STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2015AP001815-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ANDREW S. SATO,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE GLENN H. YAMAHIRO AND THE HONORABLE
WILLIAM S. POCAN, PRESIDING

Hans P. Koesser,
State Bar #1010219

Attorney for Defendant-Appellant

Koesser Law Office, S.C.
Post Office Box 941
Kenosha, Wisconsin 53141-0941
Telephone & Fax No.: (262) 654-4864

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STATEMENT OF THE ISSUES

1. Did Officer Post enter the cartilage of the defendant's residence when he walked up to the defendant's bedroom window located along a grassy strip on the side of the defendant's residence and peered into the window?

Trial Court Answer: No

2. Was the search of the defendant's residence sufficiently attenuated from the police department's illegal and warrantless entry into the defendant's residence to justify non-suppression of the evidence?

Trial Court Answer: Yes

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication. This case can be decided on the basis of the briefs and the record.

STATEMENT OF THE CASE

On November 3, 2013 a criminal complaint was filed (R1) in the Milwaukee County Circuit Court charging the Defendant with one count of armed robbery, contrary to Wis. Stat. § 943.32(2).

The complaint alleged that on October 28, 2013, the Defendant had used the telephone of an acquaintance to place a food order from Gold Rush Chicken and that the food was to be delivered to an address in the City of Milwaukee, located at 6221 West Fairview Avenue. When placing the order, the Defendant identified himself as "John."

Upon arrival at that location, the Gold Rush Chicken employee ("the delivery man") noticed man standing a on the west side of 6221 West Fairview. The Defendant then walked up to the passenger window of the delivery vehicle and stuck his head and shoulders into the vehicle. The Defendant touched the bag of chicken and the delivery man told the

Defendant that he would have to pay for the food first. The Defendant then displayed a black, hand gun and stated "I have your money here." While holding the gun in his right hand, the Defendant grabbed the food with his left hand and ran away from the location.

An initial appearance was also held on November 3, 2013, and the defendant's bail was set at $7,500.00 with conditions. (R46:5-7)

On November 12, 2013, a preliminary examination was held before Court Commissioner Rosa Barillas. City of Milwaukee Police Officer Steven Strasser testified at the hearing. At the conclusion of the hearing, Commissioner Barillas found that a felony was probably committed by the Defendant and bound the matter over for trial to the circuit court. (R47:26) The Defendant was then arraigned in open court. The Defendant's attorney entered a plea of not guilty on the Defendant's behalf. Id. The Defendant's bond was maintained at $7,500.0 cash. (R47:30)

On December 16, 2013 the Defendant's attorney filed a "Motion to Suppress Evidence: 1) Illegal Entry and Search of Home and 2) Franks/Mann issue–Illegal Search Warrant based on a Material Omission in the Affidavit for Search Warrant." (R6)

On March 7, 2014, an evidentiary hearing was held on the Defendant's motion to suppress evidence. (R49) Officer Steven Strasser testified that on the morning following the robbery (October 29, 2013) he investigated the case and found that the owner of the phone who placed the call–in order to Gold Rush Chicken was listed as Valerie McDonald, and her address was listed as 6311–A West Fairview, which was a block away from the crime scene. (49:11)

Officer Strasser went to that location and spoke with a person named Colleen McDonald. She told Strasser that the phone belonged to her brother Kevin. (49:12) Strasser then spoke with Kevin McDonald, who

told him that on the preceding evening, he was over at his friend's house, Shannon Zellmer, who resided at 6225 West Fairview, Apartment #2. McDonald stated that they were watching a sporting event on TV. He stated that at approximately 10:30 p.m., a man, who he recognized as Andrew Sato, entered Zellmer's apartment and asked McDonald if he could use his telephone so he could order some food for himself and his girlfriend. (49:13-14) McDonald told Strasser that he knew Sato and that Sato and his girlfriend lived in Apartment 3, right next to Zellmer. (49:13-14)

McDonald told Strasser that after he gave Sato the phone, Sato left the apartment and was gone for about 20-30 minutes. When Sato came back, he gave McDonald his phone back and told McDonald something to the effect that if the pizza guy calls, don't answer. McDonald said that Sato appeared to be "kind of out of breath." (49:14)

Strasser also spoke with Shannon Zellmer who gave him essentially the same story. (49:15) Strasser asked Zellmer if Sato and his girlfriend were in the apartment right now, and Zellmer indicated "Yes, I heard them. They're in their now." (49:15)

Strasser testified that he had three other police officers with him on the scene, including Officers Gajevic, Post, and Iverson (49:16). Strasser testified that he and Iverson remained by the door to Sato's apartment door. Officer Gajevic was posted by the window on the south side of the building. Officer Post was posted by the east bedroom window. (49:16)

Strasser testified that he had formulated a plan about what steps he would take: "First, going to do what's called a knock and talk. Knock on the door. If Mr. Sato answers the door, he's going to be arrested. Freeze the scene, get a search warrant, and search the

apartment. If I don't get it, freeze it on the outside, go get a search warrant." (49:17)

Strasser testified that he proceeded to "knock, pound, announce our presence for about 10 minutes." (49:17) Strasser testified that he announced their presence by:

> Yelling, "This is the police. Mr. Sato open the door. Open the door. We know you guys are in there. Open the door."

(49:18)

Strasser testified that after doing that, they received no answer from anybody inside and he heard no noise. Strasser testified that he had no intention of leaving at that point:

> We continue to knock, and we're not going to go away, continue to knock, hopefully he's going to answer, come to his senses and answer the door. After we knock for a while, Officer Post comes from the back, through the door, when I'm in front of the entry to Apartment No. 3. He tells me there's lot of movement now. Suddenly there was nothing. Now there's something. They're moving stuff around or something to that effect.

(49:18)

Strasser testified that he had to make a plan of action at that point:

> Well, I had to make a plan. If indeed I'm - - if I believe, and I did believe that evidence is being destroyed, I'm going to have to force the door open. But upon opening the door or forcing the door, effect the arrest immediately, freeze the scene, get the search warrant. It's the same thing I do on almost all my investigations.

(49:18-19)

When asked what factors or concerns he had in deciding to kick in the door and make a forceful entry, Strasser cited "[s]afety and destruction of evidence." In terms of safety, Strasser elaborated: "Well, this is an armed robbery. The suspect in this offense was armed with a gun, and we know Mr. Sato had a violent history based on his previous arrests." (49:19)

Strasser then kicked in the door and entered Sato's apartment. He arrested Sato immediately and had him transported from the scene down to the police department. Strasser

instructed the other officers to "freeze" the scene so that he could go and obtain a search warrant (49:19-20)

Strasser then indicated that he then wrote out an affidavit and presented it to an assistant district attorney for review (49:20). See pp. 3-5 of affidavit ("Probable Cause & Investigation). See Appendix at A__. Strasser conceded that at the time he wrote out the affidavit, Sato was already in custody. He further conceded that in Paragraph 8 of the affidavit, he indicated that Sato was located and arrested at 6225 West Fairview Avenue, Apartment No. 3, but he did not indicate that he and the other officers had broken down the door, forced entry and were already inside of the apartment (49:20-21).

Strasser also testified that from the time Sato was arrested until the time he obtained the search warrant, no search of the apartment was conducted, but the officers did remain on the premises and inside of the

apartment until the search warrant was obtained (49:21-22).

Strasser also testified that he believed the doctrine of exigent circumstances justified his warrantless entry into the apartment (49:22). Strasser pointed out that there was a long period of silence broken by movement in a particular bedroom, and that evidence, in particular food, is a perishable item and can easily be eaten, destroyed, or disposed of (49:22-23). He also referred to a receipt that could easily be torn up and destroyed, and that clothing and cell phones could also be hidden or destroyed (49:22-23). Strasser went on to describe in detail how many items of forensically important evidence can be destroyed. Strasser concluded:

> There's many things that can be destroyed that, I believe, was happening at the time. Otherwise, I wouldn't have kicked the door in . . . [a]nd that's like I explained earlier, that's my method of operation. There's no need. We have the time, once he's in custody and there's no one else in the apartment, there's no

> need to search. You get the search warrant, you do it properly, you get the evidence admitted in the trial.

(49:30-31).[1]

At the conclusion of Strasser's testimony, the trial court asked Strasser why he didn't include information in this affidavit that he had already broken into Sato's apartment. The following exchange took place:

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[1] In his affidavit, Strasser listed specific items of evidence he sought to obtain including "such items of U.S. currency as well as packaging used to store and transport food from the Gold Rush Chicken." See Affidavit, Averment #13.

The search warrant obtained from the Court Commissioner Rosa Barillas gave a particularized description of the items to be seized:

1. U.S. currency consisting of two (2) twenty dollar bills, one (1) five dollar bill, four (4) one dollar bills and two (2) quarters;

2. Packaging material displaying the name "Gold Rush Chicken" which contained a twelve (12) piece chicken dinner and a fourteen (14) inch pizza;

3. A black pizza bag with white letters "lights on for safety" related transactions and to record transactions;

4. Blue bib overalls worn by the suspect; dark blue knit hat; and dark blue plaid long-sleeved shirt;

5. Weapons.

BY THE COURT:

Q. Why didn't you're affidavit include information that you already entered the premises?

A. I couldn't tell you why.

Q. Well, you wrote it, didn't you?

A. I don't know. I can't tell you why I didn't put it in there. In a hurry?

Q. You didn't find that to be an important detail in this case?

A. Hindsight.

Q. I don't know what that means. Is that a "yes" or a "no"?

A. Looking at it now, sure.

Q. And what about Assistant District Attorney Ladwig, did you let him know that you had entered the premises prior to talking to him about getting a search warrant?

A. Yes.

Q. So he knew that?

A. Yes.

Q. And he still approved the affidavit without including that information for the judicial officer?

A. He signed it, sir.

> Q. (THE COURT): All right, I'm going to want to hear from Mr. Ladwig on this, too.

(49:32-33)

Later during the hearing, Assistant District Attorney Ladwig testified that he did not recall whether or not Officer Strasser had advised him that entry had already been made to the apartment, but that upon reading paragraph 8 of the affidavit, it would lead him to believe that they had already entered the apartment (49:71).

Police Officer Gary Post participated in the raid of Sato's apartment and testified at the suppression hearing on March 7, 2014 (49:34-51). For a discussion of his testimony, see infra. At p. 12, below.

On March 18, 2014, defense counsel filed a "Brief in Support of Defense Motion to Suppress Search". (R11) In his motion, defense counsel pointed out that the movement or shuffling around that prompted Strasser to kick in the door was actually not heard by

Strasser, but rather, by Officer Post, who was listening to what was going on in the apartment from a bedroom window on the side of the house. Defense counsel argued in his motion that by standing next to the bedroom window and listening in, Post had invaded the "curtilage" of Sato's home, which is also protected by the Fourth Amendment and normally requires a search warrant.

On March 27, 2014 the state filed a letter response to the Defendant's motion, but did not discuss the curtilage issue.

On April 10, 2014, a hearing was held before Judge Yamahiro. (R50) The hearing had originally been scheduled for the court to render a decision on the Defendant's suppression motion (R49:88). However, the judge indicated that after reviewing defense counsel's brief dated March 18, 2013, he believed that defense counsel had "raised a new basis to suppress which is based upon unlawful invasion into the curtilage of the

premises that was occupied by the defendant at the time of his arrest . . .” (R50:2). The court concluded that the issue had been raised, but there were insufficient facts in the record for the court to render a decision on the issue, and that “I think it was Officer Post – – independent of his hearing of movement or his belief that he heard movement within the premises there really was not a basis to enter the home at that time.” (R50:3)

On April 16, 2014, a continued motion hearing was held (R51) to get the additional testimony from Officer Post concerning his entrance into the curtilage of Sato’s residence. At the initial suppression on March 7, 2014 (R49), Post testified that he was present during the raid of Sato’s apartment and that he was assigned the task of helping contain the apartment during the raid in case anybody tried to escape (R49:34–36). At the hearing on April 16, 2014 (R51), Post

testified that he was stationed right outside the bedroom window (R51:8-9, 11-12).[2]

Initially, Post heard nothing at all coming from inside the house, but after about five to ten minutes, Post heard "what sounded like a piece of furniture being pushed," and "items being like shuffled inside . . ." Further, he heard "[l]ike shuffling, like knocking materials, that sort of thing, and then there was a loud bang." (R49:36). When he heard these noises, he alerted Officer Gajevic (who also was stationed outside), and Gajevic relayed the information to Strasser and Iverson. (R49:43)(R51:8) Post believed that the other officers then entered the apartment because he heard someone yell "show me your hands" or something to that effect (R49:43). Once he realized that the other officers were probably inside the bedroom, he reached inside of the window and peeled open a plexiglass

[2] Officer Post's testimony at both the 3/7/14 and 4/16/14 hearings is pieced together here to create a chronological summary of his testimony concerning the entire incident.

panel and peered between the blinds to see if the individuals were in custody (R51:9-10). Post agreed that the area where he was standing was not an area that was open to the public. (R51:10)

Officer Iverson also testified at the initial suppression hearing on March 7, 2014 (R49:52-65). He largely corroborated Strasser's testimony, clarifying that he and Strasser were at the front door, Officer Gajevic was at the back of the building, and Officer Post was on the east side of the apartment building (R49:53-54). Officer Gajevic and Officer Post relayed the information to Iverson concerning the movement in the building (R49:55). Iverson indicated that destruction of evidence and safety concerns (there had been a gun involved in the armed robbery) prompted them to kick in the door and storm the apartment (R49:55-56). Iverson also indicated that after breaking into the apartment, they did not search for

contraband or evidence. Rather, they were looking to apprehend the suspects (R49:56-57).

At a hearing held on April 24, 2014 (R52), the trial court rendered its decision on the Defendant's suppression motion. The court denied the Defendant's motion. The court found that the Defendant had raised two issues concerning the search. First, whether officers unlawfully entered the curtilage of the Defendant's home. Second, whether or not exigent circumstances existed that would have justified the warrantless entry of the Defendant's home, and whether the evidence obtained subsequent to the entry should be suppressed (R52:15-16).

The trial court first concluded that the area outside the Defendant's bedroom in the yard surrounding the apartment building was not within the constitutionally protected curtilage of the Defendant's residence (R52:19-20). Relying on several decisions of the United States and Wisconsin Supreme

Courts,[3] the court found that area was in close proximity to the defendant's apartment, but the area was not included within an enclosure surrounding the home (R52:20). The court further found that there was no evidence that there was any use to which the area was being put that would support a claim of an expectation of privacy, nor was there evidence that any steps were taken by the resident to protect the area from observation from people passing by (R52:20).

The trial court did conclude, however, that exigent circumstances did not justify the warrantless entry into Sato's apartment (R52:21–22, lines 15–18). The court reasoned:

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[3] *United State v. Dunn,* 480 U.S. 294, 301 (1987), listed four factors a court should consider in deciding whether an area is within a home's curtilage: (1) the proximity of the area claimed to be curtilage 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. The trial court also indicated it was relying on *State v. Artic,* 2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430, and *State v. Martwick*, 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 52. The court also referenced *State v. Davis,* 2011 WI App 74, 333 Wis. 2d 490, 798 N.W.2d 902.

> Clearly, there was some evidence in the unit that was subject to destruction.
>
> But at the same time there was clearly a basis to obtain a search warrant prior to the police even approaching that building based upon their interviews – – I shouldn't say – I shouldn't say before they approached the building – but before they approached the unit.
>
> Based upon the information that they had from their interviews that morning, I think it's clear there was probable cause to arrest the defendant, and there was also probable cause to obtain a search warrant. There would have been nothing in this case preventing officers from securing the residence in a low profile way to insure that the defendant or others did not exit that unit or that building while the search warrant was obtained.

(R52:21-22).

Ultimately, however, the court ruled that the evidence would not be suppressed, despite the illegal entry, because the search was "sufficiently attenuated" from the illegal entry (R52:23-24). Relying on the factors

listed in *Brown v. Illinois*[4] and *State v. Segura*, the trial court made the following findings:

(1) Temporal Proximity: Approximately four hours had passed between the time of the illegal entry (10:00 a.m.) and the issuance of the search warrant (2:00 p.m.), and that no search was conducted after the illegal entry but prior to the issuance of the search warrant. (R52:24);

(2) Intervening Circumstances: As counsel understands the court's decision, there was

[4] In *Brown v. Illinois,* 422 U.S. 590, 603–04 (1975), the U.S. Supreme Court considered, a confession made after an illegal arrest and employed a three factor analysis in determining whether the confession was sufficiently attenuated from the illegal arrest. The Wisconsin Supreme Court subsequently held that the same test applies to determining the admissibility of evidence obtained in the context of illegal searches. *See State v. Artic,* 2010 WI 83, ¶¶ 66–67, 327 Wis. 2d 392, 426–27, 786 N.W.2d 430. In *Artic*, the court stated the three factor *Brown* test in the context of analyzing a search is as follows: (1) Temporal Proximity – the time between the illegal entry and the search; (2) Intervening Circumstances – whether there were meaningful intervening circumstances following the illegal entry; and (3) Purposefulness and Flagrancy of the Police Conduct. See *Artic,* 327 Wis. 2d at pp. 429–36.

already enough evidence independent of the illegal entry;

(3) Police Misconduct: Although the trial court noted it got a "little upset about the apparent lack of reference or disclosure to the judicial law officer that entry had already been made into the unit at the time the search warrant was applied for, upon further thought and consideration, I think that paragraph 8 of the affidavit did clearly enough set forth the probability and likelihood that the defendant had been taken into custody, that entry had been made." The court concluded that "I don't find any indication of bad faith in this case on the part of the police officers." (R52:24-25)

Following the denial of his suppression motion the defendant eventually entered into a plea agreement with the State. Under the terms of the agreement, the charge of armed robbery (Class "C" Felony, Wis. Stat. § 943.32(2)) was amended down to a charge of robbery by

threatening the imminent use of force (Class "E" Felony, Wis. Stat. § 943.32(1)(b)), thereby reducing the Defendant's exposure from 40 years imprisonment down to 15 years of imprisonment, and reducing the Defendant's exposure to fines from $100,000 down to $50,000. Additionally, the state agreed to restrict its sentencing recommendation to a general recommendation of "prison." (R55:2-3). The defendant entered a guilty plea (R55:4) and the matter was scheduled for sentencing.

On June 10, 2014 (R58), the defendant was sentenced to eight (8) years of initial confinement, followed by five (5) years of extended supervision.

On June 11, 2014 defendant filed a notice of intent to pursue postconviction relief. (R30) On June 19, 2015 the Defendant filed a Motion for Postconviction Relief, requesting that the trial court reconsider its prior ruling denying the Defendant's suppression motion. (R39) On June 22, 2015 the trial

court, the Honorable William S. Pocan presiding, issued an Order for Briefing Schedule. (R40). On July 28, 2015 the State filed a Response in opposition to the Defendant's motion for postconviction relief. (R41). On August 20, 2015 the trial court (Ho. William S. Pocan, presiding) issued a Decision and Order Denying Motion for Postconviction Relief. (R43)

On September 1, 2015 the Defendant filed a notice of appeal seeking relief from both his judgment of conviction and sentence and from the denial of his postconviction motion. (R44). The defendant now appeals to this court pursuant to Rule 809.30 and Wis. Stat. § 971.31(10), which permits a defendant to appeal an order denying a motion to suppress evidence, notwithstanding the fact that the judgment or order was entered upon a plea of guilty to the information.

ARGUMENT

I. OFFICER POST INVADED THE CURTILAGE OF SATO'S RESIDENCE WITHOUT FIRST OBTAINING A SEARCH WARRANT AND THEREFORE ANY INFORMATION HE OBTAINED THAT WAS USED TO JUSTIFY A FORCED ENTRTY INTO SATO'S HOME ON THE EXIGENT CIRCUMSTANCES DOCTRINE MUST BE SUPPRESSED.

A. Standard of Review.

This court reviews the denial of a defendant's motion to suppress using a two-part standard of review. ***State v. Popp,*** 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 705, 855 N.W.2d 471. This court will uphold a trial court's finding of fact unless they are clearly erroneous. ***Id.*** at 706. This court then reviews de novo whether those facts warrant suppression. ***Id.*** Reviewing whether a particular area belongs to the "curtilage" of a person's home is a question of law that this court decides de novo. ***State v. Dumstrey,*** 2015 WI App 5, ¶ 7, 359 Wis. 2d 624, 631-32, 859 N.W.2d 138.

B. Post Entered the Curtilage of the Defendant's Residence Without a Warrant

At the continued suppression hearing on April 16, 2014 (R51), Post testified that he was stationed outside of a window on the side of the house. Post was shown a photograph of the residence. See R13, Exhibit 2, Image #11. The Exhibit (and the others as well) show that there is a single sidewalk leading up to the front door. There is no sidewalk leading around to the eastside of the building where Post was stationed. It was a grassy strip between Sato's residence and the residence to the east.

The starting point for defining the extent of a home's cartilage is set forth in ***United States v. Dunn,*** 480 U.S. 294, 301 (1987), where the U.S. Supreme Court identified four factors a court should consider: (1) the proximity of the area claimed to be cartilage 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; (4) the steps taken by the resident to protect the area from observation by people passing by. The Wisconsin Supreme Court adopted these factors in ***State v. Martwick***, 2000 WI 5, ¶ 30, 231 Wis. 2d 801, ___, 604 N.W.2d 552. These factors are not a "finely tuned formula that, when mechanistically applied, yields a 'correct' answer to all extend of cartilage questions." ***Dunn***, 480 U.S. at 301. Rather, the factors are a useful tool to the extent they bear upon the relevant question – "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 Proptection." ***Id.*** *See also* ***Dumstrey***, 359 Wis. 2d at 634, ¶ 10.

Thus, the determination of whether an area is cartilage is fact specific. ***Dumstrey***, 359 Wis. 2d at 633, ¶ 8. A good source for guidance is how courts have decided the issue in similar situations to the one at hand.

In ***State v. Popp***, police received a tip from a totally anonymous caller that there was a mushroom grow operation being conducted out of Popp's trailer. ***Popp***, 357 Wis. 2d at 701–02, ¶ 3. The caller further indicated that he was looking for consideration in a different investigation outside of the drug unit. ***Id.*** Officers learned that the same trailer had been the subject several years earlier "regarding a possible meth lab involving Jeremiah Popp and Christopher Thomas." ***Id.*** at 702, ¶ 5. The police found Thomas waiting outside, and when Thomas learned the men were police officers and why they were there, he became visibly nervous. ***Id.*** at ¶ 6. The officers asked Thomas for consent to search the trailer, but he refused. ***Id.***

Despite the fact that Thomas told the officers they could not search the trailer, the officers started snooping around the outside of the trailer anyway. ***Id.*** at ¶ 7. Two of the officers went to the west side of the

trailer, walked up some steps attached to the wall, and peered in a small, vertical window – a window officers could not have seen into from the road. Using a flashlight to see into this window, one officer saw what appeared to be an oxygen tank on the floor and reflective paper wrapping in glass beakers. ***Id.***

The officers also went to the north end of the trailer, where there was a large bay window and walked on the grass and snow right next to the window so that they could peer inside. Officers were able to observe the inside of the trailer through some portions of the blinds that were not functioning properly. ***Id.*** at ¶ 7. Officers observed, among other things, "some tinfoil that had some . . . circular indentations as though they were on top of jars and a surgical mask."

Thomas was then questioned about the oxygen tank, and Thomas explained he liked to breathe oxygen. Thomas asked if he was being detained and he was told by officers that he

was free to go. Id. at ¶ 8. Thomas then left the scene.

The officers returned to the police station to draft a search warrant. The anonymous caller called again and indicated that he had been in the trailer "millions" of times and had personally observed a mushroom grow operation there. ***Id.*** at ¶ 9. The officers obtained a search warrant and upon execution of the warrant, discovered a lab for the creation of mushrooms as well as mushrooms in various stages of growth. ***Id.*** at ¶¶ 9–10. Thomas an Popp were both charged with manufacturing psilocybin.

Both Thomas and Popp challenged the search on appeal to this court. ***Id.*** at ¶ 11. This court agreed that the police had trespassed on the defendants' property when they, without permission, went up the back steps and onto the porch on the west side of the trailer to peer into the window and when they peered into the window on the north end

of the trailer. ***Id.*** at ¶ 20. This court concluded that the officers conducted an illegal search of the cartilage of the defendants' trailer and ruled that the information obtained from the illegal search had to be excised from the affidavit made in support of the search warrant. ***Id.*** at ¶ 26.

There are many cases which could be cited where courts have found, in cases factually similar to this one, that the area immediately outside of the residence is protected "curtilage." The cases are too numerous to be reviewed within this brief. In summarizing the case law in this area, this court in ***Popp*** discussed the general approaches used by courts in analyzing factual situations. This court noted that Fourth Amendment jurisprudence "'has evolved into two seemingly different, but somewhat interrelated, methods of identifying protectable interests'" relating to the home. ***Popp***, 357 Wis. 2d at 707, ¶ 18 (*citing* ***Powell v. State***, 120 So. 3r

57, 582 (Fla. Dist. Ct. App. 2013). One method focuses on a person's expectation of privacy (citations omitted), i.e., first, that a person has exhibited an actual subjective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable (citations omitted). ***Id***. 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. ***Id***.

Applying either of these analytic approaches to the instant case, it is clear that Officer Post intruded upon the protected curtilage of Sato's residence. The grassy area next to Sato's residence was not open to the public, there was no paved sidewalk leading to a side or rear entrance, and the area was not visible to a passerby on the street or public sidewalk. Additionally, Officer Post went up to the window and was peering into the

winddow, just like the officers involved in ***Popp***.

The trial court, concluding that Officer Post did not enter the constitutionally protected cartilage of Sato's residence, placed heavy reliance on the fact that there was no fence or enclosure, there was no use to which the area was being put to support a claim of an expectation of privacy, and there was no evidence that any steps were taken by Sato to protect the area from observation. See supra, pp. 15-16. The defendant asserts that the trial court's analysis is wrong under the totality of the circumstances. Although the ***Dunn*** factors used by the court are relevant, they were mechanistically applied by the trial court in a way that lead to an incorrect result.

When viewing the residence in this case, it is clear that most people would not view the area on the side of Sato's residence as open to the public. In fact, if one were to

observe an individual in this area from the roadway and saw the individual peering in the side windows, one would assume that the person was a potential burglar or a peeping Tom. Most people would reasonably expect that others are not permitted to trespass into the grassy area of a yard on the side of a house and peer into bedroom windows.

The state might argue here that Officer Post was not in the protected curtilage of Sato's residence, and that the noises Post heard from inside justified an entry based on exigent circumstances. Sato disputes that for the reasons discussed above.

Although Sato specifically disputes the circuit court's determination that Officers Post and Gajevic did not enter the curtilage of the defendant's residence, that issue may not have to be decided here because of the court's specific finding that the exigent circumstances exception to the warrant requirement did not justify the warrantless

entry into Sato's apartment. The exigent circumstances claimed in this case were the movements Officer Post heard coming from within the apartment, which was communicated to Strasser and Iverson, who then concluded that the movement necessitated forced entry for safety reasons and to prevent the destruction of evidence. Since the court found no exigent circumstances for the warrantless entry, the movements Post heard inside of the apartment would be of no significance since that did not justify entry.

II. THE SEARCH OF SATO'S APARTMENT WAS NOT SUFFIENTLY ATTENUATED FROM THE WARRANTLESS ILLEGAL ENTRY OF SATO'S APARTMENT

As noted above, the trial court specifically found that exigent circumstances did not justify the entry into Sato's residence and that the entry was illegal. See supra, pp. 15-17. The court did conclude, however, that despite the illegal entry into Sato's residence, the evidence discovered

would not be suppressed because the search of his residence was sufficiently attenuated from the illegal entry.

As discussed above (see supra., pp. 16-18 and footnote 4, the attenuation analysis looks at three factors: (1) Temporal Proximity; (2) Intervening Circumstances; and (3) Purposefulness and Flagrancy of Police Conduct. *Artic*, 327 Wis. 2d at 429-36. Sato disputes the trial court's finding that that the search was sufficiently attenuated from the illegal entry. Each of the factors discussed in Artic are considered here.

A. Temporal Proximity.

The trial court found that approximately four hours passed between the time of the illegal entry and the search of the apartment. See Supra., at p. 18, above. In this case, temporal proximity does not really matter. Whether the police obtained the warrant two hours, four hours, or even ten hours after the illegal entry does not matter, because the

real issue is whether the police should have sought a warrant immediately after interviewing Kevin McDonald and Shannon Zellmer. The Defendant argues here that they should have done that, as opposed to employing the "knock and talk" procedure. The court's findings of fact and conclusions of law support this conclusion. As the court noted in finding that the entry was illegal and not supported by exigent circumstances:

> Clearly, there was some evidence in the unit that was subject to destruction.
>
> But at the same time there was clearly a basis to obtain a search warrant prior to the police even approaching that building based upon their interviews - - I shouldn't say - I shouldn't say before they approached the building - but before they approached the unit.
>
> Based upon the information that they had from their interviews that morning, I think it's clear there was probable cause to arrest the defendant, and there was also probable cause to obtain a search warrant. There would have been nothing in this case preventing officers from securing

> the residence in a low profile way to insure that the defendant or others did not exit that unit or that building while the search warrant was obtained.

See supra., at pp. 16-17, above.

After interviewing Zellmer in his apartment, Sato asserts that the police could have, and should have, monitored and secured the residence in a "low profile way to insure that the defendant or others did not exit that unit or the building while the warrant was obtained." In fact, it is likely that Sato was unaware of the police presence in Zellmer's apartment prior to Strasser pounding on the defendant's door and screaming "police, open the door!" Moreover, their concern for destruction of evidence was not as great in this case as in other cases where the items of contraband were easily disposable.[5] Here, by

[5] *See e.g.:, State v. Robinson,* 2010 WI 80, ¶ 27, 327 Wis. 2d 302, 322, 786 N.W.2d 463 (defendant suspected of selling marijuana which can easily be flushed down the toilet or down the sink); *State v. Artic*, 327 Wis. 2d at 404 (police suspected that cocaine might be in the house-

contrast, at least some of the items were indestructible, such as the black pizza bag, weapons (the black hand gun), the clothing (bib overalls, the knit hat and the long-sleeved shirt). Other items like the food, the packaging material (not including the pizza box), and receipts could possibly be destroyed, but that does not overcome, as the Defendant argues here, the need to obtain a warrant.

B. Intervening Circumstances.

To constitute sufficient intervening circumstances, the interim facts or evidence must show a discontinuity between the illegal entry and the search. *See Artic*, 327 Wis. 2d at 433. Here, there were no meaningful intervening circumstances. The police illegally broke into Sato's apartment without a warrant and arrested him promptly. He was removed from the scene immediately. Strasser then went and obtained a search warrant, and

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cocaine can easily be flushed down the toilet or the sink)

the other officers just sat around at Sato's apartment waiting for Strasser to return with the warrant.

C. Purposefulness and Flagrancy of Police Conduct.

The trial court found no "bad faith" on the part of the police officers. (R52:24-25) See supra., pp. 18-19 This court may wish to reconsider this finding by considering the "purposefulness" and "flagrancy" of the actions taken in this case.

When considering Officer Strasser's testimony as whole, it appears that it is his usual practice not to seek the issuance of a search warrant before storming into a person's home. Officer Strasser testified that in nearly all of his investigations he doesn't bother getting a warrant because if he believes that "evidence is being destroyed [which undoubtedly he will believe is happening in nearly every case], I'm going to have to force the door open. But upon opening

the door or forcing the door, effect the arrest immediately, freeze the scene, get the search warrant. *It's the same thing I do on almost all my investigations*." (emphasis added). (R49:18-19). See p. 8, supra. Strasser describes this as the "knock and talk" procedure R49:17)(See supra, p. 8), and "that's my method of operation." (R49:23)(See supra, p. 8).

As Justice Bradley noted in her dissenting opinion in *State v. Robinson*, 2010 WI 80, ¶¶ 50-51, 327 Wis. 2d 302, 327 Wis. 2d 302, 334-35, 786 N.W.2d 463:

> A recent commentator has posited that perfunctory review by courts of law enforcement's use of the knock and talk procedure to circumvent the warrant requirement "has severely limited the Fourth Amendment protection afforded to homes, despite the Supreme Court's stance that homes are heavily protected." Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 Ind. L.J. 1099, 1099 (2009). He asserts that the "'[k]nock and talk' has become a talisman before which the Fourth Amendment 'fades away and disappears.'" *Id*. at 1127.

> Likewise, courts have been critical of the knock and talk procedure. In *Hayes v. State*, 794 N.E. 492, 497 (Ind. App. 2003), the court opined that "knock and talk might more aptly be named 'knock and enter,' because it is usually the officer's goal not merely to talk but to conduct a warrantless search of the premises." It explained that "[w]hile not per se unlawful, the knock and talk procedure 'pushes the envelope' and can easily be misused." Id.

This is precisely what happened here. Strasser went to Sato's residence not only to "talk" to Sato. It was also his intention to search. Strasser should have obtained the warrant first.

Additionally, it appears that the knock and talk procedure has become the norm in the Milwaukee Police Department. As Justice Bradley noted in her dissent in *Robinson*: "Here, as with the other two cases decided today, officers engaged in the competitive enterprise of ferreting out crime chose not to seek a warrant. Instead, they opted to go to a suspected drug house and perform a 'knock and

talk.'" *Robinson*, 2010 WI 80, ¶ 49, 327 Wis. 2d at 334.[6]

The other troubling aspect of this case is the failure to advise the magistrate who issued the search warrant about the fact that a forced entry had already been made to Sato's residence. See supra., pp. 9–11. Despite the circuit court's finding of no bad faith, it became necessary for the court to conduct its own examination of witnesses during the suppression hearing to ascertain why this information had not been communicated to the magistrate. When the court asked Strasser why he did not include that information in the affidavit, Strasser couldn't explain why he did not include it, except that he might have been in a "hurry." (R49:32) See supra., p. 10. The court asked Strasser if he communicated

[6] Robinson involved a search by the City of Milwaukee Police Department. The other two cases Justice Bradley referred to -- *State v. Artic* and *State v. Pinkard*, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592, also involved and "knock and talk" home invasions conducted by the City of Milwaukee Police Department.

that to the assistant district attorney who prepared the search warrant, and he indicated that he did. (R49:32– 33). The circuit court then indicated that he wanted to hear testimony from the assistant district attorney on this issue. (R49:33)

The assistant DA was summoned down to the court room where he was examined. The assistant district attorney ("ADA") testified that he did not recall whether or not Strasser told him that entry had already been made. (R49:71) However, upon reviewing the search warrant, the ADA testified that "paragraph 8 would lead me to believe that they had entry into the apartment. But it's not stated specifically." (R49:71) The ADA indicated to the court that he agreed that whether or not entry had been made would be important information to include in a search warrant "if it affected the probable cause." (R49:70–71)

A defendant seeking to suppress evidence seized pursuant to a search warrant is

entitled to an evidentiary hearing upon making a substantial preliminary showing that: (1) an affidavit intentionally and recklessly included a false statement in an application for a search warrant, and (2) the allegedly false statement was necessary to a finding of probable cause. ***Franks v. Deleware***, 438 U.S. 154, 15-56 (1978). The ***Franks*** procedure was extended in ***State v. Mann***, 123 Wis. 2d 375, 385-390, 367 N.W.2d 209 (1985), to situations where a search warrant affidavit may be impeached if a material fact has been omitted from it and if the omission is the equivalent of a deliberate falsehood or reckless disregard for the truth.

In this case, the circuit court, ruling on the defendant's suppression motions, made the following ruling:

> The other motion is, I would say, essentially a two-part motion. First one dealing with the entry and search of the home. Second one dealing with the ***Franks-Mann*** issue, which deals with whether or not there were false statements made within the

> affidavit for the search warrant or omissions to that affidavit made that, but for those admissions or omissions I should say, there would not be probable cause. And in that regard, I don't find this omission that entry had been made into the home, that that negates the balance of the affidavit, which does set forth probable cause.

(R49:85-86).

The Defendant here does not necessarily dispute this finding, but raises this in the context of his attenuation analysis. Failure to obtain a search warrant prior to entry, using the "knock and talk" procedure as a way of evading the warrant requirement, not including specific information in the search warrant affidavit concerning the fact that entry had already been made, are all circumstances this court should consider in making a determination on the third prong of the attenuation analysis.

In summary, the trial court found that the warrantless entry to Sato's apartment was illegal and that the police should have first

obtained a search warrant. However, the trial court also concluded that despite the illegal entry, the evidence seized in the subsequent search did not need to be suppressed because there was sufficient attenuation between the illegal entry and the ultimate search. Sato disagrees with this finding because application of the attenuation factors to the facts does not support the circuit court's determination of attenuation.

Sato does not view temporal proximity is an important factor. The fact that the search occurred four hours after the illegal entry does not seem to be a factor in analyzing this case. Would it have been better for the State if more time had passed, e.g., if the search had occurred eight hours later, or perhaps several days later? Would it have been better for the defendant if the search had occurred only two hours after the illegal entry? This factor does not seem to be of great importance under the facts of this case.

Of greater importance are the other two factors – – the lack of meaningful intervening circumstances and police conduct. As argued above, there were no intervening circumstances between the illegal entry and the search.[7] The police simply waited around at Sato's residence until Strasser obtained the warrant. Nothing happened during this time period that would arguably mitigate the seriousness of the illegal search.

The fact that the circuit court found that the entry into Sato's apartment was illegal is a factor to be weighed against the state in the attenuation analysis. The court found that the entry was not justified by the exigent circumstances doctrine.

Despite the trial court's finding that the police did not enter the curtilage, Sato disagrees with that finding and asserts that

[7] The search warrant described five separate items as the "objects" of the search, including clothing and weapons. See Search Warrant at A5. However, the Affidavit does not include these items. See Affidavit at Paragraph 13 (A9).

the initial illegality in his case occurred when the police entered the curtilage of his home without a warrant by standing on the lawn outside of his bedroom window.

Couple this with evidence that Strasser, not only in this case, but in every case, utilizes the "knock and talk" procedure to get around the warrant requirement, is yet another strike against the State. Finally, although the omission in the search warrant affidavit that entry had already been made may not raise to the level of a ***Franks-Mann*** claim, it was certainly a matter that raised the circuit court's eyebrows and necessitated a special inquiry into the matter. Viewed as a whole, the evidence in this case does not support the trial court's finding of attenuation.

CONCLUSION

For all of the foregoing reasons, Sato asks that his judgment of conviction and the order denying his postconviction motion be reversed, and that his case be remanded to the

Milwaukee County Circuit Court for further proceedings with directions.

Dated this 22nd day of November, 2015.

_____

Hans P. Koesser, Bar #1010219

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a brief produced with a monospaced font. The brief is 50 pages and contains 8,064 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

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, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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