Filed in District Court
State of Minnesc
[redacted]

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ANOKA | TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

J[redacted] Y[redacted], and [redacted],

Defendants.

Court File No.: [redacted]
Court File No.: [redacted]

DEFENDANTS' JOINT POSTHEARING MEMORANDUM IN SUPPORT OF MOTIONS TO SUPPRESS AND DISMISS

> [T]he right to be left alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.
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> *State v. Larsen*, 650 N.W.2d 144, 148 (2002) (citation omitted)

INTRODUCTION

On December [redacted], 2019, Mr. Y[redacted] and Ms. [redacted] were charged with *Felony Cruelty to Animals*, in violation of Minn. Stat. § 343.21, subdiv. 1, and *Misdemeanor Overwork/Mistreat Animals—Cruelty*, in violation of Minn. Stat. § 343.21, subdiv. 7. Mr. Y[redacted] was also charged with *Felony Cruelty to Animals—Fights—Use, Train, or Possess Animals for Purpose*, in violation of Minn. Stat. § 343.31, subdiv. 1(a)(4). On [redacted], 2020, Mr. Y[redacted] and Ms. [redacted] filed *Notice of Motions and Motions to Suppress and Dismiss*, including a motion to suppress all evidence and dismiss the complaint due to law enforcement violating Mr. Y[redacted] and Ms. [redacted] Fourth Amendment rights by entering the curtilage of their home—multiple times—without a warrant, consent, or exigent circumstances.[1]

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[1] If this motion is denied, Mr. Y[redacted] and Ms. [redacted] will proceed with their remaining to motions listed in their [redacted], 2020 *Notice of Motions and Motions.*

On [redacted], 2020, the parties appeared before the Honorable Suzanne M. Brown for a joint *Contested Omnibus Hearing*. At the hearing, [redacted] Police Department Community Service Officer Katie McNally and Anoka County Sheriff's Office Investigator Cheryl Hassel testified. The Court admitted 15 exhibits: Exhibit 1 was a computer disc, Exhibit 2 was a probable cause packet, and Exhibits 3 through 15 were photos. The exhibits were stipulated to and admitted without objection.

The parties agreed to Mr. Y[redacted] and Ms. [redacted] submitting a joint defense brief by [redacted], 2020 by 4:30 p.m., and the State submitting a brief by [redacted] 2020 by 4:30 p.m. Mr. Y[redacted] and Ms. [redacted] now submit their joint defense brief.

FACTS

Squad Videos

CSO McNally's June [redacted], 2019 squad video shows her pulling into the property driveway at 12:30 pm. Visible is the side of the house and the detached garage as well as some items between the house and garage. CSO McNally walks straight to the side door, walks up the steps, and opens the screen door. She knocks at 12:31:25[2] pm. She walks back down the steps and then walks back between the house and garage at 12:31:40 pm. CSO McNally is heard calling "hello" and "[redacted] Police" at 12:32:21 pm. Crowing is also heard on the recording. CSO McNally walks back out between the house and garage at 12:34:44 pm, returns to her squad car, and drives away.

CSO McNally's July [redacted], 2019 squad video shows her pulling into the property driveway at 9:58 am. She pulls up closer to the garage, so the detached garage and house are visible as well as various items, including a patio set on what appears to be a deck between the house and the

[2] Hour:minute:second

garage. Three individuals walk up to the house. One knocks at 9:59:44 am. At 10:00:24 am, one of them walks off camera and appears to go around the house to the front. At 10:01:32 am, they proceed to walk back between the house and garage. They come back from between the house and garage at 10:11:53 am.

Community Service Officer Katie McNally Testimony

CSO McNally is a community service officer with the [redacted] Police Department (Tr. 13). She is not a licensed peace officer, but she has an Associate's Degree in Law Enforcement (Tr. 25).

On direct examination, CSO McNally testified that as a community service officer, she has very little training in animals (Tr. 13, 14). She testified that she was called out to a residence on [redacted] on a noise complaint of roosters being on the property (Tr. 14). The City of [redacted] has a city ordinance prohibiting the possession of roosters on property (Tr. 14). She went out to the property on June [redacted] and "could hear a lot of roosters crowing and a lot of animals" (Tr. 14, 15). She went to the side door to try to contact the homeowner, believing the side door was the one normally used (Tr. 15). She knocked, but no one answered (Tr. 15). She could hear roosters behind her, turned to look, and observed "three dog kennels that appeared to have multiple birds of some sort in them" (Tr. 16). She could not tell given the distance, so she walked over to the kennels and saw chickens or roosters (Tr. 16). She then heard something that sounded like a rake and shovel, so she "went over to the archway of the fence to try to make contact with the owner that I thought would be back there from the sounds that I was hearing" (Tr. 17). She announced herself twice "while walking to the archway," and then went through the archway and observed wire silos with roosters and chickens as well as some running around free-range (Tr. 17–18). She did not see anyone back in this area (Tr. 21).

Because she did not have a lot of experience with roosters and chickens, and because she wanted to see whether or not a crime was being committed, she wanted to get an expert's opinion, so she took a couple of pictures and left (Tr. 21). She then emailed the pictures to Ashley with the Animal Humane Society and spoke with her via phone (Tr. 22). Ashley wanted to go to the property, so they went back on July [redacted] with Investigator Cheryl Hassel without a warrant (Tr. 22, 23).

They first knocked on the side door with no answer, then they went to the three dog kennels located between the garage and the archway fence (Tr. 23). Then they went to the backyard where CSO McNally showed Ashley the other animals (Tr. 24). After observing the animals, Ashley believed there to be abuse and possible cockfighting, so CSO McNally froze the scene while Investigator Hassel and Ashley returned to the station to obtain a search warrant (Tr. 24).

On cross-examination by Mr. Garry, CSO McNally testified that she is not a licensed peace officer, cannot make arrests, has never applied for a search warrant, and is unable to apply for a search warrant (Tr. 25). She has an Associate's Degree in Law Enforcement and studied the Fourth Amendment, learning that consent is needed to search or step on a person's property or a warrant is needed (Tr. 25–26). She admitted that she did not have a search warrant on June [redacted], 2019 or July [redacted] 2019 (Tr. 26). Nor did she have the property owner's permission (Tr. 26).

CSO McNally testified that the noise complaint regarding the property was for multiple roosters on the property and that her police report addressing only one rooster was a clerical error (Tr. 26–28). Because it was illegal to have roosters on private property, CSO McNally admitted that her investigation was a criminal investigation (Tr. 28). She stated that when she arrived at the property, she went to the second door of the house without going to the first door (Tr. 29).

She denied seeing the mailbox on the front, the welcome mat on the front steps, or the doorbell on the front door despite there clearly being a front door (Tr. 30). She acknowledged that there was a sidewalk going from the driveway up to the front door (Tr. 31). She admitted that when no one answered her knock, she did not knock again or go to the front door to knock (Tr. 31). Instead, she waited approximately eight seconds and then walked onto Mr. Y[redacted]'s private property (Tr. 31). The property consisted of a backyard immediately behind the house and then a fence with an archway to walk through to another backyard where the rooster(s) may have been (Tr. 32–33). The following exchange occurred between Attorney Ryan Garry and CSO McNally:

Q. So, when you knocked on the door, no one answered and you walked onto the property, correct?
A. Yes.
Q. You walked through the patio and deck, correct?
A. Onto, yes.
Q. And then you walked into the first backyard, correct?
A. Yes.
Q. And then you observed a fence and in the middle of the fence was an archway, true?
A. Yes.
Q. And then you walked through the archway, correct?
A. Yes.
Q. And at that point in time, before you walked through the archway, you hadn't seen any roosters, correct?
A. Besides what was in the dog kennel.

(Tr. 33). Despite Investigator Hassel's police report showing that CSO McNally told her that she saw chickens walking in and out of a dog kennel and that they did not appear to be roosters, CSO McNally testified that she did not know if they were roosters or chickens (Tr. 34). Further, despite telling Inv. Hassel that there was one dog kennel, she wrote in her report that there were three crates (Tr. 36). She stated that she inspected the kennels/crates to see if the birds were roosters and that she was investigating a crime:

Q. Okay. Now, at this point in time, when you went over, you now testified that you didn't know what those birds were in the dog kennel, you went over to inspect those birds, correct?
A. Correct.
Q. The reason that you wanted to inspect them is because you wanted to see if they were roosters?
A. Correct.
Q. You were investigating a crime, true?
A. Yes.
Q. You're aware that it's not a crime to have chickens, correct?
A. Correct.
Q. But you're aware that it is a crime to possess a rooster, true?
A. Yes.
Q. So by peering into that crate on Mr. Y[redacted]'s private property, you were looking to see if he had committed a criminal violation, correct?
A. Yes.

(Tr. 36–37). Still, she did not consider getting a search warrant because with an ordinance violation, they would generally send the property owner a letter giving them 14 days to comply (Tr. 37). She admitted, however, that even an ordinance violation is a criminal violation (Tr. 37). Further:

Q. You were investigating an ordinance violation, true?
A. Correct.
Q. An ordinance violation is a crime, true?
A. Yes.
Q. So, you were conducting a criminal investigation on Mr. Y[redacted]'s private property, correct?
A. Yes.
Q. You didn't have his permission, true?
A. True.
Q. You didn't have a search warrant, correct?
A. Yes.

(Tr. 38).

After entering the first yard, CSO McNally stated she heard what sounded like gardening, but she did not hear any human noise or a human response to her yelling (Tr. 39). Despite this lack of response, she went from the first backyard through the fence and through the archway into the second backyard (Tr. 39). She wanted to get a closer look to rule out the chickens being

roosters, to rule out a crime, and to take pictures (Tr. 40). She admitted that she was gathering evidence on Mr. Y[redacted]'s private property (Tr. 40). She admitted that she did not have permission to take the photos nor did she have a warrant (Tr. 41).

After this search, CSO McNally contacted the Animal Humane Society investigator and Inv. Hassel (Tr. 41). She wanted to set up a date to return to the property for further investigation (Tr. 41). The three of them returned to the property on July [redacted] (Tr. 41–42). Again, they went to the side door and knocked, but did not receive an answer (Tr. 42). She admitted that although she had six days between the two visits, she did not seek a warrant (Tr. 45). She also admitted that in those six days, she did not call Inv. Hassel to discuss the property or email the pictures to the police department or suggest getting a warrant (Tr. 45). She admitted that when walking on the property, she had to walk through the patio and deck (Tr. 46). She stated that at that time, she believed Mr. Y[redacted] was committing a criminal act with the roosters (Tr. 46). The following exchange occurred:

Q. Did anyone give you permission to walk on the private property?
A. No.
Q. Did you have any evidence that anyone was fleeing you?
A. No.
Q. Were you in hot pursuit of anyone?
A. No.
Q. Was there a medical emergency that you were concerned about?
A. No.
Q. Before going back to the rear of the house, did you yell anything like you did the first time?
A. No.

(Tr. 46).

After they entered Mr. Y[redacted]'s property without a warrant, CSO McNally admitted to looking in the garage's open window because it sounded like roosters or noises were coming from there, and they could see roosters inside (Tr. 47). She admitted that the garage was part of

Mr. Y's private property and thus she looked in his private property by looking through his window without a warrant or permission (Tr. 47–48).

On cross-examination by Mr. CSO McNally testified that when she first went to the property, she did not see any birds or anything suspicious from the street or driveway, but she could hear animals from the driveway (Tr. 50). After knocking on the side door and receiving no response, she looked and saw the dog kennel approximately 15 or 20 feet away and behind the garage, not visible from the street (Tr. 51–52). She acknowledged that there was no walkway besides the alleyway or driveway portion and that there was a patio set in the area that looked as though they were using it as a backyard (Tr. 52). While at the kennel, she could not see the birds behind the fence, but she could hear them (Tr. 52). She admitted that the fence was acting as a barrier between the backyard and driveway area (Tr. 53). She said the distance from the kennel area to the second backyard area was about 25 feet (Tr. 54). After leaving the property, she talked to the Human Society investigator and showed her the photos, and then she asked the Humane Society investigator and Inv. Hassel to return to the property with her, which they did on July (Tr. 55).

On July , they essentially repeat CSO McNally's June visit (Tr. 56). The Humane Society investigator advised that there was neglect and it was a criminal case, so Inv. Hassel said they should get a warrant (Tr. 56). Inv. Hassel applied for the warrant based on what they saw on June and July (Tr. 57).

Investigator Cheryl Hassel Testimony

On direct examination, Inv. Hassel testified that she is a licensed peace officer and has been for 23 years (Tr. 60). She has a four-year Criminology degree, a law enforcement certification, police officer SKILLS and training, and ongoing training for 23 years (Tr. 60). Inv.

Hassel stated that CSO McNally approached her to discuss her case (Tr. 61). CSO McNally asked her if she would meet with her and Animal Humane Society Investigator Ashley Pudas, which they did on July [redacted] 2019 (Tr. 61). When they met, Inv. Pudas wanted to see the birds, so they went out there knowing there was crowing chickens or roosters not allowed on the property as well as signs of possible neglect and abuse (Tr. 62). They went to the property without a warrant because:

> it was consent to speak with the homeowners. And due to what, you know, basically, what could be heard on the other side and what we could see from the property, the investigator was not sure until she got a closer look of whether or not there was going to be neglect. And due to the exigent of circumstances, you know, if these birds are being neglected and abused as the pictures showed, then it deemed us to go back there to make sure these animals were not going to be harmed any further.

(Tr. 63). The arrived at the house, knocked at the side door with no answer, and heard crowing (Tr. 63–64). From her position, Inv. Hassel could see the detached garage, a small detached shed about 50 feet away, a dog kennel with some birds' movement around and in the kennel, and a partial fence approximately 5 feet tall and about 100 yards long with a large archway (Tr. 64–65). She stated that when she was inside the backyard and next to the kennel "and actually from that stoop," she could see into the archway and see an open field with noises (Tr. 65). The three officers walked back to the archway area and Inv. Hassel announced her presence and "peaked around" (sic) looking for a person (Tr. 65). She saw "quite a few makeshift housing cages" with birds (Tr. 65). She walked "back there" to see if anyone was there (Tr. 66). Inv. Pudas was behind the fenced-in area with Inv. Hassel, and Inv. Hassel saw that the birds did not seem well (Tr. 66). At that point, they froze the scene, and Inv. Hassel obtained a search warrant (Tr. 66).

On cross-examination by Mr. Garry, Inv. Hassel admitted that she "somewhat" knew about the birds, abuse, neglect, and wounds before arriving at the property (Tr. 67). She stated

that she saw the pictures and wrote a report stating that Inv. Pudas stated the birds were not cared for properly and showed signs of being in fights (Tr. 67). She knew that there were roosters on the property before going there (Tr. 68). She admitted that in her 23 years of being a peace officer, she applied for plenty of search warrants (Tr. 68). She stated that her first task in going to the property without a warrant was to get consent to speak to the homeowners, but they did not make contact (Tr. 69). The entire cross-examination revolved around Inv. Hassel trying to justify what she knew, after 23 years in law enforcement, was an illegal search. For example, the following exchange occurred:

Q. All right. Then you said something -- I was talking to my co-counsel here, about exigent circumstances justified the warrantless search of the property; did you say that?
A. I did.
Q. And what exigent circumstances are you referring to? Because those are pretty limited.
A. Yeah. They are pretty limited. I felt truly that if these animals were in such dire conditions, very sick, possibly more, I'm not sure what was going on, that at that point, it would give me the right to go back there and look at the animals.
Q. So, in your opinion, as a peace officer and under the United States and Minnesota Constitutions, that's a valid exigent circumstance justifying a warrantless search of a private U.S. citizen's property? That's your opinion?
A. I see it -- can I answer it further?
Q. Well, I am just asking; yes or no. If it's not your opinion, say no --
A. No, it's not.
Q. -- if it is your opinion, say yes.
A. Well, yes, it's my opinion.

(Tr. 69–70). She went on to testify under oath that she did *not* know if the birds were roosters (Tr. 71). Yet after further cross-examination, she conceded that she learned from Inv. Pudas that there were roosters on the property that were injured, and that she knew it was illegal to have a rooster on private property (Tr. 71).[3]

[3] A review of the cross-examination demonstrates Inv. Hassel attempted to evade what she knew was damaging testimony for the State, first testifying under oath that she didn't know what kind of birds were on the property (p. 71), yet then conceding she knew they were injured roosters after being impeached by her own investigation reports.

Once at the property, Inv. Hassel admitted that after receiving no response to her knocking, she walked onto Mr. Y[redacted]'s private property (Tr. 73). She testified that she could hear crowing and learned from Inv. Pudas that chickens can crow (Tr. 73). She admitted that she then walked through the back patio and deck to get to the backyard without a search warrant (Tr. 73–74). She conceded that even after reviewing Inv. Pudas' evidence, she did not attempt to get a search warrant (Tr. 74). She also admitted that she did not have the consent of either homeowner—Ms. [redacted] or Mr. Y[redacted]—nor any exceptions to the warrant requirement (Tr. 74). Regarding exigent circumstances:

> Q. And you're not claiming that you were chasing someone or someone was fleeing you, correct?
> A. Correct.
> Q. You weren't in hot pursuit?
> A. No.
> Q. You weren't investigating a medical emergency to a human?
> A. Correct.

(Tr. 74–75).

Inv. Hassel testified that she received an email from the State asking her to follow up with CSO McNally (Tr. 75). Inv. Hassel's report from her conversation with CSO McNally stated that CSO McNally saw in "plain view" a dog kennel with chickens walking in and out of it (Tr. 75–76). Inv. Hassel then sent an email to the State stating, "In plain view, about 15 feet from the side of the house door" (Tr. 78). Inv. Hassel could not explain why she was focusing on the phrase "plain view," and denied it had to do with justifying a warrantless search (Tr. 78, 76). Inv. Hassel basically admitted her search was illegal. The following exchange occurred:

> Q. After you got done with the search -- well, after you went on the property, did you have any concerns that you had searched someone's property without a search warrant?
> A. No.
> Q. It didn't even pop up in your mind after 23 years of law enforcement experience?
> A. No.

Q. Why not?
A. I don't have any answer for you.
Q. Well, you know after 23 years of executing warrants, you can't just walk on someone's property, right?
A. Right.

MS. [redacted]: Objection; he is being argumentive.
THE COURT: It was a fair question; overruled. I mean, do you know?
THE WITNESS: I continued along with the search. I felt that it wasn't private at that point. It's further out. There is an open area. This is a make-shift fence. Whose property is this, you know?

(Tr. 78–79). Even though Inv. Hassel kept attempting to justify the unlawful search throughout the cross-examination, she admitted that she had to walk through the property to get to the backyard and then she had to walk through an archway to get to the second backyard (Tr. 80). She testified that she was not claiming this property was public property (Tr. 81). She also admitted that she knew it was private property (Tr. 81). She then admitted that she looked in the garage's open window, thus looking in Mr. Y[redacted]'s private property without permission and without a warrant (Tr. 81–82).

On cross-examination by Mr. [redacted], Inv. Hassel admitted that she, CSO McNally, and Inv. Pudas met at the [redacted] Police Department and made the plan to go to the property, knock on the door, and if no one answered, then go into the backyard (Tr. 84). She admitted that they did not go into a rush and there were no lights and sirens (Tr. 84). They were not running or walking briskly when going to the house (Tr. 84–85). She admitted that she walked through the patio area to get closer to the backyard, went behind the garage into the backyard area, and then went through a fence into the second backyard area all to gather evidence to determine whether a crime had been committed (Tr. 85–86). When she later applied for a search warrant, it took less than an hour (Tr. 86). She agreed that she wrote in the search warrant, "In plain view in the

backyard were about 17 roosters" (Tr. 86). However, Inv. Hassel agreed that it was only in plain view when she was "well into" the property (Tr. 86).

ISSUES

This Court requested the parties address (1) *State v. Chute*, 908 N.W.2d 578 (Minn. 2018), (2) whether or not the area searched was on the curtilage of the property, and (3) that plain view is not an exception to a warrantless search, only a warrantless seizure (Tr. 88–89).

ARGUMENT

Law enforcement officers searched Mr. Y[redacted] and Ms. [redacted]'s property without a warrant, without consent, and without probable cause and an exception. The Fourth Amendment to the United States Constitution reads:

> The 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.

As a parallel, Section Ten to Article I of the Minnesota Constitution reads:

> The 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 warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

MINN. CONST. Art. I, § 10.

Generally, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Lussier*, 770 N.W.2d 581, 586 (Minn. Ct. App. 2009). The government bears the burden of showing the existence of an exception to the warrant requirement. *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (citations omitted). In marginal cases, doubt should be

State of Minnesc

resolved in favor of the warrant requirement. *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (citation omitted).

"'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Id.* The Fourth Amendment protects people's houses and the curtilage of the house. U.S. CONST. amend. IV; MINN. CONST. Art. I, § 10; *United States v. Dunn*, 480 U.S. 294, 300 (1987); *State v. Krech*, 403 N.W.2d 634, 637 (Minn. 1987).

A. Curtilage

Certain areas surrounding a home are impliedly open to use by the public. *Krech*, 403 N.W.2d at 637. Thus, police may walk on the sidewalk and onto the front porch of a house and knock on the door if they are conducting an investigation and want to question the owner. *Id.* (citing *State v. Crea*, 233 N.W.2d 736, 739 (Minn. 1975)). Furthermore, police do not need a warrant or even probable cause to approach a dwelling in order to conduct an investigation ***if they restrict their movements to places visitors could be expected to go*** (such as a walkway leading up to a front door). *Id.* The court in *Krech* noted that "[t]he fact that some people have access to certain areas surrounding a dwelling does not mean that those areas are impliedly open to use by the public. For example, a homeowner may give a garbageman permission to enter into an area to collect garbage without necessarily impliedly opening the area to other members of the public." *Id.* at n.2.

The Minnesota Supreme Court explained, in *State v. Chute*, what it means for an area to be a part of a home's curtilage:

State of Minnesc

> [W]e look to "whether 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." *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). An area has a sufficiently close connection to the home if it harbors the "intimate activity associated with the sanctity of a [person's] home and the privacies of life." *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735 (citation omitted) (internal quotation marks omitted). "[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." *Id*. at 182 n.12, 104 S.Ct. 1735.

908 N.W.2d 578, 584 (Minn. 2018). And, in determining whether or not a search took place in the curtilage:

> The Supreme Court has identified four relevant factors to determine whether a disputed area falls within the curtilage: "[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." *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134. This test is not a rigid one, *see id*., but is designed to "determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735.

Id. at 584–85.

Comparison with *State v. Chute*

This Court asked the parties to address *State v. Chute*, 908 N.W.2d 578 (Minn. 2018). The facts in *Chute* are somewhat similar to those here—albeit the constitutional violations are less egregious. The Court suppressed the search. *Id.* at 580–81. In *Chute*, the State was investigating a stolen camper. *Id.* at 581. A person reported seeing what he thought was his camper on Chute's property. *Id.* A responding officer went to Chute's property to investigate. *Id.* When he did, he could see—from the County Road—a camper on the property that appeared to match the description of the stolen camper. *Id.* The officer parked on the driveway and walked up to the camper. *Id.* He verified it was the stolen camper. *Id.*

The officer then tried to make contact with Chute. *Id.* He started walking towards the backdoor, but, when he heard voices from the garage, walked there instead and made contact with Chute. *Id.* He obtained consent to search and found incriminating items. *Id.* at 582.

The Court turned to discuss whether the search was lawful. *Id.* at 583. It first noted that the plain view exception can only justify warrantless seizures, not searches, and as the law enforcement action at issue was a search, plain view was "not relevant":

> Although the parties discuss the plain-view exception, it is not relevant to our analysis because it is an exception to the warrant requirement for a *seizure* , not for a *search* , of property. The plain-view doctrine enables law enforcement to make a warrantless seizure if officers are "lawfully in a position from which they view [the] object, if [the object's] incriminating character is immediately apparent, and if the officers have a lawful right of access to the object." *Minnesota v. Dickerson* , 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). As the Court stated in *Horton v. California* , "[i]f 'plain view' justifies an exception from an otherwise applicable warrant requirement, ... it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches." 496 U.S. 128, 134, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). No seizure occurred here.

Id. at 583 n.2.

The Court framed the issues thusly: first, was the searched property on the curtilage of the home, and second, if it was, "whether an exception to the warrant requirement would allow the officer to examine the camper without a warrant." *Id.* at 583.

Applying the law to these searches

These legal principles create the following familiar principles of black-letter law. *If*, (1), law enforcement conducts a warrantless search of an area, (2) that search is of a home's curtilage, (3) the search was conducted absent consent, (4) and the State has not established an exception to the warrant requirement, then the search is unconstitutional and the evidence obtained must be suppressed.

Either the June [redacted], 2019 or the July [redacted], 2019 search being illegal would require suppressing the evidence obtained by the State (and would make the warrant subsequently obtained based on that evidence unconstitutional). Unfortunately for the State, both searches were illegal.

1. Both the June [redacted], 2019 and July [redacted], 2019 intrusions qualify as warrantless searches

CSO McNally acknowledged that on both June [redacted], 2019 and July [redacted], 2019, she took the actions she did because (at least in part) she wanted to gather evidence to see whether a crime has been committed (Tr. 40, 55). Inv. Hassel acknowledged the same as to the July [redacted], 2019 intrusion onto the property (Tr. 86). Both agreed that these intrusions were done absent search warrant.

That both the July [redacted], 2019 and July [redacted], 2019 intrusions onto the property were warrantless searches is not in dispute.

2. Both the June [redacted] 2019 and July [redacted] 2019 searches were of the home's curtilage

Likewise, during both searches, the officers went further and further into the home's property. On June [redacted] 2019 and again on July [redacted], 2019, law enforcement went from knocking on the door to the home, to moving through the driveway away beyond the home's freestanding garage, to moving into a first backyard, to moving through a fence to a second backyard not visible from the street. The fence immediately abutted the home.

Here, too, *Chute* is instructive. There, the Court applied the four-factor *Dunn* test in determining whether the searched area qualifies as curtilage. *Chute*, 908 N.W.2d at 584–85. There, the Court found the camper being searched was in the curtilage. *Id.* at 581. The factors apply even more strongly in this case.

State of Minnesc

"The first *Dunn* factor—'the proximity of the area claimed to be curtilage to the home'—weighs in Chute's favor." *Id.* at 585 (citing *Dunn*, 480 U.S. at 301). The Court focused on the fact that the camper was parked on his driveway in close proximity to his home, in a sort of backyard. "The backyard and driveway of a home are often considered to be within the curtilage of a home." *Id.*

In this case, the search extended throughout an area immediately adjacent to the home, through the driveway, behind the garage, in a backyard, and even in a second backyard. In comparison with *Chute*, the first factor weighs even more heavily in favor of suppression.

As to the next two factors:

> The second *Dunn* factor—"whether the area is included within an enclosure surrounding the home"—weighs slightly in Chute's favor." . . .The third *Dunn* factor—"the nature of the uses to which the area is put"—weighs heavily in Chute's favor.

Id. This case is similar as to assessing these factors. Here, the areas searched similarly included an enclosure abutting the home, and here, too, the property searched was used as personal property—Officer Hassel agreed that the area searched was "someone's backyard" and "personal property" (Tr. 87). Factors two and three also weigh in favor of suppression.

Finally, in *Chute*, "The last factor—'the steps [Chute took] to protect the area from observation by people passing by'—[was] less conclusive." 908 N.W.2d at 585. The Court noted that the camper was partially visible from the road. This is not the case here.

None of the evidence that law enforcement sought was visible from the road (or, as the squad video submitted as an exhibit shows, from the driveway). Law enforcement only got the information it did from going deep onto the property. The officers acknowledged they needed to do so to investigate the suspected charge.

Here, every factor weighs in favor of finding that the search took place in the home's curtilage. Accordingly, if no exception is present (including consent), the evidence obtained from the search and all derivatively-obtained evidence must be suppressed.

3. Both the June [redacted], 2019 and July [redacted], 2019 searches were conducted absent consent

This prong is not in dispute.

Interestingly, as to the July [redacted], 2019 search, although Inv. Hassel initially said the three of them went to the house to obtain consent: "At that time, it was consent to speak with the homeowners" (Tr. 63), she later acknowledged proceeding with the search absent consent (Tr. 69). That was her plan all along:

Q. And you make a plan together as to what you're going to do?
A. Correct.
Q. And the plan is to go there and see the birds, right?
A. Correct.
Q. And you're going to go knock on the door and if no one is there, you're going to go in the backyard, right?
A. Correct.

(Tr. 84).

These searches proceeded—as designed—without consent.

4. An exception to the warrant requirement does not exist for either search

Warrantless searches may be nevertheless constitutional if they fall under a recognized exception to the warrant requirement. Recognized exceptions include, for example, the automobile exception, hot pursuit, exigent circumstances, and searches incident to arrest. The following single factors, standing alone, are considered exigent circumstances: (1) hot pursuit of a fleeing felon; (2) imminent destruction or removal of evidence; (3) protection of human life; (4) likely escape of the suspect; and (5) fire. *State v. Lussier*, 770 N.W.2d 581, 586–87 (Minn. Ct. App. 2009). "A warrantless search is permissible 'when the delay necessary to obtain a

warrant might result in the loss or destruction of the evidence.'" *Id.* (quoting *State v. Richards*, 552 N.W.3d 197, 203 (Minn. 1996)).

None of these apply here. As CSO McNally acknowledged:

Q. Did anyone give you permission to walk on the private property?
A. No.
Q. Did you have any evidence that anyone was fleeing you?
A. No.
Q. Were you in hot pursuit of anyone?
A. No.
Q. Was there a medical emergency that you were concerned about?
A. No.

(Tr. 46).

Inv. Hassel tried to create a new exigent circumstance—specifically potential harm to the animals—justified the warrantless search. This cannot save the search for at least three reasons. First, that allegation is simply not legally sufficient. Counsel have identified no cases holding that suspected animal mistreatment can qualify as an "exigent circumstance." Second, law enforcement—appropriately—did not treat the situation as an emergency. Law enforcement waited six days after the June [redacted], 2019 search to come back. They made no attempt to contact the homeowners in the interim. On July [redacted], 2019, before conducting the search of the home, law enforcement had a meeting to discuss and plan what to do and went to the property. They made no attempt to get a warrant despite ample time to so attempt. They drove there without activating the squad lights and sirens, parked in the driveway, and calmly walked around the property. Third, there was no "animal mistreatment" suspected by CSO McNally at the time of here initial search—she was conducting her search because of a noise complaint. There was no emergency nor other exception to the warrant requirement.

Notwithstanding that plain view of evidence of a crime does not even exist here, as the Court acknowledged, plain view is **not** an exception to the warrant requirement for searches—

State of Minnesc

only for seizures. *See, e.g.*, *State v. Zanter*, 535 N.W.2d 624, 631 (Minn. 1995) ("Under the 'plain view' exception to the warrant requirement, the police may, without a warrant, seize an object they believe to be the fruit or instrumentality of a crime, provided: '(1) [the] police are legitimately in the position from which they view the object; (2) they have a lawful right of access to the object; and (3) the object's incriminating nature is immediately apparent.'" (citations omitted)).

Even if "plain view" did apply to searches, it would not save the searches for two reasons. First, CSO McNally testified that when she saw the birds, she did not know if the birds were chickens (legal to possess) or roosters (illegal to possess). Only by conducting further searches did she gain the information needed to obtain a warrant (which she did not) and to eventually charge the defendants. Had their "incriminating nature" been "immediately apparent," she would have seized the birds under the plain view exception for seizures. Second, had Inv. Hassel been confident that she was legitimately in a place where she could see the roosters and had a lawful right to access them, she would have lawfully seized them during the second search. The fact that none of the birds were seized without a warrant undermines the argument that any "plain view" exception applied at all.

B. Fruits of an Illegal Search Must Be Suppressed

The chickens and roosters would not have been found by either CSO McNally or any other law enforcement officer had she not approached the house and entered the property. Minnesota statutes require the suppression of any illegally obtained evidence:

> A person aggrieved by an unlawful search and seizure may move the district court . . . to suppress the use, as evidence, of anything obtained on the ground that (1) the property was illegally seized, or (2) the property was illegally seized without a warrant . . . . If the motion is granted the property . . . shall not be admissible in evidence at any hearing or trial.

MINN. STAT. § 626.21.

Both the June [redacted], 2019 and July [redacted], 2019 searches were referenced in the later-obtained search warrant. Indeed, they make up virtually the entire statement of probable cause. With those searches illegal, the evidence obtained from the search pursuant to that warrant must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963). Without that, there is no probable cause for the case and no admissible evidence. This case must be dismissed.

CONCLUSION

For the foregoing reasons, Mr. Y[redacted] and Ms. [redacted] respectfully request that this Court issue an Order suppressing the evidence and dismissing the complaint with prejudice.

Respectfully submitted,

RYAN GARRY, ATTORNEY, LLC

Dated: [redacted], 2020

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Dated: [redacted], 2020

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