STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP938-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

QUAHEEM O. MOORE,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING 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-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Defendant-Respondent Moore accuses the State of trying to weaken *Secrist*'s[1] standard for search and arrest based on the odor of marijuana. But make no mistake: It's Moore who seeks to *overrule Secrist* to prohibit any search or arrest based on the odor of marijuana alone.

Secrist has long held that "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 . . . ."[2] Moore maintains that the odor of marijuana is no longer "unmistakable," and thus no searches or arrests may issue, because the odor might be hemp, the legal, odor-transmitting plant that may contain CBD.[3] (Moore's Br. 20–24.) He argues this is the case even when, as here, the suspect does not assert to police that the odor is hemp when confronted about it; even when there is no specific evidence that the odor is hemp; and even when nothing in the record, in case law, or in government documents appears to show how common—*or uncommon*—it is for Wisconsin motorists to keep and consume CBD in their vehicles in the manner THC is kept and consumed—by possessing the odiferous raw plant and smoking it.

Moore's theory about the effect of legal hemp on searches and seizures is incorrect. The question is whether the introduction of legal hemp renders the odor of marijuana no longer "unmistakable" under *Secrist*. It does not. "Unmistakable" continues to mean what the State believes it has all along: distinctive and easily recognizable, such that it

---

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

[2] *Id.* at 217–18.

[3] The parties agree that THC and CBD have no odor and that the odor associated with marijuana and hemp comes from the raw or burnt plant. (Moore's Br. 20.)

is *unlikely* to be mistaken for something else. This meaning is consistent with multiple dictionary definitions and established search and seizure principles. *Secrist* equated the requirement that the odor of marijuana be "unmistakable" with probable cause, a standard that "deals with probabilities, not certainties."[4] That definition allows for the possibility of some degree of error—that the distinctive, easily recognizable odor of marijuana might, in fact, be hemp or another substance.

Moore and the court of appeals would define the word differently: as something *incapable* of being mistaken for something else. But the court itself all-but admitted that this narrow, rigid reading of "unmistakable" results in a standard for search and arrest based on the odor of marijuana that is greater than probable cause[5] and, in the State's view, closer to beyond a reasonable doubt.

Without more, the *mere possibility* that the odor could be legal hemp does not defeat probable cause for search and arrest. An officer's detection of the distinctive, easily recognizable odor of marijuana may therefore still be "unmistakable"—that is, *unlikely* to be mistaken for legal hemp or something else.

---

[4] *State v. Gant*, 2015 WI App 83, ¶ 12, 365 Wis. 2d 510, 872 N.W.2d 137.

[5] *State v. Quaheem O, Moore*, No. 2021AP938-CR, 2022 WL 2978311, ¶ 31 n.11 (Wis. Ct. App. Jul. 28, 2022) (unpublished). (noting "tension between *Secrist*'s requirement that the odor of marijuana be 'unmistakable' and the quantum of evidence normally required to establish probable cause"). (A-App. 15–16.) Moore argues that the court of appeals *did not* apply a heightened standard for determining the lawfulness of the arrest. (Moore's Br. 28–33.) But even the court of appeals said that's what it did in the above footnote, which Moore doesn't address.

What Moore really seeks is overturning *Secrist*, but he fails to meet the heavy burden necessary to depart from *stare decisis*. Applying *Secrist's* long-standing standard for arrest based on the odor of marijuana, this Court should reverse the court of appeals decision and remand to the circuit court with instructions to vacate the suppression order.

ARGUMENT

I. *Secrist* remains good law, and this Court should reaffirm its principles.

The State opposes Moore's response brief arguments and, unless expressly conceded, renews the arguments made in its opening brief. Moore's response brief frequently mischaracterizes those arguments, but the point should be clear: *Secrist*'s standard remains workable and consistent with probable cause. And the court of appeals erred in failing to give deference to the circuit court's relevant findings under that standard.

A. The mere existence of legal hemp does not render *Secrist* unworkable in practice.

Moore casts himself as defending *Secrist*'s "unmistakability" requirement against what he views as the State's attempt to lower that requirement. But Moore's interpretation of *Secrist*—not unlike the court of appeals' interpretation—would render *Secrist* a dead letter; the odor would never be "unmistakable," as Moore would define it, given the existence of legal hemp. (Moore's Br. 22.)

To be clear, Moore is asking this Court to overrule *Secrist*'s holding that the odor of marijuana alone may provide probable cause to arrest a person linked to the odor *and* to search a vehicle; both standards turn on whether the odor is "unmistakable." *State v. Secrist*, 224 Wis. 2d 201, 210, 17–18, 589 N.W.2d 387 (1999). His position thus appears to be that

the existence of legal hemp renders *Secrist* "unworkable in practice." *Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216 (citation omitted) (listing grounds for departing from precedent).

But "any departure from the doctrine of stare decisis demands special justification." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citations omitted). Thus, a party asking this Court to overrule a prior interpretation carries a heavy burden. *State v. Friedlander*, 2019 WI 22, ¶ 18, 385 Wis. 2d 633, 923 N.W.2d 484. The party must "show not only that [the decision] was mistaken but also that it was objectively wrong" *Id.*

Moore cannot meet this heavy burden. The meaning of "unmistakable" that is most consistent with probable cause—that the odor is distinctive and easily recognizable such that it is *unlikely* to be mistaken for something else—already admits for the chance that the odor may be that of legal hemp or something else. That is certainly true, when, as in this case, the suspect doesn't even claim that the odor is hemp when confronted by officers about it. Moreover, there is nothing in this record, in case law, in government documents, or in anything else that this Court might rely on that would show how frequently—*or not*—Wisconsin drivers and passengers now keep and smoke hemp plant in their vehicles, and how that compares with the frequency with which the marijuana plant is kept and smoked there. Moore thus cannot show that *Secrist*'s holdings are "unworkable in practice" and should be overturned because of the mere existence of legal hemp.

Mischaracterizing the State's arguments, Moore asserts that the State requests "a *per se* rule to the *Secrist* standard of unmistakability" and that the State "is implicitly saying *Secrist* was wrong and using this case as an attempt to make new law." (Moore's Br. 17, 19–21.) To the contrary, the

State asks the Court to adopt the same well-accepted meaning of "unmistakable" that Moore himself describes in his brief: "This Court in *Secrist* held that the odor of marijuana is unmistakable if it has the distinctive and recognizable smell such that it is unlikely to be something else." (Moore's Br. 32.)

B. Under *Secrist*, whether the odor is "unmistakable" to the officer is a question of fact for the circuit court; the court of appeals erred by treating the issue as one of law, by ignoring the circuit court's factual findings, and by misreading *Secrist* to mandate evidence of the officer's training and experience in all marijuana odor cases.

In addition to misreading the meaning of "unmistakable," the court of appeals also erred by treating the question of whether the odor of marijuana is unmistakable as a legal standard, like probable cause, and then reviewing the issue *de novo* on appeal. It further erred in reading *Secrist* to mandate testimony in every case about the officer's training and experience to prove "unmistakability." (State's Op. Br. 34–37.) Moore appears to endorse the court of appeals' approach by reasserting its conclusion that the odor was not "unmistakable" for the absence of officer testimony about training and experience in detecting the odor of marijuana. (Moore's Br. 26–27.)

As *Secrist* itself shows, *the circuit court* assesses whether the officer made a clear and certain identification of marijuana—whether it was "unmistakable" to him or her—based on the officer's testimony at the hearing and the court's assessment of his or her credibility. *See Secrist*, 224 Wis. 2d at 216. The circuit court—not an appellate court—assesses whether the officer actually detected the odor of marijuana to the level of certainty required by *Secrist*.

The court of appeals erred by ignoring the circuit court's factual findings and treating "unmistakability" as a legal issue it could decide on its own. On a motion to suppress evidence, an appellate court applies the clearly erroneous standard to the circuit court's findings of fact. *State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W.2d 920.

Here, the State presented evidence that both officers detected the odor of raw marijuana coming from inside the truck. (R. 23:5, 13, A-App. 29, 37; Ex. 1 at 4:25.) The court credited this testimony and found that Officer Abel detected the "strong scent" of marijuana, and that Officer Scheppler told Moore that he also detected it. (R. 16:1–2, A-App. 21–22.) While the circuit court did not explicitly find that the odor was "unmistakable," the court's explicit findings and implicit credibility determinations are consistent with such a determination: the court *believed* Officer Abel's statement about detecting the "strong smell" of marijuana, and that Officer Scheppler confirmed her detection of the odor to Moore. (R. 16:1, A-App. 21.) Only after making these findings supporting probable cause did the court conclude that officers subsequently *lost* probable cause when they did not detect the odor on Moore's person after he got out of the vehicle. (R. 16:1–4, A-App. 21–24.)

Had the court of appeals examined these findings and applied the correct standard of review, it would have upheld the explicit and implicit findings that the officers did, in fact, detect the odor of marijuana and that, at least as to Officer Abel's identification of a "strong odor" of marijuana (confirmed by Officer Scheppler), the odor was unmistakable.[6] Not once does Moore mention the circuit court's factual

[6] Perhaps more likely, however, the court would have simply declined to take up *sua sponte* the unbriefed issue of whether the odor was "unmistakable."

findings in arguing that the State did not meet its burden at the suppression hearing. (Moore's Br. 24–28.)

On the matter of the officer's training and experience, *Secrist* treated it as an issue relevant to the officer's credibility, not as an evidentiary requirement. The *Secrist* Court stated that "the extent of the officer's training and experience in dealing with the odor of marijuana" "is important in these cases" because such testimony "bears on the officer's credibility in identifying the odor . . . ." *Secrist*, 224 Wis. 2d at 217. This passage does not mandate such testimony in every case—but it does serve as a warning to the State that, if such evidence is *not* produced, the circuit court may not find the officer credible or believe that the odor was "unmistakable" to him or her. The court of appeals overread this language to mandate in every case testimony about officer training and experience in detecting the odor of marijuana.

II. Applying the correct legal standards to the facts, officers had probable cause to arrest Moore.

Moore argues that the State did not prove at the suppression hearing that the officer had probable cause to arrest him under the totality of the circumstances. (Moore's Br. 25–28, 33–37.) But Moore's arguments about whether officers had probable cause are largely based on his misreading of *Secrist* and his refusal to acknowledge the circuit court's factual findings.

Applying a proper reading of *Secrist* and search and seizure principles to the facts, this Court should conclude that the officers' search of Moore was lawful.

A. The officers had probable cause to arrest Moore based on the odor of marijuana alone.

First, the officers had probable cause to arrest Moore under *Secrist* based on Officer Abel's detection of the "strong smell" of raw marijuana alone, confirmed by Officer Schlepper. Under *Secrist*, "[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." *Secrist,* 224 Wis. 2d at 218. Here, two officers detected the odor of raw marijuana coming from the truck cabin of which Moore was the driver and sole occupant. The circuit court found following the suppression hearing that Officer Abel detected the "strong smell" of raw marijuana on approaching the truck, and that Officer Scheppler said on the scene that he also detected the odor of marijuana. (R. 16:1–2, A-App. 21–22.)

While the circuit court ultimately granted the motion to suppress, its findings as to Officer Abel's detection of the "strong smell" of marijuana coming from a vehicle of which Moore was the driver and sole occupant provided officers probable cause to arrest. The circuit court believed Officer Abel's testimony that she detected the "strong smell" of raw marijuana and acknowledged that this gave officers probable cause to search the truck and—at that moment--to arrest Moore. (R. 16:1–2, A-App. 21–22.) "The strong odor of marijuana emanating from a vehicle being driven by the defendant," the circuit court explained, "forms the basis for probable cause" to conduct a search incident to arrest. (R. 16:1–2, A-App. 21–22.)

As noted, the circuit court concluded that officers subsequently lost probable cause to arrest Moore because Officer Abel stated that she did not smell the odor of marijuana on Moore's person when he was outside of the

truck. (R. 16:4, A-App. 24.) But this fact did not significantly diminish Moore's ties to the odor because (1) the odor was of raw marijuana, and so there was no smoke to permeate Moore's clothing; and (2) *Secrist* concerns that when "the source of the odor" is not "near the person," it diminishes the justification for an arrest have less application when, as here, Moore was the sole occupant of the vehicle. Granted, the fact that the vehicle was also not Moore's suggests another potential source for the odor. But, again, officers could (and did) reasonably conclude that it was much more likely that Moore, not his brother, was linked to the odor because he was the person operating the vehicle when the officers detected it.

B. The officers also had probable cause to arrest Moore based on the totality of the circumstances.

Second, officers also had probable cause to arrest Moore under the totality of the circumstances, which included facts in addition to the detection of the "strong smell" of marijuana coming from the vehicle.

These additional facts included the discovery of a vape pen Moore said he used for CBD and the observation of Moore disposing of a non-alcoholic liquid before the traffic stop. As the State argued, these facts created reasonable inferences that bolstered probable cause for the arrest. (State's Op. Br. 40–42.) The facts supported logical inferences of THC possession that served to reinforce evidence of THC possession based on the "strong smell" of marijuana Officer Abel detected in a truck of which Moore was the driver and sole occupant. (State's Op. Br. 40–42.)

Moore argues that the court of appeals appropriately declined to address Officer Abel's observation of the liquid being tossed out the window in determining whether probable cause existed. (Moore's Br. 35–37.) The court of appeals

refused to consider this fact known to the officer because the State did not argue its significance below. (A-App. 18–19.) But an appellate court determines *de novo* whether the facts elicited at the hearing and found by the circuit court constitute probable cause based on the totality of the circumstances known to the officers—whether those facts were "argued" by a party in the circuit court or not. *See State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981). The State therefore respectfully asks this Court to consider the officer's observation of the liquid being tossed out the window—which supported a strong inference that Moore was attempting to dispose of a liquid containing something incriminating—in assessing the circumstances.

* * * *

In sum, this Court should reaffirm *Secrist*'s principles. The mere existence of legal hemp does not render *Secrist* a dead letter; the odor of marijuana may be "unmistakable" under the accepted dictionary definition of the word that is most consistent with probable cause. Moore fails to show that, because of legal hemp, this Court should overrule *Secrist* and depart from *stare decisis*. Further, the court of appeals erred in treating "unmistakability" as a legal issue and ignoring the circuit court's factual findings, which indicated that the odor was unmistakable in this case. Applying the correct legal standards to the facts, this Court should conclude that officers had probable cause to arrest Moore.

CONCLUSION

The court of appeals' decision upholding the circuit court's order suppressing evidence should be reversed. The case should be remanded with instructions to vacate the order suppressing evidence and reinstate the criminal complaint.

Dated this 29th day of March 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

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 2,945 words.

Dated this 29th day of March 2023.

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 Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of March 2023.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General