RECEIVED
05-20-2015
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2013-AP-857

BRETT W. DUMSTREY,
Defendant-Appellant-Petitioner.

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-PETITIONER'S REPLY BRIEF

ANTHONY D. COTTON
State Bar No. 1055106

JEFFREY J. SZCZEWSKI
State Bar No. 1065686

Kuchler & Cotton, S.C.
1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993
Attorneys for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

The State misapplies the *Dunn* factors in a manner that would prevent most garages from being considered curtilage. For example, the State asserts that, "[w]hile the parking lot in this case is underground, it is not within an enclosure surrounding Dumstrey's apartment." This is false. The "parking lot" is within an enclosure: the apartment building itself. The apartment building surrounds Dumstrey's apartment, making the area in question a stronger curtilage candidate than a garage attached to a single-family home, which, even if attached, is not likely to occupy the same space as the home itself on a map. That a hallway and an elevator connect this garage to Dumstrey's apartment is no less detrimental to a curtilage finding than a breezeway's connecting a garage to a single-family home.

Notably, the State cites *Harney v. City of Chicago*, 702 F.3d 916 (7th Cir. 2012), in its discussion of the ease by which the parking area can be viewed by passersby. But the court in *Harney* 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 State should not be so quick to dismiss this Court's determinations in *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), and *Watkins v. State*, 59 Wis. 2d 514, 208 N.W.2d 449 (1973). Unlike the "recent significant cases that have changed the contours of long standing Fourth Amendment jurisprudence" cited in Dumstrey's first brief before this Court, *Dunn* did not alter the concept of

curtilage so fundamentally. Any argument to the contrary would leave *Dunn* vulnerable under the analysis undertaken in *Jones*, in which the Court noted that, "[a]t bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *United States v Jones*, 132 S.Ct. 945, 950 (2012) (*quoting Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Curtilage law has been relatively stagnant post-*Katz*, and it is time for the area to join what the State refers to as the "dynamic and vigorous body of case law that retracts and expands over time as society and the world we live in changes." After all,

> [w]hat the term "curtilage" means is that area near the dwelling itself which a person has a right to close off from public traffic; drawing the obvious analogy to an apartment, it is comparable to the hallways and staircases of the apartment building. The fact that these areas in an apartment building are common does not weaken the argument for privacy: they are common to the tenants, not to anyone who would break in. These areas of the apartment building are as common to the tenants as the areas within the curtilage are common to all members of the household. From this we conclude that each tenant of an apartment building is offended by the invasion of common premises, in the manner that each member of a household is affronted by the invasion of the curtilage. Thus history will not support the notion that apartment dwellers may be subjected to unreasonable invasion of the hallways and staircases of their apartment buildings.
>
> . . .
>
> The lock on the door protects the tenants against the prowler and the pervert, the vandal and the vigilante, the unsolicited solicitor and the unwanted waresman. The tenants possess a joint right, subject to the landlord's right to enter and to use common portions of the premises, to exclude from or to admit to those premises whomever they choose. This area is by no means public. A locked door excluding the public from certain privately owned or leased property denotes a

> right of privacy therein to those who have the right to lock that door. The lock means simply that the public may not enter – and the Government may not break in with impunity. As we mention above, the fact that these areas are common does not detract from their privacy – these areas are common to the tenants only, not to the public.

United States v. Blank, 251 F.Supp. 166, 172-73 (N.D. Ohio 1966).

It is true that Dumstrey (or any other resident) lacked the authority to override another resident's choice to permit a given visitor. But the State's position effectively transforms this private area into a public one. Although "a bus passenger clearly expects that his bag may be handled," he "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Bond v. United States*, 529 U.S. 334, 338-39 (2000).

It is beyond dispute that an individual "enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place – and indeed, even though his landlord has the right to conduct unannounced inspections at any time." *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in the judgment); *see also Fernandez v. California*, 134 S. Ct. 1126 (2014) (one tenant can invite visitors into the home despite other tenants' previous objections); *United States v. Villegas*, 495 F.3d 761, 772 (7th Cir. 2007) (Rovner, J., concurring in part and in the judgment) ("We do not say that cohabiting adults have no reasonable expectation of privacy in their shared residence although both have access to some if not all of the premises and either one may admit others; rather, we recognize that each has a cognizable privacy

interest for Fourth Amendment purposes and that a police officer normally cannot enter without the consent of at least one resident."). So too here.

CONCLUSION

This Court must reverse.

Dated this 20th day of May, 2015.

Respectfully submitted,

_____
Anthony D. Cotton
State Bar No. 1055106

_____
Jeffrey J. Szczewski
State Bar No. 1065686

KUCHLER & COTTON, S.C.
Attorneys for Defendant-Appellant-Petitioner
1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993

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 produced with a proportional serif font. The length of this brief is 1,009 words.

I further certify that I have submitted an electronic copy of this 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 20th day of May, 2015.

KUCHLER & COTTON, S.C.

By: _____
Anthony D. Cotton
State Bar No. 1055106

1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993