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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

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

The State renews the arguments made in its opening brief. Unless expressly conceded, the State opposes the arguments raised in Moore's response brief.

The parties agree that the dispositive question is whether officers had probable cause to believe that Moore used or possessed marijuana when they searched Moore's person. (Moore's Br. 13–15.) Moore argues that the search was not supported by probable cause. (Moore's Br. 5, 17–19.)

Officers had probable cause to justify the search of Moore's person based on the totality of the circumstances and reasonable inferences drawn therefrom. *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551 (probable cause is an objective determination based on the information available to officers at the time).

An odor of raw marijuana emanated from the cabin of a vehicle of which Moore was the driver and sole occupant. This odor was strong enough that both investigating officers detected the odor while standing at different spots outside the vehicle. (R. 23:13, 20, A-App. 117, 124; Ex. 1 at 4:20–25.) As the Wisconsin Supreme Court has explained: "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." *State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999). "We believe a common sense conclusion when an officer smells the odor of a controlled substance is that a crime has probably been committed." *Id.*

Moore's position is that this case isn't the "normal" one in which probable cause exists to search the driver and sole occupant of a vehicle exuding the strong odor of marijuana. Relying on other language in *Secrist*, Moore argues that

officers lacked probable cause because (1) Officer Abel agreed with Mr. Moore during the stop that she could not smell marijuana on him as he was standing outside the vehicle; and (2) the vehicle was not Moore's, it was his brother's. See *Secrist*, 224 Wis. 2d at 218 (“The probability diminishes if . . . a source of the odor is not near the person . . . or if the person offers a reasonable explanation for the odor.”). (Moore's Br. 5, 17–19.)

As acknowledged in the opening brief, these facts “diminish” to some degree the probability that Moore committed a marijuana-related crime. *Secrist*, 224 Wis. 2d at 218. But probable cause does not require “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 (citation omitted). The totality of the circumstances known to the officers supported probable cause to conduct the search incident to arrest, despite the facts Moore cites. These facts do not undermine the probable cause determination for at least two reasons.

First, the fact that Officer Abel did not smell on Moore's person the same odor she and Officer Scheppler detected coming from inside the vehicle means less in this case because the odor was of *raw* marijuana. *Secrist* involved the odor of *burnt* marijuana. 224 Wis. 2d at 205 (marijuana cigarette and “roach clip” found in ashtray). Smoke and the odors associated with burnt marijuana are more likely to permeate clothing than the mere odor of raw marijuana. The fact that the odor of *raw* marijuana did not adhere to Moore's clothes and body like burnt marijuana is unsurprising.

Second, the fact that the vehicle was leased by Moore's brother does not mean that Moore had nothing to do with the marijuana odor detected in the vehicle. The fact remains that Moore was the person using the vehicle and the only person in the vehicle when officers detected the odor of marijuana coming from the vehicle. The inference that Moore's brother

was responsible for the odor, and that Moore had no connection to it, is not the only inference—or *even the most reasonable one*—that may be drawn from this situation.

Under these circumstances, the fact that Moore was the sole occupant and driver of a vehicle from which the strong odor of raw marijuana emanated gave officers probable cause to conduct a search of Moore’s person incident to arrest.

And unlike in *Secrist*, additional objective facts bolstered the probable cause determination in this case. These included the discovery of a vape pen on Moore’s person that he uses to consume either CBD or THC in liquid form, and Officer Abel’s observation of a liquid being thrown out the window of the vehicle before Moore pulled over to comply with the traffic stop.

As discussed, officers found a vape pen on Moore’s person during the initial pat-down.¹ Officer Abel’s exchange with Moore about the pen established that Moore uses it to consume cannabinoids, and gave officers reason to suspect he uses the pen to consume THC.

Having detected the odor of marijuana coming from the vehicle, Officer Abel asked Moore (loud and clear) if he used the pen to vape THC. When, after several moments, Moore didn’t respond, the officer asked again, and Moore said the vape was “a CBD vape.” (R. 23:15, 21, A-App. 119, 125; Ex. 1 at 3:05.) Of course, officers were not required to accept this statement at face value. *State v. Colstad*, 2003 WI App 25, ¶ 21, 260 Wis. 2d 406, 659 N.W.2d 394. Rather, taking into account the odor of marijuana from the vehicle, and Moore’s

¹ As noted in the opening brief, this initial frisk for officer safety was lawful, and Moore does not argue otherwise. *State v. Johnson*, 2007 WI 32, ¶¶ 21–33, 299 Wis. 2d 675, 729 N.W.2d 182 (pat-down search is authorized when suspected crime is associated with possession of weapons).

initial silence when asked about THC use, officers had reasonable grounds to suspect that Moore is a THC user.

The discovery of a vape pen used to consume either CBD or THC in liquid form also offered a reasonable explanation for Officer's Abel's observation of Moore throwing a liquid from the drivers' window, and of liquid on the inside of the driver's side door. The officer suspected Moore was disposing of an alcoholic beverage, but she soon discovered that neither Moore nor the inside of the vehicle smelled of alcohol.

Whatever the liquid was that Moore threw out the window, it was apparently not something he wanted the officer to find in a traffic stop.² Where a vape pen was discovered on Moore's person, the objective facts supported a reasonable inference that the liquid Moore disposed of was vaping liquid containing THC or another illegal substance. The fact that the officer did not consider this possibility at the time does not undermine this analysis. *See Lange*, 317 Wis. 2d 383, ¶ 20 (probable cause is an objective determination). Further, the observation that Moore ran the curb when he pulled the vehicle over provides some additional support for the search. Though not sufficient of itself to prove that Moore was driving impaired, this conduct is consistent with the possibility that he was driving under the influence of THC.

As noted, the State does not argue that vaped CBD or THC or unvaped liquid was the source of the odor of raw marijuana. No evidence was presented at the hearing about the odor, if any, of the vape pen, or of vaped CBD or THC. Rather, these facts—the vape pen used to consume cannabinoids in liquid form and the observation of a liquid being disposed of before the traffic stop—support a reasonable inference that Moore uses or was using THC. And this

² When Officer Abel asked about the liquid she observed, Moore had “no explanation really” for it. (R. 23:19–20, A-App. 123–24.)

inference bolsters the reasonableness of the determination that Moore probably possessed or used marijuana where he was the driver and sole occupant of a vehicle from which the strong order of raw marijuana emanated.

Moore notes repeatedly that only marijuana shake³ was found during the search of the vehicle. (Moore's Br. 13, 16, 19.) But what Officer Abel ultimately found during the search of the vehicle—Abel apparently had not completed the vehicle search when Officer Scheppler called her over to assist with the search of Moore (R. 23:7–8, A-App. 111–12; Ex. 1 at 11:35)—is not relevant to whether officers had probable cause to conduct a search incident to arrest. Just as the State may not rely on observations (the bulge around Moore's belt buckle, for example) or other evidence collected during the search in arguing that probable cause existed to conduct the search, Moore may not rely on the fact that “only” shake was ultimately found in the vehicle to argue that probable cause did not exist.

As argued herein and in the opening brief, the search that uncovered illegal drugs packaged for distribution was a lawful search incident to arrest because objective facts and reasonable inferences therefrom supported probable cause to believe that Moore used or possessed marijuana.

This Court should reverse the order granting Moore's suppression motion and remand the case for further proceedings.

³ “[A] poor-quality of marijuana, usually referring to the ‘shaken-off’ weed found at the bottom of the bag, the pot dust sold at lower prices because of the high content of seeds and stems.” <http://onlineslangdictionary.com/meaning-definition-of/shake> (accessed May 20, 2022).

Dated this 22nd day of April 2022.

Respectfully submitted,

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FORM AND LENGTH 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 1,582 words.

Dated this 22nd day of April 2022.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER

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 22nd day of April 2022.

Electronically signed by:

Jacob J. Wittwer
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