

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0382

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

QUINCY SMITH,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court
Ravalli County, the Honorable Howard F. Recht, Presiding

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INTRODUCTION

Deputy Monaco violated Quincy's right to be free from unreasonable search and seizure. The Fourth Amendment provides protection from invasion of one's house or curtilage. *Olmstead v. United States* (1927), 277 U.S. 438, 466, 48 S. Ct. 564, 568, 72 L. Ed 944, 951.

Deputy Monaco was investigating a speeding ticket. (5/18/20 Tr. at 55, 58). Deputy Monaco was not immediately behind Quincy after observing the speeding infraction, did not contact Quincy on a public road, and instead drove over 350 feet up a private road, through two fence lines, into the heart of the 5-acre residence to initiate a traffic stop. (5/18/20 Tr. at 53-56, 59; Ex. 3 admitted 5/18/20 Tr. at 58 (video 1-2019-05-15_21-46-24_13-27)).

It is immaterial whether Deputy Monaco understood Quincy's privacy interest when he entered the 5-acre homesite. Deputy Monaco was immediately informed he was on private property by both Quincy, and registered owner Mr. Jacques Hennequin. (5/18/20 Tr. at 55-56). Deputy Monaco did not obtain a warrant even though he had the ability to do so. (5/18/20 Tr. at 56). No warrant exception existed.

The United States Supreme Court issued its opinion on June 23, 2021, declining to adopt a blanket misdemeanor pursuit rule.

“When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself. But the need to pursue a misdemeanant does not trigger a

categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.” *Lange v. California*, 141 S. Ct. 2011, 2021-22 (2021).

State v. Saale, 2009 MT 95, 350 Mont. 64, 204 P.3d 1220 is controlling.

Possibly being intoxicated and possibly trying to elude officers are not exigent circumstances that allow a warrantless entry into a home. *Saale*, ¶¶ 4, 16.

STATEMENT OF THE FACTS

Quincy reasserts and incorporates by reference the factual background in his Opening Brief, excepting that his vehicle was never visible in Deputy Monaco’s cruiser dash cam. Counsel for the State was able to locate the footage in the closing seconds of video 1_2019-05-15_21-28-00_13-17 and pointed it out to the undersigned.

At minute 18:06, Deputy Monaco turns on to Hidden Valley Road, Quincy dims his headlights, and the two pass each other. Deputy Monaco turns around and Quincy’s vehicle becomes visible again at 18:17. Quincy is seen braking, not speeding up, entering the corner before leaving the view of the dash cam. Deputy Monaco engages his lights at 18:21 as Quincy’s vehicle is turning right. Quincy’s vehicle is visible in the dash cam for approximately one second before completing his turn and leaving view. (Ex. 3 video 1-2019-05-15_21-28-00_13-27 at 18:06-18:23). Quincy’s vehicle is not visible again until Deputy Monaco drives up the

driveway and pulls up to the garage. Quincy and Mr. Hennequin had already parked and exited the vehicle. (5/18/20 Tr. at 54-55).

ARGUMENT

- I. Quincy had a reasonable expectation of privacy standing in the curtilage of his residence in front of the garage.

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest. Mont. Const., Art. II § 10.

Montana has a strong tradition of respect for the right to individual privacy, as reflected in our unique Constitution, which grants rights beyond that inferred from the United States Constitution. *State v. Bullock*, 272 Mont. 361, 383, 901 P.2d 61, 75 (1995). The State belies this strong tradition in attempting to argue Quincy did not have an expectation of privacy standing in the curtilage of his home, by his garage, in the middle of 5 acres in the Montana countryside. In so arguing, the State has conflated the two issues before this Court: (1) Did Quincy have an expectation of privacy that citizens of Montana recognize as reasonable; and (2) did law enforcement have a valid warrant or warrant exception?

The Fourth Amendment of the United States Constitution sets the floor for Montana, providing protection from invasion of one's house or curtilage. *Olmstead*, 277 U.S. at 466. Montana has further extended the right to privacy on private land, holding a person may have an expectation of privacy in an area of land that is beyond

the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, "No Trespassing," or similar signs, or "by some other means [which] indicates unmistakably that entry is not permitted." *Bullock*, 272 Mont. at 384. Entry by law enforcement officers requires permission or a warrant. *Bullock*, 272 Mont. at 384.

Mrs. Carli Hennequin described the arial photograph and the privacy of the property. (App. C; Ex. 1 admitted 5/18/20 Tr. at 36).

Q. (By Mr. Schulte) Do you recognize what I've handed you, Carli?

A. Yes, it looks like a layout of my home.

Q. When did you guys purchase this residence?

A. October of 2018.

Q. And will you describe the property that we are looking at.

A. Yup. It's a five-acre parcel. We have an exterior fence around the five acres. We also have an interior fence. So, got a lot of foliage, trees, very secluded, private; kind of the goal of being out in the country.

Q. And was that seclusion, that privacy, was that appealing to you when you found this home?

A. Yes.

Q. Are there any gates on the property?

A. There are.

- Q. Where are the gates?
- A. Towards the -- on the driveway, kind of coming in.
- Q. And can you -- if we were to look at Exhibit 1, are they on the driveway right where it turns off Hidden Valley Road? Is it more towards the house?
- A. It's a little bit further up the driveway towards the house. I'd say halfway to three-quarters.
- Q. Does it meet that interior fence that is around the nucleus of the house?
- A. Correct.
- Q. How long is that driveway?
- A. About 350 feet.
- Q. Do you believe you have complete privacy when you were standing at your garage?
- A. Yes.
- Q. Do you believe that anyone would have an expectation of privacy there?
- A. Yes.
- Q. Would you ask people to leave that area if they were there uninvited?
- A. Yes.

(5/18/20 Tr. at 63-64).

Quincy was in the curtilage of his residence standing in front of the garage that sits behind two fence lines, 350 feet up a private driveway, obstructed from view by foliage, in the middle of 5 acres in the countryside of Ravalli County, Montana. The United States Constitution and the Montana Constitution have both recognized an actual expectation of privacy that society is willing to recognize as reasonable within the curtilage of your home. *Bullock*, 272 Mont. at 384; *Olmstead*, 277 U.S. at 466. *Bullock*, while recognizing Montana's strong tradition of the right to privacy, extends the right to privacy *beyond* the curtilage of a residence.

The State argues the investigation in *Bullock* distinguishes the case from the traffic stop at bar and maintains Quincy did not have a right to privacy in the curtilage of his residence despite the right being universally recognized in the United States. This is a tough row to hoe, especially given Montana's broader privacy protections. In support, the State attacks the credibility of Quincy and Mr. Hennequin, arguing that Mr. Hennequin was charged with obstructing an officer for filming law enforcement tasing Quincy. Brief of Appellee, p. 25, June 25, 2021. The credibility attack is irrelevant. The 5-acre homesite, house, curtilage, and fencing are unequivocally shown on the arial photograph of the property and are exactly as described by Quincy and Mr. Hennequin. (App. C; Ex. 1 admitted 5/18/20 Tr. at 36). The layout, privacy, and import of the privacy living in the Montana countryside is further corroborated in detail by Mrs. Hennequin. (5/18/20 Tr. at 63-64).

The State next argues implied consent, citing non-binding Arizona authority. The case is easily distinguished both factually and legally. Factually, after the officers initiated the traffic stop in *State v. Hernandez* by activating their emergency lights and following Hernandez for a few seconds, Hernandez drove over a curb and into the backyard area rather than pull his vehicle over on the wide shoulder of the road. *State v. Hernandez*, 244 Ariz. 1, 6, 417 P.3d 207, 212 (2018). The Arizona Supreme Court held knowingly failing to comply with a traffic stop is a crime. *Hernandez*, 244 Ariz. at 6, 417 P.3d at 212. The State has recognized Quincy did not knowingly fail to comply with a traffic stop stating, “it may be possible that Smith did not know he just passed a sheriff’s deputy...” Brief of Appellee, pp. 9, 23, June 25, 2021. Montana’s unique Constitution grants rights beyond that inferred from the United States Constitution. *Bullock*, 272 Mont. at 383. Arizona case law that is factually distinguishable is inapplicable given Montana’s heightened constitutional protections.

Quincy, in addition to standing in the curtilage of his residence in the middle of a 5-acre parcel in the country, expressly told Deputy Monaco he was on private property and to leave the residence immediately upon Deputy Monaco’s arrival. (5/18/20 Tr. at 55-56). Deputy Monaco did not have permission, a warrant, or a warrant exception. Quincy had an expectation of privacy and enjoyed protection from invasion. *Olmstead*, 277 at 466.

The State does its best arguing that Quincy did not enjoy a right to privacy that Montanans recognize as reasonable, but the argument is not supported by fact, law, or what Montanans believe. If you do not have a right to privacy on a 5-acre parcel in the countryside of Ravalli County while standing by your garage within the curtilage of your home behind two fence lines with foliage obstructing the view from the public road and neighbors, where do you have a right to privacy in Montana? The United States Constitution, representing the floor of privacy rights, has recognized a right to privacy in the curtilage of your home. Montana's strong tradition of respect of the right to privacy has gone even further. We would be hard pressed to find any citizen of Montana that would not recognize Quincy's right to privacy.

Deputy Monaco's warrantless entry into the curtilage of Quincy's residence against his express instructions violated Quincy's constitutional rights. The district court erred when it found Deputy Monaco did not enter a home or intrude on private property that was afforded an expectation of privacy in a manner that would have required permission or a warrant. (App. B at 10).

II. Deputy Monaco did not have a warrant or warrant exception to enter the curtilage of the residence to search and seize Quincy.

The State has conceded this is "an exigent circumstances scenario." Brief of Appellee, p. 9, June 25, 2021. Exigent circumstances are an exception to the warrant requirement. *State v. Wakeford*, 1998 MT 16, ¶ 22, 287 Mont. 220, 953 P.2d 1065.

Exigent circumstances are “those that would cause a reasonable person to believe that entry (or other prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *Wakeford*, ¶ 24. The State bears the heavy burden of showing the existence of exigent circumstances. *Wakeford*, ¶ 24.

On June 23, 2021, the United States Supreme Court declined to adopt a blanket misdemeanor pursuit exception to the warrant requirement. *Lange*, 141 S. Ct. at 2021-22. *Lange* renders much of the State’s arguments moot and further supports Quincy’s argument Deputy Monaco simply should have obtained a warrant.

Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage. The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange’s blood-alcohol content was three times the legal limit. *Lange*, 141 S. Ct. at 2016.

The Supreme Court was “not eager—more the reverse—to print a new permission slip for entering the home without a warrant.” *Lange*, 141 S. Ct. at 2019.

“When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself. But the need to pursue a misdemeanor does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.” *Lange*, 141 S. Ct. at 2021-22.

The Court concluded its opinion, holding, “The flight of a suspected misdemeanor does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanor fled.” *Lange*, 141 S. Ct. at 2024.

It bears noting that speeding pursuant to Mont. Code Ann. § 61-8-303 is not considered a criminal offense and cannot therefore be a misdemeanor. Mont. Code Ann. § 61-8-725(2)(a); *In re Expungement of Misdemeanor Records of Dickey*, 2021 MT 3, ¶ 15, 402 Mont. 409, 415, 478 P.3d 821, 824. Speeding pursuant to Mont. Code Ann. § 61-8-309(1) is penalized under a different statute and considered a misdemeanor. Mont. Code Ann. § 61-8-309(6)(a). Quincy committed a minor speeding offense that, depending on which speeding statute is cited, is sometimes not even a criminal offense.

When *Lange* is applied to Quincy, the first question is, did Quincy flee? The unequivocal answer is no. Deputy Monaco engaged his lights as Quincy's vehicle is turning right and leaving view. It is only visible in the dash cam for approximately one second before completing the turn. Quincy's vehicle is also seen braking not accelerating. (Ex. 3 video 1-2019-05-15_21-28-00_13-27 at 18:06-18:23). Quincy's vehicle is not visible again until Deputy Monaco enters the curtilage of Quincy's home and pulls up to the garage. Quincy and Jacques did not see Deputy Monaco's lights until they had parked at home and exited the vehicle. They did not accelerate to avoid Deputy Monaco or extinguish the lights attempting to go unnoticed. (5/18/20 Tr. at 73, 83-84). Quincy and Jacques did not enter their residence and lock the doors, instead, they waited for Deputy Monaco to exit his vehicle, informed him it was private property, and asked him to leave. (5/18/20 Tr. at 55, 73-74, 84).

The State concedes the evidence of flight is scant, stating "Monaco's attempt to stop Smith was either ignored or negligently missed," and "it may be possible that Smith did not know he just passed a sheriff's deputy..." Brief of Appellee, pp. 9, 23, June 25, 2021. Quincy's vehicle is braking not accelerating. (Ex. 3 video 1-2019-05-15_21-28-00_13-27 at 18:06-18:23). Sergeant Guisinger testified that Quincy's vehicle was parked in a normal parking spot and that the "blackout" called in was a synonym of "parked" in this situation. (5/18/20 Tr. at 55). Quincy, additionally,

was charged with every statutory violation law enforcement could justify, but he was not charged with eluding. Deputy Monaco testified:

Q. (By Mr. Schulte) Now, corporal, within a few seconds of being there, you were informed it was private property, correct?

A. Yes.

Q. And within those few seconds, that's when you called in code, correct?

A. Correct.

Q. And what does that mean?

A. That means I requested a backup unit by code protocol. That's lights and sirens.

Q. And that's the highest protocol possible; is that correct?

A. It is.

Q. And at this point what you are dealing with is an investigation for a speeding ticket?

A. It is.

(5/18/20 Tr. at 55).

Quincy did not flee or elude law enforcement, who admittedly were only investigating a speeding ticket. Even if evidence of flight existed, the totality of the circumstances presents no facts that create an emergency such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home. *Lange*, 141 S. Ct. at 2021. No allegation has been made of any imminent

harm to others, there was no threat to Deputy Monaco, no evidence was being destroyed, and there was no worry of escape from the home. Only one road exists in and out of the 5-acre homesite and Quincy spoke to Deputy Monaco in the curtilage rather than just go in his house and lock the door. (5/18/20 Tr. at 55).

Saale remains on point, controlling, and intriguingly unaddressed by the State. Montana has rejected the notion that possibly being intoxicated and possibly trying to elude officers were exigent circumstances that allowed a warrantless entry into a home. *Saale*, ¶¶ 4, 16. Blood alcohol content is not evidence until it exists in a state capable of analysis. *State v. Peplow*, 2001 MT 253, ¶ 25, 307 Mont. 172, 36 P.3d 922. Without a sample previously extracted from the body, there is simply no physical evidence to destroy, and thus, no exigent circumstance arising from the potential destruction of evidence can exist. *Saale*, ¶ 11.

No exigent circumstances existed to allow Deputy Monaco's warrantless entry into the curtilage of Quincy's residence. Deputy Monaco entered the curtilage of Quincy's residence without permission, a warrant, or a warrant exception. Quincy expressly refused consent. Deputy Monaco had the ability to obtain a warrant and did in fact obtain a warrant later in the encounter for Quincy's blood. Deputy Monaco testified:

Q. But you had the ability to get a warrant, as evidenced by the fact that you received one for the blood?

A. Yes.

(5/18/20 Tr. at 56).

Deputy Monaco's warrantless entry into the curtilage of Quincy's residence against his express refusal of consent violated Quincy's constitutional right to be free from unreasonable search and seizure. The district court erred when it found Deputy Monaco did not enter a home or intrude on private property that was afforded an expectation of privacy in a manner that would have required permission or a warrant. (App. B at 10).

CONCLUSION

Entry by law enforcement officers requires permission or a warrant. *Bullock*, 272 Mont. at 384. Deputy Monaco violated Quincy's constitutional rights to privacy and to be free from unreasonable search and seizure. All evidence must be suppressed. Quincy respectfully requests the Court reverse the district court's denial of his motion to suppress.

Respectfully submitted this 9th day of August 2021.

By: /s/ Dwight J. Schulte
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,228 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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