STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2019AP00370-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BARRY J. KRULL,

Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Shawano County Circuit Court,
the Honorable William F. Kussel Jr., presiding
Trial Court Case No. 16CT155

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ISSUES FOR REVIEW

1. Was Barry Krull unlawfully detained while he was on his own property?

   The Trial Court Answered: No.

2. Did Krull voluntarily consent to a blood draw and therefore submit to constitutionally valid search under the Fourth Amendment?

   The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

On May 22, 2016 at around 8:38 p.m., Deputy Bartz and Deputy Rogers of the Shawano County Sheriff's Department were on duty patrolling Shawano County when they performed a traffic stop in a driveway off of Old 47 Road because Deputy Bartz had observed Mr. Krull going sixty-seven miles per hour in a fifty-five miles an hour zone. (44: 4-5). The driveway Deputy Bartz stopped Mr. Krull in did not belong to Mr. Krull but rather belonged to a friend, Mr. Blooma. (44: 8, 60-61). Mr. Krull's vehicle was about thirty to forty feet from a garage on the property when he parked his vehicle. (12: 9-10). When Deputy Bartz stopped the vehicle, Mr. Krull got out and started walking towards some individuals who were socializing on the property near a garage. (44: 8, 23, 25-16). Mr. Krull was the only occupant of the vehicle that Deputy Bartz observed. (44: 10).

Deputy Bartz then asked Mr. Krull to come back and talk to her, at which point she observed Mr. Krull smelled like the odor of intoxicants, had

slurred speech, and bloodshot eyes. (44: 9). Mr. Krull also admitted that he had drank four beers and had his last beer fifteen minutes prior to his contact with Deputy Bartz. Deputy Bartz then performed field sobriety tests with Mr. Krull. (44: 11-14). Deputy Bartz noted that Mr. Krull's friends were on scene and they were starting to get unruly and were interfering with her field sobriety testing via their use of cameras. (44: 12, 15). Deputy Bartz also asked Mr. Krull to submit to a preliminary breath test. (44: 14). Mr. Krull declined submitting to a preliminary breath test, at which point Deputy Bartz placed him under arrest. (44: 14-15). She noted that Mr. Krull had two prior OWI related offenses. (44: 15).

It was at this point that Mr. Krull expressed concerns to Deputy Bartz about his two-year-old child. (44: 15, 62). Mr. Krull told Deputy Bartz that his cousin was babysitting his child and that he was concerned for that child. (44: 15, 67). Deputy Bartz informed Mr. Krull that he was allowed to make phone calls to make arrangements for child care so long as he remained cooperative. (44:15). Mr. Krull made some phone calls while on scene, but eventually his friends became too rambunctious and Deputies Bartz and Rogers determined that it was best to leave the scene and take Mr. Krull to the hospital. (44:15).

Deputy Bartz and Rogers left the scene in their squad car with Mr. Krull in custody in the back seat. (44:15). While in the squad car, Deputy Rogers assisted Mr. Krull with making phone calls to arrange for child care. (44:16). Mr. Krull was able to get in contact with his brother while he was being transported to the hospital. (44: 68). Mr. Krull was able to arrange for his brother to relieve his cousin of her babysitting duties, noting that it was a temporary fix and that if Mr. Krull was not finished with the booking process in a conveniently timely manner, either his wife or his brother would have to miss a bit of work in order to care for his child. (44: 67-68). Mr. Krull stated during a motion hearing on March 3, 2017 that he had "other options" for childcare besides his wife. (44:67). The deputies and Mr. Krull arrived at the hospital about fifteen minutes after Mr. Krull was arrested. (44: 16). When the deputies and Mr. Krull arrived at the hospital, Deputy Bartz read Mr. Krull the Informing the Accused and then asked Mr. Krull if he would submit to an evidentiary test of his blood. (44:17). Mr. Krull then consented to a blood draw. (44: 17).

On June 21, 2016, the State of Wisconsin filed a *Criminal Complaint* which charged Mr. Krull with one count of Operating a Motor Vehicle While Intoxicated as a Third Offense, contrary to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)(3), and 343.307(1) and one count of Operating with a

Prohibited Alcohol Concentration as a Third Offense, contrary to Wis. Stat. §§ 346.63(1)(b), 346.65(2)(am)(3), and 343.307(1). (3).

On November 22, 2016, Mr. Krull filed a *Motion to Suppress Evidence* wherein he asserted that his Fourth Amendment rights were violated when he was seized on someone else's private property and that he actually had not voluntarily consented to a blood draw. (11). An evidentiary motion hearing was held on March 3, 2017. (44). The Honorable Judge William F. Kussel issued an oral ruling on that motion on October 18, 2017 holding that the detention of Mr. Krull was lawful and that the blood draw was lawfully performed and did not violate Mr. Krull's Fourth Amendment rights. (45).

With regards to the issue of whether the Mr. Krull was seized on curtilage, the court applied the relevant legal standards and found that Mr. Krull was not seized on any curtilage. (45: 18). The trial court noted that it heard "no testimony there was any action to protect" the driveway from observation. (45: 18). The court also found that there was no reasonable expectation of privacy because the driveway could be seen from the street from people passing by, was therefore not curtilage, and therefore that Deputy Bartz performed a lawful stop. (45: 18).

With regards to the issue on the blood draw, the trial court noted that there was no "*quid pro quo,*" where Deputy Bartz said anything like "I will

let you make a phone call if you take a test." (45: 22). The trial court found that Deputy Bartz said that Mr. Krull could make phone calls as long as he was cooperative throughout the entire process and really did not specifically say that he had to take a blood test in order to make phone calls. (45: 22). The trial court also looked to Mr. Krull's personal characteristics insofar as he is a "fairly young individual" who had "some experience with OWIs" given that the OWI was his third offense and he was "fairly aware of what the standards were." (45: 23).

On January 2, 2019, a *Plea and Sentencing Hearing* was held, at which point Mr. Krull pled "No Contest" to Operating a Motor Vehicle While Intoxicated as a Third Offense where he was subsequently sentenced to forty-five days jail. (48). A *Judgement of Conviction* was entered on January 11, 2019. (34). A timely notice of appeal was filed, giving rise to this appeal. (36).

STANDARD OF REVIEW

A curtilage determination involves an issue of constitutional fact. *State v. Martwick*, 2000 WI 5, ¶ 24, 231 Wis. 2d 801, 814, 604 N.W.2d 552, 558. A reviewing court therefore applies a two-step standard of review in which the court first reviews a circuit court's evaluation of the individual *Dunn* factors for clear error, whether such findings are contrary to the great weight

and clear preponderance of the evidence. *Id*. The reviewing court then reviews the circuit court's ultimate determination of the extent of curtilage *de novo*.

A question of whether consent is voluntary is a question of constitutional fact, i.e. one of mixed law and fact. *State v. Phillips*, 218 Wis. 2d 180, 189, 577 N.W.2d 794, 799 (1998). A trial court's findings of evidentiary or historical facts will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *Id* at 190. The court then applies those facts to resolve constitutional questions. *Id*.

ARGUMENT

I. Mr. Krull was not seized in a Constitutionally Protected Area Because a Driveway of a Private Residence is not a Constitutionally Protected Area.

Of course, the State concedes that Mr. Krull was being detained pursuant to a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 7, (1968). The State however rejects the notion that a *Terry* stop like the one Deputy Bartz performed cannot occur on private property as not all private property is a constitutionally protected area. The place where Mr. Krull was stopped and detained was more akin to an "open field" that is not subject to Fourth Amendment protections.

"The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the

open fields. *Oliver v. United States*, 466 U.S. 170, 176 (1984) (Citing *Hester v. United States*, 265 U.S. 57 (1924). However, the Fourth Amendment does extend protections to the curtilage of a house, i.e. the area of a property where an individual may "reasonably expect" that such an area ought to "be treated as the home itself.' *United States v. Dunn*, 480 U.S. 294, 300 (1987). Questions of whether a piece of property should be regarded as curtilage should be resolved with an inquiry to a four factor test:

> (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 301. *Also see State v. Dumstrey*, 2016 WI 3, ¶ 32, 366 Wis. 2d 64, 86, 873 N.W.2d 502, 512 ("We previously have adopted the four factors set forth by the Supreme Court."). Common entrances to a residence indicate to the public an implied permission to enter that "necessarily negates any reasonable expectation of privacy." *State v. Davis*, 2011 WI App 74, ¶ 10, 333 Wis. 2d 490, 499, 798 N.W.2d 902, 907. The primary focus of an inquiry regarding curtilages is to resolve the ultimate question of whether an area is "so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection." *Id*.

The location on which Mr. Krull was seized is not entitled to Fourth Amendment protection under the analysis set forth in *Dunn*. In regards to the first prong of *Dunn*, Mr. Krull was seized on the driveway about forty to fifty yards from Old 47 Road. (12: 2). The residence, gauging from a photo Defendant-Appellant provided in their brief, is not even connected to the driveway indicating that the not even the driveway is intimately tied to the residence. There is no apparent connection between the residence and the garage and appears to be quite a walk away from the residence itself.

In analyzing the second prong of *Dunn*, the record is bare with regards to exactly where Mr. Krull was seized in relation to the garage, but it is clear that he was not within any enclosure at the time he was seized. There was no fence demarking a curtilage of the residence or any sort of privacy interest in connection with the driveway. Quite simply, Mr. Krull was easily observable from anyone standing on Old 47 Road and the driveway was the only common entrance to the property.

The Defense suggests in considering the third prong of the *Dunn* analysis that Mr. Krull and his work partner utilize the garage and the surrounding area of the garage to store tools there. (App. Brief at 10). Yet, *Dunn* itself was a case involving an very similar issue of whether a particular barn was within the curtilage of a residence. *Dunn* at 296. The Supreme Court

noted in that case that there was no clear demarcation that the barn at issue was an area to which "activities of home life" extended. *Id* at 302. Certainly, it would not be readily apparent to law enforcement in this case that activities of daily home life would extend to that garage. More to the point, nothing on May 22, 2016 indicated to law enforcement that the **driveway** leading to that garage was an area where private intimacies of life took place.

Further, it appeared to law enforcement at the time that a social gathering was taking place near the driveway (44: 25-26). On the one hand, this might indicate that private affairs of life were taking place and that the curtilage of the residence might extend to where Mr. Krull was seized. In another view; the more appropriate view, Mr. Krull was seized in a place where an open gathering was taking place, readily observable by the public. The fact that multiple people appeared to be invited to a place where intoxicating beverages were being consumed in a readily observable manner would indicate something of a more public, less intimate affair taking place. But again, it was the driveway where Mr. Krull was seized, and that is the area most pertinent to this analysis.

Lastly, the area upon which Mr. Krull was seized was in no way concealed from the public eye. Mr. Krull was seized on what appears to be the only common entrance to the property. It was not protected by any fence.

There was nothing to indicate to law enforcement or anyone else that the curtilage of the residence extended anywhere beyond the residence itself. Just looking the photo provided by Mr. Krull himself, the driveway is the very definition of an open field.

Accordingly, this court should uphold the trial court's decision and find that the driveway where Mr. Krull was stopped and seized was an open field that is not subject to Fourth Amendment protections and that he was therefore lawfully seized.

II. Even if Mr. Krull was Seized in a Constitutionally Protected Area, he Lacks Standing to Assert a Fourth Amendment Right Against an Unlawful Search Because he did not have a Legitimate Expectation of Privacy in the Area Upon Which he was Seized.

Mr. Krull did not have a reasonable expectation of privacy on the driveway of someone else's residence and therefore has no standing to challenge the validity of his seizure there. A "defendant has the burden of establishing a reasonable expectation of privacy by a preponderance of evidence." *State v. Bruski*, 2006 WI App 53, ¶ 13, 289 Wis. 2d 704, 710, 711 N.W.2d 679, 682, aff'd, 2007 WI 25, ¶ 13, 299 Wis. 2d 177, 727 N.W.2d 503. "The test for determining whether an individual has standing to raise a Fourth Amendment issue examines 'whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the

invaded place.'" *State v. McCray*, 220 Wis. 2d 705, 710, 583 N.W.2d 668, 670 (Ct. App. 1998) (citing *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)). Whether a person has a reasonable expectation of privacy depends on two things: (1) whether the individual has exhibited an actual, subjective expectation of privacy in the area in which he is seized, (2) and whether society will recognize such an expectation of privacy as reasonable. *Bruski*, ¶ 13. In analyzing the second prong of whether an expectation of privacy in an invaded place is reasonable, the Court should look to

> (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.

McCray at 711.

The Defense relies on *State v. Trecroci*, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555 and *Jones v. United States*, 362 U.S. 257 (1960) in support of his argument that Mr. Krull had a reasonable expectation of privacy in his friend's driveway. Their reliance on these cases is misplaced because these two cases are not factually similar to the case at bar. *Trecroci* involved a situation where a slew of defendants contested a search of an attic in residence that was cohabitated by a few of the defendants, contending that

they had a reasonable expectation of privacy in an interior stairway that lead to their apartment and attic. *Trecroci,* 2001 WI App 126, ¶ 1. The defendant in *Jones* contended that he had a reasonable expectation of privacy in an apartment that he was living as a guest in. 362 U.S. 257 at 258-259. Both of these cases involved an area that was much more intimate and private than a driveway.

Applying the factors in *McCray*, this Court can definitively say Mr. Krull did not have a reasonable expectation of privacy in Mr. Blooma's driveway. 220 Wis. 2d 705, 710, 583 N.W.2d 668, 670. First, Mr. Krull did not have a property interest in Mr. Blooma's driveway. Whatever his relationship may be with Mr. Blooma, and despite the fact that he stores tools in a shed connected to the driveway, it does not follow that he had an expectation of privacy in the driveway. The record does not suggest that he had some sort of financial interest in the driveway itself or that he used the driveway to store tools or frequently keep a vehicle there.

Mr. Krull certainly seemed to be on the driveway lawfully as the driveway belonged to a close friend of his, but that is not dispositive of him having a privacy interest in the property.

Mr. Krull did not have complete dominion and control over the driveway or a right to exclude others from it. The driveway did not belong to

him and defendant points to nothing in the factual record which suggests he had permission from Mr. Blooma to keep others from using the driveway. On the contrary, and looking to the fourth and fifth prongs of the analysis, the driveway at least appears to be the only entrance to the property. At the time Mr. Krull arrived at the residence, people were out by the driveway drinking. If anything, the driveway is the only way for people to enter the property and it seems from the record from the motion hearing on March 3, 2017 that people were supposed to be using that driveway at the time to enter the property. (44: 62, 65). Anyone seeking to meet with the Mr. Blooma in person would most reasonably do so by using that driveway. The driveway was not put to private use by Mr. Krull and no precautions were taken by him to exclude anyone from using the driveway. It is highly unlikely that Mr. Krull even had permission from Mr. Blooma to implement any precautions or exclude others from the driveway and the Defense does not suggest anything to the contrary.

Lastly, historical notions of privacy are not consistent with the idea that a driveway is a place where someone maintains a reasonable expectation of privacy. People generally expect that a driveway will be used by people other than the owners of the property. Delivery people often times will use private driveways. Plumbers, electricians, and other service providers might use a

private driveway when they are arriving to provide their services. Sometimes people will use driveways to turn around when they make a wrong turn. Sometimes missionaries might solicit the word of God, driving from one house to another using people's driveways. Driveways serve many purposes to people other than the owners of that driveway and people generally expect that members of the public will use them from time to time.

The defense has not met its burden in establishing Mr. Krull's reasonable expectation in Mr. Blooma's driveway. Mr. Krull's act of storing tools in the garage of the property does not by itself exhibit a subjective privacy interest in the driveway of the property. Even if Mr. Krull had exhibited some expectation of privacy in that driveway, it would not be an expectation that society would be prepare to recognize as reasonable. Historical notions of how society utilizes driveways do not lend credence to the idea that people have a privacy interest in their driveways. The proponent of a motion to suppress bears the burden of establishing the reasonableness of the alleged privacy expectation by a preponderance of the credible. *McCray*, 220 Wis. 2d 705, 710, 583 N.W.2d 668, 670. This court should find that Defendant has not met that burden and uphold the decision of the trial court.

III. The Blood Draw Performed in This Case was Valid Because Defendant's Consent was Voluntary and Because Law Enforcement did not Engage in Improper Practices or Coercive Conduct to Procure Consent

"A warrantless search conducted pursuant to consent which is 'freely and voluntarily given' does not violate the Fourth Amendment. *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794, 802 (1998) (citing *Schnecklotch v. Bustamonte*, 412 U.S. 218 (1973)). "When the State attempts to justify a warrantless search on the basis of consent, the State must demonstrate by clear and convincing evidence that consent was voluntarily given. *Id* at 197.

In evaluating whether consent is voluntary, a court is to look to whether consent was given in the "absence of duress or coercion, either express or implied." *Id*. Whether consent is given in the absence of duress or coercion is determined by looking at the "totality of the circumstances" looking at both the "circumstances surrounding the consent and the characteristics of the defendant." *Id* at 198. "Courts generally focus on characteristics such as the defendant's age, intelligence, education, physical and emotional condition, and prior experience with police" when determining whether consent is voluntary. *Id* at 202. Another essential inquiry is "whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." *State v. Clappes*, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). Involuntariness will not be found unless there

is some showing of improper police practices **deliberately** being used. *Id* at 239.

Mr. Krull's consent was voluntary here. Deputy Bartz did not use any deception or trickery to gain Mr. Krull's consent for the blood draw, nor did she use any coercive means to gain consent. She never threatened him and Mr. Krull stated that he never felt threatened. Deputy Bartz stated that if he was "cooperative," she would allow him to continue to make phone calls. As the circuit court noted, there was no *quid pro quo* going on. (45: 22). Deputy Bartz never said anything along the lines of "give me your blood or you will not be making phone calls." In fact, way before the blood draw Deputy Bartz asked Mr. Krull to submit to a preliminary breath test, Mr. Krull declined, and he was still allowed to make phone calls. (44: 14-15). Deputy Bartz took Mr. Krull's non-consent to the PBT and still allowed him to make phone calls, so she was not using the phone as any sort of tool to coerce Mr. Krull's consent. She did not need to. If Mr. Krull had refused a blood draw, Deputy Bartz could have easily retrieved a warrant. It would be unreasonable to suggest that Deputy Bartz intentionally and deliberately used coercive tactics to gain access to Mr. Krull's blood when she can get the blood anyway without skating on constitutionally thin ice. In sum, there were no coercive tactics applied by Deputy Bartz in this case.

Further, the circumstances surround the blood draw point to the voluntariness of Mr. Krull's consent. Mr. Krull was clearly aware of his rights and his ability to refuse the PBT. He was very aware of the fact that one can be cooperative while still maintaining and executing their constitutional rights. Mr. Krull knew he could say "no" to requests of law enforcement and he in fact did so. Sure, he was concerned for his kid and wanted to remain "cooperative" with law enforcement so that he could make phone calls and maybe he was under some distress despite the fact that he was able to make temporary arrangements for his child's care prior to the blood draw. But Mr. Krull knew full well and demonstrated that he knew he did not have to accede to everything Deputy Bartz asked of him. The circumstances surrounding the blood draw indicate that Mr. Krull's consent was voluntary.

Lastly, the trial court in this case took note of Mr. Krull's character. He was a "fairly young individual" who had "some experience with OWIs" given that the OWI was his third offense and he was "fairly aware of what the standards were." This is an accurate assessment of Mr. Krull's relevant characteristics. He was thirty-eight years old at the time of this offense, well into adulthood but not mentally infirm. Nothing in the record suggested any mental health issues. He had at least two prior experiences with law enforcement, at least in the OWI scenario.

In sum, the State must demonstrate by clear and convincing evidence that consent was voluntarily given and the State has met its burden here. Deputy Bartz never deliberately engaged in coercive behavior, the Defendant's character indicated that he understood his rights and understood he could deny consent, and the circumstances surrounding the incident showed that his consent was voluntary. For those reasons the State has met its burden.

CONCLUSION

Mr. Krull was stopped and seized in an open field where no constitutional protections apply. Additionally, the warrantless blood draw on Mr. Krull was valid because Mr. Krull voluntarily consented to the blood draw. For those reasons, the Defense's appeal should be denied and the rulings of the trial court should be upheld.

Respectfully submitted this 6th day of August, 2019.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4221 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

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 copes of this brief filed with the court and served on all opposing parties.

Dated this ____ day of August, 2019.

Signed:

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