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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Appeal Case No: 2019AP644

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DEANGELO D TUBBS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE THOMAS J. ADAMS
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was there reasonable suspicion to stop or approach
Deangelo D. Tubbs and remove him from the vehicle to justify
a protective search ?

Trial Court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On May 8, 2019, Tubbs moved to suppress the fruits of what he contended was an unlawful search of his vehicle. (R3:1-5; 27:1-36).

Suppression Hearing Testimony

On Thursday, June 15, 2017, at approximately 8:30 p.m., City of Milwaukee Police Officer Evan Domine, along with five other officers, each a part of a District 7 proactive bicycle unit, observed a vehicle without a front license plate displayed on the front bumper area. (R27:8-10; R27:27). As a result of the Wisconsin traffic violation, officers conducted a stop in the City and County of Milwaukee, Wisconsin. (R27:10; R27:12).

Officers approached the vehicle and Officer Domine made contact with the sole occupant observed seated in the driver's seat. (R27:10-11). During his approach, Officer Domine was seated on his bicycle and was able to observe a firearm concealed below the window line located on the occupant's lap. (R27:12, R:27-19). For officer safety, Officer Domine immediately opened the driver's door and instructed the occupant to show his hands. *Id.* The occupant was identified via Wisconsin ID card as Deangelo D. Tubbs. (R27:11). Officer Domine determined the firearm was not stolen and Tubbs had a valid CCW permit. (R27:13; R27:20).

Because Officer Domine was standing directly in the door wedge between the driver and the driver door, he observed the odor of fresh marijuana coming from inside the vehicle.

(R27:13-14). While speaking with Tubbs, Officer Domine observed a digital scale near his feet on the driver side floorboard. (R27:13) As a result of the detection of marijuana, Officer Domine searched the vehicle to further his investigation of suspected marijuana in the vehicle. (R27:15). During the search, Officer Domine located a glass mason jar of suspected marijuana in the closed center console of the vehicle. (R27:15-16, R:27-22). The suspected marijuana was in two separate plastic baggies within the glass mason jar. (R27:22). After the investigation concluded on the street, an Officer tested the suspected marijuana using Narco Pouch Number 5, testing for THC, which tested positive. *Id.* The amount of THC recovered that evening was just over 25 grams in total. *Id.*

Officer Domine testified he had been a police officer with the City of Milwaukee for just over three years. (R27:4). During his training and experience as an officer, he had come into contact with marijuana over 500 times. (R27:6). This training involved detecting the odor of marijuana:

Officer Domine: It's generally a pungent smell. People relate it to the smell of skunk, but that, you know, you can definitely tell the smell of marijuana when it's there and fresh.

State: And you say when it's fresh. Is there any other manner in which you might recover marijuana?

Officer Domine: Yes, we come in contact – into contact with the odor of burnt marijuana very often when conducting vehicle stops.

State: And the odor of burnt marijuana compared to the odor of fresh marijuana, is that something in your training and experience you're able to discern?

Officer Domine: Yes.

State: How so?

Officer Domine: The odor of burnt marijuana has just a different smell because it's almost of a smell of char or that you can smell burning.

State: And similarly, how would you describe the odor of fresh marijuana?

Officer Domine: Again, fresh marijuana, you can smell. It's very particular, there's nothing that smells exactly the same emitting that smell.

(R27:6-7).

On cross examination, Defense counsel introduced a jar, similar to the jar located inside Tubbs' vehicle. (R27:24-25). Defense counsel stood with the jar approximately ten feet and then five feet away from Officer Domine, who testified he was unable to smell anything coming from the jar. (R27:25). When the jar was opened and placed approximately one foot away from Officer Domine, he testified he was still unable to smell anything coming from the jar. (R27:26-27). Defense counsel put on the record that the jar contained a lavender vanilla scented cleaner. (R27:27).

Suppression Arguments

On June 12, 2018, the court heard oral arguments from both parties. (R29:1-30). Defense counsel argued that this case comes down to officer credibility, whether or not Officer Domine was lying when he said he could smell the marijuana coming from the car or whether he was lying when he took the stand and said that he still couldn't smell it coming from the jar. (R29:7). Defense asserted that Officer Domine's testimony was not credible, and given that there was no presence of a dog or other smelling aids to enhance the sense of smell, there was no probable cause for the search because Officer Domine did not actually smell marijuana coming from the car. (R29:8). Defense believed Officer Domine fabricated the smell of marijuana and the jar demonstration undermined Officer Domine's credibility. (R29:13-15).

The State argued that the search was justified based on the odor of fresh marijuana, the scale on the floorboard, and the gun. (R29:16-17). Referencing *Michigan V. Long*, 463 U.S. 1032 (1983), the State argued that "it's reasonable for officers to make a cursory search of that vehicle, given the high crime area, given the fact that 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." (R29:18). Citing *State*

v. Secrist, 224 Wis. 2d 201, 589 N.W. 2d 387 (1999), the State argued that the smell of marijuana in a vehicle is probable cause to believe marijuana is in the vehicle. (R29:24).

Suppression Decision

On July 20, 2018, the Honorable Thomas J. McAdams recited findings of fact and concluded:

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 that subject matter allowed the officer to search the immediate area for contraband or a gun. So I have to deny the motion.

(R30:8).

Plea and Sentencing

Deangelo D. Tubbs pled guilty to the possession of THC, contrary to Wis. Stat. § 961.41(3g)(e). (R11:1; 33:1-19).

This appeal, follows.

STANDARD OF REVIEW

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, 259 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.*

ARGUMENT

I. The Circuit Court properly denied Tubbs’ motion to suppress.

Factual findings by trial courts are reviewed based on a “clearly erroneous” standard of review. The Wisconsin Supreme Court has repeatedly held that a “circuit court’s findings of fact [will be upheld] unless they are clearly

erroneous.” *Phelps v. Physicians Ins.*, 2009 WI 74 ¶ 34, 319 Wis. 2d 1, 21, 768 N.W.2d 615. A finding of fact is “clearly erroneous” when it is “against the great weight and clear preponderance of the evidence.” *Id.*, 319 Wis. 2d at 25. “Therefore, although evidence may have presented competing factual inferences, the circuit court’s findings are to be sustained if they do not go against the great weight and clear preponderance of the evidence.” *Id. Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979) (“Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence.”). This means that “to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence.” *Id.*, 87 Wis. 2d at 249-50.

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution establish the right of persons to be secure from unreasonable searches and seizures. *State v. Secrist*, 224 Wis. 2d 201, 208, 589 N.W. 2d 387. Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Gant*, 365 Wis. 2d 510, 518, 872 N.W.2d 137 (2015). Under an analysis of probable cause to arrest, the inquiry is whether the person to be arrested has committed a crime. 224 Wis. 2d at 209. To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide “whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to” probable cause. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

This case shares similarities with *State v. Secrist*. In *Secrist*, a New Berlin police officer was directing traffic during an Independence Day parade. *Id.*, 224 Wis. 2d at 204. The defendant, alone in his vehicle, drove up to the officer with the driver’s side window open to ask directions. *Id.* The defendant was approximately two to three feet away from the officer when he began asking directions. *Id.* The officer immediately smelled a strong odor of marijuana coming from the automobile. *Id.* The officer recognized the odor from his police training and his frequent contact with marijuana over 23 years

of experience as a police officer. *Id.* After detecting the strong odor, the officer directed the defendant to pull his car over, placed the defendant under arrest, and conducted a search of the vehicle. *Id.*, 224 Wis. 2d at 205. The search yielded a marijuana cigarette with an attached roach clip in the ashtray next to the driver's seat.

The trial court found that Officer Szczerba smelled a strong odor of marijuana, that this odor was coming directly from the area where the defendant was seated in the automobile, and that the defendant was the only occupant of the vehicle. *Id.* at 206. The Court of Appeals reversed the circuit court's decision and concluded that the odor of marijuana emanating from an automobile with a sole occupant did not establish probable cause to arrest. *Id.*, 224 Wis. 2d at 207. The Supreme Court recognized the unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime. *Id.*, 224 Wis. 2d at 210.

It is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana or some other controlled substance. *Id.*, 224 Wis. 2d at 216. The extent of the officer's training and experience bears on the officer's credibility in identifying the odor as well as its strength, its recency, and its source. *Id.* *Secrist* held the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered or because other evidence at the scene or elsewhere links the odor to the person or persons. *Id.*, 224 Wis. 2d at 217-218.

A common sense conclusion when an officer smells the odor of a controlled substance is that a crime has probably been committed. *Id.*, 224 Wis. 2d at 218. The officer will have probable cause to arrest when the quantum of evidence within the officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.

Similarly, Officer Domine testified he had been a police officer with the City of Milwaukee for just over three years.

(R27:4). During his training and experience as an officer, he had come into contact with marijuana over 500 times. (R27:6). Officer Domine described that fresh marijuana is very particular and that there's nothing that smells exactly the same emitting that smell. (R27:6-7).

During his approach, Officer Domine was seated on his bicycle and was able to observe a firearm concealed below the window line located on the occupant's lap. (R27:12, R:27-19). When Officer Domine opened the car's door, he observed the odor of fresh marijuana coming from inside the vehicle. (R27:13). While speaking with Tubbs, Officer Domine observed a digital scale near his feet on the driver side floorboard. (R27:13) As a result of the detection of marijuana, Officer Domine searched the vehicle to further his investigation of suspected marijuana in the vehicle. (R27:15). During the search, Officer Domine located a glass mason jar of suspected marijuana in the closed center console of the vehicle. (R27:15-16, R:27-22).

The trial court correctly concluded there was reasonable suspicion to stop or approach Tubbs and remove him from the vehicle. (R30:8) Further, once Tubbs was removed, the discovery of the digital scale on the floor coupled with the smell of marijuana allowed the officer to search the immediate area for contraband or a gun. (R30:8). As a result, Judge McAdams denied Tubbs' suppression motion. (R30:8).

CONCLUSION

For the reasons stated, the State respectfully requests that this court uphold the circuit court's decision denying Tubbs' suppression motion.

Dated this _____ day of August, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,266.

Date

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**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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

Date

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