

FILED
11-19-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP1385-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KAHREEM RASHAH WILKINS, SR.,

Defendant-Respondent-Petitioner.

RESPONSE TO THE PETITION FOR REVIEW

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The Plaintiff-Appellant State of Wisconsin opposes the petition for review filed by Defendant-Respondent-Petitioner Kahreem Rashah Wilkins, Sr., for the following reasons.

1. This case turns on whether police on bicycle patrol acted reasonably when they approached Wilkins's parked vehicle on a public street at bar time. The outcome is governed by the application of established legal principles recently revisited by this Court to the unique facts. There is no potential for law-development here.

2. The court of appeals correctly applied this Court's precedent when it held that Officer Ayala on bicycle patrol could reasonably approach Wilkins's parked vehicle to speak with him in what the law has long recognized to be a consensual police/citizen encounter on a public street. This quickly led to the discovery of the gun resting on Wilkins's lap in plain view through the partially open window and, ultimately, his arrest for carrying an unregistered firearm and felon in possession of a firearm. *State v. Kahreem Rashah Wilkins, Sr.*, No. 2023AP1385-CR, 2024 WL 4441900, ¶¶ 13–23 (Wis. Ct. App. Oct. 8, 2024) (unpublished).

3. As this Court has consistently held, 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. *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; *State v. Williams*, 2002 WI 94, ¶¶ 21–34, 255 Wis. 2d 1, 646 N.W.2d 834. That precedent, the court of appeals correctly held, allowed the bicycle patrol officers to approach the parked vehicle and briefly question Wilkins and his passenger:

When the officers approached Wilkins, he was sitting in a parked SUV with the engine running on a well-lit public street. There was no evidence

presented that the officers activated the emergency lights on their bicycles, used forceful language, displayed their firearms, or placed a hand on Wilkins or his nephew. Moreover, the officers did not position their bicycles in front of the SUV, which would have prevented Wilkins from pulling forward and driving away.

Wilkins, 2024 WL 4441900, ¶ 18.

Therefore, under all of the circumstances of this case, we conclude that the police officers' initial interaction with Wilkins was a consensual encounter and not a seizure implicating his Fourth Amendment rights. Wilkins was free to refuse to speak to the officers and leave. See *Vogt*, 356 Wis. 2d 343, ¶ 30.

Id. ¶ 23.

4. This was reasonable police conduct under the totality of the circumstances. There is no reason for this Court to second-guess the court of appeals' application of this Court's established precedent to these unique facts.

5. The concerns of the dissent notwithstanding, there is no reason for this Court to reverse its controlling precedent that permitted what occurred here. Moreover, up until Officer Ayala saw the gun resting in plain view on Wilkins's lap, a reasonable *innocent* person in Wilkins's position would have felt free to end the encounter. *Vogt*, 356 Wis. 2d 343, ¶ 30. In a police/citizen consensual encounter, the issue 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)).

6. If this Court grants review, the State stands ready to argue in the alternative the issue not addressed by the court of appeals: whether Officer Ayala had reasonable suspicion to approach Wilkins's vehicle based on the smell of

burnt marijuana. *Wilkins*, 2024 WL 4441900, ¶¶ 11–12. Officer Ayala testified that, as he approached Wilkins’s SUV on his bicycle, he smelled burnt marijuana. This Court’s precedent authorized Ayala to approach the vehicle if in fact he smelled burnt marijuana and to at least question Wilkins on reasonable suspicion of criminal activity. *State v. Moore*, 2023 WI 50, ¶¶ 9–12, 408 Wis. 2d 16, 991 N.W.2d 412; *State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). The trial court held that Ayala’s testimony under oath was incredible: he did not smell burnt marijuana. As it did in the court of appeals, the State will strenuously challenge in this Court the trial court’s credibility determination against Officer Ayala as utterly baseless. The trial court did not find that Ayala lacked the requisite training and experience because the suppression hearing testimony clearly established that he had extensive training and experience in detecting the odor of marijuana; Ayala certainly could have smelled it from the partially open window as he approached Wilkins’s vehicle on his bicycle. *See Secrist*, 224 Wis. 2d at 216 (“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.”). His testimony was corroborated by the presence of marijuana residue in plain view at Wilkins’s feet on the floor. *See id.* (“[C]orroboation can be helpful in firming up the reasonableness of the officer’s judgments.”). That leaves only the trial court’s implicit finding that Ayala lied under oath. There is no evidence to support that serious accusation.

7. There is no reason to grant review to delve into the fact-specific issue of Ayala’s credibility because it will not contribute to the development of the law.

8. It would be wholly improper for this Court to grant review to revisit its recent decision in *Moore* on the issue whether a trained officer can distinguish the odor of marijuana from a legal substance such as hemp, *Wilkins*,

2024 WL 4441900, ¶ 37 n.3 (Geenen, J., dissenting), because Wilkins has not argued that he was using a legal substance that produced the odor, and the trial court made no such finding. Revisiting the recent *Moore* decision for that or any other reason would stand the principle of *stare decisis* on its head.

9. The decision is not recommended for publication. If left unpublished, it will have no precedential value. This Court should deny review.

Dated this 19th day of November 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,052 words.

Dated this 19th day of November 2024.

Electronically signed by:

Daniel J. O'Brien
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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 19th day of November 2024.

Electronically signed by:

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