COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2779-CR **Cir. Ct. No. 2004CT119**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. GILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Jeffrey S. Gill appeals from a judgment of conviction for operating a motor vehicle while intoxicated (4th) (OWI) contrary to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a). The sole issue on appeal is whether the circuit court erred in denying his motion to suppress evidence. We find no error and affirm.

FACTS

¶2 On December 31, 2003, at approximately 10:41 p.m., Sheboygan County Deputy Sheriff Gary Zajkowski was out on patrol when he received a report from dispatch that there was a possibly intoxicated driver. According to dispatch, a known tipster spotted the driver in the area of County Trunk F and State Highway 28 in Sheboygan county. Dispatch provided Zajkowski with a description of the vehicle, the plate number and the driver. According to dispatch, the tipster allegedly followed this vehicle to a residence. Zajkowski checked the plate number and found that it was registered to Gill at an address in Cascade. Zajkowski proceeded to the registered location.

¶3 As he pulled up to the house, Zajkowski saw an individual, who was later identified as Gill, matching the description provided by the tipster. Gill was standing out in front of a van parked on the driveway. Zajkowski walked up the driveway leading to the residence to make contact with Gill. Shannon Brill, a deputy at the Sheboygan County Sheriff's Department, assisted Zajkowski that night. He also proceeded up the driveway to speak with Gill.

¶4 The officers made contact with Gill on his driveway between the headlights of the parked van and the garage door. Zajkowski noticed that Gill had bloodshot eyes, an odor of intoxicants on his breath, slurred speech and difficulty balancing. Zajkowski asked Gill who had been driving the van that night. Gill indicated that it was his dog. Zajkowski then asked Gill for his driver's license. According to Zajkowski, Gill "made several attempts to swipe at the left rear pocket of his pants, but due to the level of intoxication, I believe he could not get

[his] hand into his pocket to remove it from there." Gill was ultimately unable to retrieve his license or wallet from his pants pocket and simply gave Zajkowski a blank stare. At that point, Brill retrieved the wallet from Gill's left pants pocket. Brill found Gill's drivers license inside the wallet.

¶5 Zajkowski next asked Gill to perform field sobriety tests. Gill responded that "he was way too drunk to do the field sobriety tests." Zajkowski arrested Gill for OWI. The State charged Gill with OWI (4th) and operating a motor vehicle with a prohibited alcohol concentration (4th), contrary to WIS. STAT. § 346.63(1)(b).

¶6 Gill filed a motion to suppress. He posited that the officers' warrantless entry onto his driveway violated his Fourth Amendment rights because it occurred within the curtilage of his residence. Gill further argued that Brill's removal of his wallet from his pants pocket violated his Fourth Amendment rights because it was not done to determine if he was armed and dangerous. The circuit court denied Gill's motion. Gill pled no contest to the OWI (4th) charge. He appeals from the judgment of conviction.

DISCUSSION

¶7 The denial of Gill's motion to suppress evidence presents two issues for our review. First, we must ascertain whether Gill was impermissibly searched and seized in the curtilage of his home. Gill maintains that his driveway falls within the curtilage of his home for Fourth Amendment purposes. Next, we must determine whether Brill properly performed a limited search of Gill's person for his wallet and identification. Gill argues that because Brill did not have a reasonable suspicion that he was armed and dangerous, the search was illegal. We will first set forth the standard of review and then address each issue in turn.

¶8 *Standard of review*. In reviewing an order denying a motion for the suppression of evidence, we will uphold a circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, the application of constitutional principles to those facts is a question of law that we review de novo. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶9 *Officers' warrantless entry onto Gill's driveway*. The Fourth Amendment to the United States Constitution provides:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Wisconsin Constitution is essentially the same. WIS. CONST. art. I, § 11. "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). A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all governmental agents who seek to enter the home for purposes of search or arrest. ***Id.*** It is not surprising, then, that the United States Supreme Court has recognized that all warrantless searches and seizures inside a home are presumptively unreasonable. ***Id.*** at 748-49.

¶10 A person generally is entitled to the same Fourth Amendment protection in the curtilage of his or her home as if he or she were inside the home. ***United States v. Dunn***, 480 U.S. 294, 300 (1987). Curtilage means "the area to

which extends the intimate activity associated with the 'sanctity of a man's [or woman's] home and the privacies of life.'" ***Oliver v. United States***, 466 U.S. 170, 180 (1984) (citation omitted).

¶11 Four elements assist courts in determining whether an area claimed to be curtilage is so intimately tied to the home itself that Fourth Amendment protections should be available: the proximity of the area to the home; whether the area is included with in an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by passersby. ***Dunn***, 480 U.S. at 301. In addition, for Fourth Amendment purposes, a person must be in an area in which he or she has a reasonable expectation of privacy. *See* ***United States v. Santana***, 427 U.S. 38, 42 (1976).

¶12 The record contains a photograph of Gill's driveway and house. At the suppression hearing, Zajkowski described to the court, and marked on the photograph, approximately where the parties were standing when the stop, search and arrest took place. According to Zajkowski, the officers and Gill were standing on the driveway in between the parked van and the garage. Although the driveway is close to the house, it is not gated, fenced in or otherwise enclosed. The driveway is not protected from observation by passersby. Gill testified that he uses the driveway to park three of his cars and to perform oil changes and maintenance on those cars. Under some circumstances, a driveway might be used for "intimate activities" necessitating Fourth Amendment protections. ***United States v. Depew***, 8 F.3d 1424, 1427-28 (9th Cir. 1993) (secluded driveway held to be within curtilage in part because the defendant was a practicing nudist whose property was remote, secluded and shielded from public view), *overruled on other grounds by* ***U.S. v. Johnson***, 256 F.3d 895, 913 n.4 (9th Cir. 2001) (proper

standard of review is de novo not clearly erroneous). But a driveway visible from a road and used for access to the residence and for parking cars does not generally "harbor[] those intimate activities associated with domestic life and the privacies of the home." ***Dunn***, 480 U.S. at 301 n.4. We therefore conclude, based on our careful review of the record in light of the ***Dunn*** factors, that the driveway area where the search and seizure took place was outside the curtilage of Gill's home. While the parties were standing in the driveway close to the home and garage, the other three factors suggest that the area fell outside the curtilage.

¶13 Although we conclude that the driveway area in question was outside the curtilage of Gill's home, we note that entry by officers onto areas within the curtilage that are implicitly open to the public, such as walkways or access routes, also does not constitute a search and therefore does not implicate the Fourth Amendment. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 347, 524 N.W.2d 911, 914 (Ct. App. 1994) ("[a] sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy." (Citation omitted.)). The circuit court, after hearing testimony and considering the photograph of Gill's residence, found that the driveway

> would be an area people would regularly have access to the home if they were a salesman or otherwise or a person running for office and going door to door. There is not the same sort of justification that you would have to believe that you have the expectation of privacy. It is implied that this would be open. I'm satisfied that this took place within that particular area.

We see no reason to disturb this determination. Zajkowski testified that there are no sidewalks and the photograph and testimony do not suggest any other paved access route from the road to the residence. Thus, even if we were to conclude

that the driveway was in the curtilage of Gill's residence, we would sustain the denial of his motion to suppress.[2]

¶14 *Officer's retrieval of Gill's wallet.* As Gill correctly observes, ***Terry v. Ohio***, 392 U.S. 1, 26 (1968), authorizes officers to frisk an individual lawfully detained for the purpose of discovering weapons which may be used to harm the officers or others nearby. However, Gill incorrectly assumes that this is the only circumstance in which an officer may conduct a pat down or frisk in Wisconsin.

¶15 The issue of conducting an identification search has been addressed by our supreme court in ***State v. Flynn***, 92 Wis. 2d 427, 285 N.W.2d 710 (1979). There, the court determined that an officer acted reasonably in removing a defendant's wallet to ascertain his identity after the defendant refused to provide his identification to the officer. ***Id.*** at 431-32, 448. In determining that the search was reasonable under the Fourth Amendment, the court conducted a reasonableness balancing test in which the need for the particular search is weighed against the invasion of personal rights that the search entails. *See* ***id.*** at 446. *See also* ***State v. Black***, 2000 WI App 175, ¶1, 238 Wis. 2d 203, 617 N.W.2d 210 (using the ***Flynn*** balancing test to conclude that a police officer conducting a ***Terry*** stop may perform a limited search for identifying papers when the information the suspect provides is not confirmed by police records).

[2] Gill likens this case to ***Welsh v. Wisconsin***, 466 U.S. 740 (1984). However, because we hold that the driveway area where the stop, search and seizure took place is not entitled to the same Fourth Amendment protections as his home, ***Welsh*** does not apply.

¶16 We are persuaded that Brill's limited search for identification in this case was permissible under ***Flynn***. First, Brill had a proper justification for initiating the search. Brill initiated the search for the obvious and valid reason of establishing the identity of a suspected drunk driver lawfully stopped. As the ***Flynn*** court observed, "unless the officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all." ***Flynn***, 92 Wis. 2d at 442. Further, Brill conducted the search only after giving Gill the opportunity to supply the necessary identification himself. While there is no evidence that Gill refused to produce his identification like the defendant in ***Flynn***, there is also no evidence that Gill objected to the search and the suppression hearing testimony establishes that Gill could not have physically produced his license even if he had wanted to because he was too drunk.

¶17 Second, as to the nature of the intrusion, Brill's search was properly limited in scope. Professor Wayne R. LaFave has cautioned that an identification search should be strictly limited to uncovering a wallet or similar repository for identification papers. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.5(g) at 694-95 (4th ed. 2004). This is exactly what occurred here. Brill's search was focused on obtaining Gill's wallet, which Brill reasonably presumed was in Gill's pants pocket as evidenced by Gill's failed attempts to retrieve it. After Brill assisted Gill with removing his wallet from his pants pocket, Brill pulled Gill's drivers license from out of the wallet. The search ended at that point. Thus, the actual intrusion on Gill's privacy was "as limited as [was] reasonably possible consistent with the purpose justifying it in the first instance." ***Flynn***, 92 Wis. 2d at 448 (citation omitted). Because we conclude that Brill's conduct was justified and the scope of the intrusion was no broader than necessary to obtain the information

justifying the search, his identification was not obtained in violation of his Fourth Amendment rights. *See* ***id.*** at 448-49.

¶18 We affirm the circuit court's decision denying Gill's motion to suppress.

By the Court.—Judgment affirmed.

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