COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP111-CR **Cir. Ct. No. 2011CF229**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW B. KELLETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

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

¶1 PER CURIAM. Andrew Kellett appeals from a judgment convicting him of possession of THC, second and subsequent. He contends the

evidence should have been suppressed because it was obtained pursuant to an unlawful warrantless search. We disagree and affirm.

¶2 The facts as testified to at the suppression hearing are undisputed. Ozaukee county deputy sheriff Kelly Caswell stopped a vehicle that ran a red light. When the driver lowered his window, Caswell detected a strong odor of unburnt marijuana. The driver denied having any but said his passengers "might." The front-seat passenger claimed ownership and produced from the glove box a pipe with a small amount of unburnt marijuana in the bowl. Caswell's training and experience convinced him that the small amount did not account for the "extremely strong" smell. Kellett and a female were in the rear seat. A cursory search of the female yielded nothing, leaving only Kellett. On doing a pat-down, Caswell felt an "abnormal mass" in Kellett's groin area. Kellett first said it was his genitalia, then pulled out a plastic kitchen trash bag containing marijuana. A separate baggie of marijuana fell to the ground.

¶3 Kellett moved to suppress the evidence, claiming a lack of probable cause. The court denied the motion after a hearing. Kellett pled no contest and now appeals.

¶4 When reviewing a motion to suppress evidence, we will uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). The circuit court found that Caswell smelled "an extremely strong odor of unburnt marijuana" coming from the vehicle, that Caswell was not obliged to conclude that the front-seat occupant's pipe was the odor's only source because from his training he knew the strong odor was not explained by the small amount of marijuana shown to him,

and that Caswell found no marijuana on the female passenger. The court implicitly found Caswell credible. These findings are not clearly erroneous.

¶5 Whether the court's findings meet the constitutional requirement of reasonableness is a question of a law that we review de novo. ***Id.*** Probable cause to search requires at least a "fair probability" that evidence of a crime will be found in a particular place. ***State v. Carroll***, 2010 WI 8, ¶28, 322 Wis. 2d 299, 778 N.W.2d 1. Whether probable cause exists "turns on the facts of the particular case." ***State v. Mata***, 230 Wis. 2d 567, 572, 602 N.W.2d 158 (Ct. App. 1999).

¶6 Kellett argues that probable cause specific to him is lacking because Caswell did not testify that he detected the odor coming from him, nor did Caswell disprove the other passenger's "reasonable explanation" for the source of the odor by, for example, removing that marijuana from the car to see if the odor would dissipate. We reject this argument.

¶7 First, Caswell did not find the other passenger's explanation to be reasonable. "An officer's knowledge, training, and experience are germane to the court's assessment of probable cause." ***Carroll***, 322 Wis. 2d 299, ¶28.

¶8 Second, under ***Mata***, probable cause became specific to Kellett. The similarities between this case and ***Mata*** are striking and instructive. Like here, the issue in ***Mata*** was whether a police search of a passenger in a motor vehicle based solely on the odor of marijuana is reasonable. ***Id.*** at 568. Mata and two others were in a vehicle stopped for a traffic violation. ***Id.*** at 568-69. When the driver rolled down his window, the officer immediately smelled a strong odor of "raw" marijuana. ***Id.*** at 569. A pat-down search of the driver and the first passenger yielded no weapons or contraband. ***Id.*** The officer then conducted a pat-down search of Mata. He felt something in Mata's jacket pocket that Mata said was a

bag of socks. ***Id.*** Suspicious, the officer reached into Mata's pocket and removed a package containing two baggies of unsmoked marijuana. ***Id.*** This court deemed it "significant" that Mata was searched only after the other occupants of the vehicle already had been searched and no evidence of marijuana or other contraband had been found. ***Id.*** at 572. We concluded that, under those particular circumstances, the odds of Mata possessing the suspected marijuana had increased, such that "the necessary linkage" between the suspicious odor and Mata was sufficiently established for purposes of probable cause. ***Id.*** at 572-73. The odds of Kellett possessing the suspected marijuana likewise increased, providing "the necessary linkage" between the suspicious odor and him for purposes of probable cause.

¶9 Finally, that the "extremely strong odor" of marijuana might have come from somewhere in the vehicle itself does not negate a "fair probability"—the quantum of evidence required for probable cause to search—that it came from Kellett. *See* ***Carroll***, 322 Wis. 2d 299, ¶28. We agree with the circuit court that, with the other passengers ruled out and the strong odor still present, probable cause existed to search Kellett.

¶10 Yet despite the presence of probable cause, a warrantless search is per se unreasonable unless it falls within a delineated exception. ***State v. Garrett***, 2001 WI App 240, ¶9, 248 Wis. 2d 61, 635 N.W.2d 615. Kellett contends that none apply. Again we disagree.

¶11 One of the recognized exceptions is exigent circumstances, an example of which is the risk that the evidence will be destroyed. ***Id.***, ¶¶9, 11. We apply an objective test to decide whether, given the facts known at the time, the police officer would reasonably believe that delay in procuring a search warrant

would lead to that result. ***State v. Hughes***, 2000 WI 24, ¶¶21, 24, 233 Wis. 2d 280, 607 N.W.2d 621.

¶12 Here, an exigent circumstance was created once Kellett knew that Caswell had smelled the odor of marijuana. *See* ***id.***, ¶¶25-26. Having already tried to conceal the marijuana, it is reasonable to assume Kellett would have taken advantage of a break in the investigation for the purpose of securing a search warrant to destroy or discard the evidence. Because this exigent circumstance was coupled with probable cause, the warrantless search of Kellett was legal and the court properly denied his motion to suppress.

By the Court.—Judgment affirmed.

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