STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2015AP002555

State of Wisconsin
Plaintiff-Respondent,
v.
Steven J. Schaefer,
Defendant-Appellant.

On Appeal From A Judgment of the Circuit Court
For Forest County, Case No. 15-CM-88
Honorable Leon D. Stenz, Presiding

Brief of Appellant

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STATEMENT OF ISSUES PRESENTED

I. Is the exercise of a treaty right to domestic firewood through a wood chute installed by tribal housing relevant to determining the use of the location associated with the wood chute?
Answered “No” by the Circuit Court.

II. If so, does the scope of the license allowed third party firewood deliveries create an implied invitation to the general public to also have access to that location associated with the wood chute?
Answered “Yes” by the Circuit Court.

III. If not, does the absence of a door bell and continued paved approach to the side door constitute a material distinction from the front door to the extent of limiting implied access to the home initially to the front door?
Answered “No” by the Circuit Court.

IV. If so, was the decision denying curtilage erroneous in that the Circuit Court failed to recognize the tribe

distinguished between permission to invitees, as opposed to the general public concerning the gravel driveway offshoot?
Not answered by the Circuit Court.

V. If so, would a home occupant, sitting in his motor vehicle in the curtilage, be subject to implied permission of law enforcement to access that location, given the occupant was surprised by law enforcement while listening to music?
Answered “Yes” by the Circuit Court.

VI. If not, should defendant’s suppression motion have been granted based upon an unreasonable search in violation of the Fourth Amendment that occurred when law enforcement crossed the termination of the paved driveway?
Answered “No” by the Circuit Court.

VII. Was the failure of the defendant to appear in Court on June 12, 2015 mitigated or explained by a traffic

citation returnable July 5, 2015, such that the $1,000 bond forfeiture is an erroneous exercise of discretion?

Not answered by the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

NATURE OF APPEAL

This is an appeal form the final judgment of the Circuit Court of Forest County, Hon. Leon D. Stenz, presiding which entered a judgment of conviction for operating while intoxicated as a fourth offence. This a misdemeanor conviction obtained through a guilty plea entered with reservation of rights to appeal the suppression decision. §971.31(10). This appeal also challenges an oral decision refusing to vacate the forfeiture of a $1000 cash bond. Since the oral decision was not reduced to writing the final appeal also includes this issue. §809.10(4).

Mr. Schaefer disputes the Circuit Court's denial of his suppression motion. If successful, the judgment of conviction must be reversed with directions to exclude all evidence obtained by law enforcement once Officer Christopher Tanner stepped across the termination of the paved driveway.

Schaefer will first show the dirt offshoot from the paved driveway to the side door where he was parked was within the curtilage. The exercise of a treaty right to

domestic firewood through a wood chute located next to the dirt offshoot should be a factor in determining the use of that property.

The Circuit Court failed to recognize the distinction between the scope of a license for the general public to approach a home; as opposed to a distinct and limited license for invitees. The driveway offshoot, wood chute, and side door represented a license for invitees and not the general public, based upon tribal self-determination.

Officer Christopher Tanner became a trespasser the moment he stepped from the end of the blacktop pavement onto the curtilage. Since Mr. Scahefer was unaware of the presence of law enforcement and he was exercising his First Amendment right to listen to music. The state cannot establish implied permission to approach the parked vehicle.

The defendant is not a flight risk and did not prolong the proceedings. The $1000 bond forfeiture should be reversed and the $1000 refunded to the person who posted it.

THE INITIAL COURT PROCEEDINGS

This offense took place Sunday night May 31, 2015. (1-1) On June 1, 2015 bond was set at $1000 cash. (1-2) On June 1, 2015 Schaefer signed a cash bond for $1000 (2). This money was actually posted by Ronald Landru (3). The bond had an appearance date of June 12, 2015 at 9:30 AM. The defendant also received a traffic citation (26- ex2). The citation was served in person May 31, 2015. This was a mandatory appearance with a Court date of July 8, 2015 at 9:00 AM. The traffic citation specified the charge was OWI Fourth. The bond, however, did not state what the charge was.

The criminal complaint was filed June 12, 2015 (4). This document was never mailed to Mr. Schaefer. On June 12, 2015 a warrant was issued for his arrest (6). The State requested forfeiture of the $1000 bond and bench warrant body or $1,500 at the initial appearance (60-2). A notice of bond forfeiture as mailed June 12, 2015 (5).

Two days before the initial appearance date for the traffic citation the bench warrant was cancelled on July 6, 2015. (7) The case was scheduled for July 8, 2015. (8) Steven Schaefer remained in jail until July 15, 2015. (59-7;11-13). (11)

On July 8, 2015 bond was set at $1,500 cash. (61-5;17) (11). The $1000 was still being forfeited (61-5;20-21). The state had filed an amended complaint (9). Further proceedings were scheduled for July 15, 2015. (61-6;4-5) (10).

On July 15, 2015 the Public defender was relieved from representation. (59-2;15-23). The oral objection to bond forfeiture was allowed. (59-4;23-5;1). Bond was changed to a $4000 signature bond. (59-7;11) (12). Further proceedings were scheduled for September 9, 2015 (13).

The further proceedings would address two issues. Defendant moved for dismissal (20) based upon Fourth Amendment grounds. The memorandum asserted Schaefer was initially contacted by law enforcement within the curtilage (21-2). Native American treaty rights included firewood for the home. The wood chute for the firewood represented Native American self-determination since housing is a core issue of tribal government (21-4).

Defendant heavily relied upon Oregon case law concerning the fine distinction as to doorbells. (21-7). Furthermore, Schaefer asserted he was exercising his First Amendment right to listen to music. (21-8). In defendant’s view, the curtilage stopped at the end of the

blacktop driveway and a trespass occurred for Fourth Amendment purposes when law enforcement approached the parked vehicle while Schafer was listening to music. (21-8).

Defendant also opposed the bond forfeiture. The small type in the bond (2) did not meet readability standards of INS 6.07(4)(8) 2. The prominence of the Court date in the traffic citation (18-3) is another factor justifying return of the $1000.

THE EVIDENTIARY HEARING CONCERNING SUPRESSION

Defense counsel initially framed the issues as whether the location of the parked vehicle was within the curtilage. (54-5:20-24). If so, the second question would be whether or not law enforcement was a trespasser when entering the curtilage. This would depend if there was implied permission for law enforcement to approach the parked vehicle. (54-5:25-6:12).

The house has two doors. The vehicle was parked next to the side door. (54-7:3-5). Defense counsel argued the State must show the same implied permission to approach the front door must also apply to the side door. (54-7:13-18).

Defense counsel argued there was a distinction recognized by Oregon which involved the use of a doorbell. (54-8:7-8).

The Court's initial view of the case was driveways can be both gravel and blacktop. For that reason, the driveway continued past the edge of the blacktop. (54-7:19-8:19). The Court felt the driveway was in the curtilage. (54-8:16-19). If someone could continue to drive from the blacktop onto the dirt offshoot, the Court would construe both the blacktop and dirt as one continuous driveway. (54-11:18-21). The Court believed there was an implied invitation to any member of the public to continue to drive on the dirt portion. (54-11:4-7).

Prior to the taking of testimony the defense request for judicial notice of the U.S. District Court ruling at 653 F. Supp. 1420 was rejected. (54-13:4-14:8). The Court held that decision irrelevant.

The defense had emphasized this 1987 decision had construed the treaty between the U.S. Government and the predecessor to the local Indian reservation as granting rights to use firewood for the house. (21-4). The firewood use represented an exercise of tribal self-determination which by definition was a factor in land use

related to use connected with the home. (21-5).

Should Mr. Schaefer be found to have parked in the curtilage that raises the question of implied permission for law enforcement to be there nonetheless. (54-9:23-10:1). Whether there was implied permission to approach the side door, as an equal option to the front door, in defendant's view was related to the lack of a doorbell. (54-9:11-13). The Court was unpersuaded the doorbell was relevant. (54-9:14-19).

Normally the State would provide the first witness since the burden of proof is on the State. Instead, the Court required the defense to proceed initially. (54-10:13-16). (54-12:11-12). The first witness was Thomas Kirby, who worked for Sokaogon Chippewa housing for three and a half years. (54-15:2-15).

Kirby explained the blueprints for the house had a wood chute (54-21:4-6) and a doorbell on the front door (54-22:1-4); but no doorbell on the side door. (54-22:22-24). Kirby also explained a map of housing units in that area (54-23:6-11). Kirby specified the driveway ends at the front corner of the house and the wood chute is past the driveway. (54-23:22-24:4). Finally, Kirby explained

there is no sidewalk that goes to the side door, but there is a sidewalk that comes from the end of the driveway to the front door. 54-24:5-14).

Cross examination asked how often Kirby visited the house (54-25:12-16). It is possible to drive beyond the paved portion. (54-27:21-23). Wood deliveries would go beyond the paved portion (54-28:18-23). Kirby has seen people parked past the blacktop, however those people were visitors. Normally Vanessa Tuckwab parks by the side door. (54-29:2-30:1). Mr. Kirby also explained snowplowing included the side door area. (54-29:6-10).

Redirect examination asked if a stranger was ever seen parked by the side door. Kirby could not recall. (54-30:7-12).

The Court began to question Thomas Kirby. Kirby described those others who park by the side door as “people visiting them.” (54-30:23-25). The snowplowing is related to freeze up in the water lines. (54-31:3-15).

The second defense witness was Vanessa Tuckwab. She has been the original tenant for the last twenty-six (26) years and is on an annual lease. (54-32:7-23) This witness provided information about fourteen (14) photographs to the

house. (54-33:23-25). This information included use of a picnic table and grill (54-34:11-14). She walks back and forth between the side door and the shed. (54-36:9-13).

There is a concrete pathway that goes from the blacktop driveway to the front of the house. (54-8:3-17). The side door has no doorbell but the front door does. (54-38:20-23). Steve Schaefer has lived in the house for fifteen (15) years. (54-44:2-4).

On cross examination she explained she and Steve normally park by the side door. (54-45:14-24). Usually people come to the front and ring the doorbell. Otherwise family members come to the side door. (54-47:14-18). Most people stop where the pavement stops. Otherwise relatives use the side door. (54-48:4-14). The dirt portion is used for private parking. (54-49:6). People have walked by and said hi, usually from the public sidewalk running parallel to the highway. (54-50:4-18).

Redirect examination pointed out a gate at the end of the blacktop driveway would make wood deliveries more difficult. (54-51:8-13).

The Court questioned Vanessa Tuckwab about heating with LP. The LP tank is behind the side door and snow is plowed to the LP tank. (54-52:4-6). The tank is filled

every two months in the winter time. (54-52:7-21). Vanessa also purchases firewood. The delivery is to the wood chute. (54-53:3-11).

The next witness was Steven Schaefer. The household has one vehicle which is parked on the dirt. A motion light dissuades vandalism and they do not block the sidewalk to the front door. (54-55:4-16). The suggestion a gate be installed to assert privacy is unrealistic because the tribe would have to approve it and tribal snowplowing would become more difficult. (54-55:17-56:3). Schaefer also made his sketch with measurements of the property layout. (54-56:20-21) (26-Ex9).

Schaefer explained the night of his arrest he was listening to music in his vehicle and the music did not bother anybody else. (54-59:10-20). Mr. Schaefer was listening to the music when law enforcement walked up to him. At all times between being first contacted by law enforcement and being placed under arrest Mr. Schaefer was always on the dirt and never on the blacktop. (54-60:19-24). The Circuit Court misinterpreted the focus of the question to include Mr. Schaefer driving from the bar to his home. The purpose of the question was to ensure the

curtilage at all times applied since law enforcement stepped off the blacktop. Instead, the Court asked Mr. Schaefer “you flew there?” (54-60:25-61-6).

Defense counsel objected as to the Court’s question if Schaefer drove to his home. (54-61:10). Defense counsel’s objection to the Court’s question based upon Rule 901.04(4) was overruled. (54-61:12-62:9). The final question asked when the first time defendant had any knowledge law enforcement was on his property. The answer was when the officer walked up to his vehicle. (54-64:5).

On cross examination people come to the picnic table if they are invited. (54-66:2-4).

On redirect examination it was emphasized planting bushes at the end of the driveway as the State suggested would interfere with snowplowing. (54-69:1-3).

The final witness was Christopher Tanner. Tanner investigated a complaint about potential harassment. (54-71:1-4). He went to the Steve Schaefer residence and parked on the asphalt portion of the driveway. (54-71:16-19).

On cross examination Tanner was on the gravel portion approaching the drivers side of the vehicle when he first found out who was in the vehicle. (54-73:25-74:5).

Testimony was closed.

THE ORAL SUPPRESSION HEARING

The defense oral argument emphasized to be curtilaged involved short distances to the house. (54-75:4-11) The firewood shoot relates to treaty rights. (54-74:24-75:3). The more involved question would be whether or not law enforcement was a trespasser in the curtilage.

Use of the front door is unhelpful to law enforcement. However substituting the side door would overcome the curtilage. Whether only the front door can be the initial starting point is subject to debate. (54-76:6-12). The Oregon case law was relied upon to downgrade the side door compared to the front door due to lack of a doorbell and paved approach. (54-77:3-78:15)

The Jardines decision provides an option not previously available under Katz. (54-76:2-5). Jardines is the authority for suppression based upon trespassing prior to searching. (54-76:22-77:2).

The State argued the blacktop and dirt offshoot

constitute one driveway. (54-70:20-25). The State also alleged the dirt driveway was the exact width of the asphalt portion, and someone could drive on both (54-80:1-12).

The State further argued since the driveway is used for access to the side door, it also provides access to the public. (54-80:20-81:2). Vanessa Tuckwab and Steve Schaefer should have done their own snowplowing and delivered their own firewood to keep the dirt portion private. Instead they invite others to do business for them. Therefore it is open to the public. (54-81:6-15).

The Court's oral decision denied Katz applied and limited the issue to trespass under Jardines. (54-81:24-82:8). The Court reviewed the testimony concerning use of the driveway where the blacktop stops and the dirt begins. (54-83:3-11). The Court considered the gravel portion a parking lot and Mr. Kirby indicated he has seen visitors there. Extra plowing was done to give more access to the gravel area. (54-83:12-20). The Oregon authority as applied to dividing the access route between public followed by a private segment was not followed. The main reason was the potential differences between the Oregon and

the Wisconsin Constitutions. (54-84:5-10).

The Court proceeded to determine the initial question to locate the curtilage based upon the four Dunn factors. The first issue, proximity, went to the defense. (54-85:3-8).

The second factor, visibility, was in favor of the State because Schaefer's vehicle could be seen from the highway. (54-85:9-12).

The third factor as to property use was not related to the wood chute because vendors had access thereto. The Court determined the use was a parking area and a driveway. (54-85:13-86:2).

The fourth factor is steps taken to increase privacy. There were none, and the picnic table was distinguished from the parking spot. The difference was it did not appear the parking spot was used for any of the intimate activities related to the house. (54-86:3-17).

The Court determined the parking spot was not within the curtilage. (54-87:10-16). The Court further

determined even if it was curtilage law enforcement restricted themselves to the area that was impliedly open to anybody coming there to use that driveway. (54-87:17-88:6).

POST HEARING EVENTS

Defense counsel took steps to address the scope of the license granted to firewood vendors in comparison to the scope of the license in favor of the public generally. The Court appeared to view the firewood vendors as waiving the privacy of Vanessa Tuckwab for all purposes. Instead, Schaefer argues buying the firewood, and for that matter LP gas and snowplowing to reach the LP tank, created only a limited license. Purchasing firewood and LP does not constitute an implied invitation to the general public.

On October 13, 2015 defense counsel filed information from Case No. 14-CR-2040-LRR in the United States District Court for the Northern District of Iowa, Eastern Division, United States of America vs. Jeremy Daniel Conerd. (35) One of the questions in that case is the same as the case at bar. There was an electric meter on a side of the house, clearly visible from the street. (35-3,4). The

United States argued the side yard next to the meter was not curtilage because the utility company inspected the meter once per month. Access by the utility company brought with it implied access to the public as a whole. (35-18,19).

On July 28, 2015 United States District Judge Linda R. Reade issued an order which not only found the side-yard to be curtilage but rejected the government's argument concerning the utility meter. (35-19). A memorandum was filed October 23, 2015 (36) with respect staying the forthcoming sentence. One of the reasons to stay the sentence was the ruling in Conerd. (36-2).

The Conerd decision would not be given any weight. (62-31:2-5).

SENTENCING

The Court scheduled sentencing for November 19, 2015. (32). The defendant moved for a stay pending appeal. (37). The Court sentenced the defendant to a fine of $2,185; restitution of $35; 100 days in jail; 30 month

license revocation followed by a thirty month IID interval all within a withheld sentence with two years probation. (62-18:2-20:14).

Defendant promptly moved for a stay pending appeal. (62-21:21-22). Defense counsel argued the power of a court to stay pending appeal overcomes the immediate mandatory incarceration for this type of offense. (62-27:3-26).

The motion for stay was denied (62-29:14-32:3).

EVIDENTIARY HEARING-BOND FORFEITURE

The Court also conducted an evidentiary hearing concerning the $1000 bond forfeiture on September 9, 2015. (54-89:9-10). Steven Schaefer testified he had a hard time reading the actual bond form. (54-91:3-5). He missed the Court date because the traffic citation was posted on the wall at home and he thought the court date was July 8, 2015. (54-91:14-18). He did not intentionally fail to come to court. He did not know he had to be in court on June 12, 2015. (54-92:2-5).

On cross examination Schaefer said he did not come to

court because of the traffic citation. (54-93:25-94:7).

The Court did not consider INS 6.07(4)(a)2 relevant (54-94:17). Defense counsel argued consistent with the memorandum. (18) The State alleged there should not have been any confusion on Schaefer's part. (54-95:15-21).

The Court confirmed the forfeiture. (54-96:5). The defendant could have appeared. (54-96:10-13). The defendant could have gone to both court dates so there was no misunderstanding. (54-97:1-5). There was never a written order refusing to forfeit the bond.

The judgment of conviction was filed November 23, 2015 (47).

STATEMENT OF FACTS- INVESTIGATION AND ARREST

On May 31, 2015 at approximately 10:04 PM the Forest County Sheriff's department received a telephone call from George Tuckwab. Tuckwab stated Steven Schaefer was at Junior's Saloon calling his mother Myra Pitts vulgar names. Furthermore, Schaefer was intoxicated, and left in a white Ford Explorer headed toward the Vanessa Tuckwab residence. Vanessa Tuckwab lived at 3170 Highway 55. (4-3)

Dispatch contacted Officer Tanner, who began looking for the suspect vehicle. He already knew where Mr. Schaefer lived. (54-70:21-25). Officer Tanner observed a vehicle running with its headlights on and playing music located on the gravel area next to the house. (54-71:5-15). Instead of a Ford Explorer, the vehicle was actually a 1994 Chevrolet. (26-Ex2). Tanner believes it was an Explorer. (54-73:16-24).

Officer Tanner did not follow the Schaefer vehicle as it entered the driveway. Schaefer was already parked by the time Officer Tanner had turned his squad car around to park in the driveway. (4-3). Officer Tanner parked the squad car on the blacktop driveway. (54-71:16-19). Steven Schaefer was parked on the gravel. (54-74:3-5).

Steven Schaefer had no knowledge law enforcement was on the property until Officer Tanner walked up to his vehicle. (54-64:2-5). Tanner did not know who was driving the vehicle until he approached the driver's side. (54-73:25-74:2). Thereafter Tanner proceeded to process an OWI arrest. (4-4-6). The entire process from initially contacting Mr. Schaefer to his arrest all occurred on the gravel. (54-60:8-24).

Mr. Schaefer's music was not bothering anyone. (54-59:19-20). He was not inside because he was listening to music and it was a nice night. (54-59:15-18). This included bringing Mr. Schaefer into the house before making the formal arrest. (54-63:7-17). At no time did Schaefer give law enforcement permission to be on his property. (54-63:24-64:1).

USE OF THE PROPERTY

The home at 3170 State Highway 55 is located within a Native American community known as Sokaogon Chippewa Community. (26-Ex5). The home was built around 1989. Vanessa Tuckwab was the original occupant and has lived there for twenty-six (26) years. (54-32:5-14). She has annual lease renewals. The last renewal specified Steve Schaefer was a member of the household. (26-Ex2-3). Steve Schaefer has lived with Vanessa Tuckwab for fourteen years. (54-54:20-22).

There is only one vehicle which Vanessa and Steve have. This vehicle is parked on the gravel next to the side door. There is a motion light that helps protect the car. (54-54:23-55:8). There is a blacktop driveway that

runs from Highway 55 to the corner of the house. This driveway is approximately 79 feet long. (26-Ex9). There is a continued 27 foot long gravel segment running along the side of the house where Vanessa and Steven park their vehicle. (26-Ex9).

There is a concrete walkway that runs from the end of the blacktop driveway to the front door of the house. (26-Ex9)(54-8:3-17). The front door has a doorbell and the side door does not. (54-38:20-23). The blueprints for the house (26-Ex4-2) show the house was built with a doorbell on the front door (54-22:1-4) but not the side door. (54-22:22-24). There is no sidewalk that goes from the driveway to the side door. (54-24:12-14).

There is a side door across from the shed (54-36:9-13). The shed is about 29 feet from the wall of the house. (26-Ex9). The shed is used to store bicycles and other things. There is no door on the shed and the opening for the shed is across from the side door. (54-35:22-36:13).

There is an LP tank behind the dirt driveway. (26-Ex3). The LP tank is filled with 150 gallons every two or three months. (54-52:1-21). There is a wood chute located

on the side of the house. (26-Ex6-14). The blueprints show the wood chute (26-Ex4-2). Most tribal housing has a wood chute. (54-20:22-21:13). Vanessa Tuckwab buys the wood from a vendor. (54-53:6-10).

There is a picnic table to the left of the parking space. (26-Ex6-1,2,3). The picnic table is closer to the house than the shed. Vanessa Tuckwab sits at the picnic table when she gets off work, and there is some shade there. (54-34:9-14). She uses the picnic table almost everyday when there isn't snow. (54-35:1-7).

There is also a barbecue (26-6-10). The barbecue is used about three times a week. (54-35:8-13). There is no gate or bushes planted at the edge of the blacktop. Permission for these alterations would have to be obtained from the tribal housing authority. (54-55:17-21). Placing a gate or bushes at the end of the blacktop would make snowplowing more difficult. (54-55:22-56:14) (54-68:17-69:3).

The housing authority plows snow past the side door because of water line problems. (54-29:6-10) (54-31:3-15). The front of the house has a butterfly decoration. (54-41:20-24).

Thomas Kirby, tribal housing maintenance, considered the driveway to end where the blacktop stopped at the corner of the house. (54-23:22-24:1). Usually people come to the front door and ring the doorbell. (54-47::14-15). The gravel portion is used for private parking. (54-49:6).

The evidence of custom concerning the approach used by total strangers as opposed to invitees was not in dispute. Family members and friends are free to use the side door, the parking spot, the picnic table and the barbecue. The same is not true for strangers.

Thomas Kirby described anyone parking beyond the paved portion to be another vehicle that is visiting. (54-29:20-21). Kirby usually sees Vanessa's vehicle parked toward the side door. (54-29:24-30:1). Kirby could not recall if a stranger, as opposed to a visitor, had ever parked on the gravel. **"I can't recall a time, you know, when I've seen that. There –there could have been, but I'm not sure."** (54-30:10-12).

Vanessa Tuckwab explained **"only ones usually come to my side is my family."** (54-47:17-18). Most drivers **"stop right to where the pavement does."** (54-48:4-5). When

asked if people do drive past the blacktop she said, **“I’d say just my mother, my son. Not –- not too many.”** (54-48:13-14). When asked if there is anything stopping the public from parking in the gravel, she said, **“usually they don’t” “park behind us.”** (54-49:19-21).

Besides vehicles, the public can approach on foot. Pedestrians using the sidewalk parallel to the highway have come up and talked with Vanessa. (54-50:4-18). There was no testimony of an example of a stranger parking a vehicle in the gravel parking space or walking up to the side door and knocking on it.

ARGUMENT

I. THE TREATY RIGHT TO DOMESTIC FIREWOOD WAS REQUIRED TO BE CONSIDERED IN THE CURTILAGE ANALYSIS.

Steven Schaefer challenges the combination by the Circuit Court of the paved driveway and the gravel parking space into one driveway. Schaefer contends the driveway stops at the pavement and the gravel is within the curtilage of the house. The standard of review of a decision determining the extent of curtilage is a two-step process. State v. Dumstrey, 2016 WI 3 ¶12-13. If material, exclusion from consideration of a treaty right represents an error of law.

The Circuit Court refused to relate the wood chute in the cement foundation to implementing the treaty right to obtain firewood for the home. Delivery of the firewood toward the wood chute would have to use the gravel extension. Schaefer argued this use of that location is relevant to the Dunn analysis. The Circuit Court construed deliveries by third parties as causing the gravel extension to be open to the public.

The treaty right to a moderate amount of domestic firewood originates from the three treaties between the

United States and aboriginal Ojibwe inhabitants of what is now Forest County Wisconsin. These three treaties were made in 1837, 7 Stat. 536; the second in 1842, 7 Stat. 591; and the last in 1854, 10 Stat. 1109. Decades later disputes would develop between the State of Wisconsin and future generations of Ojibwe, concerning usufructuary rights on ceded land. These Ojibwe would subsequently organize into reservations both aboriginal and under the 1934 Indian Reorganization Act.

This dispute lasted for decades. Mole Lake Band v. United States, 139 F Supp. 938 (1956); State v. Gurnoe, 53 Wis.2d 390, 192 NW2d 892 (1972). Finally, after extensive litigation reaching the Seventh Circuit, on February 18, 1987 the Hon. James E. Doyle reached a decision interpreting the usufructuary rights. Lac Courte Oreilles Chippewa Ind. v. State, 653 F. Supp. 1420 (W.D. Wis. 1987).

The Federal District Court interpreted the treaties to presently provide access to firewood for domestic purposes in a moderate amount. The Vanessa Tuckwab leasehold would be a beneficiary of this right. Judge Doyle specified many species of trees used for firewood. Id. p.1427

The Chippewa were awarded the right to exploit those species for firewood. Id. p.1430. Those rights continue to be effective today Id.p.1429 subject to State imposed restrictions for personal safety and resource shortages. Id. p.1435. The key ruling limits the ability of the State to interfere with the treaty relationship unless personal safety or resource depletion is an issue. Id. p.1434.

The use of the curtilage to provide firewood for the home is consistent with the relationship between the curtilage and the home as explained in 4 W. Blackstone Commmentaries on the Law of England 225 (1769) **". . . for the capitol house protects all its branches and appurtenants. . ."** Blackstone is authoritative. Florida v. Jardines, 133 S.Ct. 1409, 1415, 185 L.Ed.2nd 495 (2013).

The Circuit Court was required to recognize the blueprints with the wood chute implement the tribe's treaty right to obtain firewood for Vanessa's home. By definition the gravel parking space next to the wood chute would be required to deliver the firewood. The house was built with a wood burner and tenants are responsible for obtaining their own firewood. Vanessa Tuckwab used the gravel parking space for the purpose of obtaining domestic firewood.

This error is harmless if the use of the third party wood vendors also created a license in favor of the general public. The Circuit Court ruled reliance upon third party vendors established an implied invitation to the public to extend the paved driveway into the gravel portion. Schaefer disagreed with that ruling and provided information from an Iowa case. The Circuit Court was not persuaded by the Iowa authority.

Schaefer brought to the attention of the Circuit Court records from the United States District Court for the Northern District of Iowa, Eastern Division, United States of America v. Jeremy Daniel Conerd, Case No. CR14-2040. One of the issues in Conerd was if a side yard was curtilage. The government argued it was not because a utility meter was inspected by the public utility. As in this case, the use of the location for utilities which requires third parties to use that location was alleged to convert that location to be impliedly accessible to the public.

The order by Hon. Linda R. Reade, U.S. District Judge dated July 28, 2015 upholds Schaefer's position.

A photograph of the electric meter was provided to the Circuit Court (31-3) and is also provided in the appendix. (148).

Judge Reade made the following ruling: **"The government objects to Judge Scole's finding that Officer Phillips invaded the curtilage of Defendant's home. The government points to the fact that Defendant's side-yard was not enclosed by a fence and that a utility meter was installed on the wall of Defendant's house. The government argues that the absence of a fence and the presence of the utility meter convey an implied license of entry onto the side-yard and, as a result, the side-yard is not curtilage.**

Moreover, the court finds that the government's argument concerning the utility meter unconvincing. Even if the meter conveyed an implied license to enter the side-yard,"[t]he scope of a license . . . is limited not only to a particular area but also to a specific purpose." *Jardines*, 133 S.Ct. at 1416. The meter provided license for a utility worker to enter the side-yard and read the meter during business hours, not for a police to enter the side-yard and peer through Defendant's basement window in the middle of the night. For these reasons, the court

shall overrule the Government Objection." This Court should adopt Judge Reade's reasoning and construe firewood deliveries as a limited license. People v. Camacho, 23 Cal. 4th 824, 836, 3 P.3d 878 (2000).

Firewood deliveries would be an intimate activity associated with the sanctity of the home. Dumstrey ¶23. Failure to take into account this use of the disputed area overlooks a material factor. Whether the facts, as augmented by the firewood deliveries, warrant suppression is reviewed de novo. State v. Popp, 357 Wis.2d 696, 706, 855 NW2d 471, 2014 WI App. 100 ¶13 (Ct. App. 2014).

II. THE SIDE-YARD TO THE SHED CONSTITUTES CURTILAGE.

The determination of the location of the curtilage involves a four-factor test. Dumstrey, ¶32. The property at 3170 State Highway 55 is a single-family home with no other housing units using the driveway. Unlike Dumstrey ¶45, this driveway is a private driveway; §340.01(46), and is not a highway within the ambit of OWI enforcement. §340.01(22).

Schaefer contends the gravel area is a private parking

spot for his vehicle. Redwood v. Lierman, 772 NE2d 803, 813, 331 Ill.App.3d 1073(2002). **"By parking a vehicle in the driveway or yard of one's home, one brings the vehicle within the zone of privacy relating to one's home."**

There are both legal and factual aspects as to whether the driveway must be bifurcated at the pavement. As a matter of law the ability to see both segments does not prevent bifurcation where, as here, there is a paved walkway to the front door and private parking is beyond the pavement. U.S. v. Wells, 648 F.3d 671, 680 (8th Cir. 2011).

Evaluation of the facts require the curtilage to constitute the area between the side-wall and the shed including the barbecue and picnic table up to the edge of the pavement. The Circuit Court equated the scope of the invitation to the general public to match the permission for invitees. Schaefer alleges the license to the public is narrower than to friends.

A review of the Dunn factors establishes the end of the pavement marks the beginning of the curtilage. There are four Dunn factors. Dumstrey ¶34-45. The first factor is proximity. The Circuit Court found this factor in favor

of the defendant. (54-85:5-8). The shed, picnic table, barbecue and parked car are all within 30 feet of the home. State v. Lange, 158 Wis.2d 609, 618, 463 NW2d 390 (Ct. App. 1990). Proximity applies to both the Circuit Courts view of curtilage (driveway extension only) and defendants (shed).

The second factor is if there is an enclosure surrounding the home. Here there is none, although that is common for single family homes not to have a fence in the front. State v. Wilson, 229 Wis.2d 256, 265, 600 NW2d 14 (Ct. App. 1999).

The third factor is nature of use. There is a shed, picnic table, barbecue, private parking spot, use of the side door, and firewood deliveries at this location. The Circuit Court did not consider anything but the driveway. (54-85:13-86:2). Schaefer is entitled to consider the gravel parking space in context with the entire curtilage.

This is consistent with the general use of a side-yard. The side-yard was determined to be curtilage in U.S. v. Conerd. **"The side-yard is closely and intimately connected to the home and deserves the same protections afforded to the home itself."** 35

***See, e.g.*, *United States v. Boyster*, 436 F.3d 986, 991 (8th Cir. 2006)(holding that curtilage is "typically comprised of land adjoining a house)"** Photographs of the Iowa home are included in the appendix. (148-149)

`The Iowa ruling is consistent with Justice Scalia's position in Florida v. Jardines, 133 S.Ct. 1409, 1414, 185 L.Ed.2nd 495 (2013) **"side-garden."** The side door is directly across from the shed opening and there is a traffic route directly between the two openings. This 29 foot distance with no separating barrier relates the two structures. U.S. v. Roencranz, 356 F.2d 310 (1st Cir. 1966).

The barbecue is related to cooking, a recognized intimate activity for curtilage purposes. U.S. v. Reilly, 76 F.3d 1271, 1278, (2d Cir. 1996). It is not what uses are objectively evident, but the actual use that must be considered. *Id.* The overall use favors curtilage, even without the firewood.

The fourth factor is protection from observation. Dumstrey ¶43. The trial court found no steps were taken, no indication to make this a private place. (54-86:5-6).

There was no testimony of an example of an actual stranger parking or visiting by the side door. Instead, the ability to reach that location without being physically restrained, or the posting of a sign, persuaded the Court. The fact the unpaved portion was exposed to public view does not always direct this factor against the defendant. U.S. v. Wells, 648 F.3d 671, 680, 678(8th Cir. 2011). The Court did not take into account the features on the land and home.

Instead of erecting barriers or signs, steps can be taken to direct the public through the layout of the house and lot. The driveway was designed to end at the pavement. The house was designed with an approach to the front door.

The tribe's site plan is similar to the layout in U.S. v. Wells, 648 F.3d 671 (8th Cir. 2011). The only difference between Wells is a carport housed a vehicle instead of parking in the open under a motion light. The layout is a positive fact that applies to the fourth factor.

The Supreme Court of Kansas didn't require barriers, but considered controlling features on the surface. **"this**

finding was significant because the lack of a sidewalk going to the area in question weighs in favor of a finding of curtilage." State v. Talkington, 345 P.3d 258, 271 (2015).

An additional feature is the sole doorbell on the front door. The Oregon courts have decided cases prior to Jardines whereby the Oregon Constitution already afforded the rights that Jardines would later provide. For that reason Oregon case law transfers to the case at bar. The side door must have a doorbell in order to impliedly invite the public thereto. State v. Pierce, 226 Or.App. 336, 203 P.3d 343 (2009).

Even if the doorbell is not working, the mere presence of the doorbell indicates the public must use that door. U.S. v. Titemore, 437 F.3d 251, 259 (2nd Cir. 2006).

When the blueprints assign the doorbells, and the driveway is constructed with only pavement, parking on a dirt off-shoot thereof does not necessarily extend the driveway. State v. Olinger, 240 OR. App. 215, 246 P.3rd. 24 (2010).

To the extent the use by the public of the gravel portion represents a question of fact, the Circuit Court

failed to distinguish between permissive users and strangers. Use by those with permission constitutes a broader license then by strangers. Permissive use does not raise an inference of an equal degree of public use. **"The mere fact that Olm parked his private vehicle in his yard, thus arguably converting that area to a semi-private area, does not compel a different conclusion."** State v. Olm, 223 Ariz. 429, 224, P 3rd 245 (2010).

There is a presumption the public must initially go to the front door. State v. Pierce, 226 Or.App. 336, 203 P.3d 343 (2009). This presumption cannot be overcome without infringing on tribal self-determination, or evidence beyond an inference from where friends visit.

Vanessa Tuckwab is a lessee and the property is managed by Sokaogon Chippewa Housing Authority. The Housing Authority is not sui generis. Buchanan v. Sokaogon Chippewa Tribe, 40 F.Supp.2d 1043 (1999). The determination of curtilage is the area around the home that is **"intimately linked to the home, both physically and psychologically"** Florida v. Jardines, 133 S.Ct. 1409,

1415, 185 L.Ed.2nd 495 (2013). This determination requires consideration of self-determination exercised by Vanessa and her tribe. Self-determination is among the "psychological" factors shared by the tribe and it's members through NAHASDA. 25 U.S. C §4101(5). Under (Native American Housing and Self-Determination Act) Congress has specifically found self-determination includes improving housing conditions for individuals. Through self-determination, tribal housing is built and managed.

Even though the house was built before 1998, subsequent leases are under NAHASDA and tribal self-determination is a factor in maintaining features of the property.

III. THERE IS A PRESUMPTION AGAINST IMPLIED ACCESS PAST THE PAVEMENT ESTABLISHED THROUGH TRIBAL SELF-DETERMINATION.

There is a common issue between the fourth Dunn factor and the scope of a "knock and talk" investigation. State v. Edgeberg, 188 Wis.2d 339, 346, 524 N.W.2d 911 (Ct.App.1994). Normally the "knock and talk" would be initiated at the front door. Florida v. Jardines, 133 S.Ct. 1409, 1415, 185 L.Ed.2nd 495 (2013).

Here, Officer Tanner had no intention of approaching the front door. Instead, he directly proceeded to investigate a motor vehicle. State v. Blakley, 226 Ariz. 25, 243 P.3d 628, 633, (2010).

Implied permission to cross the gravel area could exist if the side door was the equivalent of the front door for purposes of initiating "knock and talk." The two doors are materially different. The side door has no door bell, there are no butterfly decorations, and most importantly there is no paved continuation from the pavement to the side door. There is a paved sidewalk to the front door. These differences would not place the side door on an equal footing with the front door. State v. Olinger, 240 Or.App. 215, 246 P3d20, 24 (2010).

The Circuit Court heavily relied upon the unrestricted ability to proceed past the pavement as representing an implied invitation to Officer Tanner to approach Mr. Schaefer's vehicle. This position is contrary to the tribe's purpose as to the layout of the land itself.

Thomas Kirby specified the driveway ended at the pavement. (54-23:19-24:1). **"It comes up to the corner of**

the house and then ends right there, to the front corner of the house towards the highway." The position of the Housing Authority represents an exercise of tribal self-determination. This case raises questions as to the ability of a state court to disregard self-determination without infringing thereon.

The scope of the license was determined by the Circuit Court though implication. This is permissible, **"A license may be implied from the habits of the country."** Florida Florida v. Jardines, 133 S.Ct. 1409, 1415 185 L.Ed.2nd 495 (2013).

In general, tribal governments can exercise self-determination over matters concerning tribal housing. Schaefer filed the March 30, 1998 decision by Hon. C. N. Clevert, U.S. District Judge, Eastern District of Wisconsin Case No. 97-C-41. Judge Clevert viewed the dispute with the housing authority in that case as an important part of tribal sovereignty. (21-19). The house was built around 1987 and Congress passed on October 26, 1996 the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §4101 *et seq.*

Congress recognized the right of Indian self-determination and tribal governance by making such assistance available directly to the Indian tribes or tribal designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638, 25 USC S4101(7).

The tribal housing authority has passed the necessary resolution to comply with HUD requirements. The decisions on property management of 3170 Highway 55 have been made in the course of tribal self-determination, at least since April 2, 1998.

There is good reason not to install a gate at the end of the pavement. That would make it difficult for the housing authority to plow snow past the pavement. There is an LP tank and water lines beyond the gravel portion. The burden upon the tenant to open and close a gate to use that side of the house on a daily basis is onerous.

Vanessa Tuckwab's lease renewals for the last twenty-five years would have an implied condition to continue the present layout. H.& R. Truck Leasing Corp. v. Allen, 26 Wis.(2d) 158, 163, 131 N.W.2d 912 (1965). The evidence

permits only one reasonable inference; tribal housing had no interest in building a gate or planting bushes. The end of the pavement was the end of the driveway, as Kirby testified. In re Marriage of Spencer v. Spencer, 140 Wis. 2d 447, 450, 410 NW2d 629 (Ct. App.1987).

States cannot infringe on tribal sovereignty without sound policy reasons. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 100 S.Ct. 2578, 65 L.Ed2d 665 (1980). Self-determination also raises a factual presumption the driveway stops at the pavement. In order to rebut this presumption there must be some evidence beyond an inference only. §903.01. Since the Court relied upon only inferences this presumption was not rebutted. State ex rel Northwestern Dev.Corp. v. Gehrz, 230 Wis. 412,422, 283 N.W. 827 (1939). There is no factual basis to imply "knock and talk" extended past the pavement.

IV. A SEARCH OCCURS WHEN AN OCCUPANT IS LISTENING TO MUSIC IN THE CURTILAGE AND IS SURPRISED BY LAW ENFORCEMENT.

Should this Court determine Steven Schaefer was parked in the curtilage and there was no implied permission for the general public to approach his vehicle the Fourth

Amendment is implicated. Dumstrey ¶14. There is a distinction between a search and a seizure. Id. ¶16. The details of this case implicate a search before there was a seizure.

Officer Tanner did not know who was in the vehicle when he crossed the pavement. He only knew that when he saw Mr. Schaefer. Likewise, Schaefer was listening to music and surprised by the presence of law enforcement. This initial contact was a search because there was no visual observation by Officer Tanner of Schaefer prior to Tanner entering the curtilage. Dumstrey ¶19. Florida v. Jardines, 133 S.Ct. 1409, 1414, 185 L.Ed.2nd 495 (2013).

This search violates the Fourth Amendment because it occurred within the curtilage. There is a presumption Mr. Schaefer intended on continuing to listen to his music. Bruss v. Milwaukee Sporting Goods Co., 34 Wis.2d 688, 695, 150 N.W. 2d 337 (1967). There is no evidence to rebut this presumption.

Listening to music is a First Amendment right. City of Madison v. Bauman, 162 Wis.2d 660, 671, 470 NW2d 296 (1991).

Law enforcement interrupted the exercise of that right. There is no reason to infer Mr. Schaefer authorized law enforcement to cross the pavement.

V. THE BOND FORFEITURE WAS AN ERRONEOUS EXERCISE OF DISCRETION.

The standard of review concerning bond forfeiture decisions is erroneous exercise of discretion. State v. Ascencio, 92 Wis.2d 822, 829, 285 NW2d 910(1979). Schaefer failed to appear because of confusion over a court date. The Circuit Court found no ambiguity between the court date and the bond and the traffic citation. At sentencing, however, the Court did determine there was no risk he would not appear and that he did move the case along. (62-29:20-30:1).

There are several factors to be considered in bail forfeiture matters. State v. Ascencio, 92 Wis.2d 822, 829, 285 N.W.2d 910 (1979). The factors relied upon by the Circuit Court were the impact on the administration of justice. In hindsight, this factor was immaterial in that the defendant moved the case along. No other factors were cited and the Court discounted reliance upon the traffic citation.

The nonappearance on June 12, 2015 did not prolong proceedings past the expectation of the courts since the court had provided the initial appearance date of July 8, 2015. The defendant was in jail on July 6, 2015 with no overall delay. Forfeiting the bail was an erroneous exercise of discretion, in that the reason for the forfeiture was ultimately inconsistent with the entire record. Brown County v. Shannon B., 286 Wis.2d 278, 303-304, 706 N.W.2d 269, 2005 WI 160 (2005).

CONCLUSION

This case should be remanded with directions to grant the suppression of motion and refund the $1000 cash bond.

Respectfully submitted this 26th day of February 2016.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is forty-eight (48) pages.

Dated: February 26, 2016

/s/ Robert A. Kennedy, Jr.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of §809.19 (12). I further

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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: February 26, 2016.

Kennedy Law Office

/s/ Robert A. Kennedy, Jr.____
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Attorney For Appellant

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this day 25th of February, 2016. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

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Dated: February 26, 2016.

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