COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1525-CR **Cir. Ct. No. 02-CT-107**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD D. BARR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Gerald Barr appeals an order denying his motion to suppress evidence as well as a judgment of conviction for operating while intoxicated, third offense. Barr contends that evidence leading to his arrest should

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

have been suppressed because the investigating officer unlawfully entered his home's curtilage. He also argues that the officer lacked probable cause to arrest him. Because we conclude that Barr subsequently consented to the officer's search, thereby purging the taint of any unlawful curtilage entry, and because we conclude that the officer had probable cause to arrest Barr, we affirm the judgment and the order.

Background

¶2 The facts are essentially undisputed. A hit-and-run traffic accident occurred on May 2, 2002. The victims provided the St. Croix County Sheriff's Department with a description of the driver and the vehicle that fled the scene, including the license plate number. Deputy James Mikla was dispatched to Barr's home because Barr was the vehicle's registered owner according to information on file with the Division of Motor Vehicles. The dispatcher also provided Mikla with the driver's description and noted that the driver could be under the influence of alcohol.

¶3 When Mikla arrived at Barr's home, there was no vehicle in the driveway and the garage was closed. Mikla parked in the driveway and knocked on the front door. There was no response, but Mikla heard a dog barking inside the home. Mikla walked around to the backyard, where a raised deck was located. Mikla climbed the deck's staircase to a patio door. The door's heavy glass door was open, but the screen was closed. Mikla knocked on the back door and made

contact with Barr. Mikla asked if he could come in to speak with Barr. Barr consented and Mikla entered.[2]

¶4 Barr matched the physical description Mikla had been provided—a white male with dark hair and glasses. Mikla informed Barr he was there to investigate an accident. Barr asked whether anyone had been injured, left for a moment to secure his dog and then returned, declining to answer any further questions. During the encounter, Mikla observed slurred speech, unsteady balance, and a strong odor of intoxicants coming from Barr. Mikla arrested Barr for operating while intoxicated and for the hit-and-run. As they exited, Barr asked Mikla if they could exit through the garage so that he could secure the dog more appropriately. As they exited, Mikla observed the vehicle that was involved in the hit-and-run.

¶5 Mikla took Barr to the accident site for identification by the victims. On the way there, Barr apparently apologized for the accident, stating he was sorry for what he had done. At the accident site, the victims identified Barr as the driver of the vehicle that struck them. Mikla then took Barr to the sheriff's department for further processing, where Barr was first advised of his ***Miranda*** rights.[3] Barr took a Breathalyzer test, which returned a result of .23%.

¶6 Barr was charged with OWI as a third offense, operating with a prohibited blood-alcohol concentration as a third offense, and hit-and-run of an

[2] Barr disputes this fact, but the trial court explicitly found he gave voluntary consent.

[3] Although Barr argues that evidence should be suppressed because of an invalid arrest, he does not argue a ***Miranda*** violation on appeal. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

attended vehicle.[4] He filed a motion to suppress based on an unlawful stop, search, or arrest. The trial court denied the motion, and Barr pled guilty to the OWI charge. The remaining two counts were dismissed pursuant to a plea agreement. Because the court denied his motion to suppress, Barr now appeals.

Discussion

¶7 Whether police conduct violates Fourth Amendment protections against unreasonable search and seizure is a question of constitutional fact. ***State v. Tomlinson***, 2002 WI 91, ¶19, 254 Wis. 2d 502, 648 N.W.2d 367. Thus, we defer to the trial court's findings of evidentiary and historical fact but independently apply the facts to the constitutional standard. ***Id.*** However, because the underlying facts are undisputed, all that remains is a question of law. ***GMAC Mort. Corp. v. Gisvold***, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1988).

¶8 Initially we note that the issues raised are only whether Barr's backyard and deck are part of his home's curtilage for Fourth Amendment purposes, whether entry into the backyard and deck was lawful, and whether Mikla had probable cause to arrest Barr. Even if we agree with Barr, however, and conclude that Mikla unlawfully entered the backyard, the opinion cannot end there. Following Mikla's entry into the curtilage, Barr consented to his presence. The issue thus becomes whether these circumstances purged the "taint" of any claimed initial errors.

[4] The OWI and PAC charges were originally issued as second offenses, but were subsequently amended to third offenses.

¶9 It is well recognized that in an appropriate case we may sua sponte consider legal issues not raised by the parties. ***State v. Holmes***, 106 Wis. 2d 31, 39-40, 315 N.W.2d 703 (1982). Because of the constitutional issues involved here, we believe this is an appropriate case for sua sponte consideration of the legal question: whether the taint of an unlawful entry was purged.

Backyard Entry

¶10 "Curtilage" is the land and buildings immediately surrounding a house. *See* ***United States v. Dunn***, 480 U.S. 294, 300 (1987). ***Dunn*** established four factors for determining whether something is part of the curtilage,[5] and the parties devote considerable argument to those factors as applied to Barr's backyard and deck.

¶11 The trial court concluded:

> Mikla did not unconstitutionally invade the home's curtilage by coming to the back door …. The [deck] was implicitly open to the public, including neighbors, salespeople, and even law enforcement officers for such limited purposes as a "knock and talk." The area in question is not within an enclosure and the defendant could reasonably expect that people may use the back door. Though the concept of curtilage acknowledges the resident's legal expectation of privacy … Mikla did not violate that expectation in this situation. He made an

[5] These factors are

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and 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 (1987).

> attempt to use the front door and had the legal authority to move to the backyard to attempt contact.

¶12 Under ***Dunn***, Barr raises arguably colorable contentions that his backyard or at least his deck satisfied the criteria for curtilage. Rather than analyze all the factors, however, we will simply assume without deciding that Barr's backyard and deck are part of his home's curtilage.

¶13 For Fourth Amendment search and seizure purposes, a property's curtilage is considered the same as the home. ***State v. Martwick***, 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552. "Since physical entry of the home is 'the chief evil against which … the Fourth Amendment is directed,' it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." ***State v. Phillips***, 218 Wis. 2d 180, 195-96, 577 N.W.2d 794 (1998) (citation omitted). Thus, warrantless entry into the curtilage is as much a constitutional violation as warrantless entry into the home itself. As indicated, we will assume without deciding that Mikla entered the curtilage. It is undisputed that he did not have a search warrant.

¶14 However, one well-established exception to the warrant requirement is consent. ***Id.*** at 196. Thus, even if Mikla initially entered the backyard or deck

unlawfully, this error may have been vitiated when Barr consented to Mikla's presence in the home.[6]

¶15 Giving consent to search, however, does not mean that the subsequent search was free from the taint of the prior illegal entry.[7] ***Id.*** at 204. When voluntary consent to search is obtained after a Fourth Amendment violation, evidence seized as a result must be suppressed unless there is a sufficient break in the causal chain between the illegality and the seizure of evidence. ***Id.*** at 204-05. In other words, we must determine whether Mikla obtained Barr's consent by exploiting the unlawful entry into the curtilage. *See* ***id.*** at 203-04.

¶16 ***Brown v. Illinois***, 422 U.S. 590 (1975), established the factors we consider: (1) the temporal proximity of the official misconduct and the seizure of evidence; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of any official misconduct. ***Id.*** at 603-04; *see also* ***Phillips***, 218 Wis. 2d at 205.

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[6] On appeal, neither party has raised the issue whether Barr's consent was voluntary. Voluntariness is subject to a two-part review. First, there must be an indication, verbal or otherwise, that consent was given. ***State v. Phillips***, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998). Here, the trial court found Barr implicitly consented to Mikla's entry into the home, and this is not contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 197. Second, we must consider whether consent was given in the absence of duress or coercion, either express or implied. ***Id.*** The trial court found there was no duress or coercion and nothing in the record indicates Mikla was anything other than calm and polite when he made contact with Barr. There was no force or other questionable behavior that might give us pause, even if Barr had raised this issue.

[7] The phrasing in this case is somewhat peculiar. When Barr gave Mikla permission to enter the home, this was Barr's consent to a search even though Mikla simply observed Barr rather than physically rifling through the home. There was no tangible evidence seized, like drug paraphernalia in ***Phillips***. Rather, Mikla "seized" observation of Barr's physical appearance for comparison with the suspect's description, as well as observations of Barr's apparently inebriated state.

¶17 In ***Phillips***, officers unlawfully entered Phillips' basement through an outside door. ***Id.*** at 186-87. While they were in the basement, however, they obtained consent to search an adjoining bedroom where they found the evidence that led to Phillips' arrest. ***Id.*** at 187. The supreme court addressed the constitutionality of the search, ultimately concluding that the illegality of basement entry was purged by the consent to search the bedroom. The court denied suppression of the evidence taken from the bedroom. ***Id.*** at 189.

Temporal Proximity

¶18 This factor considers the amount of time between the alleged illegal entry and the consensual search. ***Id.*** at 206. While a short break between the two incidents weighs against attenuation, the actual time is not dispositive; also important are the factors at the time of consent. ***Id.***

¶19 In ***Phillips***, the supreme court noted first that the time between entry and consent was very short. However, it further observed that when the police entered the basement, they did not take Phillips into custody or otherwise restrain him. ***Id.*** at 206-07. The officers explained why they were at the residence. ***Id.*** Before granting consent, Phillips did not appear annoyed by the officers' presence, nor did he object to their presence. ***Id.*** The supreme court concluded that the "non-threatening, non-custodial" conditions attending the officers' presence in the basement and search of the bedroom, ***id.*** at 207, "lean[ed] toward a finding that any taint created by the initial [basement] entry had dissipated prior to the consensual search …." ***Id.*** at 206.

¶20 Here, Mikla's warrantless backyard entry parallels the basement entry in ***Phillips***. While the time span between Mikla's entry and Barr's consent appears to have been short, the situation was "non-threatening" and "non-

custodial." When Mikla made contact with Barr, he did not pull Barr from the house or otherwise restrain him, nor did Barr object to Mikla's presence.

¶21 Unlike Phillips' basement, Barr's backyard had no overt manifestation such as a fence to indicate Barr expected privacy. This is not to say individuals must always erect a fence to delineate a zone of privacy. However, unlike an enclosed subterranean room, Barr's backyard could be viewed by neighbors even if those neighbors are few and far between.

¶22 As part of the totality of the circumstances of the temporal proximity factor, though, we have a noncustodial situation with entry into an area that appears only semi-private. We conclude that this factor leans toward a conclusion that any "taint" caused by unlawful entry into the curtilage had dissipated by the time Barr allowed Mikla into the home.

Intervening Circumstances

¶23 In ***Phillips***, the short time frame between the basement entry and consent to search did not allow much opportunity for intervening circumstances. However, there was a brief discussion between one officer and Phillips where the officer explained what they were seeking. The supreme court believed this significant because it provided Phillips with sufficient information to determine whether he should consent to a search. ***Id.*** at 208-09.

¶24 Here, Mikla showed up at the back door in uniform, identifying himself and asking if he could speak with Barr. Barr did not inquire what Mikla

wanted to speak about, but rather seemed to know.[8] While this is a closer call than ***Phillips*** may have been, we believe the presence of the uniformed deputy at the door indicating he wanted to speak to Barr—not asking instead for some other family member—provided Barr with sufficient information to decide whether to admit Mikla.

Purpose and Flagrancy of Official Conduct

¶25 "This factor is 'particularly' important because it is tied to the rationale of the exclusionary rule itself." ***Id.*** at 209. "Because the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights." ***Id.*** (citation omitted).

¶26 In ***Phillips***, the supreme court concluded that the officers' conduct did not "rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion" of evidence obtained by their search. ***Id.*** The court of appeals had concluded the opposite. ***Id.*** at 209-10.

¶27 The supreme court noted the following points in support of their decision to admit the evidence seized in ***Phillips***: (1) There was no evidence the officers entered the basement in bad faith; (2) no evidence was obtained from the

[8] When informed that Mikla was investigating an accident, Barr did not disavow knowledge of any accident, but instead inquired whether anyone had been injured. Taken alone, his statement may simply seem compassionate. However, an officer is not required to eliminate every innocent explanation for a suspect's conduct. ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. As explained below in the probable cause section, it could also, under the circumstances, be interpreted by an investigating officer as a suspicious reaction.

basement; (3) the officers uncovered no information from the illegal entry that could be used to influence consent; (4) the officers did not approach Phillips without individualized suspicion; and (5) there was no evidence that the officers purposefully entered the basement to bolster pressure to consent. ***Id.*** at 210-11. The court also considered the manner of entry—the officers simply followed Phillips into the basement after they encountered him on the staircase leading to the door. ***Id.*** at 211-12.

¶28 This case is similar. There is no evidence of bad faith. Indeed, Mikla testified that one concern was the possibility that the driver involved in the accident was injured. Mikla obtained no evidence from the backyard area, nor did he obtain any information to use to influence Barr. Mikla also had a particularized suspicion based on DMV records; he did not go to Barr's home on the proverbial fishing expedition. Mikla also did not have to climb any fence, fend off a guard dog, or unlock any latch to gain entry into the backyard. As in ***Phillips***, no force was involved. It is this factor that we conclude weighs most heavily toward our conclusion that the taint of the illegal entry into the backyard had been purged.

¶29 Considering, as a whole, the temporal proximity factor, intervening circumstances, and the purpose of Mikla's conduct, we conclude that even if Mikla illegally entered Barr's backyard or deck, the taint had dissipated by the time Barr consented to Mikla's entry into his home. Because the search was consensual, there is no ground to suppress any evidence obtained.

Probable Cause to Arrest

¶30 Barr also contends that even if the initial search in the home was valid, Mikla had no probable cause to arrest him. If true, evidence obtained after Barr's arrest, including physical evidence on Barr's vehicle, should be suppressed.

Barr argues that Mikla had only an incomplete description of the hit and run driver, that Mikla had no idea where the involved vehicle was, and that Mikla did not know if there were any other registered drivers in Barr's home that might have also fit the driver's description.

¶31 Whether probable cause to arrest exists based on the facts of a given case is a question of law we review independently of the trial court. ***State v. Truax***, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). "In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the 'arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant'" had committed a crime. ***State v. Babbitt***, 188 Wis. 2d 349, 356-57, 525 N.W.2d 102 (Ct. App. 1994).

¶32 Here, Mikla had a rough description of the hit-and-run driver and vehicle, and he had confirmation of the vehicle's registered owner's name and address. When Mikla arrived at the address the DMV provided, he found Barr, who matched the suspect's physical description. When Mikla advised Barr that he wanted to discuss an accident, Barr asked whether anyone was hurt as opposed to denying any involvement in an accident. Barr did not suggest someone else had used his vehicle that evening. Mikla noticed that Barr seemed intoxicated, another factor about the driver that had been reported. Taken as a whole, we conclude that Mikla made a logical conclusion based on his knowledge at the time of the arrest. Mikla had probable cause to arrest Barr.

Conclusion

¶33 Assuming Mikla's entry into Barr's backyard and deck was an unlawful entry under the Fourth Amendment, we conclude that any taint was

purged by the time Barr consented to Mikla's entry into the home, making the subsequent search valid. Based on information obtained from the search, Mikla had probable cause to arrest Barr. After Barr's arrest, Mikla obtained additional information, including the location of the vehicle involved. Because the arrest was valid, evidence obtained incident to the arrest is also admissible.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.