STATE OF WISCONSIN COURT OF APPEALS

DISTRICT III.

APPEAL NUMBER 2018AP718

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADAM ANDERSON

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR PIERCE COUNTY
THE HONORABLE JOSEPH D. BOLES PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Respectfully Submitted,
ADAM ANDERSON
Defendant-Appellant

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ISSUES PRESENTED

Whether constant surreptitious video recording of the activities at a home violate the Fourth Amendment right of an overnight guest with an arrest warrant to be free from unreasonable searches?

Trial court found no violation.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither are requested.

STATEMENT OF THE CASE

At an unknown date and time prior to July 27, 2015, a Pierce County Sheriff placed a video surveillance camera on a telephone pole "right where the lines meet," about three, four feet down from the top of the pole. R: 48: 9.

Law enforcement guessed that there was unlawful drug activity happening at the house in question and therefore started continuously recording the house without ever seeking judicial oversight.

Law enforcement's guess was wrong/they never found evidence of unlawful drug activity. Instead, one day when Deputy Marty Shepler was reviewing recorded video on his computer from the pole cam, he noticed Mr. Anderson on the video. He sent three other deputies to go to the property to arrest Mr. Anderson for a warrant. *Id.* at page 5.

When the police arrived, Mr. Anderson ran into a garage and shut the door and then ran through a soybean filed where he eventually tripped, fell, and surrendered to law enforcement. *Id.* at page 5.

Mr. Anderson was charged with one count of resisting or obstructing an officer contrary to Wis. Stat. 946.41(1). R: 1:1-2. He was convicted after a jury trial where the jury watched video of him obtained from the police pole cam. At trial it was alleged the officers

were acting with *lawful authority* when they placed the video camera on private property and used it to record the curtilage of a house 24 hours per day and later view the recordings on a computer and used the video during the arrest and jury trial of Mr. Anderson. R: 54:1-220.

Pre-trial, the defendant moved to suppress video obtained by the sheriffs. Deputy Marty Shepler from Pierce County Sheriff Office testified about placement of the camera and how he watched the camera from his computer. R: 48: 1-23.

According to Shepler, the video camera was able to view, "Soybean fields, cornfields, Brittney Witzke's residence, the intersection of County Road EE and County Road D, and trees." "Depending on the distance, you know, what I'm viewing, I can focus on things *a couple miles away, if necessary.*" Id. at page 6.

Regarding the privacy of the house and yard, Shepler testified, "Yes, lots of trees, and I believe there might have been a fence on one side of the house." When asked about a fence and view/seeing thru the fence, Shepler testified, "I believe one side of county road the fence is restrictive, but the rest is open I believe." Id.

Mr. Anderson testified he stayed at the house for about a week and there is a fence that is about six feet tall, see through wire, and it "goes all the way around the yard." Id. at Page 19.

The circuit court denied the defense motion to suppress the video pretrial. Id. at page 23.

On March 29, 2018, the circuit court denied the defense postconviction motion to suppress the warrantless video. The court held that the camera was on Pierce Pepin property and not the property Mr. Anderson was arrested on, and that Mr. Anderson had a warrant for his arrest when the police saw him on the warrantless video camera. R: 38: 1-2.

ARGUMENT

The 4th Amendment Prohibits Warrantless, Continuous, and Covert Recording in and Around the Yards of Rural Homes in Isolated Settings.

Both the fourth amendment to the United States Constitution and Art. I, Sec. 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. This court consistently follows the United States Supreme Court's

interpretation of the search and seizure provision of the fourth amendment in construing the same provision of the state constitution. *State* v. *Kramer*, 2009 WI 14, 315 Wis.2d 414, 759 N.W.2d 598.

Warrantless searches are per se unreasonable. *State* v. *Milashoski,* 159 Wis.2d 99, 110-11, 464 N.W.2d 21, 25-26 (Ct. App. 1990), aff'd, 163 Wis.2d 72, 471 N.W.2d 42 (1991). The State has the burden of proving that a challenged warrantless search falls within one of the exceptions to this general rule. *State* v. *Pozo,* 198 Wis.2d 706, 711 n.2, 544 N.W.2d 228, 230 (Ct. App. 1995).

In this case, law enforcement never even requested a warrant from a neutral and detached judge. Their guess of drug activity was wrong.

A. Mr. Anderson Has Standing to Challenge the Unlawful Search

Status as an overnight guest is alone sufficient to show an expectation of privacy in the home that society is prepared to recognize as reasonable. *Minnesota* v. *Olson*, 495 U.S. 91 (1990), *Rakas* v. *Illinois*, 439 U.S. 128, Jones v. United States 362 U.S. 257.

Mr. Anderson testified he stayed at the house for about a week. R: 48:19.

B. Mr. Anderson was Observed and Arrested in the Curtilage of the Home

The Fourth Amendment prohibits entry onto curtilage for the purpose of making a warrantless arrest: *United States* v. *Struckman*, 603 F.3d 731, 739 (9th Cir. 2010); holding police officers' warrantless seizure of defendant within his backyard and their entry into the yard to perfect his arrest, violated the Fourth Amendment.

Fourth Amendment protections extend to a home's curtilage. *State* v. *O'Brien*, 223 Wis. 2d 303, 316, 588 N.W.2d 8 (1999). A truck parked approximately 200 feet from a farmhouse is within the curtilage when the farm consisted of a barn, outbuilding, small backyard and two driveways. In the context of a rural setting, the area extending to the outbuilding is in the curtilage. Id. at 316.

The State conceded curtilage by filing a copy of *Terry Thomas* v. *United States of America* on 9-21-17. R: 37:

1-8. That case holds that Fourth Amendment protections extended to the backyard are part of the curtilage of the house," citing *Oliver* v. *United States* 466 U.S. 170."

See also *State* v. *Walker* 154 Wis. 2d 158 overruled on other grounds. "The record thus shows that, at the time of Walker's warrantless nighttime arrest, Walker was in the fenced-in backyard of is home." This was an unlawful arrest.

In this case, defendant testified he stayed overnight at the house for a about a week prior to July 27, 2015, R 48: 16. He was observed in a fenced yard near the house. When police came to arrest him, he went inside a garage and closed the door shortly after they arrived demonstrating his right to privacy. R: 53: 99. Defendant has standing to challenge the warrantless search.

C. An Arrest Warrant Does Not Validate the Unlawful Warrantless Search

"A search is not made legal by what it turns up; in law, it is good or bad when it starts, and does not change

character from its success." *United States* v. *Di re*, 332 U.S. 581, 595 (1947).

….. "if only an *arrest* warrant were required in this type of situation, police would be free to search the homes of all the suspect's friends and acquaintances." *Steagald* v. *United States* 451 .S. 204 (1981).

The government cannot violate the 4th amendment rights of people and then argue after the fact there is no violation because they happen to find out a person had an arrest warrant.

For example, if the government places a hidden surveillance camera in a person's bedroom, or in the locker-room of a YMCA (without any judicial oversight), and later notices a person with a warrant, that search is still illegal. Without the unlawful search, the government would not have had probable cause to believe the person was at the YMCA or in the bedroom.

Similarly, here, the 24-hour warrantless video surveillance from private property with ability to view several miles was an unlawful search from the beginning. The fact the sheriffs later noticed someone

with a warrant does not change the search from unlawful to lawful.

D. The Government Cannot Use an Illegal Search to Create Probable Cause.

When police conduct a search without probable cause, the search is unlawful, and the results should be suppressed. *State* v. *Blackman*, 2017 WI 77 Court.

In *Steagald* v. *United States* 451 .S. 204 (1981), the U.S. Supreme Court differentiated between an arrest warrant and a search warrant when the person arrested was found on the property of a third person.

> "Having already held that prior to his entry Thomas did not have probable cause to believe Wanie was a resident of Kiper's apartment[1], we now conclude that Thomas needed a search warrant to enter the apartment to look for and execute the arrest warrant for Wanie. Thomas could not use the arrest warrant as legal authority to enter Kiper's home based on the simple belief that Wanie might be there, because that belief was

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[1] In this case the sheriff had probable cause to belief Mr. Anderson was on the property, but the probable cause came from an illegal search.

never subjected to the neutral and
detached scrutiny of a judicial officer."

Steagald v. *United States* 451 .S. 204 (1981), Cited by *State* v. *Kiper*, 193 Wis. 2d 69.

"An arrest warrant indicates only that there is probable cause to believe the suspect committed a crime, it affords no basis to believe that the suspect is in a stranger's house. *Wallace* v. *King,* 626 F.2d 1157 (4th Cir., 1980).

Here, before they viewed Mr. Anderson on the video search, the police did not have probable cause to believe Mr. Anderson was at the property. The probable cause came from the unlawful search.

Without the video search, the sheriffs would never have known Mr. Anderson was at the house in question. The search was bad when it started and did not become lawful after the police noticed Mr. Anderson.

CONCLUSION

The underlying purpose of the Fourth Amendment is to protect against police having the unfettered discretion to choose which homes to search. *Brown* v. *Texas*, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. [**685] 2637 (1979).

In this case, based upon a false hunch of drug activity, the sheriffs continuously video recorded a house of their own choosing without any judicial oversight.

The police were not acting with lawful authority when they came to arrest Mr. Anderson based on the illegal search. The video surveillance should be suppressed, and the case should be dismissed.

Dated this 30th day of July, 2018:

Clayton C. Griessmeyer
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,082 words.

Dated this 30th day of July, 2018:

Clayton C. Griessmeyer
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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, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.
A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Verona, Wisconsin, this 30th day of July, 2018

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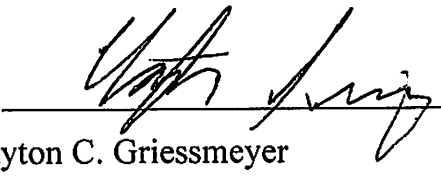
By: 

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