No. 19-AP-1240

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

LOIS M. BERTRAND,
Defendant-Appellant.

Appeal from the Circuit Court for Waukesha County
The Honorable Judge Michael P. Maxwell Presiding
Case No. 18-CT-1220

REPLY BRIEF FOR DEFENDANT-APPELLANT, LOIS M. BERTRAND

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ARGUMENT

I. The State Failed to Adequately Address the Unreasonable Search and Seizure Inside Ms. Bertrand's Attached Garage.

Ms. Bertrand was first unreasonably seized when Off. Duerwachter parked his squad car directly behind Ms. Bertrand's car, which she parked inside her garage. *See Brendlin v. California*, 551 U.S. 249, 255 (2007). During the motion hearing, the State conceded that Ms. Bertrand was seized at that point. (R.41:36; App.36). Ms. Bertrand was also unreasonably seized inside her attached garage when Off. Duerwachter grabbed her arm to prevent her from entering her home's interior. *See Payton v. New York*, 445 U.S. 573, 586 (1980); *California v. Hodari D.*, 499 U.S. 621, 626 (1991). The State does not argue against this unreasonable seizure, and thus it concedes that the seizure was unreasonable. *See Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶9, 232 Wis.2d 53, 606 N.W.2d 590 ("An argument to which no response is made may be deemed conceded for purposes of appeal."); *State v. Davidson*, 222 Wis.2d 233, 253-54, 589 N.W.2d 38 ("If a respondent does not refute an assertion made by the appellant, he or she is considered to have acquiesced to it."), *rev'd on other grounds*, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606. Lastly, Off. Duerwachter conducted an unreasonable search when he entered Ms. Bertrand's attached garage. *See Collins v. Virginia*, 584 U.S. — , 138 S. Ct. 1663, 1670 (2018) ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred."). The State cites no authority to try to justify this unreasonable search. *See Hoffman*, 2000 WI App 22, ¶9, 232 Wis.2d 53 ("This court need not consider arguments unsupported by citation to legal authority.").

Rather than address the unreasonable search (entry) and seizures (detentions) that occurred inside Ms. Bertrand's attached garage, the State argues that her "driveway" was an area "impliedly open to the public." State's Br.12-15. As an initial matter, the State did not raise this argument in the circuit court, and thus it has forfeited the argument on appeal. *State v. Crute*, 2015 WI App 15, ¶19, 360 Wis.2d 429. Moreover, an analysis of whether her driveway was impliedly open to the public is unnecessary because she was seized inside her garage. Ms. Bertrand's attached garage was not impliedly open to the public, and the State does not argue otherwise. *See State v. Davis*, 2011 WI App 74, ¶¶13-16, 333 Wis.2d 490 (concluding that defendant's "open overhead garage door" was not an "open invitation for the public to

enter"); *State v. Weber*, 2016 WI 96, ¶18, 372 Wis.2d 202 (noting that officer's act of walking inside defendant's open garage was a "warrantless home entry"); *Corey v. State*, 739 S.E.2d 790, 795-96 (Ga. App. 2013) (holding that, under facts similar to the present case, officer's entry into defendant's garage to investigate OWI was an unreasonable search). Thus, Ms. Bertrand had a reasonable expectation of privacy inside her garage. She also had a property interest against trespass. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013). The State does not argue otherwise, and thus it concedes the unreasonable and warrantless search (trespass). *See Davidson*, 222 Wis.2d at 253-54.

The State's reliance on *State v. Edgeberg* is misplaced. 188 Wis.2d 339, 524 N.W.2d 911 (Ct. App. 1994). First, the issue in *Edgeberg* was whether the defendant had a reasonable expectation of privacy on his porch (i.e., whether there was a "search"), as opposed to the attached garage here. *Id.* at 342-43. Second, *Edgeberg* was decided almost two decades prior to the Supreme Court's resurrection of the trespass doctrine, which provides Fourth Amendment protection in addition to and separate from the *Katz* reasonable expectation of privacy analysis. *See United States v. Jones*, 565 U.S. 400, 404-05 (2012) (resurrecting the trespass doctrine and stating that a "search" occurs when "[t]he Government physically occupie[s] private property for the purpose of obtaining information."); *Jardines*, 569 U.S. at 6. Third, the State fails to acknowledge that *Davis* rejected a similar argument to the one made by the State here. *Davis* emphasized: "it is unacceptable for a member of the public to enter a home's attached garage uninvited. . . . This premise is true regardless of whether an overhead or entry is open. Thus, generally, under *Edgeberg*, an attached garage will never be impliedly open to the public, i.e., police entry." *Davis*, 2011 WI App 74, ¶14, 333 Wis.2d 490.

Lastly, the State incorrectly argues that Ms. Bertrand "did not create a zone of safety simply by walking into garage (sic) as she suggests, nor did she ever suggest that he should leave the property to get a warrant." State's Br.15. First, the caselaw is clear that "[a]t the [Fourth Amendment's] very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). The caselaw is also clear that a home's attached garage falls within the home's curtilage and is considered "the home itself." *Davis*, 2011 WI App 74, ¶12, 333 Wis.2d 490 (collecting cases); *State v. Dumstrey*, 2016 WI 3, ¶35, 366 Wis.2d 64 (collecting cases). Second, the State incorrectly implies that there can be consent through acquiescence. The

caselaw is the opposite—"[c]onsent is not freely and voluntarily given if it is the result of mere 'acquiescence to a claim of lawful authority.'" *State v. Reed*, 2018 WI 109, ¶8, 384 Wis.2d 469 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968)). "Consent to an entry is not to be lightly inferred, but must be shown by clear and convincing evidence." *State v. Rogers*, 119 Wis.2d 102, 107 (1984). "The burden is on the state to show a free, intelligent, unequivocal and specific waiver." *Id.* The State has not done so here. If anything, Off. Duerwachter testified that Ms. Bertrand "didn't want [him] there." (R.41:31; App.31). Further, the State did not raise this argument in the circuit court and it is therefore forfeited on appeal. *Crute*, 2015 WI App 15, ¶19, 360 Wis.2d 429.

The searches and seizures were unreasonable and all "fruits" should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Harris*, 206 Wis.2d 243, 263 (1996).

II. The Alleged Third-Hand Knowledge of the Odor of Alcohol on Ms. Bertrand's Breath, By Itself, was Insufficient to Provide Reasonable Suspicion to Seize Her.

The State agrees with Ms. Bertrand that the odor of alcohol alone on a person's breath is insufficient to provide reasonable suspicion to seize that person. State's Br.8. However, the State incorrectly argues that the alleged third-hand knowledge (triple hearsay) of the odor of alcohol on Ms. Bertrand's breath was sufficient to provide reasonable suspicion. Contrary to the State's argument and the circuit court's finding of fact, Ms. Bertrand's ex-husband did not report to Off. Duerwachter that he smelled alcohol on Ms. Bertrand's breath. (R.41:29-30; R.42:4; App.29-30, 50). Off. Duerwachter clarified this on cross-examination.[1] (*Id.*). Therefore, this third-hand knowledge of the odor of alcohol alone on Ms. Bertrand's breath was uncorroborated and insufficient to provide reasonable suspicion to seize her.

Other circumstances in this case further show that the seizure was unreasonable. When Off. Duerwachter first spoke with Ms. Bertrand over the phone (prior to the seizure), he did not notice any signs of impairment—no slurred or slow speech or any type of discussion indicative of intoxication. (R.41:19-21; App.19-21). Nor did Off. Duerwachter observe any impaired driving by Ms. Bertrand. (R.41:29;

[1] As such, the circuit court's finding of fact on this issue (on which the State relies) is clearly erroneous. *See State v. Dearborn*, 2010 WI 84, ¶13, 327 Wis.2d 252.

App.29). There were no reports of impaired driving or of physical impairment. (R.41:19-21, 29; App.19-21, 29). Therefore, when Off. Duerwachter drove onto Ms. Bertrand's driveway and parked his squad car directly behind her vehicle, which she parked in her garage, Off. Duerwachter unreasonably seized Ms. Bertrand. *See Brendlin*, 551 U.S. at 255; *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Popke*, 2009 WI 37, ¶11, 317 Wis.2d 118; *County of Sauk v. Leon*, 2011 WI App 1, ¶¶13, 28-29, 330 Wis.2d 836, 2010 WL 4751761 (App.61, 66-67) (concluding that the odor of alcohol alone is insufficient for seizure); *State v. Gonzalez*, 2014 WI App 71, ¶13, 354 Wis.2d 625, 2014 WL 1810115 (App.81-82, 85) (same); *State v. Meye*, 2010 WI App 120, ¶1, 329 Wis.2d 272, 2010 WL 2757312 (App.95) (same).

III. Reasonable Suspicion Did Not Support the Extension of Ms. Bertrand's Detention to Request Field Sobriety Tests.

The State's characterization of the record, and the circuit court's findings of fact relative to Off. Duerwachter's initial conversation with Ms. Bertrand, is erroneous. Specifically, Off. Duerwachter did not smell the odor of alcohol on Ms. Bertrand's breath and notice her eyes until she took off her sun glasses, all of which occurred after Off. Duerwachter grabbed her arm and requested that she perform field sobriety tests. (R.41:9-10, 30-31; App.9-10, 30-31). During Off. Duerwachter's initial encounter with Ms. Bertrand in her garage (they were both inside the garage), but prior to him grabbing her arm, she denied any consumption of alcohol that day. (R.41:24-25; App.24-25). Also during this time, Ms. Bertrand "answered all of [Off. Duerwachter's] questions appropriately," and Off. Duerwachter did not observe any slurred speech by Ms. Bertrand or anything else of concern. (R.41:30-31; App.30-31). While still in the garage, she reached for and placed her hand on the handle of the door that led to her home's interior. (R.41:27; App.27). Off. Duerwachter grabbed her left arm to prevent her from entering. (R.41:27; App.27). After he grabbed her arm, he ordered her to perform field sobriety tests. (R.41:10; App.10). Under the above-mentioned sequence of events, Off. Duerwachter did not make specific observations of impairment to justify the field sobriety tests. *See County of Jefferson v. Renz*, 231 Wis.2d 293, 310 (1999).

If this Court finds that Off. Duerwachter smelled the odor of alcohol on Ms. Bertrand's breath prior to his request that she perform field sobriety tests, the extension of the seizure was still unreasonable. *See Leon*, 2011 WI App 1, ¶¶13, 28-29, 2010 WL 4751761 (finding a

lack of reasonable suspicion to extend defendant's detention to conduct field sobriety tests based on no impaired driving, admission to consuming one beer, and the smell of alcohol) (App.61, 66-67); *Gonzalez*, 2014 WI App 71, ¶¶1, 9, 2014 WL 1810115 (finding a lack of reasonable suspicion to extend the detention to conduct field sobriety tests based on the odor of alcohol alone) (App.81-82, 85).

As here, "[w]hen an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial" to justify a request to perform field sobriety tests. *Leon*, 2011 WI App 1, ¶20, 2010 WL 4751761 (App.63-64). Those factors are absent here. Off. Duerwachter detained Ms. Bertrand and subjected her to field sobriety tests without: (1) noticing any impaired driving; (2) receiving any report of impaired driving; (3) noticing any signs of physical impairment—no slurred or slow speech and no glassy or bloodshot eyes, nor any physical impairment when she walked to the street to retrieve her garbage cans; and (4) receiving any admission from Ms. Bertrand that she consumed alcohol. (R.41:24-25, 29-31; App.24-25, 29-31). Because reasonable suspicion lacked to request that Ms. Bertrand perform field sobriety tests, Off. Duerwachter also lacked probable cause to request that Ms. Bertrand submit to a preliminary breath test and to ultimately arrest her. *See Renz*, 231 Wis.2d at 316.

CONCLUSION

This Court should reverse the circuit court's denial of Ms. Bertrand's motion to suppress and order suppression of all fruits of the unreasonable search and seizures in this case.

Dated at Waukesha, Wisconsin this 6th day of November, 2019.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

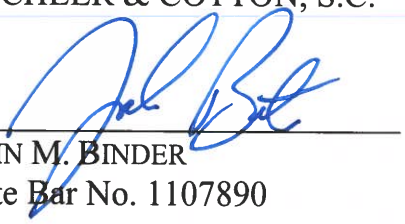
I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,991 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with Wis. Stat. § 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 6th day of November, 2019.

Respectfully submitted,
KUCHLER & COTTON, S.C.



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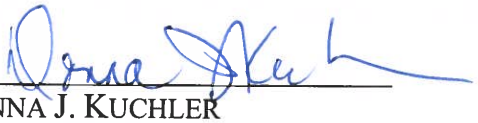

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