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**DISTRICT II**

August 21, 2019

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

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2018AP2001-CR                      State of Wisconsin v. Terrence T. Lafaive (L.C. #2015CF153)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

**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).**

Terrence Lafaive appeals from a judgment of conviction, and more specifically, the circuit court's denial of his motion to suppress incriminating drug evidence found during a search of his person. He alleges probable cause to search was lacking and that the evidence should have been suppressed accordingly. 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).<sup>1</sup> We affirm.

### ***Background***

The following relevant testimony was provided at the hearing on Lafaive's suppression motion. Lafaive was a front-seat passenger in a vehicle that was pulled over for a traffic stop. While one officer was administering field sobriety tests to the driver, another officer observed Lafaive, who remained in the passenger seat, make furtive, "abnormal" movements "consistent with either a reach for something or ... hid[ing] something." When the officer approached the driver's side door, which had the window rolled down, he "immediately smell[ed] the odor of marijuana emanating from the vehicle." The officer observed that Lafaive had "a large rip" in his pants from "the area of his upper right thigh towards his groin," and his pants were unbuckled, unzipped and pulled down "between his waist and his knees." In light of Lafaive's furtive movements and the condition of his pants, the officer believed Lafaive "may have been either accessing or placing something in the area of his groin." Another officer on the scene recognized Lafaive from a prior arrest during which the officer had discovered on Lafaive "drug paraphernalia that was consistent with possessing marijuana."

Upon Lafaive exiting the vehicle, the officers searched the vehicle for evidence of marijuana. An officer located a marijuana leaf on the front passenger's seat "exactly where Mr. Lafaive's groin would have been," as well as other marijuana leaf and stem material "throughout the floorboard on the passenger side." An officer smelled a "strong" odor of fresh

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

marijuana coming from the passenger seat and observed two pieces of a “corner cut” plastic baggy in the floorboard on the passenger side. The officer testified that a “corner cut” is “a common way to package drugs for delivery.” Officers found marijuana near the center console and a remnant of a burnt marijuana cigar in the cupholder of the passenger side door.

While standing with Lafaive between fifteen and twenty feet away from the car, one of the officers performed an initial search of him. In doing so, the officer searched his waistband, pockets and jeans and noted “the odor of fresh marijuana on his person.” Based upon the condition of Lafaive’s pants, the marijuana leaf on the seat, and the smell of fresh marijuana on Lafaive, officers believed he had marijuana hidden in his underwear.

Lafaive was arrested for underage drinking (pursuant to the fact he was underage, an officer detected the smell of alcohol on his breath, and a preliminary breath test confirmed he had been drinking) as well as possession of marijuana. During transport to the police station, an officer observed Lafaive “lifting his rear end off the seat and appear[] to be pulling his shoulder down, handcuffed behind his back, as if he was reaching for something down the back of his pant.” The officer found this to be “unusual” and it raised concern that Lafaive “may have been attempting to access or possibly destroy some sort of contraband that was not found on his person” during the initial search.

Pursuant to officer directions at the police station, Lafaive disrobed down to his underwear, at which time officers observed a “kind of a square shaped thing in his underwear.” Lafaive was then told to drop his underwear and “a package fell to the ground.” The officers recovered Alprazolam and Adderall pills, leading to the charges of which he was ultimately convicted.

### *Discussion*

“In reviewing the circuit court’s determination of a motion to suppress, we accept the court’s findings of historical fact unless clearly erroneous.” *State v. Kilgore*, 2016 WI App 47, ¶20, 370 Wis. 2d 198, 882 N.W.2d 493. However, we independently review whether the historical facts constitute probable cause. *See State v. Sveum*, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317.

Here, the information the officers possessed at the time they arrested Lafaive was sufficient to support his arrest for possession of marijuana and the search of his person incident to that arrest. In reviewing searches incident to an arrest, “[t]he primary focus must be on the lawfulness of the arrest,” *State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999), because “the mere ‘fact of [a] lawful arrest’ justifies ‘a full search of the person,’” *State v. Lemberger*, 2017 WI 39, ¶34, 374 Wis. 2d 617, 893 N.W.2d 232 (citation omitted); *see also State v. Sykes*, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277 (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.” (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973))). Police have probable cause to arrest an individual “if they have ‘information which would lead a reasonable police officer to

believe that the [individual] probably committed a crime.” *State v. Felix*, 2012 WI 36, ¶28, 339 Wis. 2d 670, 811 N.W.2d 775 (citation omitted).<sup>2</sup>

An officer observed Lafaive, who was seated in the front passenger seat of the stopped vehicle, make movements that suggested he may have been reaching for something or attempting to hide something. When the officer approached, he smelled marijuana and observed Lafaive’s pants to have a large rip in the groin area and be unbuckled, unzipped, and pulled down to between his waist and knees, all affording Lafaive easy access to hide contraband in his underwear. Officers smelled a “strong” odor of fresh marijuana coming from the seat where Lafaive had been sitting and found a marijuana leaf on the seat “exactly where [his] groin would have been,” further suggesting he may have stashed marijuana in his underwear. One of the officers, while fifteen to twenty feet away from the vehicle and in direct contact with Lafaive during an initial search of his person, smelled the odor of fresh marijuana on him. All of this would lead any reasonable police officer to believe Lafaive probably had marijuana hidden on his person, providing probable cause to arrest him, *see Secrist*, 224 Wis. 2d at 204 (holding that “the odor of a controlled substance provides probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the circumstances in which the odor is discovered or because other evidence links the odor to the person or persons”), and search him as they did. Further adding to the probable cause to search Lafaive as they did,

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<sup>2</sup> On appeal, Lafaive argues only that the officers lacked probable cause to search him. Before the circuit court, he raised the issue that the search was unlawful because it was a strip search and as such violated WIS. STAT. § 968.255. Because he fails to raise any such issue on appeal, we deem him to have abandoned it. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised before the circuit court but not raised on appeal are deemed abandoned).

during his transport in the squad car, Lafaive appeared to be trying to access something in the back of his pants. The circuit court made no error in denying Lafaive's suppression motion.

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

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*