STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP644

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEANGELO D. TUBBS,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was the warrantless search of Mr. Tubbs' vehicle permissible based on (1) probable cause that it contained contraband, or (2) reasonable suspicion to justify a protective search?

The circuit court denied Mr. Tubbs' suppression motion. (30:8-9; App.108-109).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. This case does not meet the statutory criteria for publication. WIS. STAT. RULE 809.23(1)(b)4; § 752.31(2)(f).

STATEMENT OF THE CASE AND FACTS

Deangelo D. Tubbs pled guilty to the possession of THC, contrary to WIS. STAT. § 961.41(3g)(e). (11:1; 33:3). Before pleading, Mr. Tubbs sought to suppress the fruits of what he contended was an unlawful search of his vehicle. (3:1-5; 27:1-36; App.116-151).

Suppression Hearing Testimony

At the suppression hearing, City of Milwaukee Police Officer Evan Domine testified that, while on bicycle patrol, he and five other officers conducted a stop of a vehicle based on its failure to display a front license plate. (27:8-10; App.123-125). Upon

approaching the vehicle, Officer Domine made contact with the sole occupant, identified as Mr. Tubbs, who was seated in the driver's seat. (27:10-11; App.125-26). Officer Domine testified that the windows of Mr. Tubbs' vehicle were up, and that he did not observe anyone else near the vehicle. (27:10-11; App.125-26).

Due to Officer Domine's position on his bicycle, he testified that he "was able to observe a firearm concealed below the window line," so he opened Mr. Tubbs' door and instructed him to show his hands. (27:12; App.127). Mr. Tubbs complied, and Officer Domine was able to determine that Mr. Tubbs' firearm was not stolen and that he had a valid concealed carry weapon ("CCW") permit. (27:13, 20; App.128, 135).

Officer Domine testified that he observed a digital scale near Mr. Tubbs' feet on the driver's side floorboard, "as well as the odor of fresh marijuana coming from inside the vehicle." (27:13; App.128). However, Officer Domine did not observe anything unusual about the digital scale, and he did not observe any drug residue on it. (27:22; App.137). Officer Domine agreed that it was not illegal to possess a digital scale "as [long] as it doesn't have any residue for narcotics that are testable[.]" (27:22; App.137).He testified he did not smell the odor of marijuana before he opened the door. (27:14-15; App.129-30). On cross-examination, Officer Domine testified: "if I didn't smell the odor of marijuana and I just saw the firearm, he produced a CCW permit, the

card, which I ran in my system came back valid, he would be completely valid." (27:20; App.135).

Officer Domine explained that he removed the firearm from Mr. Tubbs' lap, and then proceeded to search the vehicle "to further [his] investigation that there was suspected marijuana in the vehicle." (27:15; App.130). During the search of the vehicle, Officer Domine recovered a sealed glass mason jar containing two separate plastic baggies of suspected marijuana from Mr. Tubbs' closed center console. (27:15-16, 22-23; App.130-31, 137-38). The marijuana retrieved from Mr. Tubbs' vehicle was photographed and entered into evidence as Exhibit 1, depicted below:

(27:23-24; 5:1; App.138-39).

Defense counsel showed Officer Domine a standard Ball pickling jar that he agreed was "very similar in shape and size" to the jar found inside Mr. Tubbs' closed center console. (27:24-25; App.139-40). At ten feet away, five feet away, and then upon setting the jar on the witness stand, Officer Domine testified he was unable to smell anything coming out

of the jar. (27:25-26; App.140-41). When defense counsel opened the jar, Officer Domine maintained that he still was unable to smell anything. (27:26-27; App.141-42). Counsel explained for the record that there was lavender vanilla cleaner inside the jar. (27:27; App.142).

On redirect, Officer Domine explained that the observation of a firearm might be a concern for officers because, "As I don't know Mr. Tubbs at the time, I'm not sure if he's a CCW permit holder. I'm not sure if he's a valid gun owner, on probation or valid felon on probation. When I come into contact with people, it's just generally safer for the individual as well as myself to take the firearm, like I would say, out of your or remove it from the situation so there's no mixed signals between me and a citizen as to what's going on with that firearm at the time." (27:28; App.143).

After the redirect and recross of Officer Domine, the court asked trial counsel to put the lid of the jar back on, referencing the smell of the cleaner. (27:32; App.147). The court scheduled a date for argument and decision. (27:34; App.149).

Suppression Arguments

On June 12, 2018, the court heard arguments from the parties. Defense counsel noted this case was "relatively straightforward. It's a case that just merely comes down to officer credibility, whether or not the court believes the testimony of the police officer that testified." (29:3; App.152). Counsel argued

that the fresh marijuana found in the center console of the car was sealed in a Ball pickling jar that was nearly identical to the demonstrative exhibit she introduced at the suppression hearing, which contained a pungent lavender vanilla-scented detergent. (29:5-6; App.153).

Defense counsel argued, "we don't have the ability to smell what the officer smelled on that particular day, but I think it's pretty clear that under these circumstances, either the officer didn't smell marijuana coming from the car in a sealed container inside the center console where marijuana was inside of a bag inside of a pickling jar, or he lied when he said that he couldn't smell any of the detergent emanating from the jar that I brought in my demonstrative." (29:7-8; App.153). Defense counsel asserted that Officer Domine's testimony was not credible, and that there was no probable cause for the search because he did not actually smell marijuana coming from the car. (29:8; App.153). Counsel pointed out that Ball pickling jars are "specifically made for pickling for food fermentation, otherwise the combination of dill and onions and garlic would be an incredibly objectionable smell if not stored in this type of container which is exactly the type of container that is supposed to keep [in] smell." (29:8; App.153).

The state argued that the search was justified based on the smell of marijuana, the scale, and the gun. (29:17; App.156). The state also argued that a protective search of the vehicle was justified under

Michigan v. Long, 463 U.S. 1032, 1049 (1983), "given the scale, given the high crime area, given the fact they did smell marijuana and given the fact that Mr. Tubbs had a gun on his lap to indicate a quick search of the vehicle to ensure that there wasn't a firearm within the lunging distance of the car [sic]." (29:18; App.156).

The court followed up with a number of additional questions, during which time it noted that defense counsel's jar demonstration "was actually pretty good and theatrical[.]" (29:14; *see also* 29:22, "I mean, it was pretty good. It was pretty dramatic.") (App.155, 157). After hearing the rest of the parties' arguments, the court explained it wanted to "go back and listen to the testimony here because I have some questions about the—I'll listen to the recording about the sequencing of things. The demonstration was pretty effective. I give you that, [trial counsel]." (29:28) (App.158).

Suppression Decision

On July 20, 2018, the parties returned for a decision. The court recited findings of fact, and concluded there was reasonable suspicion to approach Mr. Tubbs and take him out of the car.[1] (30:7; App.107). Addressing the search of the center

[1] The reasonable suspicion for the stop, based on the missing front license plate, was not at issue below, nor is it being challenged in this appeal.

console where the marijuana was found, the court explained:

> [T]he state justifies this extension of the next step on the smell of fresh marijuana and the discovery of a digital scale on the floor of the car. I don't give as much weight to the overt [sic[2]] testimony as perhaps the state does, but I do give some weight to a discovery of the scale, but it's just not a normal item to find in a car. A kitchen or a laboratory or a grocery store perhaps, but in combination with the odor, which, again, I don't give a lot of weight to, but I think at that point a limited search at the point of the area around the scale of Mr. Tubbs is permissible. So I think the search is objectively reasonable whether or not it's for guns and drugs.
>
> Now the smell of evidence was impeached by a very clever demonstration and whether at that point I certainly wanted to grant the motion based on that, but the facts here is that there is a scale and a gun and I think that dictates the results here.
>
> So my conclusions are as follows.
>
> Number one, there was reasonable suspicion to stop or approach Mr. Tubbs and get him out of the car; and two, once he was removed, the discovery of the digital scale on the floor and the smell of marijuana, although less on the latter, allowed the officer to search the immediate area

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[2] Undersigned counsel believes, based on context, that the court said, "odor," rather than "overt," particularly given the following line: "in combination with the odor, which, *again*, I don't give a lot of weight to…" (30:8; App.108) (emphasis added).

> for contraband or a gun. So I have to deny the motion.

(30:8-9; 31:2; App.108-109, 114).

Defense counsel asked for clarification: "Well, just to be clear for the record, Judge, you are finding Officer Domine's testimony that he did smell at some level the distinct scent of fresh marijuana as part of your finding?" (30:9; App.109). The court answered, "I think I said what I needed to say." (30:9; App.109).

Plea and Sentencing

Mr. Tubbs pled guilty to possession of THC and was fined $500. (33:3, 17; 11:1-2). He filed a timely notice of intent to pursue postconviction relief, and this appeal follows. (10:1; 18:1). Additional facts will be referenced as necessary below.

ARGUMENT

I. This Court should reverse and remand the circuit court's order denying suppression because (1) there was no probable cause to believe that Mr. Tubbs' vehicle contained evidence of a crime, and (2) there was no reasonable suspicion to justify a protective search.

A. Relevant law and standard of review

The Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable searches. Under the Fourth Amendment, warrantless searches are per se unreasonable absent the application of a well-recognized exception to the warrant requirement. *State v. Sanders*, 2008 WI 85, ¶27, 311 Wis. 2d 257, 752 N.W.2d 713. The state bears the burden to prove that an exception to the warrant requirement applies. *State v. Denk*, 2008 WI 130, ¶36, 315 Wis. 2d 5, 758 N.W.2d 775. Where an unlawful search or seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

At issue in this case is the scope of the "automobile exception" to the warrant requirement. Under the automobile exception, vehicles may be searched without a warrant if probable cause exists to believe the vehicle contains evidence of a crime.

State v. Secrist, 224 Wis. 2d 201, ¶16, 589 N.W.2d 387 (1999). Wisconsin law establishes that the odor of marijuana is sufficient to provide probable cause to search the passenger compartment of a vehicle. *Id*. at ¶17.

In addition, law enforcement is allowed to conduct a protective search of a person and a vehicle for weapons when an officer has a "reasonable belief based on, 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Long*, 463 U.S. 1032, 1049, (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *see also State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449. Courts "decide on a case-by-case basis, evaluating the totality of the circumstances, whether an officer had reasonable suspicion to justify a protective search in a particular case." *Kyles*, 269 Wis. 2d 1, ¶5.

Appellate review of a circuit court's order on a motion to suppress evidence presents a question of constitutional fact. *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this court upholds the circuit court's factual findings unless clearly erroneous. *Id*. Second, this court independently applies constitutional principles to the facts. *Id*.

B. The evidence obtained during the warrantless search of Mr. Tubbs' vehicle must be suppressed because the officer did not have probable cause to search the vehicle based on the belief that it contained evidence of a crime.

In denying Mr. Tubbs' suppression motion, the circuit court explained that the discovery of the digital scale, in combination with the odor of marijuana—despite repeatedly minimizing its reliance on the odor—justified a limited search "at the point of the area around the scale[.]" (30:8, 31:2; App.108, 114). However, the circuit court explicitly found that the odor of marijuana claim was impeached by the defense's demonstration, and it indicated that "at that point I certainly wanted to grant the motion based on that[.]" (30:8; App.108).

Nevertheless, the circuit court explained that "the facts here is [sic] that there is a scale and a gun and I think that dictates the results here." (30:8; App.108). It concluded, "the discovery of the digital scale on the floor and the smell of marijuana, although less on the latter, allowed the officer to search the immediate area for contraband or a gun." (30:9; 31:2; App.109, 114).

Here, the circuit court made a credibility finding when it stated that the smell of evidence was impeached by the demonstrative exhibit, and that it wanted to grant the defense's suppression motion at that point in the hearing. (30:8; App.108). This

credibility finding is not inherently incredible. *See State v. Jacobs*, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 822 N.W.2d 885. (On appeal, this Court accepts the circuit court's credibility determinations unless the testimony relied upon is inherently or patently incredible.); *see also Chapman v. State*, 29 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) ("To be incredible as a matter of law, evidence must be '…in conflict with the uniform course of nature or with fully established or conceded facts.'"). As a result, the circuit court's reliance—albeit, minimized reliance—on the smell of marijuana in setting forth its findings of fact and conclusions of law was clearly erroneous, as it was contradicted by its own credibility finding. *See* WIS. STAT. § 805.17(2); *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

C. The presence of a digital scale and a lawful weapon alone were insufficient to establish probable cause that Mr. Tubbs' vehicle contained evidence of a crime.

In order to establish probable cause to conduct a warrantless search under the automobile exception, there must be a "fair probability" that law enforcement will find evidence in a particular place. *State v. Pallone*, 2000 WI 77, ¶74, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. Here, there was no fair probability that law enforcement would find evidence in Mr. Tubbs' car based only on the observation of a scale that did not have any discernable drug residue, and where,

prior to the search, the officer had determined that Mr. Tubbs had a valid permit for CCW and his firearm was not stolen.[3] (27:13, 20, 22; App. 128, 135, 137).

In *State v. Jackson*, 2013 WI App 66, ¶3, 348 Wis. 2d 103, 831 N.W.2d 426, police stopped a defendant for multiple traffic violations. An officer testified that when he approached the vehicle, Jackson was the driver and his window was rolled down. *Id*. The officer testified that he smelled fresh marijuana coming from inside the car. *Id*. After Jackson stepped out of the car, the officer searched Jackson's person and the inside of the passenger compartment, finding in the center console a digital scale covered in marijuana residue and nearly two thousand dollars in small denominations. *Id*. The officer testified that he subsequently began searching in the back seat, where he believed the odor of fresh marijuana got stronger. *Id.* at ¶4. Upon failing to discover additional drug paraphernalia in the backseat, the officer opened the trunk of the car, and found marijuana. *Id*.

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[3] *See Vill. of Somerset v. Hoffman*, No.2015AP140, unpublished slip op. at ¶20 n.12 (WI App May 17, 2016) (noting "the mere fact a person is carrying a firearm cannot itself be evidence of criminal or malicious intent.") (App.165). Cited for persuasive value only, in accordance with Wis. Stat. §§ 809.23(3)(b) and (c).

The circuit court in *Jackson* granted the defense's motion to suppress evidence, reasoning that:

> Now, we know, and I have heard it in so many cases, they come with these multiple police officers, multiple cars and they stop somebody for a small traffic violation and then they go on from that. They admit doing that….
>
> Maybe it's good practice, maybe it's bad practice, but it is a canvassing practice, a Dragnet practice, pull everybody in and hopefully find something, and I don't know all the cases where they don't find something….
>
> In every case we're getting these super sniffer police officers that can smell marijuana through trunks, through bags, anyplace and it's testing their credibility as an officer….
>
> Now, I have had cases, even trials where I have had the marijuana laying right out on this counter here, and the bags it was in and everything, and I can't smell it, nor can anybody in the courtroom, but these officers have this super sniff ability so that's what we have.
>
> And we have to question credibility.
>
> I'm not, under our Constitution and our city, going to let these officers just go out and canvas and do whatever they want to do in violation of the Fourth Amendment, just keep going further and further….

Id. at ¶5. The state appealed, and this Court reversed, based on the determination that the other evidence found in the passenger compartment of the car, aside from the alleged odor—$1961 in small

denominations, and a digital scale covered in marijuana residue—gave the police probable cause to search the trunk. *Id.* at ¶¶7, 11. As a result, this Court did not decide whether the officer had testified truthfully regarding the odor of marijuana. *Id.*

Unlike in *Jackson*, this case did not involve a sufficient confluence of other factors that established probable cause for the search, independent of the smell of marijuana. The circuit court here seemed to believe otherwise, stating "there is a scale and a gun and I think that dictates the result here." (30:8; App.108). However, the discovery of a digital scale and a legally owned gun in the possession of a person with a valid CCW permit, without more, was insufficient to establish probable cause to justify the warrantless search. Absent the odor of marijuana, the police lacked probable cause to search the passenger compartment of Mr. Tubbs' vehicle.

D. Under the totality of the circumstances, there was no reasonable suspicion to justify a protective search of Mr. Tubbs' vehicle for weapons.

The circuit court's ruling appears to also conclude that the search of Mr. Tubbs' vehicle was lawful based on reasonable suspicion to conduct a protective search for weapons.[4] (30:8-9; App.108-109)

[4] This ruling is not particularly clear, however, during the court's remarks preceding its decision, the court noted the state had "theorize[d] that the search was permissible because (continued)

("the search is objectively reasonable whether or not it's for guns and [sic] drugs" and "…allowed the officer to search the immediate area for contraband or a gun."). However, under the totality of the circumstances that existed in this case, the six police officers involved in Mr. Tubbs' stop lacked an objectively reasonable suspicion that Mr. Tubbs was dangerous and may have immediate access to a weapon. *See State v. Buchanan*, 2011 WI 49, 334 Wis. 2d 379, 799 N.W.2d 775; (27:8; 123).

The police seized Mr. Tubbs' lawful gun at the beginning of their interaction with him, the sole occupant of his vehicle. (27:10, 15; App.125, 130). Officer Domine testified that one of his first questions addressed whether Mr. Tubbs had a CCW permit, and the police determined Mr. Tubbs answered honestly when he said he did. (27:12-13, 20; App.127-28, 135). There was no testimony that Mr. Tubbs had dipped his body, made furtive movements, or was excessively nervous prior to or during his stop. (27:4-35; App.119-150); *See Buchanan, 334 Wis. 2d*. at ¶¶11-12, 19. Rather, the sole basis for the stop was the lack of front license plate, and Mr. Tubbs was acquiescent throughout the stop, complying with the request that he put his hands up, and providing

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the police were entitled to the console serving [sic] as an extended *Terry* search to protect the officer's safety." (30:5; 29:17-19; App.105, 156). Therefore, to the extent that the court's ruling denying the suppression motion incorporated a conclusion that the search was a lawful protective search, Mr. Tubbs seeks review.

police his valid driver's license and CCW permit. (27:10, 12-13, 20, 29; App.125, 127-28, 135, 144). Officer Domine did not feel the need to pat down Mr. Tubbs' person. (27:15; App.130). Officer Domine testified he had not received any reports that linked Mr. Tubbs' vehicle with any drug activity. (27:19; App.134).

As a result, once police took control of Mr. Tubbs' legal firearm, and verified his CCW permit, there was no reason to believe that Mr. Tubbs was dangerous and could gain immediate control of additional weapons. Under the totality of the circumstances in this case, the police lacked a reasonable belief, based on specific and articulable facts which reasonably warranted an officer in believing that Mr. Tubbs was dangerous and may gain immediate control of weapons. *Long*, 463 U.S. 1032, 1049. Therefore, the subsequent police search of Mr. Tubbs' vehicle cannot be justified as a protective search, because police did not have reasonable suspicion to justify a protective search under these circumstances. *Kyles*, 269 Wis. 2d 1, ¶5.

CONCLUSION

The search of Mr. Tubbs' vehicle occurred without a warrant and outside any recognized exception to the warrant requirement. The police did not have probable cause to believe that Mr. Tubbs' vehicle contained evidence of a crime, nor did police have reasonable suspicion to justify a protective search of Mr. Tubbs' vehicle. For the reasons stated above, Mr. Tubbs respectfully requests that this Court reverse and remand to the circuit court with directions to suppress the evidence discovered in the illegal vehicle search, and permit Mr. Tubbs to withdraw his plea.

Dated this 2nd day of July, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,769 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 2nd day of July, 2019.

Signed:

CARLY M. CUSACK
Assistant State Public Defender

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 one or more initials or other appropriate pseudonym or designation 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 2nd day of July, 2019.

Signed:

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APPENDIX

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