

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017
NO. _____

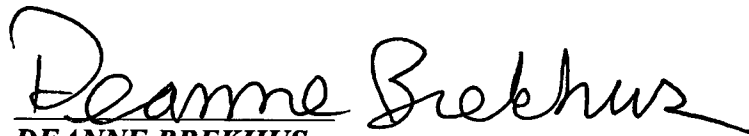
Deanne Brekhus,

Petitioner,

v.

City of Bismarck
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT


DEANNE BREKHUS

Petitioner

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Mandan, ND 58554

June 16, 2018

QUESTION PRESENTED

1. *This Court should resolve the important federal question and split among the state courts and federal circuit courts as to whether officers may make a warrantless entry into a home to arrest for a jailable misdemeanor crime committed in their presence and while in hot pursuit of the suspect.*

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	2
TABLE OF AUTHORITIES	3
OPINION BELOW	4
JURISDICTION	4
CONSTITUTIONAL PROVISION INVOLVED	4
STATEMENT OF FACTS	4
REASONS FOR GRANTING THE PETITION	7
I. This Court should resolve the important federal question and split among the state courts and federal circuit courts as to whether officers may make a warrantless entry into a home to arrest for a jailable misdemeanor crime committed in their presence and while in hot pursuit of the suspect.	7
CONCLUSION	12
APPENDIX A. Judgment of the North Dakota Supreme Court Opinion of the North Dakota Supreme Court	

TABLE OF AUTHORITIES

CASES	PAGE
UNITED STATES SUPREME COURT CASES:	
<i>Brigham City v. Stuart</i> , 547 U.S. 398, 403 (2006)	9
<i>Collins v. Virginia</i> , ____ S.Ct. ____ (2018)	8
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013)	8
<i>Georgia v. Randolph</i> , 547 U.S. 103 (2006)	8
<i>Illinois v. Rodriguez</i> , 497 U.S. 177, 191 (1990)	9
<i>Kentucky v. King</i> , 563 U.S. 452, 460 (2011)	9
<i>McDonald v. United States</i> , 335 U.S. 451 (1948)	9, 10
<i>New York v. Harris</i> , 495 U.S. 14 (1990)	9
<i>Payton v. New York</i> , 445 U.S. 573, 585–86 (1980)	8
<i>U.S. v. Santana</i> , 427 U.S. 38 (1976)	10
<i>Warden, Maryland Penitentiary v. Hayden</i> , 387 U.S. 294 (1967)	8
<i>Welsh v. Wisconsin</i> , 466 U.S. 740 (1984)	9, 10, 11
OTHER CASES:	
<i>Butler v. State</i> , 309 Ark. 211, 829 S.W.2d 412 (1992)	13
<i>Mascurro v. Billings</i> , 656 F.3d 1198 (10 th Cir.2011)	12
<i>State v. Bolte</i> , 115 N.J. 579, 560 A.2d 644 (1989)	12
<i>State v. Marcus</i> , 211 So.3d 894 (Fl.2017)	12
<i>State v. Sanders</i> , 2007 WI 174, 737 N.W.2d 44	13

OPINION BELOW

The opinion of the North Dakota Supreme Court is published at 2018 ND 84, 908 N.W.2d 715.

JURISDICTION

The North Dakota Supreme Court issued its opinion on March 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the North Dakota Supreme Court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

On December 16, 2016, at about 10:10 p.m., a Bismarck police officer observed a vehicle fail to negotiate a turn and slide into a snowbank on the side of the road. The officer then observed the vehicle back out of the snowbank and proceed to fishtail down the street. The officer testified he suspected the driver was driving at an unsafe speed for the road conditions. *State v. Brekhus*, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715.

The police officer turned around, followed the vehicle, and activated his overhead lights, but the driver did not stop. The district court found the officer had “activated his siren and continued to follow the vehicle for several blocks but the driver refused to comply with the obvious signals to stop and continued to flee the patrol car.” The vehicle made several turns before entering a parking lot,

and after about thirty seconds of pursuit, stopped in front of a garage door, waited for the door to open, and entered the garage. The garage was not attached to the defendant's residence, and the overhead garage door remained open. The officer commanded Brekhus to stay in the vehicle when she attempted to exit her vehicle. *State v. Brekhus*, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715.

At this point the police officer entered the garage on foot and made contact with the defendant, immediately noting the odor of burnt marijuana and alcohol. The officer observed that Brekhus was slurring her speech; had bloodshot, glossy eyes; and had difficulty keeping her eyes open while speaking with the officer. The officer had her come out of the garage and perform field sobriety tests. Brekhus was unable to follow directions for the horizontal gaze nystagmus test. The officer did not ask her to perform the one-leg stand or walk-and-turn tests because she had a walking cast on her leg. *State v. Brekhus*, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715.

After the police officer read Brekhus the implied consent advisory, she refused to submit to a preliminary breath test and was placed under arrest for driving under the influence. Brekhus gave the officer permission to retrieve her vehicle registration and proof of insurance from her vehicle in the garage. In his attempt to retrieve the documents, the officer observed in plain view a glass smoking device in the center console, warm to the touch and containing a substance he believed to be marijuana. The officer placed her under arrest for DUI refusal, marijuana, and paraphernalia offenses and transported her to the Bismarck police department. She was again read the implied consent advisory, and she again refused to provide a breath sample. *State v. Brekhus*, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715.

The City charged Brekhus with driving under the influence, possession of drug paraphernalia, and possession of marijuana. In February 2017 Brekhus moved the district court to suppress

evidence, arguing that her rights under the Fourth Amendment and N.D. Const. art. I, § 8, were violated when the police entered her garage and that her vehicle was searched in violation of her constitutional rights. She also moved the court contending she was denied her statutory right to consult counsel before chemical testing. The City opposed both motions. *State v. Brekhus*, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715.

In April 2017 the district court held a hearing. The court subsequently entered an order granting Brekhus's motion on the basis of the police officer's initial entry into the open, detached garage. The court explained:

As much as it seems an unjust result to reward a defendant who commits a traffic violation (especially a potentially *718 drunk driver) and then knowingly refuses to stop after being given a clear and undeniable signal from a pursuing police officer (by the use of flashing overhead lights and a siren) and who ultimately escapes into an open garage to avoid arrest, the Constitution guarantees that the Defendant's garage be free from unreasonable search and seizure. Once she entered the garage, [the officer] did not have a right to enter the Defendant's detached and open garage to make contact with her regarding the misdemeanor offenses. [The officer] could have requested that she come to speak with him, or could have waited until the Defendant left her garage to walk towards her apartment and could have engaged her once she reached the public area of the apartment complex, but he could not enter her open detached garage without a warrant or without an exception to the need for a warrant.

State v. Brekhus, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715. (Emphasis added.)

The district court therefore suppressed the evidence obtained after the officer entered her garage, concluding the officer violated Brekhus's constitutional rights when he entered the garage without a warrant or an exception to the warrant requirement. *State v. Brekhus*, 2018 ND 84, ¶¶ 2-8, 908 N.W.2d 715. On March 22, 2018, the North Dakota Supreme Court reversed and remanded, holding that the limited entry into the open garage while in hot pursuit of Brekhus for fleeing or attempting to elude an officer was reasonable under the federal constitution. *State v. Brekhus*, 2018 ND 84, 908 N.W.2d 715.

REASONS FOR GRANTING THE PETITION

- I. This Court should resolve the important federal question and split among the state courts and federal circuit courts as to whether officers may make a warrantless entry into a home to arrest for a jailable misdemeanor crime committed in their presence and while in hot pursuit of the suspect.**

“[The Fourth Amendment] was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of ‘the sanctity of a man's home and the privacies of life,’ from searches under indiscriminate, general authority.” *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967). This Court has consistently hailed the sanctity of one's home as a right to be fervently guarded, and has notably used strong language in doing so. In *Collins v. Virginia*, _____ S.Ct. _____ (2018), this Court again emphasized that “[A]t the Amendment's ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” *Also see Florida v. Jardines*, 569 U.S. 1 (2013), the Court explained, “[A]t the Amendment's ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’ ” *Id.* at 1414. Similarly, the Court in *Georgia v. Randolph*, 547 U.S. 103 (2006), reasoned, “Since we hold to the ‘centuries-old principle of respect for the privacy of the home,’ ‘it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.’ ” *Randolph*, 547 U.S. at 115.

This Court has repeatedly referred to the invasion of the privacy of the home as the “chief evil” that the Fourth Amendment was created to protect. See, e.g., *Payton v. New York*, 445 U.S. 573, 585–86 (1980) (“As the Court reiterated just a few years ago, the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’ And we have long

adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.”; *see also New York v. Harris*, 495 U.S. 14, 18 (1990)(“Payton nevertheless drew a line at the entrance to the home. This special solicitude was necessary because ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’ ”

Of course, this Court has acknowledged that with this unfettered protection of the rights of the American citizen comes certain necessary sacrifices. Indeed, the rights afforded by the Fourth Amendment at times have the effect of limiting the ability of police officers to apprehend criminals. *See McDonald v. United States*, 335 U.S. 451 (1948)(“This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike.”). With that, the purpose of the warrant is not to provide “a safe haven for illegal activities,” but rather, to allow “an objective magistrate to determine whether there is probable cause to invade the privacy of one’s home.” *McDonald*, 335 U.S. at 455.

Warrantless searches are presumed unreasonable with few carefully tailored exceptions. *See, e.g., Payton*, 445 U.S. at 585. To carry the burden, the State must show an existence of probable cause and exigent circumstances to validate the warrantless entry. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984). Exigent circumstances require that there be 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 (1990).

The North Dakota Supreme Court advanced the hot pursuit exception in this case, which allows officers to proceed into a residence without a warrant if they are in the process of the continuous hot pursuit of a fleeing suspect. *Kentucky v. King*, 563 U.S. 452, 460 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The rationale supporting the exception of hot pursuit was

aply summarized in *United States v. Santana*, 427 U.S. 38, 43 (1976): “[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.” Specifically, a key ingredient of hot pursuit is an element of danger or grave emergency. *See Welsh*, 466 U.S. at 753 (holding that the gravity of the circumstances must be considered in cases of hot pursuit); *McDonald*, 335 U.S. at 455 (concluding that a warrantless search resulting in the discovery of an illegal lottery operation did not rise to the level of exigency because “[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police”).

Welsh is the seminal case that courts look to in determining whether probable cause for a minor offense authorizes law enforcement to conduct a warrantless home search and arrest. This Court found the claim of “hot pursuit” for a misdemeanor offense unconvincing to justify entry into the home. Although the issue addressed a nonjailable traffic offense, throughout the opinion this Court repeatedly emphasized that the offense was “minor,” as opposed to “nonjailable.” Specifically, the Court expressed its hesitation to find that exigency exists when the underlying offense for which there is probable cause is a minor one. *Id.* at 750. Furthermore, the Court observed that most lower courts have refused to permit warrantless home arrests for nonfelonious crimes. *Id.* at 752.

This Court thus concluded that when the offense is minor, a home arrest should usually be accompanied by a warrant. *Id.* at 753. The *Welsh* court proceeded to rely on the reasoning in Justice Jackson's concurrence in *McDonald*. *Id.* at 750–51. In that concurrence, Justice Jackson expressed his discomfort with allowing warrantless home arrests in situations where the underlying offense did not pose a threat of violence:

Whether there is reasonable necessity for a search without waiting to obtain a warrant

certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. ... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

Id. at 751 (quoting McDonald, 335 U.S. at 459–60 (Jackson, J., concurring)).

Ultimately, the *Welsh* court held that the gravity of the offense committed by the suspect is an important factor to consider when determining whether there are exigent circumstances to justify a warrantless search:

We therefore conclude that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on “unreasonable searches and seizures,” and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see *Payton*, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed.

Id. at 753.

In this case, Brekhus did not pose a danger to the public, to the police, or to anyone. Specifically, Brekhus was observed committing a noncriminal traffic violation. When the Officer Marquis then turned on his emergency lights to stop Brekhus, she merely pulled into a safe location for the stop. She did not speed away, and when she was approached, she did not run. This was not hot pursuit—this was slow pursuit at best. Brekhus could not escape because she was in actual view of the officers the entire time. There were no hostages, no threat of weapons, and no danger.

As observed in multiple United States Supreme Court opinions, it is inescapable to look to

the gravity of the circumstances; this is critical to promote homeowner and public safety, as well as officer safety. The potential danger that accompanies an officer's entry into the private dwelling of an individual is not to be taken lightly. In this case, Officer Marquis had no need to enter the home, not only because the suspected offense was minor, but also because the evidence was at hand with no risk of imminent destruction.

Furthermore, the outcome advanced by the North Dakota Supreme Court—that anyailable offense be subject to hot pursuit, regardless of how minor—would unleash irrational and invasive results on the public. The suspicion of a minor, nonviolent misdemeanor coupled with the officer's failure to respect the restraints of the federal constitution results in an extremely invasive search and seizure. The initial underlying offense was the noncriminal traffic offense of Care Required. Brekhus merely pulled into a safe location for the stop. She did not speed away, and when she was approached, she did not run. Officer Marquis could have waited for Brekhus to exit the garage, or he could have remained outside the garage and asked her if he could speak with her, or he could have remained in the area as he waited to obtain a warrant from a neutral magistrate.

Many courts have concluded that an officer cannot claim “hot pursuit” to enter a home on a traffic violation or misdemeanor offense. In *State v. Marcus*, 211 So.3d 894 (Fl.2017), the Florida Supreme Court recently held that the Fourth Amendment does not permit a warrantless home search by hot pursuit of a nonviolent misdemeanor simply because the nonviolent offense for which there was probable cause wasailable. *Id.* Also, in *State v. Bolte*, 115 N.J. 579, 560 A.2d 644 (1989), the Supreme Court of New Jersey held that an officer, in hot pursuit of a person suspected of numerous motor vehicle offenses and disorderly conduct, could not make a warrantless entry into the suspect's home to effect an arrest. In *Mascurro v. Billings*, 656 F.3d 1198 (10th Cir.2011), the Tenth Circuit

held that a warrantless entry based on hot pursuit was not justified where the intended arrest was for a misdemeanor traffic offense. Also see *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992)(continuous pursuit for minor offense would not allow warrantless entry into home); and *State v. Sanders*, 2007 WI 174, 737 N.W.2d 44 (hot pursuit of suspect on a misdemeanor offense did not allow warrantless entry into home).

In this case, there is no exception to the statutory and constitutional requirements to justify entry into Brekhus' garage. At best, Officer Marquis had observed a noncriminal traffic violation of Care Required, and arguably a misdemeanor violation of fleeing in a motor vehicle which she was never charged with. Officer Marquis did not knock and announce, nor did he try any other options to gain the attention of Brekhus prior to entering her garage. Nor did he observe her fleeing from the car to try and get away from him. Indeed, Brekhus casually drove into her garage and parked her vehicle after one minor traffic violation was observed by Officer Marquis. He had no lawful authority to walk into the garage without a warrant.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the North Dakota Supreme Court.

Dated this 16th day of June, 2018.


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