognized in ***Roberson II***, the ***Harris*** decision is not without its detractors. ***State v. Roberson***, 2006 WI 80, ¶79 n.21, 292 Wis. 2d 280, 717 N.W.2d 111 (Abrahamson, C.J., dissenting). The 5-4 ***Harris*** decision was the subject of a vigorous dissent: "The majority's conclusion is wrong. Its reasoning amounts to nothing more than an analytical sleight of hand, resting on errors in logic, misreadings of our cases, and an apparent blindness to the incentives the Court's ruling creates for knowing and intentional constitutional violations by the police." ***Harris***, 495 U.S. at 21-22 (Marshall J., dissenting). The decision has also been criticized on multiple grounds by Professor LaFave, *see* 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(b), 304-05 (4th ed. 2004), and rejected by at least three other states, including New York upon remand of ***Harris***. *See* ***State v. Mariano***, 160 P.3d 1258 (Haw. Ct. App. 2007); ***State v. Luurtsema***, 811 A.2d 223 (Conn. 2002), *overruled on other grounds by* ***State v. Salamon***, 949 A.2d 1092 (Conn. 2008); ***People v. Harris***, 570 N.E.2d 1051 (N.Y. 1991).

[10] Even if we applied the ***Harris*** rule, Felix's clothing would need to be suppressed on remand. The clothing was seized along with Felix at the time of his illegal arrest in the home, and it remained in the State's custody until removed from Felix at the jail. *See* ***Commonwealth v. Tyree***, 919 N.E.2d 660, 679-82 (Mass. 2010); LAFAVE, § 11.4, 67-68 (Supp. 2010-11).

[11] The record reveals the State did not respond to Felix's ***Brown*** analysis in the circuit court either. Instead, the State responded with an exigent circumstances argument.

search the home. Therefore, because, as explained below, we agree with the State that the consent search was sufficiently attenuated, we remand with directions that the statements and physical evidence obtained following Felix's illegal arrest be suppressed, with the exception of any evidence discovered during the consent search. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded); ***Smith***, 131 Wis. 2d at 228 (State's burden to demonstrate attenuation).

¶21 Felix argues the search of his home was not sufficiently attenuated because the consent itself was tainted, as Kudick was subjected to the "shock and awe" of the arrest of Felix and his family at gunpoint. The proximity factor weighs in favor of suppression because Kudick's consent was obtained minutes after Felix's arrest. However, as to the second factor, the consent itself is a significant intervening circumstance. Regarding the third factor, generally, the police conduct here was both purposeful[12] and flagrant. *See* ***State v. Tobias***, 196 Wis. 2d 537, 551 n.4, 538 N.W.2d 843 (Ct. App. 1995). However, the police did not wake Kudick inside his home, point their weapons at him, direct him face down to the ground, handcuff him, illegally enter his apartment, or seize his family members. Because the conduct was not directed at Kudick, the third factor is of diminished importance. On balance, we conclude the consent search of Felix's apartment was sufficiently attenuated from his warrantless arrest.

[12] While the police could not expect the inside door to pop open, they purposely set out to arrest Felix at his home without a warrant.

Seizure and search of Felix's automobile

¶22 The State contends that Felix's vehicle was legally seized and searched. It argues the vehicle could be seized pursuant to the automobile exception to the warrant requirement and that, moreover, it obtained a search warrant prior to searching the vehicle. Felix concedes the State's argument that, pursuant to ***State v. Marquardt***, 2001 WI App 219, 247 Wis. 2d 765, 635 N.W.2d 188, the police could lawfully seize and search his vehicle if they had probable cause to believe it contained evidence of a crime. Felix's contention that the police lacked probable cause is so specious as to not merit discussion. The facts discussed herein amply demonstrate probable cause that the victim's blood would be found in the vehicle. Therefore, we affirm that part of the order denying suppression of any evidence obtained from Felix's vehicle.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.