STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. 19-AP-1240

Lois M. Bertrand

Defendant-Appellant.

On Appeal of an order denying Defendant's motion to suppress evidence and judgment of conviction entered in the Circuit Court of Waukesha County, the Honorable Michael P. Maxwell Presiding.
Trial Court Case No. 18CT1220

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

1. Was it reasonable for Officer Duerwachter to rely on two separate reports that a suspect smelled like alcohol, was intoxicated, and had an alcohol problem, in order to investigate an OWI complaint? The circuit court answered in the affirmative.
2. Was it reasonable to have the defendant submit to field sobriety tests once Office Duerwachter had reasonable suspicion that the defendant was operating while under the influence, when that reasonable suspicion is based on third-party reports and personal observations? The circuit court answered in the affirmative.
3. Was it reasonable for officer Duerwachter to enter an area of the curtilage when he had reasonable suspicion that a crime occurred? The circuit court answered in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("state") submits that oral argumentation is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

This appeal is raised by the suggestion that an officer, with reasonable suspicion, may not continue to investigate an OWI complaint if the suspect is on the open curtilage of her house. On September 6, 2018, Officer Duerwachter of the Oconomowoc Police Department responded to a child custody complaint at a local elementary school involving the defendant, her son, and the defendant's ex-husband. *Mot. Hr'g. Tr 4: 2-8.* The defendant's ex-husband, who holds primary custody of his son, originally made the complaint because his son was picked up from school without his knowledge. *Mot. Hr'g. Tr. 5: 7-10.* When Officer Duerwachter was at school, he met with the principal because there was a report, from an after-school supervisor, that the woman who had picked up the son smelled like alcohol. *Mot. Hr'g. Tr. 17; 7-10.* It turned out that the child's mother, later identified as the defendant, picked up her son. *Mot. Hr'g. Tr. 5: 11-14* Once Officer Duerwachter received this information from the principal, he called Ms. Bertrand, who reported that her son had missed the bus, and that she picked him up, and was now dropping him off at her ex-husband's house. *Mot. Hr'g. Tr. 21; 2-5.*

Officer Duerwachter eventually got into contact with the son's father who told him that the defendant had just dropped off his child.

Mot. Hr'g. Tr. 6; 6-9. The ex-husband also reported that the defendant was highly intoxicated when she dropped her son off and that she was an alcoholic. *Mot. Hr'g. Tr. 6; 16-19, 30; 2-3, 6-7; 33;5-8*. He also later provided a written statement. *Mot. Hr'g. Tr.* 30; 6. Based on the two independent reports, Officer Duerwachter went to the defendant's house to investigate further. *Mot. Hr'g. Tr.5: 20-24.* When he arrived at her home, Ms. Bertrand was absent, so he went to his squad vehicle to continue investigating her location. *Mot. Hr'g. Tr. 7; 8-11.*

During Officer Duerwachter investigation, there were multiple units looking for Ms. Bertrand's vehicle in the community. *Mot. Hr'g. Tr. 8; 15-16.* While Officer Duerwachter continued to investigate possible locations that Ms. Bertrand could be at, Officer Duerwachter observed her drive down the road and pull into her garage. *Mot. Hr'g. Tr. 8; 13-15, Mot. Hr'g. Tr.23; 12-13.* Because there was an intoxicated driving complaint at this point, Officer Duerwachter pulled into the driveway behind Ms. Bertrand. *Mot. Hr'g. Tr. 8;* 1-2. Once in the driveway, Officer Duerwachter and Ms. Bertrand had a short discussion, and a second squad car arrived. *Mot. Hr'g. Tr. 8; 11-13.*

During the conversation, Officer Duerwachter personally observed other indications that the defendant was intoxicated. Ms. Bertrand was evasive. *Mot. Hr'g. Tr. 14; 9.* Additionally, when she took her glasses off, Ms. Bertrand's eyes were glassy and bloodshot.

Mot. Hr'g. Tr. 10: 11-12. Officer Duerwachter personally noticed that she smelled like alcohol. *Mot. Hr'g. Tr.* 9: 19-20. As the conversation continued, Ms. Bertrand and Officer Duerwachter walked into the garage to continue the conversation. While in the garage, Ms. Bertrand tried to leave and go inside.

When the defendant tried to go into the garage, Officer Duerwachter did not allow her to walk into her house because he was investigating a driving complaint and for officer safety. *Mot. Hr'g. Tr. 9: 12-17, 19-20.* Based on the initial complaints, and his own observations, Officer Duerwachter had Ms. Bertrand submit to field sobriety tests, where officer Duerwachter eventually found probable cause to place her under arrest for OWI.

The defendant now challenges the stop, arguing that there was no reasonable suspicion to support a stop and that it was unreasonable to enter the curtilage of the home to investigate a possible OWI. The circuit court upheld the stop as reasonable. The state urges this court to uphold the circuit courts findings as reasonable

The circuit court denied the defendant's motion to suppress. In its ruling, the court made a finding of facts; Officer Duerwachter initially dispatched to the elementary school because a child was picked up at school without the father's knowledge. *Oral Rl'ing*; 3: 14-16. At the school, Officer Duerwachter received a report from the school

principal that a school worker had smelled a strong odor of intoxicants coming from a woman, who was later identified as the defendant and the child's mother. *Oral Rl'ing*; 3: 16-18. Officer Duerwachter called the defendant, who confirmed that she picked up her son and dropped him off at the father's residence. *Oral Rl'ing*; 3: 24-5; 4:1. In corroborating the mother's statement, Officer Duerwachter spoke with the father, who testified that the mother had a strong odor of intoxicants coming from her, that she was intoxicated, and that she had issues with alcohol. *Oral Rl'ing*; 4: 4-6.

In pursuit of the two separate reports that Ms. Bertrand was intoxicated and smelled like alcohol, Officer Duerwachter went to the defendant address. *Oral Rl'ing*; 4: 8-10. When he went to the residence, he went to the door, knocked, and returned to his squad car. *Oral Rl'ing*; 4: 11-14. While he remained in his squad car, he observed the defendant pull into her driveway. *Oral Rl'ing*; 4; 12-15. The officer, following behind, pulled into the driveway. *Oral Rl'ing*; 4: 18-19. At that time, the defendant went into the driveway to retrieve her garbage cans, and the officer began to speak with her while in the driveway. *Oral Rl'ing*; 4: 21-23.

ARGUMENT

The sole issue on appeal is whether the circuit court poperly denied the suppression motion. In reviewing the circuit court's order denying a suppression motion, the court must review it in a two-part standard. *State v. Conner*, 2012 WI App 105, ¶ 15. First, the court must uphold the trial court's finding of fact unless they are clearly erroneous. *Id.* Second, the court must review whether those facts warrant suppression. *Id.*

I. OFFICER DUERWACHTER HAD REASONABLE SUSPICION TO TEMPORARILY DETAIN THE DEFENDANT IN ORDER TO INVESTIGATE A POTENTIAL DRUNK DRIVING INCIDENT.

The circuit court correctly determined that Officer Duerwachter had reasonable suspicion to believe that the defendant was operating while intoxicated when she was picking her son up from school and after. The United States Constitution and the Wisconsin Constitution does not forbid all search and seizures. They forbid only unreasonable ones. U.S. Const. amend. IV; WI. Const. art 1 § 11. While the constitutions command that there must be probable cause to make an arrest, *Terry v. Ohio* allows officers to perform brief investigations with less than probable to determine if a person has committed a crime. 392 U.S. 1, 22 (1968). When an officer has

reasonable suspicion to believe that criminal activity is afoot, a limited intrusion into an individual's privacy is permitted under the Fourth Amendment. *Terry*, 392 U.S. at 30. Here, under *Terry*, Officer Duerwachter reasonably detained the defendant because he had reasonable suspicion to investigate whether she had been operating her vehicle while intoxicated.

There was reasonable suspicion to temporarily detain Ms. Bertrand to investigate whether she had committed a crime. To justify a temporary detention, it must be supported by reasonable suspicion. Reasonable suspicion must be grounded in specific, articulable facts and reasonable inferences from those facts that a person is or has violated the law. *State v. Colstad*, 2003 WI App 25, ¶ 8. What constitutes reasonable suspicion is a common sense test. *Id.* An officer, under the facts and circumstances, must be able to point to specific and articulable facts, when taken together with rational inferences from the facts, would reasonably warrant an intrusion. *State v. Post,* 2007 WI 60, ¶ 10. An officer must have more than a hunch, but less than probable cause and "considerably less than preponderance of the evidence. *United States v. Richmond*, 924 F.3d 404, 411 (7th Cir. 2019)(citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). The court, when making a reasonable suspicion determination, must look at the totality of the

circumstances of each case to determine if the detaining officer had a particular and objective basis to suspect that a defendant committed a crime. *United States v. Arvizu,* 534 U.S. 266, 273 (2002).

From the first two reports alone, there was reasonable suspicion to believe that the defendant had committed an OWI offense. In determining if there is reasonable suspicion to investigate whether someone was operating while under the influence, an officer must be able to point to facts that the suspect is "[u]nder the influence of an intoxicant…to a degree which renders…her incapable of safely driving. *See* Wis. Stat. §§ 346.63(1)(1) and 346.01(1). First, Officer Duerwachter received a report from the principal that an employee smelled alcohol on the defendant when they spoke. *Oral Rl'ing;* 3: 16-18. While the defendant correctly notes that the odor of alcohol alone is not sufficient to contribute to a finding of reasonable suspicion, Officer Duerwachter corroborated the report by speaking with the defendant's ex-husband. *Oral Rl'ing;* 4: 4-6.[1] Her ex-

[1] The defendant inappropriately relies on *State v. Meye* that held that odor alone is not sufficient to find reasonable suspicion. 2010 WI App 120 ¶ 6. While this case held that odor alone does not amount to reasonable suspicion, these cases does not address the facts at hand. Officer Duerwachter reported that he had more than odor alone as a basis for investigating an OWI complaint before even walking on the defendant's property. Therefore, this case is not persuasive. *Oral Rl'ing;* 4: 4-6. Further, it is in distinguishable as in the case, the only reason the officer performed a stop was because he smelled odor coming from either the driver, or passenger, but he could not determine which person. Here, there was significantly more

husband reported that Ms. Bertrand was extremely intoxicated, she had a drinking problem, and that she smelled like alcohol when he dropped her son off. *Oral Rl'ing;* 4: 4-6. Given this information, Officer Duerwachter has reasonable suspicion to investigate an OWI complaint.[2]

Reasonable suspicion is not limited only to personal observations made by a police officer. When appropriate, a third-party complaint can be reasonably relied upon to provide reasonable suspicion to investigate whether a crime has been committed. *Navarette v. California*, 572 U.S. 393, 397 (2014). By relying on two different reports that Ms. Bertrand was intoxicated and driving, Officer Duerwachter had reasonable suspicion to believe that she was operating while intoxicated. Additionally, because he had reasonable suspicion from the two reports, he did not need to observe more suspicious behavior. *Id.* at 404.

Additionally, it is not dispositive that Officer Duerwachter did not see suspicious driving when the defendant pulled into her

information that lead Officer Duerwachter to conclude that the defendant was operating while under the influence.

[2] The defendant selectively chooses the facts to make her argument. While it is true that Officer Duerwachter received such a report, it is not true that this report was uncorroborated. Her ex-husband, who had previously contact with her, reported to the officer that the defendant was extremely intoxicated. *Oral Rl'ing;* 4: 4-6. By misstating the facts, she mischaracterizes her argument, which therefore cannot be relied on.

driveway. The defendant suggests Officer Duerwachter failure to see any poor driving should negate a finding of reasonable suspicion, this is specifically not required under the law and that is mentioned in WIS JI CRIMINAL 2663 . Additionally, an officer is not required to rule out the possibility of innocent behavior when making a determination to investigate suspicious behavior. *State v. Colstad*, 2003 WI App 25 ¶ 8 (*citing State v. Anderson*, 155 Wis.2d 77, 84 (1990)).

Given that there were two reports that suggested that the defendant was drinking and driving, Officer Duerwatcher formed a reasonable basis to believe that she had committed a crime. Therefore, it was reasonable for him to begin an OWI investigation.

II. THROUGH FURTHER PERSONAL OBSERVATION, OFFICER DUERWACHTER HAD ENOUGH INFORMATION TO REQUEST THE DEFENDANT TO SUBMIT TO FIELD SOBRIETY TESTS.

Upon further investigation of the complaint, it was reasonable to detain the defendant and have her submit to field sobriety tests. After an officer has made specific observations of impairment, he may request field sobriety tests. *Cty of Jefferson v. Renz*, 231 Wis.2d 293, 310 (1999) (the court found that it was reasonable to

have defendant submit to test based on speeding, smell of intoxicants, time of night, and admission of drinking).

Before detaining a suspect to conduct field sobriety tests, an officer must have reasonable suspicion that the person has been driving after the person "has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle" *See* WIS. JI CRIMINAL 2663. *Cty of Sauk v. Leon*, 2011 WI App 1, ¶ 15, 330 Wis.2d 836, 794. The finding must be greater when an officer has not seen any bad driving. *Id. at* ¶ 20. (finding that there was virtually no admission of actual impairment based on the defendant's admission that he had one beer two hours previously, with dinner.)

Officer Duerwachter had more than enough information, based on the totality of the circumstances, to have the defendant submit to field sobriety tests without observing any bad driving. During his conversation with the defendant, he subsequently noticed signs of impairment that lead him to believe that she was operating while under the influence. During the evidentiary hearing, he testified that the defendant was evasive during the conversation, she admitted that she was drinking the night before, he smelled alcohol on her, and her eyes were glassy and bloodshot. *Oral Rl'ing;* 5: 2-6, 13-14.

Based on these observations, Officer Duerwachter concluded that the defendant was possibly too impaired to safely operate a vehicle, such that further investigation in the form of field sobriety tests were necessary. Because Officer Duerwachter had two separate reports amounting to reasonable suspicion to investigate an OWI complaint, and because he was able to corroborate those reports with his own personal observations, it was reasonable to have the defendant submit to field sobriety tests. Therefore, at no point during the investigation was the seizure unreasonable.

III. THERE IS NO REASONABLE EXPECATION OF PRIVAY AN IN AREA OF THE CURTILAGE THAT IS IMPLIEDLY OPEN TO THE PUBLIC

The circuit court did not err in finding that it was reasonable for Officer Duerwachter to investigate an OWI complaint on the defendant's driveway.[3] The circuit court concluded that Officer Duerwachter encountered the defendant on her driveway before moving into the open garage. *Oral Rl'ing;* 4: 21-23. The defendant did not have a reasonable expectation of privacy such that there was an unreasonable search nor seizure. While it is true that the protection of the Fourth Amendment extends to the curtilage, it is

[3] The defendant argues that the conversation took place in the garage, but the circuit court found that the conversation started into the driveway and proceeded into the open-garage. *Oral Rl'ing; 4: 21-23*. Again, by failing to rely on the correct facts, she mischaracterizes her argument, thus calling into question the validity of her argument entirely.

also true that law enforcement is not completely prohibited from entering the curtilage. *Oliver v. United States*, 466 U.S. 170, 180 (1984), *State v. Davis*, (par 10)(*Citing State v. Edgeberg,* 188 Wis. 2d 339(Ct. App. 1994)). Furthermore, if an officer enters the home through a legitimate means of access, no search has occurred. *Edgeberg,* 188 Wis.2d at 347. Because Officer Duerwachter entered an area of the curtilage that was impliedly open to the public, it was reasonable for him to enter and investigate the OWI complaint without an unreasonable search or seizure occurring.

Law enforcement may enter the curtilage that is impliedly open to use by the public. *Edgeberg,* 188 Wis.2d at 347. In *Edgeberg*, the Wisconsin Court of Appeals found that an officer's entry onto a suspect's porch was reasonable because it was impliedly open to the public. *Id.* In *Edgeberg,* an officer responded to complaint at the defendant's house that a dog was barking. *Id.* at 342. When he arrived at the house, he walked onto a vestibule-like porch, which appeared to be the main entrance of the house. *Id.* at 343. The porch had a screen door entrance that a person would have to enter to get to another door that entered into the house. *Id.* at 344. When the officer approached the porch, he opened the screen door, he entered the porch, and went to the inner door. *Id*. When he went to knock on the inner door, he looked through the window and saw marijuana

plants in plain view. *Id*. The defendant challenged the seizure, and the court held that the defendant had no reasonable expectation of privacy in the curtilage of his home. *Id.* at 347.

In its reasoning, the court found that a front door and the community practice of entering a porch to knock on the door suggests no expectation of privacy. *Id.* at 347. The court further elaborated that the common entrance of home offers implied permission to the public that negates any reasonable expectation of privacy. *Id.* at 347. Ultimately, the court held that when a piece is of curtilage is impliedly open to the public, and police have legitimate business, he may enter that portion of the property without violating a reasonable expectation of privacy. *Id.* at 347

The defendant did not have a reasonable expectation of privacy in her driveway. The circuit court affirmed that when he drove onto the driveway, he had reasonable suspicion to investigate for officer safety and to determine whether a crime had been committed. Therefore, he had legitimate business in entering the property that was impliedly open like the police did in *Edgeberg*. Just as the court found no expectation of privacy in a common place of the curtilage in a porch, it is reasonable for the court to make the same decision here. A driveway is arguably more open to the public than a screened-in porch. Additionally, Wisconsin courts have repeatedly

found a police officer may come onto a driveway without violating an expectation of privacy. *See State v. Wilson*, 229 Wis.2d 256, 260-61 (Ct. App. 1999). Therefore, it was reasonable for Officer Duerwachter to investigate on the driveway.

Because the defendant had no reasonable expectation of privacy, Officer Duerwachter actions were reasonable. He entered the driveway that was visible and open to the public, and he remained there while he talked to the defendant until she retreated back into the garage. Because Officers Duerwachter was investigating a crime with reasonable suspicion, it was reasonable for him to speak with the defendant while she was on her driveway. Additionally, it was reasonable for him to continue into the garage with her as he continued his investigation. The defendant did not create a zone of safety simply by walking into garage as she suggests, nor did she ever suggest that he should leave the property to get a warrant. Therefore, his actions in detaining the defendant to submit to field sobriety tests were reasonable.

CONCLUSION

For all the reasons stated above, the state respectfully requests that the Court affirm the circuit court's denial of the defendant's suppression motion, and affirm the judgments of conviction.

Dated this ___ day of October, 2019.

Respectfully,

_____
Jack A. Pitzo
Assistant District Attorney
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Attorney for Plaintiff-Respondent
State Bar Number 1099951

CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 3,964 words long.

Dated this ___ day of October, 2019.

_____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 at Waukesha, Wisconsin this ____ day of October, 2019.

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