

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0840-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD SHERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Donald Sherman appeals a judgment convicting him of possessing marijuana with intent to deliver it. Sherman entered a guilty plea to the charge after the trial court denied his motion to suppress the State's evidence. The issue is whether the trial court properly ruled on the suppression issue. We affirm.

¶2 Sherman was driving in the city of Beloit with his brother and a friend. Officer Buckley of the Beloit Police Department stopped him for a traffic violation. Upon approaching the car, Buckley smelled an odor he recognized as burnt marijuana. He then ordered Sherman out of the car and searched him. Buckley arrested Sherman after finding marijuana in his pockets.

¶3 Buckley then searched the car and discovered more marijuana. Later, after taking Sherman to a police station, Buckley and another officer went to Sherman's home. Buckley's live-in girlfriend allowed them to enter and search the premises, where they found additional inculpatory evidence. She also told them that Sherman kept a storage locker. Officers later searched the locker with a warrant and found additional contraband.

¶4 Sherman moved to suppress all of the evidence against him, contending that the search of his person was illegal and that the subsequent searches were the fruit of that illegal search. The trial court denied the motion, and Sherman renews his argument on appeal.

¶5 We conclude that Buckley legally searched Sherman after he got out of his car. The supreme court has held that evidence of marijuana use in a car provides probable cause to arrest the driver even if others occupy the car, and the officer is unsure who among the occupants possessed or used the marijuana. *See State v. Mitchell*, 167 Wis.2d 672, 684, 482 N.W.2d 364, 368-69 (1992). Consequently, Buckley's search was lawful even though he did not arrest Sherman until immediately afterward. A search may immediately precede a formal arrest "so long as the fruits of the search [are] not necessary to support probable cause to arrest." *State v. Swanson*, 164 Wis.2d 437, 450-51, 475 N.W.2d 148, 154 (1991).

Because the initial search was lawful, it did not taint the evidence seized in the subsequent searches.

¶6 Sherman also contends that the trial court should have suppressed the marijuana found in his car because there was no evidence directly linking it to him. That is an evidentiary question, not a suppression issue. Sherman therefore waived it when he entered his guilty plea. *See State v. Schroeder*, 224 Wis.2d 706, 711, 593 N.W.2d 76, 79 (Ct. App. 1999).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

