COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2019

Sheila T. Reiff
Clerk of Court of Appeals

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Appeal No. 2018AP2299-CR **Cir. Ct. No. 2018CT52**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRETT C. BASLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Reversed and cause remanded with directions*.

¶1 REILLY, P.J.[1] Brett C. Basler appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, pursuant to WIS. STAT. § 346.63(1)(a). Basler argues that the circuit court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

denying his motion to suppress evidence derived from the unlawful entry of his home. Based on the particular facts of this case, as the police intrusion into Basler's home occurred without a warrant and without exigent circumstances, we conclude that the circuit court erred in denying Basler's motion to suppress. We reverse.

¶2 The facts in the case are largely undisputed. On January 20, 2018, Officer Grant Wilson and another officer responded to the report of a truck hitting a Hardee's restaurant in Oshkosh, Wisconsin. The officers were informed by an individual following the truck that the vehicle had turned onto a residential street. Wilson saw the red pickup truck in the driveway of a home, and he observed a male, later identified as Basler, exit the vehicle and walk into the front door of the residence. Basler was already inside his home when the officers parked their vehicles.

¶3 Wilson explained that he and the other officer climbed a set of stairs and "went up to the front door" and "looked in" the window and "saw it looked like a screened-in porch area." He testified that after "briefly" pausing at the front door, he opened both an unlocked wooden "screen door type" and a second "firmer … stronger door" with a "full metal handle" and a lock and entered the interior of Basler's home. Wilson testified that he did not knock on either door nor did he ring the doorbell located to the left of the front door. Wilson also did not notice the mailbox located to the left of the stairway.

¶4 Although Wilson characterized the front room of Basler's home as a "screened-in porch," as evident in the pictures provided in the record and included at the end of this decision, the room clearly is not "screened-in" as the three outer walls are composed of a half-wall as well as glass windows. The room contained two large armchairs, a wooden table with three wooden chairs, a wooden coffee

table, a fan, a large cooler, a television on a stand, a DVD player, shoes, hooks for hanging coats, and other miscellaneous belongings. The only thing separating this front room of Basler's home from the rest of his residence is a set of French doors.

¶5 Wilson knocked on the French doors, and Basler opened the door and made contact with the officers in the front room. Wilson noted that Basler's eyes were very glassy and watery and there was also an odor of intoxicants coming from him. Basler questioned why the officers "had just broken into his house," and the officers indicated that they "wished to speak with him outside." According to Wilson's police report, Basler "continued to accuse [Wilson] of breaking into his house." Basler and the officers eventually went outside, at which time the officers conducted field sobriety tests and Basler was arrested for OWI.

¶6 Basler was charged with OWI, third offense, operating a motor vehicle while revoked, and operating with a prohibited alcohol concentration. He filed a motion to suppress, arguing that the police committed an illegal entry as the front room of Basler's home was part of the constitutionally protected curtilage. After an evidentiary hearing, the court denied his motion.[2] Basler pled guilty to the OWI, third offense. He now appeals.

¶7 We review the circuit court's order granting or denying a suppression motion as a question of constitutional fact.[3] ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. We will uphold the court's factual findings unless they are clearly erroneous, but we independently apply constitutional principles to

[2] Basler filed a motion to reconsider, which the circuit court also denied.

[3] Generally, a guilty plea waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). WISCONSIN STAT. § 971.31(10) provides an exception, however, permitting appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea.

those facts. ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463.

¶8 We begin with what we know to be true—bedrock Fourth Amendment principles. A police officer's warrantless entry into a private residence, either to make an arrest or to search, is presumptively prohibited by the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution. *See* ***Payton v. New York***, 445 U.S. 573, 586 (1980); ***State v. Reed***, 2018 WI 109, ¶¶52, 54 & n.27, 384 Wis. 2d 469, 920 N.W.2d 56.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their … houses … shall not be violated." That language unequivocally establishes the proposition that "[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 589-90 (citation omitted; alteration in original). "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984) (citation omitted); *see also* ***Silverman v. United States***, 365 U.S. 505, 511 (1961) ("At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); ***Boyd v. United States***, 116 U.S. 616, 630 (1886) (noting that the principles of the Fourth Amendment "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life" and explaining that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the

offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property").

¶9 Equally established in our legal history is the tenet that "[t]he protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence." ***State v. Martwick***, 2000 WI 5, ¶26, 231 Wis. 2d 801, 604 N.W.2d 552 (citing ***Oliver v. United States***, 466 U.S. 170, 180 (1984)). "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life and therefore has been considered part of [the] home itself for Fourth Amendment purposes." ***Oliver***, 466 U.S. at 180 (citation omitted). Warrantless entry into the curtilage, therefore, is as much a constitutional violation as warrantless entry into the home.

¶10 Accordingly, Basler argues that the circuit court erred in failing to conduct a legal analysis to determine whether the front room of Basler's home was curtilage under the four-factor test described in ***United States v. Dunn***, 480 U.S. 294, 301 (1987). The State's response is minimal, arguing only that "[a] knock on a door is not a search" and that the front room of Basler's home is not curtilage. We acknowledge that the United States Supreme Court has recognized the constitutionality of the so-called "knock and talk" procedure in ***Florida v. Jardines***, 569 U.S. 1, 8 (2013). ***Jardines*** addressed whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. The court found the dog-sniff repulsive to the Constitution, but also acknowledged an "implicit license" allowing a "visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave…. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do." ***Id.*** (citation omitted) (quoting ***Kentucky***

v. King, 563 U.S. 452, 469 (2011)). The individual, however, is free not to answer the door or speak to the police, and even if he or she does address the officers, he or she is not required to allow the police to enter the home. ***King***, 563 U.S. at 469-70.

¶11 Based on these legal standards, we conclude that the officers in this case illegally entered Basler's home in violation of the Fourth Amendment. First, we note that the circuit court found that "[t]here is no evidence to suggest that had the officer knocked on the other door of the porch that the circumstances would have been any different." This is not the standard of review for a Fourth Amendment violation. Second, we find it disingenuous that the State failed to concede that at the very least the front room of Basler's home is considered curtilage under the case law. In ***State v. Dumstrey***, 2016 WI 3, ¶32, 366 Wis. 2d 64, 873 N.W.2d 502, we acknowledged our adoption of the ***Dunn*** four-factor test, which considers "(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 the 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'" (alteration in original; citation omitted). Based on the testimony at the hearing and the photographs provided in the record, we are confident that the front room of Basler's home satisfies all the ***Dunn*** elements and is easily considered curtilage. This finding is further supported by the clear statement from the United States Supreme Court that "[t]he front porch is the classic exemplar of an area 'to which the activity of home life extends'" and is properly considered curtilage under the law. ***Jardines***, 569 U.S. at 1 (citation omitted).

¶12 That being said, we take the analysis a step further. We conclude that the front room of Basler's home is more than curtilage; it is properly considered part of Basler's home. We reach this conclusion based on a number of factors. First,

not only was the room attached to and located within the same overall structure of the house, but it is also surrounded by the same materials used on the outside of the rest of the home: siding and windows. Basler's front room is not similar to, for example, an open front porch of a person's home with a metal or wood railing surrounding it. Nor can it be compared to the screened-in porch in ***State v. Edgeberg***, 188 Wis. 2d 339, 343, 524 N.W.2d 911 (Ct. App. 1994), where the door leading onto the porch was a wooden screen door and the porch housed laundry. Basler's front room was designed to be a part of his home. Second, we know this because the door leading from the outside into the front room included not only a wooden screen door, but also a thicker, inner wooden door with a deadbolt. Outside this door was both the doorbell and the mailbox, indicating that visitors, including the mailperson, were to remain outside unless and until invited in. Third, the only doors separating the front room from the rest of Basler's home were double French doors that are typically found only in the interior of a home. And finally, the items located inside Basler's front room also make clear that this room was used in the same manner as other rooms in the rest of the house. For example, the room contained two stuffed armchairs, a television and DVD player, a wooden table and chairs, and we also note what appears to be curtains on at least two of the windows. The furnishings in this room, therefore, more closely resemble a family room or den of a home.

¶13 Given our finding that Basler's front room is not curtilage, but is properly considered part of his home, we conclude that this case does not qualify as a "knock and talk" under ***Jardines***. In stepping over the threshold of Basler's front door, into the confines of his home, the officers went beyond the "implicit license" discussed in ***Jardines*** and walked directly into a violation of the Fourth Amendment. The officers violated one of the most sacred tenets of our constitution:

the sanctity of the home. It matters little whether the officers' actions were a technical violation, albeit taken unknowingly or without bad faith. The officers were there to investigate a crime. Basler was a suspect—not a witness or a person of interest—but a suspect in that crime. The officers violated Basler's home to advance their investigation and for the purpose of collecting evidence to establish probable cause to support his arrest.[4] *See* ***United States v. Jones***, 565 U.S. 400, 408 n.5 (2012) (trespass alone does not violate the Fourth Amendment, but trespass joined with an attempt to find something or to obtain information violates Fourth Amendment); *see also* ***Jardines***, 569 U.S. at 11 ("That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."); ***United States v. Perea-Rey***, 680 F.3d 1179, 1185 (9th Cir. 2012) ("Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches.").

¶14 We reiterate that the police were made aware of their constitutional error, and although we do not have Basler's testimony to compare, it is clear from Wilson's police report that Basler immediately informed the officers that they were inside his home as he "was confrontational and asked why [Wilson] had just broken into his house, and when [Wilson] explained that [he] had just knocked on his door and that [he] wished to speak with him outside [Basler] continued to accuse

[4] As this was inside Basler's home and the officers did not have a warrant, this was not a lawful stop and the officers were therefore not legally entitled to make observations that Basler "appear[ed] to be intoxicated as his eyes were very glassy and watery and there was also an odor of intoxicants coming from him." The "plain view" doctrine does not apply when officers are encroaching on a protected area. *See, e.g.,* ***United States v. Jones***, 565 U.S. 400, 410 (2012) ("[T]he officers in this case did *more* than conduct a visual inspection…. [O]fficers encroached on a protected area."); *but see* ***Florida v. Jardines***, 569 U.S. 1, 21 (2013) (Alito, J., dissenting) ("[W]hen officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point.").

[Wilson] of breaking into his house and was also calling for his girlfriend to come down by him." According to Wilson, they did "ultimately go outside."[5] Under the law, Basler was entitled to close the door on the police and refuse to speak with them, and under these circumstances the police are also entitled to leave to obtain a warrant and return. Basler was not given an opportunity to utilize this right as the police were already in his home, and when he informed them that they had violated his constitutional rights by breaking into his house, they did not immediately leave.

¶15 As this case does not implicate the ***Jardines*** "knock and talk" procedure, the officers were required to obtain a warrant before entering either a home or curtilage to search or make an arrest absent probable cause or exigent circumstances. The State does not argue that any exigent circumstances existed, and we also find none applicable. *See* ***Welsh***, 466 U.S. at 749-50, 753 ("[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense … has been committed" and "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."). Further, the State does not argue that the police had probable cause at the time the officers entered Basler's home, and we agree with Basler that the only information that the officers had prior to entering Basler's home was that part of a Hardee's building had been struck by a vehicle and that an individual had been following that vehicle after the incident took place.

[5] The focus at the motion hearing was on the illegal entry into Basler's home, and not what happened afterwards. We do not know how long the officers lingered inside Basler's home, if the officers refused to leave, or how Basler was "ultimately" convinced to go outside with them. We do know, however, that the officers did not immediately vacate Basler's home when he confronted them and told them they had just broken into his house.

¶16 Based on the particular facts of this case, we conclude that Basler's front room was part of his home protected from intrusions in violation of the Fourth Amendment, or at the very least part of the similarly protected curtilage. Since the officer's entry into Basler's protected front room was without probable cause and exigent circumstances, Basler's motion to suppress should have been granted by the circuit court.[6] We repeat here what the Supreme Court explained so long ago in ***Boyd***, "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." ***Boyd***, 116 U.S. at 635.

¶17 Accordingly, we reverse the judgment of conviction and remand with directions to allow Basler to withdraw his plea and to grant his suppression motion.

By the Court.—Judgment reversed and cause remanded with directions.

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

[6] Clearly, the illegal entry inexorably led to the search and seizure of Basler. We note, however, that the State makes no argument as to whether his arrest was cured of the taint of the illegal entry either through consent or attenuation. We will not abandon our neutrality to develop arguments for the parties. *See* ***Clear Channel Outdoor, Inc. v. City of Milwaukee***, 2017 WI App 15, ¶28, 374 Wis. 2d 348, 893 N.W.2d 24.


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