

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 15, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-2218-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 03-CF-975**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ADAM J. KESTELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Brown County:  
J. D. MCKAY, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Adam Kestell appeals a judgment of conviction for possession of THC as a second and subsequent offense. He argues his consent to the search of his vehicle was coerced and therefore evidence resulting from the

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

search should be suppressed. Because we are satisfied that the officer had probable cause to search Kestell's vehicle, we need not determine whether Kestell's consent was coerced. We affirm the judgment.

## BACKGROUND

¶2 On October 16, 2003, at approximately 2:34 a.m., City of Green Bay police officer Phillip Scanlan was on patrol. He observed a vehicle ahead of him speeding away and then turn right without using a signal. Scanlan stopped the vehicle and identified Kestell as the driver. Scanlan testified that he smelled an odor of an intoxicant on Kestell's breath. Scanlan returned to his squad car, ran Kestell's record, and learned of prior arrests and that Kestell was on probation. Scanlan called for backup and then returned to Kestell's vehicle and asked him to step out of the car.

¶3 Scanlan asked Kestell whether he was on probation, which Kestell denied. When Scanlan continued to ask about it, Kestell eventually admitted to being on probation. Scanlan asked Kestell for permission to do a pat down and Kestell agreed. Scanlan found no weapons or contraband, but smelled an odor of marijuana on Kestell's person. Scanlan asked Kestell if he could search his vehicle. Kestell hesitated to answer and Scanlan asked again. Kestell responded he preferred that Scanlan did not search the vehicle. Scanlan then reminded Kestell he was on probation and that he was supposed to cooperate when he is on probation. Kestell then said, "go ahead and look. There's nothing in it." In the car Scanlan found a plastic bag with a substance in it he recognized as marijuana, a brass pipe with bowl attachments and burnt marijuana residue on it, medical tweezers with burnt tips and a scale. Scanlan arrested Kestell.

¶4 Kestell was charged with possession of THC as a second and subsequent offense as well as possession of drug paraphernalia. Kestell pled not guilty to both counts. He filed a motion to suppress evidence resulting from the search of his vehicle because he argued his consent to search the vehicle was coerced. At the hearing on the motion, the court determined there was no evidence in the record of coercion and denied the motion. Subsequently, pursuant to a plea agreement, Kestell pled guilty to possession of THC. The possession of drug paraphernalia charge was dismissed and read in. The court sentenced Kestell to ten days in jail with Huber privileges.

### DISCUSSION

¶5 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law that we decide without deference to the circuit court's decision. *State v. Patricia A.P.*, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶6 Kestell argues Scanlan coerced him into consenting to a search of his vehicle. He notes that Scanlan called for backup after he stopped Kestell and that the presence of an additional officer increased the pressure on him to consent. Kestell also argues he was coerced by Scanlan's statement that because Kestell was on probation, he was supposed to cooperate. Kestell contends Scanlan's statement implied that his probation would be revoked if he did not cooperate.

¶7 We conclude that regardless whether Kestell was coerced to give consent to the search, Scanlan had probable cause to search the vehicle. Law enforcement officers may conduct a warrantless search of a car, under the

automobile exception to the Fourth Amendment, if there is probable cause to believe that the vehicle contains contraband. *State v. Matejka*, 2001 WI 5, ¶23, 241 Wis. 2d 52, 621 N.W.2d 891. Probable cause means a fair probability that a search will reveal contraband. *State v. Pallone*, 2000 WI 77, ¶74, 236 Wis. 2d 162, 613 N.W.2d 568. Whether a given set of facts constitutes probable cause is a question of law that we review without deference to the trial court. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In determining probable cause, we consider the totality of the circumstances concerning the search in question. *See Pallone*, 236 Wis. 2d 162, ¶74.

¶8 Here, Scanlan testified that moments after Kestell exited his vehicle and he was patting Kestell down, he noticed an odor of marijuana on Kestell's person. Scanlan could reasonably infer from the odor that Kestell had recently used marijuana in confined quarters. In *State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999), our supreme court noted that the “unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime,” thus justifying a search. Furthermore, Scanlan was aware that Kestell had prior drug arrests and was on probation. From these circumstances, Scanlan had probable cause to believe there was contraband in Kestell's vehicle. Thus, Scanlan's search was justified, and the court correctly denied Kestell's suppression motion.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

