STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2013AP000857

Waukesha County Circuit Court
Case No. 2012CT508

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRETT W. DUMSTREY,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence by the Honorable Donald J. Hassin, Jr., Circuit Judge, Branch 9, Waukesha County

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Brief of the Plaintiff-Respondent

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STATEMENT ON ORAL ARGUMENT

Plaintiff-respondent, the State of Wisconsin, does not request oral argument unless deemed appropriate under Wis. Stat. § 809.22.

STATEMENT ON PUBLICATION

Publication is requested by the State of Wisconsin if deemed appropriate under Wis. Stat. § 809.23. The issue presented regarding the application of trespass to alleged Fourth Amendment violations will likely enunciate a new rule of law or modify, clarify, or criticize an existing rule. The factual situation presented is also significantly different from published decisions and any decision will have a substantial and continuing public interest. It does not appear that the ruling presented in United States v. Jones, 132 S.Ct. 945 (2012) has been applied in Wisconsin, nor to the specific facts of this case; whether a large underground parking garage is protected under the Fourth Amendment.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WITH THE APPROPRIATE ANALYSIS

A. Standard of Review

The State agrees with the defendant's analysis on the appropriate standard of review with exception to reviewing what is curtilage. Curtilage determination is a mixed question of law and fact and subject to a two-step standard of review. State v. Martwick, 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552.

B. Fourth Amendment Relevant Law

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and the United States Supreme Court held that a two part test is necessary when determining whether an illegal search or seizure occurred. See generally United States v. Jones, 132 S.Ct. 945 (2012). For a warrantless search to be legal, the court must find that a defendant did not have a reasonable expectation privacy and that a common trespass did not occur. Id. at 952. The court emphasized that it is a "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Id. at 949. In Jones, the government attached a GPS tracker to the bottom of the defendant's car in a public parking lot. Id. at 948. The court determined a common

law trespass had occurred on an "effect" (the defendant's car) and therefore the defendant's Fourth Amendment rights against unreasonable searches and seizures had been violated. Id. at 946. The court did not address the "reasonable expectation of privacy" concerns because, "Fourth Amendment rights do not rise or fall with the Katz formulation." Id. at 950 (citing generally Katz v. United States, 389 U.S. 347 (1967)). The court reasoned that the "Katz reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test." Id. at 952.

In Katz, telephone conversations were overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the calls had been placed and the court ruled this was a violation of privacy and therefore the petitioner's Fourth Amendment rights. See generally Katz. The court did, however, make specifically clear that the Fourth Amendment "protects people, not places," and, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id. at 351. The court also noted that the trespass doctrine can no longer be regarded as controlling. Id. at 353.

The Wisconsin Supreme Court reiterated the reasoning in Katz in Conrad v. State where the court held that though the sheriff committed a trespass by digging on the defendant's land, the evidence was admissible

because it was found in open fields approximately 450 feet away from the defendant's house. See generally Conrad v. State, 63 Wis.2d 616, 218 N.W.2d 252 (1974). The court concluded that Fourth Amendment protections are afforded when subjective intent to exercise a reasonable expectation of privacy is exhibited as well as with commonly accepted protected areas, such as a home and the curtilage surrounding the home. Id. at 627. In so doing the court stated that "an open field remains beyond the ambit of the Fourth Amendment's protection." Id. at 628. It is also important to note the court touched on curtilage specifically in relation to Fourth Amendment protections by stating that "where there is demonstrated a reasonable expectation of privacy, there can be no search in the curtilage except upon warrant issued upon probable cause." Id. at 634.

In Conrad the court touched on their earlier opinion in Watkins v. State, in which incriminating evidence was observed by officers in the storage room in the basement of the defendant's apartment building without a warrant. Watkins, 59 Wis.2d 514, 208 N.W.2d 449 (1973). The court reasoned the defendant could "harbor no expectation of privacy in this area" because the room was not for the exclusive use of the defendant and thus the search and seizure of the incriminating evidence was reasonable. Id. at 514-15. It should also be noted, however, that the court

in Conrad stated that their earlier opinion in Watkins was that this storage room was "clearly within the curtilage," of the tenants home. Conrad at 633. The two opinions indicate the importance of the reasonable expectation of privacy test in determining whether a search can occur in curtilage.

Further, the court in Jones stated that the holding of Oliver v. United States (that there was not an illegal search and seizure) did not apply because the disputed entrance onto property in Oliver occurred on non-curtilage land and not on an "effect" of the defendant. Jones at 953 (citing generally Oliver v United States, 466 U.S. 170 (1984)). In Oliver police went to the farm of the petitioner to investigate allegations of marijuana being grown in fields. Upon arriving at the farm, they drove past the petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate and the agents walked around the gate and along the road for several hundred yards when someone standing in front of a camper shouted: "No hunting is allowed, come back up here." The officers found no one when they returned to the camper and resumed their investigation of the farm and found a field of marijuana over a mile from the petitioner's home. Oliver at 173. The court reiterated non-curtilage land is not protected by the Fourth Amendment and an

entrance onto non-curtilage land is not a trespass for Fourth Amendment purposes. Jones at 953; citing Oliver at 183.

In determining whether a trespass occurred on property, it is necessary to determine if the property is curtilage of a residence, and if not, the Oliver holding, as stated in Jones, is applicable and a trespass has not occurred. Jones at 953. The Seventh Circuit Court of Appeals addressed this issue in Harney v. City of Chicago, in which the police arrested the defendant in the walkway outside of his apartment complex. Harney v. City of Chicago, 702 F.3d. 916, 925 (7th Cir. 2012). The defendant claimed that this violated his Fourth Amendment rights and the court disagreed, stating that even though the walk-way was gated and partly obscured from public view, the walkway was common to the apartment and therefore there was no reasonable expectation of privacy. Id. The language of "reasonable expectation of privacy" was used in determining curtilage and whether a trespass occurred. Id.

C. Determination of Curtilage Relevant Law

In California v. Ciraolo, the U.S. Supreme Court stated that curtilage "is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." California v. Ciraolo, 476 U.S. 207, 212 (1986). The court emphasized that curtilage is "essentially a protection of families and personal privacy in an area

intimately linked to the home, both physically and psychologically, where privacy expectations are heightened." Id. at 213. Again, indicating that expectation of privacy is a major factor in determining curtilage.

There are four factors in determining curtilage: the proximity of the claimed area to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses of the area, and steps taken by the resident to protect the area from the observations of passersby. United States v. Dunn, 480 U.S. 294, 301 (1987). In applying this to multi-family dwellings, courts have consistently found that curtilage is much narrower, as reasonable expectations of privacy decrease in urban, multi-family areas. See generally United States v. Redmon, 138 F.3d 1109 (7th Cir. 1998); United States v. Cruz Pagan, 537 F.2d 554 (1st Cir. 1979); United States v. Stanley, 597 F.2d 866 (4th Cir. 1979).

In Redmon, the court stated that in a multi-unit apartment complex, "there may in fact be no curtilage except perhaps in a separate area - like a basement storage locker – subject to one's exclusive control." Redmon at 1128. In Cruz Pagan the court similarly held that in a multi-family apartment complex curtilage "cannot reasonably be said to extend beyond [their] own apartment or perhaps any separate areas subject to [their] exclusive control." Cruz Pagan at 557-58. This was applied in United States v. Holland, in which the Second Circuit determined that shared

areas, such as apartment lobbies, are not curtilage even if it is guarded by locked doors. Holland, 755 F.2d. 253, 255 (2nd Cir. 1985).

Wisconsin has also adopted the Dunn factors in determining if an area is curtilage and therefore protected under the Fourth Amendment. See generally State v. Martwick, 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552; State v. Artic, 2010 WI 83, 327 Wis. 2d 392, 768 N.W.2d 430; State v. Davis, 2011 WI App 74, 333 Wis. 2d 490, 798 N.W.2d 902. Martwick involved a 1.52 acre property that was not a farm with a home and ginseng sheds, Artic involved a single residence, and Davis involved a single residence with an attached garage; none of which have similar facts to this case. Id.

State v. Trecroci will likely provide some guidance. See generally State v. Trecroci, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555. Trecroci involved a two-story residence subdivided into two apartments with an attic located above the second floor. Id. at ¶ 3. The court determined the defendants had a reasonable expectation of privacy in the stairway and that it was not a "common area." Id. at ¶ 1. What is important to note is the court realized case law is lacking in Wisconsin on the issue of Fourth Amendment protections in common areas of multi-unit dwellings. Id. at ¶ 27. Also, the court notes numerous cases from other jurisdictions exist and that the level of protection afforded by the Fourth

Amendment differs in larger apartment complexes than in duplexes or smaller dwellings. Id. at ¶ 27, ¶ 30.

D. The Large Underground Parking Garage of the Defendant is Not Curtilage and Therefore Officer DeJarlais Did Not Violate His Fourth Amendment Rights.

The Defendant asserts the circuit court addressed only his reasonable expectation of privacy and not whether a common law trespass occurred. As discussed previously, a trespass in this case can be determined by whether the area in question is curtilage and reasonable expectation of privacy is part of the analysis. City of Chicago at 925. The circuit court did address whether the parking garage in this case is curtilage under the Fourth Amendment. (R 20: 17-18; R-Ap. 20-21). The circuit court determined the parking garage is not curtilage and the defendant's Fourth Amendment rights do not extend to the parking garage because it is a common area. (R 20: 17-18; R-Ap. 20-21). Though the circuit court mainly focused on expectation of privacy, this is a factor in determining curtilage, and thus, if a trespass occurred.

The Defendant also asserts the large underground parking garage in this case is protected curtilage by simply stating it is similar to the storage area in Watkins without any supporting argument. The apartment

complex of the Defendant contained approximately five or six buildings with approximately thirty apartments in each building. (R 16:26; R-Ap. 15). More than one parking garage was a part of the complex and each one contained approximately thirty stalls. (R 16:26; R-Ap. 15). This is quite different than a basement storage area as was the case in Watkins, which was decided before Dunn, and is not supported by the factors enumerated in Dunn.

When reviewing the four factors in determining curtilage as stated in Dunn it is clear the large underground parking garage in this case is not curtilage. The Defendant had to enter another hallway and take an elevator to get to his apartment from the underground parking garage, indicating the garage is not in close proximity to his apartment. (R 16:40-41; R-Ap. 16-17). The large underground parking garage is not included within an enclosure surrounding the Defendant's apartment as they are in two separate locations. (R 16:40-41; R-Ap. 16-17). The Defendant only used the large underground parking garage for parking his vehicle, as did other tenants, and was not used for storage. (R 16:42; R-Ap. 18). Finally, there does not appear to be any evidence that any steps were taken by the Defendant to protect the large underground parking garage from observations of passersby. Other important factors to note are that the apartment complex does not have any gates preventing people from

getting into the complex, (R 16:19; R-Ap. 12), Officer DeJarlais did not know the Defendant lived in the apartment complex (R16:23; R-Ap. 14), and when the Defendant initially turned into the apartment complex he attempted to lose Officer DeJarlais by driving around a parking lot before eventually proceeding to the large underground parking garage. (R 16:14; R-Ap. 7).

A parking garage shared by numerous tenants is clearly not within the Defendant's exclusive control, nor is it protected curtilage, despite controlled access by a garage door opener. The circuit court was correct in assessing that any given tenant does not have a reasonable expectation of privacy in a parking garage shared by approximately thirty other households because curtilage in multi-family apartment complexes is narrow.

Further, unlike in Jones, the present case does not involve any possible trespass onto an "effect" of the Defendant. Jones at 953. Officer DeJarlais parked his vehicle in a position so the overhead garage would not close, exited his vehicle and approached the Defendant who was still in his vehicle, and spoke with the Defendant upon reaching him as he exited his vehicle. (R 16:15-18; R-Ap. 8-11). There is no evidence that Officer DeJarlais placed anything on or into the Defendant's vehicle, nor is there any evidence Officer DeJarlais ever entered the Defendant's

vehicle, apartment, or any space that is not a common area for the apartment tenants. These facts are similar to those of Oliver because the disputed entrance onto the property in this case, the large underground parking garage, occurred on non-curtilage land and not on an "effect" of the Defendant. Oliver at 953.

Because there is no reasonable expectation of privacy in the large underground parking garage, nor is it protected curtilage, entering the large underground parking garage was not a trespass and the Defendant's Fourth Amendment rights were not violated.

II. OFFICER DEJARLAIS ENTERED THE LARGE UNDERGROUND PARKING GARAGE BASED ON PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES EXISTED AT THAT TIME

A. Relevant Law

Warrantless entry into private residences is presumptively prohibited; however, exceptions exist based upon probable cause and exigent circumstances. See generally State v. Hughes, 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621. Four exigent circumstances were outlined in State v. Smith to allow a warrantless entry by officers as follows: (1) an arrest made in "hot pursuit," (2) a threat to 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. Smith, 131 Wis. 2d 220, 229, 388 N.W.2d 601, 605 (1986).

B. Probable Cause

Probable cause "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, 482 N.W.2d 364, 367 (1992)). Officer DeJarlais had probable cause to arrest the Defendant for Resisting or Obstructing an Officer contrary to Wisconsin Statute §946.41 as well as Failure to Obey Traffic Officer/Signal contrary to Wisconsin Statute §346.04(2t) prior to the Defendant entering the large underground parking garage.

To commit the crime of Resisting or Obstructing an Officer one must knowingly resist or obstruct an officer while such officer is doing any act in an official capacity and with lawful authority. (Wis. Stat. § 946.41 (2011)). Resisting or Obstructing an Officer is punishable by a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. (Wis. Stat. § 939.51(3)(a) (2011)). To commit the crime of Failure to Obey Traffic Officer/Signal one must knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety

reasonably permits after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle. (Wis. Stat. § 346.04(2t) (2011)) Failure to Obey Traffic Officer/Signal is punishable by a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. (Wis. Stat. § 346.17(2t) (2011)).

Officer DeJarlais was off-duty, in plain clothes, and on his way home from a Brewer's game in his personal vehicle when he saw a vehicle coming up from behind him at a very high rate of speed. (R 16:8, 11; R-Ap. 1, 4). The vehicle then passed him and proceeded to tailgate another vehicle after it passed Officer DeJarlais. (R 16:9; R-Ap. 2). The vehicle, later identified as the Defendant, then proceeded to alternate between tailgating Officer DeJarlais and another vehicle until it stopped at a red light at the intersection of North St. and St. Paul Avenue after passing them both. (R 16:10; R-Ap. 3). Officer DeJarlais then pulled next to the Defendant, made contact with him, identified himself as a City of Waukesha Police Officer by showing his badge and photo identification card, and told the Defendant he need to wait there as he contacted the police about his driving. (R 16:11-12; R-Ap. 4-5). Officer DeJarlais then observed signs of possible intoxication on the Defendant such as sleepy looking and glassy eyes. (R16:13; R-Ap. 6). The Defendant instead just stared at Officer DeJarlais after being told twice to pull over. (R 16:13; R-

Ap. 6). The light turned green and Officer DeJarlais went through the intersection and pulled over to the right side of the road onto Wisconsin Avenue where the Defendant eventually pulled along side of him, in the middle of the traffic lane. (R 16:13; R-Ap. 6). Officer DeJarlais again told the Defendant to wait there because the police were coming, but the Defendant instead proceeded to travel to the Riverwalk Apartments. (R 16:14; R-Ap. 7). Officer DeJarlais then followed the Defendant and he tried to lose him in parking lot before entering the large underground parking garage. (R 16:14; R-Ap. 7). Officer DeJarlais did not see the Defendant operate the garage door to the parking garage, but only assumed he did so. (R 16:20; R-Ap. 13).

By not stopping and pulling over on the roadway after being told numerous times to do so by Officer DeJarlais, the Defendant committed Resisting or Obstructing an Officer as well as Failure to Obey Traffic Officer/Signal. The Defendant knowingly obstructed Officer DeJarlais by not stopping or pulling over after being told to do so by Officer DeJarlais. This was after Officer DeJarlais identified himself verbally and with his badge and photo identification. These same facts constitute Failure to Obey Traffic Officer/Signal as the Defendant did not stop his vehicle after being told to do so by Officer DeJarlais.

The Defendant asserts he had no reason to believe Officer DeJarlais was, in fact, an officer and therefore could disregard his instructions. The record does not support this assertion, and even if it did, it is a question of fact for the jury to decide.

C. Exigent Circumstances

The circuit court considered hot pursuit and found the actions of Officer DeJarlais and the Defendant did not constitute hot pursuit. (R 20:12; R-Ap. 19). The circuit court noted, however, that not all hot pursuits require a high speed chase or lights and sirens. (R 20:12; R-Ap. 19). Hot pursuit does not have to include a high speed chase, only "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 v. Wisconsin, 466 U.S. 740, 753 (1984)). Officer DeJarlais immediately and continuously followed the Defendant after he failed to stop or pull over after being told to do so.

The Defendant asserts that since he properly parked his vehicle and did not strike anything while driving that he was not a threat to the safety of others. The evidence suggests the opposite. The Defendant was driving erratically, driving at a high rate of speed, stopping in the middle of the road, and tailgating numerous vehicles. The possibility of the Defendant injuring himself or others on the roadway continued the entire

time he was in his vehicle and Officer DeJarlais had now way of knowing the Defendant would just park his vehicle and return to his apartment.

The Defendant again asserts that because he made it to his large underground parking garage that he was not likely to attempt to flee. Again, the evidence suggests otherwise. The Defendant did not stop on multiple occasions after being told to do so by Officer DeJarlais and, in fact, did flee from Officer DeJarlais. The likelihood of the Defendant continuing to flee was great since he did not stop after being told to do so on multiple occasions only moments prior to reaching his large underground parking garage. Further, Officer DeJarlais did not know the Defendant lived at that location or if he was the one opening the door to the large underground parking garage.

CONCLUSION

For all the reasons stated above, the State respectfully requests the Court affirm the circuit court's decision and deny the Defendant's motion. The circuit court used the appropriate analysis in determining if the large underground parking garage entered by the Defendant is protected by the Fourth Amendment. In the alternative, Officer DeJarlais had probable cause to arrest the Defendant at the time he entered the large underground parking garage and exigent circumstances existed at that time.

Dated this 20th day of December, 2013.

Respectfully Submitted,

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Waukesha County
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CERTIFICATION

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with a proportional serif font. The length of this brief is 4,265 words long.

Dated this 20th day of December, 2013.

Bryan C. Bayer
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby 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). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 20th day of December, 2013.

_____
Bryan C. Bayer
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CERTIFICATION AS TO SUPPLEMENTAL APPENDIX (Wis. Stat. § 809.19(2)(b)).

I hereby certify that the supplemental appendix conforms to the rules contained in Wis. Stat. § 809.19(2)(b) and complies with the confidentiality requirement.

I further certify that I have submitted an electronic copy of this supplemental appendix which complies with the requirements of Wis. Stat. § (Rule) 809.19(13) and that the content of the electronic copy of the supplemental appendix is identical to the content of the paper copy of the supplemental appendix.

Dated this 20th day of December, 2013.

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