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STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT II

Appeal Case No. 2021AP2186

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JAY G. JACOMET,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE BRAD D. SCHIMEL, PRESIDING

Case No. 2020CT1165

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 7

ARGUMENT 7

I. Captain Schroeder had a legitimate reason to be on the driveway, which was not an area of protected curtilage where Jacomet had a reasonable expectation of privacy, therefore there is no Fourth Amendment interest…….7

II. The defendant was not unlawfully seized when Officer Schroeder entered the driveway. Instead, the contact between Jacomet and Captain Schroeder was a voluntary consensual encounter……13

III. The defendant was not seized until Captain Schroeder requested he exit the garage to perform field sobriety tests, and at that time Captain Schroeder has reasonable suspicion the defendant committed the crime of operating while intoxicated. Therefore, the seizure was lawful…….18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES CITED

Page

Cal. v. Ciraolo,
476 U.S. 207, 106 S. Ct. 1809,
90 L. Ed. 2d 210 (1986)…….7, 11, 12

Cal. v. Hodari D.
499 U.S. 621, 111 C. Ct. 1547 (1991)……..14

Collins v, Virginia,
138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018)……..……11

Conrad v. State,
63 Wis.2d 616, 218 N.W.2d 252 (1974)……9

County of Grant v. Vogt,
2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253 …….....19

Florida v. Bostick,
501 U.S. 429, 111 S. Ct. 2382,
115 L. Ed. 2d 389 (1991)…….14, 15, 17

Florida v. Royer,
460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 229 (1983)……..15

Haynes v. Washington,
373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963)……...16

Oliver v. United States,
466 U.S. 170, 104 S. Ct. 1735 (1984)……7, 9

Schneckloth v. Bustamonte,
412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d (1973)……..16

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868,
20 L. Ed. 2d 889 (1968)……...14, 15, 16, 19, 20

State v. Adell,
2021 WI App 72, 399 Wis. 2d 399, 966 N.W.2d 115……7

State v. Anderson,
155 Wis.2d 77, 454 N.W.2d 763 (1990)……..19

State v. Edgeberg,
188 Wis.2d 339, 524 N.W.2d 911 (Ct. App 1994)……10, 12

State v. Goyer,
157 Wis.2d 532, 460 N.W.2d 424 (Ct. App. 1990)…13, 14, 15

State v. Luebeck,
2006 WI 87, 292 Wis.2d 748, 715 N.W.2d 639……...14

State v. Martwick,
2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552……..7

State v. Orta,
2003 WI App 93, 264 Wis.2d 765, 663 N.W.2d 358……...10

State v. Palmersheim,
2018 WI App 71, 383 Wis.2d 633, 922 N.W.2d 323
(unpublished) ……...11

State v. Rewolinski,
159 Wis.2d 1, 464 N.W.2d 401 (1990)……..10, 13

State v. Scull,
2015 WI 22, ¶ 16, 361 Wis. 2d 288, 862 N.W.2d 562……...7

State v. Thompson,
222 Wis.2d 179, 585 N.W.2d 905 (Ct. App. 1998)…….10

State v. Waldner,
206 Wis.2d 51, 556 N.W.2d 681 (1996)……..19

State v. Williams,
2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834……..19

State v. Young,
2006 WI 98, 294 Wis.2d 1, 717 N.W.2d 729……14, 18, 19, 20

United State v. Collins,
510 F. 3d 697 (7th Cir. 2007)……...13

United States v. Drayton,
536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed. 2d (2002)……..15

United States v. Dunn,
480 U.S. 294, 107 S. Ct. 1134 (1987)……8

United States v. Jacobsen,
466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 85 (1984)……10

United States v. Martinez-Fuerte,
428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)…….16

United States v. Mendenhall,
446 U.S. 544, 100 S. Ct. 1870,
64 L. Ed. 497 (1980)……..13, 14, 16, 19

OTHER AUTHORITIES

4 Wayne R. LaFave, Search and Seizure
§ 9.4(a) (4th ed. 2004)……...16

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Case No. 2020CT1165

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

Did the circuit court properly deny Jacomet's motion to suppress, which alleged Captain Schroeder violated the curtilage of the residence by entering the shared driveway and unlawfully seized Jacomet within the curtilage of the residence?

Trial court answered: The court found at the conclusion of two separate motion hearings that officer acted reasonably, there was no violation of any reasonable expectation of privacy in the driveway, and there was no violation of Jacomet's Fourth Amendment rights.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. §809.23(1)(b)4.

STATEMENT OF THE CASE

On November 10, 2020, a Criminal Complaint was filed against the petitioner, Jay Jacomet, alleging one criminal count: operating while under the influence – 3rd offense (R. at 3:1.)

On April 20, 2021, Jacomet filed a motion to suppress evidence, alleging the defendant was unlawfully seized within the curtilage of his residence (R. at 22:4, 8.) On July 29, 2021, an evidentiary motion hearing was held and Captain Schroeder testified regarding this investigation. At the conclusion of the motion hearing, the trial court denied the motion to suppress (R. at 26:46.) The facts elicited during the testimony of Captain Schroeder are the following:

On November 6, 2020, Captain Schroeder, with the Village of Summit police department, received a dispatch at 10:02 pm regarding a possible intoxicated driver (R. at 26:7.) Captain Schroeder received information that an on-duty Western Lakes Fire District employee called dispatch and stated they had observed a white Cadillac SUV with a Wisconsin license plate pull into the Paperchase Gas Station off Highway 67 in

Dousman (*Id.*) The 911 caller observed a male subject exit the white Cadillac and go into the store (R. at 26:8.) The 911 caller further reported the male subject had difficulty standing and talking, and they believe the subject was intoxicated (*Id.*)

The caller then stated the male subject got back into the vehicle and followed the Cadillac as it headed northbound on Highway 67 (*Id.*) While following the vehicle, the 911 caller observed the white Cadillac cross the center line (*Id.*) The 911 caller continued following the vehicle and eventually observed the white Cadillac pull into the driveway at 970 South Waterville Road (*Id.*)

Captain Schroeder responded. Captain Schroeder described the driveway entrance of the residence at 970 South Waterville Road as a shared driveway that comes off the east side of Waterville Road (*Id.*) Captain Schroeder was aware that there are two residences accessible from this shared driveway (R. at 26:8-9.) The approximate length of the driveway from Waterville Road to the residence is 300-400 feet (R. at 26:9.) There are no gates or fences (R. at 26:39.) Before entering the shared driveway, Captain Schroeder testified he had a clear line of sight to the residence at 970 S. Waterville Road and he was able to see the garage door was open and the interior garage light was on (*Id.*) He also observed a subject walking in front of the garage (*Id.*) The second residence located further down the shared driveway, behind the above listed residence (*Id.*)

From his vantage point on the road, Captain Schroeder was unable to see the white Cadillac (R. at 26:11.) Captain Schroeder first observed the white Cadillac when he was on the shared driveway approximately 200 feet from the residence, and was able to confirm the vehicle and license plate matched the information provided by the 911 caller (R. at 26:11, 21.) Captain Schroeder was approximately 100 feet from the residence when he observed the subject at the garage was a male (R. at 26:26.) At 10:05 p.m., the 911 caller reported the

white Cadillac drove up the specific driveway to the specific address, and by 10:09 p.m. Captain Schroeder was on scene (R. at 26:17.)

Captain Schroeder made contact with the male subject, who identified himself as the defendant, Jay Jacomet (R. at 26:12.) Captain Schroeder testified that he did not cross the threshold into the garage at any point during this encounter, and the trial court at the close of the evidence made a finding the officer did not cross the threshold of the garage (R. at 26:12, 42.) Captain Schroeder did not unholster his firearm, or make any threats or demands of Jacomet to exit the garage to answer any questions (R. at 26:13). Captain Schroeder observed the odor of intoxicants coming from Jacomet (R. at 26:14.)

During the conversation with Jacomet, Captain Schroeder learned the Cadillac belonged to Jacomet, that he had driven the SUV to the gas station to purchase cigarettes, and that nobody else had been in the car with him (R. at 26:14-15.) Jacomet further stated to Captain Schroeder it was a poor decision to drive, and admitted he had consumed three drinks (old fashioned's) (R. at 26:16.) Captain Schroeder also learned this address was not Jacomet's residence, rather it was his parents' residence (R. at 26:26.)

Based upon the information learned during this conversation, Captain Schroeder believed Jacomet was the intoxicated driver reported by the 911 caller. During this encounter, Captain Schroeder also observed Jacomet to have difficulty walking, maintaining his balance, and had significant slurred speech (R. at 26:12.) At this time, Captain Schroeder requested Jacomet position himself in front of the squad car and perform field sobriety tests. (R. at 26:15, 18.)

At the close of the evidence, the trial court denied the motion to suppress. In its discussion of curtilage, the court stated:

> We know that this garage was wide open with the lights in the garage on such that you could see the inside of the garage. You could see a person silhouetted in front of the garage. You could see all of that from Waterville Road. It's hard to claim that someone is taking unusual or even normal steps to conceal that from public view. It's hard to claim that is curtilage when you can see all of this from Waterville Lake Road… It is reasonable to expect that all sorts of people can approach an open property.

(R. at 26:39.)

Moreover, the court found Captain Schroeder observed the Cadillac in question while on the driveway approximately 200 feet from the house. This was significant to the court who found that location was, "well outside anything that anyone could reasonably argue was curtilage." (R. at 26:41.) The trial court further discussed the prevalence in today's society of delivery trucks, that, "you can't drive five miles without seeing a delivery truck from UPS or Amazon or grocery deliveries. They are everywhere," (R. at 26:40.) The court made a finding that it is a reasonable inference that the homeowner would not expect packages being delivered to be left at the edge of the driveway adjacent to Waterville Road, the concern of theft would be too great. (R. at 26:41.)

The trial court continued and determined the contact between Captain Schroeder and Jacomet was a voluntary encounter that occurred, "in a place that even the homeowner does not have a reasonable expectation that no one would ever approach that exterior of the residence." (R. at 26:42-43.) The court further found that there is no evidence Captain Schroeder directed Jacomet to take any action until he directed Jacomet to the front of the squad for field sobriety tests. (R. at 26:42.) At the point of this first seizure, Captain Schroeder had reasonable suspicion that the defendant had driven while intoxicated. (R. at 26:44.)

On October 11, 2021, Jacomet filed a motion to reconsider the denial of his motion to suppress, in part putting forth new

evidence that there were "no trespassing signs" posted at the edge of the driveway that abutted the public road (R. at 29:5.) On November 1, 2021, the trial court held a motion hearing to address Jacomet's motion to reconsider. A significant portion of arguments focused on the "no trespassing" signs at the edge of the driveway. A "no trespassing" sign is posted at the juncture of the shared driveway and Waterville Road (R. at 79:10.) The trial court found the "no trespassing" sign did not create any reasonable expectation of privacy for anybody there (R. at 79:20.) The trial court then returned to evaluate its original ruling denying the motion to suppress. At the conclusion of the hearing, the trial court decided:

> Under all of the circumstances, I don't find that the officer proceeding across that bridge violated any reasonable expectation of privacy that the law or the constitution would recognize. So, once there, pulling into the driveway is the normal action of – and it's reasonable for an officer conducting an investigation.

(R. at 79:20.)

The trial court examined all of the facts in the record and did not find a basis to modify the denial of the motion to suppress (R. at 79:25.) The court found, "the officer's actions were reasonable, did not violate any reasonable expectation of privacy, and didn't violate Mr. Jacomet's fourth amendment rights," (*Id.*)

On November 30, 2021, Jacomet entered a no contest plea to the criminal charge of operating while under the influence – 3rd offense, and was sentenced on the same date (R. at 59.) On December 1, 2021, the trial court signed a written order granting a stay of the sentence pending appeal (R. at 67.)

This appeal follows.

STANDARD OF REVIEW

"A curtilage determination is a question of constitutional fact subject to a two-step standard of review: a circuit court's historical findings of fact are reviewed under a clearly erroneous standard, while the ultimate question of constitutional fact is reviewed de novo." *State v. Martwick*, 2000 WI 5, P 2, 231 Wis. 2d 801, 805, 604 N.W.2d 552, 554.

An appellate court analyzes the grant or denial of a suppression motion under a two-part standard of review: the circuit court's findings of fact are upheld unless they are clearly erroneous, and we independently review whether those facts warrant suppression. *State v. Adell*, 2021 WI App 72, 399 Wis. 2d 399, 966 N.W.2d 115, citing *State v. Scull*, 2015 WI 22, ¶ 16, 361 Wis. 2d 288, 862 N.W.2d 562.

ARGUMENT

I. Captain Schroeder had a legitimate reason to be on the driveway, which was not an area of protected curtilage where Jacomet had a reasonable expectation of privacy, therefore there is no Fourth Amendment interest.

As the Supreme Court observed in *Cal. v. Ciraolo*, 476 U.S. 207, 212-13, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986), "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." A person enjoys "no legitimate expectation" that areas outside the curtilage "will remain free from warrantless intrusion by government officers." *Oliver v. United States*, 466 U.S. 170, 181, 104 S. Ct. 1735 (1984); *see also Martwick*, 2000 WI ¶29. The extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect the area in question should be treated as the home itself. *U.S. v.*

Dunn, 480 U.S. 294, 300, 107 S. Ct. 1134 (1987), citing *Oliver*, 466 U.S. at 180.

In *Dunn*, the Supreme Court set forth four factors to be used in determining the scope of a home's curtilage: 1) the proximity of the area claimed to be curtilage to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) steps taken by the resident to protect the area from observation by passers-by. 480 U.S. at 301. The Court in *Dunn* explained that combining these factors would not necessarily produce a precise formula for correctly deciding all curtilage questions. *Id.* Rather, although these factors are relevant to the curtilage inquiry, the Court stressed that the "central component of this inquiry [i]s whether the area harbors the 'intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Id.* at 300 (internal citations omitted).

The first factor considers the proximity of the area claimed to be curtilage to the home. While the shared driveway leads to the residence at 970 Waterville Road, the shared driveway itself begins approximately 300-400 feet away from the house (R. at 26: 8-9.)

The second *Dunn* factor considers whether the area is included within an enclosure surrounding the home. Neither the shared portion of this driveway nor the immediate area in front of Jacomet's garage is within any enclosure. There are no gates, no fences, or any other type of barrier between the public road and the driveway. Additionally, there are no gates or fences where the driveway breaks off to continue to the other residence and Jacomet's driveway continues (R. at 26:39.) This driveway is the only way for officers, delivery drivers, guests, and other residents to gain access to both residences.

The third consideration is the nature of the uses to which the area is put. There is nothing in the record to show that the driveway was put to any specific private use beyond parking vehicles on it. There was no evidence received that the driveway was used for any purpose intimately linked to the home.

Lastly, the record is devoid of particular steps to show Jacomet intended to protect the driveway from observation by police or any other passersby. The existence of a "No Trespassing" sign at the end of the driveway connected to the main road was discussed, however the record is clear the signs were posted by the homeowner's association, not specifically by Jacomet or his parents (R. at 79:10.) These signs are at the beginning of the shared driveway, which is an area open to the public. Certainly Jacomet cannot claim to reasonably have a privacy interest in the entire island, which is essentially what he is claiming if he argues the entire shared driveway is within his protected curtilage.

In *Oliver*, 466 U.S. at 182, the Supreme Court rejected the view that by taking steps to protect privacy in an open field, one establishes a legitimate expectation of privacy in that field. In a footnote, the Court commented that "the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs." *Id.* n.13.

However, as is clear from *Oliver*, a person's efforts to keep others off his land cannot, in and of itself, transform non-curtilage into curtilage. While erecting signs warning others to "Keep Off" private property may mean that an officer's entry onto such property is a trespass, the fact a trespass has occurred does not create a Fourth Amendment violation where no reasonable expectation of privacy exists. *See Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974).

Captain Schroeder testified that he knows from prior experience there are two residences on this island and it is a shared driveway to get to both residences (R. at 26:8-9.). Captain Schroeder first saw a subject in the lit garage at Jacomet's residence before he entered the driveway and had a line of sight before entering the driveway (R. at 26:9.) This supports the argument that the driveway was impliedly open to the public and could be observed by any member of the public from Waterville Road. Between the short period of time between the initial call and Captain Schroeder arriving at the driveway, the specific address given that the 911 caller saw the suspected intoxicated driver turn into, and the observation by Captain Schroeder of a subject walking in an open, lit up garage, it was reasonable for Captain Schroeder to believe the suspected intoxicated driver was at the end of the driveway.

A "search" or "seizure" worthy of Fourth Amendment protection occurs only "when the police infringe on an expectation of privacy that society considers reasonable." *State v. Edgeberg*, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994); *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 85 (1984). Whether a person has a reasonable expectation of privacy depends on (1) whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized, and (2) whether society is willing to recognize such an expectation of privacy as reasonable. *State v. Thompson*, 222 Wis. 2d 179, 185-86 (Ct. App. 1998) (citations omitted). The defendant bears the burden of proof on the question of whether his subjective expectation of privacy was reasonable, and the burden of proof applicable is by a preponderance of the credible evidence. *State v. Rewolinski*, 159 Wis. 2d 1, 16, 464 N.W.2d 401 (1990). Jacomet offered no evidence in the record that he intended to keep his driveway private. *State v. Orta*, 2003 WI App 93, ¶¶ 12-13, 264 Wis. 2d 765, 663 N.W.2d 358 (law requires more than a simple subjective expectation of privacy; defendant must exhibit that subjective expectation in some fashion).

In *Collins v. Virginia,* 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018), the Supreme Court addressed whether the particular section of the driveway where Collins' motorcycle was parked and subsequently searched was curtilage of the home. The Court determined it was curtilage. The Court found the motorcycle was inside of a "partially enclosed top portion of the driveway that abuts the house." *Id.* at 1671. This area where the motorcycle was parked was "beyond where a neighbor would venture, in an area 'intimately linked to the home … where privacy expectation are most heightened.'" *Id.* at 1673 n.3, citing *Ciraolo,* 476 U.S. at 213.

In a recent unpublished decision by this Court, *State v. Palmersheim,* 2018 WI App 71, 384 Wis. 2d 633, 922 N.W.2d 323, the *Collins* case was discussed and applied to the facts of *Palmersheim*.[1] This Court determined the officer's location when he attempted to stop Palmersheim was not in an area of curtilage and bore no similarity to the location of the officer in *Collins. Id.* 2018 WI ¶ 32.

The facts in this case more closely resemble the location in *Palmersheim* than in *Collins* as it relates specifically to the area of the driveway Jacomet claims is curtilage. The area of the garage in which Captain Schroeder made contact with Jacomet was visible from the public road. This was an open area in front of the garage void of any enclosures or other barriers, and there is nothing in the record to suggest this area in front of the garage was used for intimate activities of the home.

Even if a driveway is considered part of the home's curtilage, police with legitimate business may enter upon it and

[1] In *Palmersheim*, the officer received information from a citizen caller that the defendant was intoxicated. Upon arrival at the scene, the officer observed Palmersheim walking up the driveway towards the open garage attached to him home. The officer followed Palmersheim up the driveway to the garage in an attempt to stop him regarding the citizen caller's complaint of his poor driving.

upon any other part of the curtilage that remains open for use by the general public and may make visual observations from that vantage point. *Edgeberg, 188* Wis. 2d at 346-47. That the area is within the curtilage does not itself bar all police observation.

> The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

Cal. v. Ciraolo, 476 U.S. at 213.

Important to the curtilage analysis is the uncontroverted evidence that there was access to this shared driveway by a variety of people. As the trial court found, delivery drivers such as Amazon or UPS would not simply drop off packages at the end of the driveway for concerns of theft (R. at 26:40.) The delivery drivers would drive up the same driveway Captain Schroeder did and drop off the packages at the resident's homes. There are no affirmative actions taken here by Jacomet to demonstrate his expectation of privacy. The openness of the driveway, its visibility to anyone driving on the road coming from the public road but also for anyone driving to the residence further behind Jacomet's, and the absence of any evidence showing that the driveway was used for any intimate activities associated with the sanctity of the home show Jacomet could not have had an objectively reasonable expectation of privacy in his parent's driveway.

Moreover, Captain Schroeder had a prior lawful justification for travelling on the driveway because he was investigating an intoxicated driver complaint. It is important to the analysis that Captain Schroeder arrived at the residence a mere four minutes after the on-duty fire department employee reported Jacomet's vehicle to dispatch, and the information

from that phone call led Captain Schroeder to reasonably believe that the white SUV reported by the 911 caller had travelled down this driveway (R. at 26:17). Even if the garage door was closed when Captain Schroeder was at the edge of the driveway still on Waterville Road, there was nothing preventing the officer from driving up the shared driveway, parking his squad, and approaching the front door of the residence. "[T]here is no legal requirement of obtaining a warrant to knock on someone's door." *United States v. Collins*, 510 F.3d 697, 700 (7th Cir. 2007). Captain Schroeder had a legitimate purpose for being at that particular residence, which was to investigate the intoxicated driver complaint that he had reasonable suspicion had occurred.

Jacomet has failed to make the required showing that he had both a subject and an objectively reasonable expectation of privacy in the driveway that is shared with a neighbor. *State v. Rewolinski*, 159 Wis. 2d at 16. The trial court properly found the driveway was not protected curtilage and that Jacomet had no reasonable expectation of privacy in the driveway.

II. The defendant was not unlawfully seized when Officer Schroeder entered the driveway. Instead, the contact between Jacomet and Captain Schroeder was a "voluntary consensual encounter."

In *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 497 (1980), the United States Supreme Court ruled that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained" by the police. A "seizure" under the fourth amendment occurs only "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554; *see also State v. Goyer*, 157 Wis. 2d 532, 536, 460 N.W.2d 424, 425 (Ct. App. 1990).

In essence, a "Terry" stop occurs "when an officer in some way restrains the liberty of a citizen by means of physical force or show of authority." *Fla. v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). A show of authority is generally defined as "conduct [which] would…communicate to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 439.

However, a consensual encounter occurs when "the person to whom questions are put remains free to disregard the questions and walk away. *Mendenhall*, 446 U.S. at 554. No "fourth amendment issue arises in a consensual encounter because no seizure has occurred." *Goyer*, 157 Wis. 2d 532, 536, 460 N.W.2d 424 (Ct. App. 1990). In fact "there is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry*, 392 U.S. 1, 34, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The defendant is not entitled to fourth amendment protections if the encounter between the defendant and the police is merely a consensual encounter, and not a seizure of some form.

A seizure occurs only when "a person submit[s] to a police show of authority [and] under all the circumstances surrounding the incident, a reasonable person would not have felt free to leave." *State v. Young*, 2006 WI 98, ¶ 37, 294 Wis. 2d 1, 717 N.W.2d 729, *citing Mendenhall*, 446 U.S. at 553; *see generally Cal. v. Hodari D*, 499 U.S. 621, 111 S. Ct. 1547 (1991) (where flight of a defendant indicates a person never submitted to a police show of authority and therefore is not seized at the time).

The question of whether an officer's actions constituted a show of authority is objective; the officer's subjective motivations are irrelevant. *State v. Luebeck*, 2006 WI App 87, ¶ 12, 292 Wis. 2d 748, 715 N.W.2d 639. The Court in *Mendenhall* stated that in analyzing whether a 'seizure' has

occurred, "the subjective intention of [the police]…is irrelevant except insofar as that may have been conveyed to the [defendant]." *Id.* at 555 n. 6.

Police can use information gathered during a consensual encounter to justify a Terry stop if they gather sufficient information to develop reasonable suspicion during the course of the consensual encounter to believe that criminal activity may be afoot. *Goyer*, 157 Wis. 2d at 537.

It is important to note that encounters between police and citizens under circumstances in which a person, as a practical matter, lacks the freedom to leave or otherwise avoid the encounter does not necessarily constitute a seizure. *See Bostick*, 501 U.S. at 436; *see also Fla. v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 229 (1983). A "seizure does not occur simply because a police officer approaches an individual and asks a few questions" and that it is only "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Bostick*, 501 U.S. at 434, citing *Terry* 392 U.S. at 16.

Furthermore, the disclosure of an official police purpose for the encounter followed by questioning or requests of the defendant does not equate to a "show of authority" sufficient to convert a consensual encounter into a seizure. *See Bostick*, 501 U.S. at 434; *see also United States v. Drayton*, 536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (concluding that no seizure occurred when police boarded a bus, announced their identity and presence, and questioned passengers despite the lack of an affirmative warning to passengers that they could refuse to cooperate; it being sufficient that the officers gave passengers no reason to believe they must answer, could not leave the bus or otherwise terminate the encounter).

Some examples of "circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall* at 554, citing *Terry*, 392 U.S. at 19. In the "absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id*.

The *Mendenhall* Court noted that the "purpose of the Fourth Amendment is not to eliminate all contact between police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." 446 U.S. at 554-55, citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S .Ct. 3074, 49 L. Ed. 2d 1116 (1976) (internal quotations omitted). Even if an officer walks up to an individual seated in a vehicle located in a public place, this alone does not then constitute a seizure. *See* 4 Wayne R. LaFave, Search and Seizure § 9.4(a), 419-20 (4th ed. 2004). As a matter of policy:

> [C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. [There is an] acknowledged need for police questioning as a tool in the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.

Mendenhall at 554 citing *Haynes v. Washington*, 373 U.S. 503, 515, 83 S. Ct. 1336, 1344, 10 L. Ed. 2d 513 (1963) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

In the case at hand, there is nothing in the record to suggest that Jacomet was seized by Captain Schroeder as soon as he approached and began speaking to Jacomet. As explained above, merely approaching a person does not constitute a seizure. *See Bostick*, 501 U.S. at 434. Before this initial encounter began, Captain Schroeder had already identified the white SUV as the vehicle that the 911 caller stated an intoxicated male was driving (R. at 26:11.) Captain Schroeder testified that he saw a male subject walking outside of the garage and after making contact with the male, he identified himself as Jacomet (R. at 26:12.) There is no evidence in the record Captain Schroeder demanded Jacomet identify himself or demanded Jacomet speak to him about his investigation. Captain Schroeder testified that he observed Jacomet had difficulty walking and maintaining his balance before asking him questions (*Id*.) Then, Captain Schroeder detected an odor of intoxicants emanating from Jacomet's person and observed him to have slurred speech (R. at 26:12, 14.)

Captain Schroeder never crossed the threshold into the garage (R. at 26:12, 42.) Jacomet argues in his brief that the evidence shows Jacomet was not free to leave the scene because he was instructed by Captain Schroeder to exit the garage. That is incorrect, and the trial court made the finding it was clear Captain Schroeder did not direct Jacomet out of the garage until he requested Jacomet to perform field sobriety tests (R. at 79:24.)

Jacomet makes two assertions to support his argument that he was unlawfully stopped by Captain Schroeder. First, that Captain Schroeder asserted control over Jacomet by asking him questions related to the investigation. As discussed above, the mere act of asking questions of Jacomet did not convert a consensual encounter to a seizure of his person, and Captain Schroeder had a legitimate duty to investigate an impaired driver complaint. The second circumstance Jacomet offers as an exertion of control by Captain Schroeder is that the way

Captain Schroeder's light falls on the driveway somehow equates to the captain ordering Jacomet out of the garage. The state fails to follow the logic of Jacomet's argument when there is a clear finding by the trial court Captain Schroeder did not order Jacomet out of the garage (R. at 79:21.)

Captain Schroeder testified he did not threaten Jacomet to answer his questions or comply with any kind of order, he had a weapon on his duty belt but did not draw his weapon, did not physically place his hands on Jacomet or exert any physical control over him (R. at 79:22.). There is no evidence in the record Jacomet attempted to end the conversation with Captain Schroeder, or that he tried to go back into his house to end the conversation. There is no evidence that Jacomet told the captain to leave. The record is devoid of any facts to suggest Jacomet was prevented by Captain Schroeder from leaving the scene, or from going into the residence, or terminating the conversation, or that the captain denied any request of Jacomet to leave.

There is absolutely nothing in the record to support the argument Captain Schroeder exerted any show of authority or control over Jacomet or that Jacomet submitted to the captain's authority. Therefore the interaction between the captain and Jacomet was a voluntary consensual encounter.

III. Jacomet was not seized until Captain Schroeder requested he exit the garage to perform field sobriety tests, and at that time Captain Schroeder had reasonable suspicion the defendant committed the crime of operating while intoxicated. Therefore, the seizure was lawful.

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protects the right of individuals to be free from "unreasonable searches and seizures." *Young*, 294 Wis. 2d 1, ¶ 18. With respect to seizures, the Fourth Amendment's protections are not

implicated unless the government seizes a person. *Id.* ¶ 23. Of course, "not all personal interactions between law enforcement officers and people constitute a seizure." *County of Grant v. Vogt*, 2014 WI 76, ¶ 19, 356 Wis. 2d 343, 850 N.W.2d 253; *see also Terry*, 392 U.S. at 19, n.16.

A seizure occurs when an officer, by means of physical force or by a show of authority, has in some way restrained the liberty of a citizen. *Mendenhall*, 446 U.S. at 552, *see also State v. Williams*, 2002 WI 94, ¶ 37, 255 Wis. 2d 1, 646 N.W.2d 834 (adopting the *Mendenhall* test). A person is seized within the meaning of the Fourth Amendment if, under all the circumstances surrounding the contact, a reasonable person would have believed that she is not free to leave. *Mendenhall*, 446 U.S. at 554. In addressing whether a person has been seized, the court must focus on the officer's conduct under the totality of the circumstances, and how a reasonable person in the position of the person subject to the police contact would regard the circumstances. *Vogt*, 356 Wis. 2d at ¶ 31. The officer's subjective intent to detain the person is irrelevant to the inquiry if that intention was never conveyed. *Mendenhall*, 446 U.S. at 554, n.6.

When police "have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed," they may conduct a brief investigatory stop of the suspect. *Young*, 294 Wis. 2d at ¶ 20. Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.* ¶ 21. What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, under all the facts and circumstances present, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996), citing *State v. Anderson*, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990). That suspicion cannot be inchoate, but rather must be particularized and

articulable: "[a] mere hunch that a person . . . is . . . involved in criminal activity is insufficient." *Young*, 294 Wis. 2d ¶ 21, citing *Terry*, 392 U.S. at 27.

The moment of the seizure occurred when Captain Schroeder directed Jacomet to come out of the garage and guided him to the front of the squad to perform field sobriety tests (R. at 26:42-44.) Once Jacomet complied and positioned himself in front of the squad car at Captain Schroeder's request, he had surrendered to the authority of the captain. The question, then, is whether Captain Schroeder had reasonable suspicion at that time to seize Jacomet. He did. Captain Schroeder had found the white Cadillac that was called in by the 911 caller after driving up the shared driveway specifically reported by the 911 caller (R. at 26:8, 11, 21.) Captain Schroeder observed Jacomet to have difficulty walking and maintaining his balance, to have slurred speech, and detected an odor of intoxicants emanating from his person (R. at 26:12.) Moreover, Jacomet admitted the Cadillac belonged to him, that he had driven to the gas station to purchase cigarettes, and that there were no other occupants in the car with him. Jacomet further admitted that he had been drinking that night and even acknowledged it was a bad decision to drive that night.

At the time Jacomet was seized, Captain Schroeder had specific, articulable facts that Jacomet had committed the offense of operating while under the influence and therefore was lawfully seized.

CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's denial of Jacomet's motion to suppress and the judgment of conviction.

Dated this 5th day of August, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19 (8) (b), (bm) and (c) for a brief produced with a proportional serif font. The word count of this brief is 6,057.

Dated this 5th day of August, 2022

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