STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1947

State of Minnesota,
Respondent,

vs.

Mildred Lavern Daniel,
Appellant.

Filed September 29, 2009
Affirmed
Schellhas, Judge
Dissenting, Ross, Judge

Hennepin County District Court
File No. 27-CR-07-124995

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Ethan Allen, 155 Central Avenue South, Milaca, MN 56353; and

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges her conviction of third-degree test refusal, arguing that (1) the arresting officer's conduct in pulling into her driveway and activating his overhead lights violated her constitutional rights, (2) the lesser-included offense of third-degree test refusal was not submitted to the jury, and (3) the evidence was insufficient to sustain a conviction of third-degree test refusal. We affirm.

FACTS

Shortly after midnight on November 25, 2007, a Brooklyn Center police officer observed appellant Mildred Lavern Daniel speeding and failing to come to a complete stop at a stop sign. The officer followed appellant, who turned into her driveway, pulled into her garage, and parked her car. The officer pulled into the driveway and activated his overhead lights. Appellant and the officer exited their vehicles and walked towards each other, meeting at the threshold of the garage door. Within seconds, the officer observed several indicia of intoxication and pulled appellant outside the garage onto the driveway. After appellant refused to participate in field sobriety testing, the officer arrested her.

Respondent State of Minnesota charged appellant with one count of third-degree driving under the influence and one count of second-degree refusal to submit to chemical testing under Minn. Stat. §§ 169A.20, subds. 1(1), 2, .25, .26 (2006). Before trial, appellant moved to suppress, arguing that the officer unlawfully seized her from her

garage in violation of the state and federal constitutions. For purposes of the suppression motion, the parties stipulated to the following facts:

> 1. An officer was traveling eastbound on 65th Avenue in Brooklyn Center when he observed [appellant's] vehicle speeding, which was verified by a laser device which had been properly calibrated;
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> 2. The officer set his laser down and began the process of catching up to [appellant's] vehicle;
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> 3. The officer then observed [appellant] slow down but fail to make a complete stop . . . ;
>
> . . . .
>
> 5. [Appellant] pulled into a driveway and into the attached garage of her residence . . . ;
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> 6. As the officer pulled into the driveway, he activated his emergency lights which also activated his in-squad camera . . . ;
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> 7. At this time, [appellant], who had been parked in her garage only for a couple seconds when the officer activated his lights, reached for her automatic garage door closer but as she recognized the officer in her driveway activate his emergency lights, she submitted to the show of authority and decided not to close her garage door;
>
> 8. [Appellant] and the officer then emerged from their respective vehicles and began to walk toward each other, ultimately meeting underneath the garage door although [appellant] remained in her garage while the officer remained just outside the threshold;
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> 9. Moments later (approximately four seconds . . .), the officer pulled or escorted [appellant] from her garage while the officer remained just outside the threshold;
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> 10. During this brief encounter of four seconds, the officer observed indicia of intoxication, which included watery eyes, slurred speech, balance issues, and odor of alcohol;
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> 11. [Appellant] refused field sobriety testing and was thereafter arrested and brought to the station for Implied Consent testing[.]

Based on these stipulated facts, the district court denied appellant's motion to suppress.

Appellant exercised her right to a jury trial. Prior to closing arguments, the district court instructed the jury on the elements of the charged offenses. Although appellant was charged with second-degree refusal to submit to chemical testing, the district court instructed the jury on the elements of third-degree refusal and on the aggravating factor—that appellant had been convicted of an impaired-driving offense within the preceding ten years. The district court provided the jury with verdict forms, including a special-verdict form to indicate whether the aggravating factor had been proven. The jury found appellant guilty of refusing to submit to chemical testing, but determined that she had not been convicted of a qualifying prior impaired-driving offense. This appeal follows.

D E C I S I O N

I

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Thus, when reviewing the constitutionality of a search or a seizure, we may independently analyze the undisputed facts to determine whether the evidence need be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

The district court denied appellant's motion to suppress, concluding that the officer's stop and subsequent arrest of appellant were supported first by reasonable suspicion and then by probable cause. The court further concluded that the officer's warrantless entry into appellant's open garage was lawful because appellant did not have a reasonable expectation of privacy when she did not close or attempt to close the open

door, distinguishing this case from *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743 (Minn. App. 2004).

Appellant argues that, similar to the defendant in *Haase*, her "attempt" to close her garage door was "interrupted" when she noticed the squad car in her driveway with its overhead lights flashing. But the stipulated facts merely state appellant "reached for her automatic garage door closer but as she recognized the officer in her driveway activate his emergency lights, she submitted to the show of authority and decided not to close her garage door." These facts show that while appellant may have intended to close the door, she chose to leave it open when she saw the officer in her driveway; the facts do not show that appellant "attempted" to close her garage door. Thus, this case is distinguishable from *Haase*, 679 N.W.2d 745, 747, where the officer kicked his leg under the closing garage door, preventing it from closing.

The state argues that the officer's conduct was justified by exigent circumstances or hot pursuit, which are exceptions to the warrant requirement. But the gravity of the underlying offense is relevant to determining whether "hot pursuit" exigency exists. *State v. Morin*, 736 N.W.2d 691, 695 (Minn. App. 2007). Here, the officer was pursuing appellant for speeding and rolling through a stop sign, offenses that alone do not justify a hot pursuit exigency. *See Haase*, 679 N.W.2d at 747 (stating that repeatedly crossing center line, "though serious, does not supply exigent circumstances").

Nevertheless, the officer's conduct can be analyzed under *Terry* principles, under which we ask first whether the stop was justified at its inception and, second, whether the officer's actions were reasonably related to and justified by the circumstances that gave

rise to the stop in the first place. *See State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). The officer was effectuating a valid *Terry* stop: he observed appellant speeding and running a stop sign; followed her to her residence; activated his lights; pulled into her driveway; and got out of his car. Because the officer was conducting a valid *Terry* stop, the officer's initial seizure of appellant, which included pulling into her driveway and activating his overhead lights, was lawful. *See State v. Lopez*, 698 N.W.2d 18, 22 (Minn. App. 2005) (holding that officer's actions in activating flashing lights, partially blocking vehicle with police car, and opening car door constituted seizure that required reasonable articulable suspicion in order to be justified).

Once the officer temporarily seized appellant pursuant to a valid *Terry* stop, he did not need a warrant or probable cause to walk up appellant's driveway and stand in the threshold of the open garage door. *See State v. Crea*, 305 Minn. 342, 346, 233 N.W.2d 736, 739-40 (1975) (holding that police with legitimate business may walk on sidewalk and onto porch of a house, areas of curtilage that are impliedly open to public, and knock on door in an attempt to get suspect to talk voluntarily with them). Expectations of privacy are less in areas accessible to the public, such as sidewalks, driveways, front porches, or even garages when the owner tends to leave the garage doors open. *See Tracht v. Comm'r of Pub. Safety*, 592 N.W.2d 863, 865 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). In these types of public areas, an officer may effectuate a valid *Terry* stop to briefly seize a person suspected of criminal activity. The scope and duration of the *Terry* stop must be reasonable under the circumstances and must be justified by reasonable suspicion as articulated by the officer.

Appellant voluntarily came to the threshold of the garage door to talk with the officer. If appellant had chosen to not approach the officer and had closed the garage door or walked into her home, it is unclear whether the officer could have followed her. *See, e.g., State v. Paul*, 548 N.W.2d 260, 267 (Minn. 1996) (officer in hot pursuit of person suspected of serious DWI offense may follow person into home to effect arrest); *State v. Koziol*, 338 N.W.2d 47, 48 (Minn. 1983) (police in true hot pursuit of fleeing suspect do not need warrant to follow suspect into his dwelling); *State v. Baumann*, 616 N.W.2d 771, 775 (Minn. App. 2000) (discussing warrantless entry into garage, concluding that suspect could not thwart probable cause arrest that had begun before suspect entered garage), *review denied* (Minn. Nov. 15, 2000). But we need not speculate about what would have happened had appellant closed the garage door or walked into her home. Rather, appellant chose to come to the threshold and stand in the open doorway, which courts have held to be a "public" place for Fourth Amendment purposes. *See United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 2409-10 (1976); *State v. Patricelli*, 324 N.W.2d 351, 354 (Minn. 1982).

Finally, the officer learned what he needed to know within a few seconds of close observation of appellant. At that point, the officer had probable cause to seize appellant in the open doorway without violating the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 1375 (1980) (holding that physical entry into home for purpose of warrantless arrest constitutes violation of individual privacy rights); *State v. Howard*, 373 N.W.2d 596, 599 (Minn. 1985) (concluding that defendant standing in open doorway is in public place for Fourth Amendment purposes). At a minimum, the

officer had reasonable articulable suspicion to continue to detain appellant under *Terry* and its line of cases. *See State v. Alayon*, 459 N.W.2d 325, 329 n.1 (Minn. 1990) (stating that mere fact that officer pulls gun, identifies himself, and orders individual to lie down does not necessarily mean individual is under arrest).

II

Appellant contends that the evidence was insufficient to support her conviction because the state did not establish that she was offered a breath test. "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine[.]" Minn. Stat. § 169A.20, subd. 2 (2006). The instructions given to the jury required it to find that "the defendant was requested by a peace officer to submit to a chemical test of defendant's breath." Appellant argues that though the officer claimed to have offered her a breath test, the transcript of the officer's interactions with appellant does not show that the officer ever uttered the phrase "breath test" during his exchange with appellant. Appellant points to several places in the transcript that indicate that the officer offered appellant a "test," but never specifically a "breath" test.

Ascertaining witness credibility is the jury's province, and this court defers to the jury's credibility determinations. *Wedan v. State*, 409 N.W.2d 266, 268 (Minn. App. 1987). And a jury may make reasonable inferences from the evidence. *State v. Filippi*, 335 N.W.2d 739, 742 (Minn. 1983). The jury in this case considered the officer's testimony and the transcript or audio recording of his discussion with appellant. Much of the audio recording is indiscernible, as the transcript's many "INAUDIBLE" notations reflect. The jury may have concluded that the officer expressly offered the breath test

and it might not have been discernable on the audio recording. Or, the jury could have reasonably inferred that, even if the officer never used the phrase "breath test," it was clearly the sort of test the officer was offering to appellant. We conclude that the evidence was sufficient to establish that appellant was offered and rejected a breath test.

III

Appellant argues that it was improper to convict her of third-degree test refusal when she was charged with second-degree test refusal.

> [W]hen evaluating whether to give a lesser-included offense instruction, trial courts must determine whether 1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.

State v. Dahlin, 695 N.W.2d 588, 595 (Minn. 2005). The district court submitted the charges to the jury as basic charges of driving while intoxicated and test refusal and separately asked the jury to decide whether those charges were aggravated by a prior impaired-driving offense. The jury determined that appellant committed third-degree refusal to submit to chemical testing and that there was no aggravating prior offense. Appellant thus argues that she was acquitted of the charge of second-degree test refusal and that the district court erred by entering a conviction for third-degree test refusal. But appellant did not object to the jury instructions or to the verdict forms and even acknowledged in closing argument that the question of the prior impaired-driving offense could be submitted separately.

Appellant contends that she intended to pursue an "all-or-nothing" trial strategy. She argues that the strategy precluded the district court from submitting and convicting on lesser-included offenses and that therefore "[n]o lesser-included offenses were ever on the table, or discussed in the least." But the district court plainly submitted the offenses charged as lesser-included offenses, separately asking whether the enhanced offenses were satisfied with a special-verdict form. And in light of the three relevant concerns discussed in *Dahlin*, the district court did so appropriately. Third-degree refusal to submit to chemical testing is included in a charge of second-degree refusal, Minn. Stat. §§ 169A.20, subd. 2, .25 (2006), and the evidence provided a rational basis to convict appellant of the lesser crime and to acquit her of the greater crime. According to *Dahlin*, the district court had discretion to instruct the jury on the lesser-included offense. 695 N.W.2d at 598. Appellant's interpretation of the district court's instruction to the jury—that it "secretly . . . submitted" the third-degree refusal question—does not present a reason to reverse her convictions. The submission was not secret and was not an abuse of the district court's discretion.

The district court did not err in denying appellant's suppression motion. The jury instructions were proper, and the evidence supports appellant's conviction.

Affirmed.

ROSS, Judge (dissenting)

I respectfully disagree with the majority's reasoning and result. Contrary to the majority's analysis, there was no police "pursuit," so the hot-pursuit doctrine should not be considered. And contrary to the majority's premise, the Constitution-implicating seizure did not occur when Mildred Daniel stood at the threshold of her garage, but earlier, when she sat in her car parked inside her garage. The post-seizure impaired-driving investigation and post-seizure arrest are valid only if the primary seizure was constitutional. It was not.

The majority accurately summarizes the stipulated facts regarding Daniel's seizure by police: "The officer followed appellant, who turned into her driveway, pulled into her garage, and parked her car" before the officer initiated the seizure by activating his emergency lights. But the majority then characterizes the situation as one in which the officer "was pursuing" Daniel *before* she got into her garage, and it holds that the hot-pursuit doctrine cannot justify intrusion onto private property only because the type of offense that triggered the "pursuit" is not sufficiently serious to justify a post-pursuit entry. I agree that the minor traffic offenses did not justify the private-property intrusion under the hot-pursuit doctrine. But I disagree that this is the only reason why the doctrine does not apply here. I would hold that because there was never a pursuit in which Daniel fled from a public place to a private place, the doctrine simply is not at issue.

A police officer's hot pursuit of a fleeing suspect may constitute an exigent circumstance justifying the officer's warrantless entry into and arrest of the suspect in the suspect's home. *Minnesota v. Olson*, 495 U.S. 91, 100–01, 110 S. Ct. 1684, 1690 (1990).

But it is clear to me that the hot-pursuit doctrine does not excuse a warrantless arrest unless there was first a genuine *hot pursuit* of the suspect that began from a place where the officer could have detained the suspect without a warrant. *See Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 2099 (1984) (requiring the state to demonstrate "immediate or continuous pursuit [of the suspect] from the scene of [the] crime"); *State v. Koziol*, 338 N.W.2d 47, 48 (Minn. 1983) ("[A] person may not defeat a warrantless arrest which has been set in motion in public by entering into his dwelling."). The doctrine does not apply here because no pursuit—hot or otherwise—from a public place to a private dwelling ever occurred.

There can be no police pursuit here because there was no officer-attempted contact followed by a suspect's flight. *Welsh*, 466 U.S. at 753, 104 S. Ct. at 2099; *Koziol*, 388 N.W.2d at 48. Until Daniel was already parked in the privacy of her residential garage and reaching to close her overhead garage door, the officer had not initiated his emergency lights or otherwise signaled Daniel that he was attempting to stop or detain her. Nothing in the record or stipulated facts suggests that Daniel was even aware that the officer was present until the officer turned on his emergency lights.

There is no basis in fact to accept the state's contention that the officer was "in pursuit" of Daniel's car before she arrived home. The only fact in the stipulation that remotely supports that contention is that after the officer saw the first traffic violation, he "began the process of catching up to defendant's vehicle." Nothing in the stipulated facts indicates that the officer intended, let alone signaled, to stop Daniel's car because of that infraction alone. He merely "began the process" of following her. Why the officer chose

not to initiate a traffic stop sooner is not stated in the stipulated facts, but we know that the officer did not attempt to stop or detain Daniel until after she was home in her garage.

The difference between pursuing a fleeing car and merely following a car needs no explanation, and this was no pursuit. Imagine the privacy-impacting mischief invited if officers could rely on their subjective intention merely to follow or to "catch up" to a driver in traffic, without more, to justify a later warrantless entry into the driver's home to seize her. The hot-pursuit exception has previously been triggered only by a suspect's intentional avoiding of lawful detention after police have attempted to stop or detain the suspect; under that accepted design, police can continue the public chase onto private property, and the doctrine prevents the illegally fleeing suspect from transforming her flight behind her closed door into an arrest-averting flight behind the Constitution. In other words, the doctrine prevents suspects from manufacturing a constitutional circumstance to avoid the completion of their arrest. Ignoring the culpability component of intentional flight to avoid seizure therefore overlooks the key premise of the doctrine.

I also disagree with the second phase of the majority's analysis. The majority relies on *Terry v. Ohio* to hold that Daniel's arrest at the threshold of her garage did not violate her Fourth Amendment rights. The analysis overlooks that Daniel was already seized before she began approaching the threshold. *Terry* does not authorize police entry into a private home. It informs us only that a police officer who has reasonable suspicion that criminal activity is afoot can detain the suspect for a reasonable period to investigate, and that the officer may conduct a slightly intrusive pat-down search for weapons if the officer has a reasonable, articulable suspicion that the suspect is armed. *Terry v. Ohio*,

392 U.S. 1, 30, 88 S. Ct. 1868, 1884–85 (1968). The majority stretches *Terry* into a sort of exception to the Fourth Amendment's prohibition against home intrusions or in-home seizures when police merely suspect that a crime has occurred. The state did not rely on or even cite *Terry* on appeal, and I do not agree with the majority's application of *Terry*. *Terry* suggests nothing of a warrant exception that authorizes police to detain a person after she enters her home.

I therefore cannot agree with the majority's reasoning that "[o]nce the officer temporarily seized appellant pursuant to a valid *Terry* stop, he did not need a warrant" to approach and arrest Daniel inside her garage. This analysis assumes (without explaining why) the stop inside the garage was "a valid *Terry* stop," but it is the validity of that pre-arrest, in-home seizure that is the subject of this appeal.

The district court accurately pinpointed the location and instant that the Constitution-implicating seizure occurred: "[Daniel] was seized in her garage at the moment the officer parked his vehicle in [her] driveway so that it blocked [her] exit, [and] turned on his emergency lights . . . ." The district court added the fact that the officer left his squad car and approached Daniel, but it is clear from the stipulated facts and caselaw that the seizure occurred at the moment the officer signaled his authority to restrict Daniel's movement inside her garage and Daniel understood that she was not free to leave. We have explained that an "officer's show of authority [indicating that the person is not free to leave] compels the conclusion that a seizure then occurred." *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989), *review denied* (Minn. May 24, 1989); *see also State v. Bergerson*, 659 N.W.2d 791, 795 (Minn. App. 2003)

("After ascertaining that a squad car's flashing lights are intended to communicate with him or her, no reasonable driver would believe that he or she is free to disregard or terminate the encounter with police."). Because the officer turned on his emergency lights, Daniel "submitted to the show of [police] authority and decided not to close her garage."

This police action and Daniel's corresponding submission marked the point of Daniel's initial detention. But the majority places the initial seizure at some different place and at a later time. It reasons implicitly that no seizure occurred until Daniel came within the officer's reach at the garage threshold because she "voluntarily came to the threshold . . . to talk with the officer." But the foundational assumption that Daniel "*voluntarily* came to the threshold" is a factual finding that is nowhere in the stipulated facts, and this court does not make findings of fact. Equally difficult, the finding misses the legal reality that "a traffic stop significantly curtails the freedom of action of the driver . . . of the detained vehicle." *State v. Herem*, 384 N.W.2d 880, 882 (Minn. 1986) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138) (1984). If the initial detention was unlawful, then so was the fruit that it produced: the DWI investigation, the meeting at the threshold, and the arrest.

It is true that in many settings an officer standing at a doorway's threshold immediately outside the home can make a valid warrantless arrest of a suspect who is standing at the threshold immediately inside the home. *See State v. Howard*, 373 N.W.2d 596, 598–99 (Minn. 1985) (outlining Supreme Court decisions authorizing police to make warrantless arrests of suspects within reach over a threshold that separates a home's

public exterior from its private interior). But the officer's contact with Daniel at the garage threshold was merely the result of the detention that Daniel was already subject to and that she challenges on appeal as unconstitutional. And neither *Howard* nor the threshold cases that it relies upon hold that an officer may lawfully seize a suspect inside her home or garage rather than at the threshold.

Police had neither a warrant nor a basis for a valid exception to the warrant requirement to seize Daniel when the seizure occurred well inside her garage. I would therefore hold that the district court erred as a matter of law by deeming the seizure to be constitutional and admitting the post-seizure evidence.