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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

March 15, 2019

To:

Hon. Todd J. Hepler
Circuit Court Judge
Columbia County Courthouse
400 DeWitt St., P.O. Box 587
Portage, WI 53901

Patty Schluter
Clerk of Circuit Court
Juneau County Justice Center
200 Oak St., P.O. Box 246
Mauston, WI 53948

Suzanne L. Hagopian
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Kenneth John Hamm
District Attorney
200 Oak St.
Mauston, WI 53948

David H. Perlman
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP874-CR State of Wisconsin v. Tiffany M. Alexander (L.C. # 2016CF186)

Before Lundsten, P.J., Sherman and Blanchard, 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).

Tiffany Alexander appeals a judgment of conviction for possession of methamphetamine. Alexander contends that the evidence obtained by a police officer's search of her purse during a traffic stop should have been suppressed because the search of the vehicle and her purse inside that vehicle were not supported by probable cause. We disagree with Alexander and conclude

that ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), compels the conclusion that the officer possessed probable cause supporting the search. *See* ***id.*** at 209-10. 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 (2017-18).[1] We affirm.

In August 2016, a police officer stopped a vehicle in which Alexander was a passenger. When the officer made contact with the driver, he noticed a faint odor of burnt marijuana coming from the vehicle. As the officer turned around to return to his squad car, he "saw, and heard the resulting thud" of Alexander placing her purse in the back seat. The officer conducted a search of Alexander's purse and located methamphetamine. The State charged Alexander with possession of methamphetamine.

Alexander moved to suppress the methamphetamine discovered during the search of her purse, arguing that the search was not supported by probable cause. The circuit court held an evidentiary hearing, at which the officer testified as to the facts surrounding the search. The circuit court found that the officer had probable cause for the search, and denied the suppression motion. Alexander then pled no contest to the charge in the information. Alexander appeals following her conviction and sentencing.

We review a motion to suppress under a two-step process. *See* ***State v. Martin***, 2012 WI 96, ¶28, 343 Wis. 2d 278, 816 N.W.2d 270. We uphold the circuit court's factual findings unless those findings are clearly erroneous. ***Id.*** We independently apply constitutional principles to those facts. *See* ***id.***

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Police may conduct a warrantless search of a vehicle and its contents if they have probable cause to believe that the vehicle contains contraband. ***State v. Matejka***, 2001 WI 5, ¶23, 241 Wis. 2d 52, 621 N.W.2d 891. Probable cause to search is established when the quantum of evidence supports a reasonable belief that it is more likely than not that evidence of a crime will be found. *See* ***Secrist***, 224 Wis. 2d at 209-10.

Alexander contends that, here, the officer relied on one single fact to support the search: the faint odor of burnt marijuana coming from the vehicle. Alexander contends that no Wisconsin case has recognized the *faint* odor of burnt marijuana, alone, as sufficient to establish probable cause for a search. Rather, Alexander asserts, case law supports the conclusion that the faint odor of marijuana, alone, is insufficient to establish probable cause for a search. In support, she cites ***Secrist***, 224 Wis. 2d at 218 ("The *strong* odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug. The probability diminishes if the odor is *not strong or recent* …." (emphasis added)); ***State v. Mitchell***, 167 Wis. 2d 672, 678, 683-84, 482 N.W.2d 364 (1992) (court found that odor of burned or burning marijuana, *together with visible smoke* inside the vehicle, provided probable cause to arrest; court did not reach question of "whether burned, burnt, or burning marijuana odor *alone* is sufficient for a finding of probable cause" (emphasis added)); and ***State v. Mata***, 230 Wis. 2d 567, 569, 572-73, 602 N.W.2d 158 (Ct. App. 1999) (court found that "*strong* odor of raw marijuana" (emphasis added), plus the fact that searches of the other two occupants of the car did not uncover marijuana, established probable cause for a search of the third occupant).

The State responds that the odor of marijuana coming from the vehicle in the present case established probable cause for the search, regardless of the strength of the odor. In support, the

State relies on a sentence in ***Secrist*** stating that "[t]he unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime." *See* ***Secrist***, 224 Wis. 2d at 210. The State argues that the ***Secrist*** court did not specifically rely on the strength of the odor in finding probable cause, but rather relied on the fact that it was unmistakable. The State contends that it does not matter that the odor in this case was "faint," asserting that what matters for the probable cause analysis is that the officer testified that he had no doubt that the odor was marijuana. The State cites federal cases holding that the odor of marijuana is sufficient to establish probable cause. *See* ***United States v. Franklin***, 547 F.3d 726, 733 (7th Cir. 2008); ***United States v. Mosby***, 541 F.3d 764, 768 (7th Cir. 2008); ***United States v. Cherry***, 436 F.3d 769, 772 (7th Cir. 2006); ***United States v. Wimbush***, 337 F.3d 947, 950-51 (7th Cir. 2003); *see also* ***United States v. Taylor***, 162 F.3d 12, 16-17, 21 (1st Cir. 1998); ***United States v. Staula***, 80 F.3d 596, 599, 602-03 (1st Cir. 1996). The State also asserts that it was not the odor of marijuana alone that established probable cause. The State argues that Alexander's placement of her purse in the back seat allowed the reasonable inference that Alexander did not want police to observe the purse.[2]

Alexander replies that the State has not disputed that no Wisconsin case has recognized the faint odor of marijuana, alone, as sufficient to establish probable cause. She points out that the federal cases cited by the State are not binding on this court and, in any event, none of those cases relied on the *faint* odor of marijuana alone to establish probable cause. Alexander also disputes any significance to her placing her purse in the back seat. She contends that there was

[2] The State does not point to any other facts relevant to the probable cause analysis.

nothing secretive about the way she placed her purse in the back seat, pointing out that she dropped the purse loudly enough for the officer to hear.

We conclude that ***Secrist*** requires us to affirm the circuit court's conclusion that the search was supported by probable cause.

At the outset, we agree with Alexander that her act of placing her purse in the back seat of the vehicle, a move observed visually and audibly by the officer, is not reasonably interpreted as an attempt to conceal the purse. To the extent that there was a conflict in the officer's testimony as to whether the officer only heard, or rather saw and heard, the placement of the purse in the back seat, that conflict was resolved by the circuit court when it found that the officer "saw, and heard the resulting thud, of [Alexander] placing her purse in the back of the vehicle." We are bound by this unchallenged finding.

Thus, the only factor significant to the probable cause analysis is the faint odor of burnt marijuana coming from the vehicle. As noted, in this respect, the officer testified that he was sure he smelled marijuana. The officer was asked if he had any doubt that the odor was marijuana and he responded, "No." The officer also gave testimony demonstrating his ability to detect the odor of marijuana. Alexander does not argue that either the circuit court or this court should not or may not rely on that testimony.

The officer's testimony regarding his ability and confidence in his detection of the presence of the odor of burnt marijuana is dispositive because, in ***Secrist***, our supreme court wrote: "The unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime." *See* ***Secrist***, 224 Wis. 2d at 210. As the State points out, this statement in ***Secrist*** does not hinge on the

strength of the odor, but on whether the odor is "unmistakable." Here, the record easily supports a finding that the officer encountered what was to him the "unmistakable" odor of burnt marijuana.

Alexander points to the discussion in ***Secrist***, where our supreme court wrote: "The strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug. The probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor." ***Id.*** at 218. However, we think it apparent that this qualifying language is specific to the arrest context and is intended to focus on the connection between the odor and a particular person.

We acknowledge that some of the federal cases cited by the State support its probable cause argument, but we do not rely on those cases or, for that matter, find them persuasive regarding whether a faint odor of burnt marijuana emanating from a vehicle, by itself, provides probable cause to search the vehicle. Rather, we conclude that ***Secrist*** dictates that the evidence here, accepted as true by the circuit court, constitutes probable cause to search.

Alexander next contends that, even if there was probable cause to support the search of the vehicle, there was not probable cause to support the search of her purse. Alexander recognizes that probable cause to search a vehicle supplies probable cause to search "every part of the vehicle and its contents that may conceal the object of the search." *See* ***United States v. Ross***, 456 U.S. 798, 825 (1982). She contends, however, that the search of her purse was not supported by probable cause because it was not reasonable to believe that evidence of marijuana use would be found in the purse, particularly because the officer testified that the smell of burnt

marijuana did not increase when he picked up the purse. She asserts that it was not impossible that evidence of marijuana use would be found in her purse, but that it was not likely, based on the faint odor of burnt marijuana.

Alexander cites this court's unpublished opinion in ***State v. Eirich***, No. 2014AP1901-CR, unpublished slip op. (WI App Nov. 26, 2014), as persuasive authority. In ***Eirich***, we held that the odor of raw marijuana coming from a vehicle did not provide probable cause to support the search of a passenger's wallet. ***Id.***, ¶¶13, 15. We explained that it was "unlikely" that the wallet would contain a sufficient amount of raw marijuana to be smelled by the officer outside the vehicle. ***Id.***, ¶13. Alexander contends that here, like in ***Eirich***, the smell described by the officer did not provide probable cause to search a container within the vehicle.

The State responds that ***Eirich*** is distinguishable because it involved the search of a very small container—the bill compartment within a wallet—rather than a purse. *See* ***id.*** The State contends that, here, the purse fell squarely within the case law authorizing the search of the contents of a vehicle that are capable of containing the object of the search. *See* ***State v. Jackson***, 2013 WI App 66, ¶8, 348 Wis. 2d 103, 831 N.W.2d 426.

We conclude that the probable cause to search the vehicle provided probable cause to search Alexander's purse. ***Eirich*** does not persuade us otherwise. We held in ***Eirich*** that it was "not 'more than a possibility' that the … object of the search—an amount of raw marijuana sufficient to be smelled while speaking to the passenger of a vehicle—could be located in the interior compartment of a closed wallet that was itself enclosed inside of the driver's purse." ***Eirich***, No. 2014AP1901-CR, ¶13. Here, the object of the search was an amount of marijuana sufficient to provide a faint odor of burnt marijuana coming from the vehicle. The purse fell

within the scope of that search. *See* ***Jackson***, 348 Wis. 2d 103, ¶8 ("'The permissible scope of a warrantless car search is defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" (quoted source omitted)).

For the reasons stated, we affirm the circuit court.

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

SHERMAN, J. (*dissenting*). I do not join in the majority opinion and order.

Sheila T. Reiff
Clerk of Court of Appeals