COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2025AP1474-CR **Cir. Ct. No. 2022CF651**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

D'ANGELO KENYON CHENOWETH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JEFFREY S. KUGLITSCH, Judge. *Affirmed*.

Before Graham, P.J., Kloppenburg, and Nashold, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. D'Angelo Chenoweth appeals a judgment of conviction for possession with intent to deliver heroin, challenging the circuit

court's denial of his motion to suppress evidence. He argues that police lacked probable cause to arrest him and to therefore perform a search incident to arrest. He also contends that police acted unreasonably in executing a body cavity search warrant. We reject Chenoweth's arguments and affirm.

BACKGROUND

¶2 The following facts, which are not disputed on appeal, are derived from the testimony and video footage from police dashboard and body cameras presented at the suppression hearing.

¶3 Deputy Erik Albeck of the Rock County Sherriff's Department pulled Chenoweth over for speeding at approximately 10:45 a.m. Albeck testified that he smelled the odor of raw marijuana emanating from Chenoweth's vehicle. When Albeck asked Chenoweth why the vehicle smelled of marijuana, Chenoweth replied that he had not "smoked in there today" and that he "really just got in" the vehicle. Based on the odor of marijuana, Albeck searched Chenoweth's person and the vehicle.

¶4 Albeck detected a "bulge in the buttocks area of [Chenoweth's] private parts." Albeck asked Chenoweth what the bulge was, and Chenoweth first replied, "Nothing," and then, "My nuts." But when Albeck had "grabb[ed]" the bulge, Chenoweth did not react, which led Albeck to believe that it was not a part of Chenoweth's anatomy and instead that Chenoweth was concealing something. Albeck told Chenoweth that police would perform a strip search of Chenoweth unless Chenoweth told Albeck what he was concealing, and Chenoweth repeated that he had nothing on him.

¶5 Another officer, Deputy Monica Fuentes, arrived and Albeck placed Chenoweth in the back of Fuentes's squad car with his hands cuffed behind his back.[1] Albeck asked Fuentes to watch Chenoweth and explained that he believed that Chenoweth was concealing drugs on his person. At the suppression hearing, the parties stipulated that Fuentes would have testified that she smelled marijuana on Chenoweth's person.

¶6 While searching the vehicle, Albeck found a large amount of cash in the glove box.[2] He did not find marijuana or any other drugs.[3] Albeck had determined that the vehicle was registered to a rental company and was being rented by Chenoweth's girlfriend, who arrived at the scene while Albeck was searching the vehicle. After searching the vehicle, Albeck released it to Chenoweth's girlfriend.

¶7 Albeck had determined that Chenoweth was on probation and Albeck called Chenoweth's probation agent, who put Chenoweth on a probation hold. Fuentes drove Chenoweth to the Rock County jail in her squad car and Albeck followed them in his.

¶8 Once at the jail, Chenoweth stopped speaking to the officers. While being escorted to the area of the jail where the strip search was going to take place,

[1] Albeck could not place Chenoweth in the back of Albeck's own squad car because Albeck had his K-9 partner in the back.

[2] Albeck testified at the suppression hearing that he found "a couple thousand dollars." The criminal complaint states that Albeck found $3,634. When Chenoweth's girlfriend arrived at the scene to pick up the vehicle, Albeck told her that he had found at least $1,750.

[3] Albeck testified that he did not have his K-9 partner conduct a dog-sniff because the dog was not trained to alert to the presence of THC, and because it was marijuana that Albeck smelled.

Chenoweth fell to the floor. He indicated, by nodding his head in response to officers' questions, that he had ingested THC. Fuentes reviewed the footage from her rear squad camera and saw that while Chenoweth was in the back of the squad car on the way to the jail, Chenoweth was able to, as Albeck testified, "with his hands behind his back[,] remove the object that was in his groin area and place it in his mouth." Chenoweth was transported to the hospital via ambulance because the officers were concerned that he might have ingested dangerous narcotics.

¶9 At the hospital, medical staff attempted to get Chenoweth to ingest what Albeck believed was charcoal to treat for the possibility that Chenoweth had ingested drugs, but Chenoweth refused. Medical staff then took x-rays, which did not show that Chenoweth had ingested any foreign objects. As a result, the officers suspected that what Chenoweth was concealing was still in his mouth.

¶10 While at the hospital, as the officers were trying to determine what was in his mouth, Chenoweth pointed to a vein on his arm. Albeck believed, based on his training and experience, that Chenoweth was indicating that he had in his mouth "something that you shoot, which is generally heroin." This belief was reinforced by the fact that Chenoweth was on probation for offenses related to heroin.

¶11 Based on this belief, while at the hospital, Albeck obtained a body cavity search warrant to search Chenoweth's mouth. A doctor at the hospital agreed to help the officers attempt to execute the warrant at the hospital using wooden tongue depressors, but Chenoweth resisted those efforts, which proved to be unsuccessful. At that point, the officers decided to transport Chenoweth back to the jail to conduct the search there for the safety of medical staff, the officers, and Chenoweth.

¶12 In the jail's sally port, officers placed Chenoweth into a restraint chair while he resisted their efforts. It took officers approximately a minute to finish securing Chenoweth in the restraint chair. As they secured Chenoweth, officers told him to open his mouth and they repeatedly told him to do so throughout their efforts to execute the search warrant.

¶13 In the restraint chair, Chenoweth's hands remained handcuffed behind his back. Officers had multiple doses of Narcan on hand and had the jail nurse "on standby." At least six officers were present. At that point, whatever Chenoweth was concealing in his mouth had been there for five to six hours. After securing Chenoweth in the restraint chair, Albeck told Chenoweth that unless Chenoweth complied with the search warrant, officers would have to use force. Chenoweth still refused to open his mouth.

¶14 Albeck first tried applying force to different pressure points on Chenoweth's head to make him open his mouth. These efforts, which Albeck tried for less than 30 seconds, were unsuccessful. Albeck testified that he realized that attempting to use the pressure points was "not a good idea" because the attempts were causing Chenoweth to clench his mouth shut even harder.

¶15 Officers then resorted to using oleoresin capsicum spray ("OC spray"). Before doing so, Albeck told Chenoweth, "This is your last warning. I'm going to give you every chance to comply. I do not want to rub this on your mouth." Another officer told Chenoweth that they were going to apply OC spray to his face unless he opened his mouth. Chenoweth did not comply. An officer applied the OC spray to Albeck's gloved hand, and Albeck rubbed the OC spray over Chenoweth's eyes.

¶16 Several seconds after Albeck finished applying the OC spray, Chenoweth began to struggle to get out of the restraint chair. Officers held him in the chair and repeatedly told him to open his mouth. Albeck told him that when he opened his mouth, they would get him "medical aid" to address the pain. Chenoweth did not open his mouth.

¶17 Approximately a minute after Albeck applied OC spray to Chenoweth's eyes, a different officer used the same technique to apply OC spray to Chenoweth's mouth. Albeck asked Chenoweth to open his mouth "so we can get water on your face and clear this shit up." Officers also repeatedly told Chenoweth that failing to comply with a search warrant was a more serious crime than possessing narcotics. Officers told Chenoweth multiple times that they were not going to stop. Albeck told Chenoweth, "You're making this way worse for yourself, dude." Another officer asked Chenoweth, "Do you want me to haul off and knee you in the midsection until you open your mouth?" but the officer did not follow through on that threat. Approximately a minute after the second application of OC spray, Albeck applied OC spray to Chenoweth's face a third time, again using the same method.

¶18 After the third application of OC spray, officers continued to tell Chenoweth to open his mouth. One officer pulled out his taser and said, "I guess the taser's next." He spark tested it before putting it against the outside of Chenoweth's thigh and asking Chenoweth, "Do you want a drive stun to the leg?" While holding the taser against Chenoweth's leg, the officer told Chenoweth, "We have a search warrant and we can use all necessary force to execute this." Right after the officer stated that, he put his taser back in his holster. Officers continued to tell him to "spit it out," sometimes yelling at him to do so. Albeck told

Chenoweth, "You're literally risking swallowing this and dying." Officers continued to tell Chenoweth that they were not going to stop.

¶19 Approximately five minutes after securing Chenoweth into the restraint chair, the officers took a break so that the jail nurse could check Chenoweth's vital signs. Albeck stated that he thought that Chenoweth was "trying to bite it," referring to the object that was in Chenoweth's mouth.

¶20 It took the nurse approximately four minutes and thirty seconds to retrieve equipment and supplies and check Chenoweth's vital signs. While waiting for the nurse to take Chenoweth's vitals, officers continued to exhort Chenoweth to spit out the suspected drugs, including by telling him that failure to comply with the warrant was a more severe offense than possessing narcotics. Officers also told Chenoweth that if he spat out the suspected drugs, he would not be charged with failing to comply with the search warrant. Albeck told Chenoweth, "[W]e don't want to do this," and another officer repeated, "Nobody wants to do this." Three additional officers entered the sally port while the nurse was checking Chenoweth's vitals. Although Chenoweth's face is not visible in the video from Albeck's body camera, Chenoweth was apparently chewing on whatever was in his mouth: Albeck started to say what Chenoweth was "trying" to do, but did not finish that sentence, and instead stated, "At this point it's gotta be bit open." Albeck testified that Chenoweth's vitals were "still good."

¶21 After the jail nurse finished checking Chenoweth's vitals, Chenoweth—who had previously been making noises as though he was attempting to respond to police while keeping his mouth closed—appears to have begun to yell, but with his mouth closed and through the object in his mouth. Officers leaned him forward, thinking that he might be going to spit out the object.

Chenoweth did not, but one of the officers said that he could see the object, and another said, "It's right there." Officers then removed the handcuffs from Chenoweth and strapped his arms into the restraint chair, as Chenoweth resisted their efforts. At that point, frothy saliva was coming out of Chenoweth's mouth and running down his face. Chenoweth opened his mouth, apparently to blow some of the saliva out, which allowed the officers to see the object in his mouth. Chenoweth managed to free one of his arms from the restraint chair and as officers struggled to restrain him and to try to get the object out of his mouth, the object came further out of Chenoweth's mouth. Although Chenoweth resisted the officers' efforts, they were able to pull out through his teeth and out of his mouth what later proved to be a bag of drugs without breaking the bag. The drugs were packaged in several smaller bags within a larger one.

¶22 Officers recovered the drugs approximately twelve minutes after they had initially finished securing Chenoweth in the restraint chair. In total, officers told Chenoweth to "open his mouth," to "spit it out," or some variation of that command more than 70 times.

¶23 Officers further secured Chenoweth in the restraint chair and then placed him, still in the restraint chair, underneath an overhead shower and ran the water. Officers asked Chenoweth whether any bags broke in his mouth and he answered no. The substance in the bags later tested positive for heroin.

¶24 Chenoweth was charged with possession with intent to deliver three to ten grams of heroin, resisting an officer, and maintaining a drug-trafficking

place.[4] Chenoweth filed a motion to suppress the evidence recovered from the searches of his person, both the initial search incident to his arrest and the subsequent search of his mouth. First, he argued that Albeck lacked probable cause to arrest and search him. He acknowledged that under Wisconsin case law—specifically, ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), which Chenoweth argued was "reaffirmed" recently in ***State v. Moore***, 2023 WI 50, 408 Wis. 2d 16, 991 N.W.2d 412—the smell of marijuana emanating from Chenoweth and his vehicle would be enough for probable cause. But he attacked the reasoning of ***Secrist*** and ***Moore***, and he further argued that Albeck's testimony that he smelled marijuana was not credible because no marijuana was actually found. Second, Chenoweth argued that the search warrant was executed unreasonably, in violation of the Fourth Amendment.

¶25 Albeck testified at a hearing on Chenoweth's motion to suppress, as did Sergeant Andrew Reed, who supervised the execution of the search warrant. Albeck testified regarding what happened from when he initiated the traffic stop until after the officers recovered the drugs from Chenoweth's mouth. Reed testified regarding the execution of the search warrant of Chenoweth's mouth. Albeck and Reed also testified about their training in the use of OC spray and the effects of OC spray. Footage from Albeck's dashboard camera and body camera was received as evidence.

[4] The substance initially tested positive for fentanyl, and Chenoweth was also charged with possession with intent to deliver less than ten grams of fentanyl. However, the fentanyl charge was ultimately dismissed because subsequent testing revealed that the substance did not contain fentanyl.

¶26 The circuit court denied Chenoweth's motion to suppress. Regarding whether there was probable cause to arrest and then search Chenoweth, the court deemed credible Albeck's testimony that he smelled marijuana emanating from Chenoweth's vehicle, which the court observed was corroborated by Fuentes' statement that she smelled marijuana on Chenoweth's person, and the court concluded that the odor of marijuana was sufficient to establish probable cause to arrest and search Chenoweth.

¶27 The circuit court also concluded that the use of OC spray in the execution of the search warrant for Chenoweth's mouth was reasonable. The court stated, "The argument is that this was the equivalent of the rack and screw. It really was not." The court found that "[t]he deputies could reasonably fear for the defendant's safety," that if Chenoweth ingested the drugs, "he could die," and that "there was serious concern for Mr. Chenoweth's safety." The court concluded that "the use of the OC spray in this matter was done in a safe manner, and was not unreasonable. It was not unreasonable force to exercise a validly signed … [body] cavity search warrant. The argument from defense is it almost killed him. In actuality, it potentially saved his life[.]"

¶28 After his suppression motion was denied, pursuant to a plea agreement, Chenoweth pleaded guilty to possession with intent to deliver between three and ten grams of heroin. The State dismissed but read in for purposes of sentencing the charges of resisting an officer and maintaining a place of drug trafficking.

DISCUSSION

¶29 On appeal, Chenoweth argues that Albeck lacked probable cause to conduct a search incident to his arrest. He concedes that under Wisconsin case

law, the odor of marijuana that Albeck detected would suffice for probable cause. *See* ***Secrist***, 224 Wis. 2d 201; ***Moore***, 408 Wis. 2d at ¶¶9-10 (setting forth this conclusion from ***Secrist***). However, he attacks the reasoning of this case law, and argues that we should certify this case to our supreme court so that it can revisit the issue of whether the odor of marijuana alone is sufficient for probable cause. And he argues that the circuit court should not have found Albeck's testimony that he smelled marijuana credible because Albeck could not have smelled marijuana since no marijuana was found. Chenoweth also argues that the officers acted unreasonably when executing the search warrant by employing pain compliance techniques that amounted to "torture."

¶30 Chenoweth's arguments are unpersuasive. We conclude that certification to our supreme court is not warranted. We also conclude that Chenoweth fails to show that the circuit court's credibility finding as to the relevant testimony from Albeck was clearly erroneous. Finally, we conclude that Chenoweth has not shown that the execution of the search warrant was unreasonable under the Fourth Amendment.

I. Probable Cause to Arrest and Search Chenoweth

¶31 "Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution forbid unreasonable searches and seizures." ***State v. VanLaarhoven***, 2001 WI App 275, ¶6, 248 Wis. 2d 881, 637 N.W.2d 411. Although warrantless searches are generally unreasonable, there are "'carefully drawn'" exceptions. ***Id.*** (quoted source omitted). One such exception is a search incident to arrest, which is valid if there is probable cause for the arrest. ***Moore***, 408 Wis. 2d 16, ¶8; ***State v. Sykes***, 2005 WI 48, ¶¶14-16, 279 Wis. 2d 742, 695 N.W.2d 277. "Probable cause to arrest is the quantum of

evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***Secrist***, 224 Wis. 2d at 212. "There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.*** Whether there is probable cause to support an arrest is an objective inquiry that examines the totality of the circumstances. ***Moore***, 408 Wis. 2d 16, ¶8.

¶32 We uphold a circuit court's findings of fact unless they are clearly erroneous, but we independently apply the constitutional standards for probable cause. ***Id.***

¶33 In ***Secrist***, our supreme court stated that, "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." ***Secrist***, 224 Wis. 2d at 218. Our supreme court was recently invited to revisit this conclusion from ***Secrist*** in ***Moore***, but declined to do so. *See* ***Moore***, 408 Wis. 2d 16, ¶¶11, 13.

¶34 Here, Chenoweth raises two arguments as to why officers lacked probable cause to arrest him and to conduct a search incident to his arrest.[5] Neither has merit.

[5] The State characterizes Albeck's search of Chenoweth after pulling him over as a search incident to arrest. Chenoweth does not dispute this, and the parties agree that Albeck needed probable cause to justify the search.

¶35 First, Chenoweth argues the case law from our supreme court concluding that the odor of marijuana alone constitutes probable cause was wrongly decided and should be overturned. Specifically, he argues that because various products are now legal that are indistinguishable in odor from marijuana, including CBD and hemp, the smell of marijuana alone should not be sufficient to establish probable cause. Chenoweth concedes, however, that under ***Secrist***, which our supreme court declined to revisit in ***Moore***, if Albeck smelled marijuana coming from Chenoweth's vehicle, that is sufficient to establish probable cause to arrest Chenoweth and search him incident to arrest. And Chenoweth further recognizes that we are bound by this case law and do not have the power to overturn it. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). Therefore, Chenoweth argues that we should certify to our supreme court the question of whether the odor of marijuana alone should continue to constitute probable cause. However, Chenoweth's argument as to why this issue warrants certification is cursory and unpersuasive. Moreover, our supreme court decided ***Moore*** just three years ago and declined to adopt the very argument that Chenoweth raises here. Accordingly, we reject Chenoweth's request for certification. Should Chenoweth seek to challenge the holding from ***Secrist*** or ***Moore***, he is free to file a petition for review with our supreme court. *See* WIS. STAT. RULE 809.62(1r) (listing the criteria for review by our supreme court).

¶36 Second, Chenoweth argues that even under ***Secrist*** and ***Moore***, Albeck lacked probable cause to arrest him and conduct a search incident to arrest. Chenoweth relies on the fact that Albeck did not ultimately find any marijuana when searching Chenoweth's vehicle: he argues that Albeck "could not have

smelled marijuana that wasn't there," that Albeck therefore "has a credibility problem," and that the circuit court should not have credited Albeck's testimony that he smelled marijuana.

¶37 As the State points out, however, Chenoweth advanced these same arguments in the circuit court, and the court nonetheless determined that Albeck's testimony was credible. And on appeal, Chenoweth fails to reckon with the relevant standard of review, namely, that we will uphold "a circuit court's findings of fact unless they are clearly erroneous." *See* ***Moore***, 408 Wis. 2d 16, ¶8 (quoted source omitted). Here, Chenoweth fails to show that the court's credibility determination is clearly erroneous. Chenoweth told Albeck, "I ain't smoked in there today. I really just got in there." If Albeck credited the veracity of these assertions, they could support a reasonable inference that Chenoweth might have recently possessed marijuana in the vehicle. The fact that Fuentes would have testified that she smelled marijuana on Chenoweth's person further supports the court's determination that Albeck's testimony that he smelled marijuana was credible.[6]

¶38 Chenoweth cites, as persuasive authority, cases from other jurisdictions in which testimony that police smelled marijuana was deemed not credible based on the fact that subsequent searches did not reveal the presence of any marijuana. However, as the State argues, although the fact that no marijuana

[6] Chenoweth argues that what Fuentes would have testified to does not corroborate what Albeck testified to because Albeck testified that he smelled the odor of marijuana in Chenoweth's vehicle, whereas Fuentes indicated that she smelled it on Chenoweth's person, and because Albeck described the odor as strong, whereas Fuentes described it as moderate. However, Albeck's and Fuentes's statements are not inconsistent, and the fact that Fuentes smelled marijuana on Chenoweth's person could lend support to Albeck's testimony that he smelled marijuana in Chenoweth's car.

was found here could support a determination that Albeck's testimony was not credible, it does not compel that determination, nor does it render the court's credibility determination clearly erroneous.

¶39 In sum, we conclude that there was probable cause to arrest Chenoweth and to conduct a search incident to his arrest.

II. Execution of the Search Warrant

¶40 Chenoweth argues that execution of the search warrant was conducted unreasonably in violation of the Fourth Amendment. We disagree.

¶41 A search conducted pursuant to a warrant must be carried out reasonably. ***State v. Sveum***, 2010 WI 92, ¶19, 328 Wis. 2d 369, 787 N.W.2d 317. To determine whether the force used to execute a search is reasonable under the Fourth Amendment, we balance the nature and quality of the intrusion against the governmental interests at stake. *See* ***Graham v. Connor***, 490 U.S. 386, 396 (1989).

¶42 Whether law enforcement conduct is reasonable under the Fourth Amendment "'is not capable of precise definition or mechanical application.'" ***Id.*** (quoting ***Bell v. Wolfish***, 441 U.S. 520, 559 (1979)). Instead, this determination "requires careful attention to the facts and circumstances of each particular case." ***Graham***, 490 U.S. at 396; *see also* ***State v. Pinder***, 2018 WI 106, ¶53, 384 Wis. 2d 416, 919 N.W.2d 568 ("Whether a search was reasonably executed is determined by considering 'the totality of the circumstances.'" (quoting ***United States v. Banks***, 540 U.S. 31, 35-36 (2003))).

¶43 "Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and

unnecessary period of time." ***Los Angeles County v. Rettele***, 550 U.S. 609, 614 (2007). When a defendant challenges a search conducted pursuant to a warrant as unreasonable under the Fourth Amendment, the burden is on the defendant to show that police conduct was unreasonable. *See* ***State v. LaCount***, 2008 WI 59, ¶37, 310 Wis. 2d 85, 750 N.W.2d 780. As stated, we will not overturn a circuit court's findings of fact unless they are clearly erroneous. ***State v. Payano-Roman***, 2006 WI 47, ¶16, 290 Wis. 2d 380, 714 N.W.2d 548. However, we independently determine whether a search warrant was executed reasonably. ***Id.***

¶44 Here, weighing the nature and the quality of the officers' conduct against the government interests at stake, we conclude that Chenoweth fails to establish that the officers' conduct in executing the search warrant was unreasonable.

¶45 We begin by considering the nature and the quality of the officers' conduct at issue here—namely, the use of OC spray, which is what Chenoweth challenges on appeal.[7] *See* ***Graham***, 490 U.S. at 396.

¶46 Officers applied OC spray to Chenoweth's face three times, with approximately a minute between each application. Each time, officers told Chenoweth that they were going to apply the OC spray before they did so and they gave him an opportunity to comply before they did. From the first application until when the drugs were removed from Chenoweth's mouth, the OC spray was

[7] One of the officers who testified at the suppression hearing stated that officers also used "body strikes to [Chenoweth's] person" to make Chenoweth open his mouth. However, Albeck did not testify that "body strikes" were used, and from our review of the video, it is not apparent that these techniques were actually used in the process of executing the search warrant. Chenoweth does not state that any such "body strikes" were used nor does he rely on their use in arguing that the officers acted unreasonably.

on Chenoweth's face for approximately 10 minutes, and the OC spray then remained on his face for an additional minute or two before officers finished securing him in the restraint chair and placed him under running water to wash off the OC spray. Officers had Narcan and the jail nurse on standby, and after applying the OC spray, officers had the jail nurse check Chenoweth's vitals, which were "still good." It was only two or three minutes after the nurse finished checking Chenoweth's vitals that the officers were able to retrieve the heroin from Chenoweth's mouth.

¶47 Sergeant Reed testified to the following regarding the use of OC spray generally. OC spray is a "standard tool" of law enforcement that "causes pain compliance. So the goal is to administer enough pain so that the subject will comply with the orders to stop resisting." Law enforcement officers are trained on the use of OC spray and, as part of that training, OC spray is used on the officers, who then have to perform various tasks before the OC spray is washed off. A manual that is used to teach Wisconsin jailers states that OC spray has not been reported to cause great bodily harm or death. OC spray can cause people to cough but does not impede breathing.

¶48 The circuit court found that the use of OC spray "is not lethal force," and that here, Chenoweth did not suffer any lasting effects from the officers' use of OC spray. The court also found that "the use of the OC spray … was done in a safe manner."

¶49 Against this, we balance the government interests at stake in executing the search warrant of Chenoweth's mouth and retrieving the drugs that officers suspected he was concealing. *See* ***id.*** These consist of the officers' interest in ensuring Chenoweth's safety and obtaining evidence of a crime.

¶50 First, the officers had an interest in keeping Chenoweth safe while he was in their custody. Officers knew that Chenoweth was concealing something in his mouth: they knew that Chenoweth had been concealing something in his pants when he was first stopped, that he moved the object to his mouth while being transported to the jail, that he had not spoken to officers or opened his mouth since first arriving at the jail, that the x-rays taken at the hospital showed that he had not swallowed anything, and that he had resisted the attempts of medical staff to get him to open his mouth. They also had reason to believe that it was heroin or some other narcotic that Chenoweth was concealing in his mouth: Chenoweth was on probation for heroin-related offenses, and, when asked about what he was concealing, Chenoweth pointed to a vein in his arm. Officers further knew that by the time they put Chenoweth in the restraint chair, whatever he was concealing had been in his mouth for five to six hours, and officers did not know how it was packaged or what condition the packaging was in. Consistent with this, the circuit court found that officers "could reasonably fear for [Chenoweth's] safety," and that Chenoweth could have died if he ingested the heroin. Officers thus had a strong interest in promptly removing the drugs from his mouth.

¶51 Second, officers had an interest in obtaining evidence of a crime. As stated, officers had strong reason to suspect that Chenoweth was concealing heroin or some other narcotic in his mouth, which is a serious crime. The offense to which Chenoweth pleaded guilty in this case, possession with intent to deliver between three and ten grams of heroin, is a Class E felony with a maximum sentence of fifteen years' imprisonment.

¶52 Balancing these factors—the nature and the quality of the intrusion on the one hand, against the relevant government interests on the other—we conclude that the officers' conduct in executing the warrant was reasonable. In

particular, the concerns related to Chenoweth's safety weigh heavily in the balance, and tip the scales in favor of reasonableness.[8]

¶53 Chenoweth argues that officers had several alternatives to using OC spray—they could have asked medical staff to anesthetize or sedate him, they could have forced laxatives if he swallowed the contraband, and they could have simply waited, because at some point he would have needed to eat or drink. Relatedly, Chenoweth contends that because the drugs were in his mouth for six hours while his vital signs remained stable, "the danger was obviously minimal." This argument fails because, as stated, the circuit court found that Chenoweth "had a potentially fatal amount of contraband in his mouth, and he was not releasing it"; that "[t]he deputies could reasonably fear for the defendant's safety"; that if Chenoweth had ingested the drugs, "he could [have] die[d]"; and that "there was serious concern for Mr. Chenoweth's safety." Chenoweth fails to show that these findings were clearly erroneous.

¶54 Regarding Chenoweth's specific argument that officers could have sedated Chenoweth, Chenoweth relies on ***United States v. Husband***, 226 F.3d 626 (7th Cir. 2000). There, the Seventh Circuit deemed reasonable the intravenous sedation of a defendant who police suspected was concealing drugs in his mouth and who refused to open his mouth. ***Id.*** But in ***Husband***, the defendant had

[8] The State frames its argument as to reasonableness using the specific factors listed in ***Graham v. Connor***, 490 U.S. 386 (1989): "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." ***Graham***, 490 U.S. at 396. However, these factors reflect that in ***Graham***, the Court was addressing the reasonableness of a seizure of the defendant's person. *See* ***id.*** Accordingly, we do not frame our analysis of reasonableness using these precise factors. *See* ***State v. Gasper***, 2026 WI 3, ¶21, 419 Wis. 2d 12, 30 N.W.3d 367 ("The touchstone of the Fourth Amendment is reasonableness." (internal quotation marks and quoted source omitted)).

begun "to twitch and sweat as if experiencing a seizure," and the same medication that sedated the defendant was also administered to treat a possible overdose. ***Id.*** at 628. Moreover, as stated, the burden is on Chenoweth to show that the officers' conduct was unreasonable, and he fails to develop an argument showing that that administering a sedative would have been safer to a degree that would render the officers' application of OC spray unreasonable. ***LaCount***, 310 Wis. 2d 85, ¶37; *see also* ***United States v. Sharpe***, 470 U.S. 675, 686-87 (1985) ("A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.… The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." (citations omitted)).

¶55 Chenoweth also argues that the Rock County Sherriff Department's policies forbid techniques that impede respiration, and Chenoweth argues that after the OC spray was applied, he could not breathe. Once again, this argument is foreclosed by the circuit court's findings, which Chenoweth fails to show are clearly erroneous. Relevant here, the court found that "the use of the OC spray in this matter was done in a safe manner." And otherwise, as support for the proposition that he could not breathe, Chenoweth relies on the froth that was on the bag when officers removed it from his mouth. This froth does not establish that Chenoweth could not breathe, and the burden is on Chenoweth to show that the officers' conduct was not reasonable.[9]

[9] For the first time in his reply brief, Chenoweth cites as persuasive authority ***Hereford v. State***, 339 S.W.3d 111 (Tex. Crim. App. 2011). We are not bound to follow this out-of-state authority, but in any event, we conclude that ***Hereford*** is sufficiently distinguishable that it does not support Chenoweth's argument. In ***Hereford***, the Court of Criminal Appeals of Texas (continued)

¶56 In sum, we conclude that Chenoweth has failed to show that the officers acted unreasonably in executing the search warrant.

CONCLUSION

¶57 For the reasons stated, we affirm.

By the Court.—Judgment affirmed.

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

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concluded that police acted unreasonably when they repeatedly tased the defendant in order to recover crack cocaine that they suspected he was concealing in his mouth. Significantly, in that case, police intentionally tased the defendant "in the upper inner thigh," or "groin area," specifically because it was a sensitive part of the body; police testified "that Tasers have been involved in incidents in which individuals have died, and that there is always a risk of death when a Taser is used"; and there was "little concern about a drug overdose." ***Id.*** at 116, 123, 126. The facts here are not analogous to those in ***Hereford***.

Chenoweth also relies on various cases from the Seventh Circuit, which he argues support the proposition that OC spray may only be used when a defendant poses an active threat. However, these cases are substantively distinct—for example, none of them concern the use of OC spray or of force generally to execute a search warrant—and ultimately provide little guidance here.