COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1838-CR **Cir. Ct. No. 2012CF5319**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMARCO KRISTEN TURMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Demarco Kristen Turman appeals from a judgment convicting him of possession of narcotic drugs. *See* WIS. STAT.

§ 961.41(3g) (am) (2011-12).[1] Turman pled guilty after the circuit court denied his motion to suppress. We affirm.

BACKGROUND

¶2 Testimony at the hearing on the motion to suppress set forth the facts leading up to Turman's arrest. Police Officer Erik Nordstrum, the only witness to testify, explained that he had been employed as a police officer for more than five years. As part of his employment, he received training on detecting marijuana, including differentiating between fresh and burnt marijuana. During his career as a police officer, Nordstrum made approximately thirty arrests for crimes involving the possession of marijuana.

¶3 On October 23, 2012, at approximately 12:35 a.m., Nordstrum conducted a traffic stop of a car with a defective brake light. Nordstrum approached the car and made contact with the driver, Turman. Upon doing so, Nordstrum "could exactly smell the odor of burnt marijuana" coming from the interior of the car. This led Nordstrum to believe that there may have been narcotics inside.

¶4 Two other occupants were in the car with Turman, prompting Nordstrum and his partner to return to their squad car and call for back-up. Additional officers arrived less than one minute later, at which time Nordstrum again approached the driver's side of the car Turman was driving. Nordstrum

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

continued to smell burnt marijuana coming from inside the car and ordered Turman to get out.

¶5 After Turman got out of the vehicle, the odor remained. Nordstrum searched Turman, reaching inside Turman's pockets. In Turman's right front pants pocket, Nordstrum found a small corner cut baggie of a tan chalky substance. Initially, Nordstrum suspected the substance was marijuana but upon further examination, he suspected it was heroin.[2] Turman was arrested. No marijuana was found in the car.

¶6 Even after all of the occupants were out of the car, the odor of burnt marijuana continued to come from inside.

¶7 Turman was charged with possession of narcotic drugs. He moved to suppress the evidence, challenging the warrantless search. The circuit court denied the motion to suppress finding that Nordstrum had probable cause to search Turman.

¶8 Turman pled guilty the same day and was convicted.

DISCUSSION

¶9 Our review of an order denying a motion to suppress is mixed. We uphold the circuit court's findings of facts unless clearly erroneous; we review independently the application of the law and constitutional principles. ***State v. Lefler***, 2013 WI App 22, ¶6, 346 Wis. 2d 220, 827 N.W.2d 650.

[2] Nordstrum testified at the preliminary hearing that field tests confirmed that the suspected heroin tested positive for opiates.

¶10 According to Turman, the sole issue on appeal is whether the search of his pocket was improper such that the fruits of the search—i.e., the heroin—should have been suppressed.[3] The State, however, frames the issue differently; it argues that we should affirm because the *search incident to arrest* was proper and was justified by probable cause.

¶11 Both parties cite ***State v. Secrist***, 224 Wis. 2d 201, 207-08, 589 N.W.2d 387 (1999), but come to contrary conclusions as to its application to the circumstances presented. The ***Secrist*** court held:

> [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.

¶12 Turman asserts that based on ***Secrist***, there needed to be a link between the odor of marijuana in this case and a specific person. *See* ***id.*** at 216-17 ("What is imperative, however, is that the officer be able to link the unmistakable odor of marijuana or some other controlled substance to a specific person or persons. The linkage must be reasonable and capable of articulation."). He argues that the requisite linkage is missing in this case:

> The source [of the odor] was never found. There were two other people in the car, and they were never considered or eliminated as a source of the odor. Once the odor of marijuana was detected, the officer went into Turman's

[3] Turman does not challenge the validity of the initial traffic stop for the brake light violation.

> pocket to seize the contents without a warrant. No further investigation was done.

According to Turman, because the testimony at the suppression hearing never established the necessary link, the search was unreasonable and his suppression motion should have been granted.

¶13 The State, in contrast, focuses on whether there was probable cause to arrest.[4] It highlights the distinction set forth in ***Secrist*** between probable cause to search and probable cause to arrest:

> 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; emphasis added). The ***Secrist*** court explained that it "believe[d] a common sense conclusion when an officer smells the odor of a controlled substance is that a crime has probably been committed." ***Id.*** at 218.

¶14 The ***Secrist*** court, however, further noted that while "[t]he strong odor of marijuana in an automobile will normally provide probable cause to

[4] The State explains that this rationale differs from that articulated by the circuit court, which analyzed the case using the principles of probable cause to search. Notwithstanding, the State asks us to affirm the circuit court's ruling on the new basis advanced. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998) (A respondent is allowed to advance any argument that allows this court to sustain the circuit court's ruling.). Turman did not file a reply brief, and he therefore did not respond to the State's detailed analysis of probable cause to arrest under ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), and related cases that led the State to conclude based on the totality of the circumstances, there was probable cause to arrest Turman.

believe that the driver and sole occupant of the vehicle is linked to the drug," there are other instances where the probability diminishes. ***Id.*** For example, "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.***

¶15 The State submits that the fact that several occupants were in the car is not fatal to the determination of probable cause. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992) ("The fact that there were two occupants in the vehicle is not fatal to a finding of probable cause to arrest [the] defendant because probable cause does not mandate that it is more likely than not that the defendant committed the offense."); ***State v. Mata***, 230 Wis. 2d 567, 570-71, 602 N.W.2d 158 (Ct. App. 1999). As noted previously in this decision, Turman did not file a reply brief and consequently, did not refute this argument.[5] Therefore, we deem it admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 Turman challenges the linkage between him and the odor of marijuana in the car, pointing to the fact that the source of the odor was not found and that the other occupants in the car were not considered or eliminated as the source of the odor. However, we agree with the State's assessment that it is illogical to conclude, as Turman does, that no probable cause existed to arrest anyone in the vehicle given that the odor came from inside a vehicle with multiple passengers and the source could not be definitively linked to any one person.

[5] In order to go further on this issue, this court would have to attempt to construct an argument in Turman's favor, which is not permitted. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge.").

Secrist does not require this level of specificity, it requires only that the evidence "lead a reasonable police officer to believe that the person to be arrested has committed or is committing a crime." ***Id.***, 224 Wis. 2d at 214. "[T]he requisite evidence need not even show that guilt is more likely than not." ***Id.*** at 214-15. What is required is that the officer link the unmistakable odor "to a specific person or persons." ***Id.*** at 216-17.

¶17 The State submits that the totality of the circumstances here established that probable cause existed to arrest Turman *and* the other occupants in the car—because the odor could not be definitively linked to one individual—on marijuana charges. Because there was probable cause to arrest, the State asserts the warrantless search of Turman was justified. *See* ***State v. Sykes***, 2005 WI 48, ¶16, 279 Wis. 2d 742, 695 N.W.2d 277 (explaining that "when 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"). Again, given the lack of a reply, we deem this argument admitted. *See* ***Charolais***, 90 Wis. 2d at 109.

By the Court.—Judgment affirmed.

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