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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP1385-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KAHREEM RASHAH WILKINS, SR.,

Defendant-Respondent.

On Appeal from an Order Granting a Suppression Motion Entered in the Milwaukee County Circuit Court, the Honorable Danielle L. Shelton, Presiding

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BRIEF OF DEFENDANT-RESPONDENT

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ISSUES PRESENTED

1. Is the circuit court's credibility finding that Officer Ayala did not smell the strong odor of burnt marijuana emanating from Mr. Wilkins's vehicle against the great weight and clear preponderance of the evidence?

After hearing evidence and argument over the course of two hearings, the trial court found that Officer Ayala's claim of smelling the strong odor of burnt marijuana coming from Mr. Wilkins's vehicle to be incredible. The trial court's credibility determination was based on the totality of Officer Ayala's testimony. The trial court found that the lack of corroborating evidence undermined the officer's credibility. Despite testifying that the vehicle's occupants likely recently smoked marijuana based on the strength of the odor, Officer Ayala found nothing—no marijuana packaging, no rolling papers, no lighters, no grinders, no scales, no "roaches" or remnants of burnt marijuana—to support his assumption.

This Court should affirm. The trial court, sitting as the fact finder, made supported and well-reasoned findings of fact. Although contrary evidence may exist, the State has not satisfied its burden to show that the findings made by the trial court are against the great weight and clear preponderance of the evidence.

2. Was Officer Ayala's interaction with Mr. Wilkins a consensual police-citizen encounter or a *Terry* stop requiring reasonable suspicion?

The circuit court found that the interaction between Mr. Wilkins and the officers was not a consensual police-citizen encounter. The encounter occurred in the early morning hours while Mr. Wilkins and his passenger sat in his vehicle parked on a residential street. After being surrounded by four uniformed and armed officers, Mr. Wilkins did what any reasonable citizen would do under those circumstances: he acquiesced to the officers' inquiries.

This Court should affirm. The trial court found that, with four, armed officers riding on fully marked police bicycles equipped with emergency lights surrounding his vehicle, no reasonable citizen would feel free to disregard the officers and simply drive away.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The legal issues presented are not novel and the case does not merit publication nor oral argument. This case involves the application of established standards of review and Fourth Amendment principles to the facts.

STATEMENT OF THE CASE AND FACTS

Mr. Kahreem Wilkins is charged with one count of possession of a short-barreled shotgun/rifle and three counts of possession of a firearm by a felon. (R. 2:1). On August 20, 2021, Officer Josue Ayala of the Milwaukee Police Department was on bicycle patrol with three other officers. (R. 29:10-11). Officer Ayala testified at the suppression hearing that, as he and his fellow officers were patrolling the Garden Homes Neighborhood, they observed a black Yukon SUV parked southbound on 25th Street. (R. 29:12). Officer Ayala was unable to recall any issues with how the vehicle was parked. (R. 29:28). As Officer Ayala and his fellow officers rode past the vehicle just before 2:00 a.m., he claimed to smelled the odor of burnt marijuana coming from the vehicle. (R. 29:12). There were no other issues with the vehicle that otherwise attracted police attention. (R. 29:32-33).

Upon purportedly smelling burnt marijuana, Officer Ayala stopped at the driver's door of the SUV. (R. 29:14). His fellow officers also stopped, one behind Officer Ayala and the other two on the passenger side of the vehicle. (R. 29:14). Officer Ayala testified that these were the positions that he and his fellow officers would take for a traffic stop. (R. 29:15). Officer Ayala informed Mr. Wilkins of the reasons for the stop and was able to easily converse with him through the partly open window. (R. 29:17). Within seconds of establishing contact with Mr. Wilkins, Officer Ayala claimed to see a gun in Mr. Wilkins's lap, address the gun with Mr. Wilkins, see marijuana flakes on the driver's floorboard, and discover that Mr. Wilkins did

not have a CCW permit. (R. 29:18). Officer Ayala testified that questions about CCW permits are standard for any traffic stop. (R. 29:24).

In response to questioning by Officer Ayala, Mr. Wilkins informed the officer that he did not have a CCW permit as he was trying to get "things" expunged from his record. (R. 29:24-25). Mr. Wilkins relayed to Officer Ayala that he was attempting to get a conviction for bail jumping expunged. (R. 29:25). Officer Ayala asked whether it was felony bail jumping and Mr. Wilkins confirmed it was. (R. 29:25). Thereafter, Mr. Wilkins and his passenger were removed from the vehicle, placed in handcuffs, and the vehicle searched. (R. 29:25-26).

During the search of the vehicle, a number of firearms were recovered. (R. 29:26-27). Officer Ayala also testified to recovering unburnt marijuana from the car. (R. 29:27). The marijuana, however, was too small to be weighed. (R. 29:28). No burnt marijuana was found in the car or in the immediate vicinity. (R. 29:29). Additionally, no paraphernalia was located in the vehicle. (R. 29:31). Similarly, no marijuana or paraphernalia were located on Mr. Wilkins's person after he was searched. (R. 29:34).

At the suppression hearing, Officer Ayala testified that the odor of burnt marijuana can linger in a confined space for a couple of days, up to a week. (R. 29:41). During the stop, when Officer Ayala informed Mr. Wilkins that he smelled burnt marijuana, Mr. Wilkins responded that he does not smoke marijuana. (R. 29:42). Officer Ayala did not have any information

as to when the marijuana he claimed to smell may have been burnt. (R. 29:42).

After hearing the testimony of Officer Ayala as well as the arguments of counsel, the trial court, by the Honorable Danielle L. Shelton, granted the defense motion to suppress. (R. 23:6-7). The court primarily based its decision on its finding that Officer Ayala's testimony about smelling a strong odor of burnt marijuana to be not credible. (R. 23:5). In so holding, the court carefully reasoned that:

> 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 [a] small amount [of] 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 Court finds it highly unlikely Officer Ayala was able to observe the small flakes on the floorboard. Fourth, Officer Ayala testified that the marijuana 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 . . . cigarettes were involved in criminal activity.

(R. 23:5). The court therefore found that the officers did not have the requisite reasonable suspicion necessary to stop Mr. Wilkins's vehicle. (R. 23:5). Additionally, the court found that the encounter was not a consensual encounter because "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 [Mr. Wilkins's] windows with flashlights to peer inside. . . ." (R. 23:5-6).

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

ARGUMENT

I. The Trial Court's Credibility Assessment was not Against the Great Weight and Clear Preponderance of the Evidence and is Entitled to Deference.

Findings made by a trial court sitting as the fact-finder are entitled to great deference. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979); *State v. Moore*, 2023 WI 50, ¶ 8, 408 Wis. 2d 16, 991 N.W.2d 412. Motions for the suppression of evidence where there exists a dispute as to the relevant facts "shall be tried by the court without a jury." Wis. Stat. § 971.31(4). Reviewing courts are to defer "to the circuit court's findings of fact unless they are unsupported by the record and are, therefore, clearly erroneous." *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶ 11, 290 Wis. 2d 264, 714 N.W.2d 530. "[T]his court will not reweigh the evidence or reassess the witnesses' credibility, but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not." *State v. Young*, 2009 WI 22, ¶ 17, 316 Wis. 2d 114, 762 N.W.2d 736 (internal quotations omitted).

Findings of fact made by the trial court may be upset on appeal only if "they are against the great weight and clear preponderance of the evidence." *Cogswell*, 87 Wis. 2d at 249; *State v. McGill*, 2000 WI 38, ¶ 17, 234 Wis. 2d 560, 609 N.W.2d 795. This does not require that the factual findings made by the circuit court constitute the great weight or clear

preponderance of the evidence. *Cogswell*, 87 Wis. 2d at 249. "Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence." *Id.* When more than one inference can be drawn from the credible evidence, "the reviewing court *must* accept the inference drawn by the trier of fact." *Id.* at 250 (emphasis added). Finally, when there is a dispute as to a fact, "the trial judge is the ultimate arbiter of the credibility of the witnesses." *Id.*

The great weight of the evidence does not support overturning the trial court's finding that Officer Ayala's claim of smelling burnt marijuana—despite finding no evidence of burnt marijuana—was not credible. The State argues that there "is no evidence that [Officer Ayala] was either mistaken or lied." State's Br. at 15. This misstates the standard required to overturn a trial court's factual or credibility finding on appeal. The State seeks to isolate and critique each of the (many) reasons the trial court identified for discrediting Officer Ayala's testimony. In doing so, however, the State fails to explain why the inferences that it would have the Court accept constitute the great weight or clear preponderance of the evidence. This court should reject the State's "divide and conquer" approach to the trial court's credibility finding and affirm.

Air Freshener

The State claims that the trial court "implicitly acknowledged that marijuana users often hang air fresheners in their vehicles to mask the odor of burnt

marijuana." State's Br. at 18. This is not true. The trial court found that air fresheners are commonly used to mask a variety of odors—not just marijuana. (R. 23:7). While using an air freshener to mask the odor of burnt marijuana may be one inference that could be drawn from the presence of an air freshener in a vehicle, it is not the inference that the trial court made from the facts presented to it. "[T]he reviewing court must accept the inference [made] by the trier of fact." *Cogswell*, 87 Wis. 2d at 250.

Smoking Cigarettes

Next, the State claims that the trial court's finding that "there [were] two people inside the vehicle that [were] clearly smoking two cigarettes, with smoke visibly circulating inside the cabin, when the officers first approach the vehicle," (R. 23:7), was an inference that "Officer Ayala could not distinguish the odor of burnt marijuana from the odor of burnt tobacco," State's Br. at 19. That was not the trial court's finding, nor is it a reasonable characterization of the court's finding.

The trial court found Officer Ayala's claim that he smelled "the strong odor of burnt marijuana emanating from the vehicle" to be incredible. Among the many reasons the court found this testimony incredible was the fact that the two occupants of the vehicle were smoking cigarettes. Much like air fresheners can be used to mask a variety of odors, so too does cigarette smoke mask a variety of odors. Additionally, Officer Ayala never identified the odor of cigarette smoke coming from the vehicle—lending

further support for the finding that his claim of a strong odor of burnt marijuana was not credible.

The State speculates that the "'cigarettes' they were smoking could actually have been hollowed out 'blunts' filled with marijuana, hence the strong odor." State's Br. at 19. Rather than bolstering Officer Ayala's credibility as the State claims this would—the claim that Mr. Wilkins and his passenger were smoking marijuana rather than tobacco cigarettes and Officer Ayala's failure to identify the cigarettes as the source of the odor—undermines his claimed ability to distinguish the odor of marijuana from other odors. Furthermore, this theory put forward by the State is nothing more than that—there is no evidence that the occupants were smoking marijuana rather than ordinary cigarettes. Officer Ayala did not collect those alleged blunts as evidence, nor did he test those blunts. Mere speculation by the State as to the contents of the cigarettes smoked during the stop does not "constitute the great weight and clear preponderance of the evidence." *Cogswell*, 87 Wis. 2d at 249-250.

Marijuana Residue on Floor

The trial court found that, based on the size and height of the vehicle involved and the small size of the marijuana residue on the floor of the vehicle, it was "highly unlikely Officer Ayala was able to observe the small flakes on the floorboard." (R. 23:7). The State claims this is "contrary to the great weight of the evidence and is also illogical" because Officer Ayala had to be able to see the marijuana flakes in order to

collect it. State's Br. at 20. The State does not address the trial court's reasonable conclusion that the small marijuana flakes would have been nearly invisible to the naked eye from as far away as Officer Ayala was during the stop, especially at night, even with the assistance of a flashlight. The marijuana flakes were not visible on the body camera footage. It is, therefore, not against the great weight of the evidence to infer that the small flakes would have been incredibly difficult, if not impossible, to see from outside the car.

Officer Ayala testified at the hearing on the suppression motion that he was unable to immediately see the gun that was in Mr. Wilkins's lap from his vantage point, even while still mounted on his bicycle. (R. 29:17). If Officer Ayala was unable to immediately see a handgun on the lap of the driver of the SUV, the record plainly supports the circuit court's finding that he was unable to see miniscule flakes of marijuana on the floorboard of the vehicle as he stood next to the driver's door.

The State next claims that it "is neither here nor there" if Officer Ayala was able to see the marijuana flakes as he testified. On the contrary, Officer Ayala's ability to view something as he claimed absolutely goes to his credibility as a witness. *See* WIS JI-CRIMINAL 300 (Credibility of Witnesses) ("In determining the credibility of each witness and the weight you give to the testimony of each witness" a number of factors are provided for jurors to consider, including "the opportunity the witness had for observing and for knowing the matters the witness testified about;" and "the reasonableness of the

witness' testimony[.]"); *see also Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980) ("The weight of the evidence and the credibility of the witnesses are matters resting within the province of the trier of fact.").

Marijuana Residue Too Small to Weigh

The trial court found that the fact that the marijuana that was present in the vehicle was too small to weigh cut against Officer Ayala's credibility. (R. 23:5). The State claims, however, that this "actually bolsters Officer Ayala's credibility." State's Br. at 20. The State suggests that the small amount of residue proves that there was marijuana in the car, despite Officer Ayala finding no burnt marijuana or evidence that marijuana had recently been burnt in the vehicle. The State fails to explain how its inference that the residue present in the car was left over from smoking marijuana which resulted in the burnt odor constitutes the great weight of the evidence. Further, the State ignores the lack of marijuana paraphernalia in the vehicle—there was no packaging, pipes, lighters, or other instruments used in consuming marijuana present in the vehicle. Evidence that supports a finding contrary to that made by the trial court is not sufficient to require reversal. *Cogswell*, 87 Wis. 2d at 249.

No Marijuana Paraphernalia

The trial court similarly found that the lack of accompanying paraphernalia cut against Officer Ayala's assertion of a strong odor of burnt marijuana. The State urges this Court to reverse a factual finding

regarding Officer Ayala's credibility because the trial court "disregarded Officer Ayala's eminently reasonable explanation for the lack of paraphernalia." State's Br. at 21. The State fails, however, to explain why the trial court was required to accept this explanation or why this Court should disregard the trial court's factual findings in favor of the State's favored finding. *See State v. McMorris*, 2007 WI App 231, ¶ 30, 306 Wis. 2d 79, 742 N.W.2d 322 (arguments that are undeveloped or unsupported need not be considered).

The State also urges this Court to reverse the trial court's factual finding because Officer Ayala testified that Mr. Wilkins and his passenger "could have been" smoking "blunts" when the officers approached the vehicle. State's Br. at 21. Speculation regarding what Mr. Wilkins could have been doing without more does not rise to the level of the great weight of the evidence or even the preponderance of the evidence. Again, Officer Ayala could have collected the suspected "blunts" for testing, but did not. Law enforcement officers, just like ordinary lay citizen witnesses, are subject to the same credibility determinations as every other witness. *See State v. Moore*, 2023 WI 50, ¶ 16, (leaving open the possibility that a trial court may not accept an officer's claim of identifying the smell of marijuana and noting that the training of the officer goes to the officer's credibility). Speculation is not evidence. *See Village of Whitefish Bay v. Hardtke*, 40 Wis. 2d 150, 153, 161 N.W.2d 259 (1968) (noting that "a finding based on conjecture and speculation . . . cannot stand."); *see also* Wis. Stat. § 906.02 (requiring all witnesses to have "personal

knowledge of the matter" to which the person is testifying.). Therefore, the speculation offered by the State cannot constitute the great weight and clear preponderance of the evidence.

No Burnt Marijuana in the Car

The State argues that the trial court erred in finding the lack of corroborating evidence in the form of some evidence that marijuana had been consumed or burnt in the vehicle cut against Officer Ayala's credibility. State's Br. at 22. The State fails to explain why this finding is in error. Again, the State offers nothing more than speculation as to why there was no corroborating evidence of marijuana consumption in the vehicle. The State does not point to any evidence contrary to this factual finding.

The State argues that the marijuana residue on the floor of the vehicle is evidence of consumption in the car. State's Br. at 22. In support of this assertion, however, the State offers nothing but speculation that the residue "indicat[es] that someone recently had rolled a joint or a blunt, spilling some in the process." State's Br. at 22. The State has failed to cite to anything to support this assertion or why the trial court was required to accept this assertion as fact. *See McMorris*, 2007 WI App 231, ¶ 30 (arguments that are undeveloped or unsupported need not be considered); *see also Royster-Clark*, 2006 WI 46, ¶ 12 ("Moreover, we search the record not for evidence opposing the circuit court's decision, but for evidence supporting it.").

Mr. Wilkins's Denial

The State claims that the trial court's finding that Mr. Wilkins denied having any marijuana in the vehicle is "meaningless." State's Br. at 22. While such a denial is "meaningless" in assessing whether there was probable cause or reasonable suspicion to seize Mr. Wilkins or search the vehicle, *Moore*, 2023 WI 50, ¶ 15, the trial court could reasonably consider that denial in assessing Officer Ayala's credibility. *See State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (noting that the probability that probable cause will result from the odor of marijuana "diminishes . . . if a person offers a reasonable explanation for the odor."). The trial court also found that Mr. Wilkins was "being fully cooperative" during the stop, (R. 23:5). A denial of criminality by someone who is being evasive during an encounter with law enforcement should be entitled to less weight than a denial by someone who has otherwise been fully transparent and cooperative with the officer.

The State appears to argue that, because the trial court "acknowledged Officer Ayala's undisputed extensive training and experience in drug identification; . . . did not discredit his training and experience; and . . . did not find that Officer Ayala was unable to distinguish the odor of burnt marijuana from burnt tobacco," the trial court has accused Officer Ayala of perjury. State's Br. at 23. The trial court did no such thing. Police officers are subject to the same credibility determinations as any other witness. *See Moore*, 2023 WI 50, ¶ 16 (noting that an officers

training and experience "goes to the *credibility* of the officers." (emphasis added)).

The State has failed to demonstrate how the trial court's finding is contrary to the great weight and clear preponderance of the evidence. Although there may be evidence to support the State's preferred inferences, "[w]hen more than one reasonable inference can be drawn from the credible evidence, the reviewing court *must* accept the inference drawn by the" trial court. *Cogswell*, 87 Wis. 2d at 250 (emphasis added). Indeed, this court must affirmatively search the record to affirm the circuit court's findings. *Young*, 2009 WI 22, ¶ 17.

While Officer Ayala testified to his training and experience regarding drug identification, that does not mean that the trial court has to accept his testimony without question. While the Wisconsin Supreme Court left open the possibility that a trial court may "not believe an officer's identification of marijuana absent an on-the-record statement of training and experience," *Moore*, 2023 WI 50, ¶ 16, the court did not foreclose other avenues of attack when an officer claims to smell marijuana. Here, the record amply supported the trial court's decision to discredit Officer Ayala's testimony, and the State has not satisfied the exceedingly high bar to justify overruling a trial court's credibility determination. Therefore, this Court must affirm.

II. Officer Ayala Seized Mr. Wilkins When he and Three Other Officers Surrounded Mr. Wilkins's Vehicle in a Manner that Any Ordinary Citizen Would Not Have Felt Free to Leave.

Both the United States Constitution and the Wisconsin Constitution provide "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. XIV; Wis. Const. art I, § 11. The Fourth Amendment protects individuals against more than formal arrests. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The constitution countenances two types of seizures: *Terry* stops and arrests. *County of Grant v. Vogt*, 2014 WI 76, ¶ 27, 356 Wis. 2d 343, 850 N.W.2d 253. A *Terry* stop is a brief investigatory stop that must be supported by reasonable suspicion that criminal activity is afoot. *Id.*

Not every police-citizen encounter implicates the Fourth Amendment, however. *State v. VanBeek*, 2021 WI 51, ¶ 26, 397 Wis. 2d 311, 960 N.W.2d 32. "Law enforcement officers may approach citizens on the street, put questions to them, and ask for identification without implicating the Fourth Amendment 'as long as the police do not convey a message that compliance with their request is required.'" *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

A. This was not simply a consensual encounter.

"A seizure occurs if, under the totality of the circumstances, the 'police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter.'" *VanBeek*, 2021 WI 51, ¶ 29 (quoting *Bostick*, 501 U.S. at 439). An officer simply approaching an individual and asking questions, without more, does not effectuate a seizure. *State v. Williams*, 2002 WI 94, ¶ 22, 255 Wis. 2d 1, 646 N.W.2d 834. The test to determine whether a police-citizen encounter is a seizure, and thus implicates the Fourth Amendment, is an objective test. *Vogt*, 2014 WI 76, ¶ 30.

A seizure occurs when, under the totality of the circumstances, an innocent, reasonable person would not feel free to end the encounter or decline the officer's requests. *VanBeek*, 2021 WI 51, ¶¶ 29-30. "So long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required." *United States v. Smith*, 794 F.3d 681, 684 (7th Cir. 2015) (citing *Bostick*, 501 U.S. at 434).

In *Smith*, the Seventh Circuit found that a police-citizen encounter was a seizure when two Milwaukee Police Officers approached the defendant in an alley at night, blocked his path with their bicycles, and asked him about weapons. *Smith*, 794 F.3d at 685. Two Milwaukee Police Officers were on

bicycle patrol at approximately 10 p.m. when they heard gunshots. *Id.* at 683. Officers rode their bicycles in the direction of the shots fired. *Id.* After making some inquiries of a potential witness, officers continued toward the location of the suspected gunshots. *Id.* Officers observed Mr. Smith crossing a street and preparing to enter an alley. *Id.* Officers did not observe any suspicious behavior by Mr. Smith. *Id.* The officers then rode ahead of Mr. Smith into the alley and, when they were roughly 20 feet in front of him, turned around to face Mr. Smith, positioning their bicycles at a 45-degree angle. *Id.* One officer dismounted his bicycle, approached Mr. Smith, and asked if Mr. Smith had any weapons. *Id.* The Seventh Circuit found that a reasonable person in Mr. Smith's "situation would not have felt at liberty to ignore the police presence and go about his business." *Id.* at 685. In so holding, the court noted that "[c]ommon sense dictates that no reasonable person in an alley would feel free to walk 'through' two armed officers on bicycles." *Id.* at 686.

In the present case, a reasonable, innocent person in Mr. Wilkins's position would not have felt free to disregard four armed officers effectively surrounding his car to leave. Just before 2:00 a.m., Officer Ayala and three other officers observed Mr. Wilkins's Yukon SUV parked on 25th Street. The vehicle was parked by a street light, such that Officer Ayala testified that he was able to clearly see into the car. Upon approaching the vehicle, Officer Ayala approached the driver's window with one officer behind him and the other two taking a position on the passenger side of the vehicle. Officer Ayala testified

that these are the same positions he and his fellow officers would have taken had this been a traffic stop. Within ten seconds, Officer Ayala informed Mr. Wilkins that he observed the handgun in Mr. Wilkins's lap. Officer Ayala then turned on his flashlight and shone it into the vehicle.

By positioning their bicycles on either side of the front of the SUV, almost immediately asking Mr. Wilkins about a gun, and shining a flashlight in the vehicle, the officers clearly communicated to Mr. Wilkins that he was not free to leave. No reasonable person—innocent or otherwise—would have felt free to drive "through" four armed officers on bicycles or to disregard their inquiries. *See Smith*, 794 F.3d at 686; *see also United States v. Burton*, 441 F.3d 509 (7th Cir. 2006) (holding that officers placing their bicycles in front of and on either side of the vehicle effectuated a seizure of the vehicle by ensuring the vehicle could not drive away).

B. Even if this Court overrules the trial court's credibility findings, Officer Ayala did not have the requisite reasonable suspicion when he seized Mr. Wilkins.

A brief investigatory stop, commonly referred to as a *Terry* stop, requires reasonable suspicion. *Vogt*, 2014 WI 76, ¶ 27. "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may briefly stop the individual and make "reasonable inquiries" to confirm or dispel his suspicions. *Terry*, 392 U.S at 30.

"Reasonable suspicion exists if, under the totality of the circumstances, 'the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.'" *State v. Floyd*, 2016 WI App 64, ¶ 14, 371 Wis. 2d 404, 885 N.W.2d 156 (quoting *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634). An officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Post*, 2007 WI 60, ¶ 13.

In the present case, Officer Ayala observed an SUV legally parked on the road at approximately 2:00 a.m. with two occupants. There is nothing inherently suspicious about two individuals sitting in a vehicle on a residential street in the early hours of the morning. Officer Ayala claimed to have smelled the odor of burnt marijuana emanating from the vehicle. As noted above, the trial court found this claim to be incredible. Without the claim of smelling burnt marijuana coming from the car, no reasonable suspicion exists.

However, in the event this Court finds the trial court's factual finding of Officer Ayala's credibility to be clearly erroneous, even with his claimed smell of burnt marijuana, Officer Ayala did not have the requisite reasonable suspicion to seize Mr. Wilkins. While the odor of marijuana will generally lead to a conclusion that probable cause exists, the odor must be adequately identified by someone able to make that conclusion. *Moore*, 2023 WI 50, ¶ 11; *see also id.*

(noting that there is no bright-line rule that the smell of marijuana will always result in probable cause).

Officer Ayala testified that, although he is qualified to identify the odor of marijuana, the smell of marijuana lingers in confined spaces. Officer Ayala testified that the smell of burnt marijuana can linger in a confined space, such as a car, for up to a week. Officer Ayala did not testify regarding how or if he is able to determine when the purported marijuana was burnt or last in the vehicle. Basing the seizure on the smell of burnt marijuana which lingers up to a week does not amount to specific and articulable facts which reasonably would lead the officer to believe that marijuana is currently present in the vehicle. *See State v. Multaler*, 2001 WI App 149, ¶ 28, 246 Wis.2d 752, 632 N.W.2d 89 (noting that the "staleness" of information is dependent on the nature of the criminal activity under investigation and the nature of what is being sought); *see also State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (noting that the probability of probable cause resulting from the smell of marijuana "diminishes if the odor is not strong or recent. . . ."). Without more, therefore, Officer Ayala did not have reasonable suspicion to seize Mr. Wilkins.

CONCLUSION

The trial court, sitting as the fact finder, made appropriate and supported findings of fact. In granting the suppression motion, the trial court found Officer Ayala's claim of smelling a strong odor of burnt marijuana incredible due to a number of factors, including the lack of any corroborating evidence. The trial court's factual findings are not contrary to the great weight and clear preponderance of the evidence and, therefore, must be affirmed. Additionally, the contact between Officer Ayala and Mr. Wilkins was a seizure, not a consensual police-citizen encounter. Because Officer Ayala did not have reasonable suspicion to seize Mr. Wilkins nor probable cause to search the car, the evidence must be suppressed.

Dated this 5th day of January, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,149 words.

Dated this 5th day of January, 2024.

Signed:

Electronically signed by Olivia Garman
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