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

2015AP2301-CR State of Wisconsin v. Gregg Wilcoxson (L.C. # 2014CF3112)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

Gregg Wilcoxson appeals a judgment convicting him of possession with intent to deliver amphetamines in violation of WIS. STAT. § 961.41(1m)(e)(2) (2013-14).[1] Wilcoxson argues that the circuit court erred in denying his motion to suppress evidence. After reviewing the record and briefs, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. For the reasons discussed below, we summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The dispositive issue Wilcoxson presents on appeal, which challenges the circuit court's denial of his motion to suppress evidence following the search of his vehicle, is a very narrow one, and may be distilled as follows: Was the testimony of a police officer that he could smell a strong odor of recently burned marijuana when he stood near the open rear passenger window of Wilcoxson's vehicle, but not when he stood near the open front driver window of the vehicle, incredible as a matter of law? If our answer to the question is "No," Wilcoxson implicitly concedes that, pursuant to ***State v. Secrist***, 224 Wis. 2d 201, ¶16, 589 N.W.2d 387 (1999), which held that the unmistakable odor of marijuana emanating from a vehicle provides probable cause for an officer to search the vehicle, the court's order denying the motion to suppress evidence is correct. Because we conclude that the officer's testimony is not incredible as a matter of law, we affirm the circuit court's order.

An officer conducted a traffic stop of Wilcoxson's vehicle.[2] The officer testified that, as he approached Wilcoxson's vehicle, he saw the driver, whom he identified as Wilcoxson, reach quickly in a forward, downward motion and then turn his entire body to the right as though he were reaching into the center console. The officer was unable to see Wilcoxson's head, shoulders, or hands during these maneuvers. Fearing the possibility of a weapon, the officer drew his own firearm and pointed it at Wilcoxson. Upon shining his flashlight into the vehicle, the officer observed syringes on the floor of the front passenger seat and in an open compartment located in the driver's side door. The officer observed three passengers in the vehicle. When the officer asked about Wilcoxson's relationship to his three passengers, Wilcoxson responded that

[2] Wilcoxson confirmed on the record at the suppression hearing that he was mounting a challenge only to the search of the vehicle, not to the traffic stop.

he did not know his passengers' names. The officer asked a rear seat passenger to roll down the window. When the passenger complied, the officer smelled a strong odor of freshly burned marijuana coming the vehicle. The officer explained that he had been standing some distance back from the vehicle when he had his firearm pointed at Wilcoxson, and was standing closer to the vehicle when he asked that the passenger roll down the window, which, he believed, was the likely reason he smelled the marijuana near the back window and not near the front window where Wilcoxson was sitting. The officer's conversation with the passengers produced the allegation that Wilcoxson "was looking for anything to shoot up." The officer understood the passenger's comment to mean Wilcoxson intended to use the syringes he observed to ingest illegal substances. The officer searched Wilcoxson's vehicle. The search uncovered a methamphetamine pipe and methamphetamine, but no marijuana.

As noted, Wilcoxson recognizes that ***Secrist*** governs his appeal and is dispositive so long as the officer's testimony about the strong smell of marijuana is credible. The circuit court credited the officer's training and experience as a basis for the officer's testimony about the marijuana odor. The court implicitly deemed the officer credible, and we defer to its finding. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (reviewing court will accept circuit court's implicit findings on witness credibility). The circuit court is the ultimate arbiter of the officer's credibility as a witness. ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. Thus, we are left with the issue Wilcoxson raises: whether the officer's observation is incredible as a matter of law, thus requiring us to reject the circuit court's credibility finding. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (reviewing court will not overturn fact finder's credibility determination unless the fact relied upon in making determination is inherently or patently incredible).

"Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts." ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994). Wilcoxson argues that the officer's testimony "places himself at the open window of the driver near pillar B[[3]] which would be very close to the rear passenger area." As a result, Wilcoxson contends, it is "patently incredible" that the officer did "not detect an odor of marijuana from his position until the rear window was also rolled down." Wilcoxson does not undertake to explain his view of how the officer's testimony conflicts with the uniform course of nature or with established or conceded facts. Instead, Wilcoxson's brief argument is merely conclusory.

We conclude that the officer's explanation that his relative distance from the vehicle at the time he trained his firearm on Wilcoxson, as opposed to his close proximity to the vehicle when the passenger complied with the officer's request to roll down the window, likely affected the officer's ability to observe the marijuana odor is adequate to support the court's credibility finding. To repeat, ***Secrist*** dictates that the strong odor of marijuana the officer discerned at the scene is alone adequate to support probable cause to search the vehicle. However, we also agree with the circuit court that its additional findings, including those regarding Wilcoxson's furtive movements at the commencement of the stop, the syringes observed on the floor and in the side door compartment, Wilcoxson's comment that he did not know his passengers' names, and the passenger's comment that Wilcoxson was looking for illegal substances to shoot up all added to

[3] The officer testified that the "B pillar is at that point in the car between the driver's door and the rear passenger door."

the totality of circumstances supporting a finding of probable cause to search. We conclude that the court properly denied Wilcoxson's motion to suppress evidence and affirm.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals