

FILED
02-21-2022
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 21 AP 938 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

QUAHEEM O. MOORE,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

ON APPEAL FROM A FINAL ORDER
ENTERED ON APRIL 8, 2021, BY THE
WOOD COUNTY CIRCUIT COURT,
THE HONORABLE NICHOLAS J. BRAZEAU, JR. PRESIDING.

Respectfully submitted,

QUAHEEM O. MOORE,
Defendant-Respondent

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
6605 University Avenue Suite #101
Middleton, Wisconsin 53562
(608) 661-6300

BY: JOSHUA HARGROVE
State Bar No. 1086823

TRACEY A. WOOD
State Bar No. 1020766

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ISSUE PRESENTED

The issue presented in this case is whether an odor of marijuana coming from a vehicle is enough to establish probable cause to arrest a driver of that vehicle when the odor is not attributable to that driver, and the vehicle does not belong to the driver. The circuit court correctly concluded there was insufficient probable cause established for the driver, Mr. Moore's, arrest and the subsequent body search that yielded other controlled substances. Under *Secrist*, probable cause diminishes if the source of the odor of marijuana is not near the person.¹ Both officers in the case at bar testified the odor only emanated from the vehicle, not from Mr. Moore himself. Further, officers verified that the vehicle did not even belong to Moore. Therefore, the court had to decide if whether, pursuant to *Secrist*, these specific facts gave rise to probable cause to conduct multiple further searches and the eventual arrest of Mr. Moore.

The circuit court answered no to the question of whether there was the requisite probable cause and found the subsequent searches unlawful.

¹ *State v. Secrist*, 224 Wis.2d 201 ¶33, 589 N.W.2d 387 (1999).

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.

STATEMENT OF THE CASE AND FACTS

On November 17, 2019, Officer Libby Abel initiated a traffic stop of a vehicle driven by the defendant solely for a suspected speeding violation and no other infractions.² Upon initiating the traffic stop, Officer Abel claimed that she observed a liquid spray coming from the driver's side window.³ Officer Abel approached the passenger side of the vehicle and made contact with the defendant; she indicated that she "could smell the odor of marijuana coming from within the vehicle." Officer Mack Scheppler arrived on scene to assist and indicated that he also "did notice the odor of marijuana emitting from the vehicle which [he] recognized based on [his] training and experience."⁴ Officer Abel informed the defendant of the reason for the stop (speeding violation) and asked him if he had thrown a liquid from his window; the defendant denied throwing anything out of his window.⁵ The defendant indicated that he was not the owner of the vehicle and that it was a rental that he was borrowing from his brother.⁶

Subsequently, Officer Abel asked the defendant to step out of his vehicle and she conducted a thorough pat down Terry search of the defendant. Officer Abel did not locate any weapons or contraband during the pat down search, nor did she indicate that she suspected the defendant was concealing anything on his person.⁷ Officer Abel questioned whether the defendant had consumed any alcohol, and he informed her he had not

² R. 11:1-5.

³ R. 23:19-20.

⁴ R. 23:20.

⁵ R. 23:19.

⁶ R. 23:27.

⁷ R. 23:21.

consumed any alcoholic beverages that day; Officer Abel indicated she could not smell alcohol coming from the defendant or in the vehicle.⁸ Officer Abel continued to question the defendant regarding the liquid she indicated she had seen thrown out the window as well as the smell of marijuana.⁹ The defendant continued to deny having thrown anything from his window or having any marijuana in the vehicle.¹⁰ Moore asked officers if they could smell any marijuana on his person.

In reviewing the body camera video footage, officers indicate that they are unable to smell marijuana on the defendant's person.¹¹ Officer Scheppler informed Moore that he would be conducting a search of his person based on the odor of marijuana from the vehicle despite not smelling marijuana on his person.¹² Officer Scheppler found nothing of evidentiary value during his initial/first body search of the defendant; Officer Abel then began to search the defendant's vehicle.¹³

A few minutes later, Officer Scheppler conducted a second body search of Moore claiming he had not searched the area around the defendant's belt buckle and claiming it was positioned higher than the top of his jeans.¹⁴ During this second body search Officer Scheppler felt what he believed to be contraband in a plastic bag in the zipper area of the defendant's pants.¹⁵ Officers placed Moore in handcuffs for officer safety but informed

⁸ R. 23:25-26.

⁹ R.23:29-20.

¹⁰ *Id.*

¹¹ R. 23:28.

¹² R. 23:22.

¹³ R. 5:3.

¹⁴ R. 23:7-10.

¹⁵ *Id.*

Moore that he was not under arrest at that time and that he was being detained.¹⁶ Officers then conducted a third, more invasive, body search (which the circuit court found to be a continuation of the second search) of Moore's zipper area and located two plastic baggies which were believed to contain cocaine.¹⁷ Moore was then subsequently arrested for Possession of Cocaine.¹⁸ Officers continued to search the vehicle on scene and later towed the vehicle and held it for investigative purposes. Officers eventually found a tenth of a gram of marijuana in the vehicle.¹⁹

Subsequently, 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, as second and subsequent offenses.²⁰

Moore filed a motion to suppress evidence.²¹ 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.²² Moore acknowledged that the odor of marijuana may provide grounds to search a vehicle but argued that officers lacked probable cause to arrest in this case under the totality of the circumstances, given that the vehicle was not his, the odor was not tethered to him in any way and officers conceded that the odor was not coming from him.²³

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; R. 5:3.

¹⁹ *See id.*

²⁰ R. 5:1-2.

²¹ R. 11:1.

²² R. 11:3-4.

²³ *Id.*

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 the second officer's video body camera was played.²⁴

On April 8, 2021, the circuit court rendered its decision granting Moore's motion to suppress.²⁵ The court held that Officer Scheppler's search of Moore was not a protective search under *Terry* because the officers alleged that the search was based on an odor of marijuana—while they had already conducted a protective search.²⁶ The court noted that this would only have been a lawful search if it was incident to arrest.²⁷

Further, the court noted that the search of the vehicle was lawful because the odor of marijuana gives probable cause to search a vehicle.²⁸ 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*.²⁹ Ultimately, after applying all of the facts to the law, the court appropriately concluded that officers did not have probable cause to arrest Moore because the link between Moore and the odor in the vehicle not only diminished but was dissipated as officers continued to investigate and inquire on scene.³⁰ Further, when Moore was taken out of the vehicle, the officer no longer noted any odor of marijuana, further diminishing any nexus to further probable cause.³¹ As the court noted:

²⁴ R. 23:1-2.

²⁵ R. 16:1-4.

²⁶ R. 16:2-3.

²⁷ *See id.*

²⁸ R. 16:3.

²⁹ *State v. Secrist*, 224 Wis. 2d, 589 N.W.2d 387 (1999).

³⁰ R. 16: 3-4.

³¹ *See id.*

The probability 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. In this case, once the defendant exits the vehicle, both officers note that the strong marijuana smell emanates from the vehicle. Neither officer links the smell specifically to the defendant, after he exited the vehicle. In fact, Abel notes that she can't smell the marijuana on the defendant when he confronts her with that question. The defendant has offered a reasonable explanation for the odor, but more importantly, once out of the vehicle the source of the odor was not near the person. As the odor of marijuana was not linked to the defendant, the officers did not have probable cause to arrest him.³²

ARGUMENT

I. THE OFFICERS LACKED PROBABLE CAUSE TO CONTINUE TO SEARCH MOORE.

A. Standard of Review

Whether a search is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.³³ Appellate courts uphold findings of facts unless they are clearly erroneous.³⁴

i. The circuit court correctly held that probable cause to arrest continues until it diminishes or is dispelled by officer's investigation under the totality of circumstances.

Moore asserts that his constitutional rights were violated, as officers did not have probable cause to arrest when Officer Scheppler conducted a body search. "A search may

³² R. 16:3-4.

³³ *State v. Guzman*, 166 Wis. 2d 577 (1992).

³⁴ *State v. Robinson*, 327 Wis. 2d 302, 786 N.W.2d 483 (Wis. 2010).

be incident to a subsequent arrest if the officers have probable cause to arrest before the search.”³⁵ However, “[w]hen a suspect is arrested subsequent to a search, the legality of the search is established by the officer’s possession, before the search, of facts sufficient to establish probable cause to arrest followed by a contemporaneous arrest.”³⁶

The State establishes the beginning principle of probable cause but fails to account for the fact that probable cause can diminish or dissipate within the course of an investigation—it does not withstand all evidence and information ascertained to the contrary.³⁷ Probable cause to arrest is the bar for evidence within the arresting officer’s knowledge at the time of the arrest which would lead a reasonable officer to believe the defendant probably committed or was committing a crime.³⁸ Probable cause is more than a possibility or suspicion the defendant has committed an offense, but the evidence does not need to reach the proof beyond a reasonable doubt standard.³⁹ Whether or not the evidence reaches the level of probable cause must be judged by the facts of each case and the totality of circumstances.⁴⁰ The probable cause standard is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.”⁴¹ When determining whether probable cause existed, the court will apply an objective standard that

³⁵ *State v. Sykes*, 2005 WI 48.

³⁶ *See id.* (emphasis added).

³⁷ *Sykes*, 2005 WI 48.

³⁸ *State v. Secrist*, 224 Wis.2d 201 ¶ 19, 589 N.W.2d 387 (1999).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Lange*, 2009 WI 49, ¶20.

considers the information available to the officer combined with the officer's training and experience.⁴²

Moore ultimately was not charged with possession of THC, and because of the miniscule remnants officers managed to scrape from the floorboards after multiple searches, the defendant believes there was insufficient evidence to establish that he knowingly possessed THC and to establish probable cause to arrest for possession of THC. It is important to note that the marijuana shake was not found by the driver's side but was found in the passenger floorboard area only after the defendant was body searched multiple times and placed under arrest for Possession of Cocaine, his vehicle was towed, and he was subsequently searched again.

In order for officers to have proceeded with a more intrusive body search of the defendant, they were required to establish probable cause to arrest prior to conducting a body search. Moore concedes that the odor of marijuana may provide probable cause to arrest in the appropriate circumstances; however, the totality of the circumstances when weighed causes any probable cause to dissipate.

ii. The circuit court correctly held that to justify the subsequent searches of Moore, it would have had to be incident to a lawful arrest.

⁴² *Id.*

If an officer finds probable cause to arrest, they may then conduct a warrantless search incident to the arrest without violating the individual's Fourth Amendment rights.⁴³ A search conducted incident to the arrest is considered a lawful intrusion under the Fourth Amendment and therefore requires no additional justification.⁴⁴ However, this search must be contemporaneous to the arrest.⁴⁵

A search is incident to a subsequent arrest only if the officer(s) have probable cause to arrest before conducting the search.⁴⁶ The probable cause to arrest must have existed independent of the fruits of the search of the suspect's person after their arrest.⁴⁷ A search may immediately precede the arrest so long as the fruits of the search are not necessary to support the probable cause for an individual's arrest.⁴⁸ According to this principle, when a suspect is arrested subsequent to a search, the legality of the search is established by the officer's knowledge before the search of facts or evidence sufficient to establish probable cause to arrest.⁴⁹

Most importantly, Moore was first subjected to a thorough pat down Terry search, which revealed no weapons or anything else of suspicion. Shortly thereafter, Officer Scheppler informed the defendant that he would be conducting a body search based on the odor of marijuana allegedly observed coming from the vehicle, while Officer Abel would

⁴³ *Sykes*, 2005 WI 48 ¶14.

⁴⁴ *Id.*

⁴⁵ *Id.* ¶15.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶16.

⁴⁸ *Id.*

⁴⁹ *Id.*

be conducting a vehicle search. However, there is a significant difference between a vehicle search and a body search. While officers may be permitted to search a vehicle without a warrant if there is probable cause to believe the vehicle contains evidence of a crime, even if the search of the vehicle is not incident to an arrest or under exigent circumstances, a body search is more intrusive and requires that officers have established probable cause to arrest prior to conducting a body search.⁵⁰ With respect to Moore, this was the third search.

iii. The circuit court correctly held that the odor of marijuana can form the basis of probable cause; however, that basis has limitations subject to the specific circumstances.

The odor of a controlled substance may provide probable cause to arrest only when the odor is unmistakable and may be linked to a specific person.⁵¹ It is imperative that the officer be able to definitively link the unmistakable odor of marijuana to a specific person and that this linkage be “reasonable and capable of articulation.”⁵² The odor of marijuana in an automobile may provide probable cause to believe the driver of the vehicle is linked to the drug.⁵³ However, the probability of linkage diminishes if the odor is not strong or

⁵⁰ See *State v. Ford*, 211 Wis. 2d 741 at 747-748, 565 N.W.2d 286 (Ct. App. 1997); *State v. Tompkins*, 144 Wis. 2d 116 at 137-138, 423 N.W.2d 823 (1988).

⁵¹ *State v. Secrist*, 224 Wis.2d 201 ¶33, 589 N.W.2d 387 (1999).

⁵² *Id.* ¶30.

⁵³ *Id.* ¶34.

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.⁵⁴

In the present matter, Officers Abel and Scheppler claimed to have smelled an odor of marijuana coming from the vehicle when making contact with the defendant. Neither officer noted whether the smell was strong or recent during their initial contact with the defendant. Further, when the defendant was removed from the vehicle, body camera video confirms that the defendant denied having any knowledge of marijuana in the vehicle and asked officers if they could smell any odor of marijuana on his person; Officer Abel replied that she did not observe an odor of marijuana on the defendant's person.⁵⁵ When searching the vehicle on scene, Officer Abel claimed and noted in her report that she observed an "overwhelming odor of marijuana coming from the area of the center console;" however, as noted previously, a total of less than one tenth of a gram of shake was recovered after multiple searches. Prior to contact with Moore, officers did not observe any smoke coming from the vehicle or any evidence of recent marijuana use.

II. THE CIRCUIT COURT, TAKING INTO ACCOUNT THE STATE'S ARGUMENTS FOR LAWFUL ARREST, CORRECTLY CONCLUDED THAT UNDER THE TOTALITY OF CIRCUMSTANCES, OFFICERS LACKED PROBABLE CAUSE TO CONTINUE TO CONDUCT SEARCHES OF MOORE.

The primary issue is whether the alleged odor of marijuana from the vehicle Moore was driving (which was determined to not be his vehicle), but not his person, provided

⁵⁴ *Id.*

⁵⁵ R. 21:10.

sufficient probable cause to arrest him. The circuit court correctly concluded there was insufficient probable cause established for Mr. Moore's arrest and the subsequent body search that yielded cocaine and fentanyl. Under *Secrist*, probable cause diminishes if the source of the odor of marijuana is not near the person. Both officers stated the odor only emanated from the vehicle, not from Mr. Moore himself.

The State asserts that the odor of marijuana coming from the car, combined with the fact that Mr. Moore was the driver and sole occupant, is sufficient to constitute probable cause to arrest under *Secrist*. They justify this assertion with *State v. Secrist* without taking into account the fact that the officers cited the odor as coming only from the vehicle, not Mr. Moore. Mr. Moore being the vehicle's only occupant does not sufficiently connect him to the odor if it is not near his person.

The State argues that three additional facts contributed to a finding of probable cause: the CBD vape pen, the liquid allegedly thrown out Mr. Moore's window before the stop, and the observation that Mr. Moore ran into the curb as he pulled the vehicle to a stop. However, the officers reported no signs of intoxication as contributing to their finding of probable cause. None of these three facts make it any more likely that the odor of marijuana was coming from Mr. Moore's person.

The court has addressed each of these facts in turn. When Mr. Moore told the officers he was in possession of a CBD vape, it gave a legal, reasonable explanation for the odor in question. Further, Mr. Moore stated the vehicle was not his, but was his brother's rental car. This was supported by the registration found by the officers. Mr. Moore also

provided this as a possible explanation for the odor. Though the officers are not obligated to believe Mr. Moore, they must note he has provided legal explanation for the odor. In a totality of circumstances determination of probable cause, a legal explanation for the odor is certainly relevant.

The court briefly addressed the liquid thrown out the window as well. It held the liquid was never shown to bear on any question presented in the motion to suppress. The officers determined the liquid was not alcohol. Lastly, the court noted neither the State, nor the officers, presented any signs of Mr. Moore's intoxication as contributing to their determination of probable cause to arrest. They also do not cite any other bad driving as contributing.⁵⁶ Therefore, the court found none of the facts cited by the State as being sufficient to constitute probable cause to arrest Mr. Moore.⁵⁷

In order for the officers to have established probable cause to arrest using the odor of marijuana and nothing else, they would have had to find probable cause to arrest Mr. Moore for a marijuana related offense prior to conducting the search of his body for other contraband. There was no such probable cause to arrest. The circuit court found, based on Officer Scheppler's statement that they were searching Mr. Moore based on the odor of marijuana and the fact that a pat down for weapons had already occurred, that the second search of Mr. Moore's person was indeed a search for contraband.

⁵⁶ *Id.*

⁵⁷ *Id.* ¶16.

The court held that the potential for the odor of marijuana providing probable cause had diminished at the time the search was initiated since Mr. Moore explained the odor possibly came from his CBD vape or from the vehicle that was not his. The ownership of the vehicle had been confirmed as belonging to a rental car company by the officers.⁵⁸ The odor did not appear to be coming from Mr. Moore as he stood outside the vehicle. No significant amount of marijuana was ever found on his person or in the vehicle. The probable cause to arrest Mr. Moore did not exist independent of the fruits of the subsequent search of his person. There was no probable cause to arrest until after the officers had already searched the vehicle for marijuana and found none. No additional evidence or articulable facts aside from the alleged odor of marijuana have been offered by the State as justification for the search of Mr. Moore.

Officers Abel and Scheppler lacked probable cause to arrest Mr. Moore, and their search of his person was therefore a violation of his Fourth Amendment rights. The evidence collected as a result of this illegal search should be suppressed.

Based on the foregoing, this Court should affirm the circuit court's decision.

CONCLUSION

The order suppressing evidence should be affirmed.

⁵⁸ *Id.*

Dated at Middleton, Wisconsin, February 21, 2022.

Respectfully submitted,

QUAHEEM O. MOORE, Defendant

TRACEY WOOD & ASSOCIATES
6605 University Avenue Suite #101
Middleton, Wisconsin 53562
(608) 661-6300

BY: Electronically signed by Joshua Hargrove

JOSHUA HARGROVE

State Bar No. 1086823

joshua@traceywood.com

BY: Electronically signed by Tracey A. Wood

TRACEY A. WOOD

State Bar No. 1020766

tracey@traceywood.com

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: February 21, 2022.

Signed,

BY: Electronically signed by Joshua Hargrove

JOSHUA HARGROVE

State Bar No. 1086823

joshua@traceywood.com

CERTIFICATION

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; 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.

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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: February 21, 2022.

Signed,

BY: Electronically signed by Joshua Hargrove

JOSHUA HARGROVE

State Bar No. 1086823

joshua@traceywood.com

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: February 21, 2022.

Signed,

BY: Electronically signed by Joshua Hargrove

JOSHUA HARGROVE

State Bar No. 1086823

joshua@traceywood.com