COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2555-CR **Cir. Ct. No. 2015CM88**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. SCHAEFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: LEON D. STENZ, Judge. *Affirmed.*

¶1 STARK, P.J.[1] Steven Schaefer appeals a judgment convicting him of one count of operating while intoxicated (OWI), as a fourth offense. Schaefer

[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.

argues the circuit court erred by denying his suppression motion. He also argues the court erred by refusing to vacate forfeiture of his cash bond. We reject Schaefer's arguments and affirm.

BACKGROUND

¶2 Schaefer was arrested for forth-offense OWI on May 31, 2015. On June 1, cash bond was set at $1000. The money was posted by a third party later that day. The bond informed Schaefer that he was required to appear at all court dates as a condition of release and that the next court date was on June 12, 2015, at 9:30 a.m. Schaefer failed to appear at the June 12 hearing. As a result, the circuit court ordered his $1000 cash bond forfeited.

¶3 An amended complaint charged Schaefer with OWI and operating with a prohibited alcohol concentration (PAC), both as fourth offenses. Schaeffer moved to suppress, arguing the officer who arrested him unconstitutionally entered the curtilage of his home without a warrant.

¶4 At the suppression hearing, deputy Chris Tanner testified police received a harassment complaint involving Schaefer on the evening of May 31, 2015. The complainant advised that Schaefer had left Junior's Bar in a white Ford Explorer and was driving toward Schaefer's residence. Tanner knew where Schaefer lived based on prior contacts and proceeded to his residence.

¶5 When Tanner arrived, he saw a white SUV "next to the side of the residence … on the driveway." The vehicle was running, with its headlights on, and loud music was coming from it. Tanner testified the driveway where the vehicle was parked runs from the highway "past the first corner of the house to the side of the house." The portion of the driveway closest to the highway is asphalt,

but it ultimately "turns from asphalt to gravel." Schaefer's vehicle was parked on the gravel portion of the driveway, and that is where Tanner made contact with Schaefer. Tanner testified there was nothing keeping him, or anyone else, from accessing the driveway.

¶6 Vanessa Tuckwab also testified at the suppression hearing. Tuckwab testified she and Schaefer have lived together for fifteen years. Documents introduced at the suppression hearing indicated that Tuckwab, a Sokaogon Chippewa tribe member, leases their residence from the Sokaogon Chippewa Housing Authority.[2]

¶7 Tuckwab testified her house has a front door, which has a doorbell, and a side door, which does not. Photographs of the house introduced during the hearing show that, when facing the front of the house, the side door is on the house's left side. The photographs show an asphalt driveway extending from the road to a point several feet shy of the front left corner of the house. An asphalt walkway branches off from the right side of the asphalt driveway toward the home's front door. Beyond the point where the asphalt portion of the driveway ends, a strip of gravel roughly the same width as the asphalt extends to approximately the house's back left corner. To the left of the gravel strip, the photographs show a grassy area containing a picnic table, grill, and utility shed.[3] Some of the photographs show a white SUV parked on the gravel strip, just outside the side door of the house.

[2] It is undisputed that Schaefer is not a tribe member.

[3] Schaefer testified the distance from the centerline of the highway to the end of the asphalt portion of the driveway is sixty-three feet, the gravel strip next to the house is twenty-seven feet long, and the utility shed is thirty feet from the side of the house.

¶8 Tuckwab testified she and Schaefer normally park their vehicles on the gravel strip on the left side of the house, and they have done so for years. She testified they generally walk across the gravel strip to get from the side door of the house to the utility shed. She also testified she sits on the picnic table to the left of the gravel strip almost every day, and she and Schaefer use the grill about three times per week. Tuckwab further testified that, although the home is heated primarily with propane, it also has a wood burning furnace. She purchases firewood from a third party, and the wood is delivered via a chute on the house's left side.

¶9 Tuckwab conceded the gravel strip next to the house is visible from the road. She further conceded that, when she is sitting at the picnic table to the left of the gravel strip, people walking by on the sidewalk "come up and talk to [her]." Tuckwab admitted there is nothing stopping visitors from approaching a vehicle parked on the gravel strip or from parking their own vehicles in that location. However, she stated the gravel area is "just for our use," and people outside her family do not typically park there. With the exception of relatives, she testified visitors typically come to the front door instead of the side door.

¶10 Tuckwab admitted there are no signs on the property advising against trespassing, telling visitors not to go beyond a certain point, or instructing law enforcement not to enter. She also admitted she has not erected any fence or gate to make the area next to the house more private. However, she asserted that erecting a fence at the end of the asphalt portion of the driveway would interfere with firewood deliveries.

¶11 Schaefer's testimony at the suppression hearing was generally consistent with that of Tanner and Tuckwab. In particular, Schaefer emphasized

that putting a gate across the driveway would interfere with snowplowing and firewood deliveries and would require permission from the tribe. However, Schaefer conceded he and Tuckwab had not done anything else to shield the area from public view.

¶12 Thomas Kirby, an employee of the Sokaogon Chippewa Housing Authority, also testified at the suppression hearing. Kirby confirmed there is a wood chute on the left side of Tuckwab and Schaefer's home. He also confirmed the home's front door has a door bell, but the side door does not. When asked to describe the home's driveway, Kirby stated, "It comes up to the corner of the house and then ends right there, to the front corner of the house towards the highway." However, on cross-examination, Kirby confirmed that "a lot of tenants … don't necessarily park right on the driveway. They'll pull up [to] different areas of the house." When asked whether some tenants "use their driveway further beyond [the asphalt portion]," Kirby responded, "Some people do, yes." Kirby testified Tuckwab and Schaefer park their vehicles on the gravel strip next to their home, and he indicated visitors might also park there. On redirect examination, Kirby clarified he could not recall a specific occasion when he observed "a stranger" parked on the gravel strip, but he testified "there could have been" a time when that occurred.

¶13 Based on the evidence introduced at the suppression hearing, Schaefer argued the gravel strip was within the curtilage of his residence. Schaefer further argued there was no "implied right of access" to the side door of the home via the gravel strip. In response, the State argued the gravel strip was simply a continuation of the home's driveway and, as such, was not part of the home's curtilage.

¶14 The circuit court denied Schaefer's suppression motion. The court agreed with the State that the gravel strip was a continuation of the asphalt driveway. After considering the factors set forth in ***United States v. Dunn***, 480 U.S. 294 (1987), the court determined the gravel strip was not within the curtilage of Schaefer's home. Specifically, the court determined that, although the gravel strip was in close proximity to the home, it was not enclosed, was clearly observable by passersby, was used as a parking area and driveway, and was open both to visitors and to vendors delivering firewood. The court further determined Schaefer and Tuckwab had taken no steps to protect the area from view or make it more private. The court concluded that, "although there is a picnic table in a different part of the lawn that's adjacent to where this was, [it] doesn't appear that this particular area was used for any of the intimate activities related to the house." In the alternative, the court reasoned that, even if the gravel strip did come within the home's curtilage, "there was an implied permission to enter for anybody coming there to use that driveway." As a result, the court held that no trespass occurred when deputy Tanner entered the gravel strip in order to make contact with Schaefer.

¶15 After denying Schaefer's suppression motion, the circuit court considered Schaefer's objection to the forfeiture of his cash bond. Schaefer was recalled to the stand, and during his testimony both the bond he signed and the citation he received on the night of his arrest were introduced into evidence. As noted above, the bond informed Schaefer the next court date was June 12, 2015, at 9:30 a.m. However, the citation stated Schaefer was required to appear on July 8, 2015, at 9:00 a.m. Schaefer testified he had a hard time reading the bond. He stated he did not know he was supposed to appear in court on June 12 because he

had the citation "posted on the wall for the court date." He asserted he did not intentionally miss the June 12 hearing.

¶16 The circuit court denied Schaefer's request to vacate the bond forfeiture. The court concluded Schaefer had not established that it was "difficult or impossible" for him to appear in court on June 12 or that he was not at fault for failing to appear. The court reasoned that if Schaefer was confused about which court date he needed to attend, he should have attended both. The court concluded:

> I think justice requires forfeiture because if we set these bonds and people don't come to court and they have really no reason for not coming, they just don't come, it impacts adversely the administration of justice, and the court system runs on the availability of people coming when told to do so.
>
> These cases are scheduled. Things have to be organized and managed, and when the defendant decides not to show, it requires adjournment of cases, additional costs and expense, and in most cases without a real good cause being shown.
>
> Justice does require that the bond be forfeited so that we maintain the integrity of court orders and the bonds and maintain the effective administration of justice, and not to forfeit this bond would jeopardize the administration of justice.

¶17 Schaefer subsequently pled guilty to the OWI charge, pursuant to a plea agreement, and the PAC charge was dismissed. He now appeals, challenging

the denial of his suppression motion and the circuit court's refusal to vacate the bond forfeiture.[4]

DISCUSSION

I. Motion to suppress

¶18 "Whether evidence should be suppressed is a question of constitutional fact." ***State v. Alexander***, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W.2d 909 (quoting ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899). We uphold the circuit court's factual findings unless they are clearly erroneous, but we independently review the application of constitutional principles to those facts. ***Id.***

¶19 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***State v. Maddix***, 2013 WI App 64, ¶13, 348 Wis. 2d 179, 831 N.W.2d 778. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." ***State v. Dumstrey***, 2016 WI 3, ¶22, 366 Wis. 2d 64, 873 N.W.2d 502 (quoting ***Payton v.***

[4] Entry of a valid guilty plea generally waives all nonjurisdictional defects and defenses. *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). However, there is a statutory exception to this rule allowing a criminal defendant to appeal an order denying suppression despite the entry of a valid guilty plea. WIS. STAT. § 971.31(10).

We question whether the guilty plea waiver rule bars Schaefer from raising his bond forfeiture argument on appeal. However, neither party addresses this issue. Moreover, the guilty plea waiver rule is a rule of administration, not jurisdiction, and we may exercise our discretion to review an issue that has been waived by entry of a valid guilty plea. ***State v. Grayson***, 165 Wis. 2d 557, 561, 478 N.W.2d 390 (Ct. App. 1991). Thus, even if Schaefer waived his right to raise his bond forfeiture argument on appeal, we could nevertheless exercise our discretion to address that issue on the merits.

New York, 445 U.S. 573, 586 (1980)). The protection provided by the Fourth Amendment extends to a home's curtilage. ***Id.***, ¶23. Curtilage is "the land immediately surrounding and associated with the home …. to which extends the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life.'" ***Oliver v. United States***, 466 U.S. 170, 180 (1984) (quoting ***Boyd v. United States***, 116 U.S. 616, 630 (1886)).

¶20 In ***Dunn***, the United States Supreme Court held that curtilage questions should be resolved "with particular reference to four factors": (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included in 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 passersby. ***Dunn***, 480 U.S. at 301. Applying these factors, the circuit court determined the gravel strip where deputy Tanner made contact with Schaefer was not within the curtilage of Schaefer's home. We agree with that determination.[5]

¶21 As the circuit court conceded, the first ***Dunn*** factor favors Schaefer. The gravel strip is in close proximity to Schaefer's home, as it is located directly next to the home's left side.

[5] It is unclear to us whether Schaefer intends to argue that deputy Tanner's conduct amounted to an unconstitutional search, an unconstitutional seizure, or both. This distinction is immaterial, however, because we conclude the gravel strip was not within the curtilage of Schaefer's home, and as a result, any search or seizure that occurred when Tanner entered the gravel strip was not unreasonable.

¶22 The remaining three ***Dunn*** factors, however, favor the State. First, it is undisputed that the gravel strip is not included in any type of enclosure surrounding Schaefer's home.

¶23 Second, the circuit court found that the gravel strip is a continuation of the asphalt driveway leading to Schaefer's residence and is essentially used as a "parking lot." Those findings are supported by the suppression hearing testimony and are not clearly erroneous.[6] Under some circumstances, a driveway or parking area might be used for the sort of "intimate activities" that necessitate Fourth Amendment protection. *See, e.g.*, ***United States v. Depew***, 8 F.3d 1424, 1427-28 (9th Cir. 1993) (secluded driveway held to be within curtilage of home in part because the defendant was a practicing nudist whose property was remote, secluded, and shielded from public view), *overruled on other grounds by* ***United States v. Johnson***, 256 F.3d 895, 913 n.4 (9th Cir. 2001). However, a driveway like the one in this case that is visible from the connected public road and is used

[6] Schaefer cites Kirby's testimony that the driveway ends at the front left corner of the house, i.e., where the asphalt stops. However, the circuit court was not required to accept Kirby's opinion on that subject, particularly in the face of photographs and other evidence indicating that the driveway continued to the back left corner of the house. Moreover, Kirby's testimony regarding the end of the driveway is not as clear cut as Schaefer suggests. When asked whether some tenants "*use their driveway* further beyond [the asphalt portion]," Kirby responded, "Some people do, yes." (Emphasis added.) This suggests that the driveway continued beyond the asphalt.

Schaefer also argues that Kirby's opinion regarding the end of the driveway is the "position of the [Sokaogon Chippewa] Housing Authority" and therefore "represents an exercise of tribal self-determination." This argument is inadequately developed. Schaefer does not explain why the opinion of Kirby, who testified he oversees maintenance work on tribal housing, is tantamount to an official position of the housing authority. Furthermore, Schaefer does not cite any authority for the proposition that the tribe's right to self-determination extends to determining the borders of a lessee's driveway, for purposes of defining the home's curtilage in a criminal case against a defendant who is not a tribe member. We need not address inadequately developed arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

for access to the residence and for parking cars does not "harbor[] those intimate activities associated with domestic life and the privacies of the home." *See* ***Dunn***, 480 U.S. at 301 n.4.[7]

¶24 Third, it is undisputed that neither Schaefer nor Tuckwab took any steps to protect the area in question from view by passersby. There are no signs advising visitors or law enforcement to stay out of the gravel strip. The area is visible from the public road and is not shielded from view by any type of fence, structure, or vegetation. Schaefer argues it would not have been convenient to erect a fence or plant bushes to protect the gravel strip from view because doing so would have interfered with snow plowing and firewood deliveries. Be that as it may, it does not change the fact that the area was not actually protected from view. Moreover, the fact that erecting barriers to protect the area from view would have inhibited third parties from accessing the area to plow snow and deliver firewood further suggests that the area was not the type of private space traditionally found to constitute curtilage.[8]

¶25 Schaefer argues the circuit court erred by failing to consider in its curtilage analysis the Sokaogon Chippewa tribe's "treaty right to a moderate

[7] We have similarly concluded in other cases that driveways and parking spaces adjacent to driveways did not constitute curtilage. *See, e.g.*, ***Oconto Cty. v. Arndt***, No. 2014AP2955, unpublished slip op. ¶¶16-19 (WI App July 21, 2015) (parking area adjacent to driveway not curtilage); ***State v. Dickenson***, No. 2015AP277, unpublished slip op. ¶¶12-13 (WI App July 8, 2015) (driveway not curtilage); *see also* WIS. STAT. RULE 809.23(3)(b) (allowing citation of authored, unpublished opinions issued on or after July 1, 2009).

[8] Schaefer asserts firewood deliveries are "an intimate activity associated with the sanctity of the home." The single case citation Schaefer provides for this proposition, however, does not support it. *See* ***State v. Dumstrey***, 2016 WI 3, ¶23, 366 Wis. 2d 64, 873 N.W.2d 502. We need not address arguments that are unsupported by legal authority. *See* ***Pettit***, 171 Wis. 2d at 646.

amount of domestic firewood." The case Schaefer cites in support of this proposition holds that the Sokaogon Chippewa have a treaty right to harvest certain natural resources, including timber, in certain areas. *See* ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin***, 653 F. Supp. 1420, 1427, 1430 (W.D. Wis. 1987). Schaefer argues the state cannot interfere with that right unless personal safety or resource depletion is at issue. However, the circuit court's decision in this case did not interfere with the tribe's right to harvest firewood. The court merely held that the gravel strip next to Tuckwab and Schaefer's residence, which one must enter to access the home's wood chute, is not within the home's curtilage. That decision has no effect on tribe members' right to harvest firewood and does not prevent them from burning that firewood in their homes.

¶26 Schaefer also makes much of the fact that the front door to his residence has a doorbell, but the side door does not. He asserts the "mere presence of the doorbell indicates the public must use that door." However, deputy Tanner did not use either the front door or the side door to Schaefer's residence. Rather, he approached Schaefer's vehicle, which was running and matched the description given by the complainant, while it was parked on the gravel strip next to the house. We have already determined, based on the ***Dunn*** factors, that the gravel strip was not within the home's curtilage. As a result, the lack of a doorbell on the side door is irrelevant.

¶27 Schaefer next makes a number of arguments intended to show that, although Schaefer and Tuckwab may have given friends and family implied permission to enter the gravel area next to the house, there was no implied permission for members of the public to enter that area. Schaefer therefore contends deputy Tanner "became a trespasser the moment he stepped from the end

of the blacktop pavement onto the curtilage." *C.f.* ***State v. Edgeberg***, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994) (Police with legitimate business may enter areas of the curtilage that are impliedly open to use by the public.). Again, however, we have already determined the gravel area was not part of the home's curtilage. Thus, we need not consider whether Tanner had implied permission to enter the gravel area. *See* ***State v. Popp***, 2014 WI App 100, ¶18, 357 Wis. 2d 696, 855 N.W.2d 471 (The "intrusion or trespass[] test" focuses on "whether government agents engaged in an 'unauthorized physical penetration' *into a constitutionally protected area*." (quoted source omitted; emphasis added)).

¶28 Based on the ***Dunn*** factors, we agree with the circuit court that the gravel strip where Schaefer's vehicle was parked was not within the curtilage of his residence. As a result, no unreasonable search or seizure occurred when deputy Tanner entered the gravel strip in order to make contact with Schaefer. We therefore affirm the circuit court's decision to deny Schaefer's suppression motion.[9]

II. Bond forfeiture

¶29 Schaefer also argues the circuit court erroneously exercised its discretion by denying his request to vacate the forfeiture of his bond. *See* ***State v. Ascencio***, 92 Wis. 2d 822, 829, 285 N.W.2d 910 (Ct. App. 1979) (decision to set aside bond forfeiture order is reviewed as a discretionary act). A court properly

[9] Schaefer cites a significant number of cases from other jurisdictions in support of his argument that the circuit court erroneously denied his suppression motion. These cases are not binding authority. *See* ***Alberte v. Anew Health Care Servs., Inc.***, 2000 WI 7, ¶7, 232 Wis. 2d 587, 605 N.W.2d 515. Moreover, they are, for the most part, distinguishable and are therefore unpersuasive.

exercises its discretion when it examines the relevant facts, applies a proper legal standard, and uses a rational process to reach a reasonable conclusion. ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 211 Wis. 2d 296, 302, 564 N.W.2d 766 (1997).

¶30 WISCONSIN STAT. § 969.13(2) permits a circuit court to set aside a forfeiture order "if it appears that justice does not require the enforcement of the forfeiture." Here, the circuit court reasonably concluded that was not the case. The court found it would not have been difficult or impossible for Schaefer to appear at the June 12, 2015 hearing, and that finding is not clearly erroneous. *See* ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999) (findings of fact underlying discretionary determinations are upheld unless clearly erroneous). While Schaefer argued he was not to blame for his nonappearance because his citation and bond listed different appearance dates, the court rejected that argument, reasoning that if Schaefer was confused by the discrepancy, he should have appeared on both dates. Further, there is no evidence in the record that Schaefer contacted anyone at the courthouse or otherwise attempted to clarify on which date he needed to appear. Under these circumstances, the court reasonably concluded bond forfeiture was necessary to "maintain the integrity of court orders and … the effective administration of justice."

¶31 Schaefer suggests the circuit court erred by failing to address all of the factors listed in ***Ascencio***. *See* ***Ascencio***, 92 Wis. 2d at 831-32. However, ***Ascencio*** does not state that a court is required to consider each of the listed factors in every case, and Schaefer does not cite any other authority supporting that proposition. Moreover, Schaefer failed to present the court with evidence relevant to the majority of the ***Ascencio*** factors, and he does not explain on appeal why any of the factors the court failed to address favor his position. Accordingly,

we cannot conclude the court erroneously exercised its discretion by failing to consider each of the ***Ascencio*** factors.

By the Court.—Judgment affirmed.

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