ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of Bismarck,
Plaintiff/Appellee,
vs.
Brian Anthony Glass,
Defendant/Appellant.

Supreme Court No. 980031
District Court No. 97-K-02313

980031

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED BY THE BURLEIGH COUNTY DISTRICT COURT ON JANUARY 27, 1998
BEFORE THE HONORABLE DENNIS A. SCHNEIDER

APPELLEE'S BRIEF

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STATEMENT OF ISSUE

DID THE POLICE OFFICER LAWFULLY ENTER THE DEFENDANT'S RESIDENCE WITHOUT A SEARCH WARRANT?

STATEMENT OF THE CASE

A. *Nature of the Case and Proceedings Below.*

Brian Glass was charged with driving under the influence in violation of §12-10-01 of the Code of Ordinances, City of Bismarck on June 20, 1997. The ordinance is identical to the state DUI law at North Dakota Century Code §39-08-01. A suppression hearing was held on November 10, 1997 and the defendant appealed from the District Court's refusal to grant the motion.

B. *Statement of Facts.*

On June 20, 1997, at 7:30 p.m., Bismarck Police Officer Craig Calkins observed a vehicle westbound on Denver Avenue (TR. p. 3, .l. 9-20). The driver was slumped forward while driving so the officer thought he might be intoxicated (TR. pp. 4-5, ll. 23-10). As the officer followed the vehicle, it weaved within its lane (TR. p. 6, ll. 10-19). The vehicle pulled into the driveway at 1119 Bozeman Drive. Officer Calkins activated his amber flashing lights to obtain the driver's attention (TR. p. 8, ll. 5-12). The officer approached on foot and the defendant exited his vehicle and went directly toward the house. The officer yelled "Sir" to him and the defendant looked at the officer and entered his house. The officer went to the front door and turned the knob. The door opened so he went in to confront the defendant (TR. p. 9, ll. 5-25). The officer believed the defendant was impaired (TR. p. 11, ll. 15-19). The officer asked the

defendant to exit the house to the driveway area and he complied. The officer was concerned that the defendant might consume more alcoholic beverages and that the two-hour time limit might expire (TR. p. 11, ll. 8-23). The officer asked the defendant to perform field sobriety tests, and then arrested him for DUI.

LAW AND ARGUMENT

The defendant argues that because the officer stopped the defendant for the non-criminal traffic offense of no current registration that he was precluded from entering the defendant's dwelling. However, the officer reasonably suspected prior to his observation of the expired registration that the defendant may be impaired because he was slumped over the wheel while driving and his vehicle weaved within its lane.

Officer Calkins had a reasonable belief that the defendant was impaired while driving. The officer observed him slumped behind the wheel while driving, weaving twice to the left and twice to the right when operating the vehicle, and failing to stop when the officer activated his flashing amber lights and said "Sir" to him. In an apparent effort to avoid the officer because he was under the influence and hoping to avoid detection or because he lacked his normal mental faculties, he failed to stop for the officer and entered his residence and shut the door. The case of ***State v. Hensel, 417 NW2d 849 (ND 1988)*** provides that for probable cause it is not necessary that the officer possess facts to prove guilt. Rather the officer needs information that would furnish a prudent person with

reasonable grounds for believing a violation occurred. A warrantless arrest is allowed if the officer has adequate information to reasonably believe that a crime is being committed. ***State v. Indvik, 382 NW2d 623 (ND 1986)***. When the necessary reasonable cause is in place, an officer does not need a warrant to make an arrest for DUI (***NDCC 29-06-15(f)***).

Once a determination has been made that an arrest without a warrant is lawful, there needs to be a showing that entry into the home without a search warrant is lawful. The plaintiff concedes that entry was not consentual because the defendant had shut the door after going inside. The plaintiff is relying on the exigent circumstances exception to the search warrant requirement. The guidelines for an exigent entry of a dwelling are discussed in ***State v. Page, 277 NW2d 112 (ND 1979)***. While there are a number of circumstances that are exigent, the relevant one in this incident is destruction of evidence. While the Court discussed the guidelines outlined in ***Dorman v. United States, 435 F2d 385 (1970)***, the threshold is probable cause to arrest and will the time and circumstances effectively prohibit the officers from securing a warrant. When faced with adopting all six criteria of the ***Dorman*** case, the Supreme Court declined to call them cardinal maxims but flexible guidelines when deciding when a home may be entered without a warrant. ***State v. Nagel, 308 NW2d 539 (ND 1981)***. It seems obvious that the defendant was trying to enter his home to avoid the police officer. Inside the defendant had the potential to consume additional alcoholic beverages. Further alcohol is metabolized from the body so the blood alcohol level starts to diminish at some point after a person quits

consuming alcohol. Obviously, it would have taken a few hours to obtain a search warrant. During the process of waiting for a warrant, the defendant could have destroyed evidence by consuming additional alcoholic beverages after the driving thereby denying the plaintiff's efforts to relate his blood alcohol content to the actual driving. The defendant could have destroyed evidence while the plaintiff waited for a warrant by "sleeping off" the alcohol to reduce the level of alcohol in his system.

The North Dakota Supreme Court held in ***State v. Ackerman, 499 NW2d 882 (ND 1993)***, that there was no exigent circumstance justifying warrantless entry because there was no showing that evidence was going to be destroyed. That case is distinguishable because those officers were at the door for a loud noise complaint and did not have probable cause to believe that a drug possession offense was taking place prior to entry. Officer Calkins believed right after his first observation of the defendant in his vehicle that he might be alcohol impaired because he was slumping behind the wheel and weaving in his lane. The second element of exigent circumstances was also present because the officer wanted to obtain a breath or blood sample from the defendant and without the ability to keep the defendant in his presence to prevent additional alcohol consumption, there was no way to make the blood alcohol content relevant to the charge of DUI.

A case decided by the Supreme Court of Minnesota, ***State v. Paul, 548 NW2d 260 (Minn 1996)***, is factually very similar to the issues in this case. The Minnesota court discussed the same issues present in this case. In ***Paul***, ***supra***,

there was probable cause to make an arrest based on the officer's observations of an alcohol-impaired driver. Certainly Officer Calkins had reasonable cause to believe that the defendant was driving while alcohol impaired.

Secondly, the Minnesota court discusses whether the arresting officer was in hot pursuit or had begun the process of an arrest prior to the defendant entering his home. In citing ***United States v. Santana, 427 US 38 (1976)***, the Court held that a "suspect may not defeat an arrest which has been set in motion in a public place by the expedient of retreating to a private place." Officer Calkins used his amber police lights in an effort to detain the defendant entering his home so he had begun to effect a stop in public.

Finally, the Minnesota court held that there is a compelling exigent circumstance to preserve a person's blood alcohol level as an exception to the search warrant requirement of the ***Fourth Amendment***.

CONCLUSION

The police officer's entry into the defendant's home was lawful because he had probable cause to believe the crime of DUI was being committed in his presence and the evidence of his blood alcohol concentration would have been destroyed, so an exigent circumstance existed allowing entry of his home without a warrant.

Dated this 3rd day of April, 1998.

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CERTIFICATE OF SERVICE

I, Paul H. Fraase, do hereby certify that on this 3rd day of April, 1998, I mailed a copy of the Appellee's Brief in the above-named to:

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