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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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I. The circuit court's finding that Officer Ayala was not credible when he testified that he smelled burnt marijuana as he approached Wilkins's vehicle is clearly erroneous because it is contrary to the great weight and clear preponderance of the evidence.

Despite his best efforts, Defendant-Respondent Kahreem Rashah Wilkins, Sr., cannot provide any evidentiary support for the trial court's finding that Officer Ayala either *could not* distinguish the odor of burnt marijuana from burnt cigarette tobacco despite his extensive training and experience, or he *did not* smell burnt marijuana and falsely testified under oath that he did.

"A finding of fact is clearly erroneous if it is against the great weight and clear preponderance of the evidence." *State v. Anderson*, 2019 WI 97, ¶ 20, 389 Wis. 2d 106, 935 N.W.2d 285. The great weight and clear preponderance of the evidence supports only one finding: Officer Ayala smelled burnt marijuana as he approached Wilkins's vehicle while on bicycle patrol.

The State challenged each one of the eight reasons articulated by the trial court to support its finding that Officer Ayala could not or did not smell burnt marijuana. (R. 23:5; State's Br. 18–23.) Wilkins argues that the court's reasons support that finding. (Wilkins's Br. 13–21.) The court's eight reasons do not overcome the great weight and clear preponderance of the evidence.

(1) *The air freshener*

Wilkins agrees that air fresheners are used to mask many odors including burnt marijuana. (Wilkins's Br. 14.) Drug users often use air fresheners to mask the odor of burnt

marijuana. *See State v. Floyd*, 2016 WI App 64, ¶ 16, 371 Wis. 2d 404, 885 N.W.2d 156.

Wilkins argues that, because an air freshener can "mask a variety of odors — not just marijuana" (Wilkins's Br. 14), its presence does not prove that he recently smoked marijuana. But the trial court seemed to imply that the air freshener masked any marijuana odor so Ayala could not have smelled it. The court did not explain why the air freshener would have *completely* masked the odor of recently smoked marijuana making it undetectable even to a highly trained nose.

If, as Wilkins seems to argue, the court mentioned the air freshener only to support its finding that no one smoked marijuana in the vehicle because it masks many other odors, the connection is both irrelevant and illogical. Wilkins and his passenger could have smoked marijuana with or without an air freshener in the vehicle. The more logical inference is that Wilkins kept an air freshener in the vehicle at least in part to mask the odor of burnt marijuana. This reasonable inference supports rather than undermines Ayala's credibility.

(2) *Wilkins and his passenger were smoking cigarettes*

Wilkins acknowledges that cigarettes, like air fresheners, can be used to mask "a variety of odors" including burnt marijuana. (Wilkins's Br. 14.) Wilkins argues that 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." (Wilkins's Br. 14—15.) In so arguing, Wilkins asks this Court to uphold the dual findings that Officer Ayala was unable to identify the odor of *either* burnt tobacco *or* burnt marijuana despite his extensive training and experience. There is no evidence to support either finding. In any event, Ayala did not testify whether he smelled tobacco smoke because no one asked. The only relevant fact question was

whether Ayala *also* smelled burnt marijuana. The court did not explain why Ayala could not have smelled both burnt tobacco and lingering burnt marijuana at the same time. The smoking of cigarettes does nothing to discredit Ayala's testimony just as the presence of an air freshener did nothing to discredit his testimony.

Wilkins takes the State to task for speculating that the cigarettes the two men were smoking could have been blunts, hollowed out and manually filled with marijuana. (Wilkins's Br. 15.) But, if it is true that Ayala smelled burnt marijuana, those "cigarettes" were as likely the source of the odor as anything else. The residue on the floor is evidence that someone rolled a joint or a blunt in the vehicle. On the body camera video, at approximately eight minutes and 45 seconds, Ayala can be heard saying to another officer words to the effect of, "You literally see it. I see you got blunts right there, brother." (R. 29:38.)

Wilkins notes that Ayala did not collect and test the cigarettes. (Wilkins's Br. 15.) That is best explained by the fact that this turned into a weapons investigation as soon as Ayala saw the gun on Wilkins's lap. The focus shifted immediately from marijuana possession to unlawful possession of a firearm, which is ultimately what led to the search and arrest.

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

Wilkins argues that it would have been difficult for Officer Ayala to see the marijuana residue on the floor with the naked eye even when aided by a flashlight. (Wilkins's Br. 15–16.) As proof, he notes that Ayala "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." (Wilkins's Br. 16.) Wrong. Ayala saw the gun almost immediately even without the aid of a flashlight. He was able

to see inside because the area was well lit by streetlights. (R. 29:13, 29.) Ayala testified that he saw the gun on Wilkins's lap without the aid of a flashlight *within ten seconds* after he pulled alongside the driver's side door and engaged Wilkins. (R. 29:17–20, 22.) There is no reason to disbelieve Ayala's testimony that he also saw the residue on the driver's side floor where Wilkins had his feet either before or after he turned on his flashlight. (R. 29:26, 28, 34–35.)

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

The residue may have been too small to weigh, as Officer Ayala admitted, but it was present and it tested positive for THC. (R. 29:27–28.) Its mere presence bolsters Ayala's credibility. Ayala smelled *burnt* marijuana after all. So how much fresh residue was left is not important. What is important is that there was residue.

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

As shown in the State's opening brief, this finding of fact is clearly erroneous. (State's Br. 21.) Again, the residue tested positive for THC. (R. 29:27–28.) Wilkins concedes this point by not disputing or even mentioning it in his brief.

(6) *No paraphernalia found inside the vehicle*

True, but *marijuana residue* was found inside. That, along with the odor, is the best evidence of recent marijuana use inside the vehicle. The presence of residue is every bit as powerful as finding a roach clip, a pipe, or a lighter on the floor. (Wilkins's Br. 17–18.) This argument also assumes that the officers searched the car for drugs and paraphernalia. It is apparent from the video that they were primarily searching the stuffed vehicle for dangerous weapons after Wilkins admitted to being a felon in unlawful possession of the gun resting on his lap.

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

Wilkins argues that police found no evidence of burnt marijuana and this proves there was none. (Wilkins's Br. 19.) The marijuana could have been completely used up or disposed of before Ayala arrived. Fresh residue was on the floor, indicating that some was spilled in the process of rolling a joint or filling a blunt at some point. The trial court was wrong to completely disregard the only reasonable explanation: Wilkins and his nephew used up all of the marijuana (except for the residue) or disposed of any evidence of its use elsewhere. The unreasonable explanation is the one on which Wilkins relies and on which the trial court relied: No one smoked marijuana inside the vehicle because Ayala could not distinguish the odor of burnt tobacco from burnt marijuana—or he made it all up. Ayala's training and experience make the former explanation unreasonable and there is no evidence whatsoever that he made it all up under oath.

Neither Wilkins nor the trial court offered any explanation for the residue. Perhaps Wilkins stepped into a pile of marijuana leaves in the street as he got into the vehicle, but that would have been an unreasonable inference. Perhaps the residue could have been there for days or weeks. But the court did not make that finding.

This Court can search the record for evidence to support the trial court's finding that Officer Ayala either could not or did not smell burnt marijuana (Wilkins's Br. 19), but it will find none. The trial court's findings are not supported by the evidence and the reasonable inferences from it.

(8) *Wilkins's denial that he had marijuana in his vehicle*

As the State pointed out in its opening brief, it is no surprise that Wilkins was cooperative and denied wrongdoing rather than incriminate himself or react belligerently. His denial was also proven to be false by the presence of the

marijuana residue. (State's Br. 22.) Wilkins's denial also carries no weight because he has yet to "offer[ ] a reasonable explanation for the odor" of burnt marijuana. (Wilkins's Br. 20 (quoting *State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999)).)

Finally, the court clearly erred when it found that Officer Ayala lacked "reasonable suspicion to *stop* the vehicle." (R. 23:5.) This was not a traffic stop of a moving vehicle. The officer approached a vehicle that was parked on a public street.

The trial court's findings of fact and credibility determination are clearly erroneous because they are contrary to the great weight and clear preponderance of the evidence adduced at the hearing. *Anderson*, 389 Wis. 2d 106, ¶ 20. The eight reasons the court offered do not add up to much of anything. It all still comes back to whether there is enough evidence for this Court to agree with the trial court that Ayala either could not distinguish the odor of burnt marijuana from the odor of burnt tobacco, or he did not smell burnt marijuana and lied when he said that he did. There is no evidence whatsoever to support either finding. The great weight and clear preponderance of the evidence adduced at the suppression hearing supports only one reasonable finding: the trained and experienced Officer Ayala smelled burnt marijuana as he approached the vehicle on his bicycle and he was thereby authorized to approach and speak to Wilkins through the partially open window. *Secrist*, 224 Wis. 2d at 210. He soon saw the gun in plain view.

II. Officer Ayala could lawfully approach Wilkins in his parked vehicle on a public street as part of a consensual police/citizen encounter.

A. Officer Ayala did not need probable cause or reasonable suspicion to approach Wilkins's vehicle and briefly speak with him.

Even if he lacked reasonable suspicion of criminal activity, Officer Ayala could approach Wilkins's parked vehicle and briefly speak with him because such an encounter is not a Fourth Amendment event; it is not a "seizure." *State v. VanBeek*, 2021 WI 51, ¶ 26, 397 Wis. 2d 311, 960 N.W.2d 32; *County of Grant v. Vogt*, 2014 WI 76, ¶¶ 9, 32–43, 51–53, 356 Wis. 2d 343, 850 N.W.2d 253. This was not, as the court erroneously found, a traffic stop of a moving vehicle that would require Ayala to have reasonable suspicion before he could approach. This was a consensual encounter.

> The test of whether an encounter is consensual is "whether a reasonable person in the defendant's position would feel free to decline the officers' requests or otherwise terminate the encounter"—not whether the person would feel free or even able to leave without being questioned.

United States v. Johnson, 856 F. App'x 48, 50 (7th Cir. 2021) (quoting *Florida v. Bostick*, 501 U.S. 429, 436–37 (1991)).

A reasonable person in Wilkins's position would have felt free to end the encounter up until the point that Officer Ayala saw the gun on Wilkins's lap. Wilkins's vehicle was parked with its motor running on a public street in a high crime area shortly before bar time. It was objectively reasonable for Ayala, while on routine patrol, to approach on his bicycle and briefly engage Wilkins through the partially open window. Wilkins, if he so chose, could refuse to speak with Ayala and "terminate the encounter." *Id*. An innocent reasonable person in his position would have felt free to refuse to speak and leave. *Vogt*, 356 Wis. 2d 343, ¶ 30. It would then

be up to Ayala to decide whether to exert his authority and detain Wilkins if he refused to talk and said he was leaving.

That all changed, however, ten seconds into the encounter when Ayala saw the gun on Wilkins's lap. This gave Ayala reasonable suspicion of criminal activity, allowing him to ask Wilkins whether he had a concealed carry permit for the gun and, when he said no, whether he was a convicted felon.

Wilkins's reliance on *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015), for the argument that this was not a consensual encounter but a seizure is misplaced. (Wilkins's Br. 23–24.) In *Smith*, two armed bicycle patrol officers investigating shots fired confronted Smith and blocked his path as he walked down a dark alley by positioning their bicycles in front of him on an angle so he could not get around them; one officer approached Smith with his hand on his gun and immediately asked Smith whether he had a weapon. *Smith*, 794 F.3d at 683, 685. The officers considered Smith a suspect in the shots fired investigation when they stopped him. *Id.* at 686–87.

Here, in contrast, Wilkins was seated with his nephew in a large SUV with its motor running. It was parked on a lighted public street, not in a dark alley. *See Smith*, 794 F.3d at 685 ("[A]lleys are by their nature less travelled and narrower than streets."). The bicycle patrol officers did not block the SUV's path. Two officers were positioned along each side of the vehicle. No officer positioned his bicycle in front of or behind the vehicle to block its path should Wilkins decide to leave. *C.f. United States v Burton*, 441 F.3d 509, 510–11 (7th Cir. 2006) (four bicycle patrol officers positioned their bicycles on both sides *and in front of* the vehicle preventing it from driving away). Wilkins "still could have driven away" and "had room to leave." *Vogt*, 356 Wis. 2d 343, ¶¶ 41, 54. Officer Ayala did not draw or put a hand on his service weapon. The officers were on routine patrol. The encounter

was congenial. The officers were not responding to a report of criminal activity in the area. They were not investigating a shooting. The fact that the officers shined flashlights into the vehicle proves nothing. (Wilkins's Br. 25.) It was almost 2 a.m. They did not even tell Wilkins to turn off the ignition until four minutes into the video. Officer Ayala did not ask Wilkins about a weapon until after he saw the gun on Wilkins's lap. Only then did the encounter turn from a consensual one to an investigation based on reasonable suspicion of criminal activity. Only then did Ayala order Wilkins out of the vehicle and detain him. In short, a reasonable innocent person in Wilkins's position would have felt free to end the encounter up until the point that Ayala saw the gun on Wilkins's lap, but not after.

B. When he smelled burnt marijuana, Officer Ayala had reasonable suspicion of criminal activity, authorizing him to approach Wilkins's vehicle and investigate further.

Wilkins insists that even if Officer Ayala smelled burnt marijuana coming from his vehicle, Ayala lacked reasonable suspicion to approach it. (Wilkins's Br. 25–27.) This argument simply ignores the controlling law and reality.

Wilkins concedes that "the odor of marijuana will generally lead to a conclusion that probable cause exists." (Wilkins's Br. 26.) Here, Officer Ayala only needed reasonable suspicion which is "a low bar." *State v. Nimmer*, 2022 WI 47, ¶ 25, 402 Wis. 2d 416, 975 N.W.2d 598 (citation omitted). The odor of burnt marijuana provided that suspicion because it provided probable cause, a higher bar. *Secrist*, 224 Wis. 2d at 210; *see Nimmer*, 402 Wis. 2d 416, ¶ 25.

The fact that the odor could be stale (Wilkins's Br. 27), does not disprove the fact that it also could be recent. Officer Ayala testified that it was a strong odor. (R. 29:12, 14, 41–42.) The trial court also did not find that the odor was stale. It

disbelieved Ayala's testimony that he smelled burnt marijuana at all. Regardless, the odor of burnt marijuana came from the vehicle no matter how long ago it may have been smoked. Officer Ayala was authorized to investigate the odor even if there were some ambiguity as to when it was smoked. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) ("[S]uspicious conduct by its very nature is ambiguous . . . .").

Given his extensive training and experience, Officer Ayala was authorized under the totality of the circumstances to approach and resolve any ambiguity because he reasonably suspected criminal activity even if he lacked probable cause when he detected the odor of burnt marijuana coming from Wilkins's vehicle. *State v. Colstad*, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394; *Secrist*, 224 Wis. 2d at 210.

CONCLUSION

This Court should reverse the order granting the suppression motion because it is not supported by the great weight and clear preponderance of the evidence.

Dated this 19th day of January 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,963 words.

Dated this 19th day of January 2024.

Electronically signed by:

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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 19th day of January 2024.

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