STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2023AP000085 - CR

v.

ROGER JAMES GOLLON,

Defendant-Appellant.

REPLY 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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INTRODUCTION

> At the Amendment's "very core," we have said, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Lange v. California*, 594 U.S. ___, p. 5 (2021)

In response to the defendant-appellant's motion to suppress, the state responds that the warrantless entry to the curtilage was justified by the emergency aid doctrine, while the trial court implied that there was no entry to the curtilage. The defendant-appellant's reply is simple. There was a warrantless entry to Dr. Gollon's curtilage which was unlawful, as there was neither a real nor apparent emergency.

STATEMENT OF THE CASE AND FACTS

This is a prosecution for operating a motor vehicle while under the influence of an intoxicant, second offense. In response to the defendant-appellant's motion to suppress evidence derived as a result of unlawful entry of the curtilage of defendant's premise, the state conceded that the police entered and searched the curtilage of Dr. Gollon's home without a warrant but asserted that the warrantless entry and search were justified under the community caretaker exception to the warrant requirement. After the evidentiary hearing, the defendant-appellant again asserted that an unlawful warrantless entry and search of Dr. Gollon's home occurred, the community

caretaker doctrine was inapplicable to a search of a home under *Caniglia v. Strom*, 593 U.S. ___, 141 S. Ct. 1596, 209 L.Ed.2d 604 (2021), and that there were no exigent circumstances.

The trial court issued a written decision on June 12, 2022. The court held that the police did not violate Dr. Gollon's "reasonable expectation of privacy," and therefore did not address the state's contention that the entry and search were justified by the community caretaker doctrine, or the "emergency doctrine."

Dr. Gollon appealed. The state replied, again conceding that there was a warrantless entry and search of the curtilage of Dr. Gollon's home. The state now argues that the "emergency aid" exception to the warrant requirement applies.

On March 26, 2021, police responded to an incident at the intersection of Hefron Street and Alder Street in Stevens Point. At that location they observed a tree and gas line (or gas line sign) that appeared to have been struck by a vehicle. Nearby they observed a maroon automobile bumper with a license plate attached. The license plate listed to the defendant at his home address on Alder Street, about two houses away from the accident site. (R: 41, p.24, ll. 24,25, p.25, ll. 1-15).

The police suspected that Dr. Gollon had struck the tree with his car and left the scene. The possible infractions then known to law enforcement were failure to perform duty upon striking property adjacent to a highway (Wis. Stat. §346.69), and failure to control vehicle (Wis. Stat. §346.57(2), both of which are civil traffic violations. The police went to Dr. Gollon's nearby home, and searched the curtilage of the home, peering into a private garage window to locate the car that was in the accident, and shining lights into the interior of the home, at one point seeing Dr. Gollon's feet. Locating the vehicle parked inside of the closed garage, the police continued banging the door and shining lights into the interior of the home until Dr. Gollon responded.

ARGUMENT

The trial court overlooked two keys facts: first, that Sergeant Long unambiguously violated the curtilage in going to the secluded side of the house and peering into the elevated garage window to locate the car; and, second, that Officer Beach's conduct in illuminating the interior of the house, and continuing to bang on the door went beyond a "knock and talk," into the realm of a violation of the curtilage.

The state concedes that the law enforcement officers entered and searched the curtilage of Dr. Gollon's home without a warrant. The state also concedes that *Caniglia, supra,* held that the community caretaker function does not apply to the entry or search of a home. The state now argues that the "emergency aid" doctrine justifies the search of the curtilage of the home. The state relies on the emergency aid doctrine, now equating it with the community caretaker doctrine.

The Police Violated the Curtilage of Dr. Gollon's Home

The trial court implied that there was no violation of curtilage, couching the decision in terms of "reasonable expectation of privacy. The law of curtilage, however, is unambiguous about the protections afforded to the exterior of a person's premises. The protections afforded to a home extend to the private areas adjacent to the home, such as the "front porch, side garden, or area outside the front window…" *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

There are four factors to be considered in determining whether an area is 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) "the steps

taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). *State v. Rewolinski*, 159 Wis. 2d 1, 17-18, 464 N.W.2d 401 (1990).

In *Collins v. Virginia*, 584 U.S. ___, 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018), the 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, even though it was a vehicle search:

> 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).

One simple way of codifying all the case law and determining whether an area constitutes curtilage is simply to answer the question of whether any ordinary citizen might have unfettered access. If a delivery man may access an area, then so may the police. That access, however, is not unfettered. Just as a delivery man may not bang on a door and shine flashlights into the

interior of a home at 2:00 a.m., neither may the police, unless they have a warrant to do so.

Utilizing this test, or the trial court's "reasonable expectation of privacy," test, it is clear why the state concedes a violation of the curtilage; as, on these facts they must do so. Dr. Gollon's closed, attached garage is protected at least as much as a motorcycle under a tarp in a driveway, as in *Collins*.

Entering the Curtilage to Shine Lights into a Home is a Search

The state argues that it is of no importance that the police used lights to illuminate the interior of Dr. Gollon's home in their search. The state urges the court to ignore that at 2:00 a.m., Officer Beach used a flashlight to illuminate the interior of a private home, as he searched for Dr. Gollon.

Bies v. State, 76 Wis.2d 457, 251 N.W.2d 461 (1977), is the closest case on this point cited by the state. In *Bies*, the police responded to a noise complaint regarding an unattached garage in an alley behind a house. As they arrived, the police noticed the garage lights switched off. From the public alley, the police attempted to look into the garage windows, which were, however, too dirty to allow a view. An officer walked into the back yard to the back yard garage entry door. There was no door in the doorframe, so the

officer shined his flashlight into the interior of the garage. He saw what he recognized as stolen cable. *Bies* held that because the officer was exercising a community caretaker function, he was lawfully in the back yard. Since there was no door on the garage, the inside of the garage was in plain view, and could be illuminated by a flashlight. *Bies*' holding that the police were exercising a community caretaker function, however, was rejected in *Caniglia, supra.* Even so, *Bies* did affirm that the back yard area from which the officer viewed the interior of the garage was, in fact, protected curtilage. *Bies* involved the search of an unattached garage with a missing door. In general, outbuildings are not afforded the same protections as a home and attached garage, and the missing door diminishes any expectation of privacy. See, e.g., *U.S. v. Dunn*, *supra*.

While the state downplays the significance of illuminating the interior of a person's home at 2:00 a.m., it is an extraordinary intrusion, impermissible to any delivery person, postal carrier, or utility worker; and thus, it is impermissible to a police officer without a warrant.

The Emergency Aid Doctrine Requires Urgency, Unlike the Community Caretaker Function

The state now asserts that that community caretaker function and the emergency aid doctrines are the same, thus justifying the warrantless entry and search of Dr. Gollon's curtilage.

The state relies on four cases for its novel assertion that the emergency aid doctrine applies when there was no actual emergency. *State v. Ware*, 2021 WI App 83, 400 Wis.2d 118, 968 N.W.2d 752; *Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed. 650 (2006); *State v. Pinkard*, 2010 WI 81, 327 Wis.2d 346, 785 N.W.2d 592; and *State v. Boggess*, 115 Wis.2d 443, 340 N.W.2d 516 (1983). Each of these cases, however, show how the emergency aid doctrine fails to justify the search of Dr. Gollon's curtilage, as each of these cases requires not just speculation, but evidence of medical urgency. Both Officer Beach and Sergeant Long, however, testified that they did not know whether there was any medical emergency. (Officer Beach: R: 41, p. 13, ll. 18-24; Sergeant Long: R:41, p. 32, ll. 6-8).

Brigham City, supra, is also instructive as to the requirement for actual urgency, rather than speculation. The police arrived at a loud party, heard shouting, witnessed juveniles drinking, and witnessed one person punch another hard enough that the victim was spitting blood.

In *Ware*, an identified citizen called the police, stating that he lived at a residence with the defendant. His girlfriend argued with the defendant the prior night and was missing. He went on to state that there was a truck in the garage, with blood leaking from it, pooling on the garage floor. The police searched the garage and found a body in the truck. Contrary to the state's assertion, *Ware* explicitly held that there is a conceptual difference between the community caretaker doctrine and the emergency aid doctrine. Whereas the community caretaker doctrine focuses on the intent of the police, the emergency aid doctrine requires objective urgency.

In *State v. Pinkard*, supra, the police responded to a detailed but anonymous phone tip, stating, '… City of Milwaukee Police Officer Mike Lopez (Lopez), received an anonymous tip in which the caller stated that he had just left 2439 South 7th Street, Pinkard's residence, in Milwaukee. The caller stated that inside that residence two people, "Big Boy" and his girlfriend, "Amalia," appeared to be sleeping; that located next to them was cocaine, money and a digital scale; and that the rear door to the residence was standing open." *Pinkard*'s holding that the community caretaker doctrine applies to homes as well as automobiles is now overruled by *Caniglia*. Also, there is no language in *Pinkard* equating the community

caretaker doctrine with the emergency doctrine. Even so, the facts of *Pinkard*, unlike this case, showed an actual emergency.

In *Boggess*, a social worker with the Oconto County Department of Social Services, received an anonymous telephone call around suppertime. The caller indicated that two children had been battered and needed medical attention. The caller identified two children by name and indicated that they lived with Boggess. The caller also stated that one of the children, L.S., was limping, bruised, and should be checked by a doctor. The caller additionally stated that he knew that Boggess had a bad temper.

These cases have far more than mere speculation that there may have been a medical emergency. In *Brigham City*, the police witnessed a man being punched and spitting blood. In *Ware*, there was an argument, a missing person, and a pool of blood leaking from a truck. In *Pinkard*, there was a report of unconscious people on the floor next to drugs and rear door left open. In *Boggess*, there was a detailed report of child abuse and a statement that a child needed a doctor. These are all in stark contrast to this case where there was a property damage single car accident, and the driver apparently went home, parked his car inside his garage, and withdrew from view (although the police momentarily saw his feet).

Officer Beach testified that did not know that anyone was injured. Rather, he saw two stocking clad feet protruding beyond a wall, toes up indicating the person was laying on his back. The feet then moved as the person stood up and retreated from view. Far from showing any medical problem or emergency, this showed that Dr. Gollon was doing exactly what he had a constitutionally protected right to do: retreat into his home and withdraw from view. If the fact that a person in his home retreats from view is used to infer that he is injured, the right of a person to retreat into his home will no longer exist.

Under these circumstances, the police required a warrant to enter the curtilage of Dr. Gollon's home, which they failed to even consider.

CONCLUSION

As a result of the unlawful entry and search of the curtilage of Dr. Gollon's home, the police discovered the car, and saw Dr. Gollon in his home. This prompted loud continuous banging on the door, compelling Dr. Gollon to respond and acquiesce to the investigation. There was no emergency nor urgency to the situation. The police could have sought a warrant. They simply omitted that step.

Signed and dated at Glendale, Wisconsin this 22nd day of June 2023.

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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 2,406 words.

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 at Glendale, Wisconsin this 22nd day of June 2023.

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Electronically signed by:

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