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STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2024AP777-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. PHELAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE W. ANDREW VOIGT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Until 1981, Department of Natural Resources (DNR) wardens had arrest powers limited to violations of natural resources law. That year, the Legislature granted wardens with specified law enforcement training, additional arrest powers, including the power to arrest a person for littering anywhere in Wisconsin, or a person who commits any crime in the warden's presence.

Here, a warden with the specified law enforcement training suspected that a man later identified as John R. Phelan littered on state-owned land. When Phelan drove away, the warden followed and saw Phelan's pickup truck cross the center line and fog line multiple times. The warden stopped the truck when it was not on state-owned land. The warden immediately smelled the odor of burnt marijuana when Phelan rolled down his truck's window and observed that Phelan had bloodshot and glossy eyes and slurred speech. After Phelan denied littering, the warden asked him to get out of his truck for field sobriety tests. The warden observed clues of intoxication on the field sobriety tests and contacted the sheriff's department. Two deputies arrived and one arrested Phelan.

Phelan challenges his convictions for operating a motor vehicle with a restricted controlled substance in his blood (RCS), possession of drug paraphernalia, and bail jumping. He does not dispute that the warden was justified in stopping his truck and investigating a littering violation. He argues that once the warden's suspicion of littering was dispelled, there was no probable cause to arrest him, so the warden was statutorily unauthorized to detain him to perform field sobriety tests. The circuit court concluded that there was probable cause to arrest Phelan as soon as the warden smelled marijuana coming from his truck and that the warden's subsequent actions were justified. This Court should affirm.

ISSUE PRESENTED

Was the warden statutorily authorized to detain Phelan and conduct field sobriety tests because there was probable cause that he committed a crime in the warden's presence?

The circuit court answered "yes" and denied Phelan's second motion to suppress evidence.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the arguments are fully developed in the parties' briefs. The State does not request publication, as resolution of this case requires only the application of well-established law to the facts of the case.

STATEMENT OF THE CASE

On October 14th, 2015, DNR Warden Ryan Volenberg, a board-certified law enforcement officer for the State of Wisconsin (R. 192:7–8), was conducting fishing enforcement (R. 110:7–8). Warden Volenberg observed a man, later identified as John R. Phelan, walking from a fishing area back to his truck with a can in his hand. (R. 110:6–7.) Warden Volenberg knew that littering was common in the area. (R. 47:17.) He saw Phelan stop and look around, and he believed Phelan was going to litter. (R. 110:7.) Phelan continued to his truck and drove away. (R. 110:7.) Warden Volenberg saw a can on the ground near where Phelan's truck had been parked, so he followed Phelan. (R. 110:7.) He saw Phelan's truck cross the double center line at least four times and the fog line at least three times. (R. 110:7.) Warden Volenberg believed that Phelan might be impaired based on his driving, so he activated his emergency lights and stopped

the truck. (R. 110:7–8.) He radioed dispatch to inform them that he was making a traffic stop for littering. (R. 192:18.)

When Warden Volenberg approached Phelan's truck, Phelan rolled down the driver's side window, and Warden Volenberg "immediately smelled the odor of burnt marijuana." (R. 110:8.) He testified that it "smelled like somebody had been smoking inside the cab." (R. 110:20.) Warden Volenberg observed that Phelan had bloodshot, glossy eyes and slurred speech, and he asked Phelan about littering. (R. 110:23.) Phelan said he had not littered and directed Warden Volenberg to empty cans in the back of his truck. (R. 110:8–9.)[1]

Warden Volenberg's focus shifted from the potential littering violation to impaired driving. (R. 110:9.) He asked Phelan to exit his vehicle, and he conducted several field sobriety tests to determine whether Phelan was impaired. (R. 110:9.) Warden Volenberg administered the horizontal gaze nystagmus test, the walk-and-turn-test, and the one-leg stand test and observed clues of impairment on each test. (R. 110: 25–28, 40.) Warden Volenberg administered a preliminary breath test (PBT), which indicated that Phelan was not impaired by alcohol. (R. 110:9.) Warden Volenberg believed that Phelan was impaired by drugs, so he contacted dispatch and requested a drug recognition expert ("DRE"). (R. 110:9–10, 12.) Warden Volenberg questioned Phelan about the marijuana odor, and Phelan admitted smoking marijuana earlier that day and said there was marijuana in his truck. (R. 110:10.)

Two sheriff's deputies arrived. (R. 110:34, 38.) Warden Wesley Austin-Nash, a DRE, conducted an additional field sobriety test, the Modified Romberg test. (R. 110:36.) He

[1] Warden Volenberg later went back to the area where Phelan's truck was parked, and he observed that the can he had seen there did not match the cans in Phelan's truck. (R. 110:9.)

observed that Phelan's tongue had a green film, and he had elevated taste buds. (R. 110:37.) This indicated to Deputy Austin-Nash that Phelan was a habitual marijuana user who had recently smoked marijuana. (R. 110:37–38.) Phelan admitted that he had smoked marijuana about four hours earlier. (R. 110:38.) Warden Mark Smit arrested Phelan. (R. 110:38–39.) Phelan consented to a blood test, which was negative for ethanol but showed the presence of delta-9 THC. (R. 180:16.)

The State charged Phelan with OWI as a third offense, RCS as a third offense, possession of THC as a second offense, possession of drug paraphernalia, and bail jumping. (R. 3; 14.)

Phelan first moved to suppress the evidence on the constitutional ground that the traffic stop was pretextual and was not justified by reasonable suspicion. (R. 23.) The circuit court denied the motion.[2] (R. 47:56–57.) Phelan filed another suppression motion, asserting that Warden Volenberg did not have statutory authority to investigate him for impaired driving, detain him, or arrest him. (R. 117.) The circuit court denied the motion after a hearing. (R. 190:6.) The court concluded that as soon as Warden Volenberg detected the odor of marijuana, he had probable cause to arrest Phelan (R. 190:3–5), and that the warden therefore had statutory authority under Wis. Stat. § 29.921(5) to detain him and conduct field sobriety tests (R. 190:2–3).

Before Phelan was tried, he stipulated that if he was found guilty of any criminal offense, he would plead guilty to bail jumping. (R. 154:1.) The State dismissed the possession of THC charge. (R. 151:1; 162.) The jury found Phelan not guilty of OWI but guilty of RCS and possession of drug

[2] Phelan does not challenge the decision denying his first suppression motion.

paraphernalia. (R. 198:285–86.) Phelan appeals his judgment of conviction. (R. 201.)

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact, where the circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's application of the historical facts to constitutional principles is reviewed de novo. *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

ARGUMENT

The circuit court properly denied Phelan's motion to suppress evidence.

The circuit court denied Phelan's motion to suppress evidence because it concluded that: (1) "as soon as" Warden Volenberg stopped the truck he detected the odor of marijuana, so under *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), there was probable cause to arrest Phelan; and (2) Wis. Stat. § 29.921(5) authorized Warden Volenberg to detain Phelan and conduct field sobriety tests and a PBT. (R. 190:2–5.)

On appeal, Phelan does not dispute that Warden Volenberg was authorized to stop his truck on suspicion of littering. Phelan argues that "when Warden Volenberg learned that Mr. Phelan had not littered," there was no probable cause to arrest him, so detaining him became unlawful. (Phelan's Br. 15–16.) He points out that Warden Volenberg did not arrest him that this point because he did not believe there was probable cause. (Phelan's Br. 15–16.)

However, it makes no difference whether Warden Volenberg believed there was probable cause, because whether there was probable cause to arrest a person is determined under an objective test. *Secrist*, 224 Wis. 2d at

212. As the circuit court recognized, under the circumstances known to Warden Volenberg, viewed objectively, there was probable cause to arrest Phelan. (R. 190:3–5.)

Warden Volenberg did not arrest Phelan. He instead detained Phelan, confirmed his observation of an OWI-related offense, and bought in two sheriff's deputies, one of whom arrested Phelan. Since there was probable cause to arrest Phelan when Warden Volenberg smelled marijuana coming from Phelan's truck (along with his observations of Phelan's truck crossing the center line four time and the fog line three times, and Phelan's glossy, blood shot eyes and slurred speech), Warden Volenberg was plainly authorized to detain Phelan.

As explained in detail below, Warden Volenberg had authority to detain and potentially arrest Phelan under Wis. Stat. § 29.921(5). There was reasonable suspicion of littering, so Warden Volenberg was authorized to stop Phelan's and look into that potential violation. And as soon as Phelan rolled down his window and smelled marijuana, there was probable cause of a drug or OWI-related offense committed in the warden's presence. Warden Volenberg was therefore justified in arresting Phelan. And as a law enforcement officer, he was justified in detaining Phelan and confirming that he had committed the offense.

There was probable cause to arrest Phelan based on Warden Volenberg's observations of Phelan's driving, the smell of marijuana, and Phelan's glossy and bloodshot eyes and slurred speech, before Warden Volenberg even asked Phelan about the marijuana or administered field sobriety tests. This Court can affirm without determining the scope of a warden's authority to conduct an investigation. If this Court addresses the scope of a warden's authorization to "conduct investigations," it should determine that while a warden's authority to conduct an investigation is limited, that limitation does not extend to doing things like asking a person

who he sees commit a crime for identification or an explanation of the person's actions, taking statements at the scene, collecting or securing evidence, taking photos, or conducting a PBT or field sobriety tests as appropriate in a given case.

A. Warden Volenberg was justified in stopping Phelan's truck for a suspected littering violation.

Warden Volenberg pursued Phelan and stopped his truck because he suspected that Phelan had littered. (R. 110:7; 192:18.) On appeal, Phelan concedes that Warden Volenberg was justified in stopping Phelan's truck on suspicion of littering. (Phelan's Br. 18). He argues only that once Warden Volenberg's suspicion of littering was dispelled he could not detain Phelan. (Phelan's Br. 18.)

Phelan is right to concede that Warden Volenberg was justified in stopping his truck. A DNR warden is authorized to "stop any vehicle" when the warden "reasonably suspects" that there is a violation of "any law enumerated in ss. 23.50 (1), 167.31, 346.19, 940.24, 941.20, 948.60, 948.605 and 948.61." Wis. Stat. § 29.921(1). And a warden is authorized to arrest "any person detected in the actual violation, or whom the officer has probable cause to believe is guilty of a violation of any of the laws cited in this subsection." Wis. Stat. § 29.921(1). One of the statutes enumerated in Wis. Stat. § 23.50(1) is Wisconsin's littering statute, Wis. Stat. § 287.81. Accordingly, a warden can stop a vehicle when he reasonably suspects littering. And since Warden Volenberg reasonably suspected Phelan had littered, he was justified in stopping Phelan's truck.

B. Even after Warden Volenberg was unable to confirm his suspicion of littering, he was authorized to detain and potentially arrest Phelan because there was probable cause that Phelan committed a crime in Warden Volenberg's presence.

In addition to the limited arrest authority granted to all DNR wardens in Wis. Stat. § 29.921(1), wardens with specified law enforcement training have additional arrest powers under Wis. Stat. § 29.921(5). Subsection (5) applies to "a warden who has completed a program of law enforcement training approved by the law enforcement standards board, has been certified as qualified to be a law enforcement officer under s. 165.85(4)(a)1. and has complied with any applicable requirements under s. 165.85(4)(a)7.," and who is on duty and in uniform. Wis. Stat. § 29.921(5). A warden with this expanded authority "may arrest a person who has committed a crime in the presence of the warden." Wis. Stat. § 29.921(5).

Phelan does not contest that Warden Volenberg, a board-certified law enforcement officer of the State of Wisconsin (R. 192:7–8), had expanded arrest authority under Wis. Stat. § 29.921(5), and was therefore authorized to arrest a person who committed a crime in his presence. (R. 190:2).

The circuit court concluded that Phelan committed a crime in Warden Volenberg's presence. (R. 190:3–4.) The court reasoned that "[a]s soon as Warden Volenberg detected the odor of marijuana" when Phelan rolled down his window, there was "probable cause sufficient to arrest" Phelan. (R. 190:3–4.) The court relied on *Secrist*'s holding that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered or because other evidence at the scene or elsewhere links the odor to the person or persons." *Secrist*, 224 Wis. 2d at 217–18.

In *State v. Moore*, the Wisconsin Supreme Court applied *Secrist* and concluded that if an odor is "sufficiently identified as an illegal substance, most likely by someone (a law enforcement officer) who could make such an identification," it is "reasonable to believe that some illegal activity had occurred or was occurring." *State v. Moore*, 2023 WI 50, ¶ 11, 408 Wis. 2d 16, 991 N.W.2d 412. The court concluded that the question is therefore "whether this illegal activity was sufficiently linked to the suspect such that a reasonable law enforcement officer would reasonably believe it was the suspect who was involved in the illegal drug activity." *Id.*

Warden Volenberg testified that "[a]s soon as [Phelan] rolled the window down, I immediately smelled the odor of burnt marijuana." (R. 110:8.) Phelan was the only person in the truck. (R. 3:2.) From this information, a law enforcement officer would reasonably believe that Phelan was involved in illegal drug activity. *See Moore*, 408 Wis. 2d 16, ¶ 11. In addition, Warden Volenberg had just seen Phelan's truck cross the center line four times and the fog line three times, and he had just observed Phelan's glossy, bloodshot eyes and slurred speech. (R. 110:7, 23.) This information was plainly sufficient for probable cause to arrest Phelan.

Phelan argues that there was not probable cause to arrest him at this point because Warden Volenberg testified that he did not believe there was probable cause. (Phelan's Br. 15–16.) But Phelan ignores *Secrist* and *Moore*, even though the circuit court explicitly relied on *Secrist* in finding probable cause. (R. 190:3–4.)

Regardless, it makes no difference whether Warden Volenberg believed there was probable cause, because whether there was probable cause is determined objectively. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that

the defendant probably committed or was committing a crime." *Secrist*, 224 Wis. 2d at 212. "[P]robable cause is an objective standard that is based upon the information available to the officer." *State v. Rose*, 2018 WI App 5, ¶ 15, 379 Wis. 2d 664, 907 N.W.2d 463 (quoting *State v. Kutz*, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 660).

The facts known to Warden Volenberg—that Phelan's truck crossed the center line four times and the fog line three times and when Phelan rolled down his window, Warden Volenberg immediately smelled burnt marijuana and observed that Phelan had glossy, bloodshot eyes and slurred speech—was sufficient for a reasonable law enforcement officer to believe that Phelan probably had committed or was committing a crime, regardless of whether that officer properly understands the probable cause standard as a legal matter.

Although Warden Volenberg was authorized to arrest Phelan as soon as Phelan rolled down his window and Warden Volenberg smelled the odor of marijuana, he did not do so. He instead addressed the littering violation he believed he saw Phelan commit. Once he saw empty cans in the back of Phelan's truck, he stopped asking about littering. (R. 110:8–9.)

Phelan argues that at this point, Warden Volenberg had to simply let him go, rather than detain him to ask about marijuana. (Phelan's Br. 16.) But Warden Volenberg was justified in detaining Phelan.

Warden Volenberg was a "[l]aw enforcement officer," which is defined as "any person who by virtue of the person's office or public employment is vested by law to with the duty to maintain public order or to make arrests for crimes while acting within the scope of the person's authority." Wis. Stat. § 967.02(5). A law enforcement officer is statutorily authorized to stop a person on reasonable suspicion of

criminal activity, "and may demand the name and address of the person and an explanation of the person's conduct." Wis. Stat. § 968.24. When a crime is committed in the presence of a warden with expanded authority under Wis. Stat. 29.921(5), the warden is authorized to arrest the person and to demand the name and address of the person and explanation of the person's conduct. The warden must be able to detain the person to ask those questions.

A law enforcement officer who has validly stopped a vehicle, which Warden Volenberg undisputedly did here, may extend the traffic stop and detain a suspect when "the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place." *State v. Adell*, 2021 WI App 72, ¶ 16, 399 Wis. 2d 399, 966 N.W.2d 115. And here, there was more than just reasonable suspicion at that point, there was probable cause.

Here, since Warden Volenberg—a law enforcement officer authorized by Wis. Stat. § 29.921 to enforce laws and make arrests for violations of those laws—had enough objective evidence to arrest Phelan outright he plainly was permitted to further detain and question him. And since there was reasonable suspicion (in fact probable cause) of impaired driving, Warden Volenberg was justified in requesting that Phelan perform field sobriety tests and take a PBT. After all, a law enforcement officer can request field sobriety tests when there is reasonable suspicion of an OWI-related offense. *Adell*, 399 Wis. 2d 399, ¶ 38. And after Warden Volenberg observed numerous clues on each of the three field sobriety tests he administered (R. 110:26–27, 40), there obviously was probable cause to request a PBT. Wisconsin Stat. § 343.303 authorizes a law enforcement officer to administer a PBT when there is "probable cause to believe" the person is violating or has

violated a drunk driving law. *State v. Colstad*, 2003 WI App 25, ¶ 23, 260 Wis. 2d 406, 659 N.W.2d 394. "'Probable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, . . . but less than the level of proof required to establish probable cause for arrest." *Id.* (quoting *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999)). Since there was already probable cause to arrest Phelan, there necessarily was probable cause to request a PBT from him.

C. Phelan's argument that Warden Volenberg could not detain him because he had no authority to investigate an OWI-related offense is incorrect.

Phelan argues that once Warden Volenberg's suspicion of littering was dispelled, he had no authority to investigate an OWI-related offense. (Phelan's Br. 15–16.) He relies on a sentence in Wis. Stat. § 29.921(5), which says that "[a] warden may not conduct investigations for violations of state law except as authorized in ss. 23.11(4), 29.924(1) and 41.41(12)." (Phelan's Br. 13.) Wisconsin Stat. § 23.11(4) grants DNR "police supervision over all state-owned lands," and it grants wardens authority to "arrest, with or without warrant, any person within such area, committing an offense against the laws of this state or in violation of any rule of the department in force in such area." Wisconsin Stat. § 29.924(1) requires the DNR and its wardens to "upon receiving notice or information of the violation of any laws cited in s. 29.921(1), as soon as possible make a thorough investigation and institute proceedings if the evidence warrants it." Wisconsin Stat. § 41.41(12)(a) grants DNR "police supervision over the Kickapoo valley reserve," and it authorizes wardens to "arrest, with or without warrant, any person on that property committing an offense against the laws of the state or in violation of any rule of the board in force on that property."

The prohibition on "conduct[ing] investigations" in Wis. Stat. § 29.921(5) cannot reasonably mean that a warden who is authorized to arrest a person who commits a crime in his presence, cannot act on a crime committed in his presence other than by arresting the person. A warden with the authority to arrest must be able to do things like ask questions, take statements at the scene, collect or secure evidence, take photos, and conduct field sobriety tests or a PBT in an appropriate case. Warden Volenberg, who had probable cause to arrest Phelan, did not violate the law by asking Phelan questions about the odor of marijuana the warden smelled coming from Phelan's truck, detaining him for field sobriety tests and a PBT, and arresting him.

A warden must first be able to do things like ask questions of a suspect in order to determine whether to arrest the suspect for committing a crime in the warden's presence. After all, in nearly every case, something a warden (or any other law enforcement officer) sees may or may not be criminal activity. For instance, if a warden sees a person hitting another person, he must be able to ask whether the person being hit has consented to being hit. If the person has consented, there likely is no crime. Or if a warden sees a person drive a truck up to a child just outside of a state park, get out and grab the child and put him in the truck and start to drive away, and the warden hears the child yell "help," the warden would certainly have probable cause of criminal activity. But the warden couldn't be sure that a crime was committed in his presence until he ascertained that the driver is not the child's parent. Under Phelan's view of the law, the warden could not arrest the person or even investigate. He would seemingly have to just let the person drive away.

Wisconsin Stat. § 29.921(5) cannot reasonably be read as authorizing the warden to arrest the person without first asking questions to determine whether what appears to be a crime committed in the warden's presence is a crime. And

when there is probable cause that a crime has been committed in the warden's presence, the warden must be authorized to do things like take statements at the scene, collect or secure evidence, take photos, and conduct field sobriety tests or a PBT. Those actions do not constitute initiating or conducting an investigation. They are simply standard law enforcement tasks attendant to an arrest.

Phelan relies on an attorney general opinion as supporting his argument that "this Court should not find [ ] an expansive view of a warden's police powers where they effectively have all the authority of a police officer with less of the training." (Phelan's Br. 15.) The attorney general opinion says, "The power of arrest of DNR wardens is limited by statute; they do not have general law enforcement authority except on state-owned lands, and property under DNR's supervision, management and control . . . ." 68 Op. Wis. Att'y Gen. 326 (Nov. 6, 1979).

The attorney general opinion does not help Phelan because it was issued in 1979, before the Legislature granted wardens with the specified law enforcement training the expanded arrest authority in Wis. Stat. § 29.921(5). Ch. 98, § 2, Laws of 1981.[3] The attorney general opinion interpreted the pre-expanded authority law and has no bearing on a warden's "additional arrest powers."

Phelan also argues that the field sobriety tests that Warden Volenberg conducted "present a perfect example of why Wisconsin law does not authorize DNR wardens to investigate or enforce laws wherever they happen to be in the state." (Phelan's Br. 16.) He attempts to poke holes in Warden Volenberg's administration of the field sobriety tests and the

[3] Expanded arrest authority was originally in subsection (2) of Wis. Stat. § 29.921. Subsection (2) of Wis. Stat. § 29.921 was later renumbered as subsection (5). The pertinent language was unchanged.

PBT, but he fails to do so. And even if he could do so, that would not mean that Warden Volenberg, a board-certified law enforcement officer with the State of Wisconsin, was not authorized to conduct the tests on a person whom he had probable cause to arrest.

Phelan criticizes Warden Volenberg's administration of field sobriety in four respects. But none of his criticisms are valid.

First, Phelan argues that Warden Volenberg was unsure whether Phelan was impaired by alcohol or drugs, so he requested field sobriety tests. (Phelan's Br. 16.) But a person can violate the OWI law in multiple ways, so when there is reasonable suspicion of a violation, regardless of whether it involves drugs or alcohol, it makes sense to request field sobriety tests.

Second, Phelan argues that when Warden Volenberg testified, he said it had been four or six years since he had administered field sobriety tests. (Phelan's Br. 16.) But he later clarified that he meant he had not administered field sobriety tests since 2017, four years before he testified in 2021. (R. 192:11–12.) In fact, he had administered field sobriety tests "fairly recently" before he administered them in this case, in 2015. (R. 192:12–13.) And he had conducted field sobriety tests over 100 times. (R. 192:11.)

Third, Phelan speculates that Warden Volenberg "is almost certainly not required to be as up-to-date on training as a police officer." (Phelan's Br. 16.) But the Legislature has granted wardens who meet the specified training and certification standards expanded authority to arrest. It is hardly surprising that it would not prohibit these wardens from doing things that any law enforcement officer would need to do when determining whether to arrest a person who committed a crime in the warden's presence.

Fourth, Phelan argues that Warden Volenberg testified that he did not interpret the results of the field sobriety tests to determine which precise substance Phelan had taken. (Phelan's Br. 16–17.) But there was probable cause to arrest for an OWI-related offense. It doesn't matter which particular intoxicant or drug was involved. And Warden Volenberg acted entirely reasonably when he called in a drug recognition expert who could interpret the test results and attempt to determine which particular drugs Phelan had taken.

Phelan also criticizes Warden Volenberg for requesting a PBT when he suspected Phelan had used marijuana. (Phelan's Br. 17.) But again, there was probable cause of impaired driving. A prudent officer who did not know precisely what the impairing substance was would request a PBT to try to confirm whether it was alcohol or some other substance.

Phelan argues that once the PBT showed a very low alcohol concentration, it was "clear" that there was no probable cause to arrest him. (Phelan's Br. 17.) He says, he "was clearly not under the influence of alcohol, Volenberg had not observed any poor driving that would lead to the establishment of probable cause for an arrest, and his testimony revealed that he did not have the proper training or experience in detection of controlled substances or marijuana." (Phelan's Br. 17.) But Warden Volenberg observed poor driving—Phelan crossed the center line four times and the fog line three times. (R. 110:7.) And he detected the odor of marijuana coming from Phelan's truck. Phelan simply ignores that under *Secrist* and *Moore*, as soon as Warden Volenberg smelled the odor of marijuana coming from his truck and observed his glossy, bloodshot eyes and slurred speech, there was probable cause to arrest him.

Finally, Phelan points out that Warden Volenberg did not contact a DRE until after the PBT showed only a low alcohol concentration. (Phelan's Br. 18.) But that is good law

enforcement work. If the PBT had shown a high alcohol concentration, there may have been no need for a DRE. When the PBT showed a low alcohol concentration, the issue became what substance other than alcohol was Phelan impaired by (likely THC, given the smell of marijuana). Hence, the need for a DRE.

In sum, a trained law enforcement officer observed Phelan's poor driving, his glossy and bloodshot eyes and slurred speech, and the odor of marijuana. There was probable cause to arrest Phelan, so the warden plainly could detain him for field sobriety tests and a PBT.

D. An argument that Wis. Stat. § 29.921(5) sets forth a standard other than probable cause for an arrest would be incorrect.

In his reply brief, Phelan may argue that Wis. Stat. § 29.921(5) contemplates a standard higher than probable cause when it says that a warden with expanded authority "may arrest a person who has committed a crime in the presence of the warden." Phelan made such an argument in his first reply brief.[4] But it does not appear that Phelan made that argument in the circuit court. And he did not make that argument in his opening brief in this Court. He instead argued that there was no probable cause to arrest him for an OWI-related offense. (Phelan's Br. 17.)

An argument that Wis. Stat. § 29.921(5) contemplates a standard higher than probable cause would fail for two reasons. First, by not raising this argument in the circuit court or in his opening brief in this Court, Phelan forfeited it. This Court "generally do[es] not consider arguments not raised in the circuit court." *State v. Kaczmarski*, 2009 WI App

[4] When this Court converted this case to a three-judge appeal and allowed the State to file a replacement respondent's brief, it also allowed Phelan to file a replacement reply brief.

117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702 (citing *Gibson v. Overnite Transp. Co.*, 2003 WI App 210, ¶ 9, 267 Wis. 2d 429, 671 N.W.2d 388). And "[t]his court need not address arguments that are raised for the first time on appeal, or, if raised below, raised for the first time in the reply brief." *State v. Reese*, 2014 WI App 27, ¶ 14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 (citing *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997)). Since Phelan did not raise this argument in the circuit court or in his initial brief to this Court, he forfeited it.

Second, when Phelan made this argument in his first reply brief, he seemed to argue that since the Legislature referred to "a person who has committed a crime," it meant that a warden cannot arrest a person he "reasonably believes probably committed a crime." (Phelan's First Reply Br. 6.) But Phelan did not explain what standard greater than probable cause he believes does or even could apply. There is no reason to think the Legislature intended any other meaning for the phrase "probable cause" than the one every federal and state court has used every day for decades.

The standard for arrests is well established. "A warrantless arrest is not lawful except when supported by probable cause." *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551. There is no reason to think that the standard is somehow higher in Wis. Stat. § 29.921(5), particularly when the Legislature did not explain that it was higher or say what the standard is. The standard cannot reasonably be proof beyond a reasonable doubt or some other level of absolute certainty. Again, a warden could observe something that, depending on the circumstances could be a serious crime, or might not a crime at all. If a warden does not know the circumstances, such as whether a person who appears to be a victim has consented, or if the person a suspect appears to be committing a crime against is the person's child, the warden could not be certain the suspect has committed a

crime. The Legislature could not reasonably have granted wardens with specified law enforcement training the expanded authority to arrest a person who commits a crime in the warden's presence but without saying so made it nearly impossible to exercise that authority.

A much more reasonable reading of Wis. Stat. § 29.921(5) is that the Legislature did not set forth a different level of certainty for an arrest, but simply differentiated between a warden's authority to arrest for specified crimes regardless of whether they are committed in the warden's presence under Wis. Stat. § 29.921(1), and a warden's expanded authority to arrest for any crime committed in the warden's presence under Wis. Stat. § 29.921(5). The standard for arrest—probable cause—is the same in either case.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 13th day of March 2025.

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 5,541 words.

Dated this 13th day of March 2025.

Electronically signed by:

Michael C. Sanders
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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 13th day of March 2025.

Electronically signed by:

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