STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP1014 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER D. WILSON,

Defendant-Appellant.

On Appeal from an Oral Order Denying Defendant's Suppression Motion Entered in the Milwaukee County Circuit Court, the Honorable Jean M. Kies, Presiding, and a Judgment of Conviction, the Honorable David Borowski, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Two police officers entered an area of Mr. Wilson's home that is protected by the Fourth Amendment. They did not have implied permission to be there because the area they entered was not held open to the public and did not lead to the front door of the house. Any evidence they obtained while there or as a result of having entered the fenced-in backyard is inadmissible. That includes their conversation with Mr. Wilson and his subsequent arrest. At the time of entry, the officers may have had reasonable suspicion that Mr. Wilson had committed a driving offense and, potentially, burglary—a jailable offense—but they did not have *probable cause* to arrest him for either of these offenses. Their arrest of Mr. Wilson was not sufficiently attenuated from their unlawful entry into Mr. Wilson's backyard, and the state did not develop an attenuation argument in Respondent's Brief. Instead, Respondent argued that officers conducted a permissible knock-and-talk in an area that was open to the public, that the officers had probable cause to arrest Mr. Wilson for a number of jailable offenses at the time they entered his backyard, and that they continuously pursued Mr. Wilson from "the scene of the crime." For the reasons stated below, all of the argument offered by Respondent are incorrect.

I. The police violated Mr. Wilson's rights when they entered an area of his home that was protected by the Fourth Amendment and was not implicitly held open to the public.

Relying on *State v. Edgeberg*, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994), Respondent claims that the officer in this case had "implied permission" to enter Mr. Wilson's backyard in order to conduct a "knock-and-talk" as long as he remained on the pathway between the gate and the garage's side door. (Respondent's Br. at 6). This is a false analogy. The "implied permission" discussed in *Edgeberg* is restricted to those "areas of the curtilage which are impliedly open to use by the public." *Edgeberg*, 188 Wis. 2d at 347.

In *Edgeberg*, the area in question was a screened-in front porch with an "unlocked screen door presenting a view of the inner front door." *Id.* at 346-47. When the officer approached the home, he gleaned from the "traffic patterns on the lawn" that the door in question was "the main entrance to the house." *Id.* at 343. He was correct. Edgeberg's father confirmed that the wooden door inside the porch was the house's front door. *Id.* The officer testified that "in the course of his duties he had encountered [similar] porches" and that "it was community practice for visitors to knock on the main front door of [such] houses." *Id.* His general procedure was as follows:

> [I]f he can see through the exterior door, and can see another door that appears to lead into the living room, and if that interior door is open, he knocks on the outside door; if the exterior door is closed and it is "obviously a porch type area," he enters the porch and knocks on the door that appears to lead to the living area.

Edgeberg, 188 Wis. 2d at 344.

The officers who entered Mr. Wilson's backyard were under no illusion they were approaching the front door of a home. Although they did knock on the side door of Mr. Wilson's garage, their path to the garage's side door was not "impliedly open to use by the public." *Edgeberg*, 188 Wis. 2d at 347. There is no evidence in the record that the concrete path inside Mr. Wilson's fenced-in backyard is open to the public—the existence of the fence itself strongly implies otherwise.

Nevertheless, Respondent presented another version of this same argument later, saying "Officer Seifert did what any private citizen has the implicit license to do, approaching the home through an accessible path, knocking, and waiting to be received." (Respondent's Br. at 16). This time, it cited *Florida v. Jardines*, 569 U.S. 1 (2013). As in *Edgeberg*, the implicit license discussed in *Jardines* was limited to those areas implicitly open to the public and not those areas enclosed by a privacy fence:

> A license may be implied from the habits of the country, notwithstanding the strict rule of the

> English common law as to entry upon a close. We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. … Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.

Florida v. Jardines, 569 U.S. at 8-9 (internal citations omitted).

Clearly, the court's conception of an implied license refers not to "some kind of path" as Respondent argues but specifically to a path that "permits the visitor to approach the home by the front path." (Respondent's Br. at 10; *Jardines*, 569 U.S. at 8). The area the officers intruded upon was protected by the Fourth Amendment, (Petitioner's Br. at 5-10), and there were no special factors mitigating that protection. Simply put, the cops were not allowed to enter Mr. Wilson's fenced-in backyard in order to confront him inside his own garage without exigent circumstances.

II. The exigent circumstance of hot pursuit was not present because the officers did not have probable cause to consider Mr. Wilson a fleeing suspect.

"There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee." *State v. Weber*, 2016 WI 96, ¶ 18, 372 Wis. 2d 202, 887 N.W.2d 554. However, "[b]efore the government may invade the sanctity of the home without a warrant, the government must demonstrate not only probable cause but also exigent circumstances that overcome the presumption of unreasonableness." *State v. Larson*, 2003 WI App 150, ¶ 9, 266 Wis. 2d 236, 668 N.W.2d 338.

Thus, the "hot pursuit" of a suspect must be based not on a hunch (the standard for reasonable suspicion) but on some quantum of evidence commensurate with probable cause. To determine if probable cause exists, the court must consider whether "the totality of the circumstances within the arresting officer's knowledge at the time of [entry] would lead a reasonable police officer to believe ... that the defendant" had committed a jailable offense. *See Larson*, 266 Wis. 2d 236, ¶ 16 (analyzing the officer's knowledge at the moment he committed the trespassory act, "put his foot inside the doorway," rather than at the time of arrest). The analysis in the

present case is limited to Officer Seifert's knowledge base at the time he entered Mr. Wilson's fenced-in backyard.

The officers cannot justify entry based on the suspicion of operating while intoxicated because they did not know whether Mr. Wilson had any prior convictions and lacked probable cause to believe it was a jailable offense; moreover, they did not have sufficient evidence that he was intoxicated or that he had even ingested any alcohol or drugs. (Petitioner's Br. at 11-12).

Respondent now asserts that the officers may have entered based on probable cause to arrest for second degree recklessly endangering safety, contrary to Wis. Stat. § 941.30. (Respondent's Br. at 12). In order to prove recklessly endangering safety, the state would have to prove that Mr. Wilson (1) endangered the safety of another human being, and (2) that he did so by criminally reckless conduct. *State v. Johnson*, 184 Wis. 2d 324, 346, 516 N.W.2d 463 (Ct. App. 1994). When asked what he knew about the driving, Officer Seifert said the caller told him the following:

> The vehicle had been traveling eastbound on Rawson Avenue from approximately 27th Street, which is about a three-and-a-half-mile distance. Over the course of the traveling the caller observed it all over the roadway, if I remember correctly, changing speeds, just driving very erratically. The caller then observed that vehicle pull into where I eventually found it.

(42:13).

The officer's description of the driving does not amount to "criminally reckless conduct." Perhaps even more importantly, there is no allegation in the record that Mr. Wilson "endangered the safety of another human being." There's no claim that he shared the road with any vehicle other than the caller, who appears to have followed Mr. Wilson's vehicle from a safe distance for three and a half miles.

Other evidence supports the conclusion that Officer Seifert did not have probable cause to arrest Mr. Wilson for recklessly endangering safety at the time he entered Mr. Wilson's fenced-in backyard. Officer Seifert did not cite recklessly endangering safety as a crime that he was investigating at the time of entry, (42:13), and we know that Mr. Wilson was not charged with that offense. Therefore, there is insufficient evidence to support an arrest for recklessly endangering safety based on this information, and the police officers could not have entered the Mr. Wilson's home to arrest him for recklessly endangering safety based on the evidence before them at the time of entry.

Respondent also claims Officer Seifert had probable cause to arrest for Mr. Wilson for burglary or trespassing before entering the backyard. (Respondent's Br. at 11). Although the officers arguably had reasonable suspicion to arrest Mr. Wilson for burglary (or trespassing), they did not

have probable cause to arrest him for burglary before entering the backyard. "Probable cause is the *sine qua non* of a lawful arrest." *State v. Mitchell*, 167 Wis. 2d 672, 681, 482 N.W.2d 364 (1992). It refers to "the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime." *Id*. Probable cause requires more than a possibility or suspicion that the defendant committed a crime but less than evidence beyond a reasonable doubt. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387, 392 (1999).

At the time of the officers' entry, there was no residential complainant, and even though Mr. Wilson's car was not registered to that address, the officers had no knowledge that Mr. Wilson was not allowed to be there. In fact, Mr. Wilson *was* allowed to be there—although, of course, the officers did not know that at the time either. Aside from the knowledge that the vehicle was not registered to that home, Officer Seifert relied on the fact that Mr. Wilson's car "was left running," that "the tailgate was left open," and that Mr. Wilson had climbed onto a garbage can to open a latch that clearly opens only from the outside. (42:14).

Officer Seifert seemed entirely incurious about whether Mr. Wilson's means of entering the backyard tended to prove that he was not allowed to be there. A quick look at the latch and door jamb shows that there is no way to manipulate the latch from the outside of the fence. (50 at 00:26, App. 180). Officer Seifert did not testify that he manipulated the gate

latch or otherwise tried to figure out how the door opens, nor does his body cam video show him doing that.

Instead, Officer Seifert rushed inside to investigate further. This, too, is a telling sequence of events. Officer Seifert claimed that he had probable cause to arrest Mr. Wilson for burglary before he entered the backyard, but rather than arresting the would-be burglar in the middle of the act, he chose to investigate further. He asked questions, made observations, and learned that many of the assumptions he had made were wrong. The fact of his continued investigation does not factor into what he knew at the time of entry, but it does tend to show that he entered with an investigative purpose rather than in order to arrest a fleeing suspect. Based on the totality of Officer Seifert's knowledge at the time of entry, he did not have probable cause to arrest Mr. Wilson and should not have entered a protected area of his home.

III. Even if the government had probable cause to arrest Mr. Wilson at the time of entry, this is not a hot pursuit case because it does not involve pursuit of a fleeing suspect.

Even if this court finds that there exists probable cause to arrest Mr. Wilson for burglary at the time of the officers' entry into a protected area of his home, this court must reverse the circuit court's decision because Respondent "did not establish the

existence of exigent circumstances." *State v. Larson*, 2003 WI App 150, ¶ 19, 266 Wis. 2d 236, 668 N.W.2d 338.

This case is a hybrid of sorts. The "pursuit" Respondent points to relates to a driving offense. The caller followed the driver (Mr. Wilson) from the public highway to his ultimate destination. If the driver had entered his home through the front door rather than the back, the officers could have knocked on the front door. If nobody answered the door, they could not have entered the home to arrest the driver.

The police also received word that somebody who had been driving erratically parked on a parking slab parallel to a garage, entered the backyard of the house by unlatching the fence from the outside, and left the car running with its tailgate up. The police responding to this incident did not pursue the driver. They arrived at what they thought might be an ongoing crime, but they cannot be said to have pursued the driver there. If they were concerned the threat to someone's safety, they may have entered the backyard in order to make sure nobody would get hurt.

However, that is not the exigent circumstance cited by Respondent or by the officers. More importantly, the officers did not express any special concern about their safety or anyone else's before entering the home: they did not articulate any concern regarding safety until after they patted Mr. Wilson down. (42:16). When they knocked on the side

door of the garage, they were calm and inquisitive. (50 at 00:50-02:10).

The officers showed up at Mr. Wilson's house, and armed with the caller's allegations and their own observations of the scene, they entered a protected area of his house in order to investigate whether Mr. Wilson had committed any crimes. They did not enter in hot pursuit of a person whom they had probable cause to suspect had committed a jailable offense; they entered to investigate whether a crime was happening or had happened. They acted unlawfully in doing so because they did not have a warrant or probable cause to enter a protected area of Mr. Wilson's home. All evidence gathered as a result of their unlawful entry, including their entire interaction with Mr. Wilson, should have been suppressed by the circuit court.

CONCLUSION

For the reasons stated above and in Appellant's initial brief, Mr. Wilson asks the court to overturn the circuit court's decision denying Mr. Wilson's suppression motion, to vacate the judgment of conviction, and to dismiss the charges against Mr. Wilson with prejudice.

Dated this 22nd day of January, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,561 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 22nd day of January, 2021.

Signed:

Electronically signed by Jorge R. Fragoso
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