STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RACHAEL A. DICKENSON,

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION FOR OPERATING A MOTOR VEHICLE 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

THE REPLY BRIEF OF THE DEFENDANT-APPELLANT RACHAEL A. DICKENSON

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CLARIFICATION OF RESPONDENT'S STATEMENT OF FACTS

On Page 6 of the Respondent's Statement of Facts in the second paragraph it states that "Officer Koester responded to an 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" potentially implying that the second residence to which Officer Koester responded may not have been the residence of Rachael A. Dickenson. Respondent's brief had no appendix provided. Respondent's cites to the record do not include which record entry but would apparently be Record 17, which is the transcript of the motion hearing. And the references in the Respondent's brief after "R" appear to be the pages of the transcript to which reference is being made. Appellant apologizes for consistently identifying the transcript in Appellant's brief as "42" as opposed to "17."

In clarification, Officer Koester was informed by Ms. Dickenson's father to go to Ms. Dickenson's father's residence first and upon arriving there contacted Ms. Dickenson's mother who said that Ms. Dickenson had left to go to her own residence, 618 Union Street, City of Hartford, to which he responded. (R.17:6-7, App. 102-03)

ARGUMENT

I. REASONABLE EXPECTATION OF PRIVACY

While other courts have defined "curtilage" differently, Wisconsin State Supreme Court in State v. Martwick, 2000 WI 5 ¶26, 231 Wis.2d 801, 604 N.W.2d. 552 sets forth four factors which the Appellant argues as follows:

1) The deck upon which Ms. Dickenson and her male friend were smoking and talking was in the immediate proximity of the home because it was attached to the home.

2) That deck was included within a rough enclosure which consisted of the house immediately in front of it, the driveway to the right, the unattached garage to the northeast and the backyard to the north.

3) The nature of a deck in the backyard is one of those intimate areas which individuals and families put to private use for leisure, play or relaxing.

4) The deck was protected from people passing by on the street or sidewalk by virtue of the fact that the deck was behind the house and not observable to those passing by or to those approaching the house by the sidewalk to the front door.

The Respondent, as did the trial court, places a great deal of emphasis upon the fact that there was a driveway as there was in State v. Bauer, 127 Wis.2d 401, 379 N.W.2d 895 (Ct.App.1985). However, there are significant differences between this driveway and the Bauer driveway:

1) Ms. Dickenson's residence and driveway is in the City of Hartford and is in a residential area with streets and numbered houses. It is uncommon for strangers or other interlopers to walk up an individual's driveway towards their private garage and into the

backyard area. The driveway in Bauer was in a rural area where it is far more common for individuals to seek access to the owner by going up a driveway because there often is not a sidewalk.

2) Ms. Dickenson's residence had a sidewalk leading up to a front door which was used by Officer Hall. Curtilage implicitly open to use by the public include the front door of a home and the approaches to it. State v. Edgeberg, 188 Wis.2d 339, 347, 524 N.W.2d 911 (Ct.App.1994). The Bauer court does not tell us the approximate location of the farm residence or outbuildings.

3) The dead horse in Bauer, which formed the immediate basis for a later search warrant, was located in the driveway itself and was visible from the public roadway. Bauer at 407. Ms. Dickenson's backyard and deck were not visible from the public roadway, from the public sidewalk nor from the sidewalk going from the public sidewalk up to the front door.

4) Bauer had called the Waukesha County Humane officer who had previously visited the property several times and asked that Humane officer for assistance in removing the dead horse and the humane officer had also received a call from the actual owner of the property asking to meet. Bauer at 404. No such invitation to enter the Dickenson property had been made to law enforcement.

5) It was so obvious that a backyard is associated with the intimacies and privacies of life that the State conceded such in State v. Wilson, 229 Wis.2d 256, 265, 600 N.W.2d 14 (Ct.App.1999) (Pet. for Rev. Denied 9-28-1999), to which the Court added that "the back door of the home is intimately related to the home itself and to home activities because

it provided access and egress to the backyard and garage." Id. Similarly, in Wilson, the back door of that home, to which that officer also went, could not be seen from the front of the house, from the street or from the sidewalk. It could only be seen after walking the length of the driveway into the backyard. Even so, the Court said that "[c]urtilage is not to be defeated merely because the subject area may be observed by some." Id.

6) Officers in Bauer had received complaints about conditions on the farm of which a dead horse could suggest criminal behavior, Bauer at 404-05. Officers who contacted Dickenson were aware of no criminal behavior nor any other unlawful activities on her part, only that she had legally driven through the cemetery and had been unable to exit it due to snow blockage. (There was no reason to inform Ms. Dickenson that her vehicle was found and about to be towed because her father was there apparently supervising the situation.)

Consequently, simply because the Court of Appeals in Bauer found that State agents had reason to proceed up Bauer's driveway does not mean that every law enforcement officer may proceed up every individual's driveway. Or, as previously stated, the warrantless entry of an individual's house for purposes of a search is presumptively unreasonable. See Welch v. Wisconsin, 466 U.S. 740, 750 (1984), as is a search of the curtilage to a person's home, State v. Walker, 154 Wis.2d 158, 184, 453 N.W.2d 127 (1990), and in order to overcome this presumption of unreasonableness, the record must reflect both that the officers had probable cause and also that exigent circumstances existed. Welch at 747. The issue in Bauer involved whether or not the warrantless search was justified by the emergency doctrine and the Court found that it was. Bauer at 408-9. The

officers herein never attempted to set forth any emergency circumstances necessitating a warrantless search because there was no emergency.

The Respondent also relies upon U.S. v. French, 291 F.3d 945 (7th Cir. 2002) because there was a "driveway" involved. The court in French opined that "privacy expectations are most heightened when the area in question is nearer (within 20 feet) to the home …." French at 952. No expectation of privacy was found with respect to the driveway in French because that particular driveway was accessible to the public. The sort of driveway involved herein with Ms. Dickenson's residence went up to an unattached but closed garage. Typically city people keep a huge amount of personal and private property in their garage. Besides automobiles other valuable items housed in a garage may include power equipment, lawn and garden tools, recreational items such as expensive road or mountain bicycles, kayaks, canoes, camping vehicles and equipment, jet skis, strollers, backyard play equipment for children or adults, all of which may be spirited away without great difficulty. Even a locked barn could be considered curtilage, French at 951. A garage that is closed is not subject to public inspection. The Dickenson backyard was not subject to public inspection. An individual strolling or sneaking up the driveway would not be invited and, if caught, would likely be called out for having wandered onto that private property involved in the intimate areas of a person's life.

The four factors set forth in State v. Martwick, 2000 WI 5, ¶23, 231 Wis.2d 801, 604 N.W.2d. 552 were adopted by Wisconsin from United States v. Dunn, 480 U.S. 294, 301-02, 94 L.Ed.2d 326, 107 S.Ct. 1134 in which that Court said:

> We do not suggest that combining these factors produces a finely-tuned formula that, when mechanically applied, yields a "correct" answer to all extent of curtilage questions. Rather, 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. Dunn at 302.

Clearly the patio/deck on the back of the house and in the backyard is one of those areas intimately tied to the home itself and placed under that home's "umbrella" of Fourth Amendment protection.

People in an urban setting whether they be residents of Milwaukee, Madison, Green Bay, La Crosse or Hartford can reasonably expect that the public is only invited to come to their front door and that the public, including police officers without a warrant or without probable cause and exigent circumstances, are not invited to walk towards the garage or into their backyard or to put themselves into a position where they can see the patio/deck or the backyard which they otherwise could not have seen from the street or sidewalk parallel to the street or the sidewalk going up to the front door. Officer Koester intentionally proceeded to the backyard where he believed there would be a back door. (R 17: 5, 6, 10, App. 101, 102, 104) We call it a backyard because it is in the back and it is not in the front. Being in the back is considered private. Those individuals who might sit on their front porch or their front yard on lawn chairs in their swimsuit or shorts and drinking a beer are inviting the public to look at them. Those who do that in the privacy of their deck and backyard are specifically excluding the public from looking at them.

Consequently, Ms. Dickenson had a reasonable expectation of privacy that when she was engaged in private activities on the back deck to her house in the backyard thereof

that no law enforcement officer would barge uninvited up her driveway without having exhausted other legal means and without probable cause that she had committed a crime and without exigent circumstances.

II. TRESPASS

This Court need not decide whether the officer's investigation by going into the backyard of Ms. Dickenson's residence violated her expectation of privacy because officers learned what they learned only by physically intruding upon her property to gather evidence and that is all that is needed to establish that a search occurred. Florida v. Jardines, 133 S.Ct. 1409, 1417(2014). That is a trespass on the part of the officer because the "background social norms that invite a visitor to the front door do not invite him there to conduct a search" Jardines at 1416, and clearly do not invite the visitor into the backyard to conduct a search and would be sufficient for the homeowner to call the police upon such an invasion. Id.

Wisconsin recognizes that an individual claiming a Fourth Amendment violation may use either the "reasonable expectation of privacy test" or the "trespass test." State v. Popp, 2014 WI App 100 ¶19, 357 Wis2d 696, 855 N.W.2d 471. An individual's Fourth Amendment Rights do not "rise or fall" with the reasonable expectation of privacy test. "[T]he government's warrantless trespass onto curtilage is presumptively a Fourth Amendment violation even if there is no reasonable expectation of privacy there". Id.

> The 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. Florida v. Jardines, 133 S.Ct.140 at 1415-16 (2013)

The virtue of this Fourth Amendment property-rights baseline is that it keeps easy cases easy. Jardines at 1417.

Further, the Respondent's failure to dispute Ms. Dickenson's proposition of trespass by Officer Koester and the legal conclusion to be drawn therefrom may be taken as a concession on those points by the Respondent. Charolois Breeding Ranches, Ltd. v. LPC Sec. Corp., 90 Wis.2d 97, 109, 279 N.W.2d 493(Ct.App.1979)

CONCLUSION

There has been a Fourth Amendment violation either because Officer Koester trespassed or violated a reasonable expectation of privacy by walking down the driveway to a point that he was at the back deck in the backyard, none of which could be seen from the street in front, the sidewalk in front or the sidewalk up to the front door. All evidence secured after that point must be suppressed.

Dated this ___ day of June, 2015

Respectfully submitted

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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 9 pages. The word count is 2729.

Dated this ____ day of June, 2015

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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 June, 2015.

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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 June, 2015

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APPENDIX AND INDEX