STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2020AP000007 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KALLIE M. GAJEWSKI,

Defendant-Appellant.

Appeal from a Judgement and Order Entered in
the Marathon County Circuit Court,
the Honorable Michael K. Moran, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Ms. Gajewski's back porch is the curtilage of her home. Thus, the police were required to have probable cause plus exigent circumstances to warrantlessly arrest her there. Because the police had neither, Ms. Gajewski's arrest was unlawful, and the evidence derived from it should be suppressed.

A. Overview.

In its response brief, the state concedes two major points. First, it explicitly acknowledges that Ms. Gajewski's back porch is part of the curtilage of her home. *See* Resp. Br. 12. Second, by declining to raise any argument to the contrary, it concedes that the police did not face any exigent circumstances when they arrested her. *See* Resp. Br. 26 n.4; *see also Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Instead of disputing the curtilage or exigency questions, the state makes the following radical claim: by standing on her semi-public back porch and speaking with the police, Ms. Gajewski transformed her home's curtilage into a public place, such that the police needed neither a warrant nor exigent circumstances to lawfully arrest her. Resp. Br. 15-21.

Case law dictates the opposite conclusion. It is well-settled that the curtilage of a home—like the home itself—is a constitutionally protected space. *See State v. Dumstrey*, 2016 WI 3, ¶¶22-23, 366 Wis. 2d 64, 873 N.W.2d 502. Thus, when police seek to arrest a person in the curtilage of her home, they need a warrant. *See id*. There is no other sensible way to read the past several decades of Fourth Amendment jurisprudence, as evidenced by the dearth of citations supporting the state's analysis.

Since law enforcement arrested Ms. Gajewski in the curtilage of her home *without* a warrant, her arrest is presumptively unreasonable. *Florida v. Jardines,* 569 U.S. 1, 6-7 (2013); *Dumstrey*, 2016 WI 3, ¶22. That is true regardless of whether the arrest was supported by probable cause (which it was not). *See* Appellant's Br. 16-17. Thus, the state now has the burden to prove that an exception to the warrant requirement applies. *See State v. Abbott*, 2020 WI App 25, ¶12, 392 Wis. 2d 232, 944 N.W.2d 8. It cannot meet that burden, and it hasn't even tried to do so. The evidence derived from Ms. Gajewski's unlawful arrest should therefore be suppressed.

B. Ms. Gajewski's back porch is curtilage protected by the Fourth Amendment. Thus, the police needed a warrant to lawfully arrest her there.

It is undisputed that Ms. Gajewski's back porch constitutes curtilage. *See* Resp. Br. 12. But without citing to any controlling law, the state argues that the

curtilage of Ms. Gajewski's home did not provide her with the full panoply of Fourth Amendment protections. *See* Resp. Br. 19.

There are three basic threads to its analysis. First, it draws a vague distinction between semi-public protected spaces, like a porch, and purely private protected spaces, like the interior of a home. Second, it implies (without arguing outright) that Ms. Gajewski consented to her own arrest by stepping onto her semi-public back porch and speaking with the police. And third, it argues that no exception to the warrant requirement was necessary for the police to arrest Ms. Gajewski on her back porch, as curtilage is entitled to Fourth Amendment protection only insofar as *searches* are concerned; warrantless *arrests* in a home's curtilage are just fine.

The state's reasoning does not comport with precedent.

1. Under the common-law trespassory test, a warrant was needed to search or seize Ms. Gajewski on her back porch.

Precedent establishes that a home's curtilage, including its porches, implicates the privacy and private-property interests served by the Fourth Amendment. *Jardines,* 569 U.S. at 7-11. Indeed, "the area 'immediately surrounding and associated with the home' … is 'part of the home itself'" for Fourth Amendment purposes. *Id.* at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

Curtilage thus passes the trespassory test, and a search or seizure conducted within it requires a warrant. *See Jardines*, 569 U.S. at 6-7.

As noted above, Ms. Gajewski's back porch is indisputably curtilage. Thus, even if she lacked a "reasonable expectation of privacy" under *Katz v. United States*, 389 U.S. 347, 351 (1967), the trespassory test dictates that her back porch was constitutionally protected. *Jardines*, 569 U.S. at 10-11. As appellate courts have repeatedly noted, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *United States v. Jones*, 565 U.S. 400, 409 (2012).

In *Dumstrey*, by contrast, the site of the challenged arrest failed both the *Katz* and trespassory tests. Dumstrey was arrested, without a warrant, in the parking garage under his apartment building. 2016 WI 3, ¶2. In assessing the lawfulness of his arrest, the Wisconsin Supreme Court asked "whether the parking garage … constitutes curtilage of Dumstrey's home," triggering the Fourth Amendment warrant requirement. *Id*., ¶3. Only after deciding the parking garage was *not* curtilage—and thus that it failed the trespassory test—did the court consider "whether Dumstrey harbors a reasonable expectation of privacy in the parking garage for some other reason, such that it [still] warrants Fourth Amendment protection." *Id*., ¶46. After conducting a *Katz* inquiry and determining Dumstrey had no reasonable expectation of privacy in his apartment building's

parking garage, the court held his arrest constitutional. *Id.*, ¶¶50-51.

Unlike in *Dumstrey*, here there is no dispute that Ms. Gajewski was in the curtilage of her home at the time of her warrantless arrest. *See* Resp. Br. 12. That, on its own, means the arrest was presumptively unreasonable. *Jones*, 565 U.S. at 411. The state's efforts at sidestepping this inescapable conclusion are in vain.

2. The fact that Ms. Gajewski's back porch is semi-public does not diminish the constitutional protections it's afforded as curtilage.

The state argues throughout its brief that Ms. Gajewski had no reasonable expectation of privacy on her back porch and thus that an arrest warrant was unnecessary. To reiterate, Ms. Gajewski's back porch is constitutionally-protected curtilage whether or not she has a reasonable expectation of privacy there. That the porch is semi-public—i.e., accessible to the public for some limited purposes—does not free law enforcement from their duty to obtain a warrant before entering it to make an arrest.

The dissent in *Dumstrey*, which the state cites twice, makes this point clear. That dissent concludes that Dumstrey's parking garage was in fact curtilage, despite its semi-public nature. *Id.*, ¶76. After all, curtilage is frequently publicly accessible—and yet there are limits to what the public can lawfully do within it. *Id.*, ¶¶87-88. For example, police, like any

other member of the public, may step onto a home's front porch to knock on the door. *Kentucky v. King*, 563 U.S. 452, 469-70 (2011). But an officer who knocks on a door cannot force the home's occupant to answer. *Id.* And if the occupant *does* "open the door and speak," she "need not allow the officers to enter … and may refuse to answer questions at any time." *Id.*

Stated differently, "[t]he scope of a license [to be on someone's property] … is limited not only to a particular area" (e.g., the front porch rather than inside the home) "but also to a specific purpose" (e.g., a consensual conversation rather than a forcible arrest). *See Jardines,* 569 U.S. at 9. Police were permitted to step onto Ms. Gajewski's porch to knock on her door. They were *not* permitted to step onto her porch to arrest her—absent a warrant.

In arguing otherwise, the state relies on *United States v. Santana*, 427 U.S. 38 (1976). *See* Resp. Br. 16-17. As noted in Ms. Gajewski's opening brief, *Santana* is both distinguishable and unhelpful on the curtilage issue. *See* Appellant's Br. 23 n.8.

Santana holds that the combination of probable cause, hot pursuit, and exigent circumstances (namely the "realistic expectation that any delay would result in destruction of evidence") justified law enforcement's warrantless entry into a woman's home to arrest her. 427 U.S. at 42-43. But here the police lacked probable cause, were not in hot pursuit, and faced no exigency. (The state disagrees only as to probable cause, which

this brief addresses later on.) Further, there is no curtilage analysis preceding *Santana*'s statement that the defendant was in a public place, for purposes of arrest, while standing in her front doorway. *Id*. at 42. Later cases, however, have clarified that the Fourth Amendment protects a home's curtilage just as it protects the home itself. *See, e.g.*, *Jardines,* 596 U.S. at 6-7. These cases control.

In sum, whether Ms. Gajewski's back porch is semi-public or not, it is constitutionally-protected curtilage. The police needed a warrant before stepping onto it to arrest her.

3. The fact that Ms. Gajewski stepped onto her back porch to speak with the police does not mean she consented to her arrest and does not mean her back porch became a public space.

The state repeatedly emphasizes Ms. Gajewski's decision to stand on her back porch and speak, albeit briefly, with the officers in her yard. According to the state, this decision meant the law enforcement no longer needed a warrant before joining Ms. Gajewski on the porch, without her consent, to conduct a search or seizure. *See* Resp. Br. 19-20. Accepting this contention would create a whole new exception to the Fourth Amendment warrant requirement.

Unless, of course, the state means to say that Ms. Gajewski *consented* to being arrested on her back porch—merely by standing on it and answering the

officers' questions. Consent, after all, is a longstanding exception to the warrant requirement. *See State v. Johnston*, 184 Wis. 2d 794, 806-807, 518 N.W.2d 759 (1994). But it would strain credulity to argue that Ms. Gajewski consented to her arrest, given her urgent effort to retreat into her home and the force the officers had to use. (*See* 53:13, 25-26, 31; App. 113, 125-26, 131). In any case, there is no authority to support the notion that a person's voluntary presence in the curtilage of her home means she consents to be searched or seized there. Such a holding would limit the protection of a home's curtilage to moments in which the home's occupant is absent. That is not how the Fourth Amendment works.

If it isn't arguing consent, then what the state must be saying is that Ms. Gajewski, by standing on her back porch and talking to police, turned the curtilage of her home into a public space. Again, there is no authority to support this radical notion—and accepting it would defy the trespassory test.

Rather than flouting precedent and establishing a novel exception to the warrant requirement, this Court should recognize that the police needed a warrant to arrest Ms. Gajewski on her back porch. A home's curtilage is curtilage whether the home's occupant is present or not.

4. Both warrantless arrests and warrantless searches are presumed unreasonable if conducted in a home's curtilage.

The state asks this Court to depart from federal and state precedent and hold that, within a home's curtilage, searches and seizures should be treated differently under the Fourth Amendment. *See* Resp. Br. 19-20. It cites no controlling law supporting such disparate treatment, as there is none. It simply proposes an analysis this Court cannot, consistent with case law, follow.

For this piece of its argument, the state relies primarily on the concurring opinion in *Dumstrey*, which argues that appellate courts have erred in requiring police to get a warrant before entering curtilage to make an arrest. 359 Wis. 2d 624, ¶58 (Prosser, J., concurring). Notably, just one justice joined that concurrence, and neither the writer nor the joiner remains on the court. But regardless of whether the *Dumstrey* concurrence would garner any votes today, it was not followed by a majority of the court when the case was decided. This Court cannot adopt a constitutional principle the state supreme court has rejected. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

The state also cites a footnote in the majority opinion in *Dumstrey*. *See* Resp. Br. 19. The footnote acknowledges that *Santana* is difficult to reconcile with the last few decades of curtilage cases.

See Dumstrey, 2016 WI 3, ¶31 n.7. (citing *Jardines,* 569 U.S. at 6-7, and *State v. Walker*, 154 Wis. 2d 158, 184 n.16, 453 N.W.2d 127 (1990), *abrogated on other grounds by State v. Felix*, 2012 WI 36, ¶42, 339 Wis. 2d 670, 811 N.W.2d 775). But, because "Dumstrey's case does not present the proper factual scenario," the court leaves the task of resolving that difficulty for another day. *Id.*

Until the federal or state supreme court tackles the tension between *Santana* and the curtilage cases, this Court is bound to grant curtilage full Fourth Amendment protection. Nothing (other than the state's hope for a different rule in the future) suggests Ms. Gajewski's arrest could be lawful when, as the state all but concedes, a search of her person or porch would have been unconstitutional.

C. The police did not have probable cause plus exigent circumstances to arrest Ms. Gajewski, without a warrant, in the curtilage of her home.

The police were not in hot pursuit of Ms. Gajewski nor acting pursuant to any exigent circumstance when they stepped onto her porch, grabbed her arm, prevented her from entering her home, and arrested her. As a result, Ms. Gajewski's arrest was unlawful. Since that is true even if the police had probable cause, this Court need not reach the probable cause question. But if it chooses to, it should reject the state's claim that what Goetsch

knew, but did not convey to Stroik, gave Stroik probable cause to arrest Ms. Gajewski.

As discussed at length in Ms. Gajewski's opening brief, the police did not have probable cause to arrest her for either operating while intoxicated or obstruction of justice. *See* Appellant's Br. 14-16. When Stroik made the arrest, he was unaware that Goetsch had seen Ms. Gajewski driving earlier in the evening. *See* Resp. Br. 23. Thus, unlike Goetsch, Stroik didn't know whether Ms. Gajewski's statement that she had not been driving was true. But—critically—the state says the collective knowledge doctrine means Stroik had probable cause to arrest her anyway. *See* Resp. Br. 24.

The state misunderstands the law. The collective knowledge doctrine permits an officer with knowledge of facts that establish probable cause "to direct a second officer without such knowledge" to perform a search or seizure. *State v. Pickens*, 2010 WI App 5, ¶12, 323 Wis. 2d 226, 779 N.W.2d 1. It does not mean every officer has probable cause to arrest as soon as one officer does.

Stroik was not acting under directions from Goetsch when he arrested Ms. Gajewski. And since Stroik didn't know Goestch believed he saw Ms. Gajewski driving that night, that belief does not affect the legality of Stroik's actions. In short, what Stroik knew was insufficient to justify an arrest, and what Goetsch knew is irrelevant.

Thus, Ms. Gajewski's arrest was illegal not just because it was warrantless and occurred in the curtilage of her home, and not just because it was unsupported by any exception to the warrant requirement, but also because it was unsupported by probable cause. For all of these reasons, this Court should vacate Ms. Gajewski's conviction and remand this case with instructions to suppress the evidence stemming from her unlawful arrest.

CONCLUSION

Kallie M. Gajewski respectfully requests that this Court vacate her judgment of conviction and remand the case to the circuit court with instructions to suppress the evidence stemming from her unlawful arrest.

Dated this 21st day of September, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,599 words.

Dated this 21st day of September, 2021.

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