COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2955 **Cir. Ct. No. 2014TR701**

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

IN THE MATTER OF THE REFUSAL OF JOSEPH R. ARNDT:

OCONTO COUNTY,

PLAINTIFF-RESPONDENT,

V.

JOSEPH R. ARNDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Oconto County: JAY N. CONLEY, Judge. *Affirmed*.

¶1 STARK, J.[1] Joseph Arndt appeals an order finding his refusal to submit to chemical testing was unreasonable. Arndt argues the circuit court erred because he was unlawfully arrested on the curtilage of his property. We disagree, and affirm.

BACKGROUND

¶2 After Arndt was arrested for operating while intoxicated, he moved to "dismiss [his] refusal and to suppress evidence based upon [his] illegal arrest." (Capitalization omitted). A motion hearing was conducted, at which the parties addressed both Arndt's refusal and his suppression arguments. The sole matter in dispute was the lawfulness of his arrest. Arndt argued law enforcement's entry onto his property violated his Fourth Amendment rights because he was arrested on his property's constitutionally protected curtilage. Arndt stipulated to the remaining refusal hearing issues.[2]

¶3 City of Gillett police officer Karl Goerlinger testified he was dispatched at approximately 7 p.m. in April 2014 to investigate a traffic complaint

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WISCONSIN STAT. § 343.305(9)(a)5. provides that the issues at a refusal hearing are limited to the following, in relevant part:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol … and whether the person was lawfully placed under arrest for violation of s. 346.63 (1) ….
>
> b. Whether the officer complied with sub. (4) [regarding the reading of the informing the accused form].
>
> c. Whether the person refused to permit the test ….

that "a black truck … was all over the road and possibly had hit a sign. The complainant … did see the vehicle pull into an address …." When Goerlinger arrived at the residence, the complainant was still at the scene. Goerlinger testified the complainant had observed the driver fall "out of the vehicle and was still by the vehicle."

¶4 Goerlinger described entering the driveway and seeing a vehicle consistent with the complainant's description, located southeast of a single-family home's detached garage and about "40 to 50 yards" from that residence. Goerlinger testified he could not see anyone when he stopped his own vehicle, but when he approached the suspect vehicle, and "walked around … I could see that the driver's side door of the vehicle was open, and I could see the suspect laying [sic] or slumped up against the seat of the vehicle." More specifically, the driver, later identified as Arndt, had his legs "standing outside of the vehicle, but his head and arms were sitting or resting on the driver's seat of the vehicle." Goerlinger testified the vehicle was still running at this time. Goerlinger observed Arndt was passed out, but appeared to be breathing. After Goerlinger shouted at Arndt, Arndt "got up" and Goerlinger observed Arndt's "pants were unbuttoned and it appeared his pants were all wet and his clothes were muddy, too." Goerlinger noted this was "[c]onsistent with what the complainant said" about Arndt falling "outside the vehicle."

¶5 Following the hearing, Arndt submitted a brief in support of his motion. The parties reconvened for oral arguments and the court's oral decision. Arndt contested the reasonableness of Goerlinger's warrantless entry onto his property and argued he was arrested within his home's curtilage. The State argued that Arndt was not located within his home's curtilage when he was arrested, and

as such the arrest was reasonable, and further, if there was a Fourth Amendment violation, that Goerlinger had acted as a community caretaker.

¶6 The circuit court concluded "it was entirely proper for Officer Goerlinger to enter the defendant's driveway[.]" The court cited ***State v. Bauer***, 127 Wis. 2d 401, 406, 379 N.W.2d 895 (Ct. App. 1985), for the proposition that no unreasonable search occurs when police "restrict their movements to those areas generally made accessible to visitors, such as driveways, walkways, or similar passageways." The court observed, "[T]hat's indeed exactly what the officer was doing." The court determined the defendant's truck was "in an area that's slightly off the driveway." Nevertheless, the court determined, based on aerial photos of Arndt's property that had been entered into evidence, "the most reasonable view is it looks like an area used for parking, and it's just off the driveway." The court then discussed ***United States v. Dunn***, 480 U.S. 294 (1987), and the four factors to be considered "when deciding … whether the area claimed to be curtilage is 'so intimately tied to the home itself that it should be placed under the home's umbrella of protection.'" ***Id.*** at 301 (one set quotations omitted).

¶7 First, the court considered the proximity to the home of the area claimed to be curtilage, and found credible Goerlinger's testimony that the area was forty to fifty yards from the home. The court noted the United States Supreme Court in ***Dunn*** had held sixty yards was a substantial distance, and, looking at the aerial photographic exhibit, stated it thought it was "fair to say that forty to fifty yards is a considerable distance from the home[.]"

¶8 Second, the court considered whether the area was within an enclosure surrounding the home. The court observed there were no fences on

Arndt's property and cited Goerlinger's testimony that he "[didn't] recall any fence at all.'"

¶9 Third, the court examined "the nature and uses to which the area is put[,]" and characterized the area, "best described by [defense counsel,]" as

> an area that Defendant or other invitees or individuals or residents regularly park their vehicles, and I think that this is a parking area, this is used for parking, and I think it's just off the driveway. I think this is pretty much, in the nature and use, is pretty much that this is part of the driveway and parking motor vehicles. I don't think that those are things that are intimately tied to the home.

¶10 Lastly, the court considered "the steps taken by the resident to protect the area from observation by passersby." The court found:

> In all the photographs, Exhibits 2, 3, 4, and 5, Mr. Arndt's property is completely open to the public, there are no steps taken whatsoever to protect this area from the observation of passersby. I think again, as the defense itself points out, I think this is an area used for parking that is just off the driveway.

¶11 The court ultimately found Goerlinger's encounter with Arndt "was not within the curtilage for Fourth Amendment purposes, but even if I assume for argument that it was a search of Defendant's property within the meaning of the Fourth Amendment, as the community-caretaker … function requires … I agree with the State." The court applied the factors of the community caretaker exception and stated:

> Officer Goerlinger said he was concerned about an OWI. … He said he wasn't sure if it was an OWI or medical reasons or something else. He said it could have been a medical reason, the defendant could have needed help. He said, "I wasn't sure what was going on."
>
> So I think he absolutely would be derelict in his duty to not go up that driveway and to check and see if the defendant was okay. So yes, part of his concern, you bet,

> was law enforcement and checking out this OWI situation, but he wasn't sure of what he had, and he was very credible in stating that.

¶12 The court concluded, "So I find the entry to the defendant's property was perfectly proper, the arrest is therefore perfectly proper based on the observations and the officer's interactions with the defendant, and therefore it was improper for [Arndt] to refuse the chemical test." The court denied Arndt's motion.

STANDARD OF REVIEW

¶13 The Fourth Amendment protects people from warrantless searches of their persons and property. This protection extends to the curtilage of a person's home. ***State v. Martwick***, 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552. Curtilage is recognized as the area "immediately surrounding and associated with the home." ***Oliver v. United States***, 466 U.S. 170, 180 (1984). It is "the area to which [a homeowner] extends the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life.'" ***Id.*** (quoted source omitted). Whether an area lies within a home's curtilage and is therefore protected by the Fourth Amendment to the United States Constitution is a question of constitutional fact. ***Martwick***, 231 Wis. 2d 801, ¶16. We review the circuit court's findings of historical fact under the clearly erroneous standard, and then independently review the ultimate decision as to the extent of curtilage. ***Id.***, ¶2.

DISCUSSION

¶14 In ***Dunn***, 480 U.S. at 301 (citations omitted), the Supreme Court held:

> [C]urtilage questions should be resolved with particular reference to four factors: 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. ... [T]hese 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.

¶15 Tracking the ***Dunn*** factors, Arndt argues: (1) he was close to his home and the circuit court "failed to consider that [he] was parked close to his unattached, two-car garage, which was itself, very close to the residence;" (2) the trees bordering his property functioned as "a natural wood fence;" (3) he was found in an area "that rural homeowners routinely associate with intimate activities of their home. For example, rural homeowners work on vehicles like urban homeowners might hang laundry out to dry in their backyard;" and (4) he claims he was found in his backyard, in an area that was not visible from outside his property because his home was "bordered by a 'woods[,]'" and suggests he had taken steps to ensure the area where he was found could not be seen by passersby. Accordingly, in Arndt's opinion, the ***Dunn*** test demonstrates he was arrested within his curtilage in violation of the Fourth Amendment.[3]

¶16 However, our independent analysis under ***Dunn*** leads us to the same conclusion as that of the circuit court: Arndt was not improperly arrested within the curtilage of his home. First, as the State observes, the court relied on

[3] Arndt also makes an argument regarding the community caretaker exception; however, that exception only applies when there has been a Fourth Amendment violation. *See* ***State v. Gracia***, 2013 WI 15, ¶15, 345 Wis. 2d 488, 826 N.W.2d 87. Given our ultimate conclusion that there was no Fourth Amendment violation, we need not reach the community caretaker exception.

testimony from the arresting officer as well as an aerial photographic exhibit when making its first finding that Arndt was located forty to fifty yards from his home. The fact there was a detached garage between Arndt's location and his residence does not negate the court's finding that this distance was sufficiently far from Arndt's home. *See* ***Dunn***, 480 U.S. at 301.

¶17 Skipping briefly to the third factor, the circuit court also found, based on its review of the exhibits and Goerlinger's testimony, that the area where Arndt was located appeared worn, appeared to be used for parking motor vehicles, and was directly adjacent to the paved driveway. *See* ***id.*** As the circuit court aptly noted, our supreme court has held there is no unreasonable search when the police restrict their movements to driveways. *See* ***Bauer***, 127 Wis. 2d at 406. Here, the worn location on which Arndt was arrested was the functional equivalent of a driveway; an extension of his driveway used to park additional vehicles.

¶18 Finally, as to the second and fourth factors, Goerlinger testified that Arndt's property was not enclosed by any fences, which was confirmed by photographic exhibits. *See* ***Dunn***, 480 U.S. at 301**.** While Arndt argues his property "was for all practical purposes closed off on three sides by a natural wood fence[,]" the remaining fourth side faced the street. The "wood fence" would not have acted to shield the driveway and adjacent parking area from the view of a person on the street passing by Arndt's home. *See* ***id.*** The record supports the circuit court's finding that despite the heavily wooded nature of Arndt's backyard, the "worn" area directly adjacent to the driveway on which Arndt's truck was located is readily visible from the street and unobstructed by any bushes, trees, or fences.

¶19 None of the circuit court's findings were clearly erroneous, and taken together, they lead us to the conclusion that Arndt was not within his curtilage at the time of his arrest. His truck was not parked in an area on his property intimately tied to the home itself, and therefore, the area was not protected by the Fourth Amendment.[4] Based on the foregoing, we affirm.

By the Court.—Order affirmed.

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

[4] We observe Arndt did not file a reply brief, and therefore fails to rebut any of the State's arguments in response to those he made in his brief-in-chief.