

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2517-CR

Cir. Ct. No. 2005CT643

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEBRA K. BERENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Debra Berenz appeals a judgment of conviction for operating while intoxicated, third offense. Berenz argues the trial court erred by

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

denying her motion to suppress evidence obtained as a result of a warrantless entry into her home. Berenz argues there were insufficient facts to establish exigent circumstances. We disagree and affirm.

BACKGROUND

¶2 At approximately 10:30 p.m. on October 29, 2005, Eau Claire police received an anonymous complaint that a hit-and-run property damage accident had just occurred. Officer Jesse Zurbuchen arrived and observed a damaged parked vehicle, some blue parts from another vehicle, and a “strong fluid trail” leading from the vehicle. Zurbuchen followed the fluid trail a short distance to a detached garage. The overhead door to the garage was closed. Zurbuchen walked around the garage to an open side door.

¶3 From either outside the open door, or immediately inside the door, Zurbuchen observed a blue Buick with severe front-end damage and deployed air bags. Zurbuchen entered the garage, however, he did not find anyone inside the car. Zurbuchen then looked into a window of the house and observed a person under the covers in bed. Zurbuchen called his supervisor, sergeant Michael Graf. Another officer arrived to assist Zurbuchen, and the officers attempted to get the woman’s attention by yelling and knocking on the window. Even though there was a barking dog on the bed, there was no response from the person on the bed and no movement. Graf then arrived on the scene and decided it was necessary to enter the residence to check on the person’s welfare.

¶4 Upon entry, officers announced their presence and were met by Berenz. The officers proceeded to question Berenz, and subsequently arrested her for operating while intoxicated.

¶5 Berenz filed a motion to suppress/dismiss evidence on the basis of the officers' warrantless entry. The trial court denied Berenz's motion, finding exigent circumstances existed and the officers had a reasonable basis to enter her home.

DISCUSSION

¶6 Warrantless entry into one's home by police is presumptively prohibited by both the United States and Wisconsin Constitutions. *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. However, there is a recognized exception to the warrant requirement when the State can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference. *Id.* In this case, Berenz does not appear to contest that police had probable cause to search her garage and home.

¶7 We therefore examine whether exigent circumstances justified the warrantless entry. Whether a warrantless entry is justified by exigent circumstances is a mixed question of fact and law. *State v. Leutenegger*, 2004 WI App 127, ¶13, 275 Wis. 2d 512, 685 N.W.2d 536. We uphold the trial court's findings of evidentiary or historical fact unless clearly erroneous. *Id.* However, we independently examine whether those facts establish "exigent circumstances sufficient to justify a warrantless entry." *Id.*

¶8 There are four categories of exigent circumstances: hot pursuit of a suspect, a threat to the safety of a suspect or others, a risk that evidence will be destroyed, and a likelihood that the suspect will flee. *Id.*, ¶9. In this case, Zurbuchen testified he entered Berenz's garage and home due to a concern for her safety.

¶9 “[W]hether a warrantless home entry is justified based on the need to render assistance or prevent harm is judged by an objective test.” *Id.*, ¶19. We must determine “whether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life....” *Id.* (citations omitted).

¶10 Berenz did not argue at the trial court level and does not argue on appeal that police needed a warrant to enter her garage, and therefore that issue may be deemed waived. However, because a garage can under some circumstances be considered curtilage to the home, thus necessitating a warrant, we begin our examination here for completeness. *See id.*, ¶21 n.5.

¶11 At the time Zurbuchen entered the open garage, he had already observed the accident scene. At the accident scene, Zurbuchen observed a damaged vehicle, parts from another vehicle in the roadway, and a strong fluid trail leading from the accident scene to the garage. Zurbuchen therefore knew that the impact of the accident was great enough to leave parts of Berenz’s vehicle in the road, and cause a strong fluid leak. Based on these observations, it was reasonable for Berenz to enter the open garage door to check the welfare of the vehicle’s occupants.

¶12 After observing the vehicle’s severe front-end damage and deployed airbags, Zurbuchen proceeded to Berenz’s home. Zurbuchen then observed Berenz lying in bed, unmoving, and unresponsive to any attempts to rouse her.

Objectively, it was reasonable for Zurbuchen to infer that Berenz may have been severely injured.²

¶13 Berenz also argues the State did not meet its burden because, “a warrant could have been obtained in as little as 30 minutes.” As stated in *Leutenegger*, “[t]he delay inherent in obtaining a search warrant would have been in conflict with the very reasons it was reasonable for the officer to immediately enter....” *Id.*, ¶31. In this case, the officers made a reasonable decision to enter in order to check Berenz’s welfare. Had Berenz been severely injured, she would have been grateful for such prompt action. Because the officers had an objectively reasonable basis to eschew a warrant in order to render immediate assistance, the entry into Berenz’s home was lawful.

By the Court.—Judgment affirmed.

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

² Berenz argues that the officers were not concerned for her welfare, but rather “suspected all along that they had a DUI suspect.” In making this argument, Berenz confuses the standard of review. Even assuming Berenz’s assertion is correct, we are not concerned with the officer’s subjective beliefs but rather, what a police officer would have reasonably believed under the given circumstances. *State v. Leutenegger*, 2004 WI App 127, ¶19, 275 Wis. 2d 512, 685 N.W.2d 536.

