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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT II**

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**Appeal No. 2015AP000277 - CR**
**Circuit Court Case No: 2014CM000385**

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

v.

**RACHAEL A. DICKENSON,**

Defendant-Appellant.

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**AN APPEAL FROM THE JUDGMENT OF CONVICTION FOR OPERATING A MOTOR VHEICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT–2ND OFFENSE IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE TODD K. MARTENS, CIRCUIT COURT JUDGE, PRESIDING.**

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# THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT RACHAEL A. DICKENSON

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## WISCONSIN CONSTITUTION



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## STATEMENT OF ISSUES

I. Did City of Hartford Police Officer Alan Koester engage in an illegal detention, search and/or seizure of Rachael A. Dickenson for the purposes of investigating a car stuck in a snowbank by walking up her driveway to her backyard area and back deck/patio in which Ms. Dickenson had a reasonable expectation of privacy and that Officer Koester did so without a search warrant, without consent and without any reasonable suspicion to believe that Ms. Dickenson had committed, was committing, or was about to commit a crime or offense for which there were also not exigent circumstances?

Trial Court Answer: No.

II. Did City of Hartford Police Officer Alan Koester engage in an illegal detention, search and/or seizure of Rachael A. Dickenson for the purposes of investigating a car stuck in a snowbank by trespassing and walking up her driveway to her backyard area and back/patio?

Trial Court Answer: No.

## STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

## STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the court concludes that the briefs had not fully presented the issue on appeal.

## STATEMENT OF THE CASE

Rachael A. Dickenson was arrested for operating a motor vehicle while under the influence of an intoxicant (R 1:1, App.1-3) contrary to Sec. 346.63 (1) (a) Stats. and operating a motor vehicle with a prohibited alcohol concentration, contrary to Sec. 346.63 (1) (b) Stats., on January 12, 2014. She entered a not guilty plea on June 2, 2014 and on the same date also filed a Motion for Suppression of Evidence (R 12, 13 & 14) for which a hearing was held on July 10, 2014 and at which the court denied the defendant's Motion to Suppress Evidence. (R42-pp. 35-40, App 20-25)

Ms. Dickenson entered a plea of guilty to the charge of operating a motor vehicle under the influence of an intoxicant on July 23, 2014. (R 18) Ms. Dickenson was sentenced on November 17, 2014. (R 31) A Notice of Intent to Pursue Post-Conviction Relief was filed on November 17, 2014. (R32) A Notice of Appeal was filed on February 6, 2015. (R 37) The record from the Washington County Clerk of Circuit Court was received by the Court of Appeals on March 17, 2015.

## STATEMENT OF FACTS

On January 12, 2014, City of Hartford Police Officer Timothy Rohrer was dispatched to the general vicinity of a cemetery located in the southwest corner of the intersection of Union Street and Wilson Street in the City of Hartford because there was either a vehicle in the ditch or in a snowbank. (R 42:25-26, App.14-15) The cemetery is located on a sloping hill. There is an entrance into the cemetery at the southern end on Wilson Street and another entrance at the north or top end on Union Street. (R 42:26, App.15) When Officer Rohrer responded to that location he found that a vehicle had apparently entered the cemetery on the south end and attempted to exit it on the north end at the top of the hill. (Id.) However, whereas the cemetery had been snowplowed for most of the winter, Officer Rohrer said that on that night or maybe a prior night the entrance at the top north end of the cemetery had not been plowed. There was snow blocking that northern entrance although it was not a complete snowbank as on the sides of the street through the cemetery. The vehicle had not attempted to exit the cemetery because to attempt such an exit was not possible without causing damage to the vehicle. So it appeared that the vehicle had attempted to exit by turning left and proceeding west down a sidewalk at the top of the cemetery and got stuck in the snow. (R 42:27, App.16) The police department was contacted by a towing company which had been called to the scene to pull the vehicle out. (R 42:26, App. 15)

Officer Rohrer agreed that it was his understanding that the vehicle had come in through the entry way at the south end of the cemetery and gone up to the north end and had its exit blocked by plowed snow. (R 42:13, App. 18)

While Officer Rohrer was at the cemetery he made contact with a male individual who identified himself as Ms. Dickenson's father and who said that she was at the residence of he and his wife located at 684 E. Rossman in the City of Hartford. (R 42:27-28, App.16-17)

Officer Rohrer did not ask if Ms. Dickenson was injured. (R 42:29, App.18) Officer Rohrer did not ask if Ms. Dickenson had been drinking. (Id.)

Officer Rohrer did look at the vehicle. (Id.) He saw no damage to the motor vehicle. (R 42:29-30, App.18-19) He saw no cracks in either the windshield or any other window in the motor vehicle. (R 42:30, App.19) He saw no blood associated with the motor vehicle. (Id.) Officer Rohrer did not enter the vehicle to inspect it for any indications of any sort of injury to any occupant. (Id.)

Officer Rohrer agreed that the vehicle had struck nothing and was simply stuck in the snow. (R 42:13, App.8)

Officer Rohrer asked City of Hartford officer Alan Koester to locate Ms. Dickenson and told him to do that by going to 684 E. Rossman, which was the father's residence, because she was there. (R 42:6-7, App.4-5)

Officer Koester went to 684 E. Rossman and contacted Ms. Dickenson's mother who confirmed that Ms. Dickenson had come there and that she had left on foot to go to her own residence, located at 618 Union Street, Hartford. (R 42:7, App.5)

Officer Koester testified that when he met with Ms. Dickenson's mother at 684 E. Rossman he did not ask the mother if Ms. Dickenson had displayed any signs of injuries. He did not ask the mother if it appeared Ms. Dickenson had been drinking. He did not ask the mother if it appeared that Ms. Dickenson was intoxicated. He did not ask the mother if it appeared that Ms. Dickenson's abilities (to operate a motor vehicle or otherwise) were impaired. (R 42:14-15, App. 9-10)

It would be reasonable for officer Koester to assume that Ms. Dickenson had walked from where she left her vehicle to her parent's house at 684 E. Rossman. In any instance, he certainly knew that Ms. Dickenson had walked from 684 E. Rossman to 618 Union, Ms. Dickenson's residence, because he had been told by her mother that she had left on foot. (R 42:14, App. 9)

To this point in time Officer Koester is aware that there is a vehicle that was rendered inoperable due to snow and therefore it cannot really be characterized as an accident. He has no information or evidence confirming that there were any injuries. He has no information or evidence indicating consumption of alcohol, intoxication or impairment of driving abilities due to the consumption of alcohol.

Officer Koester described 618 Union as being a house with a front yard on the north side of Union with a front door facing south. (R 42:16, App.11) He also described the fact that there was a driveway 20 feet to the east of the sidewalk leading to the front door which led north and back to a detached garage. (Id.)

Officer Koester responded to 618 Union at approximately the same time as City of Hartford Police Officer Hall. Officer Hall went up the front sidewalk to the front door of that residence. (R 42:7, App.5)

Officer Koester advised that he did not know if Officer Hall had knocked on the door or rang the doorbell and Officer Koester apparently did not wait for any response to anything Officer Hall may have done at the front door. (R 42:17, App.12)

Officer Koester testified that he went to the back of the house because it is their department's standard procedure. (R 42:7-8, App.5-6)

When asked to explain that policy, he advised that anytime they make contact with a residence where there might be a flight risk they always cover all entrances. And because most residences have a front and back door, it was his responsibility to the cover the secondary door "**which would be the backyard door**". (R 42:10, App.7)

However, there was no testimony or evidence presented that this officer or any other officer had ever had any other contact with Ms. Dickenson and no testimonial basis for any sort of objective determination that she was a flight risk.

Officer Koester did not testify that he called out in any way from the driveway near the street or from that portion of the driveway nearest to the front door towards the backyard to ask if Ms. Dickenson was back there and if he could have permission or consent to come back.

Officer Koester walked north down the driveway past the front of the house towards the back and the detached garage and when he came to the end of the house there was a wooden deck with benches to his left. (R 42:16-17, App.11-12) It was at that point that he saw a woman and a male sitting on the benches smoking. (R 42:17, App.12) There was a flight of stairs leading from the driveway to the deck. (R 42:18, App.13) Only then did Officer Koester call out and ask if the woman was Ms. Dickenson to which he received an affirmative response. He then went to the deck to determine if that was in fact Ms. Dickenson to continue his investigation. (Id.)

All the evidence accumulated to prosecute Ms. Dickenson for the charges of operating a motor vehicle under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration was obtained during and after Officer Koester confronted Ms. Dickenson while in her backyard on her deck. (See the Criminal Complaint (R 1, App.1-3)

## STANDARD OF REVIEW

This Court reviews the denial of a defendant's motion to suppress under a two-part standard of review: the Appellate Court upholds the trial court's findings of fact unless they were clearly erroneous, but reviews de novo whether those facts warrant suppression. State v. Hampton, 2010 WI App.169, ¶23, 330 Wis.2d 531, 793 N.W.2d901.

## ARGUMENT

**I. City of Hartford Police Officer Alan Koester engaged in an illegal detention, search and/or seizure of Rachael A. Dickenson for the purposes of investigating a car stuck in a snowbank by walking up her driveway into her backyard area and back deck/patio in which Ms. Dickenson had a reasonable expectation of privacy and that Officer Koester did so without a search warrant, without consent and without any reasonable suspicion to believe that Ms. Dickenson had committed, was committing or was about to commit a crime or offense and for which no exigent circumstances existed.**

A warrantless entry into one's home by police is presumptively unreasonable and protected both by the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. State v. Hughes, 2000 WI 24, ¶17, 233 Wis.2d 280, 607 N.W.2d 621. The warrantless entry of a house for purposes of search or arrest is presumptively unreasonable. See Welch v. Wisconsin, 466 U.S. 740, 750 (1984).

Furthermore, those Constitutional protections extend beyond the wall of the home to the "curtilage." Oliver v United States, 466 U.S. 170, 180 (1984). State v. Walker, 154 Wis.2d 158, 184, 453 N.W.2d 127 (1990).

"[C]urtilage is the area to which extends the intimate activity associated with the sanctity of a [person]'s home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes." Id., State v. Martwick, 2000 WI 5 ¶26, 231 Wis.2d 801, 604 N.W.2d 552.

A search within the protections of the United States and Wisconsin Constitutions occurs when the police infringe upon an expectation of privacy that society considers reasonable. State v. Edgeberg, 188 Wis.2d 339, 345, 524 N. W.2d 911 (Ct.App.1994)

However, there is a recognized exception to the warrant requirement when the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from that governmental interference. State v. Hughes, at ¶17.

Police are certainly allowed to walk up the front walk to the front door of a residence and knock on it in order to seek access to the occupant. That is what City of Hartford Police Officer Hall did in the instant action. However, law enforcement is not allowed to impede upon the curtilage of the home in order to speak with the residents. The Fourth Amendment and Wisconsin Constitution protect the home and the area around it to the extent that an individual has a reasonable expectation of privacy. United States v. Dunn, 480 U.S. 294, 300 (1987).

There should be no question that Officer Koester taking a stroll down the driveway constituted unconstitutional snooping along the curtilage of the home. While an officer is entitled to see what he can see from the front door/front porch, he is not entitled to walk along protected curtilage, which includes the side and back of the house, peer in the windows to see what he can see, or walk onto a back porch and stand on tiptoe to look through the door. As example, law enforcement officers were "gathering information in an area belonging to Jardines and immediately surrounding his house, in the curtilage of the house, which would have enjoyed protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." Florida v. Jardines, 133 S.Ct. 1409, 1414 (2013).

The court in Jardines considered the curtilage to include the "area around the home [which] is 'intimately linked to the home, both physically and psychologically' and is where 'privacy expectations are most heightened.'" Jardines, at p. 1415 quoting California v. Ciraolo, 476 U.S. 207, 213 (1986).

The United States Supreme Court in Jardines found that it was an invasion of the home's curtilage to bring a drug-sniffing dog to the front door.

> [T]he knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds. (Citation omitted) This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Thus, a police officer not armed with a warrant may approach a

> home and knock, precisely because that is 'no more than any private citizen might do'. (Citation omitted) To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot the same visitor exploring the front path . . ., or marching . . . into the garden before saying hello and asking permission, would inspire most of us to – well, call the police. The scope of a license - expressed or implied - is limited not only to a particular area but also to a specific purpose . . . Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.
> Jardines at pp. 1415-16.

In State v. Popp, 2014 WI App 100, 357 Wis.2d 696, 855 N.W.2d 471, the Court described the actions of the officers when they went to the Popp/Thomas residence (a trailer home), after having been specifically refused entry in the trailer, as "**snooping** around the outside of the trailer" and that they "**poked** around the outside of the trailer." (emphasis added) Popp at ¶ 7.

The unlawful search occurred in Popp when the officers went around the trailer, walked up some steps attached to a wall and peered into a small, vertical window. Id. A patio or deck attached to the back of a residence with benches and going from the residence into the backyard is one of those areas associated with the most private affairs of life such as having a drink, grilling out or otherwise eating, smoking a cigarette, having private conversation about the activities of the day or plans for the future. Law enforcement officers are not allowed to intrude into that area except with a warrant or upon invitation, neither of which they had in the instant action. Absent consent they may only conduct their search if they have probable cause that a crime or offense was committed and exigent circumstances also existed, neither of which were testified to in the instant action. The Appellate Court reviews

exigent circumstances using a flexible test of reasonableness under the totality of the circumstances. State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986). One factor the court considers when determining whether any exigency exists is the gravity of the offense for which an arrest is being made. Welch at p.750. The circumstances herein, a car being extricated from a snowbank with no apparent damage or injuries, and under the supervision of the owner's father who has apparently been in contact with the owner and knew where she is, are comparably trivial to those circumstances of Welch, a suspected drunk or reckless driver. The State bears the burden of proving that the warrantless entry into a residence or its curtilage occurred under exigent circumstances. See State v. Milashoski, 159 Wis.2d 99, 110-11, 464 N.W.2d 21 (Ct.App 1990). The State has shown no exigent circumstances. Therefore, the stroll down the driveway by Officer Koester searching for Rachael Dickenson was unlawful and proscribed by constitutional law.

**II. City of Hartford Police Officer Alan Koester engaged in an illegal detention, search and/or seizure of Rachael A. Dickenson for the purposes of investigating a car stuck in a snowbank by trespassing and walking up her drive into her backyard area.**

Absent any other considerations, Officer Koester trespassed upon the Rachael Dickenson property/curtilage by walking down the driveway. He could go to the front door, knock, wait and leave, but he could not walk to the back. While it is likely where there is some degree of probability or possibility that there is a

back door, Officer Koester assumed that but did not know that. He was walking down the driveway towards the end of the driveway towards a detached garage to see what he could see. He knew if there was a back door it was in the backyard. Only when he went beyond the northern projection of the house proper did he come upon Ms. Dickenson and a male individual who were seated and relaxing, smoking a cigarette and enjoying the privacy of her deck and back yard areas and thereupon interrupt her because his search for her was now complete and he could commence his investigation into her activities of that night. From his observations after he trespassed into her backyard, Officer Koester made determinations to arrest her for operating a motor vehicle under the influence of an intoxicant and obtain a breath alcohol sample. He was not constitutionally entitled to do any of that due to the fact that he was unlawfully trespassing upon her property.

Wisconsin recognizes that:

> Fourth Amendment jurisprudence has evolved in two seemingly different, but somewhat interrelated, methods of identifying protectable interests' relating to the home. See Powell v. State, 120 So.3d 577, 582 (Fla. Dist. Ct. App. 2013). One method focuses on a person's expectation of privacy. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) …
>
> The other method, 'known as the intrusion or trespass [ ] test, focuses on whether government agents engaged in an 'unauthorized physical penetration into a constitutionally protected area.' (citation omitted) … The Supreme Court utilized the trespass method into recent cases pertinent to our analysis here: United States v. Jones, 132 S. Ct. 945, 949 (2012) … Florida v. Jardines, 133 S. Ct. 1409, 1417-18. Popp at¶ 18.
>
> It is important to note that a defendant claiming a Fourth Amendment violation may support his or her claim using **either** method. Popp at ¶19.

Similarly:

> We need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under Katz. One virtue of the Fourth Amendment's property-rights baseline is that **it keeps easy cases easy**. That the officers learn what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred. (emphasis added) Florida v. Jardines at p. 1417.

In the slightly paraphrased words of Nicole Curtis on HGTV's Rehab Addict when she has described the various renovations she has done on an older home and it's exterior to return it to its former glory: A backyard is that place where you are supposed to be with family and friends and let the dog out. A place that is clean, inviting and **private.**

The decision of the Circuit Court, R:42 (pp. 35-40) App. 20-25, would allow any law enforcement officer to walk down any driveway as far as it would go searching for person, property or evidence with impunity because there never would be a trespass and there never would be any reasonable expectation of privacy. That is, there is no curtilage if it is along a driveway. This is erroneous. The backyard and its deck are private to Rachael Dickenson, and Officer Koester trespassed by going back there. This should be any easy case. The officer trespassed upon the curtilage of the home in his search for Ms. Dickenson by walking down the driveway all the way along the side of the home into the back yard and onto the back deck to seek out Ms. Dickenson and did this without consent, without probable cause and without exigent circumstances.

## CONCLUSION

Either Officer Koester trespassed into the clearly private areas of the back deck and backyard of 618 Union Street, the residence of Rachael Dickenson, or he violated the curtilage without warrant, without consent and without the exceptions of probable cause and exigent circumstances. Either way all evidence accumulated by him because of his activities must be suppressed.

Dated this _____day of April 2015

Respectfully submitted,

Raymond Law Office

_____

Robert C. Raymond
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## FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 15 pages. The word count is 4,243.

Dated this ____ day of April, 2015

Respectfully Submitted

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## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) 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 a 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.

Dated this ___ day of April, 2015.

Respectfully submitted,

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## CERTIFICATION OF COMPLIANCE WITH 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 s. 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 _____ day of April, 2015

Respectfully submitted,

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## APPENDIX AND INDEX