COURT OF APPEALS DECISION DATED AND FILED

June 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1800-CR

Cir. Ct. No. 2002CT1317

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. IMME,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.[1] Richard A. Imme appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, pursuant to WIS. STAT. § 346.63(1)(a) and from an order denying his motion for postconviction relief based on a claim of ineffective assistance of counsel. Imme contends that his trial counsel was ineffective by failing to seek the suppression of evidence obtained as a result of the investigating officer's intrusion onto a deck adjoining Imme's residence. Imme contends that the deck was within the protected curtilage of his property. We agree. Since the police intrusion occurred without a warrant and without exigent circumstances, a motion to suppress would have been successful. We reverse the judgment of conviction and the postconviction order and remand for further proceedings.

FACTS

¶2 The relevant facts of this case are undisputed. We take them from the proceedings at Imme's jury trial and from the posttrial ***Machner***[2] hearing. On July 22, 2002, at approximately 7:40 p.m., the Waukesha County Sheriff's Department received a cell phone call reporting that the caller was observing and following a suspected drunk driver, later established to be Imme. The caller remained on the cell phone while the sheriff's department dispatched Detective Christine Fabray to the area where the caller and Imme were traveling. Before Fabray made contact with the caller, Imme arrived at his residence in the Town of Eagle, parked his vehicle in the driveway, and entered the residence. The caller

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

parked in a nearby gas station. Shortly thereafter Fabray arrived on the scene. She parked her vehicle in the driveway behind Imme's vehicle, and then made contact with the caller who reported that Imme had entered the residence.

¶3 Fabray approached the front door of the residence and observed Imme exiting a back door onto a deck area with a drink in his hand. Fabray then left the front of the residence, walked north along the east exterior side of the residence and along the east side of the deck. This side area of the deck was protected by a fence approximately eight feet in length and ten to twelve feet in height to provide privacy from a gas station located immediately east of the deck. The remaining sides of the deck are not guarded by a fence. The deck itself extends along the entire length of the rear of Imme's residence and measures approximately thirty feet by twelve feet. The west side of the property is bordered by trees that run along the Mukwonago River. Other than the gas station on the east, the nearest structure to Imme's backyard is a pole barn located approximately one hundred feet to the north. The nearest residence to the north is approximately thirty-five to forty acres away.

¶4 When Fabray reached the end of the privacy fence, she entered onto the deck and confronted Imme and questioned him about the erratic driving reported by the informant. She noted that Imme had glassy eyes. Fabray told Imme to place the glass he was holding on a table. Imme refused and attempted to take a drink from the glass. Fabray then knocked the drink from Imme's hand. Fabray next told Imme to follow her to her vehicle and Imme complied. Another police officer who had arrived on the scene then performed field sobriety tests on Imme, after which the officer arrested Imme for OWI. Imme was then transported to a hospital where he submitted to a blood draw, which produced a blood alcohol

result beyond the legal limit. Imme also answered questions after being advised of his constitutional rights.

¶5 The amended criminal complaint charged Imme with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), third offense, pursuant to WIS. STAT. § 346.63(1)(b). Imme was represented by Attorney Alan Eisenberg. Imme pled not guilty and the matter was scheduled for a jury trial. Prior to jury selection, the State advised that it intended to use Imme's statements to the police in its case-in-chief. Imme, in turn, asked for and received a ***Miranda-Goodchild***[3] hearing. At the conclusion of the hearing, the court ruled that Imme's statements were voluntary and otherwise admissible. The matter proceeded to trial and the jury found Imme guilty of both OWI and PAC.[4]

¶6 Post conviction and represented by new counsel, Imme filed a motion alleging that Eisenberg had failed to provide effective assistance of counsel. Specifically, Imme contended that Eisenberg should have sought suppression of the evidence obtained as the result of Fabray's warrantless incursion onto his deck, which Imme contended was part of the protected curtilage under the Fourth Amendment.

¶7 The trial court conducted a ***Machner*** hearing at which Eisenberg testified. When asked why he had not pursued a motion to suppress, Eisenberg

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[3] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[4] After trial but prior to Imme filing his postconviction papers, the trial court dismissed the PAC charge.

stated that he was convinced that Imme was innocent and he wanted to try the case on the merits. In support, Eisenberg explained that he thought both the informant and Fabray were not truthful. Eisenberg said he did not raise a Fourth Amendment/curtilage argument because he thought Fabray had probable cause to enter upon Imme's deck. At one point in his testimony, Eisenberg stated that he "didn't see the potential for a suppression motion. I am not saying there shouldn't have been one. Maybe there should have. I don't know. I guess the Judge will have to decide that."

¶8 The trial court denied the motion. At various points in its bench ruling, the court stated that Eisenberg's performance was deficient. At another point, when referring to Eisenberg's failure to bring a motion to suppress based on the Fourth Amendment/curtilage grounds, the court stated, "I think the bottom line here is Mr. Eisenberg didn't give good reasons here in the record." However, in its ultimate ruling, the court concluded that a suppression motion would not have been successful and that "the better defense in the case was that he had consumed intoxicants upon return home or that anticipated defense." Imme appeals.

DISCUSSION

¶9 Imme contends that Eisenberg was ineffective for failing to bring a motion to suppress based on Fabray's warrantless incursion into the protected curtilage of his property. To support a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficiency was prejudicial. ***State v. Maloney***, 2005 WI 74, ¶14, No. 2003AP2180. Whether counsel's performance was ineffective presents a mixed question of fact and law. ***Id.***, ¶15. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters

which we will not disturb unless clearly erroneous. *See **id***. However, the ultimate conclusion whether counsel's conduct constituted ineffective assistance is a question of law. ***Id***.

¶10 At the outset, we agree with the trial court's assessment that Eisenberg failed to offer adequate reasons for failing to bring a suppression motion. While Eisenberg fervently believed that Imme was innocent and wanted to so establish at a trial on the merits by attacking the credibility of both Fabray and the citizen informant, this cannot justify an attorney overlooking or foregoing an opportunity to suppress highly incriminating evidence. We appreciate that a lawyer is not ineffective when he or she makes the determination that a suppression motion would not have been successful. ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). But we think it self-evident that such a determination must be premised on a correct understanding of the law. Here, Eisenberg's foregoing of a suppression motion was based, at least in part, on his belief that Fabray had probable cause. As we will show in a moment, this belief was incorrect. Moreover, entry into the protected curtilage requires not only probable cause, but also exigent circumstances. As we will also show, the United States Supreme Court has already held that the kind of situation presented in this case does not present exigent circumstances.

¶11 As noted, we reject Eisenberg's belief that Fabray had probable cause to enter onto the deck to conduct the investigation. Fabray knew only that the cell phone caller had reported erratic driving by Imme. The purpose of Fabray's investigation was to determine the cause of that conduct. That Fabray did not have probable cause when she initially encountered Imme is borne out by the fact that she did not immediately arrest him. Instead, she questioned him, made observations about his appearance and demeanor, and then turned him over

to the other officer on the scene who administered field sobriety tests on Imme. Only after those tests was Imme arrested.

¶12 With those preliminary matters decided, we turn to the merits. Even though this case comes to us in the form of a claim of ineffective assistance of counsel, the core issue is whether a motion to suppress would have been successful. If not, as the trial court ruled, it follows that Eisenberg's failure to bring the motion did not prejudice Imme. This is so even in the face of the inadequate reasons proffered by Eisenberg for not bringing the motion. However, if the motion would have been successful, it follows that Eisenberg was ineffective. We therefore focus on the Fourth Amendment/curtilage law.[5]

¶13 In ***State v. Walker***, 154 Wis. 2d 158, 182-83, 453 N.W.2d 127 (1990), our supreme court said the following:

> In ***Payton v. New York***, 445 U.S. 573 (1980), the United States Supreme Court held that the fourth amendment, made applicable to the states by the fourteenth amendment, prohibits police from making a warrantless and nonconsensual entry into a felony suspects's home to arrest the suspect, absent probable cause and exigent circumstances. The Court has also determined that the fourth amendment protections that attach to the home likewise attach to the curtilage, which is defined generally as "the land immediately surrounding and associated with the home." ***Oliver v. United States***, 466 U.S. 170, 180 (1984). In ***Oliver***, the Court reasoned that the curtilage receives the fourth amendment protections that attach to the home because, "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the

[5] The parties have not cited us to any published Wisconsin case which addresses whether a deck is part of the protected curtilage, nor have we located any such case. We have located cases from other jurisdictions that have reached different results under the particular facts of those cases. *See, e.g.,* ***Commonwealth v. English***, 839 A.2d 1136, 1141 (Pa. Super. Ct. 2003) (backyard deck within the protected curtilage); ***People v. Payton***, 741 N.E.2d 302, 304-05 (Ill. App. 3d 2000) (front porch that resembled a "standard deck" not within the protected curtilage).

> 'sanctity of a man's home and the privacies of life.'" ***Id***. (quoting ***Boyd v. United States***, 116 U.S. 616, 630 (1886)).

See also **State v. Hughes**, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621.

¶14 Reading ***Payton*** and ***Oliver*** together, the ***Walker*** court held that the police must obtain a warrant before entering either the home or its curtilage to make an arrest absent probable cause and exigent circumstances. ***Walker***, 154 Wis. 2d at 183. We have already concluded that Fabray did not have probable cause at the time she entered onto Imme's deck. Thus, one of the necessary attendant circumstances to justify an incursion into the protected curtilage is not present in this case. Moreover, in ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), which involved a Wisconsin OWI case with similar facts, the United States Supreme Court held that "application of the exigent-circumstance exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed."[6] ***Id***. at 753. The Court so held in the face of the Wisconsin Supreme Court's holding that the home entry was permissible, in part, because of the need to prevent the destruction of evidence.[7] ***Id***. at 748.

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[6] We appreciate that in ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), the defendant was charged as a first-time OWI offender, a forfeiture offense, whereas in this case Imme was charged criminally as a repeat offender. However, the evidence does not indicate that Fabray was aware of Imme's prior convictions when she entered onto the deck area. If we were to hold that the *possibility* of a future criminal charge constitutes exigent circumstances, we would eviscerate the ***Welsh*** holding. We obviously do not have that power.

[7] In an effort to elevate Imme's conduct to a criminal level, the State attempts to portray Imme's driving conduct as disorderly conduct or reckless conduct endangering safety. We first observe that the State never made this argument to the trial court and therefore the issue is waived. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Second, Fabray never indicated that she was investigating an incident of possible disorderly conduct or reckless endangerment. Third, Fabray never indicated that Imme's possible intoxicated state had any bearing on those possible offenses.

¶15 Therefore, without probable cause and exigent circumstances, Fabray's warrantless incursion onto Imme's deck was illegal unless the deck was not within the protected curtilage of Imme's property.

¶16 As noted, the curtilage is the area immediately surrounding and associated with the home. ***Walker***, 154 Wis. 2d at 182. The reach of the protected curtilage is determined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." ***Id***. at 183 (citation omitted). Those factors are: (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 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. ***Id***. at 183-84. We address each of these factors in turn.[8]

¶17 **Proximity of the area:** The evidence established that the deck immediately adjoins and is connected to Imme's residence. Fabray observed Imme walk directly from the residence onto the deck through a doorway. In ***State v. Wilson***, 229 Wis. 2d 256, 264, 600 N.W.2d 14 (Ct. App. 1999), the court of appeals held that a pavement area immediately adjoining a back door entrance satisfied this "proximity" factor and supported the defendant's claim that the area was part of the protected curtilage. The same is true here.

[8] Imme described the area in question in his testimony at the ***Machner*** hearing. The State neither offered any evidence which disputed this testimony nor argued that Imme's description was incorrect. And, although the trial court rejected Imme's argument that Eisenberg was ineffective, the court's bench decision did not dispute Imme's description of the area.

¶18 **Enclosure:** The evidence reveals that the east side of the deck is guarded by a fence approximately eight feet in length and ten to twelve feet in height. The purpose of the fence is to provide privacy from a gas station located immediately to the east of Imme's property. This factor supports Imme's curtilage claim. The west and north sides of the deck are not enclosed. However, the need for an enclosure to obtain privacy from these directions appears to be minimal. The west side of the property is bordered by a river with surrounding trees, thus providing natural privacy. The area to the north appears to open, but the nearest structure is a pole barn approximately one hundred feet away and the nearest residence some thirty-five to forty acres away.

¶19 The State argues that because others might be able to observe Imme's deck from the west and north and from a remote corner of the gas station on the east, the deck is not within the protected curtilage. ***Wilson*** rejected a similar argument from the State. There the court acknowledged that the defendant's backyard was not enclosed and that the area near the rear door could be seen by others outside the property and stated that "this in itself does not mean that there is no expectation of privacy. Whether an area is protected or can be observed by others is but one indicia whether the area is intimately associated with the privacies of life." ***Id***. at 265 (citing ***United States v. Dunn***, 480 U.S. 294, 300 (1987)). The court further stated, "Curtilage is not to be defeated merely because the subject area may be observed by some." ***Id***. Rather, the question is governed by "the manner in which the possesser holds the property out to the public." ***Id***. (citation omitted). We hold that this factor also supports Imme's argument that the deck is within the protected curtilage.

¶20 **Nature of the use:** A deck, particularly one that is immediately adjacent to and adjoining the principal residence, is commonly associated with the

use of the residence itself. This is particularly true during the summertime months, remembering that the events in question occurred during the month of July. The access to Imme's deck was by a door leading directly from the principal residence, allowing for quick and easy flow of traffic between the deck and the principal residence. In ***Wilson***, the court held that a backyard area where children are playing is associated with the privacies of life and that a back door providing ingress and egress to the backyard was "intimately related to the home itself." ***Id***. We see no reason why a deck immediately adjoining a residence and serviced by a door allowing for ingress and egress should be treated any differently. We hold that this factor supports Imme's claim that the deck was within the protected curtilage.

¶21 **Steps taken to protect the area:** We first observe that the deck was located at the rear of Imme's residence, away from the view of passing vehicular or pedestrian traffic. ***Wilson*** made a similar observation, noting that the back door area of the residence could not be seen from the front of the house or from the street or sidewalk. ***Id***. The ***Wilson*** court also noted that in order to reach the backyard and the area near the back door, the police officer had to walk the length of the driveway into the backyard. ***Id***. Fabray had to engage in similar conduct here. She walked along the exterior east side of Imme's residence, and then continued along the privacy fence before reaching the deck area.

¶22 Second, as we have noted in our discussion of the "enclosure" factor, the evidence indicates that the only pressing need for privacy was the gas station to the east and that the privacy fence addressed that need.

¶23 Third, while Imme took no steps to protect the deck from the west and north, we have already observed that the need for such steps was minimal or

nonexistent given the natural privacy afforded from the west and the substantial distance of the deck from any residence to the north. We conclude that this factor also supports Imme's claim that the deck was within the protected curtilage.

CONCLUSION

¶24 Based upon the particular facts of this case and our application of the relevant factors, we conclude that Imme's deck was within the protected curtilage.[9] Since Fabray's entry onto the protected curtilage was without probable cause and exigent circumstances, it follows that a motion to suppress would have been successful. Consequently, Eisenberg was ineffective for failing to bring such a motion. We reverse the judgment of conviction and the postconviction order and remand for further proceedings.

By the Court.—Judgment and order reversed and cause remanded.

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

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[9] The court of appeals has cautioned that curtilage determinations are fact specific. *See* ***State v. Leutenegger***, 2004 WI App 127, ¶21 n.5, 275 Wis. 2d 512, 685 N.W.2d 536.