

FILED
12-06-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

Case No. 2023AP1385-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KAHREEM RASHAH WILKINS, SR.,

Defendant-Respondent.

ON APPEAL BY THE STATE OF WISCONSIN FROM AN
ORDER GRANTING A SUPPRESSION MOTION,
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE DANIELLE L. SHELTON PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

	PAGES
ISSUES PRESENTED	5
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	6
STATEMENT OF THE CASE	6
STANDARD OF REVIEW	13
SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. This Court must reverse the circuit court’s suppression order because its finding that Officer Ayala gave incredible testimony is clearly erroneous and contrary to the great weight and clear preponderance of the evidence.	15
A. If Officer Ayala smelled burnt marijuana coming from Wilkins’s vehicle, then he had not only the right to investigate and make the plain view observation of the handgun resting on Wilkins’s lap, but probable cause to search the vehicle.....	16
B. The circuit court’s credibility finding is against the great weight and clear preponderance of the evidence adduced at the suppression hearing.	17
II. In the alternative, Officer Ayala could properly speak to Wilkins at the window of his vehicle as part of a consensual police/citizen encounter on a public street.	24
A. Police may lawfully approach and speak with citizens on a public street without suspicion of criminal activity.....	24

B. Viewed objectively, Officer Ayala reasonably decided to approach Wilkins’s vehicle to briefly speak with him.	25
CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	17
<i>Cogswell v. Robertshaw Controls Co.</i> , 87 Wis. 2d 243, 274 N.W.2d 647 (1979)	13
<i>County of Grant v. Vogt</i> , 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253	24, 25, 26, 28
<i>Minnesota v. Dickerson</i> , 508 U.S. 366 (1993)	16
<i>Noll v. Dimiceli’s, Inc.</i> , 115 Wis. 2d 641, 340 N.W.2d 575 (Ct. App. 1983).....	13
<i>Royster-Clark, Inc. v. Olsen’s Mill, Inc.</i> , 2006 WI 46, 290 Wis. 2d 264, 714 N.W.2d 530.....	18
<i>State v. Coffee</i> , 2020 WI 53, 391 Wis. 2d 831, 943 N.W.2d 845.....	17
<i>State v. Floyd</i> , 2016 WI App 64, 371 Wis. 2d 404, 885 N.W.2d 156	18
<i>State v. Kelley</i> , 2005 WI App 199, 285 Wis. 2d 756, 704 N.W.2d 377	16
<i>State v. McGill</i> , 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795.....	16

<i>State v. Moore</i> , 2023 WI 50, 408 Wis. 2d 16, 991 N.W.2d 412.....	16, 23
<i>State v. Secrist</i> , 224 Wis. 2d 201, 589 N.W.2d 387 (1999)	16, 23
<i>State v. VanBeek</i> , 2021 WI 51, 397 Wis. 2d 311, 960 N.W.2d 32	13, 24, 25
<i>State v. Williams</i> , 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834	24, 25, 28
<i>State v. Wiskerchen</i> , 2019 WI 1, 385 Wis. 2d 120, 921 N.W.2d 730.....	14
<i>State v. Wright</i> , 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157.....	13
<i>Texas v. Brown</i> , 460 U.S. 730 (1983)	16
<i>Wurtz v. Fleischman</i> , 97 Wis. 2d 100, 293 N.W.2d 155 (1980)	13
Statutes	
Wis. Stat. § 974.05(1)(d)2.	7

ISSUES PRESENTED

1. Did the circuit court err when it granted Defendant-Respondent Kahreem Rashah Wilkins, Sr.'s, motion to suppress evidence seized from his vehicle?

Officer Josue Ayala, on bicycle patrol, approached Wilkins's parked vehicle after he smelled what his training and experience taught him to believe was the odor of burnt marijuana coming through the partially open driver's side window. Wilkins was the driver, and the lone passenger, his nephew, was seated next to him. When Officer Ayala looked through the partially open window, he saw almost immediately a firearm in plain view resting on Wilkins's lap. A search of the car revealed two more weapons, and Wilkins was charged with three counts of being a felon in possession of a firearm and one count of possession of a sawed-off shotgun. Wilkins moved to suppress the evidence.

The circuit court granted the suppression motion. It found to be not credible the officer's testimony that he smelled burnt marijuana as he approached Wilkins's vehicle on his bicycle.

This Court should reverse. The circuit court's credibility finding that Officer Ayala did not smell burnt marijuana is clearly erroneous because there is no evidence to support it. The evidence strongly supports the opposite finding: Officer Ayala smelled what his extensive training and experience taught him to believe was burnt marijuana as he rode up to the parked vehicle on his bicycle. This allowed him to approach the vehicle and speak to its driver, Wilkins. Almost immediately, the officer saw the gun resting in plain view on Wilkins's lap. When Wilkins admitted that he did not have a permit for the gun and that he was a convicted felon, the officer properly arrested him and searched the vehicle.

2. In the alternative, was Officer Ayala permitted to approach Wilkins's vehicle and speak to him without

reasonable suspicion during a consensual police/citizen encounter on a public street?

The circuit court rejected the State's alternative argument that Officer Ayala could approach Wilkins's vehicle and speak to him without reasonable suspicion of wrongdoing as a consensual police/citizen encounter.

This Court should reverse. Police may engage citizens in brief consensual encounters on the street without reasonable suspicion of criminal activity. Officer Ayala properly approached Wilkins's parked vehicle on his bicycle and spoke to him even without reasonable suspicion, because a reasonable person in Wilkins's position would have believed he was free to leave. From his lawful vantage point at the window, Officer Ayala saw the gun resting in plain view on Wilkins's lap.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of established Fourth Amendment principles to the facts.

STATEMENT OF THE CASE

Wilkins stands charged with one count of possession of a short-barreled shotgun/rifle and three counts of possession of a firearm by a felon based on evidence recovered by police from a warrantless search of his SUV on August 20, 2021. (R. 9.) Wilkins moved to suppress the firearms seized from his SUV as the fruits of an unlawful warrantless search. (R. 12.) A suppression hearing was held on November 17, 2022. (R. 29.) Briefs were filed and an oral argument was held on May 25, 2023. (R. 24.)

The circuit court, Judge Danielle L. Shelton presiding, issued a written decision on June 15, 2023, suppressing the

evidence. (R. 23.) The court held that the bicycle patrol officer lacked reasonable suspicion to approach Wilkins's vehicle. The court found to be not credible the officer's testimony that he smelled burnt marijuana coming from the vehicle. (R. 23:4–7.) The State appeals as of right from the order suppressing the evidence, pursuant to Wis. Stat. § 974.05(1)(d)2. (R. 25.)

The Suppression Hearing Testimony

Milwaukee Police Officer Josue Ayala and three other officers were on bicycle patrol at 1:53 am in a high crime area of Milwaukee on August 20, 2021, when they came upon Wilkins's black Yukon SUV parked in front of 4305 N. 25th Street with its motor running. (R. 29:11–12.) It was the only vehicle on the street. (R. 29:13.)

As Officer Ayala approached the vehicle on his bicycle from the rear, he “immediately detected the odor of burnt marijuana” coming from the partially open driver's side window. (R. 29:12, 14.) He had received extensive training on how to identify drugs (R. 29:6), enabling him to identify fresh and burnt marijuana by smell (R. 29:7–8). He has smelled both fresh and burnt marijuana “on a daily basis” both on and off duty. (R. 29:8–9.) He was familiar with the smell of marijuana from everyday life experience even before his extensive training in law enforcement on drug identification. (R. 29:9.) The odor of marijuana has not changed over time. (R. 29:9–10.) As Officer Ayala put it: “I know what marijuana smells like. I smelled it coming from the car, and that's what I smelled.” (R. 29:31.) “We were just riding, and I smelled it.” (R. 29:33.) He explained that when he is on duty he will approach and speak with people who smell of burnt marijuana. (R. 29:33–34.) The odor of burnt marijuana can linger for days or even a week. (R. 29:41.) But when the smell is as strong as it was coming from Wilkins's vehicle, the user will usually admit they had smoked it within the past few

hours. (R. 29:41–42.) As Officer Ayala drew closer to the driver's side window, the odor grew stronger. (R. 29:14.)

When Officer Ayala pulled his bicycle alongside the driver side door to investigate, one officer stopped his bicycle behind him towards the rear of the SUV, and the other two bicycle patrol officers stopped along the passenger side; the positions they normally take when conducting a stop or making contact with a citizen. (R. 29:14–15.) This response is necessary because the officers are on bicycles and not inside a squad car, making them more vulnerable. (R. 29:15–16.) The video shows that the officers did not activate their emergency lights on the bicycles. The other three officers did not testify.

As soon as Officer Ayala pulled his bicycle alongside the driver's side door, Wilkins looked at him, and they started talking. (R. 29:17.) The window was a little less than halfway down when Officer Ayala approached. (R. 29:17.) While still seated on his bicycle less than two feet away from the window, Officer Ayala looked down and within ten seconds saw a black handgun resting on Wilkins's lap. (R. 29:17–20, 22.) He was able to see inside the vehicle because the area was well lit by streetlights. (R. 29:13, 29.)

Officer Ayala told Wilkins he saw the gun and asked if Wilkins had a concealed carry permit. Wilkins answered that he did not have a permit, he was trying to get some legal matters expunged, and he carried the gun for protection; he was not out "robbing people." (R. 29:18, 24–25.) Wilkins admitted both that he did not have a concealed carry permit and that he had a prior felony conviction (felony bail jumping). (R. 29:24–25.) At that point, Officer Ayala decided that Wilkins would be taken into custody for being a felon in possession of a firearm. (R. 29:25.) Wilkins was arrested and handcuffed. The officers then searched the vehicle. (R. 29:26, 27.) The search produced two more firearms: a loaded 40 caliber semi-automatic handgun behind the center console

(R. 29:26), and a sawed-off shotgun inside a duffel bag in the third-row seating/rear cargo area (R. 29:26–27).

Officer Ayala also recovered a small amount of marijuana residue on the front driver's side floor mat and floorboard near where Wilkins had his feet. (R. 29:26, 28, 34–35.) Officer Ayala saw the green residue on the driver's side floor soon after he approached and before he activated his body camera. (R. 29:18.) The residue was in an amount too small to weigh, but it contained sizable enough flakes to be seen and tested. (R. 29:29–30.) It later tested positive for THC. (R. 29:27–28.)

When Officer Ayala asked about the marijuana smell before activating his body camera, Wilkins answered, “[W]e live right here.” His passenger said, “I don’t smoke.” (R. 29:41.) Officer Ayala explained that police often do not find evidence of burnt marijuana when they smell it because it either has been used up or its remnants discarded before the smell dissipates. (R. 29:36–37.) Also, users will often conceal the marijuana inside a hollowed-out cigarette called a “blunt” and smoke it. (R. 29:36–37.) As can be seen on the body camera video, Wilkins and his passenger were smoking cigarettes as they spoke with Ayala through the partially lowered window. (R. 29:37.) On the body camera video, at approximately eight minutes and 45 seconds, Officer Ayala can be heard saying words to the effect of, “You literally see it. I see you got blunts right there, brother.” (R. 29:38.)

Officer Ayala wore his body camera that night. He could not recall whether it was mounted on his chest or ear. (R. 29:16.) Ayala had not yet manually activated his body camera when he first saw the gun on Wilkins's lap ten seconds after he approached the window. (R. 29:19, 21.) He activated his camera when he felt safe to do so, after he explained to Wilkins why he approached (the marijuana smell) and after he first saw the gun. (R. 29:38–40.) “[T]he first thing that caught my attention was the weed. My attention was, then,

brought to the firearm, for safety purposes.” (R. 29:40.) After he activated the camera, the weapon is clearly seen on Wilkins’s lap at the 50 second mark of the video. (R. 29:22.)

Officer Ayala explained the limitations of his body camera. It provides only a forward view whereas he can see left, right, and down with the naked eye. (R. 29:21–22.) Officer Ayala turned his flashlight on at the one minute and eleven second mark of the video to illuminate the handgun on Wilkins’s lap that he had seen earlier. (R. 29:22–23.) The body camera also shows him scooping up marijuana residue from the floorboard. (R. 29:27, 29–30.) The body camera footage was introduced into evidence at the hearing.

Oral Arguments

The court heard oral arguments on the motion May 25, 2023. The prosecutor argued that the smell of burnt marijuana gave Officer Ayala reasonable suspicion of criminal activity allowing him to approach the car and speak to its occupants. When he did so, Officer Ayala saw the gun in plain view on Wilkins’s lap. Wilkins readily admitted that the gun was his, he carried it for protection, he did not have a permit for it, and he was a convicted felon. (R. 24:3–8.)

The prosecutor argued in the alternative that this was a lawful consensual encounter between a police officer and a citizen on a public street that did not require reasonable suspicion of criminal activity. During that encounter, Officer Ayala saw the handgun in plain view on Wilkins’s lap, prompting the inquiry about the CCW permit and Wilkins’s status as a convicted felon, resulting in his arrest and the search of his vehicle. (R. 24:8–10.)

Wilkins argued that police should not be allowed to confront a citizen merely because they smell burnt marijuana, an odor that can linger for a long time. (R. 24:10–11.) Police could use the odor of marijuana as a pretext for any stop (R. 24:23), and there was no evidence of marijuana use other than

the small amount of flakes on the floor (R. 24:11–13). Wilkins also argued that the firearm on his lap was not in plain view because Officer Ayala had no right to be in a position to see it. He argued that Officer Ayala lacked probable cause to go up to the window and look down. (R. 24:12.) Finally, Wilkins argued that this was not a consensual encounter because he was not free to leave. (R. 24:14.)

In rebuttal, the prosecutor insisted that this began as a consensual encounter because “the officers bicycling by have every right to stop and talk to somebody. There is nothing unlawful about somebody standing next to a car parked on a public street.” (R. 24:14.) At the outset of the encounter, Officer Ayala was lawfully in a position to see the gun through the window. (R. 24:14–15, 24–25.) The fact that he did not activate his body camera until after he saw the gun is further evidence that this started out as a consensual encounter. (R. 24:20.) There also was evidence of recent marijuana use—the residue on the floor at Wilkins’s feet—which it is illegal to possess. (R. 24:15, 18–19.) Both Wilkins and his passenger were smoking cigarettes that could have been hollowed out “blunts” filled with marijuana. (R. 24:19.) The residue is evidence that a joint or a blunt was rolled inside the car at some point. (R. 24:24.) Or, they could have smoked and disposed of a joint or blunts earlier, leaving the odor behind, and they were now smoking ordinary cigarettes to mask the smell. (R. 24:19.)

The prosecutor argued further that Officer Ayala had reasonable suspicion to approach the vehicle because he knows the odor of burnt marijuana based on his extensive training and experience. (R. 24:16–17.) He had probable cause to arrest Wilkins when Wilkins openly admitted that he did not have a concealed carry permit and was a convicted felon. (R. 24:18.) The ensuing search of the vehicle was lawful incident to his arrest.

The court decided to view the body camera video on its own and issue a decision later. (R. 24:22.)

The Circuit Court's Findings of Fact and Decision

The circuit court issued a written Decision and Order granting the suppression motion on June 15, 2023. (R. 23.) The court found,

As officers rode southbound on N. 25th St. past the Yukon, Officer Ayala stated he detected the “strong odor of burnt marijuana emanating from the interior” of the Yukon vehicle. Officer Ayala testified that they decided to investigate based on the odor of burnt marijuana and made contact with the occupants of the vehicle. Seated in the driver seat was Kahreem R. Wilkins Sr. and the front seat passenger was Mr. Wilkins’ nephew, Lonnie Agnew.

(R. 23:2.) The court found that Wilkins and his passenger were both smoking cigarettes and the body camera video shows “smoke clearly circulating within the cabin.” (R. 23:2.) An air freshener is seen hanging from the rear view mirror. (R. 23:2.) That is all confirmed on the body camera video.

The court next found that four-and-one-half minutes into the video, Officer Ayala asked Wilkins whether there was marijuana in the car and Wilkins said there was none. Officer Ayala then asked whether Wilkins had a concealed carry permit for the gun on his lap. When Wilkins admitted that he did not have a permit and was a convicted felon, Officer Ayala ordered him out of the vehicle and placed him under arrest. (R. 23:2.) Wilkins was cooperative throughout. (R. 23:2–3.) No evidence of burnt marijuana was found inside the vehicle and the court found that the flakes recovered from the floor were “too small to be weighed or tested.” (R. 23:3.)

The court acknowledged that the odor of burnt marijuana “provides probable cause for an officer to believe that the automobile contains evidence of a crime.” (R. 23:5.) The court, however, found to be not credible Officer Ayala’s

testimony that he smelled burnt marijuana coming from the vehicle. (R. 23:5.)

The court rejected the State's alternative argument that Officer Ayala observed the gun during a consensual police/citizen encounter. (R. 23:5–6.) It found that Officer Ayala had no justification to be in a position to look inside Wilkins's vehicle and see the gun on Wilkins's lap because he had no right to approach the vehicle in the first place. (R. 23:6.) The presence of four bicycle patrol officers indicated to Wilkins that he was not free to leave. (R. 23:5–6.)

The State now appeals as of right from the order granting the suppression motion. (R. 25.)

STANDARD OF REVIEW

The State bears the burden of proving that the warrantless search of Wilkins's vehicle was reasonable. *State v. VanBeek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W.2d 32.

In deciding whether the search was lawful, this Court independently applies Fourth Amendment principles to the circuit court's findings of historical fact unless those findings are clearly erroneous. *State v. Wright*, 2019 WI 45, ¶ 22, 386 Wis. 2d 495, 926 N.W.2d 157.

The circuit court's findings of fact, including its credibility determinations, must be upheld on appeal if the evidence would permit a reasonable person to make the same findings. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The findings must be upheld unless they are contrary to the great weight and clear preponderance of the evidence. *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). To overturn a circuit court's finding of fact, the evidence supporting a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *Cogswell v. Robertshaw*

Controls Co., 87 Wis. 2d 243, 249–50, 274 N.W.2d 647 (1979). The reviewing court is to search the record for evidence that would sustain the circuit court’s findings. *State v. Wiskerchen*, 2019 WI 1, ¶ 30, 385 Wis. 2d 120, 921 N.W.2d 730.

SUMMARY OF ARGUMENT

A circuit court’s findings of fact including its credibility determinations are entitled to great deference on appeal, and they should be. It is a rare case when this Court overturns a circuit court’s finding of fact as clearly erroneous. This is that rare case.

The circuit court found that Officer Ayala did not smell burnt marijuana as he approached Wilkins’s vehicle on his bicycle. Officer Ayala either lied under oath or could not distinguish between the odor of burnt marijuana and burnt tobacco. The court did not explain on which of these two alternatives it based its credibility finding. The evidence does not support either one.

The circuit court’s finding that Officer Ayala was not credible flies headlong into the great weight and clear preponderance of the evidence. Officer Ayala’s credibility was bolstered by his extensive training and experience enabling him to detect the odor of burnt marijuana. The court did not question Ayala’s extensive training and experience. The only finding supported by the evidence is that the trained and experienced Officer Ayala, like most everyone else, knows the odor of burnt marijuana and can distinguish it from the odor of burnt cigarette tobacco.

The odor of what Officer Ayala believed to be burnt marijuana provided the legal justification for him to approach the vehicle on his bicycle and discuss the matter with Wilkins. Within seconds, Officer Ayala saw the handgun resting on Wilkins’s lap in plain view through the partially open window. That plain view observation from a position Officer Ayala had

a right to be, coupled with Wilkins's admissions that he did not have a firearm permit and was a convicted felon, provided probable cause to arrest Wilkins, allowing police to search the vehicle incident to his arrest. This Court must reverse because the circuit court did not find that Officer Ayala was unable to distinguish between the odor of burnt marijuana and burnt cigarette tobacco, and the record does not support an inference that he lied under oath.

In the alternative, this Court should independently determine that Officer Ayala developed probable cause during what began as a consensual encounter between police and a citizen seated in a parked car on a public street. Officer Ayala while on routine bicycle patrol in this high crime area had every right to ride up to Wilkins's vehicle, parked on a public street with its motor running just before 2:00 am, and speak with him. The circumstances changed markedly within seconds when Officer Ayala saw through the partially open window the gun resting on Wilkins's lap in plain view from a vantage point he had the right to be. That led to Wilkins's arrest and the lawful search of his vehicle that produced the firearms on which the charges are based.

ARGUMENT

I. This Court must reverse the circuit court's suppression order because its finding that Officer Ayala gave incredible testimony is clearly erroneous and contrary to the great weight and clear preponderance of the evidence.

There is no evidentiary support for the circuit court's finding that Officer Ayala did not smell the odor of burnt marijuana coming from Wilkins's SUV. The great weight and clear preponderance of the evidence supports the finding that he smelled burnt marijuana, and there is no evidence that he was either mistaken or lied.

- A. If Officer Ayala smelled burnt marijuana coming from Wilkins's vehicle, then he had not only the right to investigate and make the plain view observation of the handgun resting on Wilkins's lap, but probable cause to search the vehicle.**

As the circuit court acknowledged in its decision, the odor of burnt marijuana coming from a vehicle gives police probable cause to search the vehicle for marijuana. (R. 23:5 (citing *State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999)).) “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.” *Secrist*, 224 Wis. 2d at 210. The *Secrist* decision was recently reaffirmed by the Court in *State v. Moore*, 2023 WI 50, ¶¶ 9–12, 408 Wis. 2d 16, 991 N.W.2d 412. Officer Ayala could have searched Wilkins's vehicle for marijuana right then and there. *Id.* But he did not. The gun, however, soon changed everything.

If Officer Ayala smelled what his training and experience taught him was the odor of burnt marijuana coming from Wilkins's vehicle, he could approach just as he did, putting him in a lawful position at the driver's side door to speak with Wilkins, enabling him to look down through the partially open window and see the handgun resting in plain view on Wilkins's lap. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993); *State v. Kelley*, 2005 WI App 199, ¶ 15, 285 Wis. 2d 756, 704 N.W.2d 377; *State v. McGill*, 2000 WI 38, ¶ 40, 234 Wis. 2d 560, 609 N.W.2d 795. The fact that Officer Ayala's plain view observations were aided by streetlights or his flashlight is insignificant in the Fourth Amendment analysis. *Texas v. Brown*, 460 U.S. 730, 740 & n.5 (1983). Officer Ayala could have ordered the occupants out of the vehicle and searched it at that point because he had identified the odor of marijuana, giving him probable cause to search the vehicle

and its occupants for evidence of its possession. It follows that he had the right to simply peer into the vehicle from the street, with or without a flashlight.

Officer Ayala's plain view observation of the gun in conjunction with Wilkins's admission that he did not have a permit to carry the gun on his lap and that he was a convicted felon, also gave Officer Ayala probable cause to arrest Wilkins for both unlawfully carrying a concealed weapon and possession of a firearm by a convicted felon. The ensuing search of the vehicle that produced the other two firearms was lawful incident to his arrest for those firearms offenses. *Arizona v. Gant*, 556 U.S. 332, 335 (2009); *State v. Coffee*, 2020 WI 53, ¶ 25, 391 Wis. 2d 831, 943 N.W.2d 845.

Because the circuit court clearly erred when it found that Officer Ayala did not smell burnt marijuana as he rode his bicycle on routine patrol alongside Wilkins's parked SUV, this Court should reverse without even addressing the alternative consensual-encounter argument. *See infra*, Pt. II.

B. The circuit court's credibility finding is against the great weight and clear preponderance of the evidence adduced at the suppression hearing.

The circuit court provided eight reasons why it found Officer Ayala's testimony that he smelled burnt marijuana not credible:

First, Mr. Wilkins is shown on the video footage seated in the vehicle with a visible Little Trees car air freshener hanging from the rear view mirror. Air fresheners are commonly employed to mask a myriad of odors. *United States v. Guerrero*, No. 03-CR-138, 2003 WL 21976022, at 4 (S.D. Iowa Aug. 14, 2003), *aff'd*, 374 F.3d 584 (8th Cir. 2004). Second there are two people inside the vehicle that are clearly smoking two cigarettes, with smoke visibly circulating inside the cabin, when the officers first approach the vehicle. Third, there is simply no reason to believe that even

with a flashlight that Officer Ayala was able to observe small amount flakes of marijuana on the floor board of the Yukon. A 2009 GMC Yukon is a large Sport Utility Vehicle that is tall and sits high off the ground and the [c]ourt finds it highly unlikely Officer Ayala was able to observe the small flakes on the floorboard. Fourth, Officer Ayala testified that the marijuana that he observed on the floorboard was too small to weigh. Fifth, there is no proof that the small amount of flakes that were collected tested positive for marijuana. Sixth, no evidence that anyone inside the vehicle had any marijuana paraphernalia what so ever. Seventh, there is no evidence of any “burnt marijuana” inside the vehicle. Eighth, when asked whether there was any marijuana in the vehicle, Mr. Wilkins, being fully cooperative, immediately said there was none. The officers seemed to be operating on a mere hunch that two people sitting in a vehicle at 1:53am on 25th and Atkinson, smoking a cigarettes [sic] were involved in criminal activity.

Based on the facts on the record this [c]ourt cannot conclude that the State has shown that the officers had reasonable suspicion to stop the vehicle in which Mr. Wilkins was sitting in order to investigate the odor of marijuana

(R. 23:5.)

The State will now go through each of the court’s reasons to show that, individually and collectively, they do not overcome the great weight and clear preponderance of the evidence supporting Officer Ayala’s credibility. “A circuit court’s findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence.” *Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶ 12, 290 Wis. 2d 264, 714 N.W.2d 530.

(1) *The air freshener hanging from the rear view mirror*

The circuit court implicitly acknowledged that marijuana users often hang air fresheners in their vehicles to mask the odor of burnt marijuana. That is true. *See State v. Floyd*, 2016 WI App 64, ¶ 16, 371 Wis. 2d 404, 885 N.W.2d

156 (and cases cited therein). The circuit court's credibility finding is plainly inconsistent with its own factual finding that marijuana users often hang air fresheners in their vehicles to mask the odor of burnt marijuana. The presence of the air freshener therefore bolsters, rather than undermines, Officer Ayala's credibility.

(2) *Smoking cigarettes*

The fact that Wilkins and his passenger were smoking cigarettes during the encounter means nothing unless the circuit court meant to imply that Officer Ayala could not distinguish the odor of burnt marijuana from the odor of burnt tobacco. The court did not make that finding, and it could not possibly have done so. Officer Ayala's extensive training and experience made him uniquely qualified to identify the odor of burnt marijuana and to distinguish it from other odors such as burnt cigarette tobacco; indeed, most laypersons can also make that distinction. The court failed to explain why Officer Ayala could not have smelled both the lingering marijuana odor and the present tobacco odor at the same time. And, as with the air freshener, Wilkins and his passenger could have lit ordinary cigarettes to mask the smell of recently-smoked marijuana that despite their efforts still lingered.

Finally, the "cigarettes" they were smoking could actually have been hollowed out "blunts" filled with marijuana, hence the strong odor. That is what Officer Ayala reasonably suspected when he remarked: "You literally see it. I see you got blunts right there, brother." (R. 29:38.) Simply put, the fact that the two men were smoking cigarettes does not undermine Officer Ayala's credibility that he smelled burnt marijuana; it actually bolsters his credibility.

(3) *Officer Ayala's ability to see the small amount of marijuana residue on the floor*

The court found that Officer Ayala could not have seen the small amount of residue on the floor even with the aid of

a flashlight because Wilkins's Yukon SUV "is tall and sits high off the ground" making it "highly unlikely" that Officer Ayala could see the residue from where he was positioned. (R. 23:5.)

This finding, too, is contrary to the great weight of the evidence and is also illogical. Officer Ayala was in proper position to look down into the vehicle because he was seated on his bicycle just outside the partially open window. It appears from the body camera video that Officer Ayala did not dismount his bicycle until after approximately 45 seconds into the video, long after he observed the gun while looking downward seated up on his bicycle. The court also never explained why the fact that a Yukon SUV is "tall and sits high off the ground" prevents a person seated on a bicycle from seeing what is on the driver's lap or on the floor in front of the driver as he peers through the window.

The finding that Officer Ayala could not see the marijuana residue *even with the aid of a flashlight* is inexplicable, given that there is no dispute residue was recovered by Officer Ayala from the driver's side floor. He had to see it to be able to collect it.

This finding also is neither here nor there, because the important point is that Officer Ayala had already smelled burnt marijuana. He didn't use the fact that he saw fresh marijuana flakes on the floor to justify anything. He already had probable cause to search based on the smell.

(4) *The marijuana residue was too small to weigh.*

This finding is correct, but it actually bolsters Officer Ayala's credibility. It proves that the small residue Officer Ayala testified he saw on the floor was in fact there. The residue later tested positive for THC. The undisputed presence of fresh marijuana on the floor—even a small amount—further bolsters the credibility of Officer Ayala's

testimony that he smelled burnt marijuana and this was its residue.

(5) *No evidence that the flakes tested positive for marijuana*

This finding is clearly erroneous. Officer Ayala unequivocally testified that the residue, though too small of an amount to weigh, was sufficient enough to be tested, it was tested, and it came back positive for THC. “[I]t was marijuana residue, you can see on my body cam me recovering it. *We tested it back at district five. It tested positive for THC*, but the fact that it was residue, it was a little amount, so we couldn’t get a weight on it, *but we tested it*, just to -- I showed on camera we were collecting it.” (R. 29:27–28.) Wilkins did not challenge that testimony and there is no contrary evidence in the record.

(6) *No marijuana paraphernalia inside the car*

This finding is not quite correct. As Officer Ayala testified and his comments on the body camera indicate, the cigarettes Wilkins and his passenger were smoking could have been “blunts,” i.e., marijuana-filled. It is correct that no other drug paraphernalia was present, but *the drug* was. Fresh marijuana residue was found on the floor, and it later tested positive for THC. This strongly bolstered Officer Ayala’s credibility.

Officer Ayala also explained why drug paraphernalia often is not found: Wilkins and his passenger could have discarded any evidence of recent smoking before they parked or they could have smoked it all up in a rolled joint or blunts earlier. The residue on the floor likely fell while they rolled a joint or filled a blunt. The court clearly erred when it disregarded Officer Ayala’s eminently reasonable explanation for the lack of paraphernalia.

(7) *No evidence of burnt marijuana inside the vehicle*

Correct, but again that could be because Wilkins and his nephew had consumed all of it, discarded the remnants of a burnt joint or blunt somewhere before they parked on 25th Street, or were still smoking it through hollowed out “blunts” even as they spoke with Officer Ayala. And, again, there was fresh marijuana residue on the floor, indicating that someone recently had rolled a joint or a blunt, spilling some in the process.

(8) *Wilkins denied that there was any marijuana inside the car.*

This finding is meaningless. It is not surprising that Wilkins would deny having marijuana in the vehicle rather than incriminate himself. Wilkins’s denial also did not answer the question whether *his passenger* used or possessed marijuana while inside his vehicle.

Wilkins’s denial also was proven to be false. Marijuana residue was found inside the car near his feet. This proves not only that marijuana was present but that it likely spilled when Wilkins or someone else rolled a joint or filled a blunt inside the vehicle, which is perhaps what he was smoking while talking to Officer Ayala, who smelled the strong odor of burnt marijuana. (R. 29:36–37.)

Adding to the circuit court’s errors is its clearly erroneous finding that the State failed to prove “the officers had reasonable suspicion to *stop* the vehicle.” (R. 23:5 (emphasis added).) This was not a “stop” of a moving vehicle, which would have required reasonable suspicion or probable cause. The vehicle was undisputedly parked when Officer Ayala approached it from behind on his bicycle and smelled the burnt marijuana coming from it.

Noticeably absent from the circuit court’s assessment of Officer Ayala’s credibility is any finding that he lacked the training and experience to identify the odor of burnt

marijuana. “The extent of the officer’s training and experience bears on the officer’s credibility in identifying the odor as well as its strength, its recency, and its source.” *Secrist*, 224 Wis. 2d at 216. The circuit court acknowledged Officer Ayala’s undisputed extensive training and experience in drug identification; it did not discredit his training and experience; and it did not find that Officer Ayala was unable to distinguish the odor of burnt marijuana from burnt tobacco. *See Moore*, 408 Wis. 2d 16, ¶ 16 (“Furthermore, the fact that the officers testified to smelling marijuana suggests they know what marijuana smells like.”); *see also id.* (“It could be that a fact-finder will not believe an officer’s identification of marijuana *absent an on-the-record statement of training and experience.*” (emphasis added)). It is plain, then, that the highly trained and experienced Officer Ayala was not confused by the odor of cigarette smoke.

That leaves only the circuit court’s implicit finding that Officer Ayala lied under oath. There is no evidence—none whatsoever—to support that serious, potentially career-ending accusation of perjury. The great weight of the evidence, including the body camera footage that fully corroborated Officer Ayala’s testimony, supports the contrary finding that Officer Ayala told the truth. “[C]orroboation can be helpful in firming up the reasonableness of the officer’s judgments.” *Secrist*, 224 Wis. 2d at 216.

This Court must reverse the circuit court’s order granting the suppression motion because it is rooted entirely in the circuit court’s clearly erroneous finding that Officer Ayala did not smell the odor of burnt marijuana. If the circuit court’s credibility determination is reversed, then everything that happened after Officer Ayala approached Wilkins’s vehicle was lawful. The circuit court’s credibility finding must be reversed because the great weight and clear preponderance of the evidence support Officer Ayala’s credibility.

II. In the alternative, Officer Ayala could properly speak to Wilkins at the window of his vehicle as part of a consensual police/citizen encounter on a public street.

The circuit court rejected the State's argument that Officer Ayala saw the gun on Wilkins's lap during a consensual encounter.

[T]he encounter was not consensual in that the four police officers, while in full uniform, stopped their fully marked Milwaukee Police Department bicycles, equipped with emergency red and blue lights, surrounded the Yukon, and without justification leaned into the Defendant's vehicle windows with flashlights to peer inside as part of their stated marijuana investigation.

(R. 23:5–6.)

A. Police may lawfully approach and speak with citizens on a public street without suspicion of criminal activity.

Police may approach citizens on a public street and briefly speak with them even though they lack reasonable suspicion of criminal activity. This sort of encounter is not a "seizure" governed by the Fourth Amendment; it is not a Fourth Amendment event at all. *VanBeek*, 397 Wis. 2d 311, ¶ 26; *County of Grant v. Vogt*, 2014 WI 76, ¶¶ 9, 32–43, 51–53, 356 Wis. 2d 343, 850 N.W.2d 253; *State v. Williams*, 2002 WI 94, ¶¶ 21–34, 255 Wis. 2d 1, 646 N.W.2d 834.

"We know that questioning alone does not a seizure make, and the fact that this defendant—perhaps like most people—spontaneously and voluntarily responded to the officer's questions is not enough to transform an otherwise consensual exchange into an illegal seizure." *Williams*, 255 Wis. 2d 1, ¶ 28. "Absent law enforcement conduct that indicates required compliance, these types of interactions are consensual encounters and generally do not

receive Fourth Amendment scrutiny.” *VanBeek*, 397 Wis. 2d 311, ¶ 26.

The officer’s subjective intent as he approaches the citizen is not determinative so long as his actions were *objectively* reasonable. *Williams*, 255 Wis. 2d 1, ¶ 23. An officer may even act on a hunch in this sort of encounter. *See Vogt*, 356 Wis. 2d 343, ¶ 29 (the officer acted on a “savvy hunch” that the driver had been drinking when he knocked on the car window and smelled intoxicants after the driver rolled it down).

B. Viewed objectively, Officer Ayala reasonably decided to approach Wilkins’s vehicle to briefly speak with him.

The circuit court held that Officer Ayala and his three fellow bicycle patrol officers approached Wilkins’s vehicle only on a “hunch” and not reasonable suspicion of wrongdoing. (R. 23:5.) Even assuming they didn’t smell marijuana, they were legally allowed to approach and speak with the two passengers. *See, e.g., VanBeek*, 397 Wis. 2d 311, ¶ 26. It was 1:53 am in a high crime area when Officer Ayala and his three fellow bicycle patrol officers on routine patrol came upon Wilkins’s vehicle. It was parked alone on 25th Street with the motor running. Regardless of what motivated Officer Ayala, even a hunch, it was objectively reasonable for him to approach Wilkins’s vehicle and briefly engage him through the partially open window. He did not even need reasonable suspicion for this sort of encounter.

It also must be kept in mind that, contrary to the circuit court’s erroneous finding, this was not a traffic stop of a moving vehicle that would have required reasonable suspicion or probable cause of a traffic violation. *See Vogt*, 356 Wis. 2d 343, ¶ 48 (“But stopping a moving vehicle is indisputably a seizure and requires Fourth Amendment analysis.” (citation omitted)). The officers simply came upon Wilkins’s already

parked vehicle as they patrolled a public street on their bicycles. While still seated on his bicycle, Officer Ayala spoke to Wilkins through the partially open driver's window. This was not unlike an officer walking up to a citizen standing on a street corner in a high crime area and engaging him in a brief conversation based on a hunch that something may be afoot.

The vehicle was parked with its motor running. It was seven minutes before bars in Wisconsin must stop serving alcohol and typically close (2:00 a.m.). (R. 23:2.) If Officer Ayala thought he smelled burnt marijuana, he might be coming upon a situation where an impaired motor vehicle operator was about to drive off. He could briefly approach to see whether that was the case. The odor also allowed him to approach to see whether illegal drug use or even a deal was taking place.

The Fourth Amendment,

does not forestall an officer's reasonable attempt at further inquiry. In similar circumstances, a person has the choice to refuse an officer's attempt to converse and thereby retain his privacy, or respond by talking to the officer and aiding the officer in his duty to protect the public. A dutiful officer does not make a mistake by presenting a person with that choice. Only when the officer forecloses the choice by the way in which he exercises his authority—absent reasonable suspicion or probable cause—does he violate the Fourth Amendment.

Vogt, 356 Wis. 2d 343, ¶ 52. “The test is objective and considers whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances.” *Id.* ¶ 30.

An innocent reasonable person would have felt free to leave under the circumstances. A strong indication that this started out as a consensual encounter is the fact that Officer Ayala saw no need to activate his body camera until after he

saw the gun. When he approached, he did nothing to “foreclose” Wilkins’s choice to either refuse to speak or to cooperate and answer his questions. Wilkins was free to tell him, “I’ve got nothing to say.” Or, “I am going to leave.” At that point, Officer Ayala would have had to decide whether to let Wilkins drive off or to detain him. Before it reached that point, Officer Ayala saw the gun in plain view on Wilkins’s lap. This prompted his question about the concealed carry permit. There is nothing to indicate that Wilkins felt compelled to answer. He chose to answer and admitted not having a concealed carry permit, providing probable cause to believe he was unlawfully carrying a concealed weapon. Wilkins next admitted to having been convicted of a felony, providing probable cause to believe he was a felon in unlawful possession of a firearm.

The circuit court found that Wilkins was not free to leave because Officer Ayala arrived with three other bicycle patrol officers in uniform who positioned themselves on both sides of the vehicle and shined flashlights inside. (R. 23:5–6.) Keep in mind that Wilkins was behind the wheel of a large SUV with its motor running, his nephew at his side, and a large handgun in his lap. Officer Ayala was on a bicycle, as were his fellow officers. No officer was positioned in front of the vehicle. They were in no position to block Wilkins if he had decided to drive off. They did not even tell him to turn off the motor until four minutes into the video.

There was no show of force. As reflected in the body camera footage, no one shouted. Officer Ayala’s tone of voice was low key. The entire encounter, even after discovery of the gun, was cooperative on the part of both Officer Ayala and Wilkins. Wilkins and his nephew continued smoking their cigarettes. The officers did not display their weapons at any point. They did not lay a hand on Wilkins or his nephew. They did not order Wilkins and his nephew out of the car until well after Officer Ayala saw the gun and after probable cause for

Wilkins's arrest had been established. Officer Ayala did not ask Wilkins to step out of the vehicle and arrest him until almost six minutes into the video. Another officer ordered his nephew out of the vehicle almost seven-and-one-half minutes into the video. Only Officer Ayala engaged Wilkins and his passenger in conversation. The officers used flashlights because it was dark at 1:53 am. The video shows that the officers did not activate the emergency lights on their bicycles. *See Williams*, 255 Wis. 2d 1, ¶ 33 ("That the emergency lights on Staber's squad were activated does not make a significant difference."). The fact that the officers were in uniform is meaningless because most consensual encounters will involve one or more uniformed officers. There was nothing threatening about this encounter until Officer Ayala saw the gun. *See id.* ¶ 32.

The circuit court did not explain why four uniformed officers on bicycles was without more such a show of force that it intimidated Wilkins to not exercise his right to refuse to talk with Officer Ayala and leave. Contrary to the circuit court's finding, an innocent reasonable person in Wilkins's situation would have felt free to refuse to talk with Officer Ayala and leave at least up until the point when Officer Ayala inquired about the gun on his lap. *Vogt*, 356 Wis. 2d 343, ¶ 30.

Officer Ayala acted reasonably and in full compliance with the Fourth Amendment when he approached Wilkins's parked vehicle on his bicycle to briefly speak with him whether he smelled burnt marijuana or acted only on a hunch.

CONCLUSION

This Court should reverse the order granting the suppression motion.

Dated this 6th day of December 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@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 7,067 words.

Dated this 6th day of December 2023.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of December 2023.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General