STATE OF WISCONSIN

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

DISTRICT II

Case No. 2022AP0634-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WARNER E. SOLOMON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE WYNNE P. LAUFENBERG, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Warner E. Solomon pleaded no contest to possession of cocaine with intent to deliver and possession of a firearm by a felon after a police dog searched the interior of the car Solomon was driving and found cocaine, two guns, and drug paraphernalia in a backpack. Solomon asserts that the search of the car violated the Fourth Amendment so the evidence should have been suppressed. She claims that (1) there was no probable cause of criminal activity, so the search was unlawful; (2) the traffic stop was extended for a dog sniff without reasonable suspicion of criminal activity; and (3) the dog impermissibly entered the car without probable cause of criminal activity.

Solomon's claims all fail because, as the circuit court recognized, there was probable cause of criminal activity after the officer who stopped the car for speeding smelled burnt marijuana coming from the car. Since there was probable cause of criminal activity, the automobile exception to the warrant requirement justified the search of the car, the traffic stop was not impermissibly extended for the dog sniff, and the dog permissibly entered the car to search it.

ISSUES PRESENTED

1. Did the warrantless search of the car violate the Fourth Amendment?

   The circuit court answered "no." It concluded that there was probable cause of criminal activity so the automobile exception to the warrant requirement justified the search.

   This Court should answer "no" and affirm.

2. Did the traffic stop impermissibly extended for the dog sniff?

   The circuit court answered "no." It concluded that since there was probable cause to search the car, the traffic stop was not impermissibly extended when it took a few minutes for the dog to arrive.

   This Court should answer "no" and affirm.

3. Did the dog's immediate entry into the car violate the Fourth Amendment?

   The circuit court answered "no." It concluded that since there was probable cause to search the car, it was permissible for the dog to enter the car to search it.

   This Court should answer "no" and affirm.

4. If the dog search violated the Fourth Amendment, is suppression of evidence required?

The circuit court did not answer because it concluded that the dog search did not violate the Fourth Amendment.

This Court should answer "no" and affirm. Even if the dog search was improper, the evidence would inevitably have been discovered, so it should not be suppressed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

STATEMENT OF THE CASE AND FACTS

Racine County Sheriff's Deputy Anthony Valenti stopped a Dodge Yukon for speeding. (R. 89:4, 7–8, 15.) Deputy Valenti testified that when he got to the driver's side window, he immediately smelled a strong odor of marijuana coming from the vehicle. (R. 89:6.) Deputy Valenti told the driver—Solomon—that his radar indicated that the car was traveling 46 miles per hour in a 30 miles per hour zone. (R. 91:3.) Deputy Valenti also observed that the passenger in the car was not wearing a seatbelt. (R. 91:3.) Deputy Valenti identified Solomon and the passenger—Solomon's brother Devontae—from their driver's licenses. (R. 91:3.) Solomon told the officer that the car belonged to his cousin. (R. 91:3.)

Deputy Valenti returned to his squad car and called for a "cover officer" for backup because he had smelled marijuana in the Yukon. (R. 89:6; 91:6.) Deputy Valenti ran background checks on Solomon and his brother and learned that both had previous drug convictions. (R. 89:18–19.) The cover officer arrived, and Deputy Valenti told him that he stopped the car

for speeding, he smelled marijuana coming from the car, and the car's occupants had prior drug convictions including for possession with intent to deliver. (R. 89:7–8, 23.)

When Deputy Valenti returned to the Yukon, he observed that the odor of burnt marijuana was coming from Solomon's brother. (R. 89:21.) The officers had both Solomon and his brother get out of the car. (R. 89:8.) The officers searched Solomon and detained him in a squad car. (R. 89:8.) The other officer searched Solomon's brother, who admitted to smoking marijuana about an hour before. (R. 89:8, 22.) The officer asked if he had smoked it in the car, and Solomon's brother said he had. (R. 91:7–9.) He said he had smoked marijuana in the car about an hour ago (R. 111; Ex. 2, 13:55–13:58.)[1] Solomon's brother said he had the car, and then picked Solomon up. (R. 91:7; 111, Ex. 2, 16:16–16:27)[2]

Deputy Valenti observed that even after Solomon's brother had exited the car, the car still smelled of burnt marijuana. (R. 89:22.) He began to search the car. (R. 89:8.) He found a plastic bag containing a "large amount" of cash in the car's center console. (R. 89:9, 27.) When the other officer told Deputy Valenti that he was calling for a canine officer, Deputy Valenti stopped searching the car. (R. 89:9–10, 28–29.) Deputy Valenti testified that he had not completed his search when the dog was called. (R. 89:10.)

---

[1] "R. 111, Ex. 2" refers to trial exhibit number 2, video from Deputy Valenti's body camera, which was transmitted as part of the appellate record at R. 111. Citations are to the minute and second at the bottom of the video.

[2] Deputy Valenti testified that Solomon's brother said that he had smoked marijuana an hour before, and that Solomon had then picked him up at work. (R. 89:22.) However, the body camera video shows that Solomon's brother said that he had smoked marijuana in the car, and then he picked up Solomon. (R. 111, Ex. 2, 13:55–13:58, 16:16–16:27.)

A canine officer arrived about six minutes later. (R. 89:29, 39.) The canine officer opened the driver's door to the car and the dog entered the car. (R. 89:12.) A short time later, the canine officer removed a child's backpack from the car. (R. 89:12–13.) Deputy Valenti searched the backpack and found crack cocaine and powdered cocaine, two firearms, a digital scale and some cash. (R. 89:13.) Solomon told the deputy that everything found in the car was his. (R. 89:13.)

The State charged Solomon with two counts of possession of a firearm by a felon, possession of cocaine with intent to deliver, and possession of drug paraphernalia. (R. 1; 17.) Solomon moved to suppress the evidence found in the car. (R. 32; 33.) The circuit court held an evidentiary hearing on the motion, at which Deputy Valenti was the only witness. (R. 89.) The court denied motion after considering the testimony and viewing the video of Deputy Venti's body camera. (R. 91:2, 9–10.) The court concluded that the search of the car was justified under the automobile exception to the warrant requirement because the car was readily mobile and there was probable cause that the car contained evidence of a crime. (R. 91:9.) The court noted that under *State v. Secrist*, 224 Wis. 2d 210, 589 N.W.2d 387 (1999), "the unmistakable odor of THC from an automobile provides probable cause for an officer to believe the automobile contains evidence of a crime." (R. 91:6–7.) The court found that there was probable cause of criminal activity because Deputy Valenti smelled marijuana coming from the car, Solomon and his brother had prior drug convictions, and Solomon's brother admitted that he had smoked marijuana in the car. (R. 91:7.) The court also noted that Deputy Valenti found cash in a plastic baggie in the center console. (R. 91:7–8.)

The court concluded that the traffic stop was not impermissibly extended to wait for the dog, and that the dog search of the interior of the car was improper, because there was probable cause to search the car. (R. 91:8–9.)

After his suppression motion was denied, Solomon pleaded no contest to possession of a firearm by a felon and felon in possession of cocaine as part of a plea agreement in which the additional charges were dismissed but read in at sentencing. (R. 83:2–3, 10–11.) The circuit court imposed a ten-year sentence on the cocaine charge, including five years of initial confinement, and a concurrent four-year sentence, with two years of initial confinement, on the firearm charge. (R. 72:24.) Solomon now appeals. (R. 101.)

STANDARD OF REVIEW

"[W]hether law enforcement officers' conduct violated the Fourth Amendment's protections against unreasonable searches and seizures" present "questions of constitutional fact." *State v. Brereton*, 2013 WI 17, ¶ 17, 345 Wis. 2d 563, 826 N.W.2d 369. A reviewing court will "uphold the circuit court's findings of historical fact unless those findings are clearly erroneous; however, the application of Fourth Amendment principles to the facts found presents a question of law" reviewed independently. *Id.*

ARGUMENT

I. Law enforcement officers were justified in searching the car under the automobile exception to the warrant requirement.

A. Law enforcement officers are justified in searching a vehicle when there is probable cause that it contains evidence of a crime, and the vehicle is readily mobile.

"The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations

omitted). The warrantless seizure of a vehicle is presumptively unreasonable. *Brereton*, 345 Wis. 2d 563, ¶ 24 (citing *United States v. Ross*, 456 U.S. 798, 824–25 (1982)).

However, the "automobile exception" recognizes that under certain circumstances, law enforcement may seize and search a vehicle without a warrant. *Id.* (citing *Chambers v. Maroney*, 399 U.S. 42, 48–52, (1970)). *Id.* ¶ 25. The purpose behind the automobile exception is "to allow officers to seize vehicles upon probable cause, but without a warrant, because doing so serves the substantial state interest of preventing probable criminals from avoiding capture, as well as preventing the removal of incriminating evidence from law enforcement's jurisdiction." *Brereton*, 345 Wis. 2d 563, ¶ 27. Under the automobile exception, "the warrantless search of a vehicle does not offend the Fourth Amendment if (1) there is probable cause to search the vehicle; and (2) the vehicle is readily mobile." *State v. Marquardt*, 2001 WI App 219, ¶ 31, 247 Wis. 2d 765, 635 N.W.2d 188 (citing *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam)).

There is "a strong governmental interest, recognized under the Fourth Amendment, to ferret out crime and conduct necessary investigations before the vehicle and its occupants may be 'spirited away.'" *Brereton*, 345 Wis. 2d 563, ¶ 28 (quoting *Florida v. White*, 526 U.S. 559, 565 (1999)). The "automobile exception," "is intended to strike a balance between the protection of individual rights and the recognition that, when an individual has given law enforcement officers probable cause to believe that a crime is being or has been committed, the individual's Fourth Amendment interests are diminished." *Id.* ¶ 30. "Therefore, as long as officers have probable cause to believe that the vehicle is, or contains, evidence of a crime, warrantless seizures of automobiles may be lawful, provided that they are conducted reasonably." *Id.* (citing *Chambers*, 399 U.S. at 51–

52; *Ross*, 456 U.S. at 824–25; *United States v. Place*, 462 U.S. 696, 707–710 (1983.))

B. The circuit court correctly concluded that there was probable cause that the car contained evidence of a crime.

"[P]robable cause requires that law enforcement officers show that there was a 'fair probability' that the place or container seized (in this case, a vehicle) contained or was itself evidence of a crime." *Brereton*, 345 Wis. 2d 563, ¶ 25 (citing *State v. Carroll*, 2010 WI 8, ¶ 28, 322 Wis. 2d 299, 778 N.W.2d 1; *Chambers*, 399 U.S. at 49.

Here, the circuit court concluded that the information known to officers was sufficient for probable cause. (R. 91:7.) The circuit court found that Deputy Valenti smelled the odor of marijuana coming from the car. (R. 91:7.) And the court recognized that under *Secrist*, 224 Wis. 2d 201, the odor of marijuana coming from a car is sufficient for probable cause to search the car. (R. 91:6–7.) In addition, the court found that Solomon's brother said he had smoked marijuana in the car, and that both Solomon and his brother had prior drug convictions. (R. 91:7.)

Solomon asserts that the information the officers had was insufficient for probable cause. (Solomon's Br. 14–17.) He argues that the facts of this case are distinguishable from those in *Secrist* and a case the *Secrist* court relied on, *State v. Judge*, 645 A.2d 1224 (N.J. Super. Ct. App. Div. 1994). (Solomon's Br. 14–15.) But while the facts of this case are, of course, not identical to the facts in those cases, the holding and principles of *Secrist* are not limited to the specific facts in *Secrist*. And they plainly apply here. In *Secrist*, the issue was whether the odor of marijuana coming from a vehicle was sufficient for probable cause to arrest the driver. *Secrist*, 224 Wis. 2d at 207. Whether there was probable cause to search the car was not in dispute because the defendant conceded

that "there would have been probable cause to search the defendant's car once the officer smelled the strong odor of marijuana emanating from the vehicle." *Id.* at 210. The Wisconsin Supreme Court in *Secrist* simply noted that "The unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime." *Id.*

Just as in *Secrist*, there was probable cause to search the car in this case. Deputy Valenti, who was trained in distinguishing between the smell of raw and burnt marijuana (R. 89:20–21), testified that he smelled the strong odor of burnt marijuana coming from the car (R. 89:6). Under *Secrist*, that odor alone was sufficient for probable cause to search the car. *Secrist*, 224 Wis. 2d at 210.

Solomon seems to argue that under *Secrist*, since the odor of marijuana was not coming from him but from his brother, there was no probable cause to arrest him based on the odor alone. (Solomon's Br. 15–16.) But it makes no difference whether the officers could properly have arrested Solomon for the marijuana at that point because they did not do so. They had reasonable suspicion based on the odor of marijuana coming from the car and detained Solomon and his brother so that could search the car.[3] The issue is only whether there was probable cause to search the car. Under *Secrist*, there plainly was.

[3] Even if the detention were viewed as an arrest, there would be no violation because the officers could properly have arrested Solomon for the speeding offense.

Solomon argues that the odor was linked to his brother and there was no evidence that the odor was particularly strong or recent. (Solomon's Br. 16.) But again, an odor in the car is sufficient to search the car. *Secrist*, 224 Wis. 2d at 210. And Deputy Valenti testified that he observed a "strong" odor of marijuana coming from the car. (R. 89:6.)

Solomon argues that there was no probable cause to search the car because his brother told the officers that he smoked marijuana before he got into the car. (Solomon's Br. 16.) But again, the odor of marijuana coming from the car was sufficient for probable cause. *Secrist*, 224 Wis. 2d at 210. And the circuit court found as fact that Solomon's brother told the officers he smoked marijuana in the car. (R. 91:7–9.) Solomon has not shown that the circuit court's factual finding was clearly erroneous, and it was not. The body cam video that the court watched verifies that the court's finding was correct. When the officer asked Solomon's brother if he had smoked marijuana in the car, Solomon's brother answered something along the lines of "mm-hmm." (R. 111, Ex. 2, 13:58.) He then explained that he had been in the car and then had picked up Solomon. (R. 111, Ex. 2, 16:16–16:27.) In any event, the odor of marijuana coming from the car was sufficient for probable cause to search the car. *Secrist*, 224 Wis. 2d at 210.

Solomon argues that the officers were acting on a hunch when they searched the car, and that they searched the car because they learned that Solomon and his brother had prior drug convictions. (Solomon's Br. 16.) But the officers' knowledge of the prior drug convictions was not the only basis for the search. And those convictions added to the probable cause that already existed because of the odor of marijuana coming from the car.

Solomon argues that other factors the officer noted, such as the time of day, and that neither Solomon nor his brother owned the car did not provide probable cause. (Solomon's Br. 17.) But without even considering those factors there was proable cause because of the odor of marijuana, the prior convictions, and Solomon's brother's admission to smoking marijuana in the car.

Solomon argues that the title to a vehicle in the baggie of cash provided an explanation for the cash. (Solomon's Br. 17.) But an officer is not required to accept a suspect's innocent explanation. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). And a baggie of cash can be an indication of drug trafficking. *See e.g.*, *State v. Stank*, 2005 WI App 236, ¶ 34, 288 Wis. 2d 414, 708 N.W.2d 43. And again, there already was probable cause to search the car because of the odor of burnt marijuana coming from the car. The circuit court was therefore correct to deny Solomon's motion to suppress evidence.

II. The traffic stop was not unlawfully extended for the dog sniff because there was probable cause to search the car.

Solomon asserts that the traffic stop was impermissibly extended for the dog sniff. (Solomon's Br. 17–20.) He relies on *Rodriguez v. United States*, 575 U.S. 348, 350 (2015), in which the Supreme Court held that "a police stop exceeding the time to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." (Solomon's Br. 18.) Solomon points out that under *Rodriguez*, "Absent reasonable suspicion that a crime has been committed, a traffic stop becomes unreasonable and unlawful 'if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a traffic ticket.'" (Solomon's Br. 19 (citing *Rodriguez*, 575 U.S. at 354).)

Rodriguez has no bearing on this case because there was reasonable suspicion of criminal activity. In fact, there was probable cause. Therefore, even if the stop was extended to wait for the dog, there was no Fourth Amendment violation. *See e.g.*, *United States v Green*, 897 F.3d 173, 187 (3rd Cir. 2018) (recognizing that since there was reasonable suspicion of criminal activity, "extending the traffic stop to facilitate a dog sniff was permissible" under *Rodriguez*).

Solomon claims that even if there was reasonable suspicion of criminal activity, there no longer was reasonable suspicion after Deputy Valenti "stopped searching the vehicle without finding any new evidence of crime." (Solomon's Br. 19.) He argues that "Any reasonable suspicion based on the odor of marijuana was dispelled when he found neither marijuana nor related paraphernalia during his search." (Solomon's Br. 19.)

Solomon cites no authority for the proposition that reasonable suspicion (or in this case probable cause) is dispelled when an officer performs a quick search of a vehicle, so it is impermissible to then wait a few minutes for a dog to perform a more thorough search. He cites nothing even suggesting that it is impermissible to conduct more than one search of a vehicle when there is probable cause of criminal activity.

Here, Deputy Valenti began to search the car, and he found a baggie with a "large amount" of cash in the center console. He then decided to discontinue the "hand search" of the vehicle and instead have the dog search the car. Deputy Valenti testified that vehicles used for drug trafficking often have "hidden compartments" that "can be missed by basic hand search." (R. 89:8, 23–24.) He said a hand search for evidence in hidden compartments would involve "rip[ping] apart" the car and might have taken 45 minutes. (R. 89:24.) He testified that he "would have continued the search if there was no canine available, but we had one so why not use it as

a tool at my disposal." (R. 89:29.) Deputy Valenti testified that he had not completed his search when the dog was called. (R. 89:10.)

It took around six minutes for the dog to arrive. But since there was probable cause of criminal activity, the short delay did not impermissibly extend the traffic stop. As the circuit court recognized, the initial search by Deputy Valenti and the canine search were justified and did not violate the Fourth Amendment. (R. 91:8–9.) The circuit court was therefore correct to deny Solomon's motion to suppress evidence.

III. The dog's "immediate entry" into the car did not violate the Fourth Amendment.

Solomon claims that the dog's sniff of the car's interior was a search, and that the dog's "immediate entry" into the car rendered it an unreasonable search. (Solomon's Br. 20–22.) He argues that "Deputy Valenti did not find anything illegal during his search inside the vehicle," so "there was no reasonable basis for the canine to immediately enter the vehicle." (Solomon's Br. 22.)

There is no dispute that the dog's sniff of the interior of the car was a search—it plainly was. But the dog's immediate entry into the car did not make the search unreasonable. There was probable cause for the officer, the dog, or both to search the car. The officer smelled a strong odor of burnt marijuana coming from the car, Solomon's brother admitted to smoking marijuana in the car, both the driver and passenger had drug convictions. (R. 91:7–9.) As the circuit court recognized, this information was sufficient for probable cause to search the car. (R. 91:7–9.) Then, when the officer performed an initial hand search of the car, he found a baggie with a large amount of cash in the center console. (R. 91:4.) Solomon is correct that having a baggie with a large amount of cash is not illegal. But "otherwise innocent conduct can

supply the required link in the chain to establish probable cause." *State v. Schaefer*, 2003 WI App 164, ¶ 17, 266 Wis. 2d 719, 668 N.W.2d 760. And a large quantity of cash inside a vehicle suspected of being involved in drug activity is consistent with drug activity and contributes to probable cause. *Stank*, 288 Wis. 2d 414, ¶ 34. In any event, there was probable cause to search the car even without the baggie containing a large amount of cash.

As the circuit court recognized, "It's no surprise that the canine goes into the vehicle immediately because there's already an admission by the passenger that there was THC, that he smoked THC within that vehicle." (R. 91:8.) It makes no difference that the dog did not first sniff the exterior of the car but instead went into the car and searched its interior. There was probable cause to search the car, so a search of the car was justified, whether by an officer or a police dog. The circuit court was therefore correct to deny Solomon's motion to suppress evidence.

IV. Even if this Court concluded that a constitutional violation occurred regarding the dog's search of the car, the evidence found in the background should not be suppressed because the evidence would inevitably have been discovered.

A. The exclusionary rule does not automatically apply when there is a constitutional violation.

The exclusionary rule does not automatically apply following a constitutional violation. *See State v. Burch*, 2021 WI 68, ¶¶ 16–17, 398 Wis. 2d 1, 961 N.W.2d 314. A circuit court does not ordinarily decide whether the exclusionary rule applies or whether an exception to its application applies unless it first determines that the State violated a defendant's Fourth Amendment rights. When the circuit court decides that no Fourth Amendment violation occurred, the issue of

remedy, i.e., the exclusionary rule's applicability, becomes a hypothetical question, which the circuit court would not ordinarily answer. "[C]ourts in general, will not consider a question the answer to which cannot have any practical effect upon an existing controversy." *State v. Leitner*, 2002 WI 77, ¶ 13, 253 Wis. 2d 449, 646 N.W.2d 341 (citation omitted). Neither the State nor the circuit court has any reason to address whether the exclusionary rule applies when the circuit court finds no Fourth Amendment violation.

When the government obtains evidence following a constitutional violation, "the exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure." *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1. The purpose of the exclusion is to deter law enforcement from committing such violations. *State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 882 N.W.2d 422. Specifically, "[c]ourts exclude evidence only when the benefits of deterring police misconduct 'outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system.'" *Id.* (citation omitted).

B. Exclusion of evidence is inappropriate if the discovery of the evidence was inevitable even without the Fourth Amendment violation.

A well-established exception to the exclusionary rule is the inevitable discovery doctrine. *See Nix v. Williams*, 467 U.S. 431, 444 (1984); *Jackson*, 369 Wis. 2d 673, ¶ 4. Under that doctrine, evidence that police seize that "is tainted by some illegal act may be admissible" if police would have discovered that tainted evidence by lawful means. *Jackson*, 369 Wis. 2d 673, ¶ 47 (quoting *State v. Lopez*, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996)). The inevitable discovery doctrine applies if the State can prove by a preponderance of the evidence that law enforcement would

have inevitably discovered by lawful means the evidence sought to be suppressed. *Jackson*, 369 Wis. 2d 673, ¶ 66.

C. Discovery of the evidence in the backpack was inevitable.

The evidence that Solomon seeks to suppress was found in a backpack in the car. The backpack contained two firearms, crack cocaine and powder cocaine, digital scales, and cash. (R. 89:13.) The backpack was discovered during the dog's search of the car. (R. 89:12–13.) Solomon claims that the dog search was improper because the traffic stop was extended to wait for the dog, and the dog immediately entered the car. (Solomon's Br. 17–22.) As the State has explained, Solomon is incorrect; the search was entirely proper. But if this Court were to agree with Solomon, suppression would be inappropriate because discovery of the evidence in the backpack was inevitable without the dog search.

Deputy Valenti began to search the car before the K-9 unit was called. (R. 89:8.) He had authority to do that because there was probable cause of criminal activity. He testified that doing a full hand search of the car would have involved "rip[ping] apart" the car to look for hidden compartments containing evidence. (R. 89:24.) He said such a search might take 45 minutes. (R. 89:24.) But once he found a baggie containing a large amount of cash in the center console, the K-9 officer was called, and he stopped searching. (R. 89:9–10, 28–29.) Deputy Valenti testified that he had not completed his search when the dog was called. (R. 89:10.) He testified that he "would have continued the search if there was no canine available." (R. 89:29.)

If Deputy Valenti had continued his search, it is inevitable that he would have found the evidence Solomon seeks to suppress. After all, he was hand searching the car, and he was planning to search it thoroughly for hidden compartments. He did not complete the search, but he would

have completed it if the dog had not been available. And the evidence was not found in a hidden compartment. It was found in a backpack. Under these circumstances, there seems little question that Deputy Valenti would have found the evidence. Therefore, even if the wait for the dog, or the dog's search was somehow improper, exclusion of the evidence found in the backpack would be unwarranted because it would have been inevitably discovered.

D. If this Court were unable to determine whether the evidence would inevitably have been discovered, remand would be appropriate.

When this Court has disagreed with the circuit court and found a Fourth Amendment violation, it has remanded the case to the circuit court to determine whether an exception to the exclusionary rule applies. In *State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483, this Court remanded for an evidentiary hearing to determine whether independent source or inevitable discovery applied. This Court did so even though the State had not argued inevitable discovery in the circuit court. *Id.* ¶ 26. Here if this Court were to determine that the dog search of the car was somehow improper, and it is unable to determine from the factual record whether the evidence would inevitably have been discovered, it should remand the case to the circuit court for that determination.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated: October 31, 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@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 4666 words.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
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 31st day of October 2022.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General