IN SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CHRISTOPHER MARKUS,

Respondent.

Case No. SC15-801

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT APPEAL, FIRST DISTRICT

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, CHRISTOPHER MARKUS, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of eight volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

An officer on foot patrol observed Respondent and three other men standing in a public street near a parked truck. (Appx. 3). One of the men was drinking what appeared to be an alcoholic beverage. (Appx. 3). The officer, who was in full uniform, began approaching the men and identified himself as a police officer. (Appx. 3). As the officer approached, Respondent, who was smoking what appeared to be a cigarette, turned around and flicked the cigarette under the truck while exhaling smoke. (Appx. 3). The officer immediately smelled the odor of cannabis. (Appx. 3).

The officer then asked Respondent to speak with him. (Appx. 3). Respondent started backing away into a driveway, and the officer repeated his request that Respondent stop. (Appx. 3). When Respondent was told a third

time to stop, he turned around and ran toward the open garage. (Appx. 3-4). The officer gave chase and caught Respondent once he entered an open garage. (Appx. 4). A struggle ensued, Respondent was arrested, and a firearm was found in his waistband. (Appx. 4). Respondent then filed a motion to suppress based on the warrantless entry of the garage. (Appx. 3-4).

In denying the motion to suppress, the trial court found the entry into the garage was valid based on the hot pursuit doctrine. (Appx. 4). Respondent then appealed the denial of his motion to suppress. (Appx. 3-4).

The First District acknowledged the United States Supreme Court's longstanding rule that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient o escaping to a private place." (Appx. 4) (citing United States v. Santana, 427 U.S. 38, 42 (1976)). However, the First District refused to apply this rule in the instant case because "all the offenses involved in Santana were felonies." (Appx. 4). Likewise, the First District declined to follow the long line of Third District cases that apply this rule, because those cases involved "dangerous circumstances" that were not present here. (Appx. 5-6).

According to the First District, minor offenses can only justify the hot pursuit exception if they involve "a threat to the safety of the public, property, or police," or there is some indication that "critical evidence will be destroyed[.]" (Appx. 5-7). The First District held that once Respondent "crossed the threshold" of the open garage, the officers were required to cease their immediate and continuous pursuit at the threshold of the garage until they obtained a warrant. (Appx. 4, 7).

SUMMARY OF ARGUMENT

The conformity clause of the Florida Constitution mandates that the right against unreasonable searches and seizures must be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. As such, this Court is bound by the holdings in Santana and Welsh and by the Supreme Court's interpretation of said holdings as expressed in Stanton. It is clear from holdings in these cases that the hot pursuit exception to the warrant requirement includes jailable misdemeanors. If this Court were to adopt the rationale set forth by the First District, the result would be a violation of the conformity clause, thus Markus must be quashed.

ARGUMENT

ISSUE I: THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIRST AND THIRD DISTRICTS AS TO WHETHER THE HOT PURSUIT EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO MISDEMEANOR OFFENSES

STANDARD OF REVIEW

The standard of review is *de novo*. Browning v. Poirier, 165 So.3d 663 (Fla. 2015).

MERITS

In Markus v. State, 160 So.3d 488, 493 (Fla. 1st DCA 2015), the First District Court of Appeal held that the hot pursuit/exigent circumstances exception to the warrant requirement does not apply when "the arrest is for a minor offense or infraction with no evidence to indicate any danger to the public, police, or property and no indication that critical evidence will be destroyed." While the First District acknowledged the longstanding rule that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." (citing United States v. Santana, 427 U.S. 38, 43 (1976)), it refused to apply this reasoning in the instant case because "all the offenses involved in Santana were felonies."

A. The First District's decision expressly misconstrues a provision of the State and Federal constitutions.

In Smallwood v. State, 113 So.3d 724 (Fla. 2013), this Court acknowledged that the search and seizure provision of the Florida Constitution contains a conformity clause articulating the extent to which Florida courts are bound by

federal interpretations of the Fourth Amendment. Article I, section 12, of the Florida Constitution provides, in full:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Id. at 730.

In United States v. Santana, 427 U.S. 38 (1976), Patricia McCafferty arranged sell an amount of heroin to an undercover police officer. After meeting McCafferty at a prearranged location, she directed the officer to Santana's residence where she went inside with marked money from officer and returned with the heroine. The officer then arrested McCafferty who told him that Santana had the money at her residence. When the officers returned to the residence they observed Santana standing in the doorway of the house with a paper bag in her hand. As officers approached shouting "police" and displaying their badges, Santana retreated into the house and the officers followed her through the open door. The Court explained:

> This case, involving a true "hot pursuit," is clearly governed by Warden; the need to act quickly here is even greater than in that case while the intrusion is much less. The District Court was correct in concluding that "hot pursuit" means some sort of a chase, but it need not be an extended hue and cry "in and about (the) public streets." The fact that the pursuit here ended almost as soon as it began did not

> render it any the less a "hot pursuit" sufficient to justify the warrantless entry into Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. See Vale v. Louisiana, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970). Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Chimel v. California, 395 U.S. 752, 762-763, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (1969).
>
> We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place.

Id. at 42-43.

In Welsh v. Wisconsin, 466 U.S. 740 (1984), a witness observed a car that was being driven erratically and that eventually swerved off the road into a field. Despite the witness' suggestion that he wait for assistance in removing his car, the driver walked away from the scene. The police arrived a few minutes later and were told by the witness that the driver was either very inebriated or very sick. After checking the car's registration, the police proceeded to the petitioner's nearby home. They gained entry when Welsh's stepdaughter answered the door, and found him lying naked in bed. Welsh was arrested for driving a motor vehicle while under the influence of an intoxicant in violation of a Wisconsin statute which provided that a first offense was a **noncriminal violation** subject to a civil forfeiture proceeding for a maximum fine of $200. The Court held that

> Petitioner's warrantless arrest in the privacy of his own bedroom for a **non-criminal** traffic offense cannot be justified on the basis of the "hot pursuit" doctrine, because there was no immediate or continuous pursuit of the petitioner from the scene of a crime, or on the basis of a threat to public safety, because petitioner had already arrived home and had abandoned his car at the scene of the accident. Nor can the arrest be justified as necessary to preserve evidence of petitioner's blood-alcohol level. Even assuming that the underlying facts would

> support a finding of this exigent circumstance, given the fact that the State had chosen to classify the first offense for driving while intoxicated as a **noncriminal, civil forfeiture offense for which no imprisonment was possible**, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. (emphasis added)

Id. at 741. The Court's ultimate ruling was that the hot pursuit doctrine did not apply to a noncriminal civil infraction which did not occur in the officer's presence. The United States Supreme Court has not squarely addressed whether or not the hot pursuit doctrine applies to misdemeanors, but the Court has rejected the Ninth Circuit's analysis of this issue in a qualified immunity case. An analysis which was very similar to the First DCA's in Markus.

In Sims v. Stanton, 706 F.3d 954 (2012), Officer Stanton pursued a fleeing misdemeanant into a fenced yard belonging to Sims. Although the District Court found Officer Stanton was entitled to qualified immunity for injuries to Sims, the Ninth Circuit reversed finding that Santana and Welsh precluded the application of the hot pursuit exception to misdemeanors. The Ninth found that Stanton's warrantless entry did not meet either the exigency or emergency exceptions because "both exceptions turn on the underlying offense." Id. at 959. The Ninth went on to explain that the "possible escape of a fleeing misdemeanant...is not, however, generally, a serious enough consequence to justify a warrantless entry." The Ninth further explained that

> The precedent relied on by the district court, United States v. Santana, which held that a "suspect may not defeat an arrest which has been set in motion in a public place...by the expedient of escaping to a private place," involved a fleeing felon and the exigency of potential destruction of evidence of a felony. 427 U.S. 38, 43, 96 S.Ct. 2406, 49 L.Ed2d 300 (1976). Since Santana, the Supreme Court and our court

> have made it clear that **the exigency exception to the warrant requirement generally applies only to a fleeing felon and not to a fleeing misdemeanant.** Welsh, 466 U.S. at 750, 104 S.Ct. 2091; Johnson, 256 F.3d at 908 n. 6.

Id. at 961-962.

The Ninth Circuit also held that the emergency exception did not apply either because "where the threat is to the officer's safety, we observe that 'one suspected of committing a minor offense would not likely resort to desperate measures to avoid arrest and prosecution.'" Id. at 11. (citing U.S. v. George, 883 F.2d 1407, 1413 n.3 (9th Cir. 1989).

In Stanton v. Sims, 134 S. Ct. 3 (2013), the United State Supreme Court rejected the Ninth Circuit's interpretation of both Santana and Welsh; an interpretation which is mirrored in the First DCA's opinion in Markus. The Supreme expressly declared that the hot pursuit exception expressed in Santana and reaffirmed in Welsh **does not exclude jailable misdemeanor offenses.** The Court explained that "though Santana involved a felony suspect, we did not expressly limit our holding based on that fact." Id. at 6. The Court went on to declare that the Ninth Circuit, again like the First DCA, mistakenly interpreted Welsh as well. First, the Court stated that Welsh did not involve hot pursuit. Id. at 6. Further, the Court explained that despite their "emphasis in Welsh on the fact that the crime at issue was minor-indeed, a mere nonjailable civil offense-nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit.*" Id. at 6. (emphasis supplied) Although the Supreme Court has not specifically addressed whether the hot pursuit doctrine applies to fleeing misdemeanants,

they have specifically rejected the additional requirements of seriousness and/or dangerousness enunciated by the Ninth Circuit in Sims which mirror those pronounced by the First DCA in Markus.

The First District Court of Appeal incorrectly interpreted the United States Supreme Court's decision in Santana and misconstrued the Fourth Amendment by holding that applying hot pursuit to minor offenses "renders the Fourth Amendment, and article I, section 12 of the Florida Constitution, meaningless." (Appx. 6). In fact, the Supreme Court expressly held in Stanton that "the law has **not clearly established** that a warrantless entry to a home, in hot pursuit of a suspect who an officer has probable cause to arrest for a misdemeanor, violated the Fourth Amendment." Id. at 7. (emphasis added) The First District Court erroneously relied on facts from Santana and Welsh with no regard to their actual holdings as explained by the Supreme Court in Stanton. Thus using these cases to justify adding additional requirements to the hot pursuit doctrine which are not present in either case violates the conformity clause of the Florida Constitution.

B. The First District's decision expressly and directly conflicts with a long line of cases from the Third District Court of Appeal.

The First District acknowledged the longstanding rule that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." (Appx. 4) (citing United States v. Santana, 427 U.S. 38, 43 (1976)). However, the First District incorrectly interpreted Santana and refused to apply this rule in the instant case. The First DCA found that fresh pursuit exception expressed in Santana

did not apply because "all the offenses involved in Santana were felonies" despite the fact that the United States Supreme Court has specifically said that "though Santana involved a felony suspect, we did not expressly limit our holding based on that fact." Stanton at 6. Likewise, the First District declined to follow the long line of Third District cases that apply this rule, because those cases involved "dangerous circumstances" that were not present here. (Appx. 5-6).

The First District's holdings above directly and expressly conflict with a long line of Third District cases. For example, in Dyer v. State, 680 So. 2d 612, 613-14 (Fla. 3d DCA 1996), the Third District found that the warrantless entry into the defendant's enclosed yard was justified based on a hot pursuit that was triggered by possession of cannabis and resisting without violence. See id. Just like the instant case, hot pursuit was justified based on the same exact non-violent, minor offenses. See id. Just like in Dyer, the officer had no idea that Respondent even lived at the home which he fled to. See id.

In Gasset v. State, 490 So. 2d 97, 98-99 (Fla. 3d DCA 1986), although the case involved a dangerous high speed car chase, the Third District's decision did not turn on the nature of the offense. Instead, the Third District held:

> Gasset waived any expectation of privacy he may have had in his garage by . . . leading the officers directly to the place of his arrest.
>
> The enforcement of our criminal laws . . . is not a game where law enforcement officers are "it" and one is "safe" if one reaches "home" before being tagged. . . . "[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place."

Id. at 98-99 (footnote and internal citations omitted). The same is true

here. Respondent waived any expectation of privacy he may have had in the open garage by engaging the officers in a foot chase where he led them directly to the place of his arrest. (Appx. 3-4).

In Ulysse v. State, 899 So. 2d 1233, 1234 (Fla. 3d DCA 2005), the Third District explicitly held that hot pursuit applied to fleeing misdemeanants:

> Hot pursuit of a fleeing misdemeanant is permissible where the misdemeanor is punishable by a jail sentence. . . . The offense of trespass in a conveyance is a misdemeanor punishable by incarceration of sixty days or one year, depending on the circumstances. . . . In this case, whether the passenger is properly viewed as a fleeing felon or fleeing misdemeanant, hot pursuit was permissible. The motion to suppress was correctly denied.

Ulysse, 899 So. 2d at 1234. The First District neglects to mention any of these findings in distinguishing the case. (App. 6).

In State v. Brown, 36 So. 3d 770, 772-73 (Fla. 3d DCA 2010), the Third District aptly pointed out that the Florida statute authorizing hot pursuit expressly applies to misdemeanors:

> A law enforcement officer may arrest a person without a warrant when: (1) The person has committed a . . . misdemeanor . . . in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.

Id. at 772 (emphasis in original) (quoting § 901.15, Fla. Stat. (2008)). Under Brown, the hot pursuit exception is not limited to the stringent requirements added by the First District's decision here.

Finally, in State v. Williams, 128 So. 3d 30, 32-35 (Fla. 3d DCA 2012), although the case involved reports of dangerous activity in the area and the offense of carrying a concealed firearm, the decision did not turn on the dangerousness of the offense or concerns about the destruction of evidence.

Instead, the Third District broadly held:

> The officer, acting in hot pursuit, attempted to make a warrantless arrest upon probable cause before Williams entered the house. Williams could not thwart this effort, or convert a proper warrantless arrest into one requiring a warrant, simply by reaching his house before the officer reached him.

Williams, 128 So. 3d at 34-35. The same is true here. Respondent could not thwart a valid arrest or convert that "proper warrantless arrest into one requiring a warrant, simply by reaching his house before the officer reached him." See id.

In the case at hand, the First District's decision adds new requirements to the hot pursuit exception that are extremely impractical in their application. There is no way for an officer to know whether a fleeing suspect lives in the home that he runs into during a chase. For example, in Dyer v. State, 680 So. 2d 612 (Fla. 3d DCA 1996), the officer did not know that the fleeing suspect lived at the property he ran into and did not know if the defendant was intending to continue to flee to the next yard or run into the home without permission, "thereby endangering potential occupants and in so doing, be committing the felony offense of burglary." Id. at 613.

Requiring an officer to stop at the threshold of a home until a warrant is obtained risks the safety of the lawful occupants inside the home. A suspect would have time to victimize any of the lawful occupants inside the home, barricade and/or arm himself inside, or simply run out the back to escape arrest. The First District's decision enables fleeing suspects to run into any home, regardless if they live there, to facilitate their escape.

The First District's rationale would also lead to disproportionate

results. In a situation an officer sees three individuals committing a "non dangerous" misdemeanor and all three run to a residence, only the homeowner can claim sanctuary. Thus, because the other two individuals do not have standing to assert any Fourth Amendment violation, they have no legal recourse. This cannot stand.

The First District's misguided reliance on Santana and Welsh impermissibly minimizes jailable misdemeanors. In its opinion, the First District completely overlooks the reality of situations facing police officers every day. Although the officer may have only observed a "minor offense or infraction", that does not mean there is nothing else going on. It places the officer in a position in which they have to make a split second decision whether a person is running because it is some kind of a natural response or if, as in this case, there is more to the story. If, in this case, it were just the "minor" offense of being in possession of marijuana, it begs the question, why run? In all likelihood it is reasonable to suspect that the reason the defendant ran even though the officer only observed a "non dangerous" misdemeanor is because more serious crimes had occurred or were ongoing. For instance, in this case, although the officer only saw the defendant smoking a joint, after the defendant was apprehended, the officer discovered that he was a felon who was in illegal possession of a firearm which is a second degree felony, punishable by up to fifteen (15) years in prison. Although the officer may not be aware of the firearm or other charges, the defendant was aware of the firearm on his person. (See also Illinois v. Wardlow, 528 U.S. 119 (2000), "[h]eadlong flight--wherever it

occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior...[w]e conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

Fourteen states have held that hot pursuit of a fleeing misdemeanant independently justifies a warrantless home entry, without additional exigent circumstances. See: People v. Lloyd, 265 Cal.Rptr. 422, 424-25 (Cal.Ct.App. 1989) (resisting detention for traffic violations; where hot pursuit into home is based on arrest begun in public, "that the offenses ... were misdemeanors is of no significance"; Welsh did not "involve pursuit into a home after the initiation of a detention or arrest in ... public"); In re Lavoyne M., 270 Cal.Rptr. 394, 395-96 (Cal.Ct.App. 1990) (similar facts and holding); State v. Paul, 548 N.W.2d 260, 264-68 (Minn. 1996) (DUI; "a bright-line felony rule" would (1) "send a message ... that ... an arrest ... can be thwarted by beating the police to one's door"; (2) hinder law enforcement by "forc[ing]" officers to determine whether an offense is a felony or misdemeanor "on the spot in the tense and often dangerous circumstances of hot pursuit"; and (3) prohibit warrantless home arrests for misdemeanors where "the underlying conduct is serious" or the suspect's "activity ... during ... flight ... elevates the situation

to a serious one"), 268 (dissent concluded "even with hot pursuit and exigent circumstances," entry for misdemeanor is "unreasonable"); State v. Alvarez, 31 So.3d 1022 (La. 2010) (carrying concealed weapon; citing Santana policy and distinguishing Welsh); State v. Bell, 28 So.3d 502, 508-10 (La.Ct.App. 2009) (marijuana possession; Santana "recognized the exigent circumstances inherent in a ... hot pursuit"; distinguishing Welsh); City of Middletown v. Flinchum, 765 N.E.2d 330, 332 (Ohio 2002) (traffic offenses and resisting arrest; suspect should not get "a free pass merely because he was not charged with a more serious crime"), 333-34 (dissent applied Welsh, and reasoned Santana involved a felony and destruction of evidence); Lepard v. State, 542 N.E.2d 1347, 1350 Ind.Ct.App. 1989) (DUI and resisting officer; "fleeing ... a police officer creates an exigent circumstance" justifying in-home arrest); LaHaye v. State, 1 S.W.3d 149, 152-53 (Tex.Ct.App. 2000) (DUI; under Santana, "[e]xigent circumstances exist when the police are in hot pursuit"; distinguishing Welsh as involving nonmailable offense and no hot pursuit); People v. Wear, 893 N.E.2d 631, 645-46 (Ill. 2008) (DUI; entry justified under Santana because officer "had probable cause to arrest [suspect] at the threshold and [suspect] continued inside"; distinguishing Welsh as involving nonjailable offense and no hot pursuit), 647-52 (concurrence concluded hot pursuit cannot justify entry without considering seriousness of crime and totality of circumstances); Brock v. State, 396 S.E.2d 785, 786-87 (Ga.Ct.App. 1990) (traffic violation; hot pursuit justified entry under Santana); State v. Ramirez, 814 P.2d 1131, 1134-35 (Utah Ct.App. 1991) (backup officer could reasonably believe suspect committed misdemeanor; suspect "cannot reduce a legitimate arrest to a game of

'tag' by reaching 'home' a few steps ahead of the police"; Welsh involved no hot pursuit and did not limit entry to felonies); City of Kirksville v. Guffey, 740 S.W.2d 227, 228-29 (Miss.Ct.App. 1987) (DUI; finding exigent circumstances based on hot pursuit; distinguishing Welsh as involving nonmailable offense and no hot pursuit); State v. Ricci, 739 A.2d 404, 407-08 (N.H. 1999) (disobeying officer; suspect "cannot trigger the need for a warrant by racing the police" to home); State v. Penas, 263 N.W.2d 835, 837-38 (Neb. 1978) (DUI and evading officer; "'hot pursuit"' is "an exigent circumstance" justifying entry under Santana); State v. Niedermayer, 617 P.2d 911, 913 (Or.Ct.App. 1980) (traffic misdemeanors; citing Santana).

As stated above, the conformity clause of the Florida Constitution mandates that the right against unreasonable searches and seizures must be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. As such, this Court is bound by the holdings in Santana and Welsh and by the Supreme Court's interpretation of said holdings as expressed in Stanton. It is clear from holdings in these cases that the Supreme Court has not precluded the application of the hot pursuit exception to misdemeanors. Like the numerous states which have held that the hot pursuit exception does include misdemeanors, this Court should do the same by affirming the decisions of the Third District in Gasset and its progeny and reject the First District's analysis in this case. To find otherwise would encourage misdemeanants to flee into a residence, whether or not it belongs to them, it would also have disproportionate results. If this Court were to adopt the rationale set forth

by the First District, the result would not only undermine the authority of law enforcement by allowing subjects to commit "minor" crimes in their presence and then seek sanctuary in a residence, it would also endanger the public by encouraging them to run for home base in the nearest dwelling.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Court quash the decision of the First District Court of Appeal in Markus and resolve the conflict between the districts in favor of conformity with the United States Supreme Court's decisions in Santana and Welsh.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on September 2, 2015: Wm. J. Sheppard, Esq., Sheppard, White & Kachergus, P.A., sheplaw@att.net.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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APPENDIX

160 So.3d 488
District Court of Appeal of Florida,
First District.

Christopher MARKUS, Appellant,
v.
STATE of Florida, Appellee.

No. 1D13–6152. | Feb. 27, 2015.
| Rehearing Denied April 10, 2015.

Synopsis

Background: After denial of his motion to suppress, defendant was convicted in the Circuit Court, Duval County, Virginia Norton, J., of possession of a firearm by a convicted felon. Defendant appealed.

[Holding:] The District Court of Appeal, Clark, J., held that pursuit of defendant who ran after officer saw him smoking marijuana was not an exigent circumstance justifying warrantless entry into defendant's home to arrest him.

Reversed.

West Headnotes (9)

[1] **Criminal Law**
⇐ Review De Novo

Criminal Law
⇐ Evidence wrongfully obtained

When reviewing a denial of a motion to suppress evidence obtained from a warrantless search, the appellate court defers to the trial court's findings of fact but conducts de novo review of the trial court's application of the law to the facts.

Cases that cite this headnote

[2] **Searches and Seizures**
⇐ Presumptions and Burden of Proof

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. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[3] **Criminal Law**
⇐ Evidence wrongfully obtained

District Court of Appeal would defer to trial court's finding that townhome and its garage area, which defendant ran into during police pursuit, were defendant's residence, on review of trial court's denial of motion to suppress evidence obtained from warrantless search of defendant in his home; finding of fact was supported by competent, substantial evidence.

Cases that cite this headnote

[4] **Searches and Seizures**
⇐ Pursuit

The exigent circumstance of hot pursuit, allowing a warrantless entry into a home, is ordinarily limited to the pursuit of fleeing felons, because the seriousness of the crime is more likely to support the emergency nature of exigent circumstances. U.S.C.A. Const.Amend. 4; West's F.S.A. Const.Art. 1, § 12.

Cases that cite this headnote

[5] **Searches and Seizures**
⇐ Pursuit

Where the behavior observed in a public place is not a felony, the exigent circumstance of hot pursuit to support chasing the suspect into his or her home without a warrant is not easily shown by the state. U.S.C.A. Const.Amend. 4; West's F.S.A. Const.Art. 1, § 12.

Cases that cite this headnote

[6] **Searches and Seizures**
⇐ Pursuit

The gravity of an observed offense, leading to police pursuit, is an important factor for determining whether hot pursuit exigent circumstance permits warrantless entry when

the pursuit continues into a home. U.S.C.A. Const.Amend. 4; West's F.S.A. Const.Art. 1, § 12.

Cases that cite this headnote

[7] **Searches and Seizures**
⇐ Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

To rebut the presumed illegality of warrantless entry into home by police officers, the exigent circumstance leading to the warrantless entry must involve a threat to the safety of the public, property, or police, which required immediate action by officers with no time to obtain a warrant. U.S.C.A. Const.Amend. 4; West's F.S.A. Const.Art. 1, § 12.

Cases that cite this headnote

[8] **Arrest**
⇐ Pursuit

Arrest
⇐ Controlled substances

Searches and Seizures
⇐ Pursuit

Police officer's pursuit of defendant who resisted arrest without violence after officer observed him smoking marijuana did not constitute exigent circumstances sufficient to overcome warrant requirement for officers to pursue defendant into his home to arrest him; defendant's observed crimes were misdemeanors, no evidence indicated any danger to public, police, or property, and there was not any indication that critical evidence would be destroyed while waiting for a warrant to arrest defendant. U.S.C.A. Const.Amend. 4; West's F.S.A. Const.Art. 1, § 12.

Cases that cite this headnote

[9] **Searches and Seizures**
⇐ Pursuit

The exigent circumstances exception allowing warrantless pursuit of a suspect into the home cannot remove the constitutional protection for the right to security in one's home without a showing by the state of a danger to the public, police, or property requiring immediate entry by the officers leaving no time or opportunity to obtain a warrant. U.S.C.A. Const.Amend. 4; West's F.S.A. Const.Art. 1, § 12.

Cases that cite this headnote

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Opinion

CLARK, J.

Appellant Christopher Markus appeals his conviction for possession of a firearm by a convicted felon by asserting that the trial court's denial of his pre-trial motion to suppress the evidence found on his person was erroneous as a matter of law. We *490 agree, reverse the denial of the motion to suppress, and reverse the conviction.

[1] [2] When reviewing a denial of a motion to suppress evidence obtained from a warrantless search, the appellate court defers to the trial court's findings of fact but conducts de novo review of the trial court's application of the law to the facts. *Connor v. State*, 803 So.2d 598, 605 (Fla.2001); *Van Teamer v. State*, 108 So.3d 664, 666 (Fla. 1st DCA 2013). Both the trial court and this Court are bound to apply the rule reiterated in *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984): "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."

[3] According to the facts found by the trial court, a uniformed police officer patrolling on foot observed two or three males drinking beer near a pick-up truck on a public street. The officer also observed Appellant smoking a cigarette of some sort. As he came closer to Appellant, he saw Appellant "flick the cigarette while he's exhaling the smoke." The officer immediately "smelled marijuana,"

and then asked Appellant to "step towards me so I could detain him at that time" to investigate the suspected criminal activity—i.e., Appellant's possession of marijuana. Appellant instead backed away, and the officer repeated his request that Appellant stop. At that point, Appellant ran from the officer and into the open garage of his nearby residence, [1] the officer and fellow officers gave chase, and after a physical struggle, Appellant was arrested and patted down. As officers patted Appellant's person, they found the firearm at issue in his waistband.

The trial court denied the motion to suppress because it found the pursuit and arrest of Appellant was valid due to the officers' observation of Appellant's criminal activity of possession of marijuana and refusal to obey commands to stop. The court relied on section 901.15, Florida Statutes, and case law pertaining to warrantless arrest in a public place, warrantless entry into a home in hot pursuit of fleeing felons, warrantless entry in hot pursuit after a dangerous high-speed vehicle chase, and warrantless arrest of a suspected felon on an unenclosed porch. Had Appellant been arrested while outside the home, we agree with the trial court that section 901.15 supported such warrantless arrest, even for a misdemeanor committed in the officer's presence. However, once Appellant crossed the threshold of the garage of his home, the Fourth Amendment to the United States Constitution prohibiting unreasonable searches is implicated. Section 901.15 does not specifically address the legality of a warrantless arrest occurring in the home at the culmination of a "fresh pursuit" by police officers to arrest a suspect for a non-felony offense. [2]

When police chase a person who flees into his or her home to effect a warrantless arrest, the Fourth Amendment, and *491 article I, section 12 of the Florida Constitution apply in concert and in addition to the relevant Florida statutes. As stated in *Riggs v. State*, 918 So.2d 274 (Fla.2005):

> The United States Supreme Court has repeatedly identified "physical entry of the home [as] the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ... Throughout the Supreme Court's case law, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590, 100 S.Ct. 1371.

This Court has recognized that "[w]arrantless searches or arrests conducted in a constitutionally protected area ... are per se unreasonable unless they fall within one of the five established exceptions to the search warrant requirement." *Lee v. State*, 856 So.2d 1133, 1136 (Fla. 1st DCA 2003). The exceptions are referred to as "exigent circumstances," and "hot pursuit" is one type of exigent circumstance. *Id.*

[4] The exigent circumstance of "hot pursuit" is ordinarily limited to the pursuit of fleeing felons, because the seriousness of the crime is more likely to support the emergency nature of "exigent circumstances." For instance, in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), a woman committed a felony by selling heroin to undercover officers. She then told officers her mother had the money from the sale, so the officers returned to the residence and saw the mother "in the doorway of the house with a brown paper bag." The officers approached the residence, exited their vehicle, and shouted "police." The mother "retreated into the vestibule of her house." *Id.* at 40, 96 S.Ct. 2406. The officers followed her into the home, physically restrained her, and drugs fell to the floor from her person. The marked money from the drug purchase was also discovered on her person. The Court held "a suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place." *Id.* at 42, 96 S.Ct. 2406. However, all the offenses involved in *Santana* were felonies.

[5] [6] Where the behavior observed in a public place is not a felony, the exigent circumstance of "hot pursuit" to support chasing the suspect into his or her home is not so easily shown by the state. The gravity of the observed offense is an important factor when the pursuit continues into a home. In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), the Court explained:

> 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. *See Payton v. New York,* [445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)] ... 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.

Welsh, 466 U.S. at 750, 104 S.Ct. 2091 (citations abbreviated; footnote omitted); *see also* ***492** *Stanton v. Sims,* —— U.S. ——, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (civil rights action for damages to plaintiff caused by officer during chase of suspect into plaintiff's yard; "in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the rarest cases").

[7] To rebut the presumed illegality of warrantless entry by police officers, the exigent circumstance must involve a threat to the safety of the public, property, or police, which required immediate action by officers with no time to obtain a warrant. The exigent circumstance exception was described in *Riggs v. State,* 918 So.2d 274 (Fla.2005):

> When the government invokes this exception to support the warrantless entry of a home, it must rebut the presumption that such entries are unreasonable. *See Welsh v. Wisconsin,* 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). To do so, it must demonstrate a "grave emergency" that "makes a warrantless search imperative to the safety of the police and of the community." *Illinois v. Rodriguez,* 497 U.S. 177, 191, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). An entry is considered "imperative" when the government can show a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). As is often the case under the Fourth Amendment, "[t]he reasonableness of an entry by the police upon private property is measured by the totality of existing circumstances." *Zeigler v. State,* 402 So.2d 365, 371 (Fla.1981).

In *Gasset v. State,* 490 So.2d 97 (Fla. 3d DCA 1986), after Metro–Dade police officers observed the defendant's reckless driving, the defendant led officers on a high-speed chase through a residential area. The chase ended in the defendant's garage, where officers entered and arrested him. The offenses observed (reckless driving and attempting to elude a police officer) were non-felony offenses punishable by less than one year of imprisonment, but the trial court upheld the warrantless arrest of the defendant in his garage because "the propriety of the arrest does not turn on the charges upon which the arrest was effected." *Id.* at 98. Relying on the ruling in *United States v. Santana* that "a suspect may not defeat" a valid arrest beginning in a public place by fleeing to a private place, the Third District Court of Appeal ruled that "enforcement of our criminal laws, including serious traffic violations, is not a game where law enforcement officers are 'it' and one is 'safe' if one reaches 'home' before being tagged." *Id.* at 99. The court concluded that by committing a dangerous traffic violation and fleeing at high speed, Mr. Gasset "cast aside any fourth amendment shield which might have served to protect him." *Id.* Although the majority in *Gasset* did not use the phrase "exigent circumstance," the high-speed chase on the public roadways clearly presented a danger to the public, the defendant, and police officers, thus qualifying for the exigent circumstance exception to the Fourth Amendment warrant requirement.

Following *Gasset,* the suppression of evidence obtained in a warrantless arrest in the defendant's home was reversed in *State v. Williams,* 128 So.3d 30 (Fla. 3d DCA 2012). The circumstances prompting officers to pursue Williams into his home included audible gunshots in the area, recent threats of a plan to shoot and kill officers patrolling the area, observation of three males apparently trying to hide from officers patrolling the area, and observation of an individual removing an item from his waistband and concealing the ***493** item in a yard. Shortly thereafter, an officer saw Williams holding on to his waistband while walking away from him. When ordered to stop, the defendant fled, jumped over a set of bushes, "tossed a firearm into one of the bushes," and continued into the home. The officer remained outside but demanded that Williams come outside. Williams did so and was arrested. The trial court found that the officer "constructively" entered the home without a warrant and granted the motion to suppress. The Third District reversed, finding that the officers were in "hot pursuit" and attempting to make a valid warrantless arrest prior to Williams' entry into the home. "Williams could not thwart this effort, or convert a proper warrantless arrest into one requiring a warrant, simply by reaching his house before the officer reached him." *Id.* at 34. Similar to the dangerous high-speed chase in *Gasset,* the pursuit of Williams for a firearms offense could certainly present the exigent circumstance of

a hot pursuit for an offense, not necessarily a felony, which under the circumstances endangered the public and police. *See also, Ulysse v. State*, 899 S.2d 1233 (Fla. 3d DCA 2005) (affirming denial of motion to suppress where fleeing defendant involved in vehicle chase prior to entry into home by officers).

[8] Unlike the dangerous circumstances in the Third District Court of Appeal cases above, the crimes observed in the public place in this case were possession of a marijuana cigarette and flight on foot from an order to stop. The State presented no evidence here to suggest the safety and time concerns required for the exigent circumstance of a "hot pursuit" sufficient to excuse the warrant requirement for entry into the home. The (suspected) marijuana cigarette was discarded by Appellant while he was still in the public place, making it available for collection by the police without risk of destruction of this evidence. There was no evidence that any danger would result if the officers had stopped at the threshold of the garage, stationed themselves there and observed Appellant from outside the garage while they waited to obtain a warrant. Other officers were already present on the scene and could have watched other entrances of the residence to detect any exit by Appellant during the time it would take to obtain a warrant.

While the law has developed over time regarding application of the Fourth Amendment to various scenarios, the "exigent circumstances" exception to the rule against warrantless entry into the home remains an exception to the constitutional rule. We cannot accept the State's position that officers may freely pursue every misdemeanor or traffic suspect into his or her home without a warrant so long as the offense is punishable by any jail time. Government officers' pursuit into a suspect's home without a warrant, under the exigent circumstance exception of "hot pursuit," must not be applied so as to negate entirely the constitutional rule requiring a warrant for entry. Such a broad reading of exigency in every situation where officers chase a suspect of any offense into the suspect's home renders the Fourth Amendment, and article I, section 12 of the Florida Constitution, meaningless.

[9] We reject the proposition that a pursuit which continues into the suspect's home to effect an arrest for a minor offense or infraction with no evidence to indicate any danger to the public, police, or property and no indication that critical evidence will be destroyed, constitutes the exigent circumstance of a hot pursuit such that the warrant requirement for entry into the home is excused. The "exigent *494 circumstances" exception allowing pursuit of a suspect into the home cannot remove the constitutional protection for the right to security in one's home without a showing by the State of a danger to the public, police, or property requiring immediate entry by the officers leaving no time or opportunity to obtain a warrant.

Under the facts of this case, the motion to suppress the firearm should have been granted because the hot pursuit to effect an arrest for possession of marijuana and resisting arrest without violence did not constitute an exigent circumstance sufficient to overcome the warrant requirement to cross the threshold of Appellant's home. The denial of the motion to suppress, and the subsequent conviction and sentence for possession of a firearm by a convicted felon, are reversed.

PADOVANO and MARSTILLER, JJ., concur.

All Citations

160 So.3d 488, 40 Fla. L. Weekly D548

Footnotes

1 The trial court found that the townhome, including the garage area, was Appellant's residence. Because the record contains competent, substantial evidence to support this finding of fact, we defer to the trial court's finding.

2 Likewise, section 901.19, Florida Statutes—the "knock and announce" statute—has no bearing on the issue on appeal because that statute does not contemplate a chase or pursuit, and the entry into the residence in this case did not involve any "necessary and reasonable force" to cross the threshold of the home.

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