

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP662

Cir. Ct. No. 2007TR192

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF ONEIDA,

PLAINTIFF-RESPONDENT,

V.

GLENN P. SCHIFFMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Glenn Schiffmann appeals a judgment of conviction for operating while intoxicated, and an order denying his motion to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

suppress evidence. Schiffmann argues there was insufficient evidence to support the circuit court's factual findings on the motion. We disagree and affirm.²

BACKGROUND

¶2 Schiffmann was in a late-night, one-car accident, which knocked him unconscious and rendered his vehicle inoperable. After he regained consciousness, Schiffmann telephoned his wife, who picked him up and drove him home. Schiffmann called the Oneida County Sheriff's Department to report the accident. The dispatcher informed Schiffmann an officer would need to talk with him. Schiffmann responded that he would prefer to deal with the matter in the morning, but the dispatcher explained it was their policy to investigate immediately.

¶3 The dispatcher notified deputy Sara Wolosek and sergeant Tyler Young. They drove to Schiffmann's residence. At the end of the driveway was a closed gate. The gate opened automatically as the officers approached, and they drove up the driveway. Schiffmann's wife answered the door, and the officers entered the house.³ The officers detected the smell of intoxicants on Schiffmann. He acknowledged he had consumed alcohol before the accident, and agreed to perform field sobriety tests. Schiffmann failed the tests, and the officers placed

² This case is before us on remand. We previously dismissed Schiffmann's appeal due to numerous violations of the rules of appellate procedure in his brief. Our supreme court remanded to us in light of its decision in *Industrial Roofing Services, Inc. v. Marquardt*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898.

³ As will be discussed below, the officers testified Mrs. Schiffmann invited the officers in. However, the circuit court made no factual finding on this because Schiffmann focused on the officers' arrival at his property, not their entry into his house.

him under arrest for operating a motor vehicle while under the influence of intoxicants.

¶4 Schiffmann moved to suppress all evidence acquired after the officers entered his property. He argued the officers needed either a warrant or his consent to enter his property. The court denied the motion and Schiffmann was convicted.

DISCUSSION

¶5 The validity of a search and seizure is a question of constitutional fact. *State v. Vorburger*, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. We review questions of constitutional fact using a mixed standard of review. *Id.* “We examine the circuit court’s findings of historical fact under the clearly erroneous standard.” *Id.* However, we review independently “the application of constitutional principles to those facts. *Id.*”

¶6 Schiffmann argues that everything beyond the gate on his property was curtilage and that the officers therefore needed either a warrant or consent to pass through the gate.⁴ We need not address whether this area was curtilage, however, because the officers were authorized to use the normal means of access to Schiffmann’s house, whether it was curtilage or not.

⁴ Curtilage “is the area 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) (citation omitted). As such, the Fourth Amendment’s protection of the right of the people to be secure in their houses extends to the curtilage. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

¶7 “[P]olice with legitimate business may enter the areas of the curtilage which are impliedly open to the public.” *State v. Edgeberg*, 188 Wis. 2d 339, 347, 524 N.W. 2d 911 (Ct. App. 1994). Areas impliedly open to the public within “protected areas in residential premises” may include “[a] sidewalk, pathway, common entrance or similar passageway.” *Id.* (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c) at 392-93 (2d ed. 1987)). Therefore, “if police use normal means of access to and from the house for some legitimate purpose, it is not a fourth amendment search.” *Id.*⁵

¶8 Here, it is undisputed the officers responded to Schiffmann’s house on legitimate business. Schiffmann himself called the sheriff’s department to report his accident. It is also undisputed that to access Schiffmann’s house the officers merely drove up the driveway and walked to the front door. The presence of the gate is irrelevant. As Schiffmann concedes, the only way to reach his house is through the gate. Moreover, the gate presents no impediment to access his house, because it opens automatically when one approaches it.

¶9 Although we conclude the officers were authorized to proceed through Schiffmann’s gate to respond to legitimate business at his house, we agree with the circuit court that the driveway was not curtilage. The court issued a written opinion⁶ in which it thoroughly and carefully considered the four factors

⁵ Schiffmann argues the no trespassing signs on either side of his gate indicate he expects privacy beyond the gate. The presence of these signs does not change our analysis. The circuit court correctly pointed out that the law of trespass is irrelevant to the applicability of the Fourth Amendment (citing *Oliver*, 466 U.S. at 183-84). Further, the signs do not change the fact that the officers used the normal means of access to respond to Schiffmann’s house for legitimate business.

⁶ Memorandum decision dated August 16, 2007.

that define the extent of a home's curtilage.⁷ It found the disputed area: (1) was not close in proximity to the house; (2) was not enclosed; (3) was not an extension of the home where private activities normally occur; and (4) was not protected from observation by the public. It therefore concluded the driveway was not an area Schiffmann could "reasonably ... expect ... be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300 (1987). We agree and adopt the circuit court's opinion in full.

¶10 Schiffmann also argues that "consent to enter the defendant's property was obtained illegally by the sheriff's department." Schiffmann's argument appears to be that he was forced to acquiesce to the officers' entry onto his property because the dispatcher insisted the department needed to follow up on the accident immediately. Schiffmann makes no distinction between the officers' arrival at his property and their actual entry into the house. To the extent this is an extension of his argument that anything beyond his gate was protected by the Fourth Amendment, it is—as discussed above—meritless.

¶11 However, a claim that the officers' warrantless entry into his home was nonconsensual would be equally without merit. During the motion hearing, Schiffmann argued only that the officers made "a unilateral decision ... to enter the property that night." He did not argue, as he does on appeal, that he was forced to meet with the officers. Nor did he argue the officers entered the house without validly obtained consent. Issues not raised before the circuit court will

⁷ These factors are: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature in which the area is used; and (4) the steps taken to protect the area from observation by people passing by. *Dunn*, 480 U.S. at 301.

generally not be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶12 Because the officers responded to Schiffmann's house pursuant to legitimate police business, they did not need either a warrant or consent to utilize the normal means of access to his house. Once there, Fourth Amendment protections would apply to the entry of the house and any seizure that might arise out of that entry. However, because Schiffmann did not raise these issues before the circuit court, the court did not make the relevant factual findings.⁸ Thus, we consider the issues waived. *Id.*, ¶¶11-12.

By the Court.—Judgment and order affirmed.

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

⁸ Both officers testified Schiffmann's wife invited them into the house. Mrs. Schiffmann did not testify one way or another about the officers' entry.

