STATE OF WISCONSIN

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

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The area at the rear of the defendant's residence was within the protected curtilage of her home.

The issue in this appeal is not the factual findings of the trial court as they are based, in principle part, on the photographs that are part of the record. The issue relates to the application of those facts to the law which, as the State noted in well settled law, is reviewed independently by the appellate courts.

The factors set forth in United States v Dunn, 480 U.S.294, 301 (1987), to determine if an area is curtilage are, as noted previously, not mechanical and formulaic but only a framework to assist in the analysis. The State's argument does just that.

The State contends that the use of the term demarcation is inappropriate in the context as the Dunn court, in its list, uses the word enclosure. However, in its discussion of the property in question the Dunn court noted that the barbed wire 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.

More recently, as noted by the Supreme Court in Florida v. Jardines, 569 U.S. 1, at 6 (2013):

> While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver*, 466 U. S., at 182, n. 12. Here there is no doubt that the officers entered it:

> The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.*

The Jardines opinion provides minimal description of the area considered curtilage. Only a path to the front porch and the front door are referenced. There is no mention of any sort of enclosure or area protected from view and the dog that was used by officers was able to freely approach the front door. In fact, Jardines makes no reference to any of the Dunn factors at all in determining the front porch was curtilage.

The courts have not established any sort of bright line rule as to what qualifies to limit an area as part of the curtilage. There is no indication that the border or enclosure that will serve to demark the curtilage must be uniform and uninterrupted in nature. If an apparently open front porch is considered curtilage, pa partially protected back patio should equally qualify.

The State's argues the mat next to the back door that says "welcome" somehow provides permission for others, in this case, law enforcement, to enter the back patio area. While it may be a factor, it is not dispositive. It is common knowledge that door mats come with all variety of sayings, from "welcome", to "go away", to "bring wine" and everything in between. If the specific wording of the door mat were to control, a mat that says "go away" or something similar, would serve to prevent officers from performing a simple "knock and talk".

The Wisconsin Supreme Court recently addressed the implicit license outlined in Jardines in State v. Wilson, 2022 WI 77. They stated:

> The implicit license to approach an individual's home outlined in *Jardines* is not confined to that individual's front door or porch. In limited scenarios, it also may extend to an alternative approach to the house or back entryway depending on the facts of a case. There is no blanket implicit license to enter a backyard. Rather, the inquiry is highly fact specific. Wilson at ¶ 26.

Two of the cases related to the implicit license concept that are cited by the Wilson court are Alvarez v. Montgomery County, 147 F.3d 354 (4th Cir. 1998) (Wilson at ¶ 27) and United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993) (Wilson at ¶ 28). In Alvarez, the 4th Circuit held that officers were allowed to enter the backyard where there was a sign in the officers "followed a sign pointing to the backyard". Wilson at ¶ 27. In Garcia, the Wilson court noted:

> The back porch area was "readily accessible from a public place" and could reasonably be believed to be the main, public entrance to the home. Wilson at ¶28.

In this case the first officer went to the front door of the residence. There was nothing directing the officers to the back patio. The back patio entrance was partially blocked off for privacy, held items associated with the personal use of the home, and was clearly not the "main, public entrance to the home". Additionally, the fact that Moustafa may have used the back patio entrance as her primary means of entering the residence does not convert the back patio into the "main, public entrance to the home".

CONCLUSION

The back patio area, regardless of a mechanical application of the factors listed in Dunn, was within the

curtilage of the home. The officers entered the protected curtilage of Moustafa's residence and any evidence that was gathered while in a location they did not have a right to be, should be suppressed.

Dated this 13th day of January 2023.

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), (bm) 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 1072 words.

Dated this 4th day of November 2022.

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