STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP0857-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRETT W. DUMSTREY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE DONALD J. HASSIN, JR., PRESIDING

BRIEF OF WISCONSIN ATTORNEY GENERAL, PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUES

After briefing by Brett W. Dumstrey (defendant-appellant) and the State of Wisconsin (plaintiff-respondent), this court issued an order dated March 12, 2014, inviting the Wisconsin Attorney General to submit a brief. The genesis for this invitation is this court's interest

in the Attorney General's position as to the following two issues:[1]

I. Did the off-duty police officer's observations justify the ultimate stop of Dumstrey?

The trial court found that the off-duty officer had the requisite reasonable suspicion to stop Dumstrey.

II. Did the off-duty police officer's action in scooting under the garage door and entering the apartment garage violate the Fourth Amendment?

The trial court held that the off-duty officer did not violate Dumstrey's rights when he entered the apartment garage, as the garage is a common area in the condominium project held open to all the apartment tenants.

STATEMENT OF FACTS

The Attorney General has no quarrels with Dumstrey's recitation of facts in his appellant's brief. The Attorney General does add the following facts that he deems relevant to the controversy.

Officer DeJarlais pursued Dumstrey into a decent sized apartment complex. The complex consisted of five or six buildings, thirty apartments to each building, and each with a parking garage of thirty stalls (16:26). In the parking garage where Dumstrey went into, there were multiple cars present (*id*.).

[1] For clarification purposes, the Attorney General will refer to himself as the Attorney General rather than as "the state." Naturally, the Attorney General is aligned with the state as to its ultimate conclusions although, as will be discussed in the brief, he has some variances with the state's approach.

ARGUMENT

This court asks the Attorney General for his position on two issues raised in this case: 1) whether the off-duty officer had a justifiable basis for stopping Dumstrey; and 2) whether the off-duty officer had a justifiable basis for entering the apartment complex parking lot where he seized Dumstrey.

The Attorney General believes that Officer DeJarlais had reasonable suspicion that Dumstrey was operating a motor vehicle while under the influence of an intoxicant; this suspicion was generated by the following factors: 1) observed erratic driving including traveling at a high rate of speed, rapid acceleration, lane swerving and excessive tailgating (16:8-9); and 2) observation of Dumstrey's person including his sleepy, glassy eyes, with a sheen to them (16:13). Therefore, based on reasonable suspicion of a traffic infraction, Officer DeJarlais could lawfully stop Dumstrey's vehicle.

Determining that Officer DeJarlais has the requisite reasonable suspicion upon which to make a traffic stop does not end our inquiry, as the stop was not completely executed until Dumstrey had entered his apartment complex's underground parking lot. The Attorney General believes that the critical issue in this case is whether or not the communal parking lot represents curtilage to Dumstrey's apartment, or whether it is more akin to an open field, an area which Dumstrey might have an ownership interest in, but an area for which he does not have a Fourth Amendment privacy right. If the area is deemed curtilage, the Attorney General believes Dumstrey's seizure was problematic since reasonable suspicion is not a sufficient justification for a warrantless entry into a home or its curtilage. However, if the area is found to be an open field, Dumstrey's challenge to the entry must be denied since he would not have the

necessary reasonable expectation of privacy upon which to claim Fourth Amendment protections.[2]

The Attorney General argues that the communal nature of the parking lot, thirty lots for thirty stalls, the ease with which each stall can be viewed by other tenants, and the distance from the garage to Dumstrey's apartment, does not meet the *Dunn* test for establishing curtilage. *United States v. Dunn*, 480 U.S. 294 (1987). Moreover, the Attorney General rejects Dumstrey's notion that recent United States Supreme Court cases of *United States v. Jones*, __ U.S. __, 132 S. Ct. 945 (2012), and *Florida v. Jardines*, __ U.S. __, 133 S. Ct. 1409 (2013), both decided on trespass grounds, support his position. The distinction between our case and *Jones* and *Jardines* is clear cut: *Jones* involved trespass to a vehicle and *Jardines* involved trespass to the curtilage, two areas with well-established Fourth Amendment privacy rights. Conversely, our case, while arguably a trespass, is a trespass into a parking garage shared by thirty people, a trespass into an open field. The Attorney General reasons that trespass does not trigger a Fourth Amendment violation unless that trespass is to a Fourth Amendment privacy interest.

I. THE OFF-DUTY POLICE OFFICER HAD REASONABLE SUSPICION THAT DUMSTREY WAS DRIVING WHILE IMPAIRED WHEN HE SEIZED DUMSTREY.

A. Applicable law.

In determining whether a reasonable suspicion stop is lawful, this court upholds the trial court's findings of

[2] The Attorney General believes that Officer DeJarlais's off-duty status, his plain clothes, and his using his personal vehicle, vitiates the state's contention that the entry into the parking lot could be justified under a probable cause and exigent circumstance theory, as to the crimes of obstruction, resisting, or failing to obey a traffic officer's signal.

fact, unless they are clearly erroneous, and applies the de novo standard in determining whether the stop was constitutional. *State v. Samuel,* 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423; *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

In order to make a valid investigatory traffic stop, the officer must reasonably suspect, based on his experience and the totality of circumstances present, that a motorist has committed, is in the process of committing, or is about to commit an unlawful act.[3] *State v. Krier*, 165 Wis. 2d 673, 677-78, 478 N.W.2d 63 (Ct. App. 1991); *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). In determining whether a reasonable suspicion stop is lawful, the court considers whether specific and articulable facts which, taken together with reasonable inferences from the facts, reasonably justify the stop. *State v. Post,* 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. The question of what is reasonable suspicion is a common sense test; under all the facts and circumstances present, what would a reasonable police officer reasonably suspect, in light of his training and experience. *State v. Colstad,* 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394.

A fair summary of the applicable law is that a traffic stop is lawful if the officer, based on his training and experience and the totality of the circumstances present, reasonably suspects that a motorist has violated, will violate, or is violating a law.

[3] In this case, Officer DeJarlais was off duty, out of uniform, and in his own personal vehicle, when making the observations that precipitated his decision to stop Dumstrey. Nevertheless, there is no issue between the parties that the laws governing the police be the laws controlling the evaluation of Officer Dejarlais's decision and conduct in stopping Dumstrey.

B. Application of facts to the law.

There is little dispute as to the salient facts in the reasonable suspicion analysis in this case. This is probably because the focus of the dispute is not over Officer DeJarlais's suspicions about Dumstrey's driving but rather over where Dumstrey was eventually stopped. The relevant facts concerning Officer DeJarlais's reasonable suspicion that Dumstrey was operating a motor vehicle while under the influence of an intoxicant are as follows:

- Officer DeJarlais first observed Dumstrey's vehicle coming up from behind him at a very high rate of speed (16:8);

- DeJarlais then observed Dumstrey's vehicle pass him and proceed to tailgate another vehicle (16:9);

- DeJarlais then observed Dumstrey's vehicle proceed to alternate between tailgating DeJarlais's vehicle and his vehicle (16:10); and

- At a red light Officer DeJarlais pulled next to Dumstrey's vehicle and observed that Dumstrey showed evidence of intoxication, including sleepy looking and glassy eyes (16:13).[4]

The above observations made by Officer DeJarlais, a person with twenty-two years of law enforcement

[4] The record also revealed that Dumstrey seemed unresponsive to Officer DeJarlais's attempts to engage him, took off after initially pulling over, and led Dejarlais on a bit of a chase around his apartment complex before entering the garage. The Attorney General does not list these facts as support for reasonable suspicion that Dumstrey was impaired, because the inferences that can be drawn by this conduct are muddied by Officer DeJarlais being in plain clothes and in his own personal vehicle.

experience who had investigated hundreds of OWI cases (16:7-8), clearly established the requisite reasonable suspicion upon which to make a lawful investigatory traffic stop. Indeed, this point is not really challenged by Dumstrey, who focuses his attack on DeJarlais's entry into his garage without probable cause. The Attorney General respectfully submits that Officer DeJarlais had a lawful basis to stop Dumstrey's vehicle.

II. OFFICER DEJARLAIS DID NOT VIOLATE DUMSTREY'S FOURTH AMENDMENT RIGHTS WHEN HE ENTERED THE UNDERGROUND GARAGE BECAUSE THE COMMUNAL PARKING AREA WAS NOT CURTILEGE AND DUMSTREY DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE AREA.

As argued above, Officer DeJarlais had the requisite reasonable suspicion to stop Dumstrey's vehicle. The complication in this case is that Dumstrey was not stopped in the roadway, but was finally seized in the underground parking garage of his apartment building. In their briefs, Dumstrey and the state sparred over the definition of curtilage and the relationships between curtilage, expectation of privacy, and trespass. The Attorney General agrees with the parties to the extent that the determination of whether or not the garage is curtilage is critical to this case. The Attorney General submits that if the garage is curtilage, Officer DeJarlais improperly entered it to seize Dumstrey. Conversely if the communal garage parking lot is an "open field[]," the Dejarlais's entry was permissible regardless of any trespass that might have occurred. [5]

[5] The Attorney General does not believe that DeJarlais's entry can be justified under exigent circumstances since Officer DeJarlais did not have the requisite probable cause to enable the (footnote continued)

A. Curtilage—applicable law.

Curtilage is the area which extends the intimate activity associated with the sanctity of home and the privacies of life. *State v. Davis,* 2011 WI App 74, ¶ 9, 333 Wis. 2d 490, 798 N.W.2d 902. Accordingly, curtilage is considered part of the home itself for Fourth Amendment purposes, and is given the same constitutional protections as the home. A person's expectation of privacy in his or her dwelling extends to the curtilage of the dwelling. *Id.*

The United States Supreme Court articulated the four factors a reviewing court should consider in determining whether an area is within the curtilage of the home. These four factors are: 1) the proximity of area claimed to be curtilage to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) the steps taken by the resident to protect the area from observations by people passing by. *Dunn,* 480 U.S. at 301. The *Dunn* factors are not to be mechanically applied but rather are to be used as analytical tools.

"The extent of the curtilage depends upon the nature of the premises, and might be interpreted more liberally in the case of a rural single-owner home, as opposed to an urban apartment." *Davis,* 333 Wis. 2d 490, ¶ 9.

There are occasions, though not many, when an area can be considered curtilage and yet the home owner cannot reasonably claim an expectation of privacy. This is true for curtilage, which carries with it an implied permission to enter. *See State v. Edgeberg* 188 Wis. 2d

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doctrine's applicability. Moreover, the Attorney General does not see any exceptions to the warrant requirement to justify the entry. Instead , the Attorney General submits that the entry was outside the orbit of the Fourth Amendment.

339, 524 N.W.2d 911 (Ct. App. 1994) (a front porch area, while curtilage, did not trigger Fourth Amendment protections because entering the porch was the only reasonable way to make contact with the home's residents); *Jardines* 133 S. Ct. 1409 (front door area of a home is curtilage, but has no Fourth Amendment protections against people entering it, whether they be welcome or unwelcome visitors).

In *Oliver v. United States,* 466 U.S. 170, the United States Supreme Court opined that an officer's intrusion into an "open field" did not constitute a Fourth Amendment intrusion even though it is a trespass under common law. *Id.* at 183. An open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment. *Id.* at 176-177. An area to fall within the open fields doctrine need neither be open nor a field, as those terms are used in common speech. *Dow Chemical Co. v. United States,* 476 U.S. 227, 236 (1986). Land can be categorized into one of three groups for Fourth Amendment purposes: 1) open fields; 2) curtilage; or 3) a home/residence dwelling. *See State v. Martwick,* 2001 WI 5, ¶¶ 26-28, 231 Wis. 2d 801, 815, 604 N.W.2d 552. The protections of the Fourth Amendment do not attach to lands beyond the curtilage of a home, including public areas and what is referred to as open fields. *Id* ¶¶ 28-29.

Generally speaking, there is no reasonable expectation of privacy in common or shared areas of multiple dwelling buildings. *Harney v. Chicago*, 702 F.3d 916, 925 (7th Cir. 2012). This is true even when the common areas are otherwise locked to exclude persons that are not tenants of the building. *Id.*

A fair summary of the law is that the determination of whether an area is an open field or curtilage is critical since there are no Fourth Amendment protections in an open field and the full protections afforded a home are extended to the curtilage. A curtilage/open fields analysis is subject to the *Dunn* factors: 1) proximity to the home;

2) uses of the area; 3) whether the area is within a dwelling enclosure; and 4) the ease with which the area can be observed by casual passersby. *Dunn*, 480 U.S. at 301. There is a possibility that an area can be curtilage and still not be protected by the Fourth Amendment, if the area carries with it a clear implication of permission to enter. The definition of curtilage is more liberally applied in a rural setting than in an urban one, and to a home as opposed to a multi-family complex. Open fields are not necessarily open or fields, within the common sense meaning of the terms; rather it means areas that might be owned by a subject but are not his home or his curtilage.

B. Curtilage—application of the law to the facts.

Again, there is little dispute as to the facts surrounding the curtilage issue in this case but ample discord over how the facts are to be interpreted, and as to the meaning of the pertinent law. The relevant facts are as follows:

- Dumstrey's apartment complex contained approximately five or six buildings with thirty apartments in each building (16:26);

- Each building had an underground parking garage, and each garage contained approximately thirty parking stalls (16:26);

- In order to get to his apartment from the parking garage, Dumstrey had to enter another hallway and take an elevator to his apartment's floor (16:40-41);

- The underground parking garage was used exclusively for parking vehicles (16:42); and

- Entry into the parking garage was effected by using a remote control. Therefore, the

> parking garage was intended for the exclusive use of the residents of the thirty apartments (19:7, 12).

The Attorney General concedes that the underground parking area is not an area with an implied permission to enter, like the front porch in *Edgeberg* or the front door in *Jardines.* So, if the parking garage is deemed curtilage, there is nothing present in the facts to diminish Dumstrey's expectation of privacy. However, the Attorney General submits that the communal underground parking garage is not curtilage. This conclusion is supported by the application of the four-pronged *Dunn* test to the facts of this case.

1. Proximity to the home.

The parking garage is not immediately adjacent to Dumstrey's apartment. In order to get to his residence from his parked car, Dumstrey would have to go through another hallway and take an elevator. Moreover, the breadth of curtilage in an urban apartment setting is smaller than that of an urban single home or a home in a rural environment. *See Davis*, 333 Wis. 2d 490, ¶ 9.

2. Uses of the area.

The parking garage was used exclusively for parking. It was not used for any of the private activities typically associated with a home. It is hard to envision any person feeling comfortable engaged in any intimate family activity in a communal parking area shared with thirty other residents, and where there is no obstacle from a person in one stall seeing what is going on in any of the other stalls.

3. Enclosure.

While the parking lot is underground, it is not within an enclosure surrounding Dumstrey's apartment. The nature of an underground parking lot is to restrict its access and to protect vehicles from the weather, not to shield each occupant of a parking stall from observation.

4. Ease by which viewed by passersby.

The parking area cannot be viewed by the public at large. However, each stall can easily be seen by the other twenty-nine residence occupants. The parking garage is best described as a common and shared area of a multiple dwelling building. As the Seventh Circuit found in *Harney*, there is typically no expectation of privacy in a communal multiple dwelling area and this is true even when the common area is otherwise locked to exclude persons that are not tenants of the building. *See Harney*, 702 F.3d at 925.

While it is true that the *Dunn* test is not a mechanical test requiring all four factors to be met to establish curtilage, it is also true in this case that the communal parking garage does not satisfy any item on the *Dunn* check list. Dumstrey's parking lot is neither curtilage nor his residence; it is an open field. The law is well established that an individual cannot have a reasonable expectation of privacy, in a Fourth Amendment sense, in an open field. Accordingly, Officer DeJarlais's entry into the parking garage did not violate Dumstrey's Fourth Amendment rights and therefore should not result in the suppression of evidence generated by the entry.

5. The expectation of privacy and trespass issues.

Perhaps sensing the challenges of asserting a privacy interest in a communal parking garage, Dumstrey makes two assertions: 1) a reasonable expectation of privacy evaluation is not part of a curtilage determination; and 2) the recent United States Supreme Court decisions in *United States v. Jones* and *Florida v. Jardines* shifted the focus in a Fourth Amendment analysis from privacy issues to trespass concerns. The Attorney General submits that Dumstrey is wrong in both of these assertions.

First, the Attorney General submits that a curtilage analysis is necessarily intertwined with an individual's reasonable expectation of privacy. While it is true, as Dumstrey asserts, that an expectation of privacy is not one of the *Dunn* factors (*see* Dumstrey's reply brief at 2), all of the factors are connected to an individual's privacy. The closeness of the home and its intimate activities, the uses of the area for intimate family purposes, the presence of an enclosure around the area, and attempts to shield the area from nonresident observation, are all spokes on the expectation of privacy wheel. Yes, it is possible for a person not to have an expectation of privacy in his/her curtilage (an area with an implied permission to enter). However, the reverse is not true; the Attorney General knows of no case where a person can benefit from Fourth Amendment protections when the police intrude into an area for which the person has no expectation of privacy.

Dumstrey argues, "In other words, the State's assertion that 'expectation of privacy is a major factor in determining curtilage' . . . is simply incorrect." *See* Dumstrey's reply brief at 2. Dumstrey misses the point. A curtilage determination reveals the presence of an expectation of privacy. If an individual does not have an expectation of privacy in the area, then either that area is curtilage with an implied permission to enter, or the area

failed the *Dunn* test and is not curtilage. In either case, a police entry does not violate the Fourth Amendment.

Second, Dumstrey seeks refuge in *United States v. Jones* and *Florida v. Jardines* arguing that the focus of the Fourth Amendment review in this case should be on the police trespass and not Dumstrey's expectation of privacy. In *Jones,* the United States Supreme Court struck down a warrantless placement of a GPS unit on a vehicle. Dumstrey is correct that the court's rationale in finding a Fourth Amendment violation was rooted in trespass law. He is incorrect in suggesting that any trespass triggers Fourth Amendment protections. In *Jones,* the trespass was to the vehicle, a property item with a deep history of Fourth Amendment protection. In this case, the trespass was to an open field, an area with a deep history of being without Fourth Amendment protections. *Jones* made clear that its quarrel was with the trespass to a constitutionally protected zone. Moreover, *Jones* reaffirmed *Oliver v. United States,* when it wrote: "Quite simply, an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment. The Government's physical intrusion on such an area-unlike its intrusion on the 'effect' at issue here—is of no Fourth Amendment significance." *Jones*, 132 S. Ct. at 953 (citations omitted). *Jones* does not support Dumstrey's position, unless the parking area is viewed as curtilage, and as argued above, the area is not curtilage but is an open field. Therefore, *Jones* supports the joint position of the state and the Attorney General: a police trespass into an area not protected by the Fourth Amendment does not violate an individual's constitutional rights.

Similarly, in *Jardines,* the court again invalidated a government action because of trespass. In *Jardines,* the court held that the area immediately surrounding the front door of a home is curtilage but opined that the homeowner had no expectation of privacy as to people coming to the front door. This reasoning is consistent with the Wisconsin holding in *Edgeberg* that a person can have a diminished expectation of privacy in the curtilage if the

area demonstrates an implication of permission for the public to enter. In *Jardines,* the court reasoned that there is no expectation of privacy as to people entering the front door area, but there is an expectation that police controlled drug sniffing canines won't approach a front door. So, the use of a drug sniffing canine was an impermissible trespass to the curtilage. Again, *Jardines* only helps Dumstrey if the communal parking garage was curtilage.[6]

The Attorney General submits that in this case Officer DeJarlais, with reasonable suspicion that Dumstrey was operating a vehicle while intoxicated, trespassed into "open fields" and seized Dumstrey. The Fourth Amendment allows for a police seizure of a subject with reasonable suspicion of unlawful activity, and the Fourth Amendment is not implicated by the police warrantless, non-consensual entry into open fields, in this case a parking garage shared by occupants of thirty separate apartments in the complex.

[6] Dumstrey suggests that both *Jones* and *Jardines* stand for the principle that an expectation of privacy analysis is not necessary for a Fourth Amendment review. The Attorney General does not think this is true. In *Jones,* the trespass to a protected zone, the vehicle, made an analysis as to the privacy issue of following a vehicle's travel routes over an extended period unnecessary. In *Jardines,* the trespass to a protected zone, the curtilage, made an analysis as to the privacy issue of gleaming information from inside a home unnecessary. It goes without saying that in the absence of a trespass to a constitutionally protected zone, the court would more fully consider privacy issues.

CONCLUSION

For all the foregoing reasons, the Attorney General joins the state in asking this court to affirm the trial court's denial of Dumstrey's suppression motion.

Dated this 10th day of June, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,062 words.

Dated this 10th day of June, 2014.

_____
DAVID H. PERLMAN
Assistant Attorney General

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. § (Rule) 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 10th day of June, 2014.

_____
DAVID H. PERLMAN
Assistant Attorney General