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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2018AP002299 - CR

v.

BRETT C. BASLER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED AUGUST 27, 2018,
DENYING THE DEFENDANT'S MOTION TO SUPPRESS,
THE CIRCUIT COURT FOR WINNEBAGO COUNTY, BRANCH 4,
THE HONORABLE KAREN L. SEIFERT, PRESIDING

Lauren Stuckert
State Bar Number: 1074005

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STATEMENT OF THE ISSUE PRESENTED

Is an enclosed porch/entryway room with two locking exterior entrance doors curtilage to a residence, and thus, an area protected by the Fourth Amendment of the United States Constitution?

Circuit Court's Answer: Although the Circuit Court did not explicitly so state, the language in its rulings implied the area was not curtilage.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant takes no position on oral argument or publication.

STATEMENT OF FACTS

According to his testimony at the May 4, 2018 evidentiary motion hearing, City of Oshkosh Police Officer Grant Wilson (Wilson) overheard on his radio that a red pickup truck had struck the Hardee's building or part of the building on the corner of Jackson and Algoma. (R:35, p. 4, 13-25). Wilson was not privy to the initial caller's message, nor does he recall exactly where he was when the report came in on the radio. (R:35, p. 4, 22). He recalls hearing the vehicle was last seen headed southbound on Oregon Street and that somebody was following it. (R:35, p. 4, 23-25). Wilson testified that he believed whoever called was following the vehicle and had last seen it make a left turn or head eastbound on South Park Avenue before losing sight of it. (R:35, p. 5, 1-4). Wilson further testified that Officer Kopczyk (Kopczyk) had been traveling northbound on Oregon Street and that

Wilson believed Kopcyzk had called out and said that he had seen the pickup truck pull into a driveway on the north side of South Park Avenue. (R:35, p. 5, 10-13). Kopcyzk did not testify at the evidentiary hearing.

Wilson stated that he saw a vehicle matching the description in the driveway at 28 West South Park Avenue. (R:35, p. 5, 13-15). Wilson could see the truck's rear cab light or box light was on and it looked like a door was open. (R:35, p. 5, 17-19). Wilson turned around to park his squad car and saw a male exit the vehicle and walk into the house. (R:35, p. 5, 19-22). Wilson testified that he saw the driver of the vehicle walk up the steps on the east side of the residence and enter it. (R:35, p. 10, 19-20). He further testified that he didn't follow the driver of the vehicle into the home, and that the driver was already inside the residence when Wilson parked. (R:35, p. 10, 23-24).

Wilson met Kopczyk outside the residence, and the two of them walked up to the east side of the house. (R:35, p. 5, 24-25). They walked up the stairs to a storm door and another exterior door, saw an enclosed porch/entryway, walked through the doors, entered the enclosed area, and knocked on an interior French-style patio door. (R:35, p. 7). Again, Wilson and Kopczyk walked through two separate doors into the enclosed porch/entryway, a storm door and a stronger exterior door. There was a visible lock on the exterior door of the enclosed porch/entryway, a doorbell to the left of the doors, and a mailbox to the left of the staircase (R:35, pp.11-13). The porch/entryway contained the following items:

furniture, sofa chairs, a patio table, a TV stand and television, a fan, lights, coats, shoes and various other things that belonged to the residents. The door that Wilson knocked on was a glass double patio door that entered into the living room. Wilson did not recall there being a lock on those doors. (R:35, p. 15, 8-20). Photos of the relevant portions of the residence's exterior, the enclosed porch/entryway, and the glass doors leading to the living room were entered into evidence.

Basler responded to the knocking on the secondary patio doors, opened the doors, and made contact with the police in the enclosed area. (R:35, p. 7-8). An investigation and arrest for Operating while Intoxicated ensued. Wilson testified that although he was wearing a body camera at the time of the entrance, his camera did not capture any footage of the officers' entrance into the enclosed porch/entryway. (R:35, p. 12, 19-25). Wilson testified he did not know at what point his body camera was activated. (R:35, p. 12, 24).

PROCEDURAL HISTORY

On January 23, 2018, a criminal compliant charging the Defendant with Operating While Intoxicated, Third Offense, contrary to Wis. Stat. §346.63(1)(a), was filed in Winnebago County Case Number 2018CT000052. (R:4). An amended criminal complaint adding the charge of Operating with a Prohibited Alcohol Concentration, Third Offense, contrary to Wis. Stat. §346.63(1)(b) was filed on February 22, 2018 (R:12). Defendant, by counsel, filed a Motion to Suppress Evidence Derived from Unlawful Entry on March 29, 2018. (R:13). On May 4,

2018, the Circuit Court held an evidentiary hearing on the defendant's motion to suppress, where the above-described testimony was given. The Honorable Karen L. Seifert presided over the motion and issued an Oral Decision from the bench on May 31, 2018, denying the defendant's Motion to Suppress. (R: 20; R: 36).

On July 16, 2018, defendant, by counsel, filed a Motion to Reconsider that decision, first arguing that the Circuit Court failed to consider the applicable case law for a curtilage determination in this case. On August 15, 2018, the Circuit Court issued another oral decision from the bench denying the defendant's Motion to Reconsider. (R:20; R:39).

The defendant entered a guilty plea on October 29, 2018 and was sentenced on that same date (See Judgment of Conviction, R: 27). The Circuit Court entered an Order staying the sentence (R:26), and the Defendant filed Notice of Intent to Pursue Post-Conviction Relief (R:25).

STANDARD OF REVIEW

When reviewing a circuit court's denial of a motion to suppress evidence, the Court of Appeals will uphold a circuit court's findings of facts unless they are clearly erroneous. *State. v. Grady,* 2009 WI 47, ¶13, 317 Wis. 2d 344, 352, 766 N.W. 2d 729, 733. However, questions of law are subject to independent, *de novo* review. *State v. Phillips*, 2009 WI App 179, ¶6, 322 Wis. 2d 576, 585, 778 N.W.2d 157, 161-62. The constitutional reasonableness of a search and seizure is a question of law that is subject to independent, *de novo* review. *Id.* citing *State v. Nicholson,*

174 Wis. 2d 542, 545, 497 N.W.2d 791 (Ct. App. 1993). Further, whether the facts satisfy constitutional principles is also a question for this court to decide. *Id.* citing *State v. Kyles*, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT AN ENCLOSED PORCH/ENTRYWAY WITH TWO EXTERIOR MAIN DOORS WAS NOT CURTILAGE TO THE RESIDENCE AND THAT LAW ENFORCEMENT'S ENTRY WAS NOT AN UNLAWFUL TRESPASS TO THE CURTILAGE OF THE DEFENDANT'S HOME.

A. Curtilage to Residence is Protected by the Fourth Amendment.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> U.S. Const. amend. IV

Article 1, Section 11 of the Wisconsin Constitution contains a substantively identical provision that the Wisconsin Supreme Court has historically interpreted in accord with the Supreme Court's interpretation of the Fourth Amendment. *State v. Dumstrey,* 2016 WI 3, ¶14, 366 Wis. 2d 64, 77. "The protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence." *State v. Martwick,* 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552. "The curtilage is the area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life and therefore has been considered part of

[the] home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). The Fourth Amendment's protection against warrantless entry for arrest also has been reasoned to extend to places where the person "has a legitimate expectation of privacy in the invaded place." *Minnesota v. Olson,* 495 U.S. 91, 95, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).

The United States Supreme Court has held that a search may be unconstitutional in an area where a person holds a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 352-53, 360-61, 88 S. Ct. 507 (1967).

In *Conrad v. State,* 63 Wis. 2d 616, 630, 218 N.W.2d 252 (1974), the Wisconsin Supreme Court held that "under the strict curtilage test...there was, in effect, a legal presumption that all within the curtilage was protected." In *Florida v. Jardines,* 569 U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the United States Supreme Court confirmed that the curtilage of a person's home remains a constitutionally protected area without consideration of whether a reasonable expectation of privacy exists. The Court in that case held that the front porch of a home constitutes curtilage and that officers executed an unconstitutional search when they conducted a trespassory dog sniff on that constitutionally protected area. *Id.* at 1415-17.

B. The Circuit Court Failed to Conduct a Proper Legal Analysis of the Area Alleged to be Curtilage.

In determining whether an area constitutes curtilage of a home, the Wisconsin Supreme Court previously adopted the four factors set forth by the Supreme Court in *United States v. Dunn,* 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). *State v. Martwick,* 231 Wis. 2d 801, 2000 WI 5, ¶ 30 (quoting *Dunn,* 480 U.S. at 301). The four factors to be considered are as follows: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Id.*

At the May 4, 2018 motion hearing, the defense cited this four-prong *Dunn* analysis. The Court made no attempt to apply the factors to the area in question. The Defendant's Motion to Reconsider again raised the *Dunn* factors, laid out explanation in writing and asked the Court to engage in the appropriate legal analysis required for a proper curtilage determination. Again, the court failed to apply the factors.

The following images were provided to the Court, in black-and-white prints as exhibits at the evidentiary motion hearing, and in color prints in the Defendant's Motion to Reconsider.

Image 1 on the following page is a photo of the entryway room, the area the defense alleges is curtilage.

Image 1

The following two photos (Images 2 & 3) are of the exterior doors to the entryway room. In Image 2 both of the exterior doors are closed.

Image 2

In Image 3, the first exterior storm door is being held open, while the second exterior door remains closed.

Image 3

Image 4 is a photo of the two French patio doors connecting the porch/entryway room to the rest of the home. These doors open into the living room area of the home.

Image 4

Finally, Image 5 is a photo of the exterior view of the enclosed porch/entryway room taken from South Park Avenue.

Image 5

1. The Entryway Room was Attached to the Home.

The first *Dunn* factor that the Court failed to consider was the proximity of the entryway room to the defendant's home. *Id.* The only thing separating this area from the rest of Basler's home are two French patio doors, *see* Image 4, *supra*. These are clearly interior doors, less strong than the exterior front doors to the home, shown in Images 2 & 3. There is no doorbell adjacent to these doors, as the doorbell

is in the normal place a doorbell would appear: outside the front doors of the home, along with the mailbox. In examining this first factor, it is clear that this entryway room is not only in close proximity to the home, but entirely attached to it.

2. The Entryway Room was Included Within an Enclosure Surrounding the Home.

The second *Dunn* factor the Circuit Court failed to consider was whether the enclosed porch/entryway room was included within an enclosure that also surrounded the home. *Id.* This room was located within the same overall structure as the defendant's home. This favors a determination that the area was a part of the home's curtilage.

3. The Entryway Room was Used for an Array of Personal Activities.

The third *Dunn* factor the Court failed to consider was the nature of the use of the entryway room. *Id.* "The overall curtilage inquiry is directed at protecting the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life." *Dumstrey,* 366 Wis. 2d at 89. The photo of the entryway room, Image 1, *supra*, shows many personal belongings kept in the room. The residents had exclusive control over the area where it appeared many personal activities took place. The room contained the following items: a large sofa-style single person chair; a second single chair with a soft-covered cushion over it; three additional wooden chairs, a round wooden table with a vase, a glass of what appears to be filled with water, a candle, and another unidentifiable object on top of it; a

wooden coffee table; a fan; a large cooler; a television set on a stand; a DVD player; various papers; several coats; at least one pair of boots, at least two pairs of shoes; a "Cards against Humanity" game box, string lights, and some other miscellaneous personal belongings. The presence of these items unquestionably favors a curtilage designation. It is obvious that the entryway room was used for everyday living.

4. The Entryway Room was Protected from Those who Pass by the Residence.

The fourth and final factor the Circuit Court failed to consider in the *Dunn* analysis was whether steps had been taken to protect the entryway room from observation by those who pass by the area. *State v. Martwick,* 231 Wis. 2d 801, 2000 WI 5, ¶ 30. Image 5 shows that the entryway room was shielded from the public. Two wooden and glass locking exterior doors closed off the area from the public. The exterior-type windows were elevated, so that a person walking by would not be able to easily observe the interior. Adjacent to the two wooden and glass exterior doors were a doorbell and a mailbox, signaling the entry to the curtilage. These doors had locks and served as the main entrance to the home. Thus, significant steps had been taken to protect this area from observation by people who may pass by the home.

After applying the *Dunn* four-factor test, the appropriate conclusion is that the entryway room warrants Fourth Amendment protection as curtilage to the home. The Circuit Court erroneously made no attempt to consider any of these factors.

C. Defendant had a Reasonable Expectation of Privacy in the Area Entered by Law Enforcement.

Even if this Court finds that the entryway room was not curtilage, the inquiry does not end. If the Court finds that the area was not curtilage it must, nevertheless, determine whether the defendant had a reasonable expectation of privacy in the entryway room for some other reason.

The Court must consider two questions in making this determination: (1) whether the person exhibited an actual, subjective expectation of privacy in the area; and (2) whether society is willing to recognize such an expectation as reasonable. *Smith v. Maryland,* 442 U.S. 735, 740, 99 S. Ct. 2577, 61, L. Ed. 220 (1979). This inquiry involves a totality of the circumstances analysis, pointing to six relevant factors: "(1) whether the defendant had a property interest in the premises; (2) whether he [or she] was legitimately (lawfully) on the premises; (3) whether he [or she] had complete dominion and control and the right to exclude others; (4) whether he [or she] took precautions customarily taken by those seeking privacy; (5) whether he [or she] put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy." *State v. Rewolinski,* 159 Wis. 2d 1, 17-18, 464 N.W.2d 401 (1990).

All six factors favor a finding that Basler had a reasonable expectation of privacy in the entryway room. First, Basler had many significant personal items in the room. Second, since he lived there, he was lawfully on the premises. Third, he

had dominion and control over the area. Fourth, the area was shielded from the public at large. Fifth, the area was put to private use, as evidenced by the items kept in the room. Lastly, the claim of privacy is consistent with historical notions of privacy. No reasonable person would expect that a room with such personal items, and with two wood and glass exterior front doors adjacent to a doorbell and mailbox, would be open to the public. Under the totality of the circumstances, Basler had a reasonable expectation of privacy in the enclosed porch/entryway room. The Circuit Court did not attempt this type of analysis which would have been required had it found the room was not curtilage under the four factor *Dunn* test.

II. THE WARRANTLESS TRESSPASS COMMITTED BY LAW ENFORCEMENT IN THIS CASE WAS COMMITTED WITHOUT PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES.

The state did not argue, nor did the court find that there was either probable cause for the police to enter Basler's home or exigent circumstances to justify the entry. We will, nevertheless, address the issues.

A warrantless entry by law enforcement into a private residence is presumptively prohibited by the Fourth Amendment to the United States Constitution, and Article I, Section 11, of the Wisconsin Constitution. *State v. Hughes*, 2000 WI 24, ¶ 17, 233 Wis. 2d 280, 289, 607 N.W.2d 621, 626. An exception to this rule exists where the State can "show both probable cause and exigent circumstances that overcome the individual's right to be free from

government interference." *Id.* at ¶ 17, 233 Wis. 2d at 290, 607 N.W.2d at 626. In the present case, neither probable cause nor exigent circumstances existed.

A. Probable Cause.

Law enforcement in this case lacked the requisite level of probable cause to arrest the Defendant for committing a crime at any time prior to his entry into the home. "Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Paszek*, 50 Wis. 2d 619, 624-25, 184 N.W.2d 278 (1978).

The only information Officer Wilson had at the time of the entry was that a Hardee's building or part of the building had been struck by a vehicle and that an unknown person had supposedly been following the vehicle at some point after the alleged collision took place. Even if Wilson had more details about the alleged collision, leaving the scene of an accident of this nature is not a crime in Wisconsin. Wilson lacked the level of probable cause necessary to arrest the defendant when he entered the curtilage.

B. Exigent Circumstances.

"The Police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 446 U.S. 740, 749-50 (1984). "There are four recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of

a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee." *State v. Ferguson*, 2009 WI 50, ¶19, 317 Wis.2d 586, 767 N.W.2d 187 (quoting *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 540-41, 612 N.W.2d 29, 37). None of these exigent circumstances were present in this case.

1. There Was No Hot Pursuit.

Hot pursuit is established "where there is an immediate or continuous pursuit of a suspect from the scene of a crime." *State v. Richter,* 2--- WI 58 ¶32, 235 Wis. 2d 524, 612 N.W.2d 29. Both the Wisconsin Supreme Court and the Supreme Court of the United States have recognized that "law enforcement officers may make a warrantless entry onto private property…to engage in hot pursuit of a fleeing suspect." *United States v. Santana,* 427 U.S. 38, 42-43 (1976). "Hot pursuit means some sort of chase…." *Id.*

In the present case, there was no chase. An unidentified individual was at best, following the defendant and alerting law enforcement to its whereabouts. The record lacks any evidence that Basler was attempting to flee the scene of any accident. Nobody made any attempt to stop Basler's vehicle while it was in motion. Wilson testified that while he was driving by the residence, he observed an individual get out of the truck he believed was the vehicle in question, then observed that person walk into a house. (R:35, p. 5). The individual did not run, nor engage in any type of behavior that would indicate he was being chased. Further, there was no testimony that Officer Wilson was involved in any type of chase as it related to

the defendant. He testified that he turned his vehicle around, parked his car, made contact with Officer Kopczyk, and the two proceeded to walk up to the house together, up the stairs and through the two exterior front doors. (R:35, pp.6-7, 11-13). Wilson further made a point to clarify that he didn't "follow" the defendant; that the defendant was already inside when he parked his squad. There was no hot pursuit in this case.

2. There was no Threat to the Safety of the Suspect or Anyone Else.

Nothing in the record indicates that the safety of any individual was threatened at any point during the events leading up to law enforcement's entry into the home of the defendant. This exigent circumstance is inapplicable to the present case.

3. There was no Risk that Evidence Would be Destroyed.

The only information Officer Wilson received was that the Hardee's building or part of the Hardee's building had allegedly been struck by the red vehicle. The defendant made no attempt to hide his vehicle after parking it. There are no facts that would lead any reasonable officer to conclude that any evidence was at risk for destruction prior to entering the home.

4. There was Nothing to Indicate that Basler would Flee.

Basler drove to his home, parked his vehicle, exited the vehicle, and walked into his house. There is no evidence that would lead a reasonable officer to conclude

that Basler's next move would be to flee his home or attempt to evade contact with law enforcement.

CONCLUSION

The Circuit Court failed to conduct a proper legal analysis to determine whether the entryway entered by law enforcement was part of the curtilage of the defendant's home, and thus, subject to Fourth Amendment protections. A proper application of the *Dunn* factors leads to the conclusion that this enclosed porch/entryway room was indeed curtilage and that Officer Wilson's entry into it was unlawful. Further, at the time of this unlawful entry, Officer Wilson did not have probable cause to arrest the defendant for a criminal offense, nor were any of the recognized exigent circumstances present to validate the entry. Law enforcement's failure to ring the doorbell/and or knock on the front exterior doors of the home violated the Defendant's rights under the Fourth Amendment. As such, the Defendant respectfully requests that this Court reverse the Circuit Court's Denial of his Motion to Suppress Evidence Derived from an Unlawful Entry.

Signed and dated this 25th day of February, 2019.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*s/Lauren Stuckert*_____
BY: Lauren Stuckert
Attorney for the Defendant
State Bar No.: 1074005

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 3,965 words.

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 Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 reproduced to preserve confidentiality and with appropriate references to the record.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this 25th day of February, 2019.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*s/Lauren Stuckert*_____
BY: Lauren Stuckert
Attorney for the Defendant
State Bar No.: 1074005

APPENDIX 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 Wis. Stat. §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.

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Respectfully submitted,
MISHLOVE & STUCKERT, LLC

____*s/Lauren Stuckert*_____
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