COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1184-CR **Cir. Ct. No. 2009CT31**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GARY F. WIECZOREK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Buffalo County: THOMAS E. LISTER, Judge. *Reversed and cause remanded for further proceedings*.

¶1 HOOVER, P.J.[1] The State appeals an order granting Gary Wieczorek's motion to suppress evidence and motion to dismiss with prejudice.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The State asserts the circuit court erred by determining Wieczorek was unconstitutionally seized in a warrantless entry into the curtilage of his home. We agree and reverse and remand for further proceedings.

BACKGROUND

¶2 The State charged Wieczorek with operating while intoxicated and operating with a prohibited alcohol concentration, both as third offenses. Wieczorek brought a pretrial motion, arguing he had been unconstitutionally seized.

¶3 At the motion hearing, officer Jason Mork testified that, on April 13, 2009, he was asked by trooper Jeremy Brunner to assist him locating a vehicle that was just involved in a hit and run at the 4-Mile Gentlemen's Club. Mork was told the driver was male. He was also given the color, make, model, and license plate number of the suspect vehicle, as well as the registered owner's name and address. The vehicle was registered to Wieczorek. Brunner asked Mork to respond to Wieczorek's residence.

¶4 Mork testified Wieczorek's residence is located approximately one-and-one half miles from the 4-Mile Gentlemen's Club. When Mork arrived at Wieczorek's residence, he observed the suspect vehicle in the driveway. Mork explained the vehicle had "fresh damage" on the rear bumper and a broken taillight. Mork knew the damage had recently occurred because there was a layer of dirt on the vehicle except around the damaged areas.

¶5 Mork knocked on Wieczorek's front door. A male, subsequently identified as Wieczorek, answered. Mork observed Wieczorek was using the door for stabilization and "even with that, he was unable to stand straight. He was

wobbly, leaning backward … [and] had a glassy-eyed appearance. When he talked to me, his speech was severely slurred." Mork testified that he believed Wieczorek was the male driver of the vehicle because "[Wieczorek] has a wife and two young children," so no one else in the house would have been the driver. Mork introduced himself and asked if he would come outside to talk about an incident that happened. Wieczorek came out onto the porch to talk to Mork.

¶6 Once outside, Wieczorek told Mork he wanted to go inside, and he invited Mork in. Mork declined Wieczorek's invitation, citing safety concerns. Mork explained to Wieczorek that another officer, Brunner, was en route and wanted to talk to him about an incident involving the 4-Mile Gentlemen's Club, his vehicle, property damage, and potentially him. Wieczorek's wife came outside and Mork repeated the information to her. Wieczorek then asked again who Mork was and why he was here. Mork repeated the information. At that point, Wieczorek attempted to go inside his house, but Mork prevented him. Wieczorek then attempted to go inside a second time. Mork tried to make contact with Wieczorek, but he pulled away several times. As Wieczorek placed his hand on the doorknob and was about to step in, Mork pulled him back and directed him to the ground. Mork was on the ground attempting to control Wieczorek for approximately eight seconds, when Brunner arrived. Mork and Brunner handcuffed Wieczorek. Wieczorek told Mork he "wanted to fight [Mork] if [Mork] took the cuffs off."

¶7 Brunner did not testify at the motion hearing. But, according to his police report, which the court admitted into evidence, after Brunner's arrival, Brunner questioned Wieczorek and Wieczorek's wife about the incident at the gentlemen's club. Brunner also received more information from dispatch about the incident. He then arrested Wieczorek.

¶8 The circuit court, relying on ***State v. Walker***, 154 Wis. 2d 158, 184-85, 453 N.W.2d 127 (1990), determined Wieczorek had been unconstitutionally seized by Mork because the seizure took place in the curtilage of his home.

DISCUSSION

¶9 On appeal, the State asserts the court erred by determining Wieczorek had been unconstitutionally seized by Mork in his curtilage. Specifically, the State contends Wieczorek's front porch was not subject to Fourth Amendment protection and Mork's presence on the porch was proper. The State also argues Mork's seizure was proper.

¶10 Whether an area is considered curtilage and protected by the Fourth Amendment depends on whether an individual has a reasonable expectation of privacy in the area. ***United States v. Dunn***, 480 U.S. 294, 300 (1987). Factors that bear upon whether an individual has a reasonable expectation of privacy in an area are: "(1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby." ***Id.*** at 294-95, 301. Determinations of whether an individual has "a reasonable expectation of privacy in a given area must be decided on a case-by-case basis." ***State v. Edgeberg***, 188 Wis. 2d 339, 348, 524 N.W.2d 911 (Ct. App. 1994).

¶11 Here, the circuit court determined the front porch was curtilage after analogizing the situation to ***Walker***, 154 Wis. 2d at 184-85. There, our supreme court determined the defendant's warrantless arrest in his fenced-in backyard was improper because the fenced-in backyard was curtilage and police had no exigent circumstances for the warrantless arrest. In reasoning the fenced-in backyard was

curtilage, the court noted it was not accessible to the public and not visible to those passing by the front of the house. ***Id.*** at 184 n.11.

¶12 Because the determination of a reasonable expectation of privacy must be considered on a case-by-case basis, we conclude the court erred by determining by reason of analogy that Wieczorek had the same reasonable expectation of privacy in his front porch as the defendant in ***Walker*** had in his fenced-in backyard. Instead, the circuit court needed to make factual findings about the nature of Wieczorek's front porch and then use the ***Dunn*** factors outlined above to determine whether he had a reasonable expectation of privacy in the porch.

¶13 Pursuant to this same rationale, we also reject Wieczorek's reliance on ***State v. Larson***, 2003 WI App 150, ¶24, 266 Wis. 2d 236, 668 N.W.2d 338, to support his argument that Mork's entry was unconstitutional. In ***Larson***, we determined the defendant's warrantless arrest was unconstitutional because the officer actually *entered* the defendant's house without a warrant. ***Id.***, ¶¶10, 24 ("Fourth Amendment has drawn a firm line at the entrance to the house." (citation omitted)). Here, Mork did not enter Wieczorek's house.

¶14 The State asserts that even if the front porch is considered curtilage, Mork was lawfully present on the front porch for the purpose of conducting a ***Terry***[2] investigation. It is well settled that the Fourth Amendment is not implicated by an officer's entry on private land to knock on a citizen's door for legitimate police purposes. ***Edgeberg***, 188 Wis. 2d at 348. However, unless the

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

defendant voluntarily exposed him or herself to "public view, speech, hearing and touch," *see* ***United States v. Santana***, 427 U.S. 38, 42 (1976), or subsequently consented to the officer's presence, *see* ***State v. Lathan***, 2011 WI App 104, ¶10, 335 Wis. 2d 234, 801 N.W.2d 772, an officer would still need probable cause and exigent circumstances in order to seize the individual without a warrant.

¶15 Based on the record, we cannot determine whether Wieczorek was exposed to public view when he came out on his front porch. However, we conclude the record reveals Wieczorek consented to Mork's presence. In fact, Wieczorek went so far as to invite Mork into his house to wait for Brunner. Because Wieczorek agreed to the encounter, Mork's presence was lawful and Wieczorek was not unconstitutionally seized based on the location of the encounter.

¶16 Wieczorek nevertheless asserts that, even if the location of the seizure was proper, he was still unconstitutionally seized because Mork conducted an improper ***Terry*** investigation which caused him to be arrested without probable cause. Citing ***Florida v. Royer***, 460 U.S. 491, 500 (1983), Wieczorek asserts that although Mork had reasonable suspicion to conduct the investigation, Mork's investigation was "anything but diligent" because he refused to investigate until

Brunner arrived. Wieczorek contends that, because Mork refused to conduct a diligent investigation, Mork[3] arrested him without probable cause.

¶17 We conclude that, irrespective of any alleged impropriety in Mork's investigatory detention, after Wieczorek came outside to talk to Mork, Mork had probable cause to arrest Wieczorek for operating while intoxicated. Probable cause exists when the officer has "reasonable grounds to believe that the person is committing or has committed a crime." ***State v. Popke***, 2009 WI 37, ¶14, 317 Wis. 2d 118, 765 N.W.2d 569 (citation omitted). Here, prior to making contact with Wieczorek, Mork knew Wieczorek's vehicle had just been involved in a hit and run causing property damage and the reported driver was male. Mork responded to Wieczorek's address and found the damaged vehicle in Wieczorek's driveway. Mork knew Wieczorek was the only adult male living at the residence. When Mork made contact with Wieczorek, Wieczorek appeared intoxicated—he could not stand straight, used the door for stabilization, had slurred speech and red glassy eyes, and smelled like alcohol. Based on his observations and knowledge, Mork had probable cause to believe Wieczorek operated his vehicle while intoxicated.

[3] In his brief, Wieczorek asserts Brunner, not Mork, arrested him without probable cause. However, because Wieczorek's argument in support of the lack of probable cause only references Mork, we assume Wieczorek's argument is based only on Mork. If, however, Wieczorek intended to argue Brunner arrested him without probable cause, this argument is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Moreover, we observe that according to Brunner's police report, which was admitted into evidence, after Brunner's arrival but prior to his arrest of Wieczorek, Brunner interviewed Wieczorek, Wieczorek's wife, and was given more information from dispatch regarding the bouncer's encounter with the suspect male at the 4-Mile Gentlemen's Club.

By the Court.—Order reversed and cause remanded for further proceedings.

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