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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2019 AP 000370 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

BARRY J. KRULL,

Defendant – Appellant.

REPLY BRIEF OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION

ENTERED IN THE CIRCUIT COURT FOR SHAWANO COUNTY
THE HONORABLE WILLIAM F. KUSSEL, JR. PRESIDING

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ARGUMENT

I. The State's Argument on Curtilage.

As expected, the State argues that the location of seizure of Mr. Krull did not occur on the home's curtilage. In his brief-in-chief, Mr. Krull presented argument concerning the contention that the location of his detention was curtilage and Mr. Krull asserts that the State's response brief does not materially undermine those arguments; thus, Mr. Krull stands on his opening brief.

II. The State's Argument on Standing.

The State argues that Mr. Krull lacks a reasonable expectation of privacy, i.e., standing, in Brett Blooma's private property and cites the factors listed in *State v. McCray*, 220 Wis. 2d 705, 711, 583 N.W.2d 668, 671 (Ct. App. 1998).[1] The State then concludes that "[a]pplying the factors in *McCray*, this Court can definitively say Mr. Krull did not have a reasonable expectation of privacy in Mr. Blooma's driveway." St.'s Resp. Br., p. 13.[2] However, as observed by this Court in *State v. Trecroci*, 2001 WI App 126, ¶57, 246 Wis. 2d 261, 291, 630 N.W.2d 555, even if a person "comes up short" under

[1] The so-called *McCray* factors are: "(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*, 220 Wis. 2d at 711.

[2] In this section of argument, it appears that the State confuses, in part, the legal issue of "standing" with that of a curtilage argument, see generally St.'s Response Br., pp. 14-15 (example: "Historical notions of how society utilizes driveways do not lend credence to the idea that people have a privacy interest in their driveways." St.'s Response Br., p. 15). For purposes of this reply, Mr. Krull focuses on the factors concerning whether or not standing exists.

the *McCray* factors,[3] it doesn't automatically defeat standing as the State suggests.

The *Trecroci* case stands for the proposition that a non-overnight guest who uses a property regularly and has a firmly rooted relationship with the host and property, has standing to challenge a search or seizure. In that case, it was held that defendant Amy Wicks had standing to challenge entry to the attic of a private residence as she had "used the attic area on prior occasions" and she was "Ronnie Frayer's fiancé," to wit, a renter of the attic. *Id*. at ¶59.

In testimony, Mr. Krull extensively detailed his regular use of his "good friend['s]" property and his firmly rooted relationship with him. R:44 at 60-62. Specifically, Mr. Krull's testimony provided:

- Mr. Krull and Mr. Blooma have been friends since high school and "see[s] him three to four times per week;"
- Mr. Krull and Mr. Blooma work together in the construction industry;
- Mr. Krull and Mr. Blooma own tools in common, some of which are stored on Mr. Blooma's property, specifically the garage;
- Mr. Krull enters Mr. Blooma's residence and property regularly and uses it frequently; and
- On the day and time at issue, Mr. Krull was invited and expected by Mr. Blooma.

These factors, in collection, are as equally weighty, if not stronger, than the factors in *Trecroci* in which this Court found defendant Amy Wicks had standing. By simple comparison, Mr. Krull clearly has standing in this case to challenge the entry to and upon Mr. Blooma's private property.

[3] In *Trecroci*, this Court applied the factors listed in *State v. Thompson,* 222 Wis.2d 179, 186, 585 N.W.2d 905 (Ct.App.1998), which are the same factors listed in the *McCray* case.

III. The State's Argument on Consent to the Blood Test.

The State argues the absence of coercive or improper practices in this case, particularly highlighting the circuit court's comment that there was no "*quid pro quo*" at play. St.'s Resp. Br., p. 17. The State also advances similar rationale in support of its argument when it writes that "Deputy Bartz never said anything along the lines of 'give me your blood or you will not be making phone calls.'" *Ibid*. But the law does not require such overt or explicit pressures or conduct in order to be improper or coercive.

Whether consent was voluntary or not is determined from the totality of the surrounding circumstances and, as caselaw clearly provides, coercive conduct or improper pressures may come not only in the form of overt or explicit means but also in the form of subtleties. As the United States Supreme Court said in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973): "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Id*., 412 U.S. at 228, 93 S.Ct. at 2048 (also see ibid: "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions as well as the possibly vulnerable subjective state of the person who consents.").

While it is a fair characterization that Deputy Bartz did not use overt tactics of coercion with Mr. Krull, she certainly used subtle coercive and improper measures. First, after voicing concern about the welfare of his child and the need to make childcare arrangements, Deputy Bartz conditioned his ability to use his telephone for that purpose upon him being

"cooperative." Second, following this mandate of cooperation, Mr. Krull was transported directly to a hospital. Third, once at the hospital, Deputy Bartz read the *Informing the Accused* form to Mr. Krull which concluded with "Will you submit to an evidentiary chemical test of your blood?"

By immediately presenting Mr. Krull to a hospital to only then request he submit to a blood test effectively communicated to Mr. Krull that Deputy Bartz harbored an expectation that he submit to it in order to remain "cooperative." In other words, a reasonable person in Mr. Krull's position under those circumstances would reason: "she brought me to a hospital and is now is specifically requesting that I submit to a blood test, therefore, she must expect me to do so." In fact, that is the exact conclusion drawn by Mr. Krull. Mr. Krull contends that creating the impression that waiver of a constitutional privilege to refuse a warrantless search is required before a parent can fully make childcare arrangements is coercive and improper.

The State also points to Mr. Krull's declination to the PBT as evidence that "Mr. Krull was clearly aware of his rights and his ability to refuse the PBT" and "[h]e was very aware of the fact that one can be cooperative while still maintaining and executing their constitutional rights." St.'s Resp. Br., p. 18. The sequence of events do not support this inference as Mr. Krull denied the PBT before his arrest and before Deputy Bartz's conditioned access to and use of his cell phone to make childcare arrangements upon his "cooperation." If anything, as stated in the brief-in-chief, Mr. Krull's initial refusal to the PBT militates against a finding of voluntariness. See Br.-in-Chief, p. 17.

CONCLUSION

For these reasons, it is respectfully requested that the Court of Appeals reverse the circuit court's denial of the motion to suppress evidence in this matter and remand with direction to suppress the evidence.

Dated this 5th day of September 2019.

Respectfully Submitted,

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By: _____

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FORM AND LENGTH CERTIFICATION

I, Chadwick J. Kaehne, hereby certify that this reply brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,563 words.

Dated this 5th day of September 2019.

_____

Attorney Chadwick J. Kaehne
State Bar No.: 1045611

ELECTRONIC BRIEF CERTIFICATION

I, Chadwick J. Kaehne, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 5th day of September 2019.

_____

Attorney Chadwick J. Kaehne
State Bar No.: 1045611

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AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)ss
SHAWANO COUNTY)

I, Jason Masterson, being first duly sworn, under oath, states:

1. That I am a Paralegal at Kaehne, Cottle, Pasquale & Associates, S.C.
2. That on September 5, 2019, I did deposit in a mail receptacle for the United States Postal Service, in a sealed package, correctly addressed for delivery to the Wisconsin Clerk of Court of Appeals, with postage pre-paid for first class mail, or class at least equally expeditious, ten (10) copies the *Reply Brief of the Defendant-Appellant*, relative to the above-entitled matter.
3. That on the same day, I also sent via U.S. Mail, first class (or a class at least equally expeditious), three (3) service copies of the *Reply Brief of the Defendant-Appellant* to the Shawano County District Attorney's Office.

Dated: September ____ 2019.

_____
Jason Masterson
Paralegal

Subscribed and sworn to before
me this ____ September 2019:

_____
Alison Spradling, Notary Public
Winnebago County, State of Wisconsin
My Commission Expires: _____.