STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP1620-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. IONESCU,

Defendant-Appellant.

ON APPEAL FROM A JUDGEMENT OF CONVICTION, ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE LEE S. DREYFUS, JR., PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Other Authorities

ISSUE PRESENTED

Did the circuit court properly decline to suppress evidence that police found after obtaining consent to search a motorhome parked in the driveway of a residential property?

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying the well-established consent exception to the warrant requirement to the facts of this case.

INTRODUCTION

After hearing a noise in the wee hours of the morning, a man was surprised to find a burglar, Jeffrey Ionescu, in his garage. He chased Ionescu off and called the police. When the police arrived, Ionescu was nowhere to be seen, but he had left his footprints in the morning dew. With a scent-tracking canine, the police followed Ionescu's footprint trail to a motorhome parked in the driveaway of a permanent residence on Westward Drive. The police knocked on the door to the motorhome, but no one answered. They then went to the front door of the permanent home and knocked. Ionescu's mother answered and gave her permission to search her motorhome. Inside the police found Ionescu and stolen property.

Ionescu thinks this case is controlled by *Florida v. Jardines*, 569 U.S. 1 (2013). *Jardines* is a "dog sniff" case; there is a dog involved in this case, but that is where the similarities between this case and *Jardines* ends. Unlike this case, *Jardines* involved police entering the curtilage of a home, conducting a search without a warrant, and then later using that information to form probable cause for a warrant. *Id.* at 3–5. And unlike this case, *Jardines* is not a consent case.

Thus, the only issue here is whether the consent to search the motorhome was constitutionally valid. It was. There is no dispute that Ionescu's mother had authority to consent to the search of the motorhome and that her consent was voluntary. This Court should affirm.

SUPPLEMENTAL STATEMENT OF THE CASE

Officers Aaron Dreyer and James Ament responded to reports of a theft in progress at an address in New Berlin. (R. 1:3.) The dispatcher advised Dreyer that a white male carrying a flashlight had been inside of the garage at that address and had since fled on foot, heading toward Calhoun Road. (R. 1:3.)

When Officer Dreyer arrived, he spoke to the homeowner, who told Dreyer that he and his wife were asleep when they heard a noise coming from the garage. (R. 1:3.) The homeowner went to the garage and saw a white man in a white shirt, leaning into the front seat of his car that was parked in the garage. (R. 1:3.) He yelled at the man to get out of the garage, and the man ran. (R. 1:3.) He chased after the man for a while, but lost sight of him and returned home. (R. 1:3.) When he returned home, he looked inside his van that was parked in the driveway and noticed that a chrome watch worth around $1500 was missing. (R. 1:3.)

After the homeowner informed him of the direction that the intruder fled, Officer Ament noticed that there were footprints in the dew that had collected on the ground. (R. 1:4.) He and his tracking canine, Condor, began to follow the footprints. (R. 1:4.) Condor picked up the scent and tracked southeast across the front yard and then headed south along the roadway. (R. 1:4.) Ultimately, they followed the footprint and scent trail through multiple backyards and in between two residences. (R. 1:4.) The trail ended at a door to a motorhome parked in the driveway of an address on Westward Drive. (R. 1:4.)

Officer Ament advised Officer Johannik that the trail ended at the Westward Drive address. (R. 1:4.) Johannik ran the address and discovered that Ionescu, a known burglar, had previously resided there. (R. 1:4.) Johannik also learned that Ionescu was currently on supervision. (R. 1:4.)

After obtaining consent from Ionescu's mother, Officer Chilicki entered and searched the motor home. (R. 1:4.) He found Ionescu and the stolen watch. (R. 1:4.)

After the State charged Ionescu, he filed a motion to suppress evidence, alleging that the police did not have sufficient facts to support a warrantless entry onto his property, which led to the search of his home. (R. 10:3.)

The circuit court held a suppression hearing where Ionescu clarified his argument: "the part of the case that we're challenging is the scope of the case relating to the dog sniff of the property. The argument that I put forth in my motion was that the officers entering the property with the dog that was sniffing the supposed footprints that were seized in the search of the property and that was an illegal search." (R. 38:4.) Ionescu was not challenging anything that occurred after the officers entered the property, i.e., the search of the mobile home. (R. 38:4.) Rather, he alleged that an unlawful search began when Officer Ament and Condor, while following the footprint and scent trail, entered the backyard of the Westward Drive address. (R. 38:33.)

At the hearing, Officer Ament testified that when he and Condor neared Ionescu's address, the footprint and scent trail led them along the property line between two homes. (R. 38:11.) They were walking from the backyard toward the front. (R. 38:11.) As they walked along the property line, they came near a motorhome parked in the driveway. (R. 38:11–12.) The footprints and the scent trail led directly to the door of the motorhome, i.e., a mobile home that is drivable. (R. 38:11–12.)

Officer Ament did not see any lights on inside of the motorhome and there were no exterior lights. (R. 38:22.) An officer then went to the front door of the motorhome and knocked. (R. 38:13.) After receiving no answer, he walked across the driveway and went to the front door of the house. (R. 38:13.) He knocked on that door, and the homeowner, Ionescu's mother, answered. (R. 38:13.) She told the police that she owned the motorhome and that her son stayed there. (R. 38:15.) When asked, she agreed to let the police search the motorhome and personally unlocked it for them. (R. 38:15.)

The circuit court concluded that the search of the motorhome was a consent search. (R. 38:40–41.) The court also concluded Ionescu lacked standing to challenge the police entry into the curtilage. (R. 38:41–42.) It denied the motion.

STANDARD OF REVIEW

This Court applies a two-step standard of review when it reviews the denial of a motion to suppress evidence. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. First, it upholds the circuit court's findings of historical fact unless they are clearly erroneous. *Id.* Second, it independently reviews the application of the constitutional principles to those facts. *Id.*

ARGUMENT

The police entry into the curtilage of Ionescu's mother's home provides no basis for suppressing the evidence found during the consensual search of the motorhome.

Ionescu seeks to suppress the watch found within the motorhome parked in the driveaway of his mother's home on Westward Drive. (R. 10:3.) The search of the motorhome was a consent search—not a probable cause search. Thus, the only

question is whether the consent to search the motorhome was voluntary.[1] It was.

"The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). "Consent searches are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity.'" *Fernandez v. California*, 571 U.S. 292, 298 (2014) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231–32 (1973)).

It has been said that consent "is a 'waiver' of a person's rights under the Fourth and Fourteenth Amendments," but that is not wholly accurate. *Schneckloth*, 412 U.S. at 235. The term "waiver" implies a knowing and intelligent relinquishment of a right. *Id.* at 235–37. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Id.* at 237. "The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." *Id.* at 242. "The guarantees of the Fourth Amendment stand 'as a protection of quite different constitutional values—values reflecting the concern of our

---

[1] The State does not understand Ionescu to be alleging that the evidence of the footprint and scent trail should be suppressed. However, if he is arguing as much, that argument fails. *See, e.g.*, 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.6(b) at 872, 875 (5th ed. 2012) (If a suspect discards an incriminating object during flight, the object is abandoned and beyond the protections of the Fourth Amendment.).

society for the right of each individual to be let alone.'" *Id.* at 242 (citation omitted). Thus, consent to search does not have to be knowing and intelligent, rather, the constitutional mandate is that the consent was voluntarily given. *Id.* at 246–48.

To that end, "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228; *see also State v. Artic*, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430. "The determination of 'voluntariness' is . . . based upon an evaluation of 'the totality of all the surrounding circumstances.'" *Artic*, 327 Wis. 2d 392, ¶ 32 (quoting *Schneckloth*, 412 U.S. at 226).

Here, there is no dispute that Ionescu's mother could consent to the search of the motorhome. She identified herself as the owner of the motorhome and had a key to it. There is also no dispute that her consent was voluntary. Thus, this Court should affirm.

To the extent that Ionescu argues that the consent search was invalid because the police entered the curtilage of the permanent home at Westward Drive before obtaining consent to search the motorhome, his argument fails. As addressed below, Ionescu has no standing to challenge the entry into the curtilage of the permanent home. And even if he did, there is still no basis upon which to exclude the evidence found within the motorhome.

A. Ionescu has no standing to challenge the entry into the curtilage of the permanent home located on Westward Drive.

Ionescu lived in the motorhome, not in the permanent home. (Ionescu's Br. 11.) His standing argument is tied to his curtilage argument: he does not argue that the motorhome had curtilage and the police illegally entered, but rather that the motorhome *is* curtilage of the permanent home. (Ionescu's

Br. 14.) The State fails to see any reason why that would make a difference in a consent search case.[2] Nonetheless, if Ionescu wishes to frame his challenge that way, he lacks standing to raise it.

"To have a claim under the Fourth Amendment, the person challenging the reasonableness of a search or seizure must have standing." *State v. Fox*, 2008 WI App 136, ¶ 10, 314 Wis. 2d 84, 758 N.W.2d 790. "A person has standing under the Fourth Amendment when he or she 'has a legitimate expectation of privacy in the invaded place.'" *Id.* (quoting *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)). "A legitimate expectation of privacy is one which 'society is prepared to recognize as reasonable.'" *Id.* (quoting *Olson*, 495 U.S. at 95–96).

To establish standing to raise a Fourth Amendment claim, "[t]he defendant must show two things: (1) that he or she had an actual, subjective expectation of privacy in the area searched and item seized and (2) that society is willing to recognize the defendant's expectation of privacy as reasonable." *State v. Tentoni*, 2015 WI App 77, ¶ 7, 365 Wis. 2d 211, 871 N.W.2d 285.

The first prong of the test considers "whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized." *State v. Orta*, 2003 WI App 93, ¶ 11, 264 Wis. 2d 765, 663 N.W.2d 358. "[T]he law requires more than simple expectation of privacy . . . . such expectation be *exhibited* in some fashion." *Id.* ¶ 13.

A defendant must establish both prongs of the Fourth Amendment standing test by a preponderance of the evidence.

---

[2] That State does not address the curtilage factors because whether the motorhome was within the curtilage of the permanent home is not dispositive. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate courts should decide on the narrowest grounds).

State v. Knight, 232 Wis. 2d 305, 311, 606 N.W.2d 291 (Ct. App. 1999). A court need not consider the second prong if the defendant fails to satisfy the first one. *State v. Eskridge*, 2002 WI App 158, ¶ 15, 256 Wis. 2d 314, 647 N.W.2d 434.

By arguing that the motorhome is curtilage, Ionescu is attempting to claim an expectation of privacy in curtilage without having an expectation of privacy in the permanent home that the curtilage surrounds. That's not how the law works. Curtilage is not divorced from the home that it is associated with. Curtilage is the area which extends the intimate activity associated with the sanctity of the home and the privacies of life. *State v. Davis*, 2011 WI App 74, ¶ 9, 333 Wis. 2d 490, 798 N.W.2d 902. A person's expectation of privacy in his or her home extends to the curtilage of the home. *Id.*

Ionescu failed to establish that he exhibited a subjective expectation of privacy in the permanent home on Westward Drive. At the suppression hearing, Ionescu did not testify and he failed to offer any other form of evidence that he exhibited a subjective expectation of privacy in the home in which he did not reside. With no expectation of privacy in the permanent home, he had no expectation of privacy in its curtilage.

Ionescu appears to argue that since curtilage is a protected space, he had an expectation of privacy in the curtilage. (Ionescu's Br. 10–15.) Ionescu offers no support for that proposition, and ignores that the Fourth Amendment protects people, not places. *State v. McCray*, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). The primary objective of the Fourth Amendment is the protection of privacy, such that only those governmental intrusions that infringe upon a justifiable privacy interest will violate the Fourth Amendment. *State v. Bauer*, 127 Wis. 2d 401, 405–06, 379 N.W.2d 895 (Ct. App. 1985). "[T]he constitutionality or reasonableness of the government conduct does not come into

question unless and until it is established that [the defendant] had a legitimate expectation of privacy that was invaded by government conduct." *State v. Rewolinski*, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990). For Ionescu to simply claim that he was legitimately within the curtilage of the permanent home is insufficient to establish a privacy interest. *See Rakas v. Illinois*, 439 U.S. 128, 142–43 (1978) ("legitimately on the premises" is not the same as a "legitimate expectation of privacy").

Moreover, Ionescu could not legally live in the motorhome.[3] Even assuming for the sake of argument that he could, he had a diminished expectation of privacy in it.[4] Indeed, Ionescu claims no legitimate expectation of privacy in the curtilage. *See State v. Dumstrey*, 2016 WI 3, ¶ 47–50, 366 Wis. 2d 64, 873 N.W.2d 502 (historical notions of privacy are not consistent with a privacy interest in a shared space outside of the home). He cannot, because, at best, the curtilage is shared with the permanent home and more akin to a common area.

---

[3] Living in the motorhome would likely violate local ordinances and zoning regulations for single-family residential districts, setbacks, etc.

[4] There is no dispute that the motorhome was a vehicle and not attached to the driveway in any way, or "hooked-up" to utilities. Thus, being an automobile, Ionescu's expectation of privacy in the motorhome was diminished. *See California v. Carney*, 471 U.S. 386, 394 (1985) (refusing to distinguish between a sedan and a motorhome). This is likely why Ionescu wants this Court to decide that the motorhome, itself, was curtilage of the permanent home. He is attempting to subvert that there is a diminished expectation of privacy in a motorhome, and that automobile exception may apply here. *See Id.* at 392 ("When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception come into play.").

As the proponent of a motion to suppress evidence, Ionescu bore the burden of establishing that he had a legitimate expectation of privacy in the curtilage of a home in which he did not reside. He failed to do so and lacks standing to challenge the police entry into the curtilage of the permanent home.

B. Even if Ionescu had standing to challenge the entry into the curtilage, he cannot escape that his mother validly consented to the search of the motorhome.

If this Court concludes that Ionescu has standing to challenge the entry into the curtilage, Ionescu nonetheless ignores that his mother consented to the search of the motorhome. He simply asserts that the police needed a warrant to search the motorhome because it was within the curtilage of the permanent home. (Ionescu's Br. 16.) Not so. A principal tenet of Fourth Amendment law is that a search without a warrant is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). However, one well-established exception is a consent search. *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998).

The police searched the motorhome after obtaining his mother's consent; it was not the result of the police entry into the curtilage. A review of the principles of but-for causality and attenuation illustrate that there is no basis upon which to suppress the evidence found within the motorhome.

Before employing the exclusionary rule, the court must be satisfied that the "evidence sought to be suppressed was obtained 'by exploitation of [an] illegality'" and not "by means sufficiently distinguishable to be purged of the primary taint." *Artic*, 327 Wis. 2d 392, ¶ 64 (citing *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963)).

The first question is whether the police obtained evidence from an exploitation of an illegality. This requires a

link between police's conduct and the discovery of the challenged evidence. *Wong Sun*, 371 U.S. at 487–88. The second question is one of attenuation and is a distinct inquiry that is only performed after a finding that the evidence came to light at the exploitation of an illegality. *New York v. Harris*, 495 U.S. 14, 19 (1990). "The object of attenuation analysis is 'to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Artic*, 327 Wis. 2d 392, ¶ 65 (citation omitted).

1. The search of the motorhome did not result from the exploitation of the entry into the curtilage.

Wong Sun explains that there is no automatic rule requiring the exclusion of evidence even if an illegality immediately preceded the acquisition of evidence that put the defendant in the control of the police. In *Wong Sun*, the Court said that the exclusionary rule "has traditionally barred from trial" evidence "obtained either during or as a direct result" of an illegality. *Wong Sun*, 371 U.S. at 485. Neither is applicable here.

The police did not find the watch while they were walking through the curtilage. Instead they found it inside of the motorhome *after* they received consent to search it. Additionally, by walking to the front door of the permanent home, knocking on that door, and initiating a consensual encounter with the homeowner, the police ended any unlawful presence within the curtilage. That conduct, known as a knock and talk, is entirely permissible under the Fourth Amendment. *State v. Robinson*, 2010 WI 80, ¶ 32, 327 Wis. 2d 302, 786 N.W.2d 463.

If the court invokes the exclusionary rule in this case it would "put the police . . . not in the *same* position they would have occupied if no violation occurred, but in a worse one."

Murray v. United States, 487 U.S. 533, 541 (1988). If the illegality did not contribute to the position that the police where in to lawfully obtain the evidence, then the evidence was not a result of the exploitation of that illegality. But-for causality is a necessary condition for suppression, *Hudson v. Michigan*, 547 U.S. 586, 592 (2006), and it is not present in this case. Therefore, even if the police unlawfully entered the curtilage of the permanent home, there is no basis to suppress the evidence found after Ionescu's mother voluntarily consented to the search of the motorhome.

2. All of the attenuation factors favor the conclusion that the consent search was not tainted by police misconduct.

Even if this Court were to conclude that but-for causality is present, "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. "[B]ut-for cause, or 'causation in the logical sense alone,' can be too attenuated to justify exclusion." *Id*. (quoting *United States v. Ceccolini*, 435 U.S. 268, 274 (1978)). To determine whether causation is too attenuated to justify exclusion, this Court looks to three factors: (1) temporal proximity; (2) presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Artic*, 327 Wis. 2d 392, ¶ 66.

Phillips supports the conclusion that attenuation applies here. First, looking to the issue of temporal proximity, while there were only moments between the police entry into the curtilage and the consent search, that short time period is not dispositive. The "temporal proximity" factor includes "both the amount of time between the illegal entry and the consensual search and the conditions that existed during the time." *Phillips*, 218 Wis. 2d at 206 (citation omitted). Thus, a short time interval is not determinative, but merely one factor in the equation. *Id*. The court in *Phillips* also considered

whether the person giving consent was restrained, arrested or taken into custody; open and forthright, or annoyed and objecting; and assisting with the search. *Id.* at 206–07. The court also considered whether the conditions were overall nonthreatening and noncustodial. *Id*. at 207.

Here, the conditions that existed favor the State. The police initiated a consensual encounter with Ionescu's mother, she was not restrained, she never objected, and she assisted with the search by unlocking the door to the motorhome. And the overall conditions were nonthreatening and noncustodial.

Second, there was an intervening circumstance in this case—the knock and talk. The intervening circumstance "factor concerns whether the [person] acted 'of free will unaffected by the initial illegality.'" *Artic*, 327 Wis. 2d 392, ¶ 79 (citation omitted). Here, there is no evidence to suggest that Ionescu's mother even knew that the police entered her property from the backyard. They initiated a traditional consensual encounter at the front door of the home.

Third, in looking at the totality of the circumstances, the misconduct in this case was not purposeful or flagrant. "This factor is 'particularly' important because it is tied to the rationale of the exclusionary rule itself." *Phillips*, 218 Wis. 2d at 209. The police were in fresh pursuit of a burglar. They had no idea where the trail ended. They were not purposefully or flagrantly violating Ionescu's rights. Respectfully, the police appropriately recognized that once they found where the trail ended, they could not simply barge into the motorhome.

There is no evidence that the police obtained consent to search the motorhome through exploitation of the alleged unlawful entry into the curtilage. Because there was no exploitation, "[t]he consensual search . . . was therefore purged of any taint created by the [alleged] unlawful entry." *Phillips*, 218 Wis. 2d at 212.

C. Ionescu's arguments to the contrary are unpersuasive.

Ionescu largely ignores that the search at issue was a consent search and attempts to misdirect the analysis by asserting that exigent circumstance exceptions to the warrant requirement do not support the entry into the curtilage. (Ionescu's Br. 17–21.) Again, the only issue here is that this Court needs to reach is whether the consent to search the motorhome was constitutionally valid. As addressed above, it was. And this Court should limit its opinion to that issue. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate courts should decide on the narrowest grounds).

CONCLUSION

This Court should affirm Ionescu's judgment of conviction.

Dated this 29th day of March, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,116 words.

Dated this 29th day of March, 2019.

_____
TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 29th day of March, 2019.

_____
TIFFANY M. WINTER
Assistant Attorney General