STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2021AP938-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

QUAHEEM O. MOORE,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Under *Secrist*,[1] the strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug. During a traffic stop, two officers detected the distinct odor of raw marijuana upon making contact with the driver and sole occupant of a vehicle, Defendant-Respondent Quaheem O. Moore. Did these facts, and others discussed herein, give officers probable cause to believe that Moore committed a marijuana-related offense, such that the officers' search of his person—which uncovered other, much harder drugs packaged for distribution—was a lawful search incident to arrest?

The circuit court answered no.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The issue presented may be resolved on the briefs by applying established law to the facts of the case.

INTRODUCTION

The State appeals from an order suppressing evidence obtained during a search of Quaheem Moore's person following a traffic stop. Officers discovered two baggies—one containing several bindles of cocaine, the other containing fentanyl—during the search. Moore was charged with possession with intent to deliver narcotics and possession with intent to deliver cocaine.

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[1] *State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999).

At the time of the search, officers had probable cause to believe that Moore used or possessed marijuana based on the distinct odor of raw marijuana two officers detected upon making contact with Moore in his vehicle. This probable cause determination was further supported by additional evidence and reasonable inferences to be drawn therefrom, including Moore's possession of a vaping pen that he admitted using to vape a liquid cannabinoid (CBD) that was usable to vape liquid THC; and the investigating officer's observation of Moore tossing a mystery liquid that was apparently *not* alcohol out of his car window before pulling his vehicle over. Because probable cause existed to believe that Moore had committed a marijuana-related offense, the challenged search was a lawful search incident to arrest. Accordingly, the suppression order should be overturned, and this case should be remanded for further proceedings.

STATEMENT OF THE CASE

In November 2019, Quaheem Moore was charged with possession with intent to deliver narcotics and possession with intent to deliver more than one but less than five grams of cocaine, both as second and subsequent offenses. (R. 5:1–2.) According to the criminal complaint, police stopped Moore's vehicle for speeding. (R. 5:2.) Upon making contact with Moore, officers detected the odor of raw marijuana. (R. 5:2.) Officers found two plastic baggies containing the contraband during a search of Moore's person. (R. 5:2–3.)

Moore filed a motion to suppress evidence. (R. 11:1.) Moore argued that, at the time, officers had already completed a protective search for weapons, and the body search was not lawful because officers lacked probable cause to arrest Moore. (R. 11:3–4.) Moore acknowledged that the odor of marijuana may provide grounds to arrest, but argued that officers lacked probable cause to arrest in this case under the totality of the circumstances. (R. 11:3–4.)

The circuit court, the Honorable Nicholas J. Brazeau, Jr., presiding, held an evidentiary hearing on the motion on September 15, 2020, at which the investigating officers testified and a video recording of the stop and investigation from the second officer's body camera was played and entered into evidence. (R. 23:1–2, A-App. 105–06.)

At the hearing, City of Marshfield Police Officer Libby Abel testified that she was on patrol on November 17, 2019, when she observed a vehicle that appeared to be speeding; radar indicated it was travelling 39 miles per hour in a 25 mile per hour zone. (R. 5:2; 23:18–19, A-App. 122–23.) The officer testified that, while attempting to make the traffic stop, she observed "some sort of liquid fly out of the driver's window." (R. 23:19, A-App. 123.) The vehicle then "hit a curb" while coming to a stop. (R. 23:19, A-App. 123.)

Officer Abel testified that she walked up to the vehicle and made contact with the driver, whom she knew from prior contacts as Quaheem Moore. (R. 23:19–20, A-App. 123–24.) The officer told Moore that she was stopping him for speeding. (R. 23:19, A-App. 123.) She asked Moore about the liquid she saw coming from the vehicle and noticed that the inside of the driver's door appeared to be wet. (R. 23:19, A-App. 123.) The officer said that Moore had "no explanation really" for the liquid. (R. 23:19–20, A-App. 123–24.) But neither Moore nor the interior of the vehicle smelled of alcohol. (R. 23:25–26, A-App. 129–30.)

Rather, Officer Abel testified that she detected the odor of "raw marijuana" when she made contact with Moore. (R. 23:20, A-App. 124.) The officer went back to her squad car to contact the dispatcher, and a second City of Marshfield police officer, Mack Scheppler, arrived to provide assistance. (R. 23:21–22, 27, A-App. 125–26, 131.) The video recording from Officer Scheppler's body camera shows Moore exit the vehicle

and Officer Abel conduct a pat-down search of Moore for weapons. (R. 23:21, A-App. 125; Ex. 1 at 2 min 15 sec.)[2]

During the pat-down search, Officer Abel found a vaping pen in one of Moore's pockets. The officer then asked Moore, "Is this a THC vape?" (R. 23:15, 21, A-App. 119, 125; Ex. 1 at 2:50.) When Moore did not respond, the officer repeated the question, and Moore said, "It's a CBD vape." (R. 23:15, 21, A-App. 119, 125; Ex. 1 at 3:05.)

Officer Abel told Moore that she detected an odor of marijuana in the vehicle. (R. 23:20–21, A-App. 124–25; Ex. 1 at 4:20.) When Moore expressed disbelief, Office Scheppler, who made contact with Moore by the passenger's side door shortly before Moore exited the vehicle, said that he also smelled marijuana. (R. 23:13, A-App. 117; Ex. 1 at 4:25.) Moore then pulled at the front of his sweatshirt, stepped toward Officer Abel, and said, "You don't smell that shit on me!" (R. 23:11, 28, A-App. 115, 132; Ex. 1 at 4:30.) Declining Moore's invitation to smell his sweatshirt up close, the officer stuck her hand out at Moore and said, "I can't smell it right now." (R. 23:28, A-App. 132; Ex. 1 at 4:30.)

Moore also said that the vehicle was not his, and that he was borrowing it from his brother. (R. 23:27, A-App. 131; Ex. 1 at 4:35.) When Officer Abel said that she ran the vehicle's plates and the owner came back as a business, Moore said that his brother was renting the vehicle and let him borrow it. (Ex. 1 at 5:00.)

Officer Abel then told Moore that Officer Scheppler was going to search him. (R. 23:22, A-App. 126; Ex. 1 at 5:25.)

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[2] The body cam video recording is contained on a CD labelled "Exhibit #1" that was transmitted to the Court as a supplement to the record and was not given a record number by the circuit court. The recording is stored as an MP4 file and should open with most popular media players, including Windows Media Player and Apple QuickTime.

Office Scheppler added that the search was because of the odor of marijuana, and he conducted the search while Officer Abel stood by. (R. 23:6–7, 22, A-App. 110–11, 126; Ex. 1 at 6:10.) The officer searched Moore's person and discovered that Moore had a substantial amount of cash on him, later determined to be about $400 in total. (R. 5:3; Ex. 1 at 6:15–9:00.) Officer Abel then went to search the vehicle. (R. 23:22–23, A-App. 126–27; Ex. 1 at 9:05.)

While Officer Abel was searching the vehicle, Officer Scheppler was standing with Moore outside the vehicle making small talk. (Ex. 1 at 9:05–10:55.) Officer Scheppler testified at the hearing that, as he was talking to Moore, he noticed that "his belt buckle was sitting a little higher on his pants" and that there was a "bulge" in the buckle area of his pants. (R. 23:7, A-App. 111.) Officer Scheppler then said to Moore, "Hey, can I just have you put your hands on top of your head? I just want to search one more area." (Ex. 1 at 10:55–11:10.) Before the officer could finish this statement, Moore interjected, "Check me, check me, check me!" extending his arms out to his sides. (Ex. 1 at 11:05.) The officer said, "I forgot to check the belt" as he began to search. (Ex. 1 at 11:10.)

Noticing something that felt like a plastic baggie, the officer asked Moore, "You got something behind your zipper?" (R. 23:7, A-App. 111; Ex. 1 at 11:20.) When Moore joked that it was his private parts, the officer said that it was something else and called out to Officer Abel to come over. (R. 23:7–8, A-App. 111–12; Ex. 1 at 11:35.) Moore's demeanor then changed and he became unresponsive to the officers' questions. (R. 23:23, A-App. 127; Ex. 1 at 11:45.) Officer Scheppler told Officer Abel that he found something that felt like a baggie in Moore's zipper area. (R. 23:7–8, A-App. 111–12; Ex. 1 at 11:40.) Officer Abel later testified that, because of the change in Moore's demeanor, she handcuffed him for Officer Scheppler to safely continue searching the zipper area. (R. 23:7–8, 23–24, A-App. 111–12, 127–28; Ex. 1 at 12:00.) Officer

Scheppler eventually found two plastic baggies each containing several "bindles" of substances that resembled contraband and were later confirmed to be cocaine and fentanyl. (R. 5:3; 23:7–8, 24–25, A-App. 111–12, 127–28.)

Following the hearing, the State filed a brief opposing the motion, Moore filed a reply brief, and the State filed a sur-reply brief. (R. 12; 13; 14.)

In an April 8, 2021 decision and order, the circuit court granted Moore's suppression motion. (R. 16:1–4, A-App. 101–04.) The court said that Officer Scheppler's search of Moore's person was not a protective search under *Terry v. Ohio*, 392 U.S. 1 (1968), because the officers said that the search was based on the odor of marijuana, and Officer Abel had already conducted a protective search. (R. 16:2–3, A-App. 102–03.) The court indicated that, to be lawful, the search would have to have been incident to an arrest. (R. 16:2–3, A-App. 102–03.)

The court noted that the search of the vehicle was lawful and not contested because the odor of marijuana gives probable cause to search a vehicle. (R. 16:3, A-App. 103.) Further, it acknowledged that the odor of marijuana detected during a traffic stop may give probable cause to arrest the driver and sole occupant of the vehicle, citing *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999). (R. 16:3, A-App. 103.) But, applying the largely undisputed facts to the law, it concluded that officers did not have probable cause to arrest Moore because the link between Moore and the odor in the vehicle was diminished where the vehicle wasn't Moore's, and the officers didn't detect the smell of marijuana on Moore's person when he was outside the vehicle. (R. 16:3–4, A-App. 103–04.)

The State appeals the order suppressing evidence.

ARGUMENT

The search of Moore was a lawful search incident to arrest because officers had probable cause to believe that Moore used or possessed marijuana.

A. Standard of review and applicable legal principles

1. Standard of review

When reviewing an order granting or denying a motion to suppress evidence, this Court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Secrist*, 224 Wis. 2d at 207. But when, as here, the facts are undisputed, review is *de novo*. *See id.* "[T]he question [of] whether the odor of marijuana" and the circumstances as a whole "constitute[ ] probable cause to arrest 'is a question of constitutional fact involving the application of federal constitutional principles which this court reviews independently of the conclusions of the circuit court.'" *Id.* at 208 (citation omitted).

2. A search is lawful as a search incident to arrest if probable cause to arrest exists at the time of the search.

The Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution, protect against unreasonable searches and seizures. *State v. Sykes*, 2005 WI 48, ¶ 13, 279 Wis. 2d 742, 695 N.W.2d 277 (*discussing Chimel v. California*, 395 U.S. 752 (1969)). "[A] warrantless search of a person incident to a lawful arrest does not violate constitutional search and seizure provisions." *Sykes*, 279 Wis. 2d 742, ¶ 14. Because an arrest of a suspect supported by probable cause is a reasonable intrusion under the Fourth Amendment, "a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973). The search may precede the arrest so long as the

arrest is supported by probable cause, and the fruits of the search are not necessary to support the arrest. *Sykes*, 279 Wis. 2d 742, ¶ 16; *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980).

3. Probable cause is a common-sense test that asks what a reasonable officer would conclude under the totality of the circumstances.

"Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *Secrist*, 224 Wis. 2d at 212. The test is an objective one, and the inquiry focuses on what a reasonable officer in the investigating officer's position would conclude. *See id.*; *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Whether probable cause exists in a particular case must be judged by the totality of circumstances of that case. *Id.*

There must be more than a possibility or suspicion that the defendant committed an offense, "but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Delap*, 2018 WI 64, ¶ 35, 382 Wis. 2d 92, 913 N.W.2d 175. Moreover, "[p]robable cause is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Lindgren*, 2004 WI App 159, ¶ 20, 275 Wis. 2d 851, 687 N.W.2d 60 (citation omitted). "[A]n officer is not required to draw a reasonable inference that favors innocence" or to accept as true a person's innocent explanation "when there also is a reasonable inference that favors probable cause." *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125.

B. The search of Moore was lawful as a search incident to arrest based on the totality of the circumstances, which included, among other facts, the odor of marijuana in the vehicle of which Moore was the driver and sole occupant.

The circuit court properly construed the issue in this case to be whether probable cause existed to arrest Moore such that the search was a lawful search incident to arrest. (R. 16:3, A-App. 103.) The State submits, however, that the court erred in concluding that officers lacked probable cause to arrest Moore. Because the totality of the circumstances would lead a reasonable officer to believe that Moore probably committed an offense related to the use or possession of marijuana, the challenged search was a lawful search incident to arrest. *Secrist*, 224 Wis. 2d at 212.

In *Secrist*, the Wisconsin Supreme Court explained that it is "a common sense conclusion [that] when an officer smells the odor of a controlled substance . . . a crime has probably been committed." 224 Wis. 2d at 218. The probable cause determination "does not require that an officer establish with technical certainty that the controlled substance was used during a specific time." *Id.* "Rather, 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." *Id.*

"If under the totality of the circumstances, a trained and experienced police officer identifies an unmistakable odor of a controlled substance and is able to link that odor to a specific person or persons, the odor of the controlled substance will provide probable cause to arrest." *Secrist*, 224 Wis. 2d at 218. Finally, "[t]he strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." *Id.*

Here, officers detected the odor of raw marijuana in the cabin of a truck in which Moore was the driver and sole occupant. The odor was distinct and recognizable enough for each officer to have detected it when contacting Moore from opposite sides of the car—Officer Abel from the drivers' side, Officer Scheppler from the passenger's side. (R. 23:20, A-App. 124; Ex. 1 at 2:00, 4:20.)

Under *Secrist*, these facts alone—that the odor of marijuana was so unmistakable as to be detected by two officers from different spots near the vehicle, and that Moore was the vehicle's driver and sole occupant—would "normally" appear to be sufficient to constitute probable cause to arrest. *Secrist*, 224 Wis. 2d at 218. But three more facts also provided further support for a reasonable officer to conclude that probable cause existed to arrest Moore for possession or use of marijuana.

First, the vaping pen found on Moore's person during the search, and the officer's exchange with Moore about the device, established that Moore consumes cannabinoids, and gave officers a reasonable basis to suspect that Moore uses THC. When Officer Abel discovered the vaping device on Moore's person during the pat-down for weapons,[3] she asked Moore whether he used it to consume THC—a reasonable question given the odor the officer detected in the vehicle. (R. 23:15, 21, A-App. 119, 125; Ex. 1 at 2:50.) Moore did not respond to her question. When, after several moments, the officer repeated the question, Moore said that the vape was "a CBD vape." (R. 23:15, 21, A-App. 119, 125; Ex. 1 at 3:05.) If Moore's assertion that he used the vaping pen only for CBD is

[3] Moore did not challenge Officer Abel's pat-down in the circuit court, which nonetheless addressed the protective search and concluded that it was lawful. (R. 11:3; 16:2, A-App. 102.) *See State v. Johnson*, 2007 WI 32, ¶¶ 21–33, 299 Wis. 2d 675, 729 N.W.2d 182 (noting that pat-down search is authorized when suspected crime is associated with possession of weapons).

true, his possession of the pen would add nothing to the probable cause calculation; consumption of CBD products containing no more than trace amounts of THC is lawful in Wisconsin.[4]

But, of course, the officers were not required to accept Moore's statement at face value. *See Nieves,* 304 Wis. 2d 182, ¶ 14; *see also State v. Colstad*, 2003 WI App 25, ¶ 21, 260 Wis. 2d 406, 659 N.W.2d 394 (law enforcement not required to accept suspect's statements as true). Instead, where Moore did not respond when initially asked whether he used the device to vape liquid THC, and where Moore finally volunteered that he used it to vape a closely related but legal substance, CBD, police had reasonable grounds to suspect that Moore was, in fact, a THC user.

Second, Officer Abel's observation of a liquid being thrown out the driver's window before the stop, and her subsequent observation of liquid on the inside of the driver's door, provides additional grounds for the stop—though not for the same reasons Officer Abel considered at the time. *See Babbitt*, 188 Wis. 2d at 356 (test for probable cause to arrest is an objective one).

To state the obvious, the fact that Officer Abel observed Moore throw a liquid out of the window before pulling his vehicle over gave her reason to suspect that Moore was attempting to dispose of incriminating evidence. The officer reasonably suspected at first that Moore had dumped an alcoholic beverage, and so she asked him about the discarded liquid and whether he had been drinking that night. (R. 23:19, A-App. 123.) He said that he had not and that his brother had taken the truck to a car wash earlier that day. (Ex. 1 at 2:45,

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[4] *See* Wisconsin Department of Agriculture Trade and Consumer Protection "Hemp Research Program," https://datcp.wi.gov/Pages/Programs_Services/Hemp.aspx? (accessed October 7, 2021).

3:20–4:00.) But Moore did not smell of alcohol. And the officer did not detect the odor of alcohol emanating from the vehicle's cabin—even though she observed liquid on the inside of the driver's door. (R. 23:19, 25–26, A-App. 123, 129–30.) Lacking additional evidence that Moore was driving a motor vehicle under the influence of alcohol, the officers appeared to treat the discarded liquid as an investigatory dead end.

But an officer troubled by this apparent dead end—why *would* someone throw a liquid out of the window when being pulled over by police if not to dispose of evidence?—could reason to another conclusion. Again, the officers detected the odor of raw marijuana inside the vehicle, and Moore was found with a vape pen on his person that he said he used to consume CBD. Based on these facts, a reasonable officer could conclude that the liquid Moore sought to dispose of before the traffic stop may have been a prohibited liquid, containing THC or another substance, that Moore used for vaping.[5]

To be clear, the State is not arguing that the theory that the discarded liquid was a prohibited substance used for vaping necessarily connects that liquid to the odor of raw marijuana detected in the vehicle. No evidence was presented at the hearing about the odor, if any, of vaped THC or CBD, or the odor, if any, of the unvaped liquid. Rather, Moore's possession of the vaping pen, which Moore admitted he uses to consume cannabinoids in liquid form, and the suspicious disposal of a liquid that was not alcohol before the traffic stop, merely support a reasonable inference that Moore uses or was

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[5] A government publication about vaping explains that users of vaping pens consume an "e-liquid" from a prefilled or refillable cartridge, which may contain THC, CBD, or other substances. Centers for Disease Control (CDC), "E-Cigarette, or Vaping, Products Visual Dictionary" at 15–20 https://www.cdc.gov/tobacco/basic_information/e-cigarettes/pdfs/ecigarette-or-vaping-products-visual-dictionary-508.pdf (accessed October 6, 2021).

using THC. This inference, in turn, bolsters the common-sense determination that Moore probably possessed or used marijuana based on the odor of raw marijuana where Moore was the driver and sole occupant of the vehicle.

Finally, the observation that Moore ran the curb as he pulled the vehicle to a stop provides some additional support for the determination that probable cause existed to arrest him for a marijuana use or possession. (R. 23:19, A-App. 123.) While officers did not treat this stop as an impaired driving investigation once they determined that Moore did not smell of alcohol or show other outward signs of intoxication, the fact that Moore ran the curb in coming to a stop is consistent with the possibility that Moore was driving under the influence of marijuana.

In sum, officers had probable cause to arrest Moore for possession or use of marijuana based on the following facts and reasonable inferences drawn therefrom: (1) the odor of raw marijuana, detected by two officers, emanating from inside the vehicle Moore drove and was the sole occupant of; (2) Moore's possession of a vaping pen that he said he used only to vape CBD, after initially failing to respond when asked if he used the device to vape THC; (3) Moore's discharge of a liquid that was not alcohol out the driver's window before pulling his vehicle to a stop; and (4) Moore driving up on the curb while coming to a stop, consistent with impairment from (apparently) a non-alcoholic substance. Because probable cause existed to arrest Moore, the search of Moore that yielded the contraband he is charged with possessing in this case was lawful as a search incident to arrest. *See Secrist*, 224 Wis. 2d at 218.

Of course, while these facts are the building blocks of probable cause in this case, other facts emphasized in the circuit court's decision weigh to some degree against a determination of probable cause. These include Moore's assertion—apparently accepted by the officers and not

contested in the district attorney's briefs—that the vehicle was leased to Moore's brother and Moore was borrowing it; and the fact that the officers did not detect the odor of raw marijuana on Moore's person when he was outside the vehicle. (R. 16:2, 3–4, A-App. 102, 103–04.)

Secrist itself indicates that "[t]he probability" that a crime was committed "diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor." 224 Wis. 2d at 218. Here, the circuit court treated the fact that the officers did not detect the odor of marijuana on Moore's person when he was outside the vehicle as dispositive: "As the odor of marijuana was not linked to the defendant, the officers did not have probable cause to arrest him." (R. 16:4, A-App. 104.) The State disagrees.

Sufficient grounds existed for a reasonable officer to believe that Moore probably possessed or used marijuana even though the odor of marijuana was not detected on Moore personally. This fact, and the fact that the truck was leased to Moore's brother, may "diminish" the likelihood that Moore committed a crime, but the totality of the circumstances still constitute probable cause to arrest Moore for a marijuana-linked offense. *See Delap*, 382 Wis. 2d 92, ¶ 35 (probable cause does not require "proof beyond a reasonable doubt or even that guilt is more likely than not").

To repeat, Moore was the driver and sole occupant of a vehicle two officers detected the odor of raw marijuana emanating from. In this instance, the fact that the odor detected was of "raw," not burnt, marijuana as in *Secrist*, would have reasonably suggested to officers that Moore likely was not smoking marijuana at the time. More likely, officers would have concluded that the odor of raw marijuana suggested that he possessed marijuana in the vehicle. Further, officers could have reasonably concluded that the

odor of raw marijuana—without the smoke that permeates one's clothing—is less likely to be detected outside of the vehicle.[6]

Additionally, other facts and reasonable inferences to be drawn from them—as discussed above, Moore's possession of the vaping pen, the detection of a liquid that was not alcohol being tossed from the vehicle, and Moore jumping the curb while coming to a stop—buttress the determination that the odor of marijuana detected in the vehicle gave officers reasonable grounds to determine that Moore probably committed a marijuana-linked offense. With probable cause to arrest, officers also had lawful grounds to conduct a search incident to arrest. *See Secrist*, 224 Wis. 2d at 218.

Finally, the State briefly addresses the fact that the search incident to arrest in this case occurred in two parts: An initial search lasting approximately 2 minutes and 45 seconds followed less than two minutes later by the search which uncovered the two baggies containing cocaine and fentanyl. (R. 5:3; Ex. 1 at 6:15–9:00, 10:55.)

Up to this point, the State has treated the two searches as one continuous search, as the circuit court did in its decision. (R. 16:3, A-App. 103.) The State believes that the search(es) should be viewed in this manner. As noted, the lawfulness of the search in this case depends on whether officers had probable cause to arrest Moore for possession or

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[6] Moreover, while the *Secrist* Court declared that the absence of odor on the person "diminishes" the probability that a crime was committed, the *Secrist* opinion does not appear to address whether officers detected the odor of marijuana on Secrist's person when he was outside of the vehicle. *See Secrist*, 224 Wis. 2d 201. In concluding that the officer had probable cause to arrest Secrist based in large part on detecting the "strong odor" of marijuana, the opinion indicates that officers detected the odor when Secrist, like Moore, was seated in his vehicle. *Id.* at 204–07, 219.

use of marijuana *at the time the search was initiated*. *See Sykes*, 279 Wis. 2d 742, ¶ 16. Thus, neither the discovery of a substantial amount of cash on Moore's person during the "first search," nor the observation of the bulge near the belt buckle area just before the "second search" may be used to bolster the grounds for the search that uncovered the contraband.[7] (R. 5:3; 23:7, A-App. 111; Ex. 1 at 6:15–9:00.)

But here, the search plainly was a lawful search incident to arrest because officers did possess evidence sufficient to arrest Moore for marijuana use or possession when the search was initiated. And, minutes later when starting the "second search," officers continued to possess the same quantum of evidence constituting probable cause that they had before the "first search." Accordingly, the procedure that uncovered the cocaine and fentanyl was a lawful search incident to arrest. *See Sykes*, 279 Wis. 2d 742, ¶ 16.

Based on the foregoing, this Court should reverse the order granting Moore's motion to suppress evidence and remand for further proceedings.

[7] In the circuit court, the State argued that Moore consented to the "second search" of his person by stating, "Check me, check me, check me," when the officer told Moore to put his hands on his head for the officer to search Moore's belt area. (R. 14:3.) The State does not make this argument on appeal.

CONCLUSION

The order suppressing evidence should be reversed.

Dated October 13, 2021, in Madison, Wisconsin.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,840 words.

Dated this 13th day of October 2021.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of October 2021.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General

Appendix
State of Wisconsin v. Quaheem O. Moore
Case No. 2021AP938-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals: (2) the findings or opinion of the circuit court, and (3) 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; (4) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b).

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 13th day of October 2021.

Electronically signed by:

Jacob J. Wittwer
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Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of October 2021.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General