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**DISTRICT II**

October 8, 2025

*To:*

Hon. Michael S. Kenitz  
Circuit Court Judge  
Electronic Notice

Pamela Moorshead  
Electronic Notice

Sherry Coykendall  
Clerk of Circuit Court  
Washington County Courthouse  
Electronic Notice

Anne Christenson Murphy  
Electronic Notice

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

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2024AP1635-CR

State of Wisconsin v. Ayanna Chuntel McAfee (L.C. #2021CF523)

Before Neubauer, P.J., Gundrum, 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).**

Following a traffic stop on a vehicle in which she was a passenger, Ayanna Chuntel McAfee was charged with possession of THC with intent to deliver, as a party to a crime, and carrying a concealed weapon. She moved to suppress evidence found during a search of the vehicle, arguing that law enforcement lacked probable cause to conduct the search. The circuit court disagreed, concluded law enforcement had probable cause, and denied the motion.

McAfee subsequently pled guilty to the THC charge, and the concealed weapon charge was dismissed but read in. She now appeals, specifically challenging the circuit court's denial of her suppression motion. 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 (2023-24).<sup>1</sup> For the following reasons, we affirm.

### ***Background***

The officer who conducted the traffic stop testified at the hearing on McAfee’s suppression motion. He explained that he was certified as a drug recognition expert and had extensive training and experience in recognizing the odor of marijuana. He testified that upon approaching the vehicle in which McAfee was a passenger, he had detected the distinct odor of fresh marijuana emitting from it. When he asked the driver about the odor, the driver “said he did not smell marijuana and stated there was nothing in the car.” The officer agreed that neither the driver nor McAfee attributed the odor to CBD. A search of the vehicle resulted in the discovery of 250 grams of fresh marijuana and approximately \$10,000 in the trunk and a loaded firearm in the glove box.

McAfee called to the stand an expert witness who testified that both legal CBD and illegal marijuana are from the cannabis plant and emit the same odor, and the expert agreed “there’s no way to distinguish [based upon smell] whether it’s legal or illegal cannabis.” She added that “you can’t smell the difference between a very low legal THC-containing cannabis and a high [illegal] THC-containing cannabis.” And, again, she testified that the scientific evidence indicates “[y]ou cannot distinguish between legal and illegal by Wisconsin statute on cannabis products based on smell alone.” The circuit court found both the officer’s and the expert’s testimony credible and adopted their testimony in its factual findings.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2023-24 version.

The circuit court denied McAfee’s suppression motion, concluding that under the totality of the circumstances, the officer had probable cause to search the vehicle. It based its conclusion on: (1) the officer’s detection of what he believed to be the odor of marijuana in the vehicle, about which the officer was “not required to draw a reasonable inference that favors innocence [here, that the odor was caused by the presence of legal CBD] when there’s also a reasonable inference that favors probable cause [that the odor was caused by the presence of illegal marijuana]”; and (2) when the officer asked the driver about the odor, the driver “denied its existence and denied there was anything in the vehicle that would cause that odor,” which denials “provide[d] some cause to raise suspicions about what may be in the vehicle.”<sup>2</sup>

### *Discussion*

McAfee contends the circuit court erred in denying her suppression motion. In reviewing a circuit court’s order granting or denying such a motion, “[w]e will uphold the court’s factual findings unless they are clearly erroneous, but we independently apply constitutional principles to those facts.” *State v. Coffee*, 2019 WI App 25, ¶6, 387 Wis. 2d 673, 929 N.W.2d 245. Here, the constitutional question is whether law enforcement had probable cause to conduct the search of the vehicle, which ultimately led to the incriminating evidence against McAfee. *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 ....”).

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<sup>2</sup> In its oral ruling, the circuit court stated that “the Defendant” made such denials. The officer’s testimony makes clear that it was the co-defendant/driver, not defendant McAfee, who was asked about and denied any such odor, although neither the driver nor McAfee suggested the odor might have been caused by legal CBD. The parties do not suggest, nor do we conclude, that the distinction in which party denied any such odor to the officer affects the legality of the search of the vehicle in this case.

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. It “is not a high bar” and “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (citation omitted). Because it is a question “based on probabilities ..., 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).

Our supreme 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). “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). In light of the totality of the circumstances facing the officer in this case, a reasonable officer would have reasonably believed there was “more than a possibility” that evidence of illegal marijuana was in the vehicle. *See Sharpee*, 154 Wis. 2d at 518 (citation omitted).

As the circuit court recognized, and as our supreme court fairly recently reiterated in *State v. Moore*, 2023 WI 50, 408 Wis. 2d 16, 991 N.W.2d 412, “an officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause.” *Id.*, ¶15 (quoting *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125). In this case, the officer was well qualified in detecting the odor of marijuana, which according to McAfee’s expert, could have been the odor of either “a very low

legal THC-containing cannabis [or] a high [illegal] THC-containing cannabis.”<sup>3</sup> While the expert’s accepted testimony was that the smell the officer detected could have been caused by the presence of legal CBD instead of illegal marijuana, the officer was not required to draw that innocent inference. That is especially so in this case. If CBD had been the cause of the odor, when the officer asked the driver about the odor of marijuana the officer believed he detected, a reasonable officer would expect the driver to explain that the odor was caused by legal CBD. Instead, the driver altogether denied the existence of any questionable odor whatsoever, suggesting to any reasonable officer a consciousness of guilt. As the circuit court stated, the driver’s denial of the presence of any questionable odor “d[id] provide some cause to raise suspicions about what may be in the vehicle.”

“The ‘touchstone of the Fourth Amendment is reasonableness,’ and ‘[r]easonableness ... is measured in objective terms by examining the totality of the circumstances.’” *State v. Weber*, 2016 WI 96, ¶34, 372 Wis. 2d 202, 887 N.W.2d 554 (alteration in original; citation omitted). Here, where the officer, based on his training and experience, clearly recognized a distinct odor he believed was marijuana, and the driver not only failed to explain that the odor instead could be due to legal CBD but in fact denied the existence of any odor, there was more than a possibility that illegal marijuana was present in the vehicle and it was reasonable for the officer to search it.

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<sup>3</sup> Or, for that matter, the evidence indicates the odor could have been caused by a combination of some amount of legal cannabis and some amount of illegal cannabis.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *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*