STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGER JAMES GOLLON,

Defendant-Appellant.

Court of Appeals Case No.:
2023AP000086 - CR

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED JUNE 13, 2022,
DENYING THE DEFENDANT'S MOTION TO SUPPRESS, AND A
JUDGMENT DATED JANUARY 6, 2023, OF THE CIRCUIT COURT
FOR PORTAGE COUNTY, BRANCH I,
THE HONORABLE THOMAS B. EAGON, PRESIDING

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ISSUES PRESENTED

1. Did the circuit court err by failing to find that law enforcement illegally entered the home's curtilage?

   Not addressed by the circuit court.

2. Did law enforcement illegally enter the home's curtilage?

   Not addressed by the circuit court.

3. Did the circuit court err by failing to find that shining a flashlight into a home at 2a.m., while other officers entered the curtilage, constituted an illegal search?

   Answered the circuit court: No.

STATEMENT ON ORAL ARGUMENT

Appellant Dr. Roger James Gollon does not request oral argument because it would not assist the court in resolving the issues raised in this case.

STATEMENT ON PUBLICATION

The opinion in the case should be published in the official reports. The first and second issue presented implicates the "community caretaker" exception to a warrantless search, which was relied on by the State. In *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), however, the United States Supreme Court held that the community caretaker doctrine cannot be used to

justify a warrantless intrusion into a home. There is apparently no published Wisconsin case comprehensively addressing *Caniglia v. Strom*.

Additionally, if the court reaches the second issue of whether shining a flashlight into a private residence at 2 a.m. under the totality of the circumstances constitutes a search, it will enunciate, for the first time in Wisconsin, whether such conduct violates the requirement that a search of a home requires either a warrant or probable cause and an exigent circumstance. Not only is this an issue of first impression in the official reports, but it is also one of substantial statewide public interest.

STATEMENT OF CASE AND FACTS

This case involves the conviction of Appellant Dr. Roger James Gollon ("Dr. Gollon"), which arose from a no-injury accident in which he pleaded no contest to operating a motor vehicle while under the influence as a second offense. (R.55:1; Tr. 1/6/2023 2:14-15, 3:12-19.) Dr. Gollon filed a motion to suppress evidence, which was denied. (R.44:1.) He subsequently entered a no contest plea, and filed this appeal. R.55:1; Tr. 1/6/2023 2:14-15, 3:12-19.)

On July 22, 2021, Dr. Gollon filed a motion to suppress evidence derived from the unlawful entry of law enforcement officers onto the

curtilage of his home. (R.15:1.) In response, the State conceded that law enforcement entered the curtilage of Dr. Gollon's home but alleged that the "search of the house was justified without a warrant under the community caretaker exception[.]" (R.18:1.)

On October 1, 2021, the circuit court held an evidentiary hearing on the motion to suppress. (R.41.) At the hearing Officer Alexander Beach of the City of Stevens Point Police Department testified that on March 26, 2021, he responded to a vehicle accident at approximately 1:45 a.m. (R.15:1; R.41 6-7.) Officer Beach stated that he went to Dr. Gollon's address, because he was the registered owner of the vehicle. (R.41. 7-8, 10.) Police made this determination from the bumper containing the license plate that remained at the scene. (R.41. 7-8.) The vehicle's main body was gone. (R.41. 10.) Officer Beach was informed that "there was a crash where somebody had possibly hit some sort of pipe or gas line." (Id.) Officer Beach did not know how many people were in the vehicle when it crashed or if there were any injuries. (R.41. 13.)

When Officer Beach arrived at Dr. Gollon's residence with another deputy he knocked on the front door and rang the doorbell. (R.41. 8-9.) He looked through the front door window and observed a light on and "feet

sticking out in the hallway from the kitchen." (R.41. 9.) It "looked like someone was laying on the floor." (Id.) He "continued to then shine the light and knock on the front door, ring the doorbell to try to get the person to wake up or respond." (R.41. 10.) The feet then appeared to stand up and retreat from view. As Officer Beach was knocking on the door and ringing the bell, Sergeant Michael Long stepped off the paved walkway and walked into a more secluded, grassy area around the side of the house. There, he peered into a raised garage window and observed a vehicle matching the description of the bumper found at the scene of the accident. (R.15:2; R.41. 11, 17-18, 21.)

Sergeant Long then returned to the front of the house and reported finding the vehicle to Officer Beach. Officer Beach continued knocking loudly. (R.15:2; R.41. 34.) The continued efforts were based on the information gathered, including that the car that matched the bumper left at the crash scene was in the garage. (R.15:2; R.41. 34.)

Officer Beach was not certain how long he was at the residence, but speculated it was "[p]otentially five minutes. (R.41. 14.) Multiple officers knocked on the door with Officer Beach (R.41 18.) Dr. Gollon eventually answered the door. (R.41. 11-12, 14.)

Officer Beach was recording the incident on his body cam, but the recording is not in the record. (R.41. 14-15; R.42. p.2)

Sergeant Long also testified that he responded to the crash. (R.41. 23-24.) He observed that the vehicle struck some cedar trees and a gas pipe or gas marker. (R.41. 26.) He then proceeded to Dr. Gollon's residence, left the pathway, and went around the side of the house "to a window that looked into the garage to see if the car was there, if it was even there or not." (R.15:2; R.41. 27, 32.) Sergeant Long agreed that this was "a private area of the property." (R.41. 36-17.) When he looked into the window of the closed garage, he saw a vehicle that matched the bumper's color. (R.41. 28, 33.) After observing the vehicle in the garage, Sergeant Long went back to the front door, reported his observations to Officer Beach, and they renewed banging on the door with other officers. (R.41 28.) After returning to the door, Officer Beach informed Sergeant Long he saw someone laying on the floor with their feet sticking out. (R.41 28.) Officer Josh McLouth additionally testified that he "peer[ed] through the windows, the door[.]" (R.41. 40, 43.) There were at least four law enforcement agents at the residence. (A. App. 42.)

Sergeant Long was wearing a body camera, but it also is not in the record. Inexplicably, this video, which would show Sergeant Long's violation of the curtilage was never produced by the state. The state explained that it was lost (R.41. 31.; R:42, p 2).

Without citing any law in its order, the circuit court denied Dr. Gollon's motion to suppress. The court simply held that Dr. Gollon had no reasonable expectation of privacy. (R.44.1-3.) The court ignored the testimony evidence that Sergeant Long entered the premises' secluded curtilage, and the circuit court ignored Dr. Gollon's arguments on that point. (R.44:1-3.) The court declined to address whether officers entered the curtilage based on a valid exception, despite that this was the basis of Dr. Gollon's motion, and the State conceded that officers entered the curtilage. (R.44:1-3).

Additionally, the court failed to address that the continued knocking and doorbell ringing was a result of the information gathered by law enforcement, including the car observed by Sergeant Long after going around the side of Dr. Gollon's residence and looking in his garage window. (R.44:1-3; R.41 34.)

The court failed to consider that multiple officers were banging at the door at 2 a.m., which departed from a reasonable "knock and talk." The court further failed to discuss whether law enforcement had probable cause to enter the curtilage of the home. (R.44:1-3.) Nor did it address whether any exigency was present. (R.44:1-3.)

Notably, the State and circuit court did not address or rely on any other legal doctrine that would make an illegal search or evidence derived from that illegal search admissible.

On January 6, 2023, Dr. Gollon entered a plea of no contest as to Count 1, operating a motor vehicle while under the influence, as a second offense. (R.55:1; Tr. 1/6/2023 2:14-15, 3:12-19.)

This appeal followed and other relevant facts are developed as necessary in the body of this brief.

ARGUMENT

The Circuit Court Erred by Ignoring that Law Enforcement Illegally Entered the Curtilage of Dr. Gollon's Home

An order granting or denying a motion to suppress presents a question of constitutional fact. *State v. Dearborn*, 2010 WI 84, ¶ 13, 327 Wis.2d 252, 786 N.W.2d 97. This Court reviews the circuit court's findings of fact under

a clearly erroneous standard, but "[t]he application of constitutional principles to those facts is a question of law review[ed] de novo." *Id.*

"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) (citation omitted). The Fourth Amendment's warrant requirement is a fundamental safeguard against unnecessary invasions into private homes that is imposed on all governmental agents who seek to enter the home for purposes of search or arrest. *Id.* at 748. All warrantless searches and seizures inside a home are presumptively unreasonable. *Id.* at 748-49; *Payton v. New York*, 445 U.S. 573, 586 (1980); *State v. Reed*, 2018 WI 109, ¶¶ 52, 54 & n.27, 384 Wis.2d 469, 920 N.W.2d 56.

The "'very core'" of this guarantee is "'the right of a man [or woman] to retreat into his [or her] own home and there be free from unreasonable governmental intrusion.'" *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

An individual is generally entitled to the same Fourth Amendment protection in the curtilage of his or her home as if he or she were inside the home. *United States v. Dunn*, 480 U.S. 294, 300, (1987); *State v. Martwick*, 2000 WI 5, ¶26, 231 Wis.2d 801, 604 N.W.2d 552 (citing *Oliver v. United*

States, 466 U.S. 170, 180 (1984)); *State v. Dumstrey*, 2016 WI 3, ¶¶22-23, 366 Wis.2d 64, 873 N.W.2d 502.

Curtilage is "the area to which extends the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life.'" *Oliver*, 466 U.S. at 180 (citation omitted).

Under certain limited exceptions police may enter a property's curtilage. *State v. Hay*, 2020 WI.App. 35, ¶11, 392 Wis.2d 845, 946 N.W.2d 190. To do so, however, "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) (emphasis added); see also *State v. Ferguson*, 317 Wis.2d 586, ¶29 767 N.W.2d 187 (2009) ("[C]ourts, in evaluating whether a warrantless entry is justified by exigent circumstances, should consider whether the underlying offense is a jailable or nonjailable offense …."). The State bears the burden of demonstrating that the warrantless entry was both supported by probable cause and justified by exigent circumstances. *Hay*, 392 Wis.2d 845, ¶11.

"Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed

or was committing a crime." *State v. Secrist*, 224 Wis.2d 201, ¶19, 589 N.W.2d 387 (1999). For probable cause to exist, "[t]here must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *Id.*

It is well established that "[w]arrantless entry is permissible only where there is urgent need to do so, coupled with insufficient time to secure a warrant." *State v. Smith*, 131 Wis.2d 220, 228, 388 N.W.2d 601 (1986), abrogated on other grounds by *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670 ¶42, 811 N.W.2d 775.

There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: (1) hot pursuit of a suspect, (2) a threat to the safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee. *State v. Richter*, 2000 WI 58, ¶29, 235 Wis.2d 524, 612 N.W.2d 29.

Law Enforcement Illegally Intruded on the Curtilage

The circuit court failed to consider that law enforcement violated the curtilage of Dr. Gollon's premises by departing the walkway, entering his

side yard, and looking into an attached garage window. (R.44:1-3.) This was despite the fact that Dr. Gollon's motion to suppress was grounded on that illegal entry, and the State conceded entry into the curtilage. (R.15:2; R. 18:1-2.). Sergeant Long testified that he departed the walkway to enter "a private area of the property." (R.41. 36-17.) The state conceded that Sergeant Long entered the curtilage of the secluded grassy area immediately to the side of the house to look inside the attached garage. See *State v. Walker*, 154 Wis.2d 158, 182, 453 N.W.2d 127 (1990) (quoting *Oliver*, 466 U.S. at 180 (stating that the protections of the Fourth Amendment extend beyond the walls of the home to the "curtilage" or "land immediately surrounding and associated with the home."). The photographs show that this area is not visible from the street, nor is it even visible from the driveway in front of the house. Hence, Sergeant Long correctly admitted it was "private."

Attached garages are part of a home's curtilage. See *State v. Leutenegger*, 2004 WI App 127, ¶21 n.5, 275 Wis. 2d 512, 685 N.W.2d 536 (attached garages, consistently held to be part of curtilage, are subject to the warrant requirement); see also *State v. O'Brien*, 223 Wis. 2d 303, 317-18,

588 N.W.2d 8 (1999) (premises warrant authorizes search of all "plausible receptacles," including vehicles in curtilage).

In *Collins v. Virginia*, 584 U.S. ___ (2018), the U.S. Supreme Court held that a motorcycle parked on the side of the defendant's home, and covered by a tarp, was inside the protected curtilage of the premises, and therefore not subject to a warrantless search. The Court reasoned:

> The "'conception defining the curtilage' is . . . familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 569 U.S. at 7 (quoting *Oliver*, 466 U. S., at 182, n. 12). Just like the front porch, side garden, or area "outside the front window," *Jardines*, 569 U. S., at 6, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes "an area adjacent to the home and 'to which the activity of home life extends,'" and so is properly considered curtilage, *Id.* at 7 (quoting *Oliver*, 466 U. S., at 182, n. 12).
>
> *Collins v. Virginia*, 584 U.S. __ (2018).

In the present case, which involved far more invasive conduct, officers departed the pathway leading to the front door in the early morning hours, proceeded to the grassy side yard, and looked into a window. In *Collins*, however, police were merely on the defendant's driveway. But here, law enforcement went beyond *Collins* by peering into the interior of the home from the vantage point of private areas of the property. Sergeant Long left the walkway to the home and walked around the side yard, searched the

garage by peering into the side window, and entered the premises' curtilage. See *State v. Popp*, 2014 WI App 100, ¶26, 357 Wis. 2d 696, 855 N.W.2d 471 (officers walking up back steps, onto the porch, and peering into the window constituted a search subject to constitutional protections).

To the extent the State raised the plain view doctrine, that argument fails. (R.18:7.) *State v. Davis*, 333 Wis.2d 490, 798 N.W.2d 902, 2011 WI App 74, ¶¶ 15-16, held that it is "unreasonable" for law enforcement to proceed to an area of the home that is "not visible" from a lawful vantage point. Therefore, because law enforcement had no right to enter the home's curtilage and view the vehicle inside the garage, the plain view doctrine cannot apply to allow evidence subsequently derived from the investigation. See *Davis*, 2011 WI App 74, ¶ 16.

The circuit court erred, as Sergeant Long and other officers violated Dr. Gollon's right to be free from an illegal search of the curtilage of his home.

The State Argued that Police had Reasonable Suspicion of Wrongdoing, but the Standard for Warrantless Entry to the Curtilage Requires Both Probable Cause and Exigent Circumstances

There is no dispute that law enforcement did not have a warrant. Thus, the search of Dr. Gollon's premises in the curtilage of his home was presumptively unreasonable. *See Payton*, 445 U.S. at 586.

The circuit court did not specifically address whether law enforcement had probable cause to enter upon the curtilage. (R.44:1-3.) The State argued that law enforcement "had reasonable suspicion of wrongdoing based on the evidence that Mr. Gollon's vehicle was involved in a crash several houses away from his residence[.]" (R.18:4.) The State never argued that officers had probable cause and it was not discussed at the evidentiary hearing. (R.18:1-10. See generally R.41. 1-57.) Reasonable suspicion is a lower quantum of evidence than probable cause. Probable cause to enter curtilage requires more than a reasonable suspicion or possibility that the suspect committed a crime. See *Secrist*, 224 Wis.2d 201, ¶19. And in this case, the police had no evidence of anything more than civil traffic violations, at best.

Therefore, even assuming, *arguendo*, that an exigent circumstance existed, police were not justified in entering the curtilage because there was no showing of probable cause. See *Hay*, 392 Wis.2d 845, ¶11; *Kirk*, 536 U.S.

at 638; *Ferguson*, 317 Wis.2d 586, ¶29 (explaining that officers need *both* probable cause and an exigent circumstance to enter curtilage).

Because probable cause is a necessary precondition to law enforcement legally entering a residence's curtilage without a warrant, the circuit court erroneously neglected to consider whether there was probable cause. In so doing, it erred in denying the motion to suppress.

There Were No Exigent Circumstances, and the Community Caretaker Function Does Not Extend to the Home

There was no showing of exigent circumstances justifying entrance to the protected curtilage. Thus, even if there was probable cause, law enforcement illegally entered the curtilage because no exception to a warrantless search of the home existed.

The State relied on the community caretaker "exception" in arguing that the police violation of the curtilage of Dr. Gollon's home was justified. (R.18:1-2.) Specifically, while conceding that the officers searched the residence by looking through windows of the house and the garage, the state argued that it was part of the community caretaker function to gather additional evidence to address the seriousness of the situation." (R.18:5.)

This argument is nonsensical, as the community caretake function is not a matter of gathering evidence.

The community caretaker "exception" is no longer considered as an exception to the warrant requirement. Rather it is a police function that may trigger an exception. Moreover, it does not apply to the curtilage of a residence. In *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), a unanimous United States Supreme Court held that the community caretaker doctrine cannot be used to justify a warrantless intrusion into a home. Rather, the exception applies to searches of automobiles. The Court noted the 'constitutional difference' between a home and a vehicle. *Id.* at 1599.

Moreover, any "[c]ommunity caretaker action is that which is totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." *State v. Ellenbecker*, 159 Wis.2d 91, 96, 464 N.W.2d 427, 429 (1990). In this case, however, Sergeant Long admitted that he was looking for evidence of the car that was involved in a hit and run. (R.41. 27.)

Although the circuit court acknowledged in a footnote that the community caretaker exception was inapplicable to the instant case, it nonetheless relied on the doctrine. (R.44:1) It found that "Officer Long

expressed concern, because the crash of a car and leaving a "chunk" of it there, he didn't know if there's any kind of injury or possibly impaired driving or anything along those lines after arriving at the defendant's house." (R.44:2.) The court further noted that officers went to Dr. Gollon's residence to conduct their investigation and "to check for the welfare of the owner or operator[.]" (R.44:2.) See generally *State v. Ultsch*, 2011 WI App 17, ¶15, 331 Wis. 2d 242, 793 N.W.2d 505 (stating that in evaluating whether the officer was acting as a bona fide community caretaker, the court must carefully examine the expressed concern for which the community caretaker function was undertaken, and "[t]he question is whether there is an 'objectively reasonable basis' to believe there is 'a member of the public who is in need of assistance.'").

The court additionally found that "there was no 4th amendment violation as Officer Beach simply went to the front door of the defendant's house while investigating a crash with potential injury or violation." (R.44:3.)

Since the community caretaker doctrine does not apply to warrantless searches of the home, the court's reasoning was incorrectly grounded on a concern for Dr. Gollon's "welfare."

The court's reasoning conflicted with the evidence presented at the evidentiary hearing in which Sergeant Long testified that he specifically "looked into the garage to see if the car was there." (R.15:2; R.41. 27, 32.) Thus, by law enforcements' own admission, the departure from the walkway and entrance onto the curtilage was not merely to determine whether there was injury, but to gather evidence related to the crash.

Further, the State did not show that the entry into the curtilage was urgent and there was insufficient time to obtain a warrant. See *Smith*, 131 Wis.2d 220, 228. Any speculation that an injury may have occurred was mere conjecture and not based on facts known to law enforcement.

In fact, there was no testimony that law enforcement knew of any injury or medical condition associated with the crash. Even assuming such concerns were present and reasonable, there was no explanation of how peering into a garage window on the side of the house would address that concern or any immediate urgency. (R.44:2; R.41 13, 31, 46.) See generally *State v. Smith*, 131 Wis. 2d 220, 235, 388 N.W.2d 601 (1986) (emphasis added; citation omitted), abrogated on other grounds by *State v. Felix* , *supra* ("When an officer undertakes to act as his own magistrate, he ought to be in

a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.").

There was also no evidence that officers attempted to obtain a warrant; nor did officers allege that they had insufficient time to secure a warrant. *See State v. Dalton*, 2018 WI 85, ¶39, 383 Wis.2d 147, 914 N.W.2d 120 ("The exigent circumstances exception to the warrant requirement applies if the need for a search is urgent and there is insufficient time to obtain a warrant.").

Although the circuit court explained that law enforcement was concerned because Officer Beach saw the feet sticking out of the hallway, (R.44:3) Sergeant Long testified he went to the garage window *before* Officer Beach communicated what he saw to the other officers. Moreover, the person whose feet were observed stood up and retreated out of view. (R.41. 28.) Although there was some inconsistency in the evidence, Sergeant Long testified that Officer Beach informed him that he had seen someone laying on the floor after Long had already seen the vehicle in the garage. The person had moved out of view before Sergeant Long returned to the front of the house. (R.41. 28.)

Moreover, after observing the vehicle in the garage, Sergeant Long went back to the front door, told the others about the car, and continued

banging on the door. (R.41 28.) Thus, there were now multiple officers banging on the door. Officer Beach also testified that the continued knocking and ringing was based on the information gathered, including that the car that matched the bumper left at the crash scene was in the garage. (R.15:2; R.41. 28, 34.)

There was no testimony that Officer Beach would have continued knocking had Sergeant Long not reported that he observed the vehicle in the garage. Nor was there evidence that multiple officers would have commenced banging on the door without this additional information.

Police Far Exceeded a Reasonable "Knock and Talk"

Dr. Gollon acquiesced to the officers only after they entered the protected curtilage of the home, searched inside the curtilage of his home, and persisted in loud, continued, non-routine knocking on the door. *Cf. Jardines*, 133 S. Ct. at 1416 ("To find a visitor knocking on the door is routine . . . to spot that same visitor exploring the front path with a metal detector or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police."). Similarly, arriving at a house at 2:00 a.m., banging loudly on the door for a long time, shining lights into the windows, going to the secluded side area of

the house and peering in windows, is far outside the purview of an allowed "knock and talk."

Thus, contrary to the circuit court's finding that "Officer Beach knocked on the door for a reasonable period of time," (R.44:3) the record demonstrates that any so-called "knock and talk" did not occur in isolation and was accompanied by the illegal incursion. Further, unlike a situation in which an officer merely approaches a home from the front path, knocks promptly and waits briefly to be received, here officers searched a private area of the house, conferred with each other regarding that search, and banged on the door for about five minutes. When police go to a suspect's residence without a warrant, they may conduct a "knock and talk" investigation. There is an "implicit license" allowing a visitor to approach a home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Thus, a police officer may approach a home and knock, precisely because that is "no more than any private citizen might do". But when the police exceed what a "private citizen might do," they implicate constitutional privacy concerns. cf. *Jardines*, 569 U.S. at 8, (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011).

Under these circumstances, it was not reasonable for multiple officers to continue knocking on Dr. Gollon's door after 2 a.m., without a warrant, or probable cause, or exigent circumstances.

Police Use of a Flashlight to Shine the Interior of the Home was Unreasonable

In addition to Sergeant Long's intrusion into the private area at the side of the home, Officer Beach's actions also constituted an illegal search. It was unreasonable to use a light to shine the interior of a home at 2 a.m., when multiple officers were present and on the curtilage.

Government agents approaching a residence with legitimate police business may access any area of the curtilage impliedly available to the public. *Wisconsin v. Edgeberg*, 188 Wis.2d 339, 347, 524 N.W.2d 911 (1994). It is therefore not a Fourth Amendment search for police to see from that vantage point something in plain view inside the home. *Id.*

Under the plain view doctrine, which was discussed by the State (R.18:6-7), evidence is admissible if: (1) the evidence is in plain view; (2) the officer is justified in being in the position from which the evidence is discovered in plain view; and (3) the evidence in itself or coupled with facts known to the officer at the time of the seizure provides probable cause to

believe there is a connection between the evidence and criminal activity. *State v. Guy*, 172 Wis.2d 86, 101–02, 492 N.W.2d 311 (1992).

Officer Beach, however, was not justified in the continued banging and ringing of the doorbell. It was unreasonable for him to continue to persist knocking and ringing for five minutes and shining his flashlight into the interior of the residence, especially considering the early morning hour and the presence of multiple officers around the home. See *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 17, 330 Wis.2d 760, 796 N.W.2d 429 (2010) explaining that the following "nonexhaustive list of relevant factors [aid in] determining whether a constructive entry to a residence has occurred during a 'knock and talk': the time of day, the number of officers present, the show of authority and officer persistence").

No reasonable person would allow a person on their property at 2 a.m. to continue knocking and ringing their doorbell as other people look around the house. This would cause a reasonable dweller to fear and spur a call to the police for help. After a brief amount of time passed and the first prompt knock, Officer Beach was no longer justified in being in the position where he could look into the house. *Cf. Jardines*, 569 U.S. at 8 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011) (acknowledging an "implicit license"

allowing a visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave).

The state cannot argue that evidence was in plain view if unlawful means were used to obtain the vantage point for the observation. *Guy, supra*.

This was not a situation where the officers went to Dr. Gollon's home to simply knock on the door and ask questions. *See Jardines*, 133 S. Ct. at 1416 ("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'") (citation omitted). Rather, the officers were determined to induce Dr. Gollon to open the door and to locate the car. This is established by Sergeant Long's testimony that he was looking for the car and the fact that multiple officers continued banging on the door. (R.41. 27.)

As the United States Supreme Court has stated:

> [A]ny physical invasion of the structure of the home, "by even a fraction of an inch," [is] too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, ... all details are intimate details, because the entire area is held safe from prying government eyes.

> *Kyllo v. United States*, 533 U.S. 27, 37, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)).

This case is like *State v. Davis*, 333 Wis.2d 490, 798 N.W.2d 902, 2011 WI App 74 (2011), in which officers entered the defendant's attached garage without a warrant. The court assumed for the sake of argument that entry through an open door was permissible under *Edgeberg*. It nonetheless held that it "was unreasonable for [an officer] to proceed to the rear of the garage to a door that was not visible from outside." *Id* at 501. The court additionally reasoned that "it was even more unreasonable because [the officer] had to utilize a flashlight to find his way through the dark garage." *Id.* The officer has also shined his flashlight "down the foyer to the front door." *Id.* at ¶ 5.

In this case, like *Davis*, Officer Beach needed the aid of the flashlight to see through Dr. Gollon's house. (R.41. 10.) No person could reasonably conclude that a home's front door provides an open invitation to shine a flashlight into the window at 2 a.m., while other associated individuals search around the house. Because Officer Beach had no right to use his flashlight, the plain view doctrine cannot apply to allow evidence of the person he observed inside home and justify the continued efforts to get the person to

open the door. See *Edgeberg*, 188 Wis.2d at 345–46, 524 N.W.2d 911 ("The officer's right to be in the place where the view occurs is fundamental to the validity of what follows.").

Although law enforcement did not physically enter the garage as in *Davis*, there is no dispute that Officer Beach was located on the front porch, which consisted of the home's curtilage, and Sergeant Long went to the "private area" at the side of house to peer into windows. This was far beyond a lawful "knock and talk," an act that any private citizen might do. See *Jardines*, 133 S. Ct. at 1416.

The state argued that Officer Beach properly used his flashlight. (R.18.7.) Most of the State's authorities, however, address police shining a flashlight into a vehicle; yet this case involves the enhanced constitutional protections afforded to the home and its curtilage. See *State v. Weber*, 163 Wis.2d 116, 138, 471 N.W.2d 187, 196 (1991) ("[T]the expectation of privacy [in a vehicle] is considerably lower than in a home or office."). See, e.g., *Anderson v. State*, 66 Wis.2d 233, 223 N.W.2d 879 (1974) (the discovery of tools in a car by the use of a flashlight while the officer was standing outside of the car); *State v. Bell*, 62 Wis.2d 534, 541, 215 N.W.2d 535 (1974) (the discovery of items in a car by the use of a flashlight while

the officer was standing outside of the car); *Warrix v. State*, 50 Wis.2d 368, 373-74, 184 N.W.2d 189 (1971) (the discovery of items in a car by the use of a flashlight while the officer was standing outside of the car).

In particular, the State relied on *State v. Bies*, 76 Wis.2d 457, 472-73 (1977) to argue that items discovered in plain view with the aid of a flashlight in the exercise of law enforcement's community caretaker role are constitutionally permissible. (R.18:7-8.) While this case was pending, however, the Supreme Court held that the community caretaker role does not apply to a search of a home. *Caniglia, supra*.

The State's reliance on *Sanders v. State*, 69 Wis.2d 242, 256, 230 N.W.2d 845, 849, 853 (1975) is also misplaced. In that case the defendant was accused of murdering two Milwaukee police officers. Upon the statements of two eyewitnesses, police went to a residence and arrested Sanders. The circuit court and the supreme court found that there was probable cause for the arrest. The officers were allowed into the home to make the arrest. While arresting Sanders, who was laying on a couch, officers saw a box of bullets and a blood-stained jacket. When officers located the bullets, they may (the facts were unclear) have used flashlights to illuminate what they had already seen in plain view, and they were looking

at the area within the reach of a suspect in the recent murder of two police officers. The extreme facts of *Sanders* are very different than in this case because at the time of the search in *Sanders*, there was evidence rising to probable cause of homicide, and arrest in progress, and the sight of evidence in plain view and within reach of the defendant. *Id.* at 852-854.

State v. Spraggin, 71 Wis.2d 604, 611, 239 N.W.2d 297 (1976), is also distinguishable because police had an arrest warrant, an exigency existed, and the court held that "[i]n executing the arrest warrant, the officers may investigate an entire dwelling in order to make sure that the wanted person is in fact present or absent." Further, any evidence incidentally discovered pursuant to the valid arrest warrant is generally admissible. *Id.* at 612. In this case, however, there was no warrant and no exigency.

Here, Dr. Gollon had a reasonable expectation of privacy that a flashlight would not be used to peer inside his front door at 2 a.m. while other individuals searched around his house, peering into windows. See *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) ("'The touchstone of the Fourth Amendment is reasonableness.'").

Accordingly, based on the totality of the circumstances, the search of the home with the visual aid of the flashlight constituted an illegal search. *State v. Morgan*, 197 Wis.2d 200, 209, 539 N.W.2d 887 (1995) ("[T]he determination of reasonableness is made in light of the totality of the circumstances known to the searching officer."). The discovery of the car resulted from an illegal search, which resulted in continued knocking, which caused Dr. Gollon to open the door and acquiesce to the officers. Hence, all evidence subsequently discovered should have been suppressed.

CONCLUSION

The circuit court erred as a matter of law in denying Dr. Gollon's motion to suppress. Accordingly, this Court should vacate Dr. Gollon's conviction.

Signed and dated this 7th day of May, 2023.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 6,097 words.

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 Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 been so reproduced to preserve confidentiality and with appropriate references to the record.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this 7th day of May, 2023.

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