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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1014-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER D. WILSON,

Defendant-Appellant-Petitioner.

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.

PETITION FOR REVIEW

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ISSUE PRESENTED

1. Did the police have implicit license to enter the backyard of Mr. Wilson's home through a gated privacy fence?

   The circuit court did not answer.

   The Court of Appeals answered "yes."

CRITERIA FOR REVIEW

Presently, no Wisconsin case law addresses the scope of the "knock and talk" exception to the Fourth Amendment's warrant requirement in situations in which police enter through the backyard of a home. As a result, the Court of Appeals' decision in this case relies heavily on federal case law, specifically *Alvarez v. Montgomery Cnty.*, 147 F.3d 354 (4th Cir. 1998) and *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993). However, the federal case law relied on by the Court of Appeals is of no precedential value in Wisconsin and, further, does not reflect a consensus among federal circuit courts. Additionally, as will be discussed below, the Court of Appeals' decision extends the "knock and talk" exception beyond what the federal cases it cites justify.

Accordingly, review is warranted because this case presents real and significant questions of federal and state constitutional law. Wis. Stat. 809.62(1r)(a).

Furthermore, a decision by this Court will help develop and clarify the law. Wis. Stat. 809.62(1r)(c).

STATEMENT OF FACTS

Mr. Wilson was charged with one count of operating a motor vehicle while intoxicated as a 2nd offense (Count 1), one count of endangering safety by use of a dangerous weapon while under the influence of an intoxicant (Count 2), and one count of possession of a prescription drug without a prescription (Count 3). (1:2-3). All three charges were based on an incident which took place on January 16, 2017. (1:2-4). Thereafter, Mr. Wilson filed a motion to suppress all evidence derived from his unlawful seizure on the date of the offense. (8).

Suppression Hearing Proceedings:

Evidence presented at the motion hearing established that, on January 16, 2017, Mr. Wilson was alone in his garage when the police knocked on the garage's side door. (43:9; App. 119). The garage was detached from the main house, and the only access to the side door was through the backyard, which was enclosed by a tall, solid privacy fence. (42:14, 21; App. 146, 153). The police parked in the alley behind Mr. Wilson's home, entered his fenced-in backyard, knocked on the side door of his garage, and asked him nine questions about his driving and drug or alcohol use before asking him if he lived at that house. (50 at 00:00 to 02:05).

At the time of their contact with him, the overhead door was shut, and Mr. Wilson's SUV sat idling just outside of the garage door, parked in a way that did not obstruct traffic in the alleyway. (50 at 17:30; App. 189). The police officers at the scene initially responded to the site of Mr. Wilson's car based on a reckless driving tip. (42:17; App. 149). The caller told the officer that the car was "all over the roadway … changing speeds" and "driving very erratically." (42:13; App. 145). The caller followed the car to its parking spot in the alley behind 1426 Missouri Avenue where a white male wearing bright orange shoes exited the car, reached over the fence to unlatch the door, and then entered the backyard. (42:13-14; App. 145-46; 43:4-5; App. 114-15). The officer ran the car's plates and saw that it listed an address in Franklin. (42:12; App. 144). The officer testified that, "[a]t that point in time" he believed "that this was possibly an OWI and possibly a burglary," and based on that dual possibility, he decided it was necessary to enter the fenced-in backyard. (42:14; App. 146).

The officer knocked on the side door to the garage and spoke with Mr. Wilson. He told Mr. Wilson that someone had reported him for "driving kinda' goofy" and "[blowing] through a red light." (50 at 00:50-02:10). The officer asked Mr. Wilson if he had had anything to drink, if he had smoked marijuana, and if he had taken any pills or heroin, before asking him whether he lived at that address, to which Mr. Wilson answered "yes." (*Id.*).

The two spoke further about Mr. Wilson's driving, and after about another minute, Mr. Wilson led the officer back to his car to retrieve his ID card. (50 at 03:00 to 03:20). Once at the car, Mr. Wilson attempted to open the passenger side door, which was locked, and "[a]t that point in time, [the officer] believed that Mr. Wilson was possibly impaired." (42:16; App. 148). The officer saw a handgun inside the car and patted Mr. Wilson down. (43:7; App. 117). During the pat down, Mr. Wilson told the officer that he had been driving the SUV and the officers placed Mr. Wilson under arrest for operating while intoxicated. (43:7; App. 117).

The circuit court denied Mr. Wilson's suppression motion. (43). It concluded that the warrantless entry into Mr. Wilson's backyard was "justified by exigent circumstances of a hot pursuit of a fleeing suspect who had committed jailable offenses." (43:8; App. 118). According to the circuit court, "[t]he officer and his partner performed a limited entry into the backyard area and knocked on the garage door" in order to "prevent the continued flight under the circumstances, and the officer's actions were constitutionally reasonable." (43:9; App. 119). The court found that the officers' actions were proper and that "there were exigent circumstances that suggest that Mr. Wilson was trying to evade capture." (43:19; App. 129). The court went on to say, "I can't reward you for jumping over the fence." (43:19; App. 129).

Guilty Pleas and Sentencing:

On May 23, 2019, Mr. Wilson pleaded guilty to Counts 1 and 2; Count 3 was dismissed and read-in. (24:1-2; App. 109-110). He was sentenced by the Honorable David Borowski to ninety days in jail on count one and four months in jail on count two, concurrent with one another. (24:1-2; App. 109-110). He filed a timely notice of intent. (25).

Appellate Proceedings:

Mr. Wilson appealed and the Court of Appeals affirmed. *State v. Wilson*, No. 2020AP1014-CR, unpublished slip op. at ¶ 1 (May 11, 2021). (App. 101-102). The court did not address whether probable cause and exigent circumstances justified entry into the backyard. Instead, the court adopted an alternative argument raised by the State that the police had conducted a lawful "knock and talk" investigation. *Id.* at ¶ 18 (App. 105-106). In sum, the court concluded that the police conducted a permissible "knock and talk" for the following reasons:

> Under the specific facts of the case, an "implicit license" existed for the officers to enter the backyard in the middle of the day from the alley, walk to the side garage door, and knock. Although the backyard was surrounded by a fence, the gate was open….
>
> There was reason to believe that someone was in the backyard. Prior to entering the backyard, Officer Siefert spoke to the 911 caller who stated

> that the driver … had opened the fence and entered the backyard.

Id. at ¶¶ 23-24 (App. 107).

ARGUMENT

I. Police violated Mr. Wilson's Fourth Amendment rights because they did not have implicit license to enter his backyard through a gated privacy fence.

A. General principles of law.

The Fourth Amendment to the United States Constitution guarantees people the right to be free from unreasonable searches and seizures. The physical entry of the home "is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (internal quotation omitted). Among other things, the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to arrest the suspect, absent probable cause and exigent circumstances. *Payton*, 445 U.S. at 576.

Additionally, the Fourth Amendment protections which apply to the home attach to "the land immediately surrounding and associated with the home." *Oliver v. United States*, 466 U.S. 170, 180 (1984). This area is referred to as the curtilage. The Fourth Amendment prohibits a warrantless entry into the curtilage of a home unless it is supported by

probable cause and exigent circumstances. *State v. Weber*, 2016 WI 96, ¶ 19, 372 Wis. 2d 202, 887 N.W.2d 554; *State v. Dumstrey*, 2016 WI 3, ¶ 21, 366 Wis. 2d 64, 873 N.W.2d 502. Where an unlawful search or seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

Notwithstanding the above, the United States Supreme Court has recognized the constitutionality of the "knock and talk" exception to the Fourth Amendment's warrant requirement. *Florida v. Jardines*, 569 U.S. 1 (2013). The Court explained that an "implicit license" exists that allows visitors to "approach the home *by the front path*, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8 (emphasis added). Accordingly, a police officer without a warrant may approach a home and knock because that is no more than what a private citizen may do. *Id.*; *see also, State v. Edgeberg*, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994) (observing that police may enter areas of the curtilage that are impliedly open to use by the public).

B. Police violated Mr. Wilson's rights when they entered the backyard of his home through a gated privacy fence and without any illusion that they were approaching the front door of the home.

The Court of Appeals concluded that implicit license existed for police to enter Mr. Wilson's backyard from the alley, walk to the side garage door, and knock. In support, the court stated the following:

> Although the backyard was surrounded by a fence, the gate was open. … As a result, there is no clear indication that visitors were intended to be excluded from entering. *See Edgeberg*, 188 Wis. 2d at 346-47 (distinguishing the entry of a porch with an unlocked screen door leading to an interior front door from the entry of a locked hallway that was only accessible to a limited group).
>
> Moreover, there was reason to believe that someone was in the backyard. Prior to entering the backyard, Officer Siefert spoke to the 911 caller who stated that the driver … had opened the fence and entered the backyard.

Slip Op., ¶¶23-24 (App. 107).

Contrary to the court's reasoning, *Edgeberg* does not support a finding that police lawfully entered Mr. Wilson's backyard. 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." *Edgeberg*, 188 Wis. 2d 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.

Id. at 344.

Mr. Wilson's case presents a much different factual scenario than that described in *Edgeberg*. First, there is no evidence in the record that it was common practice for members of the public to enter Mr. Wilson's residence by the manner in which police entered. That is, there was no evidence that it was common practice for members of the public to enter the homes of others through backyards enclosed by tall, solid privacy fences. Regardless of the fact that the gate to the fence happened to be open at the moment police arrived, the existence of a privacy fence surrounding the perimeter of the backyard strongly implied that it was not open to the public. Second,

unlike in *Edgeberg*, the officers who entered Mr. Wilson's backyard were under no illusion they were approaching the front door of the home.

There is no case law in Wisconsin extending the Fourth Amendment's "knock and talk" exception to situations in which police enter through the backyard of a residence. As a result, the Court of Appeals opinion relies heavily on federal case law:

> [C]ourts have recognized that there are instances in which officers are justified in approaching by an alternative or back entryway. *See, e.g., Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 356 (4th Cir. 1998) (stating that the Fourth Amendment does not prohibit police from entering into a backyard when circumstances indicate they might find the homeowner there); *United States v. Garcia*, 997 F.2d 1273, 1279-80 (9th Cir. 1993) (stating that "[i]f the front and back of a residence are readily accessible from a public place, like the driveway and parking area ... the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling").

Slip Op., ¶22 (App. 106-107).

The federal case law relied on by the Court of Appeals is of no precedential value in Wisconsin and, further, does not reflect a consensus among federal circuit courts. *See Carman v. Carroll*, 749 F.3d 192, 199 (3d Cir. 2014) ("The 'knock and talk' exception requires that police officers begin their encounter at the front door, where they have an implied invitation

to go."), *rev'd on other grounds, Carman v. Carroll*, 574 U.S. 13 (2014). Additionally, the federal cases cited by the Court of Appeals do not support a finding that police lawfully entered Mr. Wilson's backyard.

In *Alvarez*, the defendant invited approximately 70-75 people to a party in which guests congregated on the back patio and in an adjacent recreation room. *Alvarez*, 147 F.3d at 356. Following a complaint of an underage drinking party, police arrived at the front of the defendant's home and found a sign which read "Party in Back" with an arrow pointing towards the backyard, whereupon officers entered the backyard. *Id.* at 356-357. The court held that there was no unlawful entry into the backyard because "in light of the sign … it surely was reasonable for the officers to proceed there directly as part of their effort to speak with the party's host." *Id.* at 358-359.

In *Garcia*, police entered the back porch of the defendant's apartment and peered through a screened door. *Garcia*, 997 F.2d at 1276. The court noted that, at the time officers entered the back porch area, they had a subjective good faith belief that they were actually approaching the front door of the apartment. *Id.* at 1279. Accordingly, the court found that the police did not violate the Fourth Amendment because they reasonably believed they were approaching the principal entrance of the apartment. *Id.* at 1279-1280.

Mr. Wilson's case is clearly distinct from *Alvarez* and *Garcia*. Unlike in *Alvarez*, there was no sign directing police to Mr. Wilson's backyard and no

indication that police would be unable to speak with anyone if they knocked on his front door. Unlike in *Garcia*, police were under no illusion that they were approaching the front door of the house. Furthermore, unlike in both *Alvarez* and *Garcia*, the record reflects that Mr. Wilson's backyard was enclosed by a tall, solid privacy fence. (42:14, 21; App. 146, 153). Consequently, the analogies the Court of Appeals draws to federal case law do not support a finding that police lawfully entered the curtilage of Mr. Wilson's home.

CONCLUSION

Mr. Wilson asks that this Court grant review, reverse the decision of the Court of Appeals, and order the suppression of all evidence derived from the unlawful seizure that occurred when police entered the curtilage of his home.

Dated this 7th day of June, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,684 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 7th day of June, 2021.

Signed:

DAVID MALKUS
Assistant State Public Defender

APPENDIX

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