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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Nos. 2011AP002956CR

Circuit Court Case No. 2010CF003377

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant.

An Appeal From an Order Denying Motion to Suppress Evidence and a Judgment of Conviction entered by Branch 12 of the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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Brief & Appendix of the Defendant-Appellant

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of record.

STATEMENT OF THE ISSUES

1. Was the act of bringing a drug-sniffing dog to the front door of Scull's residence, without a warrant or probable cause, a violation of his Fourth Amendment rights?

Circuit Court answered: No.

2. Should the circuit court have invalidated the search warrant and suppressed all evidence acquired pursuant to a tainted search?

Circuit Court answered: No.

STATEMENT OF THE FACTS

A confidential informant advised City of Milwaukee police that Scull was selling cocaine out of Scull's vehicle at various locations in Milwaukee. (A-App. 1-106). Based on this information, the police took a drug detecting canine to the front entry door of Scull's residence. (A-App. 1-107). The dog made an "alert" – a positive indication that controlled substances were contained in the residence. (A-App.1-107). The police then applied for and received a search warrant to search Scull's residence. (A-App. 1-103-08).

The police executed the search warrant and recovered crack cocaine, marijuana, cash, a scale, and clear plastic sandwich baggies. (2:2-4).

Armed with this physical evidence, the State charged Scull with Possession With Intent to Deliver Cocaine, Possession With Intent to Deliver THC and Keeping a Drug House. (2).

Scull filed a motion to suppress the items found during the search (5) and the circuit court held an evidentiary hearing to help determine whether there was an unlawful invasion of the cartilage of Scull's home when the officer deployed the drug-sniffing dog at Scull's residence. (24:4).

The evidentiary hearing consisted of brief testimony from the officer who brought the drug-sniffing dog to the residence. The officer testified that he went by the property on two occasions (24:11). The first time he went by the property he did nothing because people were around. (24:12). On the second occasion, the officer initially went to the side door and the front door and the K-9 alerted to the door (24:12). The officer stated that he did not cut on the grass but stayed on walkways to both the side and front doors (24:13). The officer stated there were no "no trespassing" signs on the property. The officer did concede that he did not want anyone to know what he was doing (24:17). His only intention was to bring the dog to the house to see what the dog was going to do. (24:17). The court adjourned the case for a decision. (24:28).

The circuit court ruled that the use of the K-9 dog was valid and denied Scull's motion to suppress. (26:2-3). Scull pled guilty to Possession With Intent to Deliver Cocaine and Keeping a Drug House (10) and was sentenced to prison. (15).

Scull filed a Notice of Intent to Pursue Postconviction Relief (16) and a Notice of Appeal. (18). Scull appeals the Judgment of Conviction, including the Order denying his motion to suppress evidence.

ARGUMENT

I. THE INITIAL POLICE INTRUSION INTO SCULL'S PRIVACY WAS ILLEGAL, THE GROUNDS FOR THE SEARCH WARRANT WERE INSUFFICIENT AND THE CIRCUIT COURT SHOULD HAVE SUPPRESSED THE PHYSICAL EVIDENCE FOUND AFTER THE EXECUTION OF THE SEARCH WARRANT.

The Fourth Amendment to the United States Constitution states that the "right of the people to be secure in their persons, homes … against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The counterpart provision from the Wisconsin Constitution is essentially the same. WIS. CONST. art I, § 11.

Curtilage is the area immediately adjacent to the home to which a person extends the intimate activities associated with the privacies of life. ***Oliver v. United States***, 466 U.S. 170, 180 (1984). The extent of a home's curtilage is "determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." ***United States v. Dunn***, 480 U.S. 294, 300 (1987). The factors to be considered are: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps the resident takes to protect the area from observation by passersby. ***Id***. at 301. These factors are not to be mechanically applied; rather, they are useful analytical tools. ***Id***.; *see also* ***State v. Walker***, 154 Wis.2d 158, 183-84, 453 N.W.2d 127, 137-38 (1990). The Fourth Amendment protects the home *and the area around it*, to the extent that an individual has a reasonable expectation of privacy. ***Dunn***, 480 U.S. at 300-01.

In reviewing a denial of a motion to suppress, the reviewing court upholds the circuit court's findings of fact unless they are clearly erroneous. ***State v. Waldner***, 206 Wis. 2d 51, 54 556 N.W.2d 681 (1996). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law which is reviewed *de novo*. ***Id***.

The affidavit in support of the warrant used to search Scull's residence asserted that a confidential informant claimed that Scull was selling controlled substances from his vehicle. The informant made no mention of controlled substances being kept or sold at Scull's residence. The police, without a warrant, took a police dog to Scull's residence and claimed that the trained dog alerted them as to the scent of controlled substances. The police then obtained the search warrant based upon both the confidential informant's information and the "alert" from the drug sniffing dog.

By taking the trained police dog to Scull's residence without a warrant or probable cause the police violated Scull's Fourth Amendment Rights. Information obtained by an unlawful search cannot be used to justify a search warrant. Without the alert from the drug sniffing dog, there would not have been probable cause justifying the issuance of the search warrant. All evidence acquired by the police during and after the execution of the search warrant should have been suppressed by the circuit court. The circuit court committed an error of law when it denied Scull's suppression motion.

The State will argue that there is an implied invitation to anyone to approach the front door of a single family residential property. While there is a custom of prospective visitors approaching the front door of a residence to trigger a social encounter, this was not the reason for the police to approach Scull's front door in this case. There is no such implied consent for allowing the police to bring a drug sniffing dog into one's front yard. The police do need permission to bring a drug sniffing dog onto someone's property without a warrant.

The only reasonable interpretation of the police approaching Scull's front door was to bring a drug sniffing dog there to smell it. The police were not approaching the door to ring the doorbell and initiate a social encounter. In fact, the officer kept his presence secret from the occupants of the home. If the court adopts the State's position, the court is essentially authorizing the police to bring a drug detecting dog to the front door of any residence without any reason at all. There is no authority to support the existence of such a broad implied consent to enter onto private property.

The State will argue that this case is governed by ***State v. Edgeberg***, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994). That case was decided on plain view grounds. It was not as if the police went up with the intention of speaking with Scull and then observed contraband in plain view.

The ***Edgeberg*** court concluded, under the circumstances presented, that there was no reasonable expectation of privacy that should bar the officer's approach to the inside door of the residence. Although Edgeberg's

porch may have been a laundry area, it was also an entryway. The unlocked screen door presenting a view of the inner "front door" and the community practice of entering the porch to knock suggest no expectation of privacy. Regarding protected areas in residential premises, "`[a] sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there.'" 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c) at 392-93 (2d ed. 1987) (quoting ***Lorenzana v. Superior Court***, 511 P.2d 33, 35 (Cal. 1973)). "[P]olice with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public'" and in doing so "`are free to keep their eyes open ..." LAFAVE, *supra,* at 393 (quoting ***State v. Crea***, 233 N.W.2d 736, 739 (Minn. 1975)). This means that if police use normal means of access to and from the house for some legitimate purpose, it is not a fourth amendment search for police to see from that vantage point something in the dwelling. *Id.* at 393-94. ***Edgeberg***, 188 Wis. 2d at 346-47.

As discussed earlier, the police were not utilizing the normal means of access to Scull's residence for some legitimate purpose. The police here were essentially bringing sense-enhancing equipment (the drug sniffing dog) to the outside of the residence in order to find out what was going on inside the residence. This is not a situation in which the police approached the residence, had a consensual encounter with Scull, and then observed contraband within plain view as in ***Edgeberg***.

There is no community custom for citizens to consent to their homes being smelled by drug detecting dogs. There is no implied community consent, even for legitimate visitors, to bring any animal onto private property without permission. This is not a plain view case. This is not a case in which the police approached Scull's residence as a visitor. ***Edgeberg*** does not apply.

Since the utilization of the drug sniffing dog was unconstitutional, the search warrant was unlawfully obtained and should have been quashed by the circuit court. Because the search warrant was unlawfully obtained, the evidence

recovered during the execution of the search warrant is "fruit of the poisonous tree" and must be suppressed. ***See Wong Sun v. United States***, 371 U.S. 471, 488 (1963); ***State v. Phillips***, 218 Wis. 2d 180, 204-13, 577 N.W.2d 794 (1998).

CONCLUSION

Based on the argument and authorities presented herein, the Defendant-Appellant respectfully requests this Court to reverse the circuit court's judgment and remand the case with directions to the circuit court to enter an order granting the suppression motion.

Dated this __ day of March, 2012.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,649 words.

I hereby further certify that filed with this brief, as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of

the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

Dated this __ day of March, 2012.

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Basil M. Loeb