

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2009

David R. Schanker
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. 2009AP305-CR

Cir. Ct. No. 2008CT598

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN M. MADRID,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Juan Madrid appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, and the order of the circuit court denying his motion to suppress evidence. He

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

contends that the porch extending from the rear of his apartment is curtilage protected by the Fourth Amendment, and that because a law enforcement officer was on the porch without a valid warrant or without probable cause and exigent circumstances, the circuit court should have suppressed all evidence obtained as a result of the illegal intrusion. We disagree and therefore affirm.

BACKGROUND

¶2 The following facts are taken from the suppression hearing. At approximately 10:50 p.m. on June 27, 2008, Jesse Deckert, a police officer with the City of Watertown police department, was dispatched to a noise complaint at a four-unit apartment building in Watertown. Deckert testified that while another officer was at the front of the apartment building attempting to make contact with the occupants inside the apartment, he positioned himself at the rear of the building. At the back of the apartment building are separate rear doors for each apartment, and attached to and extending from the building are wooden porches for each apartment. Relevant to this case are the porches for apartment A and apartment B. Deckert observed that the porch for apartment A is approximately six feet by eight or ten feet and is visible from the rear parking lot for the apartment building. The parking lot appears to run the length of the back of the building and is separated from the building by the porches and two grassy areas, one of which abuts the porches for apartments A and B and one of which abuts the porches for apartments C and D. Three sidewalks lead from the parking lot to the individual apartments—one to apartment A, one to apartment D, and one to apartments B and C, which share a sidewalk. Along the side of apartment A's porch abutting the porch for apartment B is a fence, which is used to afford the occupants of apartment A privacy from apartment B's porch.

¶3 Deckert testified that he positioned himself behind apartment A in the shadow created by that apartment's porch fence. The exact location of his position, however, is not entirely clear. Deckert was unable to remember whether he was originally standing on the edge of apartment A's porch or whether he was standing in the grassy area abutting the porch near the porch's fence. Madrid testified that Deckert was positioned on the "end" of the porch but later testified that he was "standing right by the [porch] on the corner of the fence." The court did not make any findings clarifying this issue.

¶4 While he was positioned behind apartment A, Deckert observed a vehicle pull into the building's rear parking lot. Two people exited the vehicle, one from the driver's seat and one from the front passenger seat. Both the driver, who was later identified as Madrid, and the passenger began walking toward Deckert. Madrid, however, quickly turned around and began walking back toward the vehicle. Deckert observed Madrid hand the keys to the passenger before he began walking in Deckert's direction again. While Madrid was walking toward him, Deckert overheard Madrid place a call on his cell phone and say to the individual to whom he was speaking something to the effect of: "Be careful there are two police cars outside of my house." Deckert testified that after overhearing this statement, he stepped out of the shadows where he had been standing and announced his presence. Deckert's exact location once he stepped out of the shadows is also uncertain. Deckert testified that he stepped onto the sidewalk or the grassy area abutting the porch. Madrid, however, testified that Deckert was on the porch of apartment A.

¶5 After stepping out of the shadows, Deckert asked Madrid to identify the person to whom he had been speaking. Madrid responded by telling Deckert to get off his property. Deckert testified that at this point Madrid became

“verbally abusive” toward him—swearing at Deckert and asking him to leave—before walking past Deckert into apartment A through the apartment’s rear door. Deckert testified that as Madrid walked toward him, he observed a strong odor of intoxicants coming from Madrid.

¶6 After Madrid entered the apartment, Deckert spoke to the passenger of the vehicle who informed Deckert that Madrid was drunk. During this conversation, Deckert was either standing on the sidewalk leading from the parking lot to the porch or on the grassy area abutting the sidewalk and porch. After his conversation with the passenger, Deckert knocked on the rear door of the apartment, which was accessible only by walking across the porch. When Madrid did not answer the door, Deckert began walking back toward the parking lot and engaged in another conversation with the passenger. At this point, Deckert was standing on the porch and the passenger was standing approximately two or three feet away on either the sidewalk or grassy area. While Deckert was still standing on the porch, Madrid came out of the apartment and told Deckert to get off of his porch. Deckert did so and walked down to the sidewalk where he and Madrid spoke.

¶7 During this conversation with Madrid, Deckert observed that Madrid’s eyes were bloodshot and glassy. Madrid also acknowledged that he had consumed four beers before driving to his apartment. Deckert then administered field sobriety tests and a preliminary breath test, before placing Madrid under arrest and charging him with driving under the influence of an intoxicant, third offense, in violation of WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, third offense, in violation of § 346.63(1)(b).

¶8 Madrid moved to suppress all evidence obtained by law enforcement officers subsequent to Madrid's initial contact with Deckert on the basis that Deckert was on the curtilage of Madrid's property without a valid warrant or without probable cause and exigent circumstances. The court denied Madrid's motion. The court ruled that the area where Deckert was standing when he first observed Madrid—whether it was the area surrounding the porch or the porch itself—was not curtilage protected by the Fourth Amendment. With respect to the sidewalk leading up to the porch and the grassy area abutting the sidewalk and porch, the court ruled that neither area was “connected directly to the intimate area or internal section of the apartment.” With respect to the porch, the court explained its ruling as follows:

This is not an enclosed porch. This is this privacy fence that basically blocks the view of people on the porch for Apartment A looking over to the porch for Apartment B and vice versa.

It is not an enclosed area, and someone in the parking lot area where the defendant had parked, based on the diagrams today, would be able to observe the entirety of the defendant's porch and grassy area, assuming that there was sufficient light.

....

Based upon the testimony also, I conclude that the officer, when he is at the edge of the defendant's porch, is at least ten feet from the wall of the defendant's apartment. He is at least ten feet from the window, if there is a window there, or the wall that separates the interior of the apartment from the exterior where the porch is located.

I find given these factors, and considering the elements referred to by the State, and the curtilage balances, that the area where the officer was first observed by the defendant is not a part of the curtilage. It is a part of the structure that is occupied by the defendant.

¶9 Following the denial of his motion to suppress, Madrid pled guilty to operating a motor vehicle while under the influence of an intoxicant, third offense. Madrid appeals.

STANDARD OF REVIEW

¶10 A curtilage determination presents a question of constitutional fact. *State v. Martwick*, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. In reviewing questions of constitutional fact, we will uphold a circuit court’s factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423.

DISCUSSION

¶11 Madrid contends that evidence obtained following his initial contact with Deckert should have been suppressed because it derived from Deckert’s illegal intrusion onto his porch, which he maintains is curtilage protected by the Fourth Amendment.² The State contends that the circuit court considered the appropriate facts and legal factors when making a curtilage determination and “properly determined that the porch area from which Officer Deckert observed Madrid is not part of Madrid’s curtilage.”

¶12 Under the Fourth Amendment, police are prohibited from making warrantless and nonconsensual entry into a suspect’s home absent probable cause and exigent circumstances. *Martwick*, 231 Wis. 2d 801, ¶26. This Fourth

² Madrid does not dispute the circuit court’s ruling that the sidewalk area adjacent to the grassy area and the grassy area abutting the porch and sidewalk are not curtilage.

Amendment protection also extends to the curtilage of a home. *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735 (1984). Curtilage is the area immediately adjacent to a home to which the inhabitants have extended “the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life’” and is considered part of the home for purposes of the Fourth Amendment. *Martwick*, 231 Wis. 2d 801, ¶26 (quoting *Oliver*, 466 U.S. at 180). Areas outside the home and curtilage, however, are not afforded the protections of the Fourth Amendment. *Id.*, ¶27.

¶13 In *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134 (1987), the Supreme Court explained that the extent of curtilage is determined by whether the inhabitant could reasonably expect the area in question to be treated as the home itself. Whether the inhabitant had such an expectation depends on an affirmative answer to the following two questions: “whether the individual by his conduct exhibited an actual, subjective expectation of privacy ... [and] whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable.” *State v. Rewolinski*, 159 Wis. 2d 1, 13, 464 N.W.2d 401 (1990). To help answer these questions, the Supreme Court articulated in *Dunn* four factors relevant to determining the extent of a home’s curtilage: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps the resident takes to protect the area from observation by passers-by. *Dunn*, 480 U.S. at 301. It is the defendant’s burden to prove, at the very least inferentially, that he or she had a subjective expectation of privacy that was objectively reasonable. *Rewolinski*, 159 Wis. 2d at 13-14; *Conrad v. State*, 63 Wis. 2d 616, 631, 218 N.W.2d 252 (1974).

¶14 Madrid does not contend that the circuit court's factual findings were erroneous. We therefore apply the *Dunn* factors to the undisputed facts at hand and determine independently whether Madrid has proven that he exhibited an actual subjective expectation of privacy and, if so, whether that expectation of privacy was legitimate or justifiable. See *Martwick*, 231 Wis. 2d 801, ¶16; *Rewolinski*, 159 Wis. 2d at 13-14. After reviewing all the facts and applying the *Dunn* factors to the facts, we conclude that Madrid has not met his burden of proving he demonstrated an actual subjective expectation of privacy over the porch.

¶15 There is no dispute that the porch is within close proximity to Madrid's apartment. The back porch immediately adjoins the apartment and Deckert observed Madrid walk directly from the porch into the apartment. See, e.g., *State v. Wilson*, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999) (holding that the pavement area adjoining back entrance satisfies the proximity factor). The porch, however, is not within an enclosure surrounding the home. One side of the porch abuts the apartment building and another side is protected by a fence designed to afford the occupants of apartment A privacy from the occupants of apartment B. The other two sides of the porch, however, are not enclosed or protected in any manner and the porch is wholly visible to those outside, with the exception of the view available to the occupants of apartment B by virtue of the privacy fence. As to the use that Madrid put to the porch, we infer from the evidence that the porch was used to access the back of the residence and thus provided a direct path of egress and ingress. No other evidence, however, was presented regarding Madrid's use of the porch. There is also no indication in the

record that Madrid took any physical steps to protect the privacy of the porch.³ To the contrary, Deckert testified that the porch was plainly visible from the building's parking lot. Thus, the only evidence indicative of a subjective expectation of privacy on Madrid's part is the porch's close proximity to the apartment, the existence of a fence bordering one side of the porch, and the fact that it was used on at least one occasion as a means of entering and exiting the apartment.

¶16 We conclude that when the facts are viewed in their totality, they do not support the conclusion that Madrid exhibited a subjective expectation of privacy over the porch. Because Madrid has not established his subjective expectation of privacy, we need not address whether such an expectation of privacy over the porch in question would be legitimate or justifiable. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).

CONCLUSION

¶17 For the reasons discussed above, we affirm the order of suppression and judgment of conviction.

By the Court.—Judgment and order affirmed.

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

³ Madrid argues that the numerous times he ordered Deckert off his porch is a clear indication that he attempted to “keep individuals off the porch.” However, he presented no evidence that he did so routinely and regardless of whether the individual is a law enforcement officer.

