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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 REPLY BRIEF

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I. CURTILAGE.

The State's brief confuses the issues of whether an area constitutes curtilage and whether an individual holds a "reasonable expectation of privacy" in that area. This confusion is best exemplified by the State's interpretation of *Harney v. City of Chicago*, 702 F.3d 916 (7th Cir. 2012). The Defendant agrees with the State that, "[i]n determining whether a trespass occurred on property, it is necessary to determine [whether] the property is curtilage . . . ." (State's Br. 6). The Defendant disagrees with the State's assertion that "[t]he Seventh Circuit Court of Appeals addressed this issue in *Harney v. City of Chicago* . . . ." (State's Br. 6). The State asserts in its brief that the individual arrested in that case claimed that his arrest in a walkway outside of his apartment complex "violated his Fourth Amendments rights and the court disagreed, stating that even though the walk-way [sic] was gated and partly obscured from public view, the walkway was common to the apartment and therefore there was no reasonable expectation of privacy." (State's Br. 6).

It is true that the court in *Harney* indicated that "the record does reveal that the area of Harney's arrest was in an area shared by all of the tenants of the condominium building," 702 F.3d at 925, and further noted that, "[a]bsent certain particular facts not alleged here, there is no reasonable expectation of privacy in common areas of multiple dwelling buildings," *id*. The absence of a reasonable expectation of privacy, however, did not prevent the court from simultaneously

recognizing that "the proximity of the area of Harney's arrest to the condominium building and the fact that it occurred behind a gate may support a finding that this area fell within the curtilage of the condominium building . . . ." *Id*. at 924. In other words, the court held that the area *could* constitute curtilage, despite the lack of a reasonable expectation of privacy. The State further asserts that "[t]he language of 'reasonable expectation of privacy' was used in determining curtilage and whether a trespass occurred." (State's Br. 6). This is false. In fact, the phrase "reasonable expectation of privacy" does not appear in the *Harney* decision until after the court has completed its discussion of curtilage. *See id*. at 925.

In other words, the State's assertion that "expectation of privacy is a major factor in determining curtilage" (State's Br. 7) is simply incorrect. The State demonstrates this in its brief by immediately listing the four factors that the United States Supreme Court described in *United States v. Dunn*, 480 U.S. 294 (1987), as meriting consideration when determining whether an area constitutes curtilage. (State's Br. 7). An "expectation of privacy" is not one of the four factors listed. The State immediately follows that listing with an assertion that "courts have consistently found that curtilage is much narrower, as reasonable expectations of privacy decrease in urban, multi-family areas," (State's Br. 7), implying that a reasonable expectation of privacy is one of the four factors listed in *Dunn*. The State cites three cases in support of that assertion that, as it turns out, explicitly distinguish between the two concepts.

In *United States v. Redmon*, 138 F.3d 1109 (7th Cir. 1998), the court characterized the defendant's arguments as follows: "First, it is claimed that the garbage cans were located within the curtilage of Redmon's residence. . . . Thirdly, it is claimed that Redmon had a 'reasonable expectation of privacy in the contents of his garbage cans.'" *Id*. at 1111. That court correctly identified the two arguments as distinct. In *United States v. Cruz Pagan*, 537 F.2d 554 (1st Cir. 1979), the court recognized that "[w]hether or not the agents' entry was a technical trespass is not the relevant inquiry" when determining "whether the agents' entry into the garage defeated the reasonable expectation of privacy of any of the appellants." *Id*. at 557, 558. Finally, neither the phrase "reasonable expectation" nor even the word "privacy" appear in the decision in *United States v. Stanley*, 597 F.2d 866 (4th Cir. 1979).

The State also discusses *State v. Trecroci*, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555, indicating that the decision in that case "will likely provide some guidance." (State's Br. 8). But *Trecroci* contains no discussion whatsoever of curtilage. In fact, while the defendants in that case challenged "each sequential step of the police procedure, starting with the entry into the curtilage of Trecroci's backyard and ending with the search of Trecroci's apartment" in the circuit court, *id*. ¶ 12, 246 Wis. 2d at 271, 630 N.W.2d at 560, "[t]he trial court's opinion did not discuss the first two levels of the police conduct – the entries into the backyard and the enclosed porch," *id*. ¶ 24, 246 Wis. 2d at 276, 630 N.W.2d at 562, and the court of appeals declared, "We begin our analysis at the same point . . . ," *id*. ¶ 25,

246 Wis. 2d at 276, 630 N.W.2d at 563. Contrary to the State's assertion, the court did not "realize[] case law is lacking in Wisconsin on the issue of Fourth Amendment protections in common areas of multi-unit dwellings." (State's Br. 8). Rather, the court noted that case law is lacking in Wisconsin on the issue of whether a *reasonable expectation of privacy* exists in such areas. *Trecroci*, ¶ 27, 246 Wis. 2d at 277, 630 N.W.2d at 563. The State's brief discusses *Trecroci* in support of its argument on a topic that the *Trecroci* court explicitly declined to address.

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. It simultaneously noted that "the extension of the *Katz* rule permits inroads upon the protection of the curtilage unless there is a subjective demonstration of a reasonable expectation of privacy." *Id*. The defendant in *Watkins v. State*, 59 Wis. 2d 514, 208 N.W.2d 449 (1973), lacked a reasonable expectation of privacy in the storage area of his apartment building, but the storage area nevertheless constituted curtilage. Even if the Defendant in the present case lacked a reasonable expectation of privacy in the parking area, the parking area nevertheless constitutes curtilage.

The State acknowledges the United States Supreme Court's holding in *United States v. Jones* that "Fourth Amendment rights do not rise or fall with the *Katz* formulation," 132 S.Ct. 945, 950 (2012), but the State's analysis implies the

opposite by assuming that curtilage cannot exist without a reasonable expectation of privacy. The State assumes this in the face of the very cases that it cites, which properly recognize the important distinction between the two concepts. The State then argues that "the garage is not in close proximity to [the Defendant's] apartment," and that the garage "is not included within an enclosure surrounding the Defendant's apartment." (State's Br. 10). But the circuit court made it clear to the State at the very evidentiary hearing when the Defendant testified that the Defendant "testified he pays for a parking spot in the basement of this apartment building," and that "[y]ou have to live there to use the elevator." (16:41). The State also asserts that the garage was only used "for parking his vehicle . . . and was not used for storage." (State's Br. 10). Parking is storage. Finally, the State argues that there were no "step taken by the Defendant to protect the large underground parking garage from observations of passersby." (State's Br. 10). But the garage is *underground*, only accessible to tenants (19:12), and requires a remote control to enter (19:7).

II. WARRANTLESS ENTRY.

Because the underground private parking area constitutes protected curtilage, Officer DeJarlais could not enter without probable cause and exigency. Neither existed in the present case.

A. Probable Cause.

The State does not assert that Officer DeJarlais had probable cause to arrest the Defendant for Operating a Motor Vehicle While Intoxicated when he

conducted his warrantless entry into the parking area. Instead, the State now asserts that probable cause existed to arrest the Defendant for "Resisting or Obstructing an Officer," a violation of Wis. Stat. § 946.41, and "Failure to Obey Traffic Officer / Signal," a violation of Wis. Stat. § 346.04(2t). Probable cause did not exist to arrest the Defendant for any of these three offenses.

All three offenses include as a required element that the Defendant know that he is interacting with an officer. *See* WIS JI-CRIMINAL 1765 ("The defendant knew that (officer) was an officer"); WIS JI-CRIMINAL 1766 ("The defendant knew that (officer) was an officer"); WIS JI-CRIMINAL 2632 ("The defendant knowingly resisted the traffic officer"). The State asserts that Officer DeJarlais "identified himself as a City of Waukesha Police Officer by showing his badge and photo identification card," (State's Br. 14), but does not assert, and cannot assert, that the Defendant knew that he was interacting with an officer. All of the evidence indicates the contrary. As the State admits, Officer DeJarlais "was off-duty, in plain clothes, and on his way home from a Brewer's [sic] game." (State's Br. 14). The Defendant did not acknowledge understanding that Officer DeJarlais was an officer, and "instead just stared at Officer DeJarlais after being told twice to pull over." (State's Br. 14). Furthermore, Officer DeJarlais answered "Yes" when asked by the State whether the Defendant stopped "once he finally believed you that you were an officer." (16:17).

Finally, Officer DeJarlais's statements to the Defendant made clear to the Defendant that Officer DeJarlais was not an officer, or at least not acting as an

officer at the time. Officer DeJarlais testified that, while stopped next to the Defendant at a red light, he told the Defendant that he "was on the phone with the police and that he needed to wait here, that the police were coming . . . ." (16:12), and the State acknowledges in its brief that Officer DeJarlais "told the Defendant he need [sic] to wait there as he contacted the police . . ." (State's Br. 14). An individual who is acting in an official capacity as a police officer does not indicate that he is "on the phone with the police" or that "the police were coming;" such an individual *is* police. The only legitimate interpretation of a statement that "the police were coming" is that the police had not arrived yet. Officer DeJarlais was present at the time; therefore, he was not police.

1. Resisting an Officer.

The State conducts no analysis of how the facts it alleges constitute this offense. The first element of this offense requires proof that "[t]he defendant resisted an officer." This element requires that "the resistance must be active and direct towards" the officer. *State v. Welch*, 37 Wis. 196, 202 (1875). But the Defendant clearly did not have any direct or active contact with Officer DeJarlais at any time, and did not "oppose by direct, active and quasi-forcible means." *Id.* at 201.

Nor was Officer DeJarlais "doing an act in an official capacity," the second element of the offense. Officer DeJarlais was off-duty, in plain clothes, in his personal vehicle, and had been drinking earlier in the evening. Officers "act in an official capacity when they perform duties that they are employed to perform."

WIS JI-CRIMINAL 1765. An officer is not employed to advise individual "to wait there as he contacted the police." (State's Br. 14). Finally, the State cites no authority, and attempts no discussion, in support of an argument that Officer DeJarlais had the lawful authority, while off-duty, in plain clothes, and operating his personal vehicle after consuming intoxicants, to order the Defendant to "to wait there as he contacted the police." (State's Br. 14).

As discussed above, the Defendant could not be expected to know that he was interacting with, let alone resisting, an officer acting in an official capacity with lawful authority.

2. Obstructing an Officer.

The State conducts no analysis of how the facts it alleges constitute this offense. The first element of this offense requires proof that "[t]he defendant obstructed an officer," meaning that "the conduct of the defendant prevent[ed] or ma[de] more difficult the performance of the officer's duties." WIS JI-CRIMINAL 1766. But, again, the State does not identify what duty Officer DeJarlais had that the Defendant's conduct made more difficult. Officer DeJarlais had no duties at the time; he was *off-duty*. He clearly had no duty to detain the Defendant, given his lack of uniform, equipment, firearm, or vehicle. If Officer DeJarlais had a duty to contact on-duty officers regarding the Defendant's driving, the Defendant's conduct did not make that duty more difficult; the State does not argue that Officer DeJarlais was ineffective or was thwarted in his attempt to place a phone call.

As discussed above, Officer DeJarlais also was not doing an act in an official capacity or with lawful authority. Nor could the Defendant be expected to know that he was interacting with, let alone obstructing, an officer acting in an official capacity with lawful authority.

3. Resisting an Officer by Failing to Stop.

The Defendant concedes that he operated a motor vehicle on a highway, the first element of this offense. The second element of this offense is that "[t]he defendant received a visual or audible signal to stop [his] vehicle from a [traffic officer.]" WIS JI-CRIMINAL 2632. The State, by asserting that the Defendant committed this offense when he "did not stop his vehicle after being told to do so by Officer DeJarlais" (State's Br. 15), implies that Officer DeJarlais's spoken orders constitute an "audible signal." It does not.

The Wisconsin Supreme Court has held that an emergency vehicle proceeding through a red stop signal must "given an audible signal, which the statute defines as 'a siren or exhaust whistle.'" *Brown v. Acuity*, 2013 WI 60, ¶ 46, 348 Wis. 2d 603, 625, 833 N.W.2d 96, 107 (citing Wis. Stat. § 346.03(3)). The same definition should be applied to the term "audible signal" as used in Wis. Stat. § 346.04, as both statutes regulate operation of a motor vehicle in deference to emergency vehicles. Furthermore, another subsection of the same statute reads, "No person shall fail or refuse to comply with any lawful order, signal or direction

of a traffic officer." Wis. Stat. § 346.04(1).[1] This subsection would not list both "order" and "signal" if a traffic officer's verbal order also constituted a signal; the use of both terms would be redundant.

As discussed above, the Defendant could not be expected to know that he was interacting with, let alone resisting, a traffic officer.

B. Exigent Circumstances.

The State does not assert in its brief that the warrantless entry was justified by a risk that evidence would be destroyed. The State's analysis of the other three categories of exigent circumstances, *see State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 540-41, 612 N.W.2d 29, 37, is flawed.

The State correctly notes, "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's Br. 16)(*quoting State v. Smith*, 131 Wis. 2d 220, 232, 388 N.W.2d 601, 606 (1986)). The State then notes that "Officer DeJarlais immediately and continuously followed the Defendant . . . ." (State's Br. 16.) It is clear that, as much as the State would have preferred to describe the present case with language mirroring the language in *Smith*, the State clearly knew that it could not assert that "Officer DeJarlais immediately and continuously *pursued* the

[1] An individual who commits a violation of Wis. Stat. § 346.04(1) "may be required to forfeit not less than $20 nor more than $40 for the first offense and not less than $50 nor more than $100 for the 2nd or subsequent conviction within a year." Wis. Stat. § 346.17(1). Such a violation, therefore, does not constitute a criminal offense, and does not support a warrantless entry. *See Welsh v. Wisconsin*, 446 U.S. 740 (1984).

Defendant," since no "pursuit" occurred. There was no chase; at best, Officer DeJarlais was merely following the Defendant.

The State focuses its analysis of the potential threat to the safety of the Defendant or others and the likelihood that the Defendant would flee on the events that preceded the warrantless entry. However, the proper focus of an analysis of these categories is the facts in existence at the time of the warrantless entry. Even if, as the State asserts, "[t]he possibility of the Defendant injuring himself or others on the roadway continued the entire time he was in his vehicle," (State's Br. 16-17), that possibility dissipated as soon as the Defendant entered the parking area and parked his vehicle. Similarly, even if, as the State asserts, the Defendant "did not stop . . . prior to reaching his large underground parking garage," the likelihood of his continuing to "flee" was nonexistent once the Defendant arrived at his apartment building and parked his vehicle. To the extent that his actions ever constituted "fleeing," such fleeing was over once the Defendant arrived at his destination.

CONCLUSION

For these reasons, and those discussed in the Defendant's initial brief, 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 9th day of January, 2014.

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 reply brief produced with a proportional serif font. The length of this brief is 2,951 words.

I further certify that I have submitted an electronic copy of this reply brief, 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 9th day of January, 2014.

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