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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 REPLYING TO WISCONSIN ATTORNEY GENERAL

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I. AGREEMENT.

The Defendant agrees 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." (AG brief at 4 n.2). The Defendant also agrees with the Attorney General's affirmations that he "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 doctrine's applicability," and that he "does not see any exceptions to the warrant requirement to justify the entry." (AG brief at 7-8 n.5).

Further, the Defendant appreciates the concession "that the underground parking area is not an area with an implied permission to enter, like the front porch in [*State v.*] *Edgeberg*[, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994)] or the front door in [*Florida v.*] *Jardines* [, 133 S.Ct. 1409 (2013)]." (AG brief at 11), and agrees that, "if the parking garage is deemed curtilage, there is nothing present in the facts to diminish [his] expectation of privacy." (*Id.*)

II. DISAGREEMENT.

The Attorney General asserts that "[a] curtilage determination reveals the presence of an expectation of privacy." (AG brief at 13). It is not clear what this means, since it is not the Attorney General's position that a determination that an

area constitutes curtilage means that the individual automatically has an expectation of privacy in the area. The very next sentence posits that, "[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 [*United States v.*] *Dunn* [, 480 U.S. 294 (1987)] test and is not curtilage." (AG brief at 13).

Further, this would be contrary to the Wisconsin Supreme Court's declaration in *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), that "an officer could conduct a search of a common storage room of an apartment house (clearly within the curtilage) without violating the defendant's Fourth Amendment rights," *Id.* at 633, 218 N.W.2d at 261, as well as the holding in *Harney v. City of Chicago*, 702 F.3d 916 (7th Cir. 2012), which the Attorney General cites approvingly. In that case, the court noted that, despite no expectation of privacy, "the proximity of the area . . . to the condominium building and the fact that [the area was] behind a gate may support a finding that this area fell within the curtilage of the condominium building." *Id.* at 924.

The Attorney General also notes, "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)." (AG brief at 13). This statement implies that the Attorney General's position is that the only situation in which an individual can lack a reasonable expectation of privacy in curtilage is if the reasonable expectation of privacy is negated by an implied permission to enter. This position seems consistent with the Defendant's. It is also compatible with the Wisconsin Supreme Court's analysis in

Conrad and *Watkins v. State*, 59 Wis. 2d 514, 208 N.W.2d 449 (1973). In other words, "a common storage room of an apartment house" may be "clearly within the curtilage" of a tenant's home, *Conrad*, 63 Wis. 2d at 633, 218 N.W.2d at 261, but the tenant may nevertheless lack a reasonable expectation of privacy because "in such common room accessible to all," *id*., the other tenants of the building have "an implied permission to enter," as the Attorney General puts it. It is also compatible with *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), in which the court endorsed a holding that "the area outside the defendant's residence, which was not specifically allocated to one tenant or the other, was a common area to both, and as such became part of the curtilage of the premises . . . ." *Id*. at 315, 588 N.W.2d at 13.

Just as the United States Supreme Court held in *Jardines* that it "need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*," 133 S.Ct. at 1417, this Court need not decide whether the Defendant had a reasonable expectation of privacy in the parking area. This issue "is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." *Id*.[1] The Attorney General concedes "that the underground parking area is not an area with an

[1] The Attorney General summarizes the holding in *Jardines* as follows: "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." (AG brief at 9). In fact, the Court held in *Jardines* that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." 133 S.Ct. at 1417-18.

implied permission to enter . . . ." (AG brief at 11). Regardless, the Defendant prevails even under the Attorney General's theory of the law.

A. *Dunn*.

The Attorney General's application of the "four-pronged *Dunn* test to the facts of this case" is flawed.

1. Proximity to the home.

It is true that "[t]he parking garage is not immediately adjacent to Dumstrey's apartment," (AG brief at 11), but adjacency and proximity are very different concepts. In *State v. Martwick*, 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552, the Wisconsin Supreme Court analyzed whether objects "located between 50 and 75 feet from the house" were within that house's curtilage. *Id*. at ¶ 33, 231 Wis. 2d at 818, 604 N.W.2d at 560. The court noted, "If the proximity factor would be the sole factor examined in the *Dunn* analysis, this would be a close case." *Id*. And in *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), the court analyzed whether a vehicle "parked approximately 200 feet west of the home" was within the home's curtilage, holding that it was. *Id*. at 316, 588 N.W.2d at 14. Of course, if proximity is to be analyzed by measuring distance "as the crow flies," then the distance at issue in the present case is zero, since the parking area and the Defendant's apartment are within the same building. Appellate courts "consistently hold that an attached garage is part of the curtilage." *State v. Leutenegger*, 2004 WI App 127, ¶ 21 n.5, 275 Wis. 2d 512, 525 n.5, 685 N.W.2d 536, 543 n.5.

2. Uses of the area.

The Attorney General asserts that the parking area "was not used for any of the private activities typically associated with a home." (AG brief at 11.) But the Attorney General later asserts that "[t]he nature of an underground parking lot is to restrict its access and to protect vehicles from the weather . . . ." (AG brief at 12). The Attorney General also notes that "there is no obstacle from a person in one stall seeing what is going on in any of the other stalls." Even if this is true, it is not relevant to this factor. The area under consideration here is not the Defendant's stall, but rather the entire parking area. What an individual located inside the parking area can see after entering the parking area is irrelevant; such an individual has already entered the area.

3. Enclosure.

The Attorney General argues that, "[w]hile the parking lot is underground, it is not within an enclosure surrounding Dumstrey's apartment." (AG brief at 12). The underground parking garage and the Defendant's apartment are part of the same enclosure: the apartment building. To the extent that a building is not an "enclosure" as the term is used in this context, a building can only afford more protection, not less, than a mere "enclosure." The Attorney General also argues that "[t]he 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." (AG brief at 12). The Defendant appreciates the concession that part of the "nature" of the area in question is "to restrict its access." But the

Attorney General again conflates the parking area with each individual parking stall. If Officer DeJarlais were legitimately inside the parking garage, the Defendant's individual stall would not be shielded from view. But "[t]he nature of an underground parking lot is to restrict its access . . . ." (AG brief at 12).

4. Ease by which viewed by passersby.

The Attorney General concedes that "[t]he parking area cannot be viewed by the public at large." (AG brief at 12). But the Attorney General goes on to conduct the same flawed analysis of *Harney* that the State made in its brief. Regarding the exact same location that the Attorney General discusses, the Seventh Circuit specifically noted that "the proximity of the area . . . to the condominium building and the fact that [the area was] behind a gate may support a finding that this area fell within the curtilage of the condominium building." *Id*. at 924. Both of the factors that the Seventh Circuit cited in *Harney* as supportive of a curtilage finding are present in this case. The parking area was behind a gate that Officer DeJarlais was required to physically impede to maintain access. The parking area's "proximity" to the apartment building, as discussed above, is even greater than the proximity of the area in *Harney* to the condominium building; the parking area in the present case is part of the building itself.

B. Open Fields.

According to the Attorney General, "Land can be categorized into one of three groups for Fourth Amendment purposes: 1) open fields; 2) curtilage; or 3) a home/residence dwelling." (AG brief at 9 (*citing State v. Martwick*, 2001 WI 5, ¶¶

26-28, 231 Wis. 2d 801, 815, 604 N.W.2d 552, 558-59)). The Defendant concedes that the parking area itself is not his "home/residence dwelling" insofar as he does not live in his parking stall. Nor, however, is the area an "open field" as the term is used in any sense.

It is true that an "open field" "need neither be open nor a field, as those terms are used in common speech." (AG brief at 9. (*citing Dow Chemical Co. v. United States*, 476 U.S. 227, 236 (1986)). But these areas "by their very character [are] open and unoccupied . . . ." *Oliver v. United States*, 466 U.S. 170, 179 n.10 (1984). The underground parking area in the present case is neither open nor unoccupied, nor does it match any of the description of what constitutes an "open field" in the United Supreme Court's view:

> There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air.

Id. at 179. The parking area was not "accessible to the public and the police" at all. There was no fence, because the area was underground and part of the building itself; the public was, however, barred from viewing inside the garage.

C. *Conrad* and *Watkins*.

This Court is bound by the Wisconsin Supreme Court's holdings, including that court's holdings in *Watkins v. State*, 59 Wis. 2d 514, 208 N.W.2d 449 (1973),

and *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974). The storage area at issue in *Watkins* was described as follows:

> 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.

59 Wis. 2d at 514, 208 N.W.2d at 449-50. Less than one year later, the court described this area as "clearly within the curtilage." *Conrad*, 63 Wis. 2d at 633, 218 N.W.2d at 261. If that storage area was curtilage, how can the parking area in the present case not be?

- "easily accessible to the public and passersby" – The Attorney General concedes that the parking area in the present case "cannot be viewed by the public at large." (AG brief at 12).
- "apparently had in the past been used by persons other than tenants in the apartment building" – The record in the present case reflects no such use, and the Attorney General concedes that "the parking garage was intended for the exclusive use of the residents of the thirty apartments." (AG brief at 10-11).
- "The door to the storage room always stood open" – The Attorney General concedes that "[e]ntry into the parking garage was effected by using a remote control." (AG brief at 10).

- "This room was not for the exclusive use of the defendant and not even for the exclusive use of the tenants of the building." – Again, access to the parking area in the present case was more restricted in that, as the Attorney General concedes, "the parking garage was intended for the exclusive use of the residents of the thirty apartments." (AG brief at 10-11).

In every relevant respect, the parking area here is less publicly accessible and better shielded from public view than the storage area in *Watkins*. The storage area in *Watkins* was "clearly within the curtilage." *Conrad,* 63 Wis. 2d at 633, 218 N.W.2d at 261. So is this parking area.

III. CONCERN.

The issues in the present case are important, as this Court has recognized. The Fourth Amendment protects the citizen against "the invasion of his indefeasible right of personal security, personal liberty. and private property . . . ." *Boyd v. United States*, 116 U.S. 616, 630 (1886). "Contemporary concepts of living such as multi-unit dwellings must not dilute [an individual]'s right to privacy any more than is absolutely required." *Fixel v. Wainwright,* 492 F.2d 480, 484 (5th Cir. 1974).

The Supreme Court has made it clear that a search has occurred where "[t]he Government physically occupied private property for the purpose of obtaining information." *United States v. Jones*, 132 S.Ct. 945, 949 (2012). The Attorney General concedes that "[t]he parking area cannot be viewed by the public

at large," and that "[t]he nature of an underground parking lot is to restrict its access . . . ." (AG brief at 12). The Attorney General's argument boils down to this: a police officer may enter a private area that is only accessible to the residents of an apartment building because the area is accessible to the residents of the apartment building. This cannot be true. The Attorney General repeatedly notes that the area is available to thirty tenants. Perhaps this would be important if one of the other tenants gave Officer DeJarlais even implicit permission to enter, although "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Georgia v. Randolph*, 547 U.S. 103, 122-23 (2006).

The Attorney General effectively concedes that a trespass occurred. (*See* AG brief at 4). Officer DeJarlais entered a private building without permission for the purpose of conducting a seizure under the Fourth Amendment. Perhaps one of the other twenty-nine tenants could have granted him permission to enter, but none did. Perhaps one of the other twenty-nine tenants *would* have granted him permission to enter, but none was asked. The Attorney General's arguments would permit officers to do here exactly what the authorities did in *Hester*. The "revenue officers" in that case "concealed themselves from fifty to one hundred yards away and saw Hester come out . . . ." *Id.*, 265 U.S. at 58. Under the Attorney General's legal theory of the present case, no resident of an apartment building would have any basis to challenge the admissibility of evidence obtained by officers setting up permanent camp inside a parking garage like the one here, or placing hidden

cameras in the hallways of the building that cannot otherwise be accessed by the public.

This Court should adopt the Sixth Circuit's analysis in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976). As that court held, "A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not except trespassers." *Id*. at 551 (6th Cir. 1976). This Court should reach the same conclusion, that when "an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." *Carriger*, 541 F.2d at 552.

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 25th day of June, 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 2,993 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 25th day of June, 2014.

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