State v. Michael Louis VonSchrader

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COURT OF APPEALS DECISION DATED AND FILED

January 5, 2023 Sheila T. Reiff 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. 2020AP1843-CR Cir. Ct. No. 2019CM258

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL LOUIS VONSCHRADER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. Affirmed.

Before Stark, P.J., Hruz and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3). ¶1 PER CURIAM. 1 The State appeals an order granting Michael VonSchrader s motion to suppress evidence obtained after VonSchrader was ordered out of his home at gun point by law enforcement. 2 The State concedes that VonSchrader was seized within his home, but it argues that the seizure was justified by exigent circumstances and probable cause. In the alternative, the State contends that the exclusionary rule does not apply to the evidence obtained after VonSchrader left his home because law enforcement had probable cause to arrest him. We conclude the State has forfeited its newly raised probable cause theories, To the extent the State has not abandoned an earlier argument regarding the exclusionary

rule, we reject that argument as well. Accordingly, we affirm.

BACKGROUND

¶2 The State charged VonSchrader with four offenses: one count of operating a motor vehicle while intoxicated (OWI) as a second offense; one count of operating with a prohibited alcohol concentration as a second offense; one count of possession of a firearm while intoxicated; and one count of obstructing an

1 The chief judge of the court of appeals converted this from an appeal decided by one judge to a three-judge panel by order dated March 3, 2022. See WIS. STAT. RULE 809.41(3) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted. Upon converting the appeal to a three-judge panel, we ordered the parties to serve copies of their briefs upon the Wisconsin Department of Justice (DOJ), and we asked the DOJ to advise whether it would stand upon the briefs already filed by the assistant district attorney or whether it would submit a supplemental brief. The DOJ opted to submit a supplemental brief. We rely almost entirely on largely abandoned the arguments previously made by the assistant district attorney. 2 statements after he was placed in handcuffs but before Miranda warnings were administered. See

Miranda v. Arizona, 384 U.S. 436 (1966). officer. VonSchrader later moved to suppress all evidence obtained after law enforcement ordered him out of his home, arguing that law enforcement unlawfully seized him within his residence without a warrant.

¶3 The circuit court held two evident motion, hearing testimony from Deputies Chris Coniglio

and Mitchell Ellis. Coniglio and Ellis testified that they responded to a 3:00 a.m. report on July 21, 2019, regarding a disturbance involving several men and a naked woman who had run away from a reside Upon arriving at the residence, the deputies spoke with the reporting party and two other men.

¶4 The men reported that they had recently returned home from a

VonSchrader a man whom the reporting party knew personally from prior encounters. According to Deputy Ellis Deputy Coniglio testified that the

reporting party stated that VonSchrader had unsuccessfully attempted to punch him, that one of the other men then punched VonSchrader, and that the reporting The men told the deputies that the woman appeared intoxicated and that she had run away from the home without wearing any clothing. They also stated that VonSchrader had left the residence in a black Ford F-150 around the same time as the woman, and he appeared to have parked just down the road.

¶5 Out of concern for the the deputies began searching for her in the surrounding area. When they

were unable to locate her, they went residence. trailer home sometime around 4:00 a.m. As the deputies walked up to the home, Deputy Coniglio observed a male later identified as VonSchrader standing in the home using a cell phone.

¶6 The deputies stepped knocked on an unshaded window near the front door, and shined lights on their uniforms to show that they were . VonSchrader looked at the deputies and , but his attention returned to his cell phone.

After the deputies continued knocking, VonSchrader walked to the side of the residence and picked up what Deputy Coniglio believed to be . [g] alert Deputy Ellis, and they subsequently retreated for cover.

¶7 After taking cover behind some vehicles in the front yard, the ing [VonSchrader] out of the traile VonSchrader eventually came out of the residence holding a cell phone and a beer. The deputies subsequently placed him in handcuffs. The deputies began asking VonSchrader questions, including where the unclothed woman had gone. Although VonSchrader was not

tr According to Deputy Coniglio, when the deputies asked about VonSchrader having a handgun definitive answer, jus Deputy Ellis, on the other hand, recalled VonSchrader saying that the gun was on the table in the residence. The deputies never entered the residence, and no gun was ever recovered.

¶8 Both deputies described VonSchrader as having slurred speech and The deputies subsequently arrested VonSchrader for OWI and transported him to a different location to conduct field sobriety testing. After administering the field sobriety tests, Deputy Ellis took VonSchrader to the hospital for a blood draw.

¶9 In an oral ruling, the circuit court motion to suppress evidence gathered after he left his home. In essence, the court concluded that VonSchrader was not seized until he court rejected the Sta had probable cause of The State had previously argued in its circuit court briefing and at the motion hearing that law enforcement had probable cause to believe VonSchrader committed an OWI offense and unlawfully possessed a firearm while intoxicated. Each of those probable cause theories was based, in part, on the s speech after he exited his home. The State did not argue any other theories of

probable cause.

¶10 VonSchrader later filed a motion for reconsideration, arguing that he was constructively seized within his home. The circuit court agreed and concluded that there was a constructive entry because a reasonable person in

commands. should not apply to the evidence gathered from VonSchrader outside of his home. The

court explained that the Harris 3 exception to the exclusionary rule requires

3 See New York v. Harris, 495 U.S. 14 (1990). ruled that there was not probable cause prior to the deputies ordering Mr. [V]o Accordingly, the court suppressed all evidence obtained after VonSchrader exited his home.

¶11 The State now appeals. Additional facts will be provided as necessary below.

DISCUSSION

¶12 Both the Fourth Amendment to the United States Constitution and article I, section 11 of the W [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Absent prohibits the police from making a warrantless and non s home in order to make a routine felony arrest. Payton v. New York, 445 U.S. 573, 576, 590 (1980). Furthermore, as relevant here, where a person does not wish to leave a location,

feel free to decline t requests or otherwise terminate the encounter. City of Sheboygan v. Cesar, 2010 WI App 170, ¶13, 330 Wis. 2d 760, 796 N.W.2d 429 (citing Florida v. Bostick, 501 U.S. 429, 436 (1991)). tion of the Fourth State v. Scull, 2015 WI 22, ¶20, 361 Wis. 2d 288, 862 N.W.2d 562.

¶13 two-part standard of review. State v. Adell, 2021 WI App 72, ¶14, 399 Wis. 2d

unless they are clearly erroneous, and we independently apply constitutional principles to those facts. State v. Felix, 2012 WI 36, ¶22, 339 Wis. 2d 670, 811 N.W.2d 775.

¶14 The State concedes in its supplemental brief seized VonSchrader within his home by ordering him outside at gunpoint nevertheless argues that the seizure was lawful because it was supported by probable cause and justified by exigent circumstances. In the alternative, the State argues that the circuit court erred by suppressing certain evidence because the Harris exception to the exclusionary rule applies.

¶15 Before addressing these arguments directly, we must first address the issue of probable cause, which is a necessary component of both of th arguments. The State argues that the deputies had probable cause to arrest

VonSchrader before ordering him out of his home. In particular, on appeal, the State contends that the deputies could have reasonably believed that VonSchrader probably committed the crimes of attempted battery and disorderly conduct because the reporting party said that VonSchrader had attempted to punch him.

¶16 In response, VonSchrader a this probable cause argument. He contends that the State never argued and the circuit court never considered whether the deputies had probable cause to arrest VonSchrader before he was seized within his home. ¶17 lly deemed 4 State Farm Mut. Auto. Ins. Co. v. Hunt, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (citation omitted). rule is to enable the circuit court to avoid or correct any error as it comes up, with

State v. Counihan, 2020 WI 12, ¶26, 390 Wis. 2d 172, 938 N.W.2d 530. The forfeiture rule also encourages attorneys to diligently prepare for and conduct court Id., ¶¶26-27. blindside [circuit] courts with reversals based on theories which did not

originate in their forum. State v. Rogers, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

¶18 The State has indeed argued new theories of probable cause for the first time on appeal. In the circuit court, the State argued that the deputies had probable cause to arrest VonSchrader for the crimes of: (1) possession of a firearm while intoxicated; and (2) OWI. Both of these theories were based, in part, on the after VonSchrader exited his home. The State, however, never argued as it does

now that there was probable cause to arrest based on the crimes of attempted battery or disorderly conduct before VonSchrader was seized in his home. Thus, not only has the State changed its argument regarding the crimes for which

4 P interchangeably, but Loren Imhoff

Homebuilder, Inc. v. Taylor, 2022 WI 12, ¶13, 400 Wis. 2d 611, 970 N.W.2d 831 (citation the failure to make the timely assertion of a right Id. (citation omitted). Waiver, on the other hand, Id. (citation omitted). This case involves a forfeiture because VonSchrader does

not argue, nor does the record support a conclusion, that the State intentionally relinquished or abandoned the probable cause arguments now raised on appeal. probable cause existed, but it has also changed its argument regarding when probable cause existed.

¶19 The State fails to acknowledge in its supplemental briefing that it is advancing new probable cause theories, and it even seems to imply that it had made these arguments to the circuit court. Specifically, after highlighting evidence that supports its current probable cause theories, the State asserts that only reasonable suspicion id] not [have] probable

cause The State even goes ruling , while ignoring the fact that the State never presented the court with its current probable cause theories. The State also ignores the fact that it never to a man in either its briefing or its oral argument in the circuit court. In fact, when recounting the facts e verbal a

¶20 We conclude that the State has forfeited its new argument regarding probable cause. If the State had presented the circuit court with its current probable cause theories, the court could have avoided the alleged error, which, in turn, might have prevented the necessity of this appeal. In addition, if we were to would risk blindsiding the circuit court with a reversal based on theories that did not originate in its forum. See Rogers, 196 Wis. 2d at 827.

¶21 Of course, forfeiture is a rule of judicial administration, and a reviewing court may disregard a forfeiture and address the merits of an unpreserved issue. See Town of Mentor v. State, 2021 WI App 85, ¶48, 400 Wis. 2d 138, 968 N.W.2d 716. involves a question of law rather than of fact, when the question of law has been

briefed by both parties and when the question of law is of sufficient public interest Marotz v. Hallman, 2007 WI 89, ¶16, 302 Wis. 2d 428, 734 N.W.2d 411. For several reasons, this is not a case where we can disregard the forfeiture.

¶22 Fi theories are not fully developed. Whether the facts of a particular case constitute

probable cause is a question of constitutional fact. State v. Mata, 230 Wis. 2d 567, 570, 602 N.W.2d 158 (Ct the question of probable cause turns on the facts of the particular case. Id. at 572. Here, because the State never argued its current theories of probable cause, the circuit court never made specific findings of fact regarding what the deputies were told about the alleged VonSchrader points out this omission in his supplemental briefing, arguing [it] assume[s] re were no such specific findings made

support its probable cause arguments in its supplemental briefing; it does not cite any factual findings by the court.

¶23 The circuit court did disturbance that arose as a result of all this, and the court appeared to find the deputies generally credible. at least reasonable suspicion to believe [VonSchrader] was in either a state of agitation, possibly intoxication, based on what they already knew from what they But, again, the court never made any specific findings about what the deputies were told or what they believed. Significantly, the deputies both testified that they went to and to ensure her safety, and Deputy Coniglio agreed with d that the deputies did not have probable cause to arrest VonSchrader before going to his home. One could therefore infer that the deputies themselves doubted the credibility of the reporting party This inference would not be unreasonable, given that the reporting party had stated he just observed his naked fiancée in bed with VonSchrader.

¶24 It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. State v. Poellinger, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Because the circuit court was not given a fair opportunity to make findings of fact regarding probable cause theories, we have not been presented with a clean question of law.

Marotz, 302 Wis. 2d 428, ¶16.

¶25 Second, we ca both parties have not briefed Although VonSchrader new probable cause theories in his supplemental brief, he did not make an alternative argument to his waiver argument. The State might fault him for not doing so, but this second requirement for disregarding a forfeiture has plainly not been met. See id.

¶26 Third, the forfeited issues in this case are not of sufficient public

brief (probable cause; exigent circumstances; and the Harris exception to the exclusionary rule) involve the application of well-settled rules of law to a recurring fact situation; therefore, the issues are not novel or complex and would not warrant a published or authored opinion. 5 See WIS. STAT. RULE 809.23(1)(b)1. In addition, all of the charges against VonSchrader are misdemeanors, and there do not appear to be any identifiable victims of his alleged crimes, other than society in general.

¶27 volve questions of fact that we cannot resolve, the parties have not fully briefed the issue of probable cause, and the forfeited issues in this case are not of sufficient public interest. See Marotz, 302 Wis. 2d 428, ¶16.

¶28 failure to establish probable cause on appeal is fatal to each of its main arguments. For a warrantless seizure inside of a home to be justified by exigent circumstances, the warrantless entry must also be supported by probable cause that the individual has committed a jailable offense. See State v. Weber, 2016 WI 96, ¶¶19, 32, 372 Wis.

justified by exigent circumstan omitted)). Likewise, the Harris exception to the exclusionary rule applies only

Felix, 339 Wis. 2d 670, ¶42.

5 Although we initially converted this appeal from a one-judge decision to a three-judge decision, thereby signaling that publication might be warranted, the largely abandoned its previous arguments and did not contest that VonSchrader had been seized

within his home. ¶29 Because the State has forfeited its new probable cause theories and because it has abandoned its earlier probable cause theories, 6 the State cannot establish either an exigent circumstance exception to the warrant rule or the Harris exception to the exclusionary rule. Accordingly, we reject these arguments.

¶30 Finally, to the extent the State has not abandoned its argument in its original briefing that the exclusionary rule does not apply, we reject that argument as well. In its initial brief-in-chief, the State argued that the exclusionary rule did not apply because the deputies did not engage in reckless

or deliberate misconduct eat to

meaningfully deter it, and [is] sufficiently culpable that such deterrence is worth the price State v. Burch, 2021 WI 68, ¶16, 398 Wis. 2d 1, 961 N.W.2d 314 (citation omitted). Police misconduct is sufficiently deliberate and can be effectively deterred through the exclusion of evidence where

Id., ¶17 (citation omitted).

¶31 The deputies did not have probable cause or a warrant to arrest VonSchrader, and

they ordered him out of the sanctity of his home at gun point. As the circuit court recognized during the

6 A.O. Smith Corp. v. Allstate Ins. Cos., 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). indicate that [VonSchrader] brandished or threatened a weapon against the officers or, for that matter, whether it was loaded at least based on the record in this case relative to this motion, a potential argument as to what exactly it was in hand because apparently the officer[s] did not enter the dwelling at that time to locate the item

Accordingly, we meaningfully deterred by the application of the exclusionary rule.

By the Court. Order affirmed.

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