

**RECEIVED**

STATE OF WISCONSIN **07-18-2016**

COURT OF APPEALS

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

DISTRICT III

---

Case No. 2015AP002555

---

STATE OF WISCONSIN,  
Plaintiff – Respondent,

v.

STEVEN J. SCHAEFER,  
Defendant – Appellant,

---

ON APPEAL FROM A JUDGMENT OF CONVICTION  
AND AN ORDER DENYING SUPPRESSION OF EVIDENCE  
IN THE CIRCUIT COURT OF FOREST COUNTY,  
THE HONORABLE LEON D. STENZ, PRESIDING

---

RESPONSE BRIEF AND APPENDIX OF  
PLAINTIFF – RESPONDENT

---

CHARLES J. SIMONO  
Forest County District Attorney  
State Bar No. 1030774

Forest County Courthouse  
200 E. Madison Ave  
Crandon, Wisconsin 54520  
Office: (715) 478 – 3511  
Fax: (715) 478-3490  
Charles.Simono@da.wi.gov

Attorney for the Plaintiff-Respondent

## TABLE OF CONTENTS

	Page
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	6
I.     UNDER WISCONSIN CASE LAW, THE POLICE, OPERATING WITH LEGITIMATE BUSINESS, MAY ENTER THE AREAS OF THE CURTILAGE WHICH ARE IMPLIEDLY OPEN TO USE BY THE PUBLIC INCLUDING DRIVEWAYS. ....	6
THE DUNN FACTORS .....	9
II.    UNDER FEDERAL LAW, STEVEN SCHAEFER IS SUBJECT TO THE CRIMINAL JURISDICTION TO THE LAWS OF THE STATE OF WISCONSIN AND IS NOT PROTECTED BY ANY TREATIES.....	11
CONCLUSION.....	12
APPENDIX .....	15

## CASES CITED

State v. Dickenson, 364 Wis.2d 760; 869 N.W.2d 171(2015).....	6
State v. Crea, 233 N.W. 2d 736, 739 (Minn. 1975) .....	7
United States v. French, 291 F.3d 945, 951 (7 <sup>th</sup> Cir. 2002).....	7

## CASES CITED CONTINUED

United States v. Dunn, 107 S.Ct. 1134; 480 U.S. 294 (1987).....	9
--	---

## SATUTES CITED

Wis. Stat. § 346.63(1)(a).....	1, 2
Wis. Stat. § 346.63(1)(b).....	1
Pub.L.No. 83-280, 67 Stat. 588, 18 U.S.C. s 1162, 28 U.S.C. s 1360.....	11
18 U.S.C.A § 1162 (a) .....	11

**STATE OF WISCONSIN**

**COURT OF APPEALS**

**DISTRICT III**

---

**Case No. 2015AP002555**

---

**STATE OF WISCONSIN,**  
**Plaintiff – Respondent,**

**v.**

**STEVEN J. SCHAEFER,**  
**Defendant – Appellant,**

---

**ON APPEAL FROM A JUDGMENT OF CONVICTION  
AND AN ORDER DENYING SUPPRESSION OF EVIDENCE  
IN THE CIRCUIT COURT OF FOREST COUNTY,  
THE HONORABLE LEON D. STENZ, PRESIDING**

---

**RESPONSE BRIEF AND APPENDIX OF  
PLAINTIFF – RESPONDENT**

---

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established principles to undisputed facts.

**STATEMENT OF THE CASE**

The Defendant was originally charged in Forest County Case 2015-CM-88 for the offenses of Operating While Intoxicated 4<sup>th</sup> Offense contrary to Wisconsin Statute § 346.63(1)(a) and Operating With a Prohibited Alcohol Concentration contrary to Wisconsin Statute § 346.63(1)(b).

An initial appearance was held on June 12, 2015 at which time the defendant did not appear for his scheduled 9:00 a.m. hearing and the court forfeited the \$1000.00 case bond at approximately 10:42 a.m.

On or about June 8, 2015 an amended complaint was filed and the defendant appeared based on his return on a warrant. The court held an initial appearance on June 8, 2015. The defendant was granted further time to hire an attorney.

On June 15, 2015 an adjourned initial appearance was conducted at which time the defendant and Robert Kennedy appeared and entered not guilty pleas on the amended complaint.

On or about September 9, 2015 the defendant through and by his attorney presented testimony and argument to support their suppression motion challenging curtilage and trespass by law enforcement. Upon conclusion of the hearing the Honorable Leon D. Stenz ruled in favor of the State and denied the defendant's motion.

On or about September 9, 2015 a second hearing regarding Steven Schaefer was conducted regarding the forfeiture of his bond based upon his failure to appear as ordered on June 8, 2015. The conclusion of the hearing resulted in the Court confirming the forfeiture.

On September 9, 2015 the defendant requested a Jury Trial to which the court scheduled a trial date for November 20, 2015.

On November 19, 2015 the defendant entered a guilty plea to the Operating While Intoxicated 4<sup>th</sup> offense contrary to Wisconsin Statute § 346.63(1)(a).

### **STATEMENT OF FACTS**

On September 9, 2015 while at the defendant's motion to suppress, the following information was testified to by multiple parties:

On or about May 31, 2015 Deputy Chris Tanner (hereinafter referred to as Deputy Tanner) of the Forest County Sheriff's Department responded to a complaint filed by a George Tuckwab whereby he was asserting that Steven Schaefer, the defendant/appellant in the above listed matter, was harassing people while at Junior's Bar. (70: 7-19). George Tuckwab advised the Forest County Sheriff's Department that Steven Schaefer had just left Junior's Bar driving a white Ford Explorer and was heading toward his residence. (70:18-20).

Deputy Tanner stated that he knew who Steven Schaefer was from prior contacts and was further aware of the location that Steven Schaefer lived. (70: 21-25).

During testimony, both Vanessa Tuckwab and Thomas Kirby testified that the residence in which Steven Schaefer lives at is actually leased to a Sokaogan Chippewa Tribal Member, being Vanessa Tuckwab. (32: 3-14 and 15-9-23). Vanessa Tuckwab also testified that the residence is on State Hwy 55, specifically at 3170 State Highway 55. (32: 5-6).

According to Forest County Sheriff Department Arrest Report Personal Information Sheet for Incident 201500008582 regarding the Arrest of Steven Jack Schaefer being the above listed defendant, it indicates that he is Caucasian and thus not a tribal member. (Arrest Report page 1 of 1). Additionally, Citation number T383384-1 issued to Steven Jack Schaefer, date of birth 08/19/1951, states that he is white under the "race" section. (please see defendant's appendix for citation).

Deputy Tanner testified that upon his arrival at the Steven Schaefer residence he observed a vehicle running with its lights on and loud music coming from the vehicle. (71:5-8). Deputy Tanner further testified that upon his arrival he was still investigating a potential domestic situation and/or harassment complaint. (71: 1-3).

Deputy Tanner stated that vehicle operated by Steven Schaefer was located in the driveway of his residence. (71: 13-14). Deputy Tanner further explained

that the vehicle occupying Steven Schaefer was in the driveway which is initially asphalt and eventually turns into a continuation of gravel. (71: 9-25 and 72:1). Deputy Tanner specifically described having observed the Steven Schaefer Vehicle next to the residence and still located on the gravel portion of the driveway(71: 9-25 and 72:1). Steven Schaefer also agreed that the location where the vehicle was parked, being part of the driveway, was gravel and dirt. (55: 1-3). Steven Schaefer confirmed that Deputy Tanner approached him while in the vehicle and asked his name. (59: 24-25 and 60: 1).

Steven Schaefer testified that he always parks on the gravel portion of the driveway by the back door, being the same location he was found by law enforcement, and that on the night in question he was in his vehicle yet listening to the radio because there was a good song playing. (59:10-18).

Steven Schaefer further confirmed through his testimony that he exited the vehicle for law enforcement and that he always remained on the dirt and/or gravel portion of the driveway (60:8-24).

Steven Schaefer testified that the centerline of Highway 55, which is the road in front of his home, is sixty-three (63) feet to the end of the asphalt portion of the driveway and that the gravel portion continues on for another twenty-seven (27) to the end of the home. (56: 25 and 57:1-10). Steven Schaefer also testified that width of the gravel section of the driveway where he was parked is twenty-seven feet wide being the same width as the asphalt portion of the driveway. (58:21-25 and 63:10-17).

The Steven Schaefer vehicle was readily recognized by Deputy Tanner as he indicated that he observed the vehicle from the public road and could see the vehicle in the driveway of the Schaefer residence with no form of objects or other obstructions obscuring his view. (72: 9-17). Deputy Tanner stated that the Steven Schaefer driveway and residence did not have any signage indicating that law enforcement is not permitted to enter; signage indicating private property or signage to not enter. (72: 18-24). Deputy Tanner further testified that there was

nothing present that would have kept him or anyone else from accessing the driveway at the Steven Schaefer residence. (72: 25 and 73: 1-3).

Steven Schaefer confirmed Deputy Tanner's testimony by stating that he has done nothing to make the driveway portion where he parks to be private. (64:24-25 and 65: 1-16). Steven Schaefer further confirmed that at the time he was approached by Deputy Tanner and to the date of his testimony that nothing existed telling anyone to stay out or made any efforts to keep people out (65:5-17).

Deputy Tanner made contact with Steven Schaefer while he was sitting in his running vehicle as it was parked in his driveway as described above. (72: 6-8). Steven Schaefer confirmed that he was parked in the driveway by the backdoor when he was contacted by law enforcement (54: 25 and 55:1).

The defendant also had a Thomas Kirby testify whereby he explained how he is employed by the Sokaogon Chippewa Housing Department and that part of his duties include repairing tribal homes, maintenance to said homes and winter plowing of snow at said homes. (15:1-8 and 29: 1-15). Thomas Kirby testified that he and his maintenance department plow the driveway where Steven Schaefer lives and that the driveway gets pretty wide. (29: 5-7). Thomas Kirby added that they have to plow the snow in a manner so it gets pushed way back so they can access the house as they have visitors at the Steven Schaefer residence (29:5-21).

Vanessa Tuckwab further confirmed that aside from visitors to the residence, they also have routine fill-ups of propane and wood deliveries conducted by third parties. (52: 1-25 and 53: 1-12).

Steven Schaefer was ultimately arrested for Operating While Intoxicated 4th offense and was convicted by a Guilty Plea on or about November 19, 2015. (Please see Judgment of Conviction in defendant's appendix).



## ARGUMENT

### **I. UNDER WISCONSIN CASE LAW, THE POLICE, OPERATING WITH LEGITIMATE BUSINESS, MAY ENTER THE AREAS OF THE CURTILAGE WHICH ARE IMPLIEDLY OPEN TO USE BY THE PUBLIC INCLUDING DRIVEWAYS.**

The Wisconsin Court of Appeals, through their ruling under State v. Dickenson, 364 Wis.2d 760: 869 N.W.2d 171(2015) address a defendant's challenge to privacy and trespass by law enforcement. The Dickenson case involves a law enforcement investigation of an accident. The contention within the case surrounds the fact that the investigating officer walked down the driveway of the defendant, which by the facts is determined to extend two car lengths beyond the house so as to allow plain view of the backyard. The officer remained within the driveway while making contact with two occupants on the deck connected to the home at which time one of the occupants identified themselves as being the named person the officer was seeking as part of his investigation. The suspect was ultimately charged with Operating While Intoxicated second offense. The defendant appealed asserting that she had an expectation of privacy as she was within a protected and private area of the curtilage of the home. The Dickenson court agreed that the location in which the defendant was located, which was upon the deck, was in fact part of the curtilage and an apparent effort to be less open to the public as it was on the back side of the home. However, the Dickenson court also noted that the driveway, being adjacent to the home was not closed off and was open to the public. The court specifically noted that the officer

walked completely down the driveway unimpeded. The nature and use of the area where Officer was standing was that it was a driveway that would be used for ingress and egress to the front, side, and rear areas of the property by anyone living at or visiting the home, and the driveway continued past the back end area of the home toward a detached garage about two cars lengths farther up the driveway. The Dickenson court held that the driveway was an access point to the property and an area that could be readily utilized by visitors. It directly abutted the city street and was not, as a whole, a constitutionally protected area and therefore the officer was not trespassing by standing where he stood on the driveway when he observed the defendant.

The Dickenson court, in reaching their decision, noted that Police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public and in doing so are free to keep their eyes open. (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c) at 393 (2d ed.1987) (quoting State v. Crea, 233 N.W.2d 736, 739 (Minn.1975))). The Dickenson court further noted that “[T]he curtilage is the area that encompasses the intimate activities associated with the sanctity of the home and the privacies of life.” Citing United States v. French, 291 F.3d 945, 951 (7th Cir.2002).

The case at hand, although somewhat different from Dickenson in regards to the geographic location of driveways and respective defendants, is on point with the issues that must be decided regarding Steven Schaefer’s appeal.

Similar to the officer in Dickenson, Forest County Deputy Tanner walked

down the Steven Schaefer's driveway. Deputy Tanner remained within the driveway while making contact Steven Schaefer, being the named person he was seeking as part of his investigation. Both Deputy Tanner and Steven Schaefer indicated that the two were always within the driveway during the law enforcement contact and arrest. Additionally, Deputy Tanner noted that Steven Schaefer was not only in the driveway but was also behind the wheel of his vehicle that was still running and had the lights on. Deputy Tanner, just as in the Dickenson case, arrested his suspect and ultimately charged Steven Schaefer with Operating While Intoxicated fourth offense.

Unlike the Dickenson case, the Steven Schaefer was not within any protected area giving rise to an expectation of privacy as he was not within a protected and private area. However, Steven Schaefer was located within his driveway, being adjacent to the home was not closed off and was open to the public. Deputy Tanner, just as the officer in Dickenson, walked down the driveway with legitimate business of investigating an harassment complaint and in doing so remained within the driveway that would be used for ingress and egress to the front and side areas of the Steven Schaefer property by anyone living at or visiting the home. The facts presented under the appeal by Steven Schaefer are consistent with those in Dickenson and that his driveway is an access point to the property and an area that could be readily utilized by visitors. The driveway directly abutted the State Hwy 55 and was not, as a whole, a constitutionally protected area and therefore Deputy Tanner was not trespassing by standing where he stood on the

driveway when he observed the Steven Schaefer.

Based on the above listed reasons, the State hereby respectfully requests that the defendant's appeal be denied in its entirety and that the Court sustain the circuit court's ruling.

### **THE DUNN FACTORS:**

The State is aware of the United Supreme Court's ruling under United States v. Dunn, 107 S.Ct. 1134; 480 U.S. 294 (1987) and how the Court addressed issues surrounding curtilage challenges. The Dunn Court specifically listed four factors when determining if there has been an infringement into a curtilage and right to privacy. The defendant, although not providing a cite to United States v. Dunn, does in fact reference the "Dunn Factors" commencing on page thirty-four (34) of his brief.

The factors as delineated by the Supreme Court are as follows:

- (1) the proximity of the area to the home;
- (2) whether the area is within an enclosure surrounding the home;
- (3) the nature and uses to which the area is put; and
- (4) the steps taken by the resident to protect the area from observation by passersby.

United States v. Dunn, 107 S.Ct. 1134, 1135 (1989).

In reference to the factors as delineated by the Dunn court, the State through argument and stated facts listed above, and incorporated herein, has demonstrated

that the driveway is directly next to the Steven Schaefer residence. However, the driveway is not within any enclosure nor is there any signage to signify a desire for privacy. The defendant makes issue with regards to a shed and a picnic table asserting a side-yard protection. Based on the testimony received from Vanessa Tuckwab and Steven Schaeffer, the shed is at the end of the driveway and is not used for parking purposes. The picnic table area is off to the left of the driveway and is further from the home but remains open to the public whereby people passing by on the road or sidewalk can openly see anyone sitting and could also converse with or approach the picnic table without any impediments. (45: 25 and 50: 1-25 and 51:1) (65:19-25 and 66: 1-22). Lastly, Steven Schaefer and Vanessa Tuckwab have taken no efforts to enclose or privatize the picnic table area nor the driveway as the testimony is clear to the fact that no fences, bushes or signage has ever existed and that anyone can use the driveway including where they park but also can approach the picnic table area in the same manner. (65: 12-25 and 66: 1-22).

The focus of the analysis has always been the area in which Deputy Tanner and Steven Schaefer were located on the night of May 31, 2015, which is the open driveway to the Vanessa Tuckwab residence. The defendant does not deny the open access to the driveway but rather attempts to capture the driveway under some form of an umbrella protection using the picnic table which was further from the home and still open to public view and access.

Based on the above listed reasons, the State hereby respectfully requests that the defendant's appeal be denied in its entirety and that the Court sustain the circuit court's ruling.

**II. UNDER FEDERAL LAW, STEVEN SCHAEFER IS SUBJECT TO THE CRIMINAL JURISDICTION TO THE LAWS OF THE STATE OF WISCONSIN AND IS NOT PROTECTED BY ANY TREATIES.**

Under Federal law Pub.L.No. 83-280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360 which is commonly referred to Public Law 280. Through the enactment of Public Law 280, Wisconsin, among other States, was granted jurisdiction over Offenses committed by or against Indians in the areas of Indian Country to the same extent that Wisconsin has jurisdiction over offenses committed elsewhere within the State and the criminal laws of Wisconsin shall have the same force and effect within Indian Country as they have elsewhere within the Wisconsin. 18 U.S.C.A. § 1162 (a). The defendant makes argument to a protection that should cover him as well despite no showing by the defendant that he is a Native American and more specifically an enrolled member to the Sokaogon Chippewa Band from Mole Lake Wisconsin. The State contends that even if Steven Schaefer were an enrolled member to the Sokaogon Chippewa Band, the civil regulatory function of administering and enforcing a treaty would not give rise to creating a protection against the State of Wisconsin from enforcing concurrent criminal jurisdiction and application of its Operating While Intoxicated Laws. The Defendant impliedly admits no protection directly for

himself as his argument is couched under a protection whereby Vanessa Tuckwab, the leaseholder for the residence, would be the beneficiary to any treaty. (please see defendants brief page 29, last paragraph.)

The State has demonstrated that Steven Schaefer is Caucasian and not a Native American. Please be reminded That which are According to Forest County Sheriff Department Arrest Report Personal Information Sheet for Incident 201500008582 regarding the Arrest of Steven Jack Schaefer being the above listed defendant, it indicates that he Is Caucasian and thus not a tribal member. (Arrest Report Page 1 of 1). Additionally, Citation number T383384-1 issued to Steven Jack Schaefer, date of birth 08/19/1951, states that he is white under the “race” section. (please see defendant’s appendix for citation).

The defendant has not established a legal nexus between the treaty assertion for firewood to his non-native status. Moreover, the defendant has not established how the laws of Wisconsin are not applicable to him anywhere within the state of Wisconsin as Public Law 280 applies to acts done by or against Indians within Indian Country.

Based on the above listed reasons, the State hereby respectfully requests that the defendant’s appeal be denied in its entirety and that the Court sustain the circuit court’s ruling.

### **CONCLUSION**

This Court should determine that the defendant was located within an unprotected, Forest County Deputy Tanner walked down the Steven Schaefer’s

driveway. Deputy Tanner remained within the driveway while making contact Steven Schaefer, being the named person he was seeking as part of his investigation. Both Deputy Tanner and Steven Schaefer indicated that the two were always within the driveway during the law enforcement contact and arrest. Additionally, Deputy Tanner noted that Steven Schaefer was not only in the driveway but was also behind the wheel of his vehicle that was still running and had the lights on. Deputy Tanner, just as in the Dickenson case, arrested his suspect and ultimately charged Steven Schaefer with Operating While Intoxicated fourth offense.

Unlike the Dickenson case, the Steven Schaefer was not within any protected area giving rise to an expectation of privacy as he was not within a protected and private area. Specifically that Steven Schaefer was located within his driveway, being adjacent to the home was not closed off and was open to the public and are used for ingress and egress to the front and side areas of the Steven Schaefer property by anyone living at or visiting the home. Deputy Tanner walked down the driveway with legitimate business of investigating an harassment complaint and in doing so remained within the boundaries of the driveway. The driveway directly abutted the State Hwy 55 and was not, as a whole, a constitutionally protected area and therefore Deputy Tanner was not trespassing by standing where he stood on the driveway when he observed the Steven Schaefer. In doing so, this court should sustain the circuit court's previous findings and orders.

The court should further determine that the Defendant's arguments to capture



the driveway under some form of extended umbrella protection through a side-yard argument and use of the Dunn court factors has not established a protection for the open and publicly accessible driveway where the defendant was approached for legitimate police business and is not entitled to any relief. In doing so, this court should sustain the circuit court's previous findings and orders.

Lastly, the Court should determine that the defendant is not entitled to any treaty protections available to Native Americans, firstly as such rights would not abdicate the duties and permissions allowed under Public Law 280, but more so because he is a non-native and is subject to Wisconsin Laws wherever he is located within the boundaries of the State of Wisconsin. In doing so, this court should sustain the circuit court's previous findings and orders.

Dated this 18<sup>th</sup> day of July, 2016

Respectfully submitted,

Charles J. Simono  
District Attorney  
State Bar No. 1030774

Forest County District Attorney  
Forest County Courthouse  
200 E. Madison Ave.  
Crandon, Wisconsin 54520  
Office: (715) 478 – 3511  
Fax: (715) 478-3490  
Charles.Simono@da.wi.gov

CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 18<sup>th</sup> day of July, 2016.

---

Charles J. Simono  
District Attorney  
State Bar No. 1030774  
Attorneys for Petitioner-Respondent

Forest County District Attorney  
Forest County Courthouse  
200 E. Madison Ave.  
Crandon, Wisconsin 54520  
(715) 478 – 3511  
(715) 478 – 3490  
Charles.Simono@da.wi.gov

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19 (8)(b) and (c) Stats. for a brief produced with proportional serif font, double spaced; 1.5 margin on the left side and 1 inch margins on the other three sides. The length of this brief is 3614 words on fourteen (14) pages.

Dated this 18<sup>th</sup> day of July 2016

---

Charles J. Simono  
District Attorney  
State Bar No. 1030774

### Certificate of Mailing

I certify that this brief was deposited in the United States Mail at Crandon, Wisconsin for delivery to Clerk of Court of Appeals by first class mail on this 18<sup>th</sup> day of July, 2016. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify that three copies of the brief were simultaneously served by mail as follows:

Robert A. Kennedy Jr.

209 East Madison Street

Crandon, Wisconsin 54520

Dated: July 18, 2016

---

Charles J. Simono  
Attorney for Respondent

## **CERTIFICATION**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 reproduces to preserve confidentiality and with appropriate references to the record.

Dated the 18<sup>th</sup> day of July 2016.

---

CHARLES J. SIMONO