

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF MCLEOD

FIRST JUDICIAL DISTRICT

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State of Minnesota,

Plaintiff,

**EVIDENTIARY ORDER**

v.

S. A. B.

Defendant.

Court File No. CR-07-1951

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The above-entitled matter came on for an evidentiary hearing at the McLeod County Courthouse in Glencoe, Minnesota on the 20<sup>th</sup> day of November 2007, before the Honorable Judge of District Court. The State appeared by its attorney, Mr.

Glencoe, Minnesota. The Defendant appeared in person and with his attorney, Mr. Ryan P. Garry, Minneapolis, Minnesota.

The issues before the Court were whether the officer unlawfully entered the curtilage of the Defendant and whether the officer unlawfully extended the scope of his investigation when he ordered the Defendant to submit to a PBT. The Court, having heard the evidence produced and the arguments of counsel, having reviewed the contents of its file, and being duly advised in the premises now makes the following:

**IT IS HEREBY ORDERED THAT:**

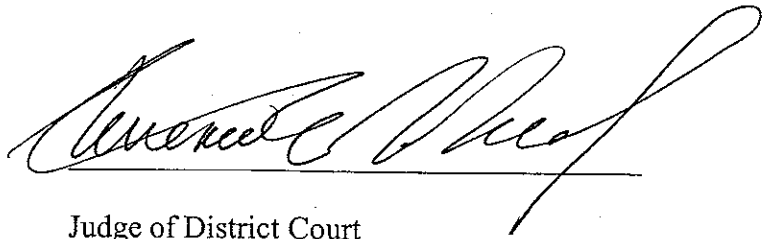
1. The Defendant's motion to dismiss the criminal charge against him because the officer unlawfully entered the Defendant's curtilage is granted.
2. The Memorandum set out below is hereby made a part of this Order.

Dated this 31<sup>st</sup> day of January, 2008.

**FILED**

FEB 01 2008

ROBERT L. SCHMIDT  
COURT ADMINISTRATOR  
MCLEOD COUNTY, MN



Judge of District Court

**MEMORANDUM**

Testimony at the November 20<sup>th</sup> hearing and documents submitted by the State and the Defendant indicate that the following described events took place. On August 2<sup>nd</sup>, 2007 Sergeant **A** **W** of the McLeod County Sheriff's Department responded to a report of vehicles blocking traffic in Plato, MN. Upon arrival, Ward observed a green Ford truck parked on the south side of 2<sup>nd</sup> Street Northeast and a trailer parked on the north side of 2<sup>nd</sup> Street Northeast. He called the truck's license plate into dispatch and was notified that the truck was owned by the Defendant and his wife.

Ward then spoke with an unidentified resident on the southeast corner of McLeod Avenue and 2<sup>nd</sup> Street Northeast who told him the truck and trailer were owned by a person residing a couple houses north on McLeod Avenue. **W** also stopped a semi-truck and spoke to the unidentified driver who told him the truck and trailer were owned by an individual living two houses north on McLeod Avenue. After speaking with the semi driver, **W** observed an individual on a four-wheeler travelling westbound on 2<sup>nd</sup> Street Northeast. The individual then turned north on McLeod Avenue and pulled into the driveway at 213 McLeod Avenue. The driver was not identified, and **W** noted nothing unusual about the driving conduct, such as erratic driving.

W● then went to 213 McLeod Avenue, walked up the driveway, and noticed the Defendant standing on his deck. The deck is wooden with a surrounding railing and a latched gate attached. In addition, the deck is connected to a chain link fence that surrounds the backyard of the Defendant's residence. As the Defendant stood on his deck W● questioned him from the driveway below about his truck and trailer. The Defendant told W● that he owned the truck and trailer parked on 2<sup>nd</sup> Street Northeast. W● advised the Defendant that vehicles cannot be parked within 30 feet of a stop sign and the Defendant agreed to move the truck and trailer. W● testified that he observed that the Defendant had bloodshot watery eyes and slurred speech. W● also testified that he detected the odor of an alcoholic beverage. W● asked the Defendant if he had been drinking and the Defendant said that he had not. W● told the Defendant that he would be right back with a Preliminary Breath Testing (PBT) machine.

W● retrieved a PBT machine from his squad car and returned to the driveway. The Defendant was still standing on his deck when Deputy W● returned. W● climbed the steps to the deck, reached over and unlatched the closed gate, swung it open and stepped onto the deck. At no point did W● ask permission to enter the Defendant's deck and the Defendant did not invite W● to enter the deck. Likewise, W● never asked the Defendant to step down to the driveway in order to conduct field sobriety tests and/or administer the PBT.

While standing on the Defendant's deck, W● ordered the Defendant to submit to the PBT, and the Defendant refused. Despite informing W● that he was blind in his left eye, W● ordered the Defendant to submit to the Horizontal Gaze Nystagmus (HGN) test. After performing the HGN test, the Defendant told W● that he would not submit to any other field sobriety tests. W● then arrested the Defendant and took him to the McLeod County Jail. The

Defendant refused to submit to breath testing and was consequently charged with Third Degree Test Refusal in violation of Minn. Stat. §169A.20 Subd. 2.

### ANALYSIS

The Minnesota and United States Constitutions safeguard the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. U.S. Const. Amend. IV; Minn. Const. Art. I, § 10. This constitutional protection applies to a home's curtilage if "the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *State v. Krech*, 403 N.W.2d 634, 637 (Minn.1987) (quoting *United States v. Dunn*, 480 U.S. 294, 301 (U.S.1987)). The Minnesota Supreme Court uses a four factor analysis for determining whether an area is within the home's curtilage. *See Krech* at 636-37. These factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *Id.*

The Defendant argues that his deck is part of his home's curtilage and this Court agrees. First, the Defendant's deck, including the railing surrounding the deck, is physically connected to the rear of the house. One can access the deck by taking one step from the interior of the home onto the deck. Second, the deck is included within an enclosure surrounding the backyard of the home. The Defendant built a chain link fence that surrounds the entire back yard and connects to the deck. Entrance onto the deck may only be made through the house or through a latched gate on the deck. The latched gate does not have a handle on the outside, but can only be accessed on the inside portion of the door.

Third, the Defendant's deck is not open to public use. The deck is primarily used by the defendant and his family to enjoy the outdoors while still maintaining the privacy provided by their home. The deck is not visible from the street. It measures 6 feet and 3 inches from its ground base to the top of its railings. Fourth, the Defendant has taken a number of steps to secure his privacy while using the deck. The Defendant enclosed all four sides of the deck by, first, building a railing surrounding the entire deck and, second, by building an attached fence that surrounds the backyard. The back yard is only accessible through the latched fence gate located near the Defendant's garage and the deck itself is only accessible through its latched gate or through the home.

Absent probable cause and exigent circumstances, or consent, a warrantless entry of a private residence is *per se* unreasonable and violates the Fourth Amendment. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 578 (Minn.2003). Accordingly, a warrantless entry upon the curtilage of a person's home must be based on consent or probable cause and exigent circumstances to be reasonable under the Fourth Amendment. *See Krech* at 637 (constitutional protection applies to a home's curtilage).

W████ did not have a warrant when he entered the Defendant's deck. In addition, the Deputy never asked the Defendant if he could come on to the deck, nor did the Defendant give any indication that it would be alright for him to do so. Therefore, W████ did not have consent to enter the Defendant's curtilage. Because W████ lacked either a warrant or consent, lawful entry could only be made if there was probable cause that a crime had been committed and the existence of exigent circumstances.

Probable cause exists when there are sufficient facts "such that under the circumstances a person of ordinary care and prudence (would) entertain an honest and strong suspicion that a

crime has been committed.” *State v. Johnson*, 314 N.W.2d 229, 230 (Minn.1982). The state bears the burden of establishing that the warrantless entry was justified by a recognized exception to the warrant requirement. *Haase v. Comm’r of Pub. Safety*, 679 N.W.2d 743, 747 (Minn.App.2004). “[H]ot pursuit of a fleeing felon, imminent destruction or removal of evidence, protection of human life, likely escape of the suspect, and fire” qualify as exigent circumstances justifying a warrantless search and seizure. *B.R.K.* at 579.

There were no exigent circumstances in this case. First, there was no hot pursuit of a suspect. Although W████ had just seen the Defendant operating a motor vehicle he observed no traffic violations and did not suspect any illegal behavior until he started talking with the Defendant while the Defendant was standing on his deck. This was not a hot pursuit situation. W████ had identified the Defendant and now knew where he lived. The Defendant cooperated in answering questions and showed no sign that he intended to flee or escape. There was no indication that the Defendant or anyone else in his home or curtilage were in need of medical attention. The only possible exigent circumstance in this case would be the need to timely test the Defendant’s blood alcohol content. However, a chemical test to determine a person’s blood alcohol content can be administered any time within two hours after operating or being in control of a vehicle. See Minn. Stat. § 169A.20, Subd. 1(5). Deputy ward had observed the defendant operating a motor vehicle just a few minutes earlier. Under these circumstances Deputy W████ had an adequate amount of time to seek a warrant for the Defendant’s arrest, but failed to do so.

In conclusion, the officer entered the Defendant’s curtilage while lacking a warrant, without consent, and without probable cause and exigent circumstances. The officer thereafter arrested the Defendant and brought him to the McLeod County Jail. While at the jail the Defendant refused to take a breath test and was charged with Third Degree DWI-Test Refusal.

Because the charge against the Defendant followed from the officer's unconstitutional entry onto the Defendant's cartilage and subsequent arrest of the Defendant, the motion to dismiss the charge is hereby granted.

TEC