COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1427-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABRIEL L. ZITLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Gabriel Zitlow appeals his conviction for possession of marijuana as a party to the crime. He contends that the trial court erred by denying his motion to suppress evidence because the arresting officer

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

lacked probable cause to conduct a warrantless search. However, the trial court's findings of fact support its conclusion that the arresting officer had probable cause to arrest Zitlow for possession of marijuana as a party to the crime. The trial court also correctly concluded that the search was proper even though it preceded Zitlow's formal arrest. Therefore the suppression order and judgment of conviction are affirmed.

BACKGROUND

¶2 The facts are undisputed and were supplied by arresting officer Eric Dahl at a hearing on Zitlow's motion to suppress evidence.[2] On June 29, 2000, at about 10:30 p.m., Dahl received a complaint that there was a vehicle going through a car wash and its occupants appeared to be smoking marijuana. The complainant stated that he saw one of the occupants light what he described as a "marijuana bowl." Dahl went to the car wash and saw a vehicle exiting that matched the description given to him. There were several occupants in the vehicle. It pulled out into the street with its headlights turned off. Dahl followed and then stopped the vehicle.

¶3 The driver's side window was open. When Dahl approached the driver, Zitlow, he "immediately smelled a very strong odor that [he] recognized to be burnt marijuana." Dahl asked the occupants several times who had been smoking marijuana, but received no response. Dahl then asked the driver to exit the vehicle, and he complied. Dahl asked Zitlow whether he "had any contraband on him," to which the latter answered no. Dahl patted Zitlow down and found a

[2] Dahl was the only witness to testify at the hearing.

cigarette box. In the box was a glass pipe and a plastic bag containing what appeared to be marijuana. Dahl then arrested Zitlow.

¶4 The trial court noted that under ***Rawlings v. Kentucky***, 448 U.S. 98, 111 (1980), and ***State v. Swanson***, 164 Wis. 2d 437, 450-51, 475 N.W.2d 148 (1991), if probable cause to arrest exists before the search is conducted, the search may precede formal arrest. The court observed that Dahl had been given information that matched what he discovered upon investigation. Zitlow was driving the vehicle from which emanated a strong odor of burning marijuana. The court concluded that Dahl had probable cause at the time he conducted the search, which was immediately followed by Zitlow's arrest.

¶5 Upon receiving the trial court's ruling on his motion to suppress, Zitlow pled no contest to possession of marijuana as a party to the crime, contrary to WIS. STAT. §§ 961.41(3g) and 939.05. He now appeals the judgment of conviction, claiming that the trial court erred by denying his motion to suppress.

LEGAL STANDARDS

¶6 Whether undisputed facts constitute probable cause to arrest is a question of law that this court reviews without deference to the circuit court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶7 Probable cause refers to that quantum of evidence that would warrant a reasonable police officer to conclude that a suspect had probably committed a crime. ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). In making a determination of probable cause, the relevant inquiry is not whether the particular conduct is "innocent" or "guilty." Rather, it is a common sense test, based on probabilities. ***United States v. Sokolow***, 490 U.S. 1, 10

(1989). The facts need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). "The probabilities with which it deals are not technical: They are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act." ***Id.*** (citation omitted). The quantum of information that constitutes probable cause to arrest must be measured by the facts of the particular case, ***State v. Wilks***, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984), and in making that measurement, we look to the totality of the circumstances within the officer's knowledge at the place and time of the arrest. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

¶8 Where a formal arrest immediately follows the challenged search, it is irrelevant that the search preceded the arrest, as long as the fruits of the search were not necessary to support probable cause to arrest. ***Swanson***, 164 Wis. 2d at 450-51; *see also* ***Rawlings***, 448 U.S. at 111.

¶9 WISCONSIN STAT. § 961.41(3g) provides:

> No person may possess or attempt to possess a controlled substance or a controlled substance analog unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice, or unless the person is otherwise authorized by this chapter to possess the substance or the analog.

The elements are: (1) possessing marijuana and (2) knowing or believing it to be marijuana. *See* WIS JI—CRIMINAL 6030, possession of a controlled substance. Possession of marijuana may be imputed if the defendant had knowledge of the drug's presence and it is found in a place immediately accessible to and under the

defendant's joint dominion and control. ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985).

¶10 Under WIS. STAT. § 939.05, where one defendant knows another is committing a crime, he is considered a party thereto if he acts in furtherance of the other's conduct, is aware of the fact that a crime is being committed, and acquiesces or participates in its perpetration. ***Frankovis v. State***, 94 Wis. 2d 141, 149, 287 N.W.2d 791 (1980).

DISCUSSION

¶11 Zitlow's argument is succinct.[3] He contends that the only evidence that Dahl had to justify the arrest was the odor of burnt marijuana. Dahl was not aware of any direct connection between Zitlow and the marijuana odor. Zitlow argues that, under ***State v. Mata***, 230 Wis. 2d 567, 571, 602 N.W.2d 158 (Ct. App. 1999), while the strong odor of marijuana alone may provide probable cause to believe a person or two people in a vehicle possess marijuana, as the number of occupants grows, the probability diminishes that the marijuana is linked to a particular person.[4] This court in unpersuaded.

---

[3] Before the trial court, Zitlow focused in part on the chronology of the search and the arrest. On appeal, he alludes to the trial court's ruling and cites cases that considered this issue, but he does not appear to earnestly challenge the trial court's conclusion in this regard. In any event, this court is satisfied that Dahl had probable cause to arrest Zitlow before the pat-down search, and it is undisputed that Zitlow was formally arrested almost immediately after the search. Therefore, Dahl performed a valid search incident to arrest. *See* ***State v. Swanson***, 164 Wis. 2d 437, 450-51, 475 N.W.2d 148 (1991).

[4] Zitlow states that the complaint indicates there were at least five occupants in the vehicle Zitlow was driving. Thus, "[a]ll things being equal, the probability of a connection between the odor and one of the occupants of the Zitlow van are one in five, or 20%." However, no evidence of the number of occupants was adduced at the motion hearing.

¶12 In ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387, cited in ***Mata***, the supreme court ruled:

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

Secrist, 224 Wis. 2d at 204. In assessing this "linkage" requirement, the court stated:

> 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. at 218.

¶13 The ***Mata*** court, however, recognized a potential conflict between the ***Secrist*** "diminished linkage" language and ***State v. Mitchell***, 167 Wis. 2d 672, 482 N.W.2d 364 (1992), where the supreme court stated:

> Based on the presence of both the odor of marijuana and the smoke, Officer Smith had reason to believe that defendant, his passenger, or both had been smoking marijuana, and thus possessing, marijuana. The fact that there were two occupants in the vehicle is not fatal to a finding of probable cause to arrest defendant because probable cause does not mandate that it is more likely than not that the defendant committed the offense.

Id. at 684. Thus, the ***Mata*** court noted that ***Secrist*** appeared to support Mata's argument for suppression because there were three occupants in the vehicle in which Mata was a passenger, thereby diminishing the probable linkage between the odor and Mata. ***Mata***, 230 Wis. 2d at 571-72. On the other hand, ***Mitchell***

appears to support the State's argument for admissibility because probable cause does not require that the evidence make it more likely than not that the defendant committed the offense.

¶14 The ***Mata*** court was not required to resolve the apparent conflict between ***Secrist*** and ***Mitchell***. ***Mata***, 230 Wis. 2d at 572. Rather, it observed that the question of probable cause turns on the facts of the particular case. The court found it significant that by the time the police searched Mata, the other two occupants of the vehicle had already been searched and no evidence of marijuana or other contraband had been discovered. Thus, under the particular circumstances of that case, the odds of Mata possessing the suspected marijuana had increased, not diminished.

¶15 This court similarly need not attempt to reconcile ***Secrist*** and ***Mitchell*** because of the facts of this particular case. Here, Zitlow was driving the vehicle from which the marijuana odor emanated. Further, he was charged as a party to the crime. Dahl had been informed that the vehicle's occupants were smoking marijuana, and this was confirmed by the strong odor Dahl detected as he approached Zitlow. A common sense approach to these facts supports Dahl's reasonable inferences that Zitlow knew marijuana was being possessed and that he acted in furtherance of the crime by providing the environment in which it was possessed and smoked. *See* ***Frankovis***, 94 Wis. 2d at 149. Moreover, Zitlow had imputed possession because he had knowledge of the drug's presence in a place immediately accessible to and under his joint dominion and control. *See* ***McCaffrey***, 124 Wis. 2d at 236. Under either theory, as a party or a principal, Dahl had probable cause to arrest Zitlow for possession of marijuana. Therefore, the trial court properly denied Zitlow's motion to suppress.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(2)(b)4.