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.

REPLY BRIEF 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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ARGUMENT

Whether a knock on the door is a search is not an issue in this case.

The State attempts to reframe the issue in this case to be whether a knock on the door is a search. The defense has never argued that a knock on the door is a search, and therefore asserts this argument is misplaced, but will nevertheless respond. The defense has consistently argued that law enforcement unlawfully entered Brett Basler's (hereinafter "Basler") home without his consent when they walked through the two front exterior doors that led into the enclosed entryway porch area of his home. That entry and breach into Basler's home is the conduct in question. The officers did not knock on those exterior doors. They knocked on the interior doors. Had the evidence shown that the officers knocked on the outside exterior doors of Basler's home prior to entering the premises, there would be no case before this Court today.

The plaintiff refers to the following statement made by the circuit court: "[t]there is no evidence to suggest that had the officer knocked on the other door of the porch that the circumstances would have been any different." (R: 36, p. 3). First, in its initial brief, Basler addressed the differences between the exterior doors that the officers walked through

without consent, and the interior doors that the officers knocked on. The defense entirely disputes the circuit court's characterization of these doors and the area in question. The photos entered into evidence and included in the appellant's initial brief speak for themselves.

Furthermore, there is nothing in the evidentiary record that shows that the defendant allowed the officers to enter his home. The testimony at the motion hearing concerned what had occurred prior to any contact between Basler and the officers. Specifically, whether the officers unlawfully entered Basler's home when they walked through the two front doors. Basler's response to the officers unlawfully entering his home was not a part of the record; nor were any communications between him and law enforcement. It may have been casually mentioned that Basler was ultimately arrested for operating while intoxicated, but there was no testimony in the record that Basler allowed officers to enter his home or that he consented to any entry. That is an inappropriate assumption made by the State and also by the circuit court. This new argument by the State is especially troubling to the defense since the State is in fact aware (or should be aware given the discovery it provided to defense counsel) that the defendant did not consent to the officers being in his home, and in fact questioned why they broke into his home when

he came to the interior porch doors. However, these interactions are not a part of the evidentiary record for this court to consider in the first place, nor are they at all relevant since the appellate issue at question is the act of the officers' initial entry through the two exterior front doors into Basler's home. The defense reiterates this entire segment of the State's argument is irrelevant for purposes of this case. However, if this Court believes the aftermath of what occurred between Basler and the officers is somehow relevant to any ultimate determination, the proper remedy would be remand for a hearing to determine what occurred after the knock on the interior doors, as it should not be assumed to the favor of the State that Basler consented to the officers' entry.

The enclosed entryway porch at 38 W. South Park Avenue is curtilage, and part of the home for Fourth Amendment purposes.

In the second portion of its argument, the State cites the four-part test in *Dumstrey* that the defendant also cited in its initial brief. To determine whether an area lies within a home's curtilage, the court must consider (1) the area's proximity to the home; (2) whether the area is included within an enclosure that surrounds the home; (3) the nature of uses to which the area is put; and (4) whether the area is protected from observation from passersby.

State v. Dumstrey, 366 Wis. 2d 64, 86, 873 N.W.2d 502, 511, 2016 WI 3, 32. The defense already provided its analysis of this four-part test to the Court in its initial brief but will respond to the points made by the State.

First, the State acknowledges the porch is attached to the house and that it is enclosed within the house. Those two undisputed factors unquestionably favor a determination that this area is curtilage. The State goes on to state that "so are virtually all porches, including the smallest of concrete pads with a decorative or functional arm rail around it." (Brief of Plaintiff-Respondent, p.3-4).

There is no Wisconsin rule or law stating that every porch attached to every home is excluded from the curtilage designation. To the contrary, Wisconsin courts are instructed to follow the four-factor test in *Dumstrey* to determine whether an area attached to or near a home is curtilage. Some porches may not qualify for the curtilage designation, such as open porches attached to the outside of a home. The area in this case, however, is both attached to the home, and can only be accessed via the exterior doors.

In what is seemingly an attempt to apply the "nature of use" prong of the *Dumstrey* test to the area in question, the State asserts that "the photographic evidence shows this porch is used as a porch," acknowledges

that there is furniture for lounging and a doormat, but fails to mention the numerous other personal belongings in that enclosed porch entryway. (Brief of Plaintiff-Respondent, p.4, ¶2). The State makes no attempt to refute the facts that the defendant had exclusive control over that area and that it was an area where it appeared many personal activities took place. "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." *Id at* 366 Wis. 2d 64, 89. People lounge on furniture, play games and watch television in the privacy of their own homes. The "nature of use" *Dumstrey* factor undoubtedly favors a determination that this enclosed entryway porch area is curtilage.

The State next addresses the "protection from observation" prong, and although it does acknowledge that the doorbell on the outside of the doors might favor the curtilage determination, it states that the defendant's failure to put up "no trespassing" signs or window coverings on the windows indicate that they did not protect the area from observation from passersby.

Many individuals live in homes without window coverings, or have their coverings open to let light in. The majority of American citizens do not have "No Trespassing" signs on the sides of their homes and porches. Failure

to put a sign on a home or equip a window with drapes does not mean that the interior of that home is not protected by the Fourth Amendment. Further, the windows are elevated on the home, likely to provide privacy, so that a passerby could not easily see inside this area. It must also be noted that the State fails to mention the fact that the doors the officers walked through have locks on them. If a person leaves his door unlocked, it does not mean that anyone is welcome to enter his home. Rather, the mere existence of a lock on a door signifies the area which that door leads to is private to the owner, and thus, qualifies as curtilage.

CONCLUSION

This is a case about an unlawful entry by officers into curtilage that was protected by the Fourth Amendment. The issue of whether a knock is a search is irrelevant to this case. The State has made a half-hearted attempt to argue that the area is not curtilage, and ignored many factors that favor the curtilage designation in its assertion that the area in question should not be placed under the home's 'umbrella' of Fourth Amendment Protection.

The Circuit Court failed to engage this four-part inquiry for a proper curtilage analysis, despite two separate requests that it do so at the suppression hearing and the Defendant's Motion to Reconsider. The

evidence overwhelmingly favors a curtilage designation when the *Dumstrey* test is properly applied to the area in question. 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 12th day of April, 2019.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

____*s/Lauren Stuckert*____
BY: Lauren Stuckert
Attorney for the Defendant
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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 1,418 words.

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 12th day of April, 2019.

Respectfully submitted,
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