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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2014 AP 2955 CR
Trial Court Case No. 14 TR 701

In the Matter of the Refusal of Joseph R. Arndt:
COUNTY OF OCONTO,

Plaintiff-Respondent,

v.

JOSEPH R. ARNDT,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered
In the Circuit Court for Oconto County
The Honorable Jay N. Conley Presiding

Respectfully Submitted:

Melowski & Associates, LLC
524 South Pier Drive
Sheboygan, WI 53081
Telephone: (920) 208-3800
Facsimile: (920) 395-2443

By: **Dennis M. Melowski**
State Bar No. 1021187
Attorneys for Defendant-Appellant

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STATEMENT OF THE ISSUE

WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED MR. ARNDT'S MOTION TO SUPPRESS WHERE THE OFFICER ENTERED THE CURTILAGE OF MR. ARNDT'S PROPERTY WITHOUT A WARRANT OR PROBABLE CAUSE AND WALKED AROUND UNTIL HE FOUND MR. ARNDT?

Trial Court Answered: **No.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Appellant believes that the publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF FACTS AND CASE

On April 20, 2014, Officer Karl Goerlinger was dispatched "to a traffic complaint… there was a black truck that was all over the road and possibly had hit a sign. The complainant was still behind the vehicle, and the complainant did see the vehicle pull into [a residence] just outside of the city limits." (R14 at 5.)

The tipster further reported that "the driver had fell out of the vehicle and was still by the vehicle." (*Id*. at 6.) There was no other reported movement on the property by the tipster, and Officer Goerlinger arrived over 5 minutes after the initial dispatch. (*Id*. at 26.)

When Officer Goerlinger arrived at the residence, he saw who he believed was the tipster parked across from the residence point "to the direction of where the suspect vehicle was at." (*Id*. at 8.) Officer Goerlinger, however, could not see

"anybody in the residence or outside the residence" at that time. (*Id*. at 7.)

Officer Goerlinger decided to drive his vehicle up the driveway, which he later learned belonged to Mr. Joseph Arndt, the Defendant-Appellant. (R14 at 8, 18.) Officer Goerlinger further admitted that as he drove up Mr. Arndt's driveway, he could not see anyone. *Id*. at 9.

Officer Goerlinger found the suspect vehicle off the garage driveway, some 40 yards from the residence. (*Id*. at 22-23, 32.) While the officer did not recall seeing a fence, he admitted that the backyard was bordered by a "woods." (*Id*. at 23-24.)

Officer Goerlinger then exited his squad car, and started walking around the suspect vehicle. (*Id*. at 9, 29.) It was only after he walked around to the driver's side door that he was first able to see Mr. Arndt. (*Id*. at 29.) Importantly, the driver's side

door was not visible to passersby on the street, or to the officer who was parked in the driveway. (*See* R12: Ex. 5.)

Eventually, Mr. Arndt was arrested for Operating While Intoxicated (First Offense), Refusing Chemical Testing, and other charges not related to this appeal.

On November 10, 2014, a motion hearing was held on Mr. Arndt's motion to dismiss the Refusal Charge and suppress evidence because Mr. Arndt was unlawfully arrested within the curtilage of his home and the police lacked probable cause and/or exigent circumstances. (R10.)(citing *State v. Walker*, 154 Wis. 2d 158, 184 (1990)).

At the conclusion of the motion hearing, the circuit court set a briefing schedule and a date for oral arguments. (R14 at 47, 49.) Mr. Arndt filed his brief on November 14, 2014. (R13.) The County chose to not file its brief. *See* (R20 at 22.)

In his brief, Mr. Arndt argued that the officer entered the curtilage of his home without probable cause or exigent

circumstances. (R13 at 2-3.) Specifically, Mr. Arndt argued that he was found in his back yard, which based on pictures – exhibits 2,3,4 and 5—which were admitted at the motion hearing, established the curtilage of his home. (*Id*. at 3.)(R12, Ex. 2,3,4,5). For example, Mr. Arndt argued that the vehicle was behind his home in an area that was well maintained with cut grass. *Id*. at 2-3.

On December 18, 2014, Oconto County Circuit Court Judge Jay Conley denied Mr. Arndt's motion on two separate grounds. First, the circuit court held that the officer did not enter the curtilage of Mr. Arndt's home. (R20 at 22-27.) Second, the circuit court held that even if the officer had entered the curtilage of Mr. Arndt's home, the intrusion would have been permitted under the community-caretaker function of law enforcement. (R20 at 27-33.)

The circuit court did note that it believed that "there are all sorts of legitimate issues" for Mr. Arndt to appeal. (R20 at

37-38.) Mr. Arndt then promptly appealed the circuit court's order denying his motion.

STANDARD OF REVIEW

"Whether police conduct has violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact." *State v. St. Martin*, 2011 WI 44, ¶16, 334 Wis. 2d 290, 800 N.W.2d 858 (citation omitted). For example, whether a place forms part of the curtilage of a home is a matter of constitutional fact. *See State v. Murdock*, 155 Wis. 2d 217, 226, 455 N.W.2d 618 (1990). An appellate court exercises independent appellate review of constitutional facts. *Id*. at 226.

Further, appellate courts "independently review whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment and Article I, Section 11 of the Federal and state Constitutions." *State v. Ultsch*, 2011 WI

App. 17, ¶9, 331 Wis. 2d 242, 793 N.W.2d 505(citation omitted).

ARGUMENT

THE ARRESTING OFFICER VIOLATED MR. ARNDT'S CONSTITUTIONAL RIGHTS TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.

Citizens have the right to be free from "unreasonable searches and seizures." *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830, 833 (1990)(citing the fourth amendment to the federal constitution and Article I sec. 11 of the Wisconsin Constitution). Ultimately, "[t]he fourth amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Reichl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127, 128 (Ct. App. 1983).

Thus, evidence obtained after the unlawful entry onto a citizen's property is suppressed. *See generally Wong sun v.*

United States, 371 U.S. 471 (1963); *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991).

The Wisconsin Supreme Court has held that it is unlawful to make a warrantless arrest within the curtilage of a person's home absent probable cause and exigent circumstances. *State v. Walker*, 154 Wis. 2d 158, 184, 453 N.W.2d 127 (1990). Again, whether a place forms part of the "curtilage" of a home is a matter of constitutional fact. *See Murdock*, 155 Wis. 2d at 226.

Curtilage

To determine if a location is part of the curtilage of a home, a four-part test is used:

- proximity of the are claimed to be curtilage to the home;
- whether the area was being used for intimate activities of the home;
- what steps were taken by the resident to protect the area from observation by people passing by; and
- whether the area is included within an enclosure surrounding the home.

See United States v. Dunn, 480 U.S. 294, 301 (1987)(" these factors are useful analytical tools only to the degree that, in any

given case, they bear upon the centrally relevant consideration - whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection.").

In the present case, Mr. Arndt was detained in the curtilage of his home as discussed below.

First, Mr. Arndt was close to his home. While the circuit court found the first *Dunn* factor against Mr. Arndt, it failed to consider that Mr. Arndt was parked close to his unattached, two-car garage, which was itself, very close to the residence. *See* (R12. Ex. 5.)

Rather, the circuit court stated that "forty to fifty yards is a considerable distance from the home, and I think, again, the aerial photograph, Exhibit 5, shows it to be a considerable distance from the home. So I think that weights against it being curtilage." (R20 at 26.)

Again, what the circuit court failed to consider was that Mr. Arndt was not found 40 to 50 yards across an open field

from the residence, but rather, was next to a building, which was directly next to his home. Thus, this factor weighs more in Mr. Arndt's favor than found by the circuit court.

Second, Mr. Arndt was found in an area that rural homeowners routinely associate with intimate activities of their home. For example, rural homeowners work on vehicles like urban homeowners might hang laundry out to dry in their backyard.

The circuit court, however, found that Mr. Arndt was in a parking area, which in its opinion was "not intimately tied to the home." (R20 at 26-27.) Such a bright-line rule is not warranted for rural homeowners. For example, rural homeowner's driveways are considerably longer, and thus, garages are located at a considerable distance from the street compared to urban homeowners.

Thus, the second *Dunn* factor weighs in Mr. Arndt's favor because the officer had to travel a considerable distance

onto Mr. Arndt's property and then walk around Mr. Arndt's vehicle, which was deep in his backyard, before he found Mr. Arndt.

Third, Mr. Arndt was found in his backyard, in an area that was not visible from outside his property. Again, Mr. Arndt's home was bordered by a "woods." (*Id*. at 23-24.) Moreover, the arresting officer could not see Mr. Arndt from the front of the home. (R14 at 9.); (*See* R12: Ex. 5.)

Again, the arresting officer could not see Mr. Arndt until he had entered Mr. Arndt's property and walked around Mr. Arndt's vehicle. (R14 at 9-10, 29.) In other words, Mr. Arndt had taken steps to ensure that the area where he was found could not be seen by passersby. Accordingly, this factor weighs heavily in Mr. Arndt's favor.

Importantly, court's have held that backyards are generally more private then front yards because the backyard cannot be seen by those in the front, and is not open to the

public to approach the home from that direction. *See generally Walker*, 154 Wis. 2d at 184 n.16.

Conversely, the circuit court found that "Mr. Arndt's property [was] completely open to the public, there [were] no steps taken whatsoever to protect this area from the observation of passersby." (R20 at 27.) This finding is not supported by the facts in the record and the officer's observations.

Lastly, the circuit court examined whether the area was enclosed by a fence and found that it was not. (R20 at 26.) Importantly, as exhibit 5 shows, Mr. Arndt's property and home are encircled by woods. Thus, while the arresting officer could not recall seeing a fence, the property was for all practical purposes closed off on three sides by a natural wood fence. Thus, this factor weighs in Mr. Arndt's favor.

Ultimately, when weighing all these factors, the area where Mr. Arndt was found was clearly within of the curtilage of his home.

Community-Caretaker Function

The circuit court, however, went further in its ruling. Specifically, the circuit court also found that the community caretaker exception applied to the search in this case. (R20 at 32.)

The Wisconsin Supreme Court has laid out a three-step test to determine whether this exception applies, with four relevant factors in deciding the third step. *State v. Garcia*, 2013 WI 15, ¶15, 345 Wis. 2d 488, 826 N.W.2d 87.

Specifically, the *Garcia* court listed the steps as follows:

> (1) Whether a search or seizure within the meaning of the Fourth Amendment has occurred;
>
> (2) if so, whether law enforcement were exercising a bona fide community caretaker function; and
>
> (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker exception was

> reasonably exercised within the context of a home.[1]

Id.

Concerning the second step, the circuit court found an objectively-reasonable basis to "check on the condition" of Mr. Arndt because of the report that the driver fell out of the vehicle and "information" that there had been an accident. (R20 at 31.)

The community-caretaker exception, however, does not apply to this case because the officer did not have an objectively reasonable basis to believe anyone was hurt.

Specifically, there was only a report that the truck "possibly had hit a sign." (R14 at 5.) Furthermore, there was no evidence of any damage, much less the type of destruction that would imply injuries before the officer entered the curtilage of Mr. Arndt's home. *See* (R20 at 17.)

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1 The officer clearly conducted a search in this case. Thus Mr. Arndt only challenges the second step, and the four factors of the third step need not be examined.

The facts of this case are more favorable than the facts in *State v. Ultsch*. In *Ultsch*, the officers were dispatched to the scene of an accident involving a vehicle and a brick wall of a building that "caved in." *Ultsch*, 2011 WI App. at ¶2. The officers then found "significant" damage to the defendant's left front fender. *Id*. at ¶19.

Ultimately the *Ultsch* court found that the officer lacked an "objectively reasonable basis" to believe that the defendant was in need of assistance because there was nothing to tie the known accident to a possible injury. *Id*. at ¶20-22.

In the present case, there is no known accident, no known damage to the vehicle, and the alleged "fall" reported of the driver loses any significance.

Again, the circuit court acknowledged the close call this case was when it stated that it believed that "there are all sorts of legitimate issues" for Mr. Arndt to appeal. (R20 at 37-38.)

CONCLUSION

WHEREFOR, Mr. Arndt respectfully requests this Court to reverse the circuit court below and suppress the evidence seized after the unconstitutional search and seizure.

Dated this 3rd day of March, 2015.

Respectfully submitted,

MELOWSKI & ASSOCIATES, LLC

By: _____

Dennis M. Melowski
State Bar No. 1021187
Attorney for Defendant-Appellant

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APPENDIX

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,909 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 3rd day of March, 2015.

Respectfully submitted:
By:_____
Dennis M. Melowski
State Bar No. 1027573
Attorney for Defendant-Appellant