COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2268-CR **Cir. Ct. No. 2010CF3541**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN OLIVER HUFF, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN and CLARE L. FIORENZA, Judges. *Affirmed in part; reversed in part; and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. John Oliver Huff, Jr., appeals from an amended judgment of conviction, entered on his guilty plea, for possession with intent to deliver more than forty grams of cocaine, contrary to WIS. STAT.

§ 961.41(1m)(cm)4. (2009-10).[1] Huff argues that his suppression motion should have been granted. We reject his suppression argument.

¶2 Huff also appeals from an order denying his postconviction motion for additional sentence credit.[2] The State concedes that Huff is entitled to the nine additional days of sentence credit that he seeks, and we agree. Therefore, we reverse the postconviction order denying Huff additional sentence credit and remand with instructions to enter an amended judgment awarding Huff a total of seventy-seven days of sentence credit. In all other respects, the amended judgment is affirmed.

BACKGROUND

¶3 Huff was charged with possession with intent to deliver after an officer found cocaine in his pants pocket during a traffic stop. Huff, who was the passenger in the vehicle, moved to suppress the cocaine on grounds that the officer lacked probable cause to search Huff.[3]

¶4 Huff and Officer Christopher Ottaway both testified at the suppression hearing. According to Ottaway's testimony, he stood on the passenger side of the stopped vehicle, toward the rear door, while his partner, Officer William Kingston, spoke with the driver. Ottaway said that as Kingston

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Honorable Clare L. Fiorenza denied the postconviction motion for additional sentence credit after being assigned the case due to judicial rotation. The Honorable Paul R. Van Grunsven presided over Huff's suppression motion, accepted his plea, and sentenced him.

[3] Huff did not challenge the decision to stop the vehicle, which was based on an improperly displayed temporary license plate.

spoke to the driver, Kingston used a facial expression—"crinkling his nose"—to communicate to Ottaway that Kingston "could smell something coming from the vehicle."

¶5 Ottaway said that Kingston asked the driver to get out of the car and got consent to search the vehicle. Ottaway said that when Kingston put the driver in the back of the squad car, Kingston told Ottaway that "he could smell a strong smell of burnt marijuana coming from inside the vehicle."

¶6 Ottaway testified that he tapped on the passenger side window and asked Huff to step out of the vehicle. Ottaway said that once the car door was open, he "could smell a strong odor of a burnt marijuana substance." He explained: "I could smell it coming from the vehicle as I opened the door, and as I was directing him towards the back of the vehicle towards the rear quarter panel I could still smell it illuminating [sic] from his clothing."

¶7 Ottaway said that he asked Huff if he had any weapons or narcotics on him and then conducted a pat-down search of Huff's "outer clothing garment." Ottaway said that he felt "a soft spongy substance" near Huff's right pants pocket that Ottaway "believed to be some type of controlled substance." When he asked Huff what the bulge was, Huff replied, "I'm f---ed." Ottaway removed a clear plastic bag from Huff's pocket that was later found to contain cocaine.[4] However, no marijuana was recovered from Huff, the driver, or the vehicle.

[4] According to the criminal complaint, Ottaway subsequently found two larger bags of cocaine in Huff's other pants pocket.

¶8 Both the State and trial counsel asked Ottaway questions about his detection of a burnt marijuana smell. Ottaway testified that he had smelled marijuana during his work as a police officer, a job he had held for nine years. When asked whether, "[t]hrough [his] training and experience as an officer," he was "able to ascertain whether the smell is of marijuana ready to be smoked or marijuana that has been smoked," Ottaway replied: "From my experience, yes, usually I can detect a difference." Ottaway said he could also tell the difference between "a recent smell" and "old, stale smoke," and he said that in this case, he smelled "recently smoked" marijuana.

¶9 Huff also testified at the motion hearing. He said that he had been with the driver "for most of the day" and that neither of them had smoked any marijuana that day. Huff indicated that he heard Kingston ask the driver whether he and Huff had been smoking marijuana, but Huff denied that Ottaway asked Huff about smoking marijuana.

¶10 The circuit court explicitly found Ottaway's testimony was credible. It made factual findings consistent with Ottaway's testimony and analyzed the facts under the controlling case law, ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), which we discuss below. The circuit court denied Huff's motion to suppress.

¶11 Huff subsequently entered a plea bargain with the State pursuant to which Huff pled guilty. The circuit court sentenced Huff to five years of initial confinement and five years of extended supervision, concurrent to any other sentence, and awarded Huff ninety-one days of sentence credit. The judgment was subsequently amended to correctly state that the sentence was concurrent. The

circuit court also amended the number of days of credit available to Huff, reducing the credit to sixty-eight days.

¶12 Postconviction counsel filed a postconviction motion seeking nine additional days of sentence credit, which the circuit court denied. This appeal follows.

DISCUSSION

¶13 Huff argues that this court should reverse the order denying his suppression motion. He also contends that he was entitled to nine additional days of sentence credit. We consider each issue in turn.

I. Suppression motion.

¶14 Huff's suppression argument is based on ***Secrist***, a case discussing when the smell of marijuana can provide probable cause to search or arrest an individual. ***Secrist*** provides the applicable standard of review:

> In reviewing an order granting or denying a motion to suppress evidence, this court will uphold a circuit court's findings of fact unless they are clearly erroneous. Nonetheless, the question whether the odor of marijuana constitutes probable cause to arrest "is a question of constitutional fact involving the application of federal constitutional principles which this court reviews independently of the conclusions of the circuit court." It is thus subject to independent review and requires an independent application of the constitutional principles involved to the facts as found by the circuit court.

Id. at 207-08 (citations omitted).

¶15 In ***Secrist***, the defendant drove up to an officer who was directing traffic and asked for directions. ***Id.*** at 204. The officer detected the smell of marijuana emanating from the vehicle and directed the defendant to pull over to

the side of the road. ***Id.*** at 204-05. The officer approached the car, told the defendant to get out of the car, and arrested him for possession of marijuana. ***Id.*** at 205. The officer subsequently searched the defendant's car and found a marijuana cigarette and roach clip in the ashtray. ***Id.***

¶16 At issue in ***Secrist*** was the arrest and the search incident to arrest. ***Id.*** at 209. ***Secrist*** considered "whether the odor of a controlled substance may provide probable cause to arrest, and, if so, when." ***Id.*** at 204. The court concluded:

> [T]he odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered or because other evidence at the scene or elsewhere links the odor to the person or persons.

Id. at 217-18. ***Secrist*** explained that it is a "common sense conclusion" that "when an officer smells the odor of a controlled substance … a crime has probably been committed." ***Id.*** at 218.

¶17 ***Secrist*** held that an officer will have probable cause to arrest "[i]f under the totality of the circumstances, a trained and experienced police officer identifies an unmistakable odor of a controlled substance and is able to link that odor to a specific person or persons." ***Id.*** The court added:

> 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. The probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.

Id. ***Secrist*** also discussed special considerations concerning the credibility assessment of officers who detect the smell of controlled substances:

> It is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana or some other controlled substance. The extent of the officer's training and experience bears on the officer's credibility in identifying the odor as well as its strength, its recency, and its source. While corroboration by another officer is not required, corroboration can be helpful in firming up the reasonableness of the officer's judgments.

Id. at 216.

¶18 In its oral ruling, the circuit court discussed ***Secrist*** at length. It found that Ottaway was a credible witness, noting that Ottaway said he could smell the marijuana both inside the car and on Huff's person. It noted that Ottaway had not provided details concerning his training or experience, but concluded that Ottaway was credible based on his testimony that he was familiar with the smell of marijuana, his nine years as a police officer, and Kingston's corroboration of the smell of marijuana.[5] *See* ***id.*** The circuit court concluded that based on Huff's detection of marijuana in the car and on Huff's person, there was probable cause to conduct a pat-down search of Huff and to arrest him. Therefore, it denied the motion to suppress.

¶19 On appeal, Huff argues that "the State failed to meet its burden to establish that Officer Ottaway had probable cause to conduct the pat-down based on the smell." He faults the State for presenting "absolutely *no* evidence regarding

[5] Although Kingston did not testify, Ottaway said that Kingston told him he smelled marijuana and Huff indicated that he heard Kingston ask the driver whether he and Ottaway had been smoking marijuana.

Ottaway's training." He further notes that the only evidence of Ottaway's experience came from Ottaway, who testified that he had been a patrol officer for nine years, had smelled marijuana in the past, and could, based on his experience, distinguish between burnt and raw marijuana. Huff argues that "***Secrist*** requires more than a police officer simply testifying that he is a police officer and that he has 'training and experience.'" He notes:

> ***Secrist*** stresses the importance of testimony regarding the *extent* of the officer's training and experience….
>
> ….
>
> … The issue is not whether Ottaway truly believed he smelled marijuana; the issue is—how likely is it that his belief was reasonable. ***Secrist*** suggests that the answer lies in determining how the officer was able to make the determination. Therefore, without testimony regarding the extent of either Ottaway or Kingston's training and experience, the State failed to demonstrate probable cause to search based on the perceived smell.

¶20 In response, the State notes that ***Secrist*** did "not set a minimum level of information required to support a finding that an officer is qualified to recognize the smell of marijuana." The State explains:

> [I]n ***Secrist***, there are no specifics of the arresting officer's qualifications other than that he was "a trained veteran of the New Berlin police department with 23 years [of] experience," and that "[h]e recognized the odor from his police training and frequent contact with marijuana over 23 years [of] experience as a police officer."
>
> Moreover, as the ***Secrist*** court explained, "[t]he extent of the officer's training and experience *bears on the officer's credibility* in identifying the odor as well as its strength, its recency, and its source…." In other words, facts regarding training or experience go to the credibility of the officer witness, a question for the factfinder and an issue that a defendant has the ability to challenge on cross-examination.
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> ….

> … Officer Ottaway provided unchallenged testimony that he has nine years of experience as a patrol officer in Milwaukee, that he had on-the-job experience smelling marijuana, and that he can distinguish the difference between fresh and burnt forms of the substance. The court's finding that Ottaway's testimony was credible had support in the record, and its conclusion that the probable cause standard was satisfied was proper.

(Bolding and one set of brackets added; citations omitted.)

¶21 We begin our analysis by observing that Huff frames the issue as whether there was probable cause to *search* Huff, while the State generally refers to the existence of probable cause to *arrest* Huff. ***Secrist*** recognized there is a distinction between the two:

> Generally, the same quantum of evidence is required whether one is concerned with probable cause to search or probable cause to arrest. However, while the two determinations are measured by similar objective standards, the two determinations require different inquiries. Under an analysis of probable cause to search, the relevant inquiry is whether evidence of a crime will be found. Under an analysis of probable cause to arrest, the inquiry is whether the person to be arrested has committed a crime.

Id. at 209 (citations omitted). As noted, ***Secrist*** involved "both an arrest and a search incident to arrest," so "[t]he primary focus" of the case was "on the lawfulness of the arrest." *See* ***id.***

¶22 Here, the circuit court concluded both that there was probable cause to conduct a pat-down search and that there was probable cause to arrest Huff. The State suggests that this court affirm the suppression order because there was probable cause to arrest and therefore the search was justified as a search incident to arrest. *See* ***State v. Sykes***, 2005 WI 48, ¶16, 279 Wis. 2d 742, 695 N.W.2d 277 ("[W]hen a suspect is arrested subsequent to a search, the legality of the search is established by the officer's possession, before the search, of facts sufficient to

establish probable cause to arrest followed by a contemporaneous arrest."). The State explains: "[T]he focus of the analysis is … whether Ottaway had probable cause to arrest Huff based on the strong odor of burnt marijuana on his person. If Ottaway had probable cause to arrest Huff based on that odor, the search producing the cocaine was justified under ***Sykes***." (Bolding added.)

¶23 We agree with this approach. Ultimately, the State bears the burden of proving that a challenged warrantless search falls within an exception to the general rule that warrantless searches are *per se* unreasonable. ***State v. Pozo***, 198 Wis. 2d 705, 710 n.2, 544 N.W.2d 228 (Ct. App. 1995). We conclude that the State met this burden when it proved the officer had probable cause to arrest Huff for possession of marijuana prior to the search, so the search incident to arrest was valid. *See* ***Sykes***, 279 Wis. 2d 742, ¶16.

¶24 As noted, Huff does not challenge Ottaway's truthfulness; at issue is whether Ottaway's belief that he was smelling marijuana was reasonable. Huff asserts that without additional testimony about Ottaway's experience and training concerning marijuana, the circuit court should not have found that Ottaway's perceptions were reasonable. We are not convinced.

¶25 As the State notes, ***Secrist*** did not establish specific facts that must be introduced before an officer's testimony can be found credible. ***Secrist*** directed courts to consider the extent of an officer's training and experience, as well as whether there is corroboration by another officer. *See* ***id.***, 224 Wis. 2d at 216. Here, Ottaway testified that he was a nine-year veteran of the police force and had experience smelling marijuana. When asked whether, "[t]hrough [his] training and experience as an officer," he could tell the difference between marijuana that had been smoked or was simply ready to smoked, he said he could tell the

difference. There was also uncontroverted testimony that Kingston smelled marijuana as well. We are satisfied that based on this testimony, the circuit court could find Ottaway's testimony about his perceptions to be credible. We disagree with Huff's assertion that the testimony fails to meet the standards established in ***Secrist***. Therefore, we affirm the circuit court's order denying Huff's suppression motion.

II. Sentence credit.

¶26 The second issue Huff raises involves the circuit court's determination of sentence credit. After a series of amendments to the judgment of conviction, Huff received sixty-eight days of sentence credit. He argues that he is entitled to nine additional days of sentence credit, and the State agrees. On appeal, we independently review whether a defendant is entitled to additional sentence credit based on the undisputed facts. *See* ***State v. Presley***, 2006 WI App 82, ¶4, 292 Wis. 2d 734, 715 N.W.2d 713.

¶27 The traffic stop that led to Huff's arrest occurred on July 16, 2010. Huff was on extended supervision at the time of his arrest, and that extended supervision was revoked on September 22, 2010. He was "received" at the correctional institution nine days later to begin serving his revocation sentence.

¶28 Two weeks later, the circuit court sentenced Huff in this case. It ordered that Huff's sentence be imposed concurrent to any other sentence. Therefore, Huff was entitled to dual sentence credit consistent with WIS. STAT. § 304.072(4),[6] ***Presley*** and ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382

[6] WISCONSIN STAT. § 304.072(4) provides:

(continued)

(1985). At issue is when Huff's eligibility for dual sentence credit was severed: on the day his extended supervision was revoked or on the day that he reported to the correctional institution to begin serving his revocation sentence.

¶29 The State notes that the court in ***Presley*** held that the reconfinement hearing, not the revocation hearing, severed the connection between the charges. *See* ***id.***, 292 Wis. 2d 734, ¶10 ("[A] reconfinement hearing is a 'sentencing,' and under ***Beets***, it, not the revocation, severs the connection between the charges."). The problem with applying ***Presley*** here, the parties assert, is that there was no reconfinement hearing before the circuit court because the Legislature eliminated them. *See* 2009 Wis. Act 28, § 2726 (shifting authority for reconfinement determinations from circuit court to Division of Hearings and Appeals) (effective October 1, 2009).

¶30 The State agrees with Huff that, consistent with WIS. STAT. § 304.072(4), he is entitled to credit on his revocation sentence for time spent in custody "until received at the institution," *see* ***id.***, and that "Huff is entitled to that same credit on the sentence tied to the present conviction." The State explains:

> [T]he State agrees that when an offender's term of extended supervision is revoked and that revocation and return to prison occurs before sentencing on the new crime, the event that severs the connection between the old and new offenses is the offender's arrival at prison, not the date of revocation. In the context of this case, Huff is therefore entitled to nine days of additional credit from September 22 through October 1, 2010.

> The sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution subject to sentence credit for the period of custody in a jail, correctional institution or any other detention facility pending revocation according to the terms of s. 973.155.

¶31 This court agrees with the analysis summarized here and discussed at length in the parties' briefs.[7] We reverse the postconviction order denying Huff additional sentence credit and remand with instructions to enter an amended judgment awarding Huff a total of seventy-seven days of sentence credit.

By the Court.—Judgment and order affirmed in part; reversed in part; and cause remanded with directions.

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

[7] This court does not address the parties' debate over the potential applicability of an unpublished court of appeals case cited for persuasive value by Huff, and this court's decision is not based on that unpublished case.