STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2018AP1620-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. IONESCU,

Defendant-Appellant.

On Appeal from a Judgment of the Circuit Court for Waukesha County, the Honorable Lee S. Dreyfus, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Ionescu has standing to challenge police entry into the curtilage of the Ionescu home.

A. Police violated Mr. Ionescu's Fourth Amendment rights when they had a trained police dog sniff at the base of the motorhome's front door.

The unambiguous holding of *Florida v. Jardines* is that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 11–12, 133 S. Ct. 1409 (2013). In *Jardines*, police brought a K-9 to Jardines's home and allowed the K-9 to sniff the base of the front door, where the K-9 alerted to the odor of drugs. *Id*. at 4.

> After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

Florida v. Jardines, 569 U.S. at 4.

On the basis of what he had learned at the home, the police officer applied for and received a warrant to search the residence. *Id*. After the trial

court found the police action was unlawful, it excluded the evidence obtained by virtue of the dog sniff and found that the remaining evidence lacked probable cause to justify the warrant. *Id*. at 5. The trial court's decision was affirmed by the Supreme Court in *Jardines*.

This case is very similar to *Jardines*. In this case, Officer Ament followed his K-9 (Condor) through 10-12 backyards in the area surrounding Mr. Ionescu's home. (38:23). The two eventually made their way to the Ionescu property. When they arrived, Officer Ament had no reason to request consent to search the motorhome in the front yard because he had no reason to suspect it contained evidence. Officer Ament followed Condor through the Ionescu backyard, along "the property line roughly heading … from the back side to the front side," and to the front door of the motorhome parked in front of the house. (38:11). At that point, Officer Ament "observed Condor [who] sat and stared at the door which is an indicator that tells [Officer Ament] he's finished his track and he thinks that the person is in there." (*Id*. at 13).

Just as the K-9 in *Jardines* alerted at the front door of the Jardines home, Condor alerted at the front door of what is essentially Mr. Ionescu's bedroom. Unlike the search in *Jardines*—during which law enforcement never veered from the area of the home in which visitors have an implicit license to enter—the search in this case started in the Ionescu

backyard and ended with a trained police dog sniffing at Mr. Ionescu's front door.

B. Mr. Ionescu has standing to challenge the police entry onto the curtilage of the Ionescu home.

Unlike the 10-12 people whose yards were invaded by highly trained police dogs and their handlers, Mr. Ionescu has standing to challenge the unlawful search on his property. The state argues that Mr. Ionescu lacks standing to challenge a search of the *house's curtilage* because he lives in the *motorhome*, and that he cannot challenge a search of the *motorhome* because it is on the curtilage of a *house*. This is a confusing argument that leaves Mr. Ionescu without a home worthy of Fourth Amendment protections.

In support of its argument, the state claims that "the Fourth Amendment protects people, not places." (State's Br. at 8 (*citing State v. McCray*, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998))). This is true with regard to unwelcome visitors such as the defendant in *McCray*,[1] but it is not true of a person's own home. Although the protections of the Fourth Amendment have been extended to protect people outside their home, see *Katz v. United States*,

[1] The homeowner in McCray testified that "she had neither known about nor authorized McCray's presence in her basement" and her son testified "that he met McCray for the first time on the [prior] evening." McCray, 220 Wis. 2d at 708.

389 U.S. 347 (1967) and its progeny, the protections it provides at home remain in place:

> When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred. By reason of our decision in *Katz*, property rights are not the sole measure of Fourth Amendment violations—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections when the Government does engage in a physical intrusion of a constitutionally protected area.

Jardines, 569 U.S. at 5 (internal citations omitted).

When confronted by police, Mr. Ionescu's mother told them that she owned the home and that "her son stayed in the motorhome." (38:15). From this, we know that Mr. Ionescu's home is 17620 W. Westward Dr. and that he "stay[s] in the motorhome." (1:2; 38:15). This is no different than if his bedroom were in the detached pool house or garage of his parents' home, yet the state seeks to diminish his right to privacy in his own private space in order to justify the search.[2] The record includes enough evidence to argue that Mr. Ionescu's mother had shared authority to consent to a search of the motorhome, but contrary to the state's argument, it

[2] Mr. Ionescu is not arguing that his mother does not have shared authority over the motorhome, simply that he does have a right to privacy in the motorhome.

does not contain evidence to suggest that Mr. Ionescu did not have a right to be in the Ionescu home.

The state raises two other contentions without developing them. (State's Br. at 9, n. 3 & 4). The state claims that Mr. Ionescu "could not legally live in the motorhome" because of uncited "local ordinances and zoning regulations" that *likely* exist. (State's Br. 6, 9). This claim is entirely speculative. The state does not cite any ordinances or regulations or case law, nor does it develop the claim properly. Mr. Ionescu will deny the claim without further response.

The state also argues that the motorhome is subject to the automobile exception. (State's Br. at 9). The state cites a passage from *California v. Carney*, 471 U.S. 386 (1985) for support: 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. (*Id.* (*citing Carney*, 471 U.S. at 392)). However, the state does not allege that the motorhome was "being used on the highways" or that it was found stationary "in a place not regularly used for residential purposes." Regardless, the Fourth Amendment prevents an officer from "enter[ing] a home or its curtilage to access a vehicle without a warrant," so even if the automobile exception applies, an officer cannot search it without a warrant. *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018); (*see also* Appellant's Br. at 12-17).

II. Mr. Ionescu's mother's consent to search was not so attenuated as to dissipate the taint of the police's illegal search.

Mr. Ionescu does not challenge his mother's shared authority over the motorhome. (State's Br. at 5 (*citing Georgia v. Randolph*, 547 U.S. 103 (2006))). Neither does he challenge the consent as not knowing or intelligent or voluntary. (State's Br. at 5-6 (*citing Schneckloth v. Bustamonte*, 412 U.S. 218 (1973))). Instead, Mr. Ionescu argues that the constitutional violation was not justified by any exception to the warrant requirement, it led directly to the discovery of a key piece of evidence against Mr. Ionescu (his identity and whereabouts), and his mother's consent was tainted because it came about by exploitation of that illegality.[3]

A. Police would not have asked for consent to search the motorhome if not for their constitutional violation.

The state argues that Mr. Ionescu's mother's consent to search the motorhome "did not result from the exploitation of the entry into the curtilage." (State's Br. at 11-12). That is incorrect. Police obtained a key piece of evidence by engaging in a constitutional violation: the location and identity of the alleged perpetrator. After sniffing at the front

[3] Mr. Ionescu's initial brief addressed the exceptions to the warrant requirement, and because the state did not respond to those claims, they will not be addressed here. (Appellant's Br. at 17-21).

door of the motorhome, Condor "sat and stared at the door which is an indicator that tells [Officer Ament] he's finished his track and he thinks that the person is in there." (38:13). But for this unlawfully obtained insight, the police would not have requested consent to search the motorhome and would not have subsequently found the wristwatch. Therefore, Mr. Ionescu's mother's consent came about directly as a result of the police exploitation of the illegality.

B. Mr. Ionescu's mother's consent was not sufficiently attenuated from the police illegality to be purged of the primary taint.

If consent to search is obtained by the exploitation of prior illegal police activity, then any evidence seized during the subsequent search must be excluded *even if the consent was voluntary*. *State v. Bermudez*, 221 Wis. 2d 338, 352, 585 N.W.2d 628 (Ct. App. 1998) (emphasis added). In analyzing whether the disputed evidence was acquired by means sufficiently distinguishable from the police illegality to be purged of the primary taint, Wisconsin courts have applied the attenuation test originally put forth in *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975). *See State v. Artic*, 2010 WI 83, ¶¶ 65-67, 327 Wis. 2d 392, 786 N.W.2d 430. The following must be considered to determine whether consent to search is sufficiently attenuated from the taint of a Fourth Amendment violation: (1) the temporal proximity of the misconduct and the subsequent consent to search, (2) the presence of intervening circumstances, and (3)

the purpose and flagrancy of the official misconduct. *Bermudez*, 221 Wis. 2d at 353.

In applying the first *Brown* factor, temporal proximity, courts are to "consider the amount of time between the police misconduct … and the grant of consent, as well as any conditions which existed during that time." *Bermudez*, 221 Wis. 2d at 353. Case law since *Brown* has added a second component to the temporal proximity factor. In *Brown*, the defendant was illegally detained in custody for two hours before giving a statement. *Brown*, 422 U.S. at 604. His statement was deemed to be not sufficiently attenuated, despite the fact that the defendant was read the Miranda warnings in the intervening time. *Id*. at 604-05. In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the defendant was illegally detained (out of custody) for 45 minutes before giving a statement. *Rawlings*, 448 U.S. at 107. The Court held that *Rawlings* was distinguishable from *Brown* because, even though less time lapsed, the defendant in *Brown* was in custody, and the "congenial atmosphere" of *Rawlings* "outweigh[s] the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions." *Rawlings*, 448 U.S. at 108. The court seems to call for a balancing of the temporal proximity and the intervening conditions.

This case is most similar to *Bermudez*, which also involves third-party consent, i.e., the constitutional violation was perpetrated against the defendant but the consent to search was obtained

from a third party. As in this case, the third-party in *Bermudez* was out of custody at the time she gave consent. *Bermudez*, 221 Wis. 2d at 353. In *Bermudez*, only a few minutes elapsed between the unlawful entry and the search, and after cataloging a number of federal cases with a similar time frame, the court concluded that "the passage of a few minutes is [not] enough to support the application of the attenuation doctrine to these facts." *Id.* at 354.

In this case, there was very little time between the constitutional violation and the request for consent to enter the motorhome. The court did not make a finding as to how much time passed, but the two events seem to have occurred without interruption. Officer Ament testified that once Condor alerted, he "knock[ed] on the motorhome door and nobody answered," and then the officers "backed up and explained to dispatch what residence we were at and *immediately* made contact with the homeowner of that residence at the front door." (38:13) (emphasis added). As in *Bermudez*, the third party in this case—Mr. Ionescu's mother—was not in custody when she gave consent to search. Thus, the nature of the circumstances does not outweigh the immediacy between the constitutional violation and request for consent. This factor weighs against attenuation.

The second *Brown* factor instructs courts to look at whether there are any meaningful intervening circumstances between the police illegality and the consent to search that demonstrate

that a person was acting "of free will unaffected by the initial illegality" when they gave consent. *Artic*, 327 Wis. 2d 392, ¶79. In *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991), the Court concluded that the reading of Miranda warnings and the signing of a waiver of constitutional rights constituted intervening circumstances. *Anderson*, 165 Wis. 2d at 450-51. In addition, Anderson's wife had fully informed him of the searches that had taken place the prior day. *Id.* In *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), the intervening circumstance was a conversation between law enforcement and the defendant after which the defendant himself consented to the search. *Phillips*, 218 Wis. 2d at 208. The same is true in *Artic*, where the defendant himself consented to police entry in his house, and the conversation between the police and the defendant was found to be an intervening circumstance. *Artic*, 327 Wis. 2d 392, ¶ 83.

In this case, after Condor alerted on Mr. Ionescu's door, the officers notified dispatch of their location and they immediately made contact with Mr. Ionescu's mother. (38:13). If notifying dispatch of their location is to be considered an "intervening circumstance," it should not be considered a meaningful one. This factor weighs against attenuation.

The third factor which must be considered is the flagrancy of the police misconduct. *Bermudez*, 221 Wis. 2d at 355. When evaluating this factor, the court must "consider all of the circumstances leading up to

the illegal entry." *Id*. The circumstances leading up to the illegal entry occurred when the police responded to the 911 call. Officers followed a series of footprints and scents through 10-12 backyards before arriving at the Ionescu residence. Once there, they crossed the Ionescu backyard and allowed Condor to lead them through the front yard of the home and straight to the front door of the motorhome. (38:13). The only reason Condor entered the curtilage of the Ionescu home and sniffed at the front door of the motorhome was to search the motorhome for the presence of the suspect. Thus, the police involved in this case intentionally searched the curtilage of the home and found that their suspect was inside the motorhome.

This is flagrant police conduct that stands in stark contrast to other cases in which courts have found the police conduct to be not flagrant. In *Anderson*, the Court held that "the detectives' reliance upon a 15-year-old daughter's permission to search was [not] so improper as to be labeled conscious or flagrant misconduct." *Anderson*, 165 Wis. 2d at 452. The Court also held that the subsequent search, which relied on an unsigned search warrant that the police mistakenly believed to be signed, was neither "purposeful nor flagrant misconduct by the police detective." *Id*. Requesting consent from a minor might be intentional but it's not flagrant. Mistakenly relying on the warrant, in this case, was not intentional, let alone flagrant.

In *Phillips*, the Court concluded that police did not act in bad faith and that they did not enter the

basement in order to "bolster the pressures for the defendant to give consent or to vitiate any incentive on his part to avoid self-incrimination." *Phillips*, 218 Wis. 2d at 210-11 (internal quotations omitted). Unlike the present case, *Phillips* did not involve third-party consent. Moreover, in *Phillips*, the police "found no evidence as a result of the illegal entry," whereas in this case, the constitutional violation led directly to the location of the suspect. *Id.* at 211. Finally, *Phillips* did not come about "as part of a systematic and continuing series of Fourth Amendment violations." *Id.* The present case involves police tracking through a dozen properties in the area. Though these violations are not against Mr. Ionescu, they are significant when examining the police conduct.

Finally, in *Artic*, police entered the curtilage of the defendant's home "to further a legitimate law enforcement objective," which is allowable if "[t]he officer's reason for entering the curtilage [is] unconnected with a search of the premises directed against the accused." *Artic*, 327 Wis. 2d 392, ¶ 95. The officer in that case entered the curtilage "not to search the area or investigate the back of the house but to prevent any person in the house from trying to escape." *Id.*, ¶ 96. In the present case, the officers entered the area specifically to search the curtilage with their trained police dog.

CONCLUSION

For the reasons stated, Mr. Ionescu respectfully requests that this court vacate the judgment of conviction and remand this case to the circuit court with instructions to grant the defendant's motion to suppress all evidence that derived from the constitutional violation and to dismiss the case for lack of evidence.

Dated this 15th day of April, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,949 words.

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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 15th day of April, 2019.

Signed:

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