STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2021AP002186

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

JAY G JACOMET,

Defendant - Appellant.

BRIEF AND APPENDIX OF DEFENDANT – APPELLANT

APPEAL FROM THE ORDER ENTERED ON NOVEMBER 30, 2021 IN THE CIRCUIT COURT OF WAUKESHA COUNTY
The Honorable Brad M. Schimel, Presiding
Trial Court Case No. 2021CT001165

Respectfully Submitted:

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ISSUES PRESENTED

I. **WHETHER THE DEFENDANT-APPELLANT WAS WITHIN THE CURTILAGE OF THE HOME.**

The trial court answered: No.

II. **WHETHER THE PLAINTIFF-RESPONDENT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH PROBABLE CAUSE THAT THE POLICE MAY ENTER THE CURTILAGE OF THE HOME IN PURSUIT OF A MISDEMEANANT, WITHOUT A WARRANT.**

The trial court answered: Yes.

STATEMENT ON PUBLICATION

The appellant believes it is possible the Court's opinion in this case may meet the criteria for publication insofar as it may resolve a conflict between Wisconsin and Federal precedent.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as the briefs should sufficiently explicate the facts and law necessary for this Court to issue its decision.

STATEMENT OF THE CASE

On November 10, 2020, the plaintiff-respondent, State of Wisconsin, issued a criminal complaint against the defendant-appellant, Jay G. Jacomet. On April 30, 2021, Jacomet filed a Motion to Suppress Evidence. On July 29, 2021, the trial court held a hearing on the motion and denied the defendant's motion to suppress. On October 11, 2021, Jacomet filed a Motion for Reconsideration. On November 1, 2021, the court reviewed video evidence and heard additional testimony from the arresting officer. The court found the officer did not violate Jacomet's expectation of privacy and that the officer's actions were reasonable.

On November 22, 2021, Jacomet filed a motion to suppress statements, the circuit court elected to hear the motion on the date set for trial. On November 30, 2021, the date set for trial, the Court did hear Jacomet's motion to suppress statements and did review video evidence. The Court denied Jacomet's motion to suppress statements. Out of options, Jacomet changed his plea and accepted the sentence of the Court. This appeal followed.

STATEMENT OF THE FACTS

On November 6, 2020, Village of Summit Police Captain, Steven Schroeder, was patrolling the area of Summit, Wisconsin when he received a call from police dispatch concerning and alleged erratic driver. The caller identified himself by name and phone number to the dispatcher and described the vehicle as a white Cadillac SUV. The caller further identified where the car drove.

The caller further described the driver of the car as a male but did not offer further description. The dispatcher relayed this information to Schroeder who travelled to the area identified by the caller. Schroeder stopped at the identified address and noted that it was a driveway which was bordered by Waterville Lake on both sides. Schroeder noticed no trespassing signs on either side of the driveway, but no gate. Schroeder then traveled down a private drive shared by two residences, without knowledge or information as to which residence if any the alleged drunk driver had entered. The driveway is approximately 150 meters in length.

When he arrived at a home on an island in the middle of Waterville Lake, he saw a man standing the open garage door of the home. Schroeder exited his squad and called to the man – Jacomet. Schroeder began questioning Jacomet without knowledge of the description of the driver or any identifying information other than the description of the vehicle.

At no point did Schroeder observe the driver exit the vehicle. Other than the general description he had been given by dispatch of the vehicle, Schroeder had no idea what the alleged driver of the SUV looked like.

Schroeder did observe Jacomet inside the garage and asked him to come out. Upon seeing Jacomet, Schroeder required Jacomet answer questions concerning his actions earlier in the evening and ultimately demanded he exit the garage and perform filed sobriety testing and arrested him. At no point, did Schroeder have a warrant to enter the property nor did the situation provide for Schroeder to witness the alleged erratic driving himself.

At no point prior to the warrantless entry to the property, did Schroeder confirm that the citizen witness never lost visual contact with the SUV they had been following. At no point prior to requiring Jacomet to perform field sobriety tests did Schroeder confirm that Jacomet had not been drinking after he was driving. While speaking with Jacomet, Schroeder was, at two different moments inside the garage of the home.

Jacomet had relied upon the trial court concluding that the particular facts and circumstances of the case would require the court to find the length and nature of the driveway did create in Jacomet a reasonable expectation of privacy. The Court disagreed. Jacomet argued that the area of the garage and just in front of the garage, in this specific case did fall within the definition of curtilage. The Court disagreed. Jacomet argued that as he was within the curtilage, the State would have a higher burden to show the State had probable cause. The Court disagreed.

The trial court relied entirely on evidence obtained from Schroeder's testimony (Appendix B) and the squad video taken by Schroeder. (Appendix E)

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING JACOMET WAS NOT WITHIN THE CURTILAGE OF THE HOME AND THUS ENTITLED TO A REASONABLE EXPECTATION OF PRIVACY WHICH IN TURN WOULD REQUIRE A WARRANT PRIOR TO ENTRY UPON THE LAND.

A. THE AREA OF THE SEARCH FALLS WITHIN THE CURTILAGE OF THE HOME.

Jacomet was up a driveway approximately 150 meters in length, at night and produced only a featureless silhouette for the officer to identify prior to entering private property well marked with no trespassing signs.

Whether a police officer's conduct violates the fourth amendment prohibition on unreasonable searches and seizures is a question of law the court reviews without deference to the trial court. *State v. Woods*, 117 Wis. 2d 701, 712, 345 N.W.2d 457, 463 (1984). The exclusionary rule applies only to evidence seized as the result of an illegal search or seizure. *Segura v. United States*, 468 U.S. 796, 804, 806 (1984). This Court must first determine whether there was a search within the meaning of the fourth amendment. *See State v. Whitrock*, 161 Wis. 2d 960, 970-71, 468 N.W.2d 696, 700 (1991). A search occurs when the police infringe on an expectation of privacy that society considers reasonable. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

If there is no such infringement, there is no search. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). Thus, under the plain view doctrine: "[O]bjects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." *State v. Bell*, 62 Wis. 2d 534, 540, 215 N.W.2d 535, 539 (1974) (citations omitted).

The trial court did find that because Jacomet was a welcome guest at his parent's home he had a reasonable expectation of privacy in the house. (Appendix C, p76 L13-15) In spite of this finding, the Court concluded that the officer would be free to drive up the driveway to get a better view.

It was clear from the Officer's testimony that he could not even identify the gender of the person he had seen from the public road, nor even see the vehicle identified by the 911 caller. From that viewpoint could hardly be claimed "plain view." It is only after the warrantless entry to the property, the long drive up the unlit road, that the officer begins to accumulate relevant information. That entry should be recognized for what it was – an entry into the curtilage of the home and a breach of the defendant-appellant's Fourth Amendment rights. The search after entry should have been suppressed.

B. NO EXIGENT CIRCUMSTANCES EXISTED AT THE TIME OF THE WARRANTLESS ENTRY WHICH JUSTIFY THAT ENTRY WITHOUT A WARRANT

Each investigatory situation presents police with unique specific facts which must be reconciled against the law and their admissibility.

The question is whether the officer had prior justification for his presence or, in other words, had a right to be where he was. The officer's right to be in the place where the view occurs is fundamental to the validity of what follows. *State v. McGovern*, 77 Wis. 2d 203, 211, 252 N.W.2d 365, 369 (1977).

Officer Schroeder did enter into private property without a warrant and, after driving a football field and half, was finally in a position to collect basic information such as the actual make and plate number of the vehicle identified by the 911 caller. This in turn led to Officer Schroeder asking to speak with Jacomet and in a specific factual dispute caught on the squad video, enter the garage to speak with Jacomet. The speaking with Jacomet led to an identification of signs of intoxication. Those signs were the first witnessed specifically by Officer Schroeder which in any way corroborated the 911 caller.

The trial court made the specific point of the timeline and noted that the compactness of it was key to the court's conclusion that this was the "right place, the right vehicle and ultimately the right person." (Appendix B p52, L2-4). This is an incorrect application of the law. The officer did reach the conclusion, that he had the right person, only after violating the 4th Amendment.

An officer may make a warrantless entry when "the exigencies of the situation," considered in a case-specific way, create "a compelling need for official action and no time to secure a warrant." *Kentucky v. King*, 563 U. S. 452, 460 (2011); *Missouri v. McNeely*, 569 U. S. 141, 149 (2013).

The Court has found that such exigencies may exist when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect's escape. *Lange v. California*, 579 U.S. 486, 141 S. Ct. 2011 (2021). "The Court has held that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. *See Welsh v. Wisconsin*, 466 U. S. 740, 742–743." *Id at 487*.

The officer here was pursuing a suspected intoxicated driver, who was no longer driving. There was no accident or injury. There was not even an indication of what number violation might be occurring – in this case a third offense. Nothing more was available to the officer at the time he entered onto private property and headed down the driveway which might give rise to any kind of exigency.

C. THE OFFICER VIOLATED THE CURTILAGE OF THE HOME AND DID AFFECT A *TERRY* STOP WITHOUT SUFFICIENT EVIDENCE TO ESTABLISH THAT THE OFFICERS HAD REASONABLE SUSPICION THAT A CRIME WAS BEING COMMITTED

The legality of stops and searches has been progressively refined by courts following from the original decision in *Terry v. Ohio*, 392 U.S. 1 (1968). The Supreme Court's holding in *Terry* was codified in Wisconsin by Wis. Stats. §968.24, which provides "a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime."

Additionally, officers may detain and investigate an individual if they reasonably suspect an individual has violated, is violating or is about to violate an ordinance. *State v. Bennett*, 178 Wis.2d 878, 506 N.W.2d 427 (Ct. App. 1993) (unpublished).

The plaintiff-respondent has the burden of establishing probable cause at the hearing of the defendant-appellant's motion to suppress, but the majority of the evidence advanced by the plaintiff-respondent at the motion hearing was obtained by the arresting officers after they approached Jacomet's home and car and stopped and detained him, not before. The trial court's finding of probable cause erroneously used the sole fact of a citizen driver witnessing erratic driving.

In its ruling the Court did make specific reference to the character of the driveway, shared by two separate homeowners, having no expectation of privacy. (Appendix B, P47, L 7-9). The Court highlighted this conclusion by comparing the shared drive to Waterville Road and "open to the public." Ultimately, the Court reached an even more expansive conclusion that "Everything across the isthmus is fair game for anyone." (Appendix B, P47, L 10-11). In fact, the testifying officer, Captain Steven Schroeder filmed not one but two "No Trespassing" signs at the end of the driveway. (Appendix E, at time 3:03-3:10).

That video is persuasive regarding the visibility of anyone at or near the home on the other side of the isthmus. (Appendix E, at time 3:10-3:29). It was frankly impossible to identify even the gender or height of the person seen by Officer Schroeder.

While the audio is turned off at that point, the video does confirm direction and the movements of both Mr. Jacomet and Officer Schroeder, and the fall of Officer Schroeder's light upon the driveway certainly appear to indicate the Officer did order Mr. Jacomet out of the garage. (Appendix E, at time 3:29 – 4:00).

It is only upon actually asking Jacomet if he owns the SUV identified by the 911 caller, that officer Schroeder learns anything at all which ties Jacomet to operating the alleged vehicle. Up to that moment, Officer Schroeder had not collected any other information, from dispatch, or otherwise, about the suspect driver other than that the driver was male and the vehicle driven was a white SUV with a plate number. The plate number is not visible from the squad at any time. (Appendix E, at time 0:01-5:00).

Here, the record overwhelmingly demonstrates the officers did not have probable cause to enter onto the property without a warrant. The testimony given at the motion hearing strongly suggests the arresting officers in this case conducted a textbook *Terry* stop.

D. THE PLAINTIFF-RESPONDENT DID NOT PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THAT THERE WAS A CONSENSUAL ENCOUNTER BETWEEN JACOMET AND OFFICER SCHROEDER

Officer Schroeder approached Jacomet's vehicle, immediately identified himself as a police officer, asked for identification, instructed Jacomet to come outside and asked a series of investigative questions. The plaintiff-respondent had the burden of providing sufficient evidence at the motion hearing to establish that the officers had reasonable suspicion to justify their assertion of control.

Lacking reasonable suspicion to justify stopping Jacomet, the plaintiff-respondent had the burden of providing sufficient evidence establishing that there was a consensual encounter between the officers and Jacomet, which would require establishing that a reasonable person in Jacomet's situation would believe they were free to decline to answer the officers' questions and free to leave the scene.

The evidence shows that Jacomet was not free to leave the scene as he had already been instructed by Officer Schroeder to exit the garage (Appendix B, P24, L1-9) and walked around him blocking his reentry to the house. (Appendix E, at time 4:00 to 5:00). The encounter was not consensual.

E. WHETHER A STOP MEETS STATUTORY AND CONSTITUTIONAL STANDARDS ARE QUESTIONS OF LAW REVIEWED *DE NOVO*.

The officers did not have the authority to approach Jacomet's vehicle and stop and detain him. Such authority would have to be justified in one of three ways.

First, before approaching the vehicle, the officers had probable cause to seize and arrest Jacomet.

Second, the officers had reasonable suspicion that Jacomet committed, was committing or was about to commit a crime or violation of an ordinance, which would justify a stop under Wis. Stats. §968.24. Third, the officers could have begun a consensual encounter with Jacomet.

The trial court never made any determination as to the legality of the stop, focusing solely on evidence obtained by the officers after they had already stopped and detained Jacomet. Nevertheless, whether the officers' stop met constitutional and/or statutory standards is a question of law that this court reviews *de novo*. *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991)

F. THE PLAINTIFF-RESPONDENT DID NOT PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THAT THE OFFICERS HAD REASONABLE SUSPICION TO MAKE A *TERRY* STOP UNDER §968.24 OR A STOP FOR VIOLATION OF LAW OR ORDINANCE.

The plaintiff-respondent did not present sufficient evidence to establish that the officers had reasonable suspicion to make a *Terry* stop. This court has held that the state cannot use evidence obtained *after* a stop as the basis for legitimizing the stop itself. *State v. Meza*, 238 Wis.2d 840, 618 N.W.2d 273 (Ct. App. 2000) (unpublished). In *Meza*, a conservation warden witnessed Meza drive a car onto a hunting ground, the warden, in uniform, approached Meza with his flashlight, identified himself as an authority and began asking questions, noticing the odor of intoxicants. The state conceded that at the time the warden approached Meza, no reasonable suspicion existed to justify a *Terry* stop. *Id.* at ¶ 2. Instead, the state argued that "the legitimate basis to justify the stop occurred when the warden formed the opinion that Meza was operating while intoxicated." *Id.* at ¶ 7. In essence, the state was trying to argue that evidence obtained after the stop could be used to justify making the stop in the first place.

This court rejected that argument because "the *Terry* stop occurred before the warden told Meza he was suspected of OWI." *Id.* at ¶ 8. In other words, the state could not use evidence obtained by the warden after the stop to show that the stop itself was lawful under §968.24.

Here, the plaintiff-respondent relied entirely on evidence obtained by the officers after they made the stop to show the officers had probable cause to arrest Jacomet for operating while intoxicated. Indeed, the facts in the record overwhelmingly indicate that the officers had no reasonable suspicion to make a *Terry* stop and could not reasonably suspect Jacomet had violated the law before they made the stop.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the Defendant-Appellant respectfully requests that this Court find, that the Defendant-Appellant was within the curtilage of the home; that he was entitled to a reasonable expectation of privacy, that based on the specific facts and circumstances in this case, warrantless entry was not justified; that warrantless entry did occur; and that the motion to suppress the evidence collected by the officer after the warrantless entry should be suppressed or in the alternative, that the trial court erred in determining the officers had probable cause to believe Jacomet was operating a vehicle while intoxicated.

Based on these findings, the Defendant-Appellant requests the court vacate the Judgment of Conviction and remand this matter with an order directing dismissal.

In the alternative, the Court should remand the matter to the trial court for further proceedings consistent with its findings.

Dated this 5th day of July, 2022.

s/ Electronically signed by Michael F. Torphy

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MICHAEL F. TORPHY
Attorney for the Defendant-Appellant

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,968 words. Including the cover, tables, and certifications, the length is 4,432 words.

s/ Electronically signed by Michael F. Torphy

_____

Michael F. Torphy
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CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant circuit court record entries; (3) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

s/ Electronically signed by Michael F. Torphy

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TABLE OF APPENDICES