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.

RESPONSE TO PETITION FOR REVIEW

Respectfully submitted,

QUAHEEM O. MOORE,
Defendant-Respondent

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The State of Wisconsin requests review of the Court of Appeals' decision in *State v. Quaheem 0. Moore,* case number 21 AP 938-CR (Wis. Ct. App. July 28, 2022). In that decision, the Court of Appeals upheld an order by the trial court suppressing evidence. This decision was based upon the fact specific record adduced at the suppression hearing and the findings made by the trial court.

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

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.

In an unpublished opinion, the District IV Court of Appeals panel affirmed the trial court's decision to suppress based upon a record made in the trial court. The appellate court, applying this Court's decision in *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999) to the fact specific case of Moore, affirmed the trial court's decision. Due to the

paucity of evidence presented by the State at the suppression hearing and the information garnered and employed upon the scene by officers, the court affirmed the trial court's decision and concluded that the State had not proven at the suppression hearing that the odor of marijuana was "unmistakable" under *Secrist*.

Contrary to the position of the State as a basis for its petition, the Court of Appeals did not use an elevated standard in finding lack of probable cause; it simply deferred to the fact specific analysis rendered by the trial court and found the State's evidence tendered at the hearing to be lacking and thus unable to substantiate the probable cause needed to prevail. Moreover, the State carries the burden of establishing that probable cause existed to believe that Moore was committing or had committed a crime—to that end, it failed. (***State v. Blatterman***, 2015 WI 46, 362 Wis. 2d 26.)

STATEMENT OF THE ISSUES

In *Secrist,* this Court held that 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. (***State v. Secrist****,* 224 Wis.2d 201 ¶ 33, 589 N.W.2d 387 (1999).) 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." (*Id.* ¶ 30.) The odor of marijuana in an automobile may provide probable cause to believe the driver of the vehicle is linked to the drug. (*Id.* ¶ 34.) However, the probability of linkage 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. (*Id.*)

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. (R. 21:10.) 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, 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. The appellate court affirmed the findings of the trial court based upon the record provided.

STATEMENT ON WHY CRITERIA SUPPORTING REVIEW IS NOT MET

1. The Court of Appeals did not misread *Secrist*; it applied *Secrist* to the extremely specific facts of Moore's case and found the State's attempt to meet its burden to establish probable cause to be lacking. The Court of Appeals' opinion is unequivocally not in conflict with the *Secrist* decision of this Court, and thus Wis. Stat. Sec. 809.62(1r)(d) does not apply.

2. The appellate court's decision is based upon a specific and narrow set of facts unlikely to recur. Further, the appellate court applied the standard established in *Secrist* to this set of facts in a clear manner which does not require additional clarification from this Court, and therefore Wis. Stat. Sec. 809.62 (1r)(c) does not apply.
3. The opinion, while citable for extremely limited reasons, is unpublished and therefore lacks binding authority. Further, due to its fact-specific application it would not cause confusion among judges, lawyers and officers—such a pronouncement is hyperbolic. Simply put, the State failed to meet its burden to establish probable cause based upon this narrow set of facts unlikely to recur or cause confusion due to an unpublished decision. The State also faults the Court of Appeals for noting the State's concession that THC and CBD smell the same and relying on the fact that there was an innocent explanation for the smell that was unrefuted by the State's evidence at the suppression hearing because the State did not argue that on appeal. The Court of Appeals is permitted to consider the entire record, just as the trial court did. Credibility decisions are not to be reversed on appeal unless they were based upon an erroneous exercise of discretion. The trial court weighed the evidence, made credibility determinations, and suppressed the evidence. This Court should not take a case simply to permit the State to take another position on appeal that it did not take in the trial court. This was a fact- specific non-binding decision where the issue is unlikely to recur. Such decisions are not proper

ones for the Wisconsin Supreme Court to take. This is not an issue likely to recur due to the specific facts in this one case and the fact that this decision is non-binding.

STATEMENT OF THE CASE

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. (R. 11:1-5.) Upon initiating the traffic stop, Officer Abel claimed that she observed a liquid spray coming from the driver's side window. (R. 23: 19-20.) 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." (R. 23:20.) 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. (R. 23:19.) 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. (R. 23:27.)

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. (R. 23:21.) Officer Abel

questioned whether the defendant had consumed any alcohol, and he informed her he had not consumed any alcoholic beverages that day; Officer Abel indicated she could not smell alcohol coming from the defendant or in the vehicle. (R. 23:25-26.) 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. (R. 23:29-20.) The defendant continued to deny having thrown anything from his window or having any marijuana in the vehicle. (*Id.*) 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. (R. 23:28.) 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. (R. 23:22.) 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. (R. 5:3.)

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. (R. 23:7-10.) 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. (*Id.*) Officers placed Moore in handcuffs for officer safety but informed Moore that he was not under arrest at that time and that he was being detained. (*Id.*) 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. (*Id.)* Moore was then subsequently arrested for possession of cocaine. (*Id.*; R. 5:3.) 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. (*See id.*)

Subsequently, on November 17 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. (R. 5:1-2.)

ARGUMENT

The Court of Appeals in its analysis assessed whether (1) officers had probable cause to believe a crime was committed based solely on the odor they detected. Because, as the record established, officers could not state that it was unmistakably marijuana, or assert any training to identify or differentiate the odor, as *Secrist* requires, the Court of Appeals found that the State did not establish probable cause. Second, the Court considered whether, based upon the totality of circumstances, including testimony of officers, their observations, information garnered on the scene and what officers testified as to what they took into account, and other facts known to the officers, probable cause existed to believe a crime had been committed. Based upon the record created in the trial court and findings of fact made by the trial court, the Court of Appeals found that it did not. Due to the State's proffering failing to meet the threshold of the existence of probable cause to believe a crime was committed, the Court did not move to the next step to address whether there was

probable cause to believe that Moore was the person who committed the crime. Simply put, because the State did not provide sufficient evidence to substantiate that the facts available to the officers established probable cause to believe that a crime had been committed, in accordance with *Secrist*, the analysis of the officers' inability to even "link" the odor of marijuana in the vehicle to Moore was unnecessary.

The State also faults the Court of Appeals for recognizing the State's concession that THC and CBD smell the same and noting the fact that there was an innocent explanation for the smell that was unrefuted by the State's evidence at the suppression hearing. Because the State did not mention this on appeal, the State now faults the Court of Appeals for noting this issue in its decision. A higher Court is permitted to consider all evidence in the record, and simply because the statements of the prosecutor in the trial court hurt the State's case on appeal does not mean the Court should not have considered them. It was the State's burden to establish that the odor was unmistakable, and that burden was not met. There was also zero evidence adduced to explain the smell (which was not unmistakable), and the evidence showed that Moore had not ingested THC. Moreover, the Court of Appeals correctly, in accordance with *Secrist*, notes the State's failing to elicit any testimony about (1) the officers' training and/or experience in detecting the odor of THC, and/or (2) the officers' ability to distinguish the odor from other odors, which substantiates unmistakability. That coupled with the State's insistence on drawing unfounded inferences based on the presence of a vape pen for CBD further underscore the State's paucity of evidence to establish probable cause in accordance with the *Secrist* standard based upon the specific facts of this case.

A trial court is entrusted with credibility determinations and choosing between conflicting versions of evidence when determining probable cause at a suppression hearing in a criminal case. (***State v. Pfaff***, 269 Wis.2d 786 (Ct. App. 2004).) The trial court did what it was supposed to do, and the Court of Appeals did not overturn that decision, as it was not an erroneous exercise of discretion.

CONCLUSION

In conclusion, the unpublished Court of Appeals decision is based upon a narrow set of facts unlikely to recur. The Court of Appeals applied *Secrist* to the narrow set of facts and based upon the scant evidence adduced by the State to substantiate probable cause to arrest, it affirmed the decision of the trial court to suppress. This case is highly specific and narrow and unpublished. The *Secrist* standard was not elevated but applied prudentially, and the State was found lacking. This is not the case that requires review as (1) it is not in conflict with this Court's precedent and (2) it is highly unlikely to cause any confusion due to its fact specific analysis and limited persuasiveness due to it being unpublished.

Dated at Middleton, Wisconsin, September 9, 2022.

Respectfully submitted,

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2535 words.

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

Dated: September 9, 2022.

Signed,

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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.

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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.

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