STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2021AP485-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BROOKE K. EDER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Barron County Circuit Court,
the Honorable James C. Babler, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

Office of the State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-2124
susensd@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

This case involves two search warrants.

The first warrant authorized police to enter Brooke Eder's apartment to find a man named Joshua Estes. Police executed that warrant and arrested Estes. Then, rather than leave, they conducted a nonconsensual warrantless search of the basement of Eder's apartment building, finding drugs and drug paraphernalia.

Based on the evidence discovered in Eder's basement, police got a second search warrant. It authorized them to search the basement (which they'd already done) and Eder's bedroom (where they found more drugs).

In two separate motions, Eder asked the circuit court to suppress the evidence found in the basement of her apartment building and in her bedroom. The circuit court denied her motions.

1. Was the first search warrant defective because the affidavit failed to state probable cause?

The circuit court held that affidavit to the initial search warrant established probable cause.

2. Did Eder have standing to challenge the constitutionality of the warrantless search of the basement under the Fourth Amendment?

The circuit court held that Eder did not have standing because she did not have a reasonable expectation of privacy in the basement.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Eder does not request oral argument or publication. The issues presented are governed by well-established legal principles and the parties can fully address them in the briefs.

STATEMENT OF THE CASE AND FACTS

On April 25, 2019, Detective Michael Carroll of the Barron County Sheriff's Department executed two separate search warrants at Brooke Eder's apartment in the Village of Brill, WI. (R.22:4-8; App. 14-18). The first warrant identified Joshua Estes as the object of the search. (R.21:1; App. 4). After entering the apartment and taking Estes into custody, law enforcement officers entered and searched the basement of the apartment building. (R.22:4; App. 14). While walking through the basement, Detective Carroll discovered suspected methamphetamine, a digital scale, and paraphernalia on a table in an area of the basement that was set up as a small living room. (R.1:2).

That same day, based on his discovery of suspected methamphetamine in the basement of Eder's apartment building, Detective Carroll obtained

a second search warrant authorizing him to search Eder's apartment and the basement. (R.1:2) The officers immediately executed the second warrant and discovered suspected methamphetamine in a jewelry box in Eder's bedroom. (R.1:3).

The State filed joined charges against Eder and Estes in a single criminal complaint. (R.1). The State charged Estes with possession with intent to deliver methamphetamine (count 1) and possession of drug paraphernalia (count 2), and Eder with possession of methamphetamine (count 3). (R.1:1-2).

Eder later filed the first of two motions to suppress. (R.20). She argued that the first search warrant was faulty because it lacked information sufficient to establish probable cause. She also argued that the court should suppress the evidence discovered in her bedroom because it was the fruit of the poisonous tree: law enforcement obtained it while executing the second search warrant, which resulted from both the faulty first warrant and an unlawful search of her apartment building's basement. (R.20).

The circuit court held a non-evidentiary hearing on Eder's first motion to suppress. The court determined that the purpose of the hearing was to review the first search warrant to determine whether there was probable cause. (R.35:3-4; App. 21-22). Eder argued that the information in the affidavit was stale and—even if it were not stale—did not establish probable cause. (R.35:9-11, 13; App. 27-29, 31). The State conceded—and the court held—that the affidavit

for the first warrant did not authorize a search of the basement. (R.35:23-24; App. 41-42).

At the hearing, the court made several factual findings related to the first warrant. It found that Eder receives her mail at the residence listed in the first search warrant. (R.35:14; App. 32). The county "has a system indicating that" the address in the first warrant is Estes's address. (R.35:14; App. 32). Estes was prohibited from being at the address listed in the first warrant because of a CPS agreement (R.35:15; App. 33). Officers saw Estes outside the residence listed in the search warrant five days before the court issued first warrant. (R.35:14-15; App. 32-33).

The circuit court held that the order prohibiting Estes from being at the address listed in the first warrant made it less likely that he would be there. (R.35:13-14; App. 31-32). The circuit court did not consider the information in the paragraphs 12 and 14 of the affidavit related to uncorroborated statements of a confidential informant. (R.35:19-20, 30; App. 37-38, 48). Ultimately the circuit court found that the affidavit was enough to establish probable cause that the residence listed in the affidavit was Estes's residence, but it left open whether the staleness of the information negated probable cause. (R.35:14-16; App. 32-34).

The circuit court asked the parties to brief the issue of whether the information in the affidavit for the first search warrant was stale. (R.35:25; App. 43). Later, it issued a written decision denying Eder's first

motion to suppress because the affidavit contained probable cause and that the information in the affidavit was not stale. (R.29:1-3; App. 50-52). The court found that it was reasonable to believe that Estes would be at the property described in the first search warrant "due to an ongoing relationship with Ms. Eder" and because officers saw Estes at the address on April 19, 2019. (R.29:3; App. 52). Without reaching the question of whether the warrantless search of the basement was valid, the court held that "because the first search warrant was valid, there is no basis to suppress the second search warrant." (R.29:3; App. 52).

Eder then filed a second motion to suppress. She argued that the court should suppress the evidence obtained in her basement and bedroom because the second warrant contained information tainted by the warrantless search of the basement. (R.33). The State responded with a letter to the court requesting a hearing on whether Eder and Estes had standing to challenge the search of the basement. (R.34).

The court held an evidentiary hearing on the question of standing. The court heard testimony from Estes, Eder, Mr. Johnson (the main floor tenant), and Mr. Smekar (the landlord/owner). (R.48; App. 53-110). Based on the testimony, the parties agreed to submit their arguments in writing. (R.48:54; App. 106). After the parties briefed the issue, they reconvened for another hearing on standing, and the court delivered an oral ruling.

While there was some conflicting testimony, the court made several findings of fact. It found that the apartment building had three units but tenants only occupied two units when the court issued the warrants here. (R.65:9; App. 119). Estes and Eder rented one of the upstairs units from Smekar, the owner. (R.65:8; App. 118). Johnson rented the main floor unit and the basement was part of his lease. (R.65:9; App. 119).

As to the basement, the court found that Smekar and Johnson allowed Eder and Estes to use the basement. (R.65:9; App. 119). Estes and Eder paid rent so they could use the basement and used it regularly for storage and for Estes to work on projects. (R.65: 9-11; App. 119-21). Estes put a lock on the outside door to the basement, locked it, and gave one his two keys to Johnson. (R.65:9; App. 119). Johnson had access to the basement through his apartment but did not regularly use the basement because it was wet. (R.65:11; App. 121).

Based on those facts, the court denied Eder's motion to suppress based on a lack of standing. (R.65:13; App. 123). The court applied a two-prong test set out in a long line of cases. On the first prong, the court held that Eder had a subjective expectation of privacy in the basement area because they used it regularly, had permission, and put a lock on the door to exclude others. (R.65:10-11; App. 120-21).

The court next analyzed the six factors of the second prong of the test and held that Eder's subjective expectation of privacy was not reasonable. (R.65:

11-13; App. 121-23). First, the court held that Estes and Eder met four of the six factors. The court held that they had a property interest in the basement, they were legitimately on the premises, they took precautions to seek privacy in the basement, and they used the basement for a private use. (R.65:11-12; App. 121-22).

Next, the court held that Estes and Eder did not have complete dominion and control and a right to exclude others. While Estes and Eder did exclude others from the basement, the court held that Johnson had access and was the only person who had a right to exclude others. (R.65:12-13; App. 122-23). The court also held that the basement "was not a regular common area of the apartment building"; it was "just part of an apartment lease that Mr. Johnson allowed someone else to use." (R.65:12-13; App. 122-23).

Finally, the court held that Estes and Eder's claim of privacy was "not consistent with historical notions of privacy." (R.65:13; App. 123). According to the court, Johnson could go into the basement at any time; Estes and Eder could not have a reasonable expectation of privacy in the basement when "they knew that the real tenant could have accessed [it] at any time." (R.65:13; App. 123).

After the court denied her motions to suppress, Eder entered a guilty plea and was convicted of misdemeanor possession of amphetamine and placed on probation. (R.59). This appeal follows.

ARGUMENT

On April 25, 2019, the Barron County Sheriff's Department violated Brooke Eder's Fourth Amendment rights three times. First, the police entered her apartment to execute a search warrant that the court issued based on an affidavit insufficient to establish probable cause. Next, the police conducted a warrantless search of the basement of her apartment that did not fall within any of the delineated exceptions to the warrant requirement. Finally, the police entered Eder's apartment to execute a second search warrant that law enforcement obtained as a direct result of the fruits of the prior constitutional violations.

The methamphetamine discovered during the execution of the second search warrant prompted Eder's prosecution. The second search warrant could not have issued if the police had not conducted a warrantless search of the basement. But, despite Eder's repeated arguments on the issue, the circuit court never directly addressed the lawfulness of the warrantless search of the basement. This Court should reverse the circuit court's denial of both Eder's motions to suppress because the execution of the first search warrant, the warrantless search of the basement, and the execution of the second search warrant were all unreasonable under the Fourth Amendment.

I. The Warrant Requirement of the Fourth Amendment.

The Fourth Amendment to the United States Constitution and Article I, §11 of the Wisconsin Constitution protect against unreasonable government searches and seizures. *State v. Dearborn,* 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. Wisconsin courts interpret the protections of Article I, §11 "identically to the protections under the Fourth Amendment as defined by the United States Supreme Court." *Id.*

The text of the Constitution demands that "the ultimate touchstone of the Fourth Amendment is reasonableness." *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). To ensure that a government invasion into an individual's privacy and security is reasonable, the Fourth Amendment generally requires that the government first obtain a warrant. *Riley v. California,* 573 U.S. 373, 282 (2014). Warrantless searches are "per se unreasonable" and courts may only permit them in accordance with a few "jealously and carefully drawn" exceptions. *State v. Sanders,* 2008 WI 85, ¶27, 311 Wis. 2d 257, 752 N.W.2d 713; *Georgia v. Randolph,* 547 U.S. 103, 109 (2006).

A search based on a warrant, meanwhile, is reasonable only if the warrant stems from a judicial finding of probable cause. *State v. DeSmidt,* 155 Wis. 2d 119, 131, 454 N.W.2d 780. Probable cause requires a judicial examination of the totality of the circumstances presented in the affidavit, including the

"veracity and basis of knowledge of persons supplying hearsay information," to determine whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983) (internal citations omitted).

II. The First Search Warrant Was Unsupported by Probable Cause and the Evidence Discovered as a Result Should Be Suppressed.

A. Introduction

Eder filed her first motion to suppress arguing that the court should suppress evidence which led to her conviction because it was the fruit of the first search warrant which was not based on probable cause. (R.33). Eder argued that the officers' execution of the first enabled their unlawful entry into the basement which led to a second search warrant enabling the search of her bedroom which yielded drugs. Thus, the invalidity of the first warrant dictates suppression of the evidence found in the basement and Eder's bedroom because it is fruit of the poisonous tree. *Wong Sun v. United States,* 371 U.S. 471, 488 (1963).

The circuit court denied the first motion to suppress without addressing the search of the basement based on a finding that the first warrant rested on probable cause. The court should have analyzed the search of the basement, and suppressed the evidence based on that warrantless search as shown below. Either way, whether law enforcement

used evidence to obtain the second warrant tainted by a single unreasonable search or several, the circuit court erred in denying Eder's first motion to suppress.

B. Standard of review.

In general, when reviewing motions to suppress, appellate courts employ a two-step analysis. Courts review a circuit court's findings of fact under the clearly erroneous standard, but review the circuit court's application of constitutional principles to those facts de novo. *State v. Anker,* 2014 WI App 107, ¶10, 357 Wis. 2d 565, 855 N.W.2d 483 (citations omitted).

In reviewing whether probable cause exists for the issuance of a search warrant, this Court must confine itself to the record before the warrant-issuing judge and gives great deference to that judge's determination. *State v. DeSmidt,* 155 Wis. 2d 199, 132, 454 N.W.2d 780 (1990). The person challenging the warrant must establish that the evidence before the warrant-issuing judge was clearly insufficient. *Id.* The duty of the appellate court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.* at 133.

C. The first warrant was not based on probable cause.

Based on the totality of the circumstances before the warrant-issuing judge, Detective Carroll's affidavit supporting his first search warrant application did not establish probable cause that "contraband or evidence of a crime" would be found at

Eder's apartment. *Gates,* 462 U.S. at 238. Paragraphs 12-15 of the affidavit contained the only information specific to the particular object and location of the search. (R.21:3-4; App. 6-7). The circuit court correctly disregarded paragraph 14 because—as the State conceded—the information from a purported confidential informant contained no indicia of reliability. (R.35:24, 30; App. 42, 48).

But the court found probable cause that "a detached and neutral magistrate would believe that" Estes would be present at the residence listed in the warrant. (R.35:30, App. 48). The court ultimately denied the motion to suppress, holding that the information in the affidavit was not stale so there was probable cause to issue the first warrant. (R.29:2-3; App. 51-52). Even under the deferential "clearly insufficient" standard, the warrant-issuing judge erred in issuing the warrant and the court erred in denying the motion to suppress.

Courts must determine whether probable cause exists based on the totality of the circumstances by "invoking the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Gates,* 462 U.S. at 230-31. The totality of the circumstances available to the warrant-issuing judge in the affidavit did not establish probable cause.

According to the affidavit, officers saw Estes outside the premises identified in the warrant five days before they submitted the affidavit. (R.21:3;

App. 6). Estes "has an address listed through Barron County RMS system" at those premises but was prohibited from being there by a child protective services order. (R.21:3-4; App. 6-7). Eder is Estes' "girlfriend" and receives her mail in the upstairs apartment of the premises. Officers saw Eder's cars had parked there at some undisclosed time. (R.21:3-4; App. 6-7).

The affidavit established that Estes was outside the premises on April 19, 2019. Law enforcement could have—but apparently decided not to—arrest Estes at that time based on an arrest warrant. But the affidavit did not establish a fair probability they would find him inside the premises on April 24, 2021 because the information was stale and the child protective services order made it substantially unlikely that Estes would be there on April 24.

To establish probable cause, the information in the affidavit must be "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States,* 287 U.S. 206 (1932). Staleness depends on the nature of the circumstances of each case, not "a counting of the days or months" between the information in the affidavit and the issuance of the warrant. *State v. Ehnert,* 160 Wis. 2d 464, 469-70, 466 N.W.2d 237 (Ct. App. 1991). The "nature of what is being sought" influences "where the line between stale and fresh information should be drawn in a particular case." *Id.* at 470.

While five days is not a particularly long time, Estes was the object of the search warrant, and people are highly mobile. A single observation that a particular person was in a particular place at a particular time says very little about whether they will be there five days later. While the affidavit may have established that Estes lived there at one point, the affidavit did not establish that it was likely he would present at the listed address on April 24.

To the contrary, the only timely information in the affidavit established that Estes was prohibited from being present on April 24. (R.21:4; App. 7). The affidavit states that on April 19, the address for Estes "listed through Barron County RMS" was the address in the warrant. (R.21:3; App. 6). But there is no information about what Barron County RMS is or proof that the address listed there was accurate or up-to-date even on April 19. And even if that address were accurate on April 19, there is no proof that the prohibition on Estes' presence there was in place on April 19. Based on the information in the affidavit obtained on April 24, Estes was prohibited from residing there and there is no evidence to suggest that Estes was violating that prohibition.

The validity of the warrant here depends on whether the affidavit established "probable cause to believe that" Estes was "linked to the commission of a crime" and was "likely to be found in the place designated in the search warrant. *Ehnert,* 160 Wis. 2d at 470. Because staleness is a question of timeliness and because search warrants that identify people as

the object of a search are novel in Wisconsin case law, the law on the execution of arrest warrants in a home is instructive. Entry into a home to execute a valid arrest warrant at is reasonable only when the officer has a reasonable belief that the person identified in the warrant is home at the time of entry. *State v. Blanco,* 2000 WI App 119, ¶10, 237 Wis. 2d 395, 614 N.W.2d 512.

The affidavit here establishes neither a reasonable belief that Estes lives at the residence, nor a reasonable belief that Estes would be at the residence at the time of entry. As a result, the search warrant was unlawful and the officers had no basis to enter the home to execute the outstanding warrants for Estes' arrest so the entry into Eder's home violated the Fourth Amendment. The circuit court erred in denying the first motion to suppress.

Here, the information gained from the execution of the illegal first warrant was critical to Detective Carrol's decision to seek a second warrant and the warrant-issuing judge's decision to grant the second warrant. When a warrant relies on information that results from an unconstitutional search, the warrant is valid only if other evidence that is "genuinely independent" of the tainted evidence is enough to establish probable cause. *State v. Carroll*, 2010 WI 8, ¶44, 322 Wis.2d 299, 778 N.W.2d 1.

In circumstances that implicate this so-called "independent source doctrine," the State must prove that "no information gained from the illegal entry

affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *Carrol*, 322 Wis. 2d 299, ¶45; *Murray v. United States*, 487 U.S. 533 (1988).

Here, the second warrant was a direct product of the information gained through the illegal entry based on the first warrant. Thus, the circuit court erred in denying Eder's first motion to suppress. If the first warrant was defective, this Court need go no further and should reverse and remand with instructions to suppress all the evidence obtained as a result of the first warrant—including the drugs that led to Eder's conviction.

III. Eder Had a Reasonable Expectation of Privacy in the Basement, and Its Warrantless Search Violated Her Fourth Amendment Rights.

A. Introduction

The State conceded the first warrant did not authorize a search of the basement. (R.35:24; App. 42). Thus, even in the State's view, the court's finding that the first warrant was valid did not dispose of the basement-search issue. Because the second warrant directly stemmed from the evidence discovered during the warrantless search of the basement, and that search was unlawful, Eder's first motion to suppress should have been granted even if the first warrant were valid. (R.22:4; App. 11).

Even assuming the first warrant was valid, a search must end "after the objects identified in the warrant have been located and seized." *State v. Starke*, 81 Wis. 2d 399, 414, 260 N.W.2d 739 (1978). According to the affidavit for the second warrant, officers conducted the search of the basement after Estes—the object identified in the warrant—had been "arrested." (R.22:4; App. 14). Yet the court rejected the first motion to suppress without fully addressing Eder's argument that the drugs found in her bedroom were "a direct result of a Fourth Amendment violation." (R.20:5).

While a finding that the first warrant was invalid would have been dispositive, the court prematurely denied the first motion after finding that the affidavit established probable cause. The State bears the burden of proving that a warrantless search meets one of the "narrowly drawn exceptions" to the warrant requirement. *State v. Payano-Roman,* 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W. 2d 548. But the circuit court never held the State to that burden. Because—as shown below—Eder had standing to challenge the warrantless search of the basement, the circuit court erred by prematurely denying the first motion to suppress.

Similarly, the circuit court erred by prematurely denying Eder's second motion to suppress without reaching the issue of whether the State could meet its burden to justify the warrantless search of the basement. But unlike with the first motion, where the circuit court failed to grapple with this critical issue,

with the second motion the court declined to reach that issue based on its determination that Eder lacked standing to challenge the search of the basement under the Fourth Amendment. Even if this Court finds that the first warrant was valid, this court should reverse and remand for an evidentiary hearing on the warrantless search of the basement because the circuit court erred in finding that Eder lacked standing.

B. Fourth Amendment "standing" and standard of review.

To invoke the protections of the Fourth Amendment, an individual must first experience a search or seizure that infringes on the privacy and security interests which the founders designed the Fourth Amendment to protect. *State v. Harris*, 206 Wis. 2d 243, 251, 557 N.W.2d 245 (1996). Because "the Fourth Amendment protects people, not places," individuals have a constitutional interest in privacy and security even outside their homes. *Katz v. United States*, 389 U.S. 347, 351-53 (1967). Thus, the question of "standing" does not turn on the location of a search, per se—it turns on the legitimacy of an individual's expectation of privacy in that location. *State v. Dixon*, 177 Wis. 2d 461, 467, 501 N.W.2d 442 (1993). A legitimate expectation of privacy is one which "society is prepared to recognize as reasonable." *Minnesota v. Olson,* 495 U.S. 91, 95-96 (1990) (internal citations omitted).

The Wisconsin Supreme Court has established a two-pronged test to determine whether an individual

has a legitimate expectation of privacy. A court must determine "(1) whether the individual has by his or her conduct exhibited an actual (subjective) expectation of privacy in the area searched and in the seized item, and (2) whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable." *Dixon,* 177 Wis. 2d at 469.

Whether a defendant has a legitimate expectation of privacy is a question of law that the court reviews independently. *State v. Fox*, 2008 WI App 136, ¶8, 314 Wis. 2d 84, 758 N.W.2d 790. The individual seeking to invoke the protection of the Fourth Amendment bears the burden of proving the reasonableness of their expectation of privacy by a preponderance of the evidence. *Id.* at 10.

C. Eder had a subjective expectation of privacy.

Here, the circuit court correctly held that Eder had a subjective expectation of privacy in the basement. (R.65:10; App. 120). The court found that Eder and Estes were using the basement regularly with Johnson's knowledge and permission, and that they put a lock on the exterior door. (R.65:10-11; App. 120-21). The State did not contest the first prong, so the dispute here is whether society is willing to recognize Eder's expectation of privacy as reasonable.

D. Eder's subjective expectation of privacy was objectively reasonable.

In assessing whether society is willing to accept an individual's subjective expectation of privacy as reasonable, courts often look to six relevant factors:

> (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; (6) whether the claim of privacy is consistent with historical notions of privacy.

Dixon, 177 Wis. 2d at 446.

The circuit court held that Estes and Eder "did not have standing to object to the search of the basement" because they "did not have complete dominion over this basement" and "there is no claim of privacy consistent with historical notions." (R.65:13; App. 123). While the court discussed each of the six factors, it reached its conclusion based on the application of a faulty legal standard divined from a single line in *State v. Eskridge,* 2002 WI App 158, ¶16, 256 Wis. 2d 314, 647 N.W.2d 434; "[i]f Eskridge

satisfies all six factors, he prevails on the second prong of the *Trecroci* test.[1]"

In *Eskridge,* the court of appeals relied heavily on *Trecroci* but held that the defendant failed to establish a subjective expectation of privacy. Then, despite noting that the analysis was unnecessary for reaching a decision, it discussed the six factors relevant to the second prong of the standing test. *Id.,* ¶15. The circuit court held that *Eskridge* created a definitive requirement that a defendant must satisfy all six factors of the second prong to have standing. (R.65:8; App. 118) (emphasis added).

If *Eskridge* wanted to establish a rigid requirement that a defendant satisfy all six factors, it would have said so. But did not. Instead, the *Eskridge* court merely stated the obvious—a defendant's expectation of privacy is reasonable if they satisfy all six factors of the second prong. *Eskridge,* 256 Wis. 2d 314, ¶16. And in a clear signal that its "discussion" of the second prong was unnecessary, the court noted that it need not analyze the second prong at all and only did so "to provide some direction" to trial courts. *Id.,* ¶15.

A rigid requirement that demands satisfaction of all six factors would contradict the overall tenor of

[1] *Eskridge* calls the applicable two-prong, six-factor test as the "*Trecroci* test" based on *State v. Trecroci,* 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555. The test has also be called the *"Dixon* test" and the Wisconsin Supreme Court discussed it in *Dixon* well before the court of appeals decided *Trecroci.*

the *Eskridge* decision and a long line of well-established precedent. *Eskridge* makes clear that bright-line rules about a reasonable expectation of privacy "would be inappropriate." *Eskridge,* 256 Wis. 2d 314, ¶10. Under the two-prong test described in *Eskridge, Trecroci, Dixon,* and elsewhere—courts must examine both the subjective expectations of the defendant and the objective reasonableness of those expectations—all based on the totality of the circumstances. *Dixon,* 177 Wis. 2d at 469. And when evaluating the facts of each case, the six factors discussed by the circuit court here are "relevant" but "not controlling or exclusive." *Id.*

Based on the totality of the circumstances here, Eder had a subjective expectation of privacy that was objectively reasonable by community standards.

First, as the circuit court correctly held, Eder and Estes satisfied the first two factors because they had a property interest in the premises and were legitimately on the premises. Eder and Estes had permission to use the basement, regularly used it to store personal property, and paid some rent to Johnson for its use. (R.65:11; App. 121).

Next, the circuit also correctly held that Eder and Estes satisfied the fourth and fifth factors because they took precautions to seek privacy and put the basement to private use. Estes put a lock on the outer door where no lock had been before. (R.65:11; App. 121). Eder and Estes stored household items in the basement and Estes did some "tinkering" down

there. (R.65:12; App. 122). According to the criminal complaint, the basement was "set up as a small living room." (R.1:2). Johnson testified that he never had a key to the outer door of the basement and never went into the basement after Estes and Eder began using it[2]. (R.48:48-50; App. 100-02).

Further, the totality of the circumstances shows that—while Eder and Estes shared dominion and control over the basement with Johnson—they exercised control over who entered the basement and had right to exclude others from the basement. Eder and Estes placed a lock on the outer door. Irrespective of Johnson's access to the basement through his apartment, they used that lock to exclude others from entering from the outer door. Johnson's access may have reduced their expectation of privacy but it did not negate it. *See, e.g.*, *Trecroci,* 246 Wis. 2d 261, ¶¶39-40 (Defendant's shared access to a stairway and attic area did not forfeit any reasonable expectation of privacy in the stairway), *O'Connor v. Ortega,* 480 U.S. 709, 721-25 (1987) (access by employers to an employee's work area does not negate that individual's substantial expectation of privacy).

Finally, while the basement was part of Johnson's lease, Eder and Estes' claim of privacy aligns with historical notions of privacy. Like Trecroci,

[2] The circuit court found that Estes gave Johnson a key to the outer door. (R.65:12; App. 121). Estes testified that he gave Johnson a key (R.48:12; App. 64). But Johnson's testimony to the contrary was unequivocal and the circuit court never assessed Johnson's credibility.

Eder and Estes lived on the property and their use of the basement was private. *Trecroci,* 246 Wis. 2d 261, ¶41. The Fourth Amendment "accords the highest degree of protection to a person's home" but "protects people, not property." *Id.,* ¶¶41-42 (internal citations omitted). Eder and Estes did not live in the basement but they lived in the building, paid rent for the use of the basement, and used the basement in a private manner that resembles the normal use of the basement of an individual's home. Their expectation of privacy followed historical notions.

On top of applying the six factors of the second prong in a manner inconsistent with well-established Wisconsin law, the circuit court's ultimate conclusion goes against well-established Supreme Court precedent. Under the Fourth Amendment, even if Eder were merely a "guest" and Johnson had "ultimate control" over the basement, Eder's expectation of privacy in the basement is still reasonable and "rooted in understandings that are recognized and permitted by society." *Olson,* 495 U.S. at 99-100 (internal citations omitted). This is true even if Johnson "may admit or exclude" anyone "he prefers" from the basement because "Untrammeled power to admit and exclude" is not essential to a reasonable expectation of privacy. *Id.*

Whether by satisfying all six factors under the second prong or under the totality of the circumstances, Eder established an expectation of privacy that society is prepared to recognize as reasonable. The circuit court erred in denying Eder's

second motion to suppress. This Court should reverse and remand for a hearing on whether the State can justify the warrantless search of the basement under an exception to the warrant requirement.

CONCLUSION

For the reasons stated above, Brooke K. Eder respectfully asks this court to reverse the circuit court's denial of Eder's first motion to suppress with instructions to suppress all evidence obtained as a result of the illegal search. In the alternative, Eder asks this court to reverse the circuit court's denial of Eder's second motion to suppress and remand for further proceedings.

Dated this 2nd day of July, 2021.

Respectfully submitted,

Electronically signed by David J. Susens
DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

Office of the State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-2124
susensd@opd.wi.gov

Attorney for Defendant-Appellant

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 5,414 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of July, 2021.

Signed:
Electronically signed David J. Susens
DAVID J. SUSENS
Assistant State Public Defender