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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2018AP000718-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADAM BLAINE ANDERSON,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
ANDERSON'S MOTION AND POSTCONVICTION
MOTION, PIERCE COUNTY CIRCUIT COURT,
THE HONORABLE JOSEPH D. BOLES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUE

Did the circuit court properly deny Adam Anderson's motion to suppress video evidence where the video constituted ongoing surveillance of a yard in which Anderson was observed and subsequently arrested?

The circuit court answered "yes" in denying Mr. Anderson's motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

The State does not take a position on publication of this Court's decision and opinion.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its discretion to not present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. The State cites to relevant facts in the Argument section below.

ARGUMENT

ADAM ANDERSON DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY WHILE STANDING IN A YARD THAT WAS VISIBLE TO THE CAMERA.

Anderson argues that he was on the curtilage of the property, he has standing, and that officers should have obtained a warrant to place a camera and review video footage which ultimately led to his arrest. However, the circuit court properly denied Anderson's motion to suppress the video evidence. The arguments presented by Anderson are addressed below.

A. ANDERSON WAS NOT IN THE CURTILAGE WHEN HE WAS OBSERVED ON THE CAMERA.

Anderson alleges that he was on the curtilage of the property in question when he was observed on camera by law enforcement. However, Anderson was not in the curtilage.

The United States Supreme Court has cited the following four factors which are to be taken into

consideration when determining whether an area is considered curtilage:

proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139 (1987). This four-step analysis has been adopted by the Wisconsin Supreme Court. State v. Dumstrey, 2016 WI 3, ¶ 32, 366 Wis. 2d 64, 86, 873 N.W.2d 502, 512, cert. denied, 137 S. Ct. 43, 196 L. Ed. 2d 28 (2016). In Dumstrey, the Wisconsin Supreme Court noted that the four factors, “are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's ‘umbrella’ of Fourth Amendment protection.” Dumstrey, 366 Wis. 2d 64, ¶ 32; citing Dunn, 480 U.S. at 301, 107 S.Ct. 1134.

In the present case, the address of the residence W5309 County Road EE, Pierce County, Wisconsin. (R. 47:4.) Investigator Marty Shepler testified at the suppression motion hearing that the area in which Anderson was located had a fence on one side, as well as trees. (R. 47:6.) He further clarified this statement by testifying, “I believe one side of County Road D the fence is restrictive, but the rest is open, I believe.” (Id.) Investigator Shepler testified that County Road EE is an east-west road that runs north of the property, while County Road D is a north-south road that runs on the east side of the property. (R. 47:7.)

In response to Anderson's counsel's inquiry regarding whether a warrant authorized the placement of the camera to "look into the backyard of [the homeowner's] home," Investigator Shepler responded with characterizing the area as "open fields." (R. 47:14.) Anderson testified that the yard was fully fenced. (R. 47:18-19.) He also testified that it is "about six feet tall, it's see-through wire, not barbed wire." (R. 47:18.)¹

The testimony regarding the surroundings of the area Anderson was observed within distinguish the yard in this case from a fully fenced-in backyard that would make the yard itself unable to be viewed from beyond the fence. The address of the residence as well as Investigator Shepler's description of the other surrounding county roads show that the property is located at the corner of two county roads: County Road EE and County Road D. Per Anderson's own testimony, the fence was "see-through wire," thus making the yard viewable from beyond the fence, presumably from both county roads. Regardless of the amount of fencing, the area was visible from outside. Under the Dunn factors, the area is not curtilage.

B. ANDERSON DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY WHEN HE WAS STANDING IN THE YARD OF THE RESIDENCE AND OBSERVED ON CAMERA BY LAW ENFORCEMENT.

Anderson argues that law enforcement should have obtained a warrant to place the camera on the pole across the street from the yard. However, law enforcement did not need to obtain a warrant and Anderson did not have a reasonable expectation of privacy where he was standing. The State does not concede that law enforcement's actions in placing the camera constitute a search under the Fourth Amendment.

¹ The State concedes that Anderson's description of the fence is accurate.

Wisconsin courts apply a two question standard in determining whether an individual has a reasonable expectation of privacy: “(1) whether the person exhibits an actual, subjective expectation of privacy in the area; and (2) whether society is willing to recognize such an expectation as reasonable.” Dumstrey, 366 Wis. 2d 64, ¶ 47; citing Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); State v. Rewolinski, 159 Wis.2d 1, 13, 464 N.W.2d 401 (1990); State v. Eskridge, 2002 WI App 158, ¶ 11, 256 Wis.2d 314, 647 N.W.2d 434. In Rewolinski, the Wisconsin Supreme Court set forth six factors that are relevant in making this determination:

(1) whether the defendant had a property interest in the premises; (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Rewolinski, 159 Wis. 2d at 17-18.

First, Anderson did not have a property interest in the property, and he did not have control or the right to exclude others. (See R. 47:16-17.) He may have legitimately been on the property, but that does not grant him “complete dominion and control.”

Regarding whether Anderson took “precautions customarily taken by those seeking privacy,” the State would note that Anderson was outside. Anderson was observed “fixing a swimming pool that was in the yard.” (R. 47:4.) Investigator Shepler was able to observe Anderson in the yard through a surveillance device that allowed Investigator Shepler to monitor the outdoor areas. (R. 47:5.) In response to questions, Investigator Shepler testified that the type of camera used is something that can be purchased by essentially anyone. (R. 47:10, 13.)

These facts are also applicable to the factor regarding putting property to private use. By standing in a yard that can be observed by the public or from a device that can be purchased by the general public, Anderson was not putting the property to private use. He was not inside of the house or even the garage when he was first observed; he was standing in the yard.

The totality of the circumstances show that Anderson did not have a reasonable expectation of privacy. See Rewolinski, 159 Wis. 2d at 17. Law enforcement placed a camera that could be purchased by the public, on land that did not belong to Anderson, and they were able to observe an open, outdoor area of a property not belonging to Anderson. (R. 47:4-5, 10, 13.) Investigator Shepler was aware that he had a warrant, and because of this, other officers attempted to apprehend Anderson. (R. 47:4-5.) Anderson ultimately ran through an open soybean field in an attempt to elude officers. (R. 47:5.)

Anderson did not have a reasonable expectation of privacy. As the circuit court noted, the video observations were those that could be made by the public. The video did not peer into the home. The video showed the yard which is where Anderson was standing. As such, the circuit court properly denied his motion.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 18th day of September, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,390 words.

Dated this 18th day of September, 2018.

Signed:

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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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 18th day of September, 2018.

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CERTIFICATE OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expedition, on September 18, 2018.

I further certify that on September 18, 2018, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 18th day of September, 2018.

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