**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 1, 2000

**Cornelia G. Clark**
**Acting Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2459-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**SCOTT A. TEASDALE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Marinette County: LARRY L. JESKE, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J.[1] The State of Wisconsin appeals an order suppressing evidence associated with Scott Teasdale's alleged offenses of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All statutory references are to the 1997-98 edition.

disorderly conduct and endangering safety by use of a dangerous weapon.[2] The circuit court suppressed the evidence associated with both charges because it concluded that the police officers had unlawfully entered the curtilage of Teasdale's home. Among other things, the State argues that even if the officers did unlawfully enter the curtilage, Teasdale's reaction of brandishing a gun and threatening the officers constituted independent criminal activity that was sufficiently attenuated from the officers' unlawful presence making the evidence admissible. This court agrees and therefore reverses the suppression order.[3]

¶2 The facts relevant to this appeal are not disputed. From their investigation of a vehicle stuck in a snow bank in February 1998, two City of Marinette police officers followed a trail of footprints in freshly fallen snow to what they would later discover to be Teasdale's home. The officers followed the footprints leading through a backyard, onto a snow-cleared deck and to a back door. Around 11:00 p.m., the officers knocked on the door and announced their presence. Teasdale answered the door and asked the officers to leave. The officers did not obey his request. Teasdale allegedly advanced towards the officers, walking out of his home without wearing any shoes while cursing the officers and further demanding that they leave. The officers did not leave. Teasdale went back into his home and retrieved what appeared to be a long-barreled firearm. Holding the gun, he again advanced towards the officers and continued to threaten them.

[2] The State brings this appeal from the circuit court's suppression order pursuant to WIS. STAT. § 974.051(1)(d).

[3] Because this court reverses on other grounds, it is not necessary to consider the State's argument that the officers never violated Teasdale's rights under the Fourth Amendment by simply approaching his back door.

¶3 Teasdale's backyard is partially secluded by thick woods. He uses his backyard for various recreational activities and considers his yard to be private. Curtilage is known as the area surrounding a person's home that extends the intimate activities associated with the sanctity of the home and the privacies of life. *See* ***Oliver v. United States***, 466 U.S. 170, 180 (1984). The Fourth Amendment protects the home and the area around it, to the extent that an individual has a reasonable expectation of privacy. *See* ***United States v. Dunn***, 480 U.S. 294, 300-01 (1987). The circuit court concluded that Teasdale's description of his backyard sufficiently established that the area was curtilage of his home. Because the officers did not have authority to arrest Teasdale in his home, the court concluded that they unlawfully entered the curtilage.

¶4 The State argues, however, that even if the police had no authority to approach Teasdale's back door, his criminal response was sufficiently attenuated from the officer's illegal conduct so that the evidence seized need not be suppressed.[4] The Supreme Court in ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975), set forth several factors to guide courts in determining whether the causal chain between illegal police conduct and discovered evidence is sufficiently attenuated as to dissipate the taint: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. In the final analysis,

[4] As a preliminary matter, Teasdale contends that the State's appeal is not timely. The circuit court entered a "memorandum decision" in August 1998, but did not file a written order until August 1999. Teasdale argues that for all substantive purposes the memorandum decision constituted an order and therefore the State had forty-five days from the filing of that decision to appeal. Generally a memorandum decision is not appealable, *see* ***Wick v. Mueller***, 105 Wis. 2d 191, 193, 313 N.W.2d 799 (1982), and this court concludes that the circuit court did not intend the litigation of this issue to be complete until it entered its written order in August 1999. The State's appeal from the 1999 order was timely. *See* WIS. STAT. § 808.04(4).

though, the determinative issue is whether the evidence came about from the "exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *See* ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963).

¶5 Whether evidence should be suppressed as the fruit of a prior illegal search is a question of constitutional fact. *See* ***State v. Anderson***, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991). Questions of constitutional fact are sometimes referred to as mixed questions of fact and law, requiring an appellate court to determine whether the facts found fulfill a particular legal standard. We will not disturb the circuit court's finding of historical or evidentiary facts unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether the historical or evidentiary facts satisfy constitutional muster is an inquiry this court makes independent of the circuit court. *See* ***State v. McMorris***, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997).

¶6 In cases where a person subjected to an illegal search reacts by committing a criminal offense, such as endangering the safety of the officers conducting the search, courts have uniformly held that the evidence of this new crime is admissible. *See* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(j), at 339-41 (3d ed. 1996). In ***United States v. Waupekenay***, 973 F.2d 1533 (10th Cir. 1992), police officers entered the defendant's trailer and partially saw the defendant in the back of the trailer. The defendant then stepped fully into view and pointed a rifle at the officers. *See* ***id.*** at 1535. Although the Tenth Circuit determined that the officers illegally entered the defendant's trailer, evidence involving the defendant's criminal response was not suppressed. *See* ***id.*** at 1537.

¶7 ***Waupekenay*** explained that courts have used different rationales when considering the admissibility of evidence involving separate and independent crimes initiated against police officers in their presence after an illegal entry. *See* ***id.*** at 1538. Some courts have found the intervening act of the defendant to be so separate and distinct from the illegal entry as to break the causal relationship. *See* ***id.*** "Other courts have stressed the limited objective of the exclusionary rule—*i.e.*, deterring unlawful police conduct by excluding evidence obtained as a result of such conduct—and the strong public interest in preventing and punishing force or threats of force directed against police officers." ***Id.*** For example, ***United States v. Bailey***, 691 F.2d 1009 (11th Cir. 1982) held that "the police may legally arrest a defendant for a new, distinct crime, even if the new crime is in response to police misconduct and causally connected thereto." ***Id.*** at 1017-18. The court explained:

> Unlike the situation where in response to the unlawful police action the defendant merely reveals a crime that *already* has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This is too far reaching and too high a price for society to pay in order to deter police misconduct.

***Id.*** at 1017. The South Dakota Supreme Court agreed with this reasoning and noted that a contrary holding "would have allowed [the] defendant to summarily

execute [the two officers involved] with no legal accountability …." ***State v. Miskimins***, 435 N.W.2d 217 (S.D. 1989).[5]

¶8 No matter what rationale is used, the result is the same: Evidence of a separate, independent crime initiated against police officers in their presence after an illegal entry will not be suppressed under the Fourth Amendment. Here, Teasdale allegedly responded to the officers' presence in his back yard by cursing and retrieving a gun. He threatened to kill the officers and created a highly charged and unsafe environment. This court therefore concludes that Teasdale's reaction to the officers' presence constituted an independent action that was sufficiently attenuated from the officers' entry into his backyard curtilage as to be purged of the primary taint. *See* ***Wong Sun***, 371 U.S. at 488. Further, prosecuting Teasdale for his response would not constitute exploitation of the officers' illegal presence.

[5] The incident involved in this case occurred before our supreme court's decision in ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), in which the court prospectively abrogated the common law right to forcibly resist an unlawful arrest. *See* ***id.*** at ___. ***Hobson*** is relevant to this decision only because the court discussed the important public policy considerations involved in scenarios of unlawful but peaceable arrests:

> We feel that the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets. It is not too much to ask that one believing himself unlawfully arrested should submit to the officer and thereafter seek his legal remedies in court. Such a rule helps to relieve the threat of physical harm to officers who in good faith but mistakenly perform an arrest, as well as to minimize harm to innocent bystanders.

***Id.*** at 380 (quoted source omitted). This court considers these policy concerns when considering the reach of the exclusionary rule. *See* ***United States v. Bailey***, 691 F.2d 1009, 1017 (11th Cir. 1982).

*By the Court.*—Order reversed and cause remanded.

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