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DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RACHAEL A. DICKENSON,

Defendant-Appellant.

ON APPEAL FROM AN ORDER
ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY,
THE HON. TODD K. MARTENS, PRESIDING

PLAINTIFF-RESPONDENT'S REPLY BRIEF

STATE OF WISCONSIN,
Plaintiff-Respondent

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STATEMENT OF ISSUES

- I. Whether the Defendant has a reasonable expectation of privacy in her driveway such that Officer Koester's presence in her driveway, that led him to observe the Defendant and subsequently interview her, violated the Defendant's Fourth Amendment protections against unreasonable searches?

Trial Court Answer: No

STATEMENT ON PUBLICATION

Plaintiff-Respondent does not request publication, pursuant to Section 809.19(1)(c), Wis. Stats.

STATEMENT ON ORAL ARGUMENT

Plaintiff-Respondent does not request oral argument, pursuant to Section 809.19(1)(c), Wis. Stats.

STANDARD OF REVIEW

This Court applies a two-part standard to review the Defendant-Appellant's motion to suppress: the Court will uphold the trial court's findings of fact unless they are clearly erroneous but reviews *de novo* the application of law to those facts. State v. Hampton, 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901.

STATEMENT OF FACTS

On January 12, 2014, at about 11:23 p.m., Officer Michael Koester and Officer Timothy Rohrer of the City of Hartford Police Department were dispatched to investigate a report by ASAP Towing of a vehicle in a snowbank near the intersection of Union Street and Wilson Street in the City of Hartford. (R. 6:9-25; 26:8-11.) Officer Rohrer responded to the reported location, observed an unoccupied vehicle, and obtained the license plate information from the vehicle in order to identify the registered owner. (R. 6:11-14.) He provided that information to dispatch who subsequently shared said information with both officers. (R. 6:17-25; 7:1-8.)

Officer Koester responded to the address associated with the registered owner and was advised by an occupant at that residence that the Defendant was located at 618 Union Street in the City of Hartford. (R. 7:5-8.) Therefore, Officer Koester responded to that residence. (Id.) Upon arrival Officer Koester indicated he was assisted by Officer Hall; Officer Hall approached the front door of the residence and Officer Koester reported that he walked up the driveway toward the backyard of the residence. (R. 7:23-25.) When Officer Koester walked far enough down the driveway to be able to see the backyard he observed the Defendant and a male subject; he reported that while he remained standing in the driveway he called out to the subjects and asked to speak with Rachael Dickenson, and the Defendant identified herself as such and then had contact with said officer. (R. 18:15-18.)

Officer Koester described the driveway as located on the east side of the residence, adjacent to the residence (R. 9:25; 10:1-3), running north-south in direction (R. 21:22-25), which is accessed from Union Street (R. 10:7-9). The front of the residence faces south; the backyard is on the north side of the residence. (R. 10:4-6.) The driveway extends past the house to the detached garage, located about two car lengths past the northern wall of the residence. (R. 22: 4-11; R. 24:1-5.) Officer Koester testified that he restricted his presence to the driveway and walked down the driveway to the point where he was able to see the patio attached to the back of the house, at which time he observed the unidentified male and the Defendant. (R. 38:3-4.)

ARGUMENT

I. THIS COURT SHOULD CONCLUDE THAT THE DEFENDANT DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE RESIDENCE'S DRIVEWAY BECAUSE THE DRIVEWAY WAS HELD OUT TO THE PUBLIC FOR ACCESS AND THE DEFENDANT FAILED TO TAKE ANY STEPS TO SECLUDE THE DRIVEWAY FROM ACCESS OR OBSERVATION BY THE PUBLIC.

The protections afforded in the Fourth Amendment and Wisconsin Constitution against unreasonable searches extend to the curtilage that surrounds a home. United States v. Dunn, 480 U.S. 294, 300 (1987). However, Fourth Amendment protections apply only to areas where an individual holds a subjective expectation of privacy that society is willing to recognize as reasonable. State v. Sigarroa, 2004 WI App 16, ¶ 18, 269 Wis. 2d 234, 249, 674 N.W.2d 894, 901. A court's analysis focuses on the manner in which the defendant holds the property out to the public or restricts its access: "[t]he focus of the fourth amendment inquiry is not upon the ability of third parties to gain access to or view the property but rather upon the manner in which the possessor holds the property out to the public. State v. Bauer, 127 Wis. 2d 401, 406, 379 N.W.2d 895, 897 (Ct. App. 1985) (citing State v. Grawien, 123 Wis. 2d 428, 436-37, 367 N.W.2d 816, 820 (Ct. App. 1985)).

As part of this analysis, Wisconsin courts consider whether the location searched is within curtilage, which is defined as "the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." Sigarroa, 269 Wis. 2d 234, ¶ 19; State v. Martwick, 2000 WI 5, ¶ 26, 604

N.W.2d 552, 559, 231 Wis. 2d 801, 815 (citing Oliver v. United States, 466 U.S. 170, 180 (1984)). Wisconsin courts apply four factors to determine whether an area claimed to be protected by the Fourth Amendment constitutes curtilage: (1) the proximity of the area 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 observation by people passing by. Martwick, 231 Wis. 2d 801, ¶ 30 (citing United States v. Dunn, 480 U.S. 294, 301 (1987)). However, the Fourth Amendment's protections do not apply to lands outside the curtilage of a home. Id. at ¶ 27 (citing Hester v. United States, 265 U.S. 57, 59 (1924)).

The circuit court relied on State v. Bauer; there, the Wisconsin Court of Appeals addressed whether an officer's presence in the driveway of the property, which led him to observe a deceased horse, violated the defendant's fourth amendment privacy rights. Bauer, 127 Wis. 2d at 405. In Bauer, the officer received a call alerting him to a dead horse located in the property's driveway and he responded to the property, walked up the driveway, and observed the deceased animal as it was lying in the driveway. Id. at 404-405. In concluding that the defendant did not have a reasonable expectation of privacy in the driveway, the court noted that the driveway was a common driveway that allowed access to the residence and barns located on the property. Id. at 406. Access to the driveway was not enclosed, fenced, or restricted in any fashion. Id. The court concluded "[n]o unreasonable search occurs where police officers who enter private property

restrict their movements to those areas generally made accessible to visitors, such as driveways, walkways, or similar passages.” Id. (citing United States v. Reed, 733 F.2d 492, 501 (8th Cir. 1984)).

Consider also United States v. French, a decision from the Seventh Circuit that addressed whether the officer’s presence in the defendant’s driveway, which led to the officer acquiring evidence of drug trafficking, violated the Fourth Amendment. 291 F.3d 945 (7th Cir. 2002). The defendant alleged the driveway was within the curtilage of the home. French, 291 F.3d at 950. The Seventh Circuit applied the Dunn factors and concluded that the driveway was not within the curtilage of the home because the defendant failed to take any steps to protect the area of the driveway such that it should be viewed as “intimately connected with the home.” Id. at 951 (citing Siebert v. Severino, 256 F.3d 648, 653-54 (7th Cir. 2001). The court concluded that “the defendant failed to produce any evidence that his driveway . . . [was] hidden from view, inaccessible, or otherwise used for an intimate activity.” Id. at 953.

The driveway at issue here is as equally unrestricted as were the driveways in Bauer and French. The driveway is accessed directly from Union Street and is thus visible from the road. There was no evidence that access to or from the driveway was restricted in any manner. There was no evidence of any signage restricting use of the driveway (“private property”; “no trespassing”). There was no evidence that the driveway was held out for or put to use as something other than a traditional driveway for use by visitors to the residence. Furthermore, the

patio located adjacent to the driveway was not protected from view by persons located in the driveway either. There was no fencing or other shield to create a private, intimate setting on the patio as opposed to the driveway. Accordingly, the Defendant did not have an expectation of privacy in the driveway that society is willing to recognize as reasonable because she took no action to restrict access to or use of the driveway in any fashion that would associate it with the intimate activities of a home.

The Defendant cites to State v. Popp and attempts to analogize the officer's observations in this case to that in Popp. 2014 WI App 100, 357 Wis. 2d 696, 855 N.W.2d 471. That analogy fails. In Popp the officers, acting on an anonymous tip of drug activity, approached the defendant's trailer, "walked up the steps attached to the wall [of the trailer], . . . peered in a small, vertical window—a window the officers could not have seen into from the road" and used a flashlight to see inside the residence. Id. at ¶ 7. They then walked up to the north end of the trailer where there was a large bay window, "walked on the grass and snow right next to the window so they could peer inside" and were close enough to peer through the sheet and blinds to see inside the trailer. Id. These officers were standing on land immediately adjacent to the trailer and looking into the trailer's windows. Id. The Court concluded that the areas upon which the officers stood to be able to look inside the trailer were curtilage and concluded that the officers' conduct therefore violated the Fourth Amendment. Id. at ¶ 20.

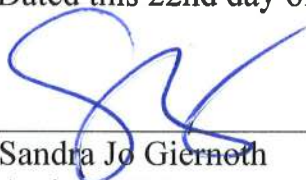
Here, Officer Koester walked down the driveway that was unobstructed and completely held open as an access way; from that vantage point he was able to see the Defendant standing on an unobscured, unshielded patio. He did not step foot onto any curtilage; he remained in the driveway and observed from that position the Defendant's presence in the backyard. Thus, Officer Koester did not traverse upon a constitutionally protected area because the Defendant took no steps to seclude or otherwise restrict access to or observation of the driveway or backyard.

CONCLUSION

Accordingly, because the Defendant took no action to restrict access to the driveway, and because the Defendant's driveway was held open to the public, the driveway does not constitute curtilage. Because Officer Koester restricted his presence on the property to the driveway and observed the defendant from his vantage point on the driveway, his presence and observations did not violate the Fourth Amendment.

Respectfully submitted,

Dated this 22nd day of May, 2015.




Sandra Jo Gierneth
Assistant District Attorney

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,815 words.

Dated this 22nd day of May, 2015.



Sandra Jo Giernoth
Assistant District Attorney

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. § 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 22nd day of May, 2015.



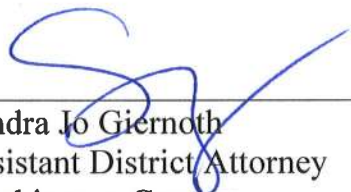
Sandra Jo Giernoth
Assistant District Attorney

CERTIFICATION OF MAILING

Pursuant to Sec. 809.80(3)(b), Stats., I hereby certify that on the 26th day of May, 2015, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the original and ten (10) copies of the enclosed addressed to the following named person at the following post office address:

Diane Fremgen
Wisconsin Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Dated this 22nd day of May, 2015.



Sandra Jo Giernoth
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