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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2022 AP 1315

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JENNIFER MOUSTAFA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN
OUTAGAMIE COUNTY CASE 2019 CT 887, THE
HONORABLE JUDGE CARRIE SCHNEIDER
PRESIDING.

BRIEF OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
Statement of Issue	3
Statement on Oral Argument	3
Statement on Publication	3
Statement of the Case	3
Statement of Relevant Facts	5
Argument	6
Conclusion	10

CASES CITED

<u>Florida v. Jardines</u> , 133 S.Ct. 1409 (2013)	6,9,10
<u>Kirk v. Louisiana</u> , 536 U.S. 635 (2002)	6
<u>Oliver v. United States</u> , 466 Us. S. 170 (1984)	6
<u>Payton v. New York</u> , 445 U.S. 573 (1980)	6
<u>State v. Hughes</u> , 2000 WI 24	6,7
<u>State v. Martwick</u> , 2000 WI 5	6
<u>United States v. Dunn</u> , 480 U.S. 294 (1987)	7,8,9,10
<u>Welsh v. Wisconsin</u> , 466 U.S. 740 (1984)	6

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

<u>United States Constitution</u>	
4 th Amendment	4
<u>Wisconsin Constitution</u>	
Article 1, Section 11	4
<u>Wisconsin Statutes</u>	
346.63(1)(a)	1,3
346.65(2)(f)	1,3

STATEMENT OF ISSUE

Was the area where officers approached Moustafa within the curtilage of her home and as such should the evidence obtained from that encounter have been suppressed?

Trial Court answered: no

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because the facts and legal analysis can be sufficiently developed in writing.

STATEMENT ON PUBLICATION

Publication is requested because the facts of this case are not so unique that they are unlikely to recur. The issue presented in this case has the potential to establish precedent in the context relating entry by law enforcement to areas surrounding an individual's home

STATEMENT OF THE CASE

Jennifer Moustafa ("Moustafa") was charged with Operating a Motor Vehicle While Under the Influence – 1st Offense, with a Minor Child in the Vehicle, contrary to sec. 346.63(1)(a) and 346.65(2)(f) Wis. Stats. R. 4. According to the criminal complaint, officers received a report of a reckless driver. The reporting party described the vehicle in question and erratic driving behavior. DOT records returned to Moustafa and provided her address. Officer Akins knocked on the front door while Officer Rosetti approached the rear of the residence. Moustafa was exiting the rear of her residence

when she was approached by Officer Rosetti. Officer Rosetti engaged Moustafa in discussion regarding the report of the reckless driving. Officer Rosetti advised that he was going to have Moustafa perform field sobriety tests. Moustafa attempted to reenter the residence and was stopped by officers. She was ultimately arrested for and charged with Operating a Motor Vehicle While Under the Influence – 1st Offense, with a Minor Child in the Vehicle.

Moustafa filed a motion to suppress the physical evidence and all derivative evidence therefrom. R. 28. Moustafa's motion alleged that she had an expectation of privacy in the patio area behind her home. R. 28-2. Moustafa's motion also alleged that law enforcement did not have probable cause nor did exigent circumstances exist at the time they entered the patio area. R. 28-4. Moustafa sought to suppress the evidence observed by officers as well as any derivative evidence.

The motion to suppress was heard by the trial court on June 28, 2021. The trial court heard testimony from Officer Phillip Akins, one of the officers that responded to the scene. R. 36-4 to R. 36-24. Testimony was also received from Officer Anthony Rosetti, the officer who initially entered the patio area and first interacted with Moustafa. R. 36-24 to R. 36-37.

The trial court issued an oral decision on October 6, 2021, denying Moustafa's motion to suppress. R. 78. The trial court found that the back patio area was not curtilage. R. 78-9. Furthermore, the trial court ruled that Moustafa was not seized until she attempted to reenter the home and that at that time the officers had probable cause and exigent circumstances existed. R. 78-11.

Moustafa was subsequently convicted Operating a Motor Vehicle While Under the Influence – 1st Offense, with a Minor Child in the Vehicle, contrary to sec. 346.63(1)(a) and 346.65(2)(f) Wis. Stats. The trial court sentenced Moustafa to serve 35 days jail. R. 49.

STATEMENT OF RELEVANT FACTS

On June 16, 2019 at approximately 8:25 p.m. officers responded to a complaint of a reckless driver. R. 36-6. Officer Akins reported speaking with the reporting party who described following the vehicle for a period of time. They described the driver and the driving behavior. R. 36-7. There were no reports of injury or property damage, and no reports that alcohol was involved. R. 36-20 to R. 36-22. The license plate number was also provided to the officer. Officer Akins responded to the residence that was provided by DOT. R. 36-8. Officer Akins first went to the front door and eventually went around to the back door upon being contacted by Sergeant Rosetti. R. 36-9. Akins' body camera captured two images that were ultimately introduced into the record. Exhibit 1 (R. 83) is a still image of the north side of the apartment building as he walked around to the back. R. 36-12. Exhibit 2 (R. 84) is a still image of the patio area in question. R. 36-12. Rosetti described approaching the rear patio area and observing a person (later identified as Moustafa) exit the home. R. 36-26. Ultimately, he approached Moustafa inside the rear patio area. Additionally, he confirmed that he was not invited into the area R. 36-29.

ARGUMENT

The officers entered the curtilage of Moustafa’s home without consent or probable cause.

A police officer’s warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment of the United States Constitution, and Article 1, Section 11, of the Wisconsin Constitution. Payton v New York, 445 U.S. 573, 586 (1980); State v. Hughes, 2000 WI 24, ¶17. In other words, searches and seizures inside a home without a warrant are presumptively unreasonable. Payton, 445 U.S. at 586. “It is axiomatic that the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” Welsh v. Wisconsin, 466 U.S. 740, 748 (1984). Payton makes clear that “police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.” Kirk v. Louisiana, 536 U.S. 635, 638 (2002). The Supreme Court in Florida v. Jardines, 133 S.Ct. 1409 (2013) noted that:

This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window. Id. at 1414

The protection provided by the Fourth Amendment to a home also extends to the curtilage of a home. State v. Martwick, 2000 WI 5, ¶26. The curtilage of a home is defined generally as “the land immediately surrounding and associated with the home.” Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). In Oliver, the Court reasoned that the curtilage receives the fourth amendment protections that attach to the home because, “[a]t

common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’ ” *Id.* See also State v. Hughes, 2000 WI 24, ¶17. Again, the curtilage of a home is the area immediately surrounding and associated with the home and whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. In United States v Dunn, 480 U.S.294, 301 (1987), the factors to determine if an area is curtilage are: (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 uses to which the area is put; and (4) the steps taken by the resident to protect the area. However, the Dunn court went on to clarify that the factors are only analytical tools to determine “whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection. *Id.*

The first of the Dunn factors, proximity to the home, is fairly straightforward as the patio area was directly adjacent to the home itself. At the trial level the State conceded this point. R. 29-3.

The second factor, whether the area is within an enclosure, is open to greater interpretation. Exhibits 1 (R. 83) and 2 (R. 84) show that the patio area was partially enclosed by fencing and trees on the north (along a public street) and south sides (adjacent to the neighboring unit). The eastern side is enclosed by the building itself. The primary issue is the west side of the area that is partially enclosed by a fence and greenery. The Dunn court noted

for most homes, the boundaries of the curtilage will be clearly marked, and the conception defining the curtilage -- as the area around the home to which the activity of

home life extends -- is a familiar one easily understood from our daily experience. [internal citations omitted]. Dunn at 480 U.S. 303.

In Dunn, the property was described as an approximately 198-acre ranch completely enclosed by a perimeter fence with several internal fences consisting of posts and barbed wire. The area in question was a barn approximately 50 yards from a fence that was surrounding the house. Dunn at 480 U.S. 297. The court noted with regards to the internal fence:

it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house. Id. at 302.

What is important is the demarcation of the area. The fencing, greenery and obvious patio slab clearly mark the area in question.

The third factor, the nature of the uses to which the area is put, is again not as clearcut as the first factor. The photographs clearly show a bench and table in the area. R. 84. Further, Moustafa described that she used the area for grilling, fires, a play area for her child, planting, and entertaining guests. R. 36-33. The Dunn court noted that

It is especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home. Id. at 302.

The officers in Dunn had aerial photographs of a truck that contained chemicals, odors of acid, and

sounds of a motor of some sort clearly suggesting that the area was not used as part of the home. Dunn at 302. In this case the uses Moustafa was using the area for were clearly related to family life.

The fourth factor, protection from observation, is fairly straightforward to determine from the photos. As described earlier, the north and south sides are significantly enclosed by fencing. The focus at the trial court level was whether the west side that is only partially enclosed was sufficient. While the area is partially open, that openness does not negate the conclusion that the area is within the curtilage. In Florida v. Jardines, 133 S.Ct. 1409 (2013), the Supreme Court stated that [t]he front porch is the classic exemplar of an area adjacent to the home and “to which the activity of home life extends” Id. at 1415. Like a patio, front porches often have areas visible to outside views.

The trial court additionally relied on the fact that the patio area and entrance was used by Moustafa as she would enter the home from her parking area next to the patio area. This raises the issue of whether the officers would have had leave (even implicitly) to enter the area. It is clear that the officers did not have explicit permission. The court in Florida v. Jardines discussed the implicit permission as follows:

We have accordingly recognized that “the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal

knowledge; it is generally managed without incident by the Nations's Girl Scouts and trick-or-treaters. Thus a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do. [internal quotations and citations omitted] Florida v Jardines at 1415.

The fact that Mousafa entered her residence through the rear entry does not give others an invitation to do so.

The trial court also noted, that if it was incorrect about the curtilage issue that the officers had probable cause to seize Moustafa at the time she attempted to re-enter the home. R. 78-9. The court noted various factors in addition to the original report regarding the driving. Those factors included the officers smelling the odor of intoxicants, Moustafa's admission of drinking, her admission of driving, and some inconsistencies in her statements. However, this analysis ignores the fact that the officers obtained this evidence after already violating the curtilage of Moustafa's home. The only information that officers had prior to invading the back patio area was the bad driving of a car that was associated with the residence.

CONCLUSION

It has routinely been held that areas within the curtilage of a home are protected from unreasonable searches and seizures. In this case the officers entered an area adjacent to the rear of Moustafa's residence. Mechanical application of the four factors in Dunn is insufficient and incorrect. While relevant and useful, the ultimate question is if the area was so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection. If the front porch in Florida v. Jardines is clearly

curtilage, the partially enclosed back patio should be entitled to equal protection.

The appellant requests that the Court of Appeals rule that officers entered the curtilage of Moustafa's home without consent or probable cause and that any evidence obtained while in the curtilage or derived therefrom be suppressed.

Dated this 4th day of November 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2581 words.

Dated this 4th day of November, 2022.

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