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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1873-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VAUGHN CARUTH GILMER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the
Milwaukee County Circuit Court, the Honorable Timothy G.
Dugan Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the circuit court err by allowing marijuana entered into evidence to go to the jury room so that the jury could consider the smell?

The circuit court said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcomed if it would be helpful to the court. Publication is not warranted, as this is a fact-specific-case requiring application of established legal principles.

STATEMENT OF THE CASE AND FACTS

Vaughn Caruth Gilmer was charged with possession with intent to deliver a controlled substance, tetrahydrocannabinols (“THC”), in an amount not more than 200 grams, as a second offense, contrary to Wis. Stat. § 961.41(1m)(h)1 & 961.48(1)(b). (2; 13). According to the complaint, Mr. Gilmer possessed a black plastic bag with nine

sandwich bags containing a total of 140.30 grams of marijuana.¹ (2:3). Mr. Gilmer was previously convicted of possession with intent to deliver cocaine between 15 and 40 grams. (2:4).

A jury trial took place. The parties stipulated that the substance in the black plastic bag was marijuana, the total weight of the marijuana found in the black plastic bag was 135.09 grams, the total weight of the marijuana found in the plastic bag in Mr. Gilmer's pocket was 0.51 grams, the fingerprints on a black plastic bag containing the marijuana did not match Mr. Gilmer, and the fingerprints matched Milwaukee Police Officer Peter Hauser. (48:3; 49:81-84).

Several witnesses testified for the State including Officer Adam Dettman, Officer Daniel Garcia, and Detective Timothy Graham. Mr. Gilmer also testified.

Officer Dettman and Officer Garcia testified that while walking a "beat," they observed a parked car that they believed had previously been traveling at a high rate of speed and had eluded a stop. (*See, e.g.*, 49:36-37, 67-68). At approximately 8:40 p.m., the officers, in uniform, saw Mr. Gilmer exit a residence and walk towards the BMW. (49:37-38, 68-69). Dettman said, "Milwaukee Police Department. Can I speak with you for a second?" (49:38, 69). Mr. Gilmer looked at the officers and immediately ran the other way on

¹ The complaint also noted officers subsequently searched a residence that Mr. Gilmer was seen exiting and found scales, suspected marijuana, suspected cocaine, \$2170.00 in currency, and 22 firearm cartridges in two bedrooms. The two bedrooms allegedly had several "identifiers" of Mr. Gilmer, including mail and correspondence. However, no charges were issued for the items found in the residence, and the State stipulated that it would not introduce any evidence found in the residence at trial. (2; 48:2-3).

foot throwing a white hat and a pair of sunglasses to the ground. (49:39, 69). As Mr. Gilmer ran, Dettman observed him “reaching in his waistband area”. (49:40). Dettman testified that he was approximately ten feet behind Mr. Gilmer and “could smell the strong scent of fresh marijuana emitting from his person.” (49:40, 60). Dettman also testified that he saw Mr. Gilmer discard a “black plastic bag which was weighted” onto the ground. (49:41-42, 63, 65). After that, Mr. Gilmer continued going through the waist area while running. (49:43, 59). Dettman eventually tackled and stopped Mr. Gilmer. Mr. Gilmer stated that “y’all was like ninjas. I didn’t see you all coming.” (49:44). Mr. Gilmer also threw several hundred dollars in small denominations and a bank card. (49:45). Dettman “retraced” the flight path and found a black bag with a “gold letter thank you on the front.” (49:46, 51). The bag contained nine individual bags of marijuana. (49:47). The marijuana in the black plastic bag was moved into evidence. (49:52; 16). The black plastic bag was also moved into evidence. (49:51; 16).

Officer Garcia testified that he did not see Mr. Gilmer drop the black plastic bag. (49:69, 72, 76). Garcia testified that he was 25 feet behind Mr. Gilmer and could smell marijuana. (49:73, 76). Officer Garcia testified that marijuana “has a very distinct smell and odor that once you recognize it, it’s – then you smell it, again, you know it’s there, especially in the amount of quantity that we recovered that night.” (49:73). Search incident to arrest, Officer Garcia recovered a small plastic baggy with marijuana from Mr. Gilmer’s front right pants pocket. (49:72, 79). Mr. Gilmer stated that “I was only going to smoke it.” (49:73). There is no indication in the record that the marijuana found in Mr. Gilmer’s pocket was entered into evidence.

Detective Timothy Graham testified that the marijuana in this case appeared to be high grade based on the appearance and odor. Graham stated the better marijuana has a “stronger, more pungent odor.” (49:108). Graham also testified that the amount was consistent with street sales and that nine individual bags would support his opinion that the marijuana was for distribution. (49:109-110).

Mr. Gilmer testified that he fled because he heard “some noises, scrambling and noises” coming from the bushes and he feared for his life. (50:6-7). He never saw a police car and nobody identified themselves. (50:7). He heard yelling as he was running, but it was never made clear that the men chasing him were police. Mr. Gilmer denied dropping a black bag. Mr. Gilmer eventually stopped running because he saw it was an officer that was chasing him. (50:8). The officer tackled him and “got real rough.” (50:8-9). Mr. Gilmer testified that his glasses and hat came off “from just running naturally.” The bank card, cell phone, and money was “dragged out during the scuffle when they was handling me rough like just dragging me across the concrete... throwing me into the back of the paddy wagon, all those things of the nature.” (50:9-10). Mr. Gilmer said that he was referring the “nickel back of weed” he had in his pocket when he said that he was only going to smoke the pot. (50:10). He said that the cops were like ninjas because he did not see them or know who they were. (50:10).

During closing arguments, the State emphasized that Mr. Gilmer possessed the black bag with nine sandwich baggies in part because the smell of marijuana was “so strong” as the officers were chasing him. The State argued:

Well, what else do we know? We know that both officers could smell the marijuana coming from what they assume was the defendant. Now, kind of common

sense, if you're running, someone's chasing you, and they're in your path, makes sense that they're going to smell what's on you. Walking into an elevator and you smell cologne. I walk in the elevator here, sometimes you smell marijuana.

Got to ask yourself in this situation, what are they smelling? What makes more sense? Are they smelling a half a gram of marijuana that's in his pocket? Or are they smelling 135 grams of marijuana that he's pulling out of a pocket or out of his waistband?

Now, both officers say it was the strong smell of fresh marijuana. What is going to be stronger, 135 grams or a half a gram? They're smelling that 135 grams that's on him that he's pulling out and dropping to the side.

(50:31-32; App. 104-105).

The State also told the jurors that they could smell the marijuana during deliberations. The State indicated:

Detective Graham[] posed as a drug dealer, he's posed as a drug buyer, he's seen pounds of marijuana, he's seen tiny bits of marijuana. I had him take a look at the marijuana that we had in this case, and he looked at it, he could smell it, and he said, well, this is the high grade good stuff. That is State's Exhibit No. 2. If you want when you're back there talking about the case, you can probably have the deputy come by and show it to you. I don't know if you're going to get to hold it. But you can smell it. It's strong. Gave me a headache while it was under my desk.

(50:33; App. 106)(emphasis added).

In response, trial counsel argued there was no evidence presented in this case that the marijuana smells the same now as it did at the time of the offense. Trial counsel stated:

So the State said, well, you can smell it. Smell it. Well, let's be clear. Okay. There is no evidence in this case that the pot here is smelling the same at the time it was picked up. That pot has been sitting in evidence since September of 2012. We don't know if it's the same, if it smells stronger or less strong or whatever, there's no evidence that's the same condition as it was. That's not something the State has proven.

(50:51; App. 110). Trial counsel further argued that it did not make sense that the officers smelled marijuana when running and there was no testimony that the smell of marijuana dissipated once Dettman alleged he observed Mr. Gilmer drop the black plastic bag. Additionally, Garcia, who was behind Dettman, did not testify that he smelled the marijuana as he ran past the discarded black bag. (50:44-46; App. 107-109).

After closing arguments, the court inquired whether there was an objection to any of the exhibits going to the jury room. Trial counsel objected to sending the marijuana that was found in the black plastic bag to the jury room on the grounds that there was no testimony in the record that the smell of marijuana was the same today as at the time of the incident. The circuit court overruled the objection and stated that the smell of the marijuana would be appropriate for the jury to consider. The following exchange took place:

THE COURT: Everyone else may be seated. All right. First, as to the exhibits, any objection to any of the exhibits going back to the jury? If they request it. And if the marijuana were asked -- requested, bailiff would take it in, he would remain in the room while they're looking at it, and then remove it after they've had an opportunity to observe it.

TRIAL COUNSEL: I'm going to object to that, and the reason that I am is that there was a reference to the smell of the marijuana for them to smell the marijuana, but

there was no testimony in the record that the smell of the marijuana would be the same today as it was at the time of the incident. We don't know how that smell has been affected by the fact that it's been sitting in evidence since September of 2012, and because of that it could be misleading, and I don't think it's part of the case.

THE COURT: State's position?

THE STATE: I would disagree with that, Your Honor. If they want to look at it, I think they should be able to look at it. If they -- Perhaps somehow the deputy can prevent them from smelling it if that's an issue, but I think they at least get to look at it.

THE COURT: All right. I'm going to overrule the objection, allow it to go back. It is -- There's a question about the value of the marijuana, and to the extent that it's high grade marijuana, the description by Officer Graham and regarding the distinct nature of the different types of marijuana, and there is truly in all the cases that I've testified -- had testimony about, that there is a unique smell to the marijuana, and whether it's stronger or less strong, there's no indication one way or another at this point, and yet it does have a distinctive smell that would be appropriate for a jury to consider. So I'll overrule that.

(50:65-66; App. 111-112)(emphasis added).

During deliberations, the jury requested to review three exhibits, including the marijuana. The marijuana was “sent in with the bailiff.” The jurors “reviewed it briefly,” and it was removed. (51:2; App. 113). Subsequently, the jury returned a guilty verdict. (51:4-6).

On April 25, 2013, the Honorable Timothy G. Dugan imposed a total prison sentence of six years (four years of initial confinement and two years of extended supervision)

concurrent to Milwaukee County Case 12-CF-3467. (52:29; App. 101-102).

Additional relevant facts are referenced below.

ARGUMENT

I. Allowing the Marijuana to Go to the Jury Room For the Jurors to Consider the Smell Was Erroneous and Deprived Mr. Gilmer of a Fair Trial.

Whether an exhibit should be sent to the jury during deliberations is a discretionary decision for the trial court. *See State v. Larsen*, 165 Wis. 2d 316, 321-22, 477 N.W.2d 87 (Ct. App. 1991). “A court properly exercises its discretion when, in making a decision, it employs ‘a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards.’” *Id.* at 322 (citation omitted).

A trial court’s decision whether to send exhibits during deliberations is guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *State v. Hines*, 173 Wis. 2d 850, 860, 496 N.W.2d 720 (Ct. App. 1993).

In this case, the circuit court failed to adequately address these three considerations before sending the marijuana that was in the black plastic bag to the jury room.

As trial counsel correctly noted, allowing the jurors to consider the smell of the marijuana as it existed at the time of the trial was “misleading,” and not “part of the case.” There

was no testimony in the record that the smell of the marijuana at the time of the trial was the same as the smell at the time of the incident. (50:65; App. 111). The jury heard no testimony as to how the smell of marijuana may have changed over time or how the method of storage may affect the smell. As a result, it was error to allow the marijuana to go to the jury room for the jurors to consider the smell of the marijuana.

Moreover, the circuit court's reasoning in this case is flawed. The court stated that "there is a unique smell to the marijuana, and whether it's stronger or less strong, there's no indication one way or another at this point, and yet it does have a distinctive smell that would be appropriate for a jury to consider." (50:66; App. 112). However, whether the odor of marijuana is "distinctive" or "unique" was not at dispute in this case. Nor did the defense dispute that the marijuana was "high quality." Rather, at issue was whether Mr. Gilmer possessed the black plastic bag of marijuana. The State's argument emphasized that Mr. Gilmer must have possessed the black plastic bag of marijuana in part based on the strong odor that the officers smelled. (50:31-33; App. 104-106). The State argued:

Now, both officers say it was the strong smell of fresh marijuana. What is going to be stronger, 135 grams or a half a gram? They're smelling that 135 grams that's on him that he's pulling out and dropping to the side....

(50:31-32; App. 104-105). Thus, the strength of the smell of marijuana was at issue and because there was no testimony as to how the smell was affected by the passage of time nor does it appear from the record that the jurors received the "nickel back of weed" to compare, allowing the jury to consider the smell was improper, misleading, and prejudicial to Mr. Gilmer.

In addition, allowing the marijuana to go to the jury room for the jurors to consider the smell effectively produced new off-the-record evidence that Mr. Gilmer did not have an opportunity to cross-examine or rebut.

In *Robinson v. State*, the defendant challenged the circuit court's decision to permit a gun to go to the jury room. 52 Wis. 2d 478, 190 N.W.2d 193 (1971). In *Robinson*, the defendant was convicted of first-degree attempted murder. *Id.* at 479. At trial, the defendant denied attempting to fire a gun at an officer. *Id.* at 481. The gun was introduced into evidence. A firearms expert of the state crime laboratory testified as to the functioning of the weapon and demonstrated "click" sounds made by the operation of the gun. *Id.* at 481-82. Additionally, police officers, the defendant, and both attorneys, used the gun for various demonstrations during the trial. *Id.* at 482. The circuit court stated in relevant part that its reasons for allowing the gun to go the jury room were that "I could not in my mind conjure up any experimentation that the jury could have done in that jury room with that revolver that wasn't done for them here in Court knowing of no new experimentation that I could, in fact, conjure up in my mind that they would be doing these in testing the credibility of witnesses." *Id.* at 484-85. On appeal, the Wisconsin Supreme Court held that the circuit court did not abuse its discretion. *Id.* at 485.

In *Robinson*, permitting the gun to go to the jury room simply allowed the jurors to duplicate or repeat demonstrations made in open court to make credibility determinations. As the circuit court stated, there was no new experimentation that the jurors could do that was not already done in open court. Additionally, there is no indication, and it is unlikely, that the physical properties of the gun changed from the time of the offense to the time of trial.

In contrast, here, allowing the marijuana to go to the jury room for the jurors to consider the smell produced new off-the-record evidence. Smell is an individual and subjective determination. Some people may have a better sense of smell than others. Jurors may also have differing backgrounds and experiences with the odor of marijuana. *See generally, State v. Secrist*, 224 Wis. 2d 201, 216, 589 N.W.2d 387 (1999) (“It is important...to determine the extent of the officer’s training and experience in dealing with the odor of marijuana or some other controlled substance.”). In addition, jurors may have conducted various experiments or investigation involving the marijuana in the jury room that was not done in court. For example, the jurors may have tried smelling the marijuana from multiple distances or smelling the marijuana with the packing open and closed.

Moreover, the jurors were smelling the marijuana after the incident and under vastly different conditions. Smelling marijuana outside while running from ten or twenty-five feet away is surely different from smelling marijuana in a closed, presumably small, jury room. Further, nothing in the record indicates that the marijuana was provided to the jury in the same packing as it was found in—the black plastic bag and the nine sandwich baggies. It is unknown how the type and kind of packing or storage container may affect the smell of the marijuana. Thus, unlike in *Robinson*, allowing jurors to consider the smell of marijuana effectively produced new off-the-record evidence, not simply an opportunity to duplicate or reproduce a demonstration that was done in open court.

Therefore, allowing the marijuana to go to the jury room for the jurors to consider the smell was erroneous, and given the State’s emphasis on the strength of the smell of the marijuana to connect Mr. Gilmer to the black plastic bag

containing the 135.09 grams of marijuana, a new trial should be granted.

CONCLUSION

For the reasons stated, Mr. Gilmer respectfully requests a new trial.

Dated this 28th day of November, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,249 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of November, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of November, 2014.

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APPENDIX

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