COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1451-CR **Cir. Ct. No. 2013CF1867**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARSHALL S. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge

¶1 PER CURIAM. Marshall S. Anderson appeals a judgment of conviction entered upon his guilty pleas to the charges of possessing cocaine and possessing tetrahydrocannabinols, both as second or subsequent offenses. The circuit court denied his motion to suppress the cocaine and marijuana underlying

the charges. The single issue is, as Anderson frames it in his appellate brief, whether police "ha[d] probable cause to search [his] person based solely on the smell of burnt marijuana coming from inside a vehicle with two occupants."[1] We affirm.

¶2 We take the facts from the testimony and evidence presented at the suppression hearing. Officer Christopher Conway testified that he approached a minivan that he believed was illegally parked. Conway could see two people in the vehicle. He knocked on the window, but the person in the driver's seat, subsequently identified as Anderson, did not respond to the officer. Instead, Anderson made movements that Conway suspected might be associated with hiding or retrieving a weapon. For officer safety, Conway opened the driver's-side door and immediately smelled "a strong odor of burnt marijuana coming from the vehicle." Conway ordered Anderson out of the minivan and searched him. Conway explained that he was looking for "the source of the marijuana" smell. During the course of the search, Conway found marijuana and cocaine in Anderson's pockets.

¶3 Whether police had probable cause to search is a question of constitutional fact. *See* ***State v. Mata***, 230 Wis. 2d 567, 570, 602 N.W.2d 158 (Ct. App. 1999). On review, we defer to the circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** Additionally, we defer to the circuit court's assessment of witness credibility. *See* ***State v. Young***, 2009 WI App 22, ¶17, 316

[1] We may review the circuit court's order denying Anderson's suppression motion notwithstanding Anderson's guilty pleas. *See* WIS. STAT. § 971.31(10) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wis. 2d 114, 762 N.W.2d 736. We apply the law to the facts *de novo*. *See* ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621.

¶4 Here, the circuit court believed Conway. Based on his testimony, the circuit court found that Conway smelled marijuana upon opening the driver's door, and therefore he had probable cause to search the person in the driver's seat, namely, Anderson.[2]

¶5 "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Id.***, ¶21 (citation omitted). The supreme court concluded in ***Hughes*** that "[t]he unmistakable odor of marijuana coming from [the defendant's] apartment provided this fair probability." *See* ***id.***, ¶22. In reaching this conclusion, the supreme court canvassed the "many cases [that] have addressed the situation in which an officer relied upon his or her sense of smell to detect the presence of illegal drugs." *See* ***id.*** These cases include authority holding that the "'unmistakable odor of marijuana' emanating from a car provided probable cause for an officer to believe that the car contained evidence of a crime and thus to search." *See* ***id.*** (citation omitted).

¶6 Here, Conway testified that he smelled the strong odor of marijuana coming from inside the illegally parked vehicle. Anderson does not dispute that Conway smelled marijuana as he claimed. Accordingly, ***Hughes*** dictates that he had probable cause to search.

[2] The circuit court also made findings about the lawfulness of the officer's actions in stopping the minivan. Anderson does not challenge the validity of the stop on appeal.

¶7 We must next consider whether the scope of the probable cause extended to permit a search of Anderson's person. Our supreme court has explained that "[w]hat is imperative ... is that the officer be able to link the unmistakable odor of marijuana ... to a specific person or persons. The linkage must be reasonable and capable of articulation." *See* ***State v. Secrist***, 224 Wis. 2d 201, 216-17, 589 N.W.2d 387 (1999). In Anderson's view, the passenger's presence in the minivan prevents the State from specifically linking Anderson to the odor of marijuana. We cannot agree. "Whether probable [cause] exists is 'measured by the facts of the particular case.'" ***Mata***, 230 Wis. 2d at 572 (citation omitted). In ***Mata***, for example, we concluded that the smell of fresh marijuana gave rise to probable cause to search a defendant who was one of three people in a car. *See* ***id.*** at 572-73. We reasoned that, under the facts and circumstances of the case, the presence of additional people in the car actually strengthened the link between the odor and the defendant because, by the time police searched the defendant, they had already searched the other people in the car without finding any marijuana. *See* ***id.***

¶8 In this case, only two people were in the minivan. The person in the driver's seat, Anderson, made suspicious movements that caused Conway concern. Conway therefore opened the driver's-side door. He testified, and the circuit court found, that when he opened that door, he detected the "strong" odor of marijuana. As ***Secrist*** explains, a person's proximity to an odor may provide the necessary linkage between the odor and the person. *See* ***id.***, 224 Wis. 2d at 217. Anderson's proximity to the odor of marijuana provided that linkage under the facts here, and nothing about the passenger's presence weakens the link. Indeed, ***Secrist*** expressly contemplates the possibility that an odor may be linked to more than one person. *See* ***id.***, at 217-18. Moreover, "an officer is not required to draw a

reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

¶9 Anderson nonetheless argues that the odor of burnt marijuana is insufficient to justify a search because, he says, such an odor reflects only that "marijuana had been present but not that it is still present." We must reject this contention. In ***Hughes***, the supreme court considered whether the smell of burning marijuana gives rise to probable cause for a search. *See* ***id.***, 233 Wis. 2d 280, ¶¶14, 21-22. The court opined: "[w]hen the strong smell of marijuana is in the air, there is a 'fair probability' that marijuana is present. This is common sense." ***Id.***, ¶23.

¶10 For all the foregoing reasons, we are satisfied that the police had probable cause to search Anderson.[3] Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

[3] The State offers additional reasons for upholding the circuit court's order denying suppression in this case, but we do not address them. *See* ***State v. Hughes***, 2011 WI App 87, ¶14, 334 Wis. 2d 445, 799 N.W.2d 504 (we decide cases on narrowest possible ground).