COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP277-CR **Cir. Ct. No. 2014CM385**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RACHAEL A. DICKENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Rachael Dickenson appeals her judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense,

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

entered upon her guilty plea following the circuit court's denial of her motion to suppress evidence. For the following reasons, we affirm.

Background

¶2 The following undisputed facts are taken from the hearing on Dickenson's motion to suppress. The only two witnesses were city of Hartford police officers who investigated a report of a vehicle in a snowbank. Officer Timothy Rohrer testified regarding the accident scene, and Officer Michael Koester testified regarding his investigation to locate the vehicle's owner.

¶3 Rohrer was called to testify by Dickenson.[2] He was dispatched on January 12, 2014, at 11:23 p.m. to a cemetery in the city of Hartford, based on a call from a local towing company. Rohrer found that the vehicle had been traveling from the south entrance of the cemetery to the north exit, but that the north exit had recently been plowed in, so the vehicle's driver had attempted to go around the plow-in and gotten the vehicle stuck in a snowbank. Dickenson's father arrived at the scene after Rohrer and informed Rohrer that Dickenson had been the driver of the vehicle and that she had gone to his and his wife's residence.

¶4 Koester was the only witness called by the State. He testified that on January 12, 2014, at approximately 11:30 p.m., he responded to a dispatch call to "investigat[e] an accident … and … locate the registered owner of the vehicle," Dickenson. Koester "was first informed to go to [Dickenson's] father's

[2] In order to provide a clearer, more chronologically ordered recitation of the facts, we begin with this officer's testimony, even though it came through the defense's case.

residence," but when he made contact with Dickenson's mother there, he was informed that Dickenson had already left to go to her own home.

¶5 Koester proceeded to Dickenson's residence, where he was met by another officer. Koester testified that following department policy where there was a flight risk, he proceeded up the driveway toward the backyard area while the other officer approached the front door. The driveway is located on the east side of the residence and there is a detached garage about two car lengths past the house. Koester stated that when he reached the back of the house, he saw a male and female sitting and smoking on a deck behind the house.

¶6 Koester testified that while he was standing on the driveway, he "asked to speak with Rachael Dickenson and the female party stated that she was Rachael." Koester confirmed he then had "a conversation about the investigation regarding the vehicle" and that it occurred on the deck in the backyard. On cross-examination, Koester confirmed he "did not wait to see if [the other officer] had any response at the front door" before walking up the driveway, nor did he "call out to see if anyone was in back."

¶7 Dickenson was ultimately charged with OWI, second offense, and filed a motion to suppress, which is the subject of this appeal. The circuit court denied the motion and Dickenson subsequently pled guilty. She appeals her conviction and the circuit court's denial of her motion to suppress.

Discussion

¶8 In reviewing a circuit court's order denying a motion to suppress evidence, we will uphold the court's factual findings unless they are clearly erroneous, but whether those facts satisfy a particular constitutional standard is a

question of law we determine independently. ***State v. Parisi***, 2014 WI App 129, ¶9, 359 Wis. 2d 255, 857 N.W.2d 472.

¶9 Dickenson argues that because Koester had no search warrant or consent and was "without any reasonable suspicion to believe that [she] had committed, was committing or was about to commit a crime or offense[[3]] and [because] no exigent circumstances existed," his actions in seeing and making contact with her in the back of the house were unlawful. She argues this is so because (1) she had a reasonable expectation of privacy in the area of the house where she was sitting, i.e., its curtilage, when Koester observed her and (2) Koester trespassed. She is incorrect on both points.

¶10 Whether Koester's presence in the driveway of Dickenson's residence amounted to an unconstitutional search raises a Fourth Amendment question. ***State v. Purtell***, 2014 WI 101, ¶21, 358 Wis. 2d 212, 851 N.W.2d 417. However, only if we first conclude Koester's presence in the location of the driveway from where he first observed Dickenson infringed on Dickenson's legitimate expectation of privacy, and thus constituted a search under the Fourth Amendment, will we inquire whether such conduct was unconstitutional. *See* ***State v. Rewolinski***, 159 Wis. 2d 1, 12-13, 464 N.W.2d 401 (1990) ("It is worth emphasizing that the constitutionality or reasonableness of the government conduct does not come into question unless and until it is established that [the

[3] The parties do not argue about "reasonable suspicion." We do point out, however, that at the time Koester walked up Dickenson's driveway, law enforcement was aware that she may have been the cause of a single-car incident in which she drove into a snowbank and then departed from her stuck vehicle, at a time of night often associated with alcohol consumption. *See* ***State v. Post***, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 (poor driving at a later time of night "does lend some further credence" to an officer's suspicion of intoxicated driving).

defendant] had a legitimate expectation of privacy that was invaded by government conduct, i.e., that a search or seizure within the meaning of the fourth amendment even occurred."); *see also* ***State v. Edgeberg***, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994) ("Police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public and in doing so are free to keep their eyes open.") (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c) at 393 (2d ed. 1987) (quoting ***State v. Crea***, 233 N.W.2d 736, 739 (Minn. 1975))).

¶11 "[T]he curtilage is the area that encompasses the intimate activities associated with the sanctity of the home and the privacies of life." ***United States v. French***, 291 F.3d 945, 951 (7th Cir. 2002). Some factors to be considered in determining whether a particular area is within the curtilage of a home are: "(1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps the resident takes to protect the area from observation by passersby." ***State v. Wilson***, 229 Wis. 2d 256, 264, 600 N.W.2d 14 (Ct. App. 1999) (citing ***United States v. Dunn***, 480 U.S. 294, 301 (1987)). Ultimately, the question is whether the area at issue is "one of intimate activity … [where] there was a reasonable expectation of privacy." ***Wilson***, 229 Wis. 2d at 265; *see also* ***French***, 291 F.3d at 951.

¶12 Based on these considerations, we have no problem concluding that the deck where Dickenson was seated when Koester observed her was within the curtilage of the home, but that the location on the driveway where Koester was standing when he observed her on the deck was not. As to the deck, the testimony indicates it was immediately next to the back of the home. While it was not within an enclosure surrounding the home, its placement in the immediate back of the

home suggests the homeowner's attempt to have it in a less visible location, than, for example, the front or side of the home. Further, decks are commonly used for activities with family and friends, such as barbeques, relaxing with a cocktail, or general socializing.

¶13 The area of the driveway where Koester was standing when he observed Dickenson on the deck is another matter. While the driveway was adjacent to the home, there is no evidence to suggest the location on the driveway where Koester was standing was within any type of enclosed setting. For example, there was no testimony of any gate, wall, fence, or other barrier which would create an enclosed area. Indeed, it appears from the evidence that Koester simply walked up to that location on the driveway completely unimpeded. The nature and use of the area where Koester was standing was that it was a driveway that would be used for ingress and egress to the front, side, and rear areas of the property by anyone living at or visiting the home, and the driveway continued past the back end area of the home toward a detached garage about two cars lengths farther up the driveway. Lastly, nothing in the record suggests Dickenson took any steps to "protect the area from observation by passersby." The entrance of the driveway abutted up against the street, and there is nothing to suggest any passerby would not have been able to see the location where Koester was standing when he observed Dickenson. The deck where Dickenson was seated was "intimately connected with the home and the activities that normally go on there" such that it would reasonably be considered part of the home. *See* ***French***, 291 F.3d at 951. The area where Koester was standing when he observed Dickenson was not so connected.

¶14 The key question for our constitutional inquiry, as we see it, is whether Koester was lawfully permitted to be in the location where he was

standing when he observed Dickenson, apparently in plain sight, on the deck. *See* ***Wilson***, 229 Wis. 2d at 264-66 (analyzing as the key issue the location where the officer was standing, approximately two feet from the back door, when he smelled the odor of marijuana); *see also* ***French***, 291 F.3d at 949, 952-55 (holding that the defendant's driveway and "backyard" gravel walkway were not within the curtilage of his home and he had no reasonable expectation of privacy related to them; thus law enforcement observations of a methamphetamine lab inside a shed, observations which were made in plain view and smell while the officers were located on the walkway, were lawful). The question then is whether the area where Koester was standing when he observed Dickenson was an area "of intimate activity … [where] there was a reasonable expectation of privacy." ***Wilson***, 229 Wis. 2d at 265. Here, Koester was not standing in an area of intimate activity or where Dickenson would have had a reasonable expectation of privacy. Any person could have readily walked up to the same area where Koester was standing when he saw Dickenson without raising any alarm that Dickenson's privacy had been significantly invaded. Further, from the description of the layout of the house, driveway, and detached garage, one would likely conclude that as Koester walked up the driveway toward the back end of the house, he also would have been able to observe other areas of the backyard before he ever reached the back end of the house.

¶15 ***Wilson*** is instructive. In ***Wilson***, an officer had "parked his vehicle in the driveway adjacent to the [defendant's] home and walked to the backyard." ***Id.*** at 260. He asked a young girl if she had seen a female juvenile for whom the officer had a warrant. ***Id.*** The girl denied having seen the juvenile that day, and the officer asked the girl if her parents were home. ***Id.*** The girl proceeded to the back door of the home, and the officer followed her to the door, standing on the

stoop and approximately two feet from the door and home. ***Id.*** at 260-61, 264. From this location, the officer smelled the odor of burning marijuana, ***id.*** at 261, 264, which ultimately led to the defendant's conviction for possession of marijuana, ***id.*** at 259-60.

¶16 Upon appeal related to a motion to suppress, the ***Wilson*** court concluded that the officer was within the curtilage of the defendant's property when he smelled the marijuana while standing on the stoop of the back door of defendant's home. ***Id.*** at 260-62, 264-66. Significant to the case before us, however, the court saw no constitutional improprieties with the officer's prior actions and locations—"park[ing] his vehicle in the driveway adjacent to the home and walk[ing] to the backyard," where he inquired of the young girl about the juvenile. ***Id.*** at 260-61.

> [The officer] went to the back of Wilson's home to investigate whether [the juvenile] was there. Before approaching the back door, he had determined that [the juvenile] was not among the children playing in the backyard and had been informed that [the juvenile] had not been seen that day. [The officer] made no effort to go to the front door to speak to Wilson. Having determined that [the juvenile] was not present, [the officer] was without legal authority to move into the backyard and stand at the rear door's threshold merely because a child, at his request, advised the adults that the police wished to speak to them.

Id. at 266. Unlike the officer in ***Wilson***, who after being on the driveway and "walk[ing] to the backyard," subsequently proceeded to the back door of the house where he smelled the marijuana, here, Koester simply walked up the driveway and from the driveway itself, saw Dickenson on the deck behind the house. From his position on the driveway, he informed the individuals on the deck he was trying to locate Dickenson, and Dickenson identified herself. Koester's actions in walking up and standing where he did when he first saw Dickenson did not bring him into

an area where Dickenson had a reasonable expectation of privacy. As a result, his presence in that location and inquiry of the individuals on the deck did not constitute an unlawful search under the Fourth Amendment.

¶17 Dickenson, citing to ***State v. Popp***, 2014 WI App 100, 357 Wis. 2d 696, 855 N.W.2d 471, argues in the alternative that Koester trespassed when he walked up her driveway to the point where he could observe her on the deck. In ***Popp***, we noted the United States Supreme Court's recognition that

> Fourth Amendment jurisprudence "has evolved into two seemingly different, but somewhat interrelated, methods of identifying protectable interests" relating to the home. One method focuses on a person's expectation of privacy…. The other method, "known as the intrusion or trespass[] test, focuses on whether government agents engaged in an 'unauthorized physical penetration' into a constitutionally protected area."

Id., ¶18 (citations omitted). We further noted "that a defendant claiming a Fourth Amendment violation may support his or her claim using either method." ***Id.***, ¶19 (emphasis omitted). We concluded in ***Popp*** that officers "trespassed on the defendants' property when they, without permission, went up the back steps and onto the porch on the west side of the defendants' trailer to peer into the window" using a flashlight and "walked on the grass and snow" to the north end of the trailer and peered into the trailer through a window with blinds that were closed but not fully functioning. ***Id.***, ¶¶7, 20.

¶18 Dickenson argues that Koester trespassed "by walking down the driveway all the way along the side of the home into the back yard and onto the back deck to seek out Ms. Dickenson." First, the evidence does not support Dickenson's claim that Koester came onto the back deck prior to engaging Dickenson in a voluntary conversation from his location on the driveway. Further,

Dickenson does not suggest that, after she began her conversation with Koester, she ever informed him that he could not come onto the deck to more conveniently continue the conversation; nor would the evidence support such a finding. In addition, relating to Koester's walk up the driveway alongside the house, Dickenson makes no claim, and the evidence would not support a claim, that Koester walked up to the house and attempted to "peer" inside through a window or otherwise impinged on the curtilage. The facts of this case are markedly different from those in ***Popp***.

¶19 Dickenson does not contend an officer's, or other citizen's, presence on all parts of the driveway would constitute trespass and provides no suggestion for how a reasonable person would know he or she had crossed the imaginary line on her driveway that would signal to the person that he or she had left the lawful area and become a trespasser. We also note there was no testimony that Koester ever utilized any extraordinary means or devices in order to observe Dickenson sitting on her deck.

¶20 The driveway was an access point to the property and an area that could be readily utilized by visitors. It directly abutted the city street and was not, as a whole, a constitutionally protected area. We conclude Koester was not trespassing by standing where he stood on the driveway when he observed Dickenson.

By the Court.—Judgment affirmed.

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