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STATE OF MONTANA
Case Number: DA 20-0382

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0382

STATE OF MONTANA,

Plaintiff and Appellee,

v.

QUINCY SMITH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Howard F. Recht, Presiding

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STATEMENT OF ISSUE

1. Whether Deputy Monaco violated Smith's rights under the Fourth Amendment of the United States Constitution when he followed Smith's vehicle onto a private driveway to complete a traffic stop, which was initiated on a public road.

STATEMENT OF THE CASE

At approximately 10 p.m., on May 15, 2019, Corporal Monaco (Monaco) of the Ravalli County Sheriff's Office, attempted to pull Quincy Smith (Smith) over for going 57 mph in a 40 mph zone on a public roadway. Instead of pulling over, Smith continued down the road, eventually turning into a private driveway. Upon arriving where Smith eventually stopped, Monaco was asked to leave by both Smith, and the passenger, Jacques Hennequin (Hennequin), both claiming that the area was private property. Upon initiating contact with Smith, Monaco noted the presence of alcohol on Smith's person and the interaction ripened into a DUI investigation with Smith ultimately being arrested.

Smith was issued a complaint alleging that on May 15, 2019, Smith: (1) violated Mont. Code Ann. § 61-8-309, speeding; (2) violated Mont. Code Ann. § 45-7-302, obstructing a peace officer; (3) violated Mont. Code Ann. § 61-8-401, driving under the influence of alcohol or drugs, 1st offense; and (4) violated

Mont. Code Ann. § 45-7-301, resisting arrest. (D.C. Doc. 18.) Before the trial in justice court, Smith filed a Motion to Suppress and Motion to Suppress Blood Test Results, claiming, "law enforcement entered private property, against the express instructions of [Smith] and the property owner, [Hennequin], and made an unlawful search and arrest." (D.C. Doc. 6.) Both motions were denied and at the bench trial on February 19, 2020, Smith was found guilty on all charges. Smith appealed to the district court that same day.

In district court an omnibus hearing was held, followed by Smith's renewed motions to suppress. The district court, after a hearing, issued an order and opinion on May 26, 2020, denying Smith's motions. (D.C. Doc. 18.) After reviewing the cases the parties briefed, the district court distinguished the facts and found, in part, that Monaco "pursued [Smith] in furtherance of a lawful investigatory stop under [Mont. Code Ann. § 46-5-401]."

Smith's appeal followed.

STATEMENT OF THE FACTS

On May 15, 2019, Monaco was on patrol near Florence, Montana, on Hidden Valley Road. Around 10 p.m., Monaco encountered a car driving at an excessive speed. (D.C. Doc. 18 at 2.) The driver, later determined to be Smith, was traveling at 57 mph in a 40-mph zone. (*Id.*) After passing Smith, Monaco

immediately turned his vehicle around and activated his emergency lights. (*Id.*) Monaco testified that his lights were activate before Smith made a substantial turn around a corner on Hidden Valley Road and the dash camera supported his testimony. (Tr. at 43; Dash Cam. Video at 18:10:00.) Specifically, Monaco testified that after he activated his lights, he "initiated trying to catch up to the suspect vehicle, which at that point it appeared to accelerate around a corner, and I, I guess pursued . . . the suspect vehicle until it stopped down a residential driveway." (*Id.*) Monaco testified that he only lost sight of Smith's vehicle "for a quick moment when it took that hard right on that corner" and that he never lost "the knowledge of where the vehicle was." (Tr. at 44.) Further, Monaco testified that Smith's vehicle had its lights on "[i]nitially," but that "[a]s it came closer to its stopping point, it did not." (*Id.*). Monaco testified that the driveway was "not any more or less private than any of the others" in the neighborhood. (Tr. at 45.)

Monaco testified that when he arrived at the "violator vehicle" he got out and both Smith and Hennequin "became almost instantly kind of confrontational" and that he "advised the Defendant the reason for the stop, and [he] requested driver's license, registration and insurance, none of which the Defendant attempted to locate or provide." (*Id.* at 46.) Monaco testified that Smith then "became confrontational with regard to providing the documents" and stated "that he was slowing down and apologized for going 17 over the speed limit, almost discounting

it as not really an issue." (*Id.* at 47.) Monaco then testified that Smith "became argumentative about my position on what he referred to as 'private property,'" and persisted in "getting [Monaco] to turn off the emergency lights from the traffic stop." (*Id.*) Monaco then testified that both Smith and Hennequin "became increasingly kind of argumentative." (*Id.*) Monaco "didn't feel comfortable with the stop," and felt that he needed "an additional code backup unit." (*Id.*)

At the suppression hearing Sergeant Guisinger (Guisinger) testified that Monaco called for assistance in stopping a vehicle "that had shut its lights off on him, blacked out on him" and that Monaco "was out with two uncooperative males," requiring an "emergency response." (Tr. at 27-28.) Guisinger testified that he didn't recall the layout of the property, other than that "there [were] trees there," because he "was focusing on Corporal Monaco's location, his emergency lights and what was actually going on there." (*Id.* at 29.) Guisinger then testified that he did recall that "[t]here was no closed gate" and that he didn't see any "no trespassing signs." (*Id.*) Monaco testified that he could not tell if the "view of the house from Hidden Valley Road [is] obstructed by the fencing and foliage" as he "never visited it in the day after [the incident]." (Tr. at 54.) However, Monaco testified that he only lost sight of Smith's vehicle for "a quick moment when it took that hard right on that corner [on Hidden Valley Road]." (Tr. at 44.) Further, Monaco testified that Smith's vehicle "had its lights on" and "[a]s it came closer to

its stopping point, it did not." (*Id.*) Ultimately, Monaco determined that the residence was not "any more or less private than any of the other [residences in the area]" and at no point did he feel like he "needed to get a warrant to go into that driveway." (*Id.* at 45.) Monaco testified that he is not "required to end [his] pursuit of [a] vehicle if it goes into a driveway." (Tr. at 61.)

At the suppression hearing, Hennequin testified as to the layout of the property and that there is "360 degrees of fencing around the perimeter for pastureland" with an interior fence that goes around the lawn. (Tr. at 70.) Hennequin, testified that the house is set "back off the road. You really can't see it," but that "depending on certain angles you can kind of see back there[.]" (*Id.*) Hennequin, testified that the biggest consideration when he purchased the home was privacy. (*Id.*) Hennequin testified that they never noticed "the officer while [they] were actively operating the vehicle" and that Smith never "accelerate[d]" or "turn[ed] his lights off." (*Id.* at 73.) On cross examination Hennequin testified that he asked Monaco to turn off his emergency lights because he "didn't want to wake [his] neighbors" and that the "neighbor that you can see, would be directly to the west of us, the lights were lighting his house up heavily." (*Id.* at 75.) When asked whether the "driveway is not so private that other residences and other people can't see you in the driveway," Hennequin responded: " I suppose they could. It's pretty secluded." (*Id.* at 76.) Towards the end of his testimony, Hennequin testified that

he did not think the emergency lights on Monaco's cruiser could "be seen for miles," but then agreed that the emergency lights "are pretty aggressive" and "very in your face." (Tr. at 76-77.) On the stand Hennequin acknowledged that he had pled guilty for obstructing the officers during this encounter, but then later testified that the emergency lights were "embarrassing" and that he was a "law-abiding citizen." (*Id.* at 77.)

Smith then testified on his own behalf. Smith testified that the property is private with "bigger trees" and "foliage around the house." (Tr. at 82.) In regards to the speeding violation, Smith testified that he "flip[ped] the throttle, accelerated, realized that he was speeding at that point, slowed down, taking that Y onto Hidden Valley Road South," and then "turned into the Hennequins' driveway." (*Id.* at 83.) Smith then testified that he noticed law enforcement "[a]s soon as [he] got out of the vehicle" and that the "emergency lights [were] very bright, very aggressive." (*Id.*) Smith also testified that he did not accelerate "to get away from Corporal Monaco" and that he did not "turn [his] lights off." (*Id.* at 84.)

The district court's order reviewed the parties testimony, noting that Smith's testimony differed from Monaco's: "Defendant denied speeding up as he approached the curve on Hidden Valley Road," and that Smith "said he pulled into the driveway, parked and exited the vehicle, and intending to go into the house to eat dinner (at 10:00 at night) when he first noticed Monaco's patrol car pull into

the driveway with his emergency lights on." (D.C. Doc. 18 at 4.) The district court noted that Smith "did not admit he had a couple of drinks at the Rustic Hut; rather, he claimed to have been viewing a property he had recently determined to buy." (*Id.*) In denying the motion to suppress, the district court determined that "[u]nder § 46-5-401, MCA, Monaco was legally authorized to stop the defendant, 'request [his] name and present address and an explanation of [his] actions' and, because defendant admitted to having been the driver, 'demand [his] driver's license and the vehicle's registration and proof of insurance.'" (*Id.* at 8.) Finally, in concluding that "[t]he law recognizes no such 'King's X' under these circumstances[,]"' the district court denied the motion to suppress as "Monaco did not enter a residence or any other place upon which the law confers a comparable expectation of privacy. There were no gates across the driveway, no 'No Trespassing' or similar signs, and nothing to indicate 'unmistakably that entry is not permitted.'" (*Id.* at 9.) In support, the district court reviewed the language and factual distinctions from *State v. Bullock,* 272 Mont. 361, 384, 901 P.2d 61, 75-76 (1995), " . . . in Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, 'No Trespassing,' or similar signs, or 'by some other means [which] indicates unmistakably that entry is not permitted,' entry by law enforcement officers requires permission or a warrant.'"

(D.C. Doc. 18 at 9-10.) Further, the district court distinguished the cases discussed by the parties in their briefs as those cases involved situations where law enforcement entered a home without a warrant. (*Id.)*

STANDARD OF REVIEW

This Court reviews the grant or denial of a motion to suppress to determine whether the lower court's findings of fact were clearly erroneous and whether the court correctly interpreted and applied the law to those facts. *State v. Wagner*, 2013 MT 159, ¶ 9, 370 Mont. 381, 303 P.3d 285. It is "not this Court's function, on appeal, to reweigh conflicting evidence or to substitute our evaluation of the evidence for that of the trial court" and this Court will "defer to the trial court in cases involving conflicting testimony because . . . the [lower] court had the benefit of observing the demeanor of witnesses and rendering a determination of the credibility of those witnesses. *Id.* ¶ 15 (citing *State v. Deines*, 2009 MT 179, ¶ 20, 351 Mont. 1, 208 P.3d 857).

A finding of fact is clearly erroneous if it is not supported by substantial credible evidence, if the lower court has misapprehended the effect of the evidence, or if this Court's review of the record creates a firm conviction that a mistake was made. *State v. Cooper*, 2010 MT 11, ¶ 5, 355 Mont. 80, 224 P.3d 636 (citation omitted).

This Court reviews lower court rulings that are appealed to district court as if the appeal originally had been filed in this Court. *State v. Gai*, 2012 MT 235, ¶ 11, 366 Mont. 408, 288 P.3d 164 (citing *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646).

SUMMARY OF THE ARGUMENT

In failing to stop his vehicle, despite Monaco's pursuit, Smith did not hold a reasonable expectation of privacy by seeking refuge in the driveway of the residence where he was temporarily residing. This case is distinguishable from *Bullock* and that distinction is important because of the differing privacy rights at issue.

The nature of the property at issue here substantially differs from that in *Bullock*. Additionally, the nature of the investigation in *Bullock* is completely different from the active pursuit which occurred here. A law enforcement officer going onto private property because they received a third-party tip is substantially different than an officer engaged in an active pursuit for an observed statutory violation.

This is an exigent circumstances scenario where Monaco's attempt to stop Smith was either ignored or negligently missed. Smith failed to stop on the public road, despite substantial indications that he was aware of Monaco's pursuit.

Monaco was authorized to complete the stop and ultimately there was no expectation of privacy that society would deem reasonable in this situation. This is not a situation where law enforcement entered a home to pursue a suspected misdemeanor, this is a situation where a valid traffic stop was immediately initiated on public property and brought by Smith into the driveway. Analysis of relevant Fourth Amendment cases supports Monaco's actions under these facts.

ARGUMENT

I. Under the facts at issue, Smith did not hold an expectation of privacy that society could identify as reasonable.

Smith likens this situation to *Bullock*, but factually, this was not a situation where there is a reasonable expectation of privacy. The question herein is whether a defendant may commit a statutory violation and despite law enforcement's efforts to effect a stop on public property, move the encounter to a driveway on private property. Montana's privacy interests should not be interpreted to afford statutory violators to seek refuge in such a situation by claiming they have made it to "base" or "King's X".

A search for Fourth Amendment purposes in Montana occurs when "the government infringes upon an individual's expectation of privacy that society considers objectively reasonable" and "where no objectively reasonable expectation of privacy exists, a 'search' does not occur within the contemplation

of Article II, Section 11 of the Montana Constitution.'" *State v. Funkhouser*, 2020 MT 175, ¶ 15, 400 Mont. 373, 467 P.3d 574 (citing *State v. Goetz*, 2008 MT 159, ¶ 18, 343 Mont. 301, 184 P.3d 305). *Funkhouser* defined a "search" as referring to "an act of observation that is invasive enough to intrude upon an expectation of privacy that society recognizes as reasonable." *Id.* ¶ 17 (citations omitted).

Smith couches his claim as an unfounded intrusion to his privacy rights after Monaco completed the traffic stop in the driveway of the residence where Smith temporarily resided. In support, Smith relies heavily on the extension of privacy rights elicited in *Bullock*. Smith's reliance on *Bullock* is misguided and wholly distinguishable in several notable respects from the circumstances at issue here.

A. Bullock is distinguishable

Smith's argument on appeal asserts that Montana's privacy protections should be extended to situations where a stop was initiated on a public roadway, but the suspect then takes the encounter to a private driveway. Smith claims that he did not notice Monaco's emergency lights, but as will be discussed below, that assertion was not persuasive.

Smith bases his privacy-based claim on *Bullock*. However, considering the notable factual differences between the property at issue in *Bullock*, as well as the circumstances of the encounter here, the State asserts that Smith is not entitled to

privacy-based protections which society would deem reasonable. A brief review of the factual distinctions between *Bullock* and this matter is necessary.

In *Bullock,* an eyewitness identified two individuals, later identified as Peterson and Bullock, unlawfully kill an elk and load it on a pickup truck at approximately 6:30 a.m. *Bullock*, 272 Mont. at 365, 901 P.2d at 64. The witness recognized the pickup truck as belonging to Peterson and reported the incident to the sheriff's office, who then relayed the information to the Game Warden, Anderson. *Id*. Later that morning, after interviewing the eyewitness, Anderson drove to Peterson's house, but Peterson was not home. *Id.* Anderson later learned that Peterson had a cabin and Anderson and the sheriff's deputy decided to continue the investigation. Anderson drove to the cabin, which was approximately seven miles away on a "one-lane forest service road." *Id.* Law enforcement reached Peterson's property and entered through an open gate and drove up to the property, passed several no trespassing signs, to a point where they "observed a large bull elk hanging from a tree in an area about 126 feet from Peterson's cabin." *Id.*, 272 Mont. at 366, 901 P.2d at 64. Anderson then went up and examined the carcass and questioned Bullock and Peterson. *Id.* The following day Anderson returned and confiscated the elk carcass, and on November 8, 1991, "Bullock was charged with possession of an unlawfully killed animal in violation of § 87-3-112, MCA"

and Peterson was charged with "unlawfully killing a game animal in violation of § 87-3-103, MCA." *Id.*, 272 Mont. 361, 901 P.2d at 65.

The cabin at issue in *Bullock* was on property approximately "334 feet from the forest service road," and the terrain was "elevated in a way that conceals" the cabin and other structures on the property. *Id.* 272 Mont. at 365, 901 P.2d at 64. The officers' entered the property through an open gate and drove approximately 180 feet down the private road and over "the crest of the hill between his cabin and the forest service road" before they saw the elk hanging up near the cabin. *Id.*, 272 Mont. at 366, 901 P.2d at 64.

The comparison between *Bullock* and this matter is also misguided as the type of investigation differs drastically. This was not a situation where law enforcement was investigating whether a crime occurred hours after the fact; this was a situation where a sheriff's deputy witnessed an undisputed statutory violation and immediately acted to stop the suspect. (Dash Cam Video at 18:09.) This situation involves a hot pursuit, where the State's interests outweigh Smith's expectation of privacy in the driveway of the temporary residence. *Bullock*, on the other hand, involved a general investigation from an informant. Here, Monaco initiated contact immediately on a residential public road. Monaco testified that he ignited his emergency lights before Smith traveled around a corner and testified that he only lost sight of Smith's vehicle "for a quick moment when it took that

hard right on that corner," but never "[lost] the knowledge of where the vehicle was." (Tr. at 44.)

Further differentiating in *Bullock*, was the fact that there were notable indications that Smith was eluding Monaco's pursuit. Monaco not only testified that Smith's vehicle "appeared to accelerate" through the turn on Hidden Valley Road, but that Smith's vehicle lights were on initially, but "[a]s it came closer to its stopping point, it did not." (Tr. at 43.) These indicators arguably meet the criteria of a violation under Mont. Code Ann. § 61-8-316 ("A person operating a motor vehicle commits the offense of fleeing from or eluding a peace officer if a uniformed peace officer operating a police vehicle in the lawful performance of the peace officer's duty gives the person a visual or audible signal by hand, voice, emergency light, or siren directing the person to stop the motor vehicle and the person knowingly fails to obey the signal by increasing the speed of the motor vehicle, continuing at a speed that is 10 or more miles an hour above the applicable speed limit, extinguishing the motor vehicle's lights, or otherwise fleeing from, eluding, or attempting to flee from or elude the peace officer."). This was not a standard speeding infraction.

The officers in *Bullock* had to travel seven miles down a "forest service road" to even reach the private road to the cabin. *Id.*, 272 Mont. at 365, 901 P.2d at 64. Whereas this encounter took place in a residential area, where Hennequin

expressed substantial concerns about the emergency lights waking his neighbors. (Tr. at 75.) Smith's and Hennequin's testimony claimed that the property was private and highlighted the fact that there was a fence and some trees and landscaping that made it so. (Tr. at 70, 82.) In opposition, Monaco testified that he never lost sight of Smith, or his vehicle, and that the vehicle's lights were turned off prior to its eventual stop. (Tr. at 44.)

The layout of the property here was different than that in *Bullock*. Hennequin testified as to how private he thought it was, but noted that "depending on certain angles you can kind of see back there." (Tr. at 70.) There were no posted "no trespassing" signs, the exterior fence is not a privacy fence and can easily be seen through, and there were no closed gates. Up at the driveway, where the encounter occurred, Hennequin testified, "Our neighbor that you can see, would be directly to the west of us, the lights were lighting his house up heavily." (Tr. at 75.)

In *Bullock*, law enforcement had previously asked for permission to go onto the property, indicating additional privacy interests. *Bullock*, 272 Mont. at 366, 901 P.2d at 64. That was not the case here. Smith emphasizes that Monaco was immediately informed that he was on private property, but given the concerns regarding eluding, driving under the influence, and avoiding law enforcement, Hennequin's and Smith's attempts to ask Monaco to leave were more an indication of not wanting to have any interaction with law enforcement than an exercise of

their privacy rights in the driveway. If privacy were as important as they testified then there would have been posted signs at the entry way, as opposed to choosing to inform an officer involved in an active pursuit that he was on private property.

Monaco was not on the property to search for general evidence of a crime, he was there to talk with the driver of the vehicle he saw traveling 17 mph over the speed limit. Smith's position ultimately asserts that since he made it to the driveway of a private residence, the officer was precluded from completing the stop. If this position stands, it sets a dangerous standard for all further situations. Such is a position that society would not recognize as reasonable. Monaco had no way of identifying who was driving if he did not make contact with the driver of the vehicle. A warrant would have hindered Monaco's ability to determine who was driving. Additionally, a warrant would have allowed the occupants to arrive at the house, enter, and otherwise avoid liability entirely, even for the eventual DUI investigation, as the parties could have claimed that they had alcohol after they arrived at home. This is a situation where the minimal intrusion into a residential driveway was justified and necessary.

Notably, jurisdictions are split on the issue of hot pursuits in situations involving misdemeanors, but it bears noting that the cases dealing with the issue involve searches which occurred inside the home. That is not the case here, where Monaco completed the traffic stop out of necessity at the driveway, which is a

significant distinction. In Montana, the only case somewhat related to the facts here involved a situation where the officer went into the home to arrest the suspect. *See State v. Sorenson*, 180 Mont. 269, 274, 590 P.2d 136, 139 (1979). In *Sorenson*, this Court stated that "the doctrine [of hot pursuit] is unavailable to peace officers until a felony has been committed and the suspect is fleeing," however, this decision was issued in 1979, without supporting citation. This matter should be revisited for situations such as this, where there is no invasion into the home and an active pursuit had been initiated on a public roadway. There is no reasonable expectation of privacy in this scenario.

Further, this was an arrestable offense. A law enforcement officer has probable cause to stop and arrest pursuant to Mont. Code Ann. § 61-8-703 if the officer has "observed the recording of the speed of the vehicle by radio microwaves or other electrical device" and the arrest is made "immediately after the observation . . . as the result of uninterrupted pursuit." *See State v. Skurdal*, 235 Mont. 291, 296, 767 P.2d 304, 308 (1988). Further, "as long as 'the officers [have] probable cause to believe that [defendant] had violated the traffic code[,] . . . the stop [was] reasonable under the Fourth Amendment.'" *United States v. Willis*, 431 F.3d 709, 716 (9th Cir. 2005). Under Mont. Code Ann. § 61-8-703(1) "the driver of a motor vehicle may be arrested without a warrant under this section if the arresting officer is in uniform or displays the officer's badge of authority and has either: (a)

observed the recording of the speed of the vehicle by radio microwaves or other electrical device." Montana Code Annotated § 61-8-703(2) provides "the arrest without a warrant of any driver must be made immediately after the observation or radio message and as the result of uninterrupted pursuit." This was not a minor traffic offense.

The United States Supreme Court has held that there is no "categorical rule for all cases involving minor offenses, saying only that a warrant is 'usually' required." *Stanton v. Sims*, 571 U.S. 3, 8, 134 S. Ct. 3, 6 (2013) (citing *Welsh v. Wis.*, 466 U.S. 740, 750 (1984)). *Stanton* dealt with a qualified immunity issue but provided significant review of how various jurisdictions have handled the issue regarding misdemeanor offenses and felonies in hot pursuit situations, stating that "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may **enter a home** without a warrant while in hot pursuit of that suspect." *Id.*, 571 U.S. 3, at 6, 134 S. Ct. 3 at 5. (emphasis added). *Stanton* specifically provided:

> Compare, *e.g.*, *Middletown* v. *Flinchum*, 95 Ohio St. 3d 43, 45, 2002 Ohio 1625, 765 N. E. 2d 330, 332 (2002) ("We . . . hold today that when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor"), and *State* v. *Ricci*, 144 N. H. 241, 244, 739 A. 2d 404, 407 (1999) ("the facts of this case demonstrate that the police had probable cause to arrest the defendant for the misdemeanor offense of disobeying a police officer" where the defendant had fled into his home with police officers in hot pursuit),

> with *Mascorro* v. *Billings*, 656 F. 3d 1198, 1207 (CA10 2011) ("The warrantless entry based on hot pursuit was not justified" where "[t]he intended arrest was for a traffic misdemeanor committed by a minor, with whom the officer was well acquainted, who had fled into his family home from which there was only one exit" (footnote omitted)), and *Butler* v. *State*, 309 Ark. 211, 217, 829 S.W. 2d 412, 415 (1992) ("even though Officer Sudduth might have been under the impression that he was in continuous pursuit of Butler for what he considered to be the crime of disorderly conduct, . . . since the crime is a minor offense, under these circumstances there is no exigent circumstance that would allow Officer Sudduth's warrantless entry into Butler's home for what is concededly, at most, a petty disturbance").

Id.

Notably, each of those cases involved an officer's entry into the home; again, this is not the case here. As opposed to *Bullock*, this situation's facts more closely mirror those in *State v. Hernandez*, No. CR-17-0325-PR, 244 Ariz. 1, 417 P.3d 207, 2018 Ariz. LEXIS 147 (May 18, 2018). In *Hernandez*, police officers initiated a traffic stop by activating their emergency lights and following the defendant for a few seconds on a public road; the defendant then drove into a private driveway, rather than pulling over to the side of the public roadway. After officers attempted to affect a stop for failure to carry insurance Hernandez, "led officers along the length of the driveway and into the backyard area of a residence." *Id.* at 2-3. Hernandez stopped the vehicle at what would later be discovered was his girlfriend's home. Upon exiting the vehicle, the police officers' informed Hernandez to stay in his vehicle and when they approached the vehicle they smelled marijuana. *Id.* Hernandez "was indicted for possession of marijuana,

possession of drug paraphernalia, and transporting methamphetamine for sale." *Id.* On appeal Hernandez argued, as does Smith, that "the officers' warrantless entry into the area of his girlfriend's property where the driveway met the backyard violated his rights under the Fourth Amendment." *Id.* at 3.

To resolve the issue, the Arizona Supreme Court reviewed whether the defendant had a reasonable expectation of privacy in the driveway and its confluence with "the backyard of his girlfriend's home." *Hernandez,* 244 Ariz. 1 at 4. The Arizona Supreme Court relied on *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975), to clarify the reasonable expectation of privacy test to "be that of reasonableness, both of the possessor's expectations of privacy and of the officers' reasons for being on that driveway." *Hernandez,* 244 Ariz. 1 at 4. The *Hernandez* court determined that "even if an individual has a reasonable expectation of privacy in a protected area, the warrant requirement does not apply if the person consents to an officer's entry." *Id.* at 4-5. Ultimately, the Arizona Supreme Court concluded that because "consent to a search need not be express but may be fairly inferred from context[,]" that the "officers did not impermissibly invade Hernandez's reasonable expectation of privacy in the curtilage of his girlfriend's home because [Hernandez] impliedly consented to the officer's entry [on to the property] to complete the traffic stop." *Id.* at 5 (citing *Birchfield v. North Dakota,* 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560 (2016)).

This analysis is appropriate given the factual similarities here: "During a traffic stop, officers typically follow the pursued vehicle until it stops and the driver of the pursued vehicle does not have a legal right to fail or refuse to stop." *Id.* While not binding, the analysis here provides a solid foundation for situations where a defendant ignores an officer's attempts to affect a valid traffic stop and seeks to escape culpability by seeking sanctuary in a private residential driveway.

Other jurisdictions have adopted the hot pursuit doctrine for misdemeanors where the officer enters a home to arrest the suspect. Here, Smith was in the driveway of his temporary residence, and there was no invasion of any privacy interest in the home.

In other contexts, this court has held that conduct can revoke consent, as evidenced in implied consent blood test situations: "[a] refusal to take a blood test does not have to be express but may be implied . . . ." *Montana v. Shepp*, 2016 MT 306, ¶ 9, 385 Mont. 425, 384 P.3d 1055 (citing *Wessell v. DOJ Motor Vehicle Div.*, 277 Mont. 234, 239, 921 P.2d 264, 266 (1996) *see also Johnson v. Div. of Motor Vehicles, Dep't of Just.*, 219 Mont. 310, 711 P.2d 815 (1985)). The inverse should be applied to a situation where the facts demonstrate that a suspect has ignored, or was oblivious to, law enforcement's blatant attempts to affect a stop and takes law enforcement onto private property. Neither lower court erred in this matter, and, as

stated by the district court: "The law recognizes no such 'King's X' under these circumstances." (D.C. Doc. 18 at 9.)

II. Credibility determinations

At the hearing on the motion to suppress there was conflicting testimony regarding whether Smith knew he was being stopped. However, relevant facts from the encounter demonstrate that Smith was on notice that he was being stopped.

It is "within the province of the District Court to assess both the credibility of the witnesses at the suppression hearing and the weight to be given to the witnesses' testimony." *State v. Gilmore*, 2004 MT 363, ¶ 22, 324 Mont. 488, 104 P.3d 1051.

The district court thoroughly reviewed the applicable testimony, applicable case law, and properly determined that Smith's "contention . . . [that] Monaco was required to obtain a warrant is misplaced. The law recognizes no such 'King's X' under these circumstances." (D.C. Doc. 18 at 9.) The relevant testimony and evidence support the district court's conclusion.

It is uncontroverted that Smith was speeding, as he testified, "I pulled out onto Hidden Valley pretty excited" and "flip[ped] the throttle, accelerated, realized that I was speeding at that point, slowed down, taking that Y onto Hidden Valley Road South," (Tr. at 83.) However, in order to find Smith's position that he didn't

realize he was being stopped credible, the district court would have to believe that Smith failed to see the deputy's cruiser despite passing it, while going 17 mph over the speed limit, then that Smith didn't notice the cruiser immediately turn around and activate the emergency lights in his rearview mirror, and that the lights never caught his attention, despite being worried about how they would "wake [the] neighbors." (Tr. at 75.) Given that we now know that Smith was operating the vehicle while being over the legal limit it may be possible that Smith did not know he just passed a sheriff's deputy going 17 mph over the speed limit, but that would be no excuse. These facts, combined with Monaco's testimony, clearly show that this was not a situation where Smith was enjoying the privacy of the driveway of his temporary residence. This was a situation where Smith sought to escape the interaction and any associated accountability there with.

Monaco's testimony provided a more credible account of the events leading to the stop. Monaco testified that he purposefully activated his lights prior to Smith's turn on Hidden Valley Road, stating that he "tried to turn around as quickly as I could and initiate a traffic stop" (Tr. at 43), and that he "knew that that corner was coming up, so in my mind, I wanted to get those lights on before that vehicle took that corner, which is why the lights were activated when they were activated." (Tr. at 60.) The dash camera video clearly shows Monaco activate his emergency lights while Smith's vehicle was ahead of him and for a few seconds

prior to turning the corner. (Dash Cam Video at 18:16.) Additionally, Monaco testified that Smith's vehicle "appeared to accelerate around a corner," which in addition to his testimony that the suspect vehicle's lights were turned off prior to arriving at the stopping point, further increases the likelihood that Smith and Hennequin were aware that they were being pulled over for speeding. (Tr. at 43-44.) Further, the visibility of the lights was significant enough such that Guisinger, used Monaco's emergency lights to find Monaco's location. (Tr. at 29.)

Notably, the district court found that Monaco:

> "observed a vehicle . . . driving eastbound at what Monaco judged to be an excessive speed. [Monaco] immediately reversed course, activated his emergency lights and dashcam video, and pursued the vehicle eastbound.
>
> Monaco's radar clocked the defendant driving at 57 mph in a 40-mph zone.
>
> Monaco testified that he had activated his emergency lights and dashcam video when he did because he knew Hidden Valley Road made a substantial turn to the right and he wanted to signal his lights and record the events before defendant's vehicle reached the turn."

(D.C. Doc. 18 at 2.)

Additionally, testimony from Smith and his witness, Hennequin, contained several inconsistencies which undermined their credibility. Hennequin testified that he did not "notice the officer" while in the vehicle, but that the "neighbor . . . directly to the west of us, the lights were lighting his house up heavily." (Tr. at 75.) This is notable as Hennequin also noted that the emergency lights were "pretty

aggressive" and classified them as "very in your face." (*Id.* at 77.) Hennequin, when asked if "this driveway is not so private that other residences and other people can't see you in the driveway?" responded, "I suppose they could," but that "it's pretty secluded." (Tr. at 75-76.) The State then directly addressed Hennequin's credibility by asking if Hennequin changed his plea to guilty for the obstruction charges from the encounter, to which Hennequin testified that he did. (Tr. at 76.) Not long after that question, Hennequin then testified that he is "a law-abiding citizen." (Tr. at 77.) The inconsistencies continued; Hennequin testified that the lights of a police vehicle can't "be seen for miles," but then agreed that the police lights are "pretty aggressive" and "very in your face."(Tr. at 76-77.)

Ultimately, the district court did not find either Hennequin's or Smith's testimony particularly credible: making sure to note that they "intend[ed] to go into the house to eat dinner (at 10:00 at night)" and that Smith "admitted he had had a couple of drinks at the Rustic Hut," but that "[i]n his testimony, Defendant did not admit he had a couple of drinks [there]; rather, he claimed to have been viewing a property he had recently determined to buy." (D.C.Doc. 18 at 4.) The district court's findings and conclusions were not clearly erroneous in this situation.

CONCLUSION

The State respectfully requests this Court affirm Smith's conviction and sentence.

Respectfully submitted this 19th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,309 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, W. R. Damon Martin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-25-2021:

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