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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2022 AP 1315 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Jennifer MOUSTAFA,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT
COURT, BRANCH FIVE, FOR OUTAGAMIE COUNTY

The Honorable Carrie A. Schneider, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

QUESTIONS PRESENTED

Whether the area where Officers had contact with Ms. Moustafa was within the curtilage of her home, and whether Officers speaking with her in that area warrants suppression of evidence?

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument in this matter. Additionally, the State is not requesting publication as the underlying law in this matter is clear, and the appeal is a request for the Court to review the

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trial court's application of the facts to the established
law.

STATEMENT OF THE CASE

The State agrees with the Appellant's Statement of the Case to the extent of the nature of the case, procedural status, and disposition in the trial court, so the State will not reproduce those aspects, as allowed under Wisconsin Statute 809.19(3)(a)(2). However, the State will provide a statement of facts, as relevant facts were not included in the Appellant's brief.

On June 16, 2019, at approximately 8:25p.m., Officer Akins was dispatched regarding a reckless driving complaint. *Tr. Mot. Hr'g*, 6, June 28, 2021. While responding to the complaint, Officer Akins spoke to the reporting party. *Id.* Officer Akins testified to what he learned from the reporting party, that there was a vehicle driving in a reckless manner, which included the vehicle being on the sidewalk and kind of bouncing off curbs. *Id.*, 7. The reporting party provided a description of the driver. *Id.* The reporting party also provided the license plate for the subject vehicle. *Id.*, 8. Officer Akins testified that there was nothing from his conversation with the reporting party that gave him concern regarding the credibility of what was

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reported. *Id.*, 7. It should be noted, that when Officer

Akins initially spoke with the reporting party, they were not anonymous; that request was made during a later follow-up. *Id.*

Officer Akins was able to use the provided license plate number to determine that the registered owner of the vehicle was Jennifer Moustafa (married name of Lopez-Romero). *Id.*, 8. Additionally, Officer Akins found the registered address of the vehicle, which was near the last reported location of the vehicle. *Id.* Officer Akins and Sgt. Rosetti both responded to the registered address of the vehicle. *Id.*, 9.

Upon arriving at the address, Officer Akins went to the front door of the apartment, which was facing east, and knocked without a response from anyone inside. *Id.* At the same time, Sgt. Rosetti proceeded to the rear of the apartment, into the parking lot of the housing complex, and located the vehicle that was the source of the reckless driving complaint. *Id.* At that time, Sgt. Rosetti alerted Officer Akins that a female had come out the back door of the residence. *Id.*

Sgt. Rosetti testified that if no one had exited the back door, he had intended to walk through the open patio area

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to knock on the door himself. *Id*, 26. However, since

Moustafa had exited the residence, Sgt. Rosetti proceeded to make contact with her. *Id*, 30. Sgt. Rosetti walked up to Moustafa, as is his normal practice, so he could speak to her in a normal conversational tone, as opposed to yelling at her for all to hear. *Id*. Sgt. Rosetti inquired with Moustafa if she had been driving, to which she replied something to the effect of "not really." *Id*, 26. While Sgt. Rosetti was having this initial contact with Moustafa, Officer Akins walked around the side of the building, along the patio area, into the parking lot, towards the spot where Sgt. Rosetti and Moustafa were standing. *Id*, 16&17. While walking up, Officer Akins heard the initial conversation, then introduced himself and the reason for him and Sgt. Rosetti being present. *Id*, 17. Officer Akins testified that when he asked if Moustafa had been driving, she indicated she had. *Id*, 18. Officer Akins also testified that he could smell a pretty strong odor of alcohol coming off of Moustafa when he had contact with her, and Moustafa also admitted she had been drinking. *Id*.

Given the information already collected, reckless driving, odor of intoxicants, and Moustafa's admission to drinking, Officer Akins informed her that they needed to do Field

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Sobriety testing. *Id.*, 19. It is at this point, that

Moustafa attempts to go back into her apartment, and

Officer Akins ordered her to stop. *Id.*

While Officer Akins was speaking with Moustafa, Sgt.

Rossetti walked to Moustafa's door in an attempt to verify

her story. *Id.*, 27. Specifically, to see if there were any

alcoholic beverages on the counters. *Id.*

Sgt. Rossetti testified that while he was not explicitly

invited into the patio area, neither was he told to not

come into the area. *Id.*, 29. Moreover, Moustafa testified,

and even the Judge noted that Moustafa had a mat by her

back door, which said, "Welcome." *Id.*, 36&37. Moustafa also

testified that she used the back patio as an entrance and

exit for her residence. *Id.*, 35.

STANDARD OF REVIEW.1

Upon review of a suppression decision, the circuit court's factual findings will be upheld unless those findings are clearly erroneous. See Wis. Stat. § 805.17(2). Whether those facts satisfy the constitutional requirement of reasonableness, however, presents a question of law that is reviewed de novo. See *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

¹ The Appellant's brief fails to include the correct standard of review, or any standard at all.

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ARGUMENT

- 1. The patio area is not so intimately tied to the home itself that it should be considered curtilage and placed under the umbrella of Fourth Amendment protection.**

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. *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 289-290, 607 N.W. 2d 621, 626. However, the Wisconsin Supreme Court and the United States Supreme Court have recognized exceptions to the warrant requirement where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference. *Id.* The Fourth Amendment requires probable cause to support every search or seizure in order to, "safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id.*, at ¶19, (quoting, *State v. DeSmidt*, 155 Wis. 2d 199, 130, 454 N.W. 2d 780 (1990)). Probable cause is a fluid concept, assuming different requirements depending upon its context. *Hughes*, 2000 WI 24, at ¶17.

The protection provided by the Fourth Amendment to a home also extends to the curtilage of the home. *State v. Martwick*, 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552. 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 (1984). The United States Supreme Court reaffirmed that the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, (1987). The Court in *Dunn*, identified the central component of this inquiry as whether the area harbors the intimate activity associate with the sanctity of a man's home and the privacies of life. *Id.*, quoting *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 532, 29 L.Ed 746 (1886). The *Dunn* court also provided four factors to help resolve the curtilage question: (1) the proximity of the area

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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) the steps taken by the resident to protect the area from observation by people passing by. *Id.*, at 301. Finally, the *Dunn* court did note that it was not suggesting that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct," answer to all extent-of curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – 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.*

In this case, the patio area does not qualify as curtilage entitling it and Moustafa to Fourth Amendment protection. The trial court made factual findings to support their ruling based upon the testimony, picture exhibits, and video that were entered into evidence. Tr. Decision, 2, October 6, 2021. The Court also considered all of the *Dunn* factors and applied the factual findings to those factors. Regarding the first factor, proximity of the area to the home, the court found the area is immediately adjacent to the home, which would be in favor of Moustafa. *Id.*, 7. For the second factor, whether the area is within an enclosure surrounding the home, the Court determined the area was not in an enclosure. *Id.* The Court specifically noted, "there's more open area than enclosed area and anyone standing in that parking lot traveling through the parking lot, that area is completely observable." *Id.*, 8-9.

Next, the Court looked at the third factor, concerning the nature of the area and what it is used for. The Defense argued the area was primarily used for private relaxation. *Id.*, 8. The Court noted that such a purpose may indeed be a use for the area given evidence of chairs and other furniture in the back; however, the Court also found that the evidence showed the area in question was also used as a main pathway that residents used to gain entry to their homes. *Id.* The Court reasoned that because the parking lot was immediately adjacent to the patio area, logically, residents would walk through the patio area in lieu of

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walking around the building to the traditional front door entrance. *Id.* 8.

As to the fourth factor, what steps were taken to protect the area from view, the Court decided this factor in favor of the State. *Id.* The Court noted the area was rather open, and in fact the "Officers did not need to travel on any area that was not held open or open to other members of this apartment building or to the public." *Id.*, 8&9.

The factual findings of the trial court for a suppression motion are upheld unless those findings are clearly erroneous. There has been no showing that those findings were erroneous. In fact, the Appellant's brief makes no argument regarding where or how the trial court's findings may have been wrong. Instead, Moustafa repeats the previous arguments made to the trial court and seeks a second opinion from the appeals court to overturn the trial court's decision, without any specific argument as to the standard of review regarding how the trial court's decision was unreasonable.

The State agrees with Moustafa that the first *Dunn* factor is straight forward, the area in question is right next to the home. As for the second factor, the State agrees with the trial court's findings that the area was not enclosed. Moustafa argues that what is important is the demarcation of the area, specifically the fencing, greenery and obvious patio slab, citing *U.S. v Dunn*. Moustafa's reliance on *Dunn* is misplaced. *Dunn* does not use the term demarcation but rather the term enclosure. Therefore, when considering the *Dunn* factors, the relevant inquiry is to any enclosure of the area. If Moustafa's argument is taken to the logical extreme, then a person only needs to plant a row of flowers around the exterior of their property, and the whole property becomes curtilage, at least according to the second *Dunn* factor and Moustafa's interpretation. The reality is, however, as reflected in the State's argument and the trial court's ruling, the area in question was not enclosed, but rather was left open, especially on the side immediately connected to the apartment complex's parking lot.

As for the third factor, Moustafa argues the area was used for activities related to family life, citing the exhibits.

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Strangely, Moustafa's brief does not address the trial court's findings that the area was also used as an entrance/exit until later in their brief. That aspect is most appropriately addressed here. Moustafa's brief says this raises the issue of whether the officers would have had leave to enter the area, and argues the officers did not have explicit permission. However, Moustafa's brief ignores her admission at the motion hearing about having a welcome mat by this door. A regular mat, commonly used to wipe shoes would be different, but this mat, specifically had the word "welcome," that even the trial court noted during the hearing. This mat is both implicit permission and explicit permission to enter the area and knock on the door. It is no different than the knocker on the front door, girls scouts, or trick-or-treaters, considered in *Flordia v. Jardines*, 569 U.S. 1, 8, 133 S.Ct 1409, 1416, 185 L.Ed. 2d 495 (2013). A welcome mat, or a welcome sign, is exactly as described, an item that invites someone to approach the door and knock.

Finally, the fourth factor was ruled in favor of the State. Moustafa fails to argue how the trial court incorrectly ruled as to this factor. Relying upon the evidence presented at the hearing, the trial court held the evidence clearly established the patio area at issue here was open to observation. The area was visible from the public street on the south side, where there is only a partial fence, as well as, from the west side, where the apartment's parking lot was located. No efforts were made by Moustafa to complete the fencing and close the area off from observation.

The trial court's factual findings following the suppression hearing were not erroneous. In fact, the court's findings were made after consideration of all testimony and evidence had been submitted, as well as additional written arguments from the parties. The facts were then applied to the *Dunn* factors and the resulting analysis was clear that the area in question did not meet the factors for curtilage.

CONCLUSION

The State asks the Court to standby the trial court's factual findings, as well as the legal analysis of those

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facts to the *Dunn* factors that clearly determine the area
was not curtilage, and therefore, not protected under the
Fourth Amendment.

Respectfully submitted this 6th day of December, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 10 pages.

Dated: December 6, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Rule for Wisconsin's Appellate Electronic Filing.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties by electronic filing.

Dated this 6th day of December, 2022.

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