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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2013-AP-857

BRETT W. DUMSTREY,
Defendant-Appellant.

Waukesha County Circuit Court
Case No. 2012-CT-508

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE DONALD J. HASSIN, JR., PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE PRESENTED

1. Is the locked, private, underground parking garage, located underneath the apartment building in which the Defendant is a tenant, an area protected by the Fourth Amendment of the United States Constitution, such that probable cause to arrest for a crime and exigent circumstances were required for City of Waukesha Police Officer Paul E. DeJarlais to conduct a warrantless entry?

Circuit Court's answer: No, the Defendant's lack of a reasonable expectation of privacy in the area, because it was accessible to multiple tenants, removed the area from the purview of the Fourth Amendment.

2. If probable cause to arrest for a crime and exigent circumstances were required for City of Waukesha Police Officer Paul E. DeJarlais to conduct a warrantless entry into the garage, were these requirements met?

Circuit Court's answer: The Circuit Court did not directly address this question, except to comment that the circumstances were "anything but a hot pursuit." (20:12).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). At such time as counsel for appellant has had sufficient opportunity to review the brief of respondent, it may be that the

briefs fully present and meet the issues on appeal, rendering oral argument technically unnecessary under Wis. Stat. (Rule) 809.22(2)(b).

Publication may be appropriate in this case, which involves the relatively novel issues of application of *United States v. Jones*, 132 S.Ct. 945 (2012), to a warrantless entry, and the scope of curtilage in a private parking garage located underneath an apartment building. As the Circuit Court noted, "we've reached an area of law that's not clear and yet may certainly benefit from further clarity from the Court of Appeals." (20:19, App. 16).

STATEMENT OF FACTS

According to his testimony at an evidentiary motion hearing, on April 20, 2012, at around 10:30 P.M., City of Waukesha Police Officer Paul E. DeJarlais was off duty, driving in his personal vehicle from a Milwaukee Brewers baseball game, where he had consumed two beers.[1] (16:18). While driving on North Street in Waukesha, he "looked in [his] rearview mirror and [he] saw a vehicle coming up from behind [him] at a very high rate of speed." (16:8). He further testified that the vehicle, later identified as the Defendant's, was tailgating other vehicles while they both traveled down the road. (16:8-10).

[1] At the hearing, defense counsel attempted to question Officer DeJarlais about the prevalence of individuals minimizing the extent of their alcohol consumption upon questioning. The Circuit Court, however, *sua sponte* restricted defense counsel from asking questions about this topic on multiple occasions, indicating that "The question isn't whether the police officer was intoxicated. It's whether he had probable cause to stop [the Defendant.]" (16:19). "Clearly the state of a witness' sobriety at the time he makes an observation is relevant . . . ." *Ruiz v. State*, 75 Wis. 2d 230, 237, 249 N.W.2d 277, 280 (1977).

Officer DeJarlais testified that he pulled up to the Defendant's vehicle at the corner of North Street and St. Paul Avenue, (16:10), having already called the City of Waukesha Police Department and explaining his observations to a dispatcher, (16:11). While stopped, Officer DeJarlais made eye contact with the Defendant, (16:11), attempted to identify himself as a police officer by displaying his "badge and photo identification," and indicated to the Defendant that he "was on the phone with the police and that he needed to wait here, that the police were coming as [Officer DeJarlais] told him he was driving erratically," (16:12). The Defendant did not respond, and blankly stared back at him. (16:13). Officer DeJarlais also testified that, while stopped at this intersection, he "could tell his eyes were very sleepy looking and they had a sheen to them. They were kind of glassy." (16:13).

When the traffic control signal at the intersection turned green, the Defendant did as Officer DeJarlais had asked and "sat just about throughout the whole green light" before eventually following Officer DeJarlais through the intersection and pulling alongside where Officer DeJarlais had stopped his vehicle. (16:13). After Officer DeJarlais repeated his request to wait, the Defendant again waited for "a couple seconds" before "he drove off and turned into a driveway headed towards the Riverwalk Apartments." (16:14).

Officer DeJarlais followed the Defendant's vehicle to Riverwalk Apartments, where, according to his testimony, the Defendant "just kept driving around through this parking lot . . . ." (16:14). Eventually, Officer DeJarlais

observed an "underground parking garage door going up and then [the Defendant] turned into that driveway and drove down beneath the apartment building into the parking garage." (16:15). At this point, Officer DeJarlais parked his personal vehicle so that his vehicle "was partially outside and the front end was inside," so that "when the officers got there they would be able to get into the garage otherwise the garage door would have come down and they wouldn't have been able to get in." (16:15). Officer DeJarlais then entered the garage, where he observed the Defendant exit his parked vehicle. (16:16).

As the Circuit Court indicated, "The record is that it was a remote controlled garage in which constituted the basement of the apartment building in which Mr. Dumstrey lived," (19:7), a "private parking lot available only to those who dwelled in the apartments and had a controlled mechanism" for entry, (19:12). Mr. Dumstrey testified that he rented an apartment in the building and that he needed to use his remote garage door opener to gain entry via the vehicle entrance. (16:39). The only other entrance from outside the building was a locked door, (16:40), and the elevator from the basement to the apartments was only open to tenants as well, (16:41).

Upon making contact with him, the Defendant indicated to Officer DeJarlais that "he didn't believe [Officer DeJarlais] was an officer." According to his testimony, Officer DeJarlais then "actually physically removed [his] photo identification card from [his] wallet. Stuck it right up in front of his face to show that [he] was." At that time, the Defendant "finally believed [he was] an officer

and he stopped." (16:17). A few seconds later, Officer Joseph M. Lichucki arrived at the scene, (16:18), and entered the garage through the door that Officer DeJarlais had kept opened, (16:37). At no time during these events was Officer DeJarlais aware of whether the Defendant had any prior convictions for Operating While Intoxicated. (16:21).

CASE HISTORY

A criminal complaint charging the Defendant with Operating While Intoxicated, Second Offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)2, was filed in Waukesha County Case Number 2012-CT-508 on April 24, 2012. (1). An amended criminal complaint adding a charge of Operating With a Prohibited Alcohol Concentration, Second Offense, contrary to Wis. Stat. §§ 346.63(1)(b) and 346.65(2)(am)2 was filed on May 10, 2012. (5). The Defendant, by counsel, filed a Notice of Motion and Motion to Suppress Evidence on May 31, 2012, (6), and an evidentiary hearing on the motion was held on September 24, 2012, where the above-described testimony was given. The Circuit Court, the Honorable Donald J. Hassin, Jr., presiding, denied the motion on that date.

Characterizing the Defendant's position as that, "because he failed to follow the instructions of the officer throughout much of this, after having the officer make the observations he's testified on, is somehow to be rewarded because he made it to a safe haven," (16:43, App. 4), the Circuit Court noted that "the officer testified unequivocally that he identified himself as such," (16:44,

App. 5), and held that "the officer pursu[ed the Defendant] into a garage as a result of their observations and their reasonable belief that [the Defendant] was operating a motor vehicle under the influence of intoxicants." (16:48, App. 9). The Circuit Court further held that entering the underground parking garage was "akin to simply following someone to the driveway and making a stop incident to the premises of the house itself." (16:51-52, App. 12-13).

The Defendant filed a Motion to Reconsider that decision on January 10, 2013, (7), citing *State v. Christofferson*, 2012-AP-571, an unpublished Court of Appeals decision issued on October 30, 2012, (App. 17), in which this Court suppressed evidence obtained after an officer illegally entered that defendant's garage to investigate a driving complaint. That motion was initially argued on January 17, 2013. In light of the issues discussed on that date, the Circuit Court asked the State to file a memorandum of law. That memorandum was filed on January 25, 2013, (8), and on February 7, 2013, the Circuit Court, after hearing additional arguments, denied the Defendant's motion to reconsider, holding that the Defendant lacked the expectation of privacy in the underground parking garage that the defendant in *Christofferson* held in the garage attached to his house. (20:17-18, App. 14-15).

The Defendant entered a guilty plea on February 21, 2013 (see 9), and was sentenced on March 12, 2013. (See Judgment of Conviction, App. 1). He timely filed a Notice of Intent to Pursue Post-Conviction Relief on March 19, 2013, (12), and a Notice of Appeal on April 8, 2013, (14).

ARGUMENT

When reviewing a circuit court's denial of a motion to suppress evidence, this Court upholds a circuit court's findings of fact unless they are clearly erroneous. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344, 352, 766 N.W.2d 729, 733. However, because whether an entry constitutes a search, whether probable cause existed at the time of an entry, and whether exigent circumstances existed at the time of an entry are all questions of law, this Court reviews those rulings independently. *State v. Phillips*, 2009 WI App 179, ¶ 6, 322 Wis. 2d 576, 585, 778 N.W.2d 157, 161-62.

I. THE CIRCUIT COURT ERRONEOUSLY BASED ITS RULING ON WHETHER THE FOURTH AMENDMENT PROTECTED A LOCKED, PRIVATE UNDERGROUND PARKING GARAGE ON WHETHER THE DEFENDANT HELD A REASONABLE EXPECTATION OF PRIVACY IN THE AREA, RATHER THAN WHETHER OFFICER DeJARLAIS COMMITTED A TRESPASS.

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *United States v. Jones*, 132 S.Ct. 945, 949 (2012). The Circuit Court's denial of the Defendant's motion to suppress evidence was based entirely on its holding that the Defendant lacked an objectively reasonable expectation of privacy in the parking area underneath the apartment building. "I can't conceive of any circumstances where a tenant would think his interests are protected in a common area garage of 30 cars or 30 spaces." (20:18, App. 15). The "reasonable expectation of privacy" analysis has

certainly dominated Fourth Amendment jurisprudence over the last half-century, but, as Justice Prosser has acknowledged, the United States Supreme Court's decision in *United States v. Jones*, 132 S.Ct. 945 (2012), "unquestionably affirms the Court's continuing recognition of the Fourth Amendment's roots in property law and the Court's willingness to adhere to a property rationale . . . ." *State v. Felix*, 2012 WI 36, ¶ 102, 339 Wis. 2d 670, ¶ 102, 811 N.W.2d 775, ¶ 102 (concurrence).

In *Jones*, the Court rejected the Government's argument "that no search occurred [since the defendant] had no 'reasonable expectation of privacy' . . . ." 132 S.Ct. at 950. The Court stated, "But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id*. Instead, the Court held, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id*. at 952 (emphasis in original). Because the common-law trespassory test remains a legitimate test of whether an individual's Fourth Amendment rights have been violated, "when 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 133 S.Ct. 1409, 1414 (2013) (*quoting Jones* at 950-51, n.3). It is clear that, in the present case, Officer DeJarlais did just that.

In *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), the Wisconsin Supreme Court characterized "a common storage room of an apartment house" as

"clearly within the curtilage" of a tenant's home. *Id*. at 633, 218 N.W.2d at 261. The court was referring to its decision in *Watkins v. State*, 59 Wis. 2d 514, 208 N.W.2d 449 (1973), in which officers entered "the storage room in the basement of the defendant's apartment building." *Id*.

> The storage area was easily accessible to the public and passersby and apparently had in the past been used by persons other than tenants in the apartment building. The door to the storage room always stood open and only a few of the individual lockers within the room had their doors closed or padlocks on them. The incriminating evidence was observed on a chair beneath the utility meters and in a locker standing open nearby. This room was not for the exclusive use of the defendant and not even for the exclusive use of the tenants of the building.

Id. at 514, 208 N.W.2d at 449-50. The State discussed *Watkins* in its January 24, 2013, memorandum of law in support of its argument that the Fourth Amendment cannot be violated when a defendant lacks a subjective and objective expectation of privacy in the area being searched, implying that the State considers the area in the present case analogous to the area in *Watkins*. (8:2).

The court in *Watkins* held that the search in that case was legal because "[t]he defendant could harbor no expectation of privacy in this area," *id*., using language that alludes to Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), in which the United States Supreme Court established that a constitutional violation occurs when an officer violates a person's "reasonable expectation of privacy," *id*. at 360. The logic in *Watkins*, however, does not survive *Jones*. As discussed above, *Jones* makes clear that the "expectation of privacy" test is not the exclusive test. *Watkins* remains relevant, however, in that

the court held in *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), that the area described in *Watkins* did constitute curtilage.

The Defendant did argue before the Circuit Court that he had a greater expectation of privacy in the parking area than the defendant in *Watkins* had in the storage area. In addition, the Circuit Court's ruling was based on its rejection of this argument. But, as the Defendant argued in his motion to suppress evidence, the United States Supreme Court's decision in *Jones* makes it clear that a defendant's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." 132 S.Ct. at 950. The analysis that carried the day in *Jones* mirrors the analysis undertaken by the Sixth Circuit Court of Appeals in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976).

The court stated in that case, "we are of the view that *Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy." *Id*. at 549. As such, the court held that an arrest made after officers were able to gain "entry through a locked entrance as workmen were leaving the twelve unit apartment building" was invalid. *Id*. at 547. The court's analysis is worth repeating here.

> Doubtless a tenant's quarters in a rooming or apartment house are legally as well as practically exposed to lawful approach by a good many persons without his consent or control. Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped

> through the keyhole or climbed on a chair or on one another's shoulders to look through the transom, I should see no grounds on which the defendant could complain. If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.
>
> But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. . . . Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality.

Id. at 550.

In the present case, the parking area in the Defendant's apartment building constitutes protected curtilage, just like the storage area in *Watkins*. *See Conrad*, 63 Wis. 2d at 633, 218 N.W.2d at 261. Officer DeJarlais trespassed on the property when he followed the Defendant's vehicle into the building, and "encroached on a protected area." *See Jones*, 132 S.Ct. at 952. Without a warrant, this trespass, combined with "an attempt to find something or to obtain information," constitutes a violation of the Defendant's constitutional rights. *Id*. at 951 n.5.

II. THE WARRANTLESS TRESPASS COMMITTED BY OFFICER DeJARLAIS WAS COMMITTED WITHOUT PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES.

Because the Circuit Court held that the Defendant's lack of a reasonable expectation of privacy in the basement parking area precluded application of the

Fourth Amendment, the Circuit Court did not conduct a complete analysis of whether probable cause and exigent circumstances existed when Officer DeJarlais entered the area.

"A police officer's warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution." *State v. Hughes*, 2000 WI 24, ¶ 17, 233 Wis. 2d 280, 289, 607 N.W.2d 621, 626. One exception to this rule exists where the State can "show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." *Id*. at ¶ 17, 233 Wis. 2d at 290, 607 N.W.2d at 626. In the present case, neither probable cause nor exigent circumstances existed.

A. Probable Cause.

Officer DeJarlais clearly lacked the required level of probable cause to arrest the Defendant for committing a crime at any time prior to his entry into the garage. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Secrest*, 224 Wis. 2d 201, 212, 589 N.W.2d 387, 392 (1999) (citing *State v. Mitchell*, 167 Wis. 2d 672, 681, 482 N.W.2d 364, 367 (1992)).

Officer DeJarlais testified at the evidentiary hearing that, while "operating in [his] personally owned vehicle (after consuming two beers at the Brewer game)," he "had looked in [his] rearview mirror and [he] saw a vehicle coming up

from behind [him] at a very high rate of speed." (16:8). He further testified that the vehicle, later identified as the Defendant's, was tailgating other vehicles. Because he was not on duty, was not wearing a uniform, and was not driving a squad car, (16:8), the Defendant logically had no reason to believe that Officer DeJarlais was an officer, (*see* 16:17), and did not follow his instructions when Officer DeJarlais told him that he "needed to wait" until uniformed officers arrived, (16:12).

Officer DeJarlais also testified that, while stopped at this intersection, he "could tell his eyes were very sleepy looking and they had a sheen to them. They were kind of glassy." (16:13). Eventually, Officer DeJarlais followed the Defendant's vehicle to Riverwalk Apartments, where, according to his testimony, the Defendant "just kept driving around through this parking lot . . . ." (16:14). The Defendant eventually turned into the underground parking garage and properly parked in his spot. At this point, Officer DeJarlais parked his personal SUV so that his vehicle "was partially outside and the front end was inside." (16:15.). The officer did so in order to prevent the automated garage door from closing, which would of course enable other officers to enter the defendant's garage unfettered.

Even if these observations provided Officer Dejarlais with a reasonable suspicion that the Defendant was under the influence of an intoxicant, Officer DeJarlais lacked even a reasonable suspicion that the Defendant was committing a *crime* because he was not familiar with the Defendant's criminal record when he entered the parking area. (16:21). Operating While Intoxicated as a first offense is

not a crime. *See Welsh v. Wisconsin*, 446 U.S. 740, 746 n.6 (1984). Even if he had been aware of the Defendant's criminal record, Officer DeJarlais still lacked the level of probable cause necessary to arrest the Defendant when he entered the parking area. He had not observed bloodshot eyes. He did not smell the odor of intoxicants. He had not observed the Defendant's balance or coordination. He had not asked the Defendant to submit to any standardized field sobriety tests. He had not asked the Defendant to submit to a preliminary breath test. To enter the parking area, Officer DeJarlais needed to be able to arrest the Defendant immediately; he clearly was not able to do so.

B. Exigent Circumstances.

"[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 446 U.S. 740, 749-50 (1984). There are four categories of exigent circumstances: "1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee." *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 540-41, 612 N.W.2d 29, 37. None apply to the present case.

1. Hot Pursuit.

"Hot pursuit" occurs "where there is an 'immediate or continuous pursuit of [a suspect] from the scene of a crime.'" *State v. Smith*, 131 Wis. 2d 220, 232, 388 N.W.2d 601, 606 (1986) (quoting *Welsh*, 466 U.S. at 753)). "'Hot pursuit' means some sort of a chase . . . ." *United States v. Santana*, 427 U.S. 38, 42-43 (1976).

There was no chase in the present case; at best, Officer DeJarlais was merely following the Defendant. Officer DeJarlais did not initiate a traffic stop. Nor did Officer DeJarlais make any attempts to detain the Defendant or prevent him from driving home.

The Circuit Court did address this potential exigent circumstance, and rejected any suggestion that Officer DeJarlais was in hot pursuit of the Defendant's vehicle. "This is anything but a hot pursuit. I don't mean to suggest all hot pursuits include lights and sirens and speeding through urban or suburban or rural areas in a case because this case is anything but that. This is apparently a follow along investigative type case." (20:12). This finding is not clearly erroneous.

2. Threat to Safety.

Officer DeJarlais testified that, when he confronted the Defendant inside the parking area, "He had already walked away from his vehicle . . . ." (16:23). The Defendant had parked properly in a parking space, and did not appear to have struck anything while driving. (16:23). There clearly was no threat to anyone's safety at that point.

3. Destruction of Evidence.

In *Welsh v. Wisconsin*, the United States Supreme Court indicated that it was particularly hesitant to find exigent circumstances "when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on

the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." 446 U.S. 740, 750 (1984). The Court held that "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.

The minor offense examined in *Welsh*, of course, was operating while intoxicated, which, the Court stressed, "[t]he State of Wisconsin has chosen to classify . . . as a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id*. at 754. The Court held that, "[g]iven this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. To allow a warrantless home *entry* on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction." *Id*. (emphasis added).

Just like the officers in *Welsh*, Officer DeJarlais "did not know that the [Defendant] had ever been charged with, or much less convicted of, a prior violation for driving while intoxicated. It must be assumed, therefore, that . . . police were acting as if they were investigating and eventually arresting for a nonjailable traffic offense . . . ." *Id*. at 746 n.6. To the extent that Officer DeJarlais had reason to believe that the Defendant's blood-alcohol level had any evidentiary value, concern that his blood-alcohol level would dissipate was not sufficient to

justify his warrantless entry into the parking area, given that Officer DeJarlais had no information indicating that he was investigating a jailable offense. (16:21).

4. Likelihood of Fleeing.

There was no likelihood that the Defendant, having driven to his apartment after 11:30 PM, would then proceed to attempt to flee the building. Furthermore, there is no likelihood, were he to so attempt, that the Defendant would have been able to do so successfully. Officer DeJarlais testified that he had been in contact with dispatchers even before he and the Defendant were stopped at the intersection. (16:11). The officers on their way would have been able to establish a perimeter around the building, seal any exits, and either attempt to procure a warrant allowing them to enter the building to arrest the Defendant or wait for the Defendant to attempt to leave and approach him then. Because the Defendant did not believe that Officer DeJarlais was an officer, (*see* 16:17), there was no reason for Officer DeJarlais to believe that the Defendant would attempt any unusual or dangerous acts in an attempt to evade capture.

CONCLUSION

The Circuit Court's analysis of the Fourth Amendment issues in the present case erroneously focused exclusively on the *Katz* test, which resulted in the Court ending its analysis of whether the underground parking garage in the present was a protected area after ruling that the Defendant lacked a reasonable expectation of privacy in the area. By limiting its analysis in this manner, the Circuit Court failed

to consider whether the trespass-focused test revalidated in *Jones* protected the area from warrantless entry by Officer DeJarlais.

By so limiting its analysis, the Circuit Court also restricted itself from analyzing whether probable cause and exigent circumstances permitted the warrantless entry. Because Officer DeJarlais lacked probable cause to arrest the Defendant for a criminal offense, and none of the oft-enumerated exigent circumstances were present, his failure to obtain a warrant prior to entering the garage violated the Defendant's rights under the Fourth Amendment. As such, the Defendant respectfully requests that this Court reverse the Circuit Court's denial of his Motion to Suppress Evidence, and remand this case for further proceedings consistent with such an reversal.

Dated this 23rd day of September, 2013.

Respectfully submitted,

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CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,370 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19 (12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 23rd day of September, 2013.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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.

Dated this 23rd day of September, 2013.

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