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**DISTRICT II**

May 22, 2024

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You are hereby notified that the Court has entered the following opinion and order:

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2023AP1318-CR      State of Wisconsin v. Michael A. Quezairé (L.C. #2022CF1384)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

During a traffic stop, officers concluded they had probable cause to search Michael A. Quezairé's vehicle for marijuana. When they searched it, they found no marijuana but instead found a firearm Quezairé could not lawfully possess, and he was criminally charged in connection with this find. Quezairé brought a suppression motion asserting the officers lacked probable cause for the search and that the firearm evidence therefore must be suppressed. Following an evidentiary hearing, the circuit court agreed and granted his motion. The State moved for reconsideration, the court denied the motion, and the State now appeals. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>1</sup> For the following reasons, we reverse and remand for further proceedings.

### ***Background***

Both the officer who performed the traffic stop, Officer Alyssa Kreger, and the second officer to arrive on the scene, Sergeant Zachary Patterson, testified at the hearing on Quezaire's suppression motion.

In her testimony, Kreger indicated she had been trained and/or had experience in determining "if somebody is impaired by drugs" and in investigating "cases involving controlled substances," including in the context of traffic stops, and that she had been certified as a drug recognition expert. Kreger detailed her field certification and experience in correctly identifying specific drug categories causing impairment. She agreed that in her particular "evidence technician" role in her police department, she "actually deal[s] with controlled substances more often than, maybe, a general patrol officer would." She agreed she had previously smelled the odor of marijuana on multiple occasions and had specialized training in detecting that odor.

She testified that she performed a traffic stop on Quezaire because she had observed him cross the center line of the road multiple times. Initiating contact from the front passenger side window, Kreger noted that the front passenger's eyes were "like, closed. She was slow to talk. Her speech was low.... [S]he appeared to be impaired at the time or at least under the influence of something." Kreger observed in an ashtray what appeared to be a "cigarillo or a Black and

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Mild,” and detected “a light odor of marijuana” coming from the vehicle. She also noticed “a heavy presence of perfume, as well as ... a smokey presence, which I believed to be from [Quezaire’s] Black and Mild[.]” She agreed that in her experience investigating controlled substance cases during traffic stops, it was “common to smell perfumes and other masking agents,” adding “[t]ypically, when there’s a heavy presence of cigarettes, cigars, perfume it’s used to mask separate odors, typically, marijuana and other odors to hide that smell.” Kreger agreed that even though the marijuana odor she smelled was “light,” she had “[no] doubt ... that’s what the odor was.” She agreed no marijuana was found in the vehicle during the search of it, and she testified that there were one or two other occasions during her career as an officer where she had detected the odor of marijuana but ended up not locating any during a search, explaining that this occurs “if there was marijuana in the vehicle at one point. It could be on clothes and hair. Could’ve smoked right before getting in a vehicle.”

Kreger asked Quezaire if he had smoked in the vehicle earlier that day, and he responded, “[N]o.” She asked “when the last time was somebody smoked marijuana in the vehicle,” and she believed he responded with “about a day or two ago.” She decided to search the vehicle because she believed she had “probable cause of odor of marijuana.”

On cross-examination, Kreger agreed that in her body camera video recording, which was played at the hearing, she expressed to the second officer on the scene, Patterson, that she observed a heavy perfume and smokey smell but that the recording did not show her telling Patterson that she smelled marijuana. She indicated that when she asked Quezaire to step out of the vehicle, she “had the intent to search the vehicle due to the odor of marijuana,” which she described as “a faint odor of marijuana, burnt not raw.” She acknowledged that at that time, she did not suspect Quezaire of being “under the influence and unable to drive.”

Kreger agreed that the object she observed in the ashtray could be used for smoking marijuana, and she acknowledged that cigarillos can also sometimes have “smokey, perfume-type flavors that can be overwhelming” and potentially “almost mask the smell of marijuana,” though she also stated that “the odor of marijuana is unmistakable, so you would still smell the marijuana.”

On re-direct examination, Kreger stated she had smelled an odor of marijuana numerous times and more specifically agreed she had smelled burnt marijuana “[m]ore than 20 times.” She further concurred that the odor she smelled coming from Quezaire’s vehicle was “unmistakably marijuana.”

In his testimony, Patterson agreed that the odor of marijuana is “unmistakable” and that through his training and experience, he had smelled the odor of raw marijuana “[m]ore than 20 times” and burnt marijuana “many times.” He acknowledged there had been times when he smelled the odor of marijuana coming from a vehicle and ultimately did find marijuana in the vehicle, but there were also times when he had smelled that odor in a vehicle and did not locate any marijuana therein. He explained that the latter circumstance could occur if the odor was on an occupant’s clothes, if an occupant had smoked marijuana but already discarded it, or “[i]t could be in their hair, the fabric of the seats, if they smoked a day earlier in the vehicle.” Patterson agreed that in his experience, individuals sometimes “us[e] brown, cigar-like paper to smoke marijuana.”

Patterson testified that he had made contact with the occupants of Quezaire’s vehicle and noted the smell of marijuana. At one point, he tried to explain to the female passenger that she

needed to exit the vehicle because they were going to search it due to the odor of marijuana. He confirmed he had no doubt that he smelled the odor of marijuana emanating from the vehicle.

On cross-examination, Patterson stated he remembered smelling marijuana coming from the vehicle and/or Quezairé.

While the circuit court found that both officers were “familiar with the odor of marijuana, both burnt and un-burnt,” it nonetheless granted Quezairé’s suppression motion, primarily because the officers testified to smelling only a “light” odor of marijuana and the court believed that our supreme court’s decision in *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), requires a “strong” and/or “unmistakable” odor of marijuana to establish probable cause to search a vehicle. The court stated that it read *Secrist* as indicating that to establish probable cause to search a vehicle, an officer had to be able to say, “I definitely smell[] marijuana, we need to search this vehicle,” yet it found that the officers in this case did not have that level of certainty.

The State moved for reconsideration. At a hearing on the motion, the circuit court stated that “the body cam video was clear that neither officer detected a strong odor of marijuana” and “I’m not sure that any officer specifically said [in the videos], ‘I smell marijuana.’” The court summarized its findings: “The record in this case does not support that the unmistakable odor of marijuana was emanating from the vehicle. The record certainly does not support that the strong, unmistakable odor of marijuana was emanating from the vehicle.” “Because of that,” the court concluded that its previous decision granting the motion to suppress was correct. The State appeals.

### *Discussion*

This appeal centers around one question: Did the officers have the requisite probable cause to search Quezaire’s vehicle? See *State v. Caban*, 210 Wis. 2d 597, 607, 563 N.W.2d 501 (1997) (“The warrantless search of an automobile is justified when the police have probable cause to believe that an automobile, found in a public place, contains evidence of a crime ....”). Whether the undisputed facts satisfy the probable cause standard is a question of law we review de novo. *State v. Delap*, 2018 WI 64, ¶¶27-28, 382 Wis. 2d 92, 913 N.W.2d 175.

Probable cause is a question “based on probabilities; and, as a result, the facts faced by the officer ‘need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.’” *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). “What is required is more than a possibility, but not a probability, that the conclusion is more likely than not. This court has always stressed the reasonableness factor. Is it reasonable to believe in the circumstances that particular evidence or contraband may be located at a place sought to be searched?” *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). Probable cause is a “practical, common-sense determination” based on the totality of the circumstances. *State v. Robinson*, 2010 WI 80, ¶27, 327 Wis. 2d 302, 786 N.W.2d 463. “The test is objective: what a reasonable police officer would reasonably believe under the circumstances....” *State v. Erickson*, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407 (citation omitted).

We conclude the circuit court erred in determining that probable cause to search Quezaire’s vehicle was lacking. This error appears to have occurred at least in part because, despite the State at times referencing other presented evidence the court should consider in

determining whether the totality of the circumstances amounted to probable cause, the court instead focused almost exclusively on the officers' failure to express that they had detected a "strong" and "unmistakable" odor of marijuana emanating from Quezairé's vehicle.

Here, both officers indicated they searched Quezairé's vehicle because they believed they smelled an odor of marijuana coming from it. Furthermore, when asked at the scene, Quezairé admitted marijuana had been smoked in the vehicle a day or two earlier. While Quezairé asserts on appeal that this response "would provide an explanation for any faint smell and make it less likely that there was currently marijuana in the car," there is another view of Quezairé's admission that supports probable cause. See *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 ("[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause."). Quezairé's admission would have confirmed for the officers—and any reasonable officer—that the "light" or "faint" smell they believed was marijuana was in fact the smell of *marijuana*. Furthermore, even if a reasonable officer could believe Quezairé's self-serving representation that the smell was the result of marijuana having been smoked in the vehicle a day or two earlier—as opposed to much more recently—such an officer would have reason to believe there may still be evidence of marijuana possession in the vehicle.

Additionally, the impaired and "faded" appearance of the front seat passenger provided reason to believe the use of marijuana was more recent than a day or two earlier. And, as supported by the testimony, cigarillos like the one Kreger observed in the ashtray of Quezairé's vehicle can be used for smoking marijuana. Considering the totality of the circumstances, we conclude there was "more than a possibility" that evidence of marijuana possession was located in the vehicle, and thus, the officers had probable cause to search it.

IT IS ORDERED that the orders of the circuit court are reversed and the cause is remanded to the circuit court. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*