No. COA 21-144 DISTRICT FIVE

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover
	)	
JAQUALYN ROBINSON	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

INDEX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

No. COA 21-144 DISTRICT FIVE

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover
	)	
JAQUALYN ROBINSON	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN DENYING THE MOTION TO SUPPRESS WHERE THE SOLE BASIS FOR THE SEARCH WAS THE VERY FAINT ODOR OF SOMETHING THE OFFICER COULD NOT DISTINGUISH FROM A LEGAL SUBSTANCE?

STATEMENT OF THE CASE

This matter was heard at the 26 October 2020 criminal session of New Hanover County Superior Court, before the Honorable R. Kent Harrell, on indictments charging Jaqualyn Robinson with window tint violation, carrying a concealed gun, possession of a schedule I controlled substance, driving while license revoked, possession of a schedule II controlled substance, possession of marijuana, possession with intent to manufacture, sell or deliver a controlled substance, possession of a controlled substance within 1000 feet of a park, and possession of a controlled substance within 1000 feet of a school. (R pp 1, 11-13)

Following a hearing on Mr. Robinson's Motion to Suppress, the trial court denied the motion. (R pp 14-27, 43-44, T p 71) Mr. Robinson subsequently pled guilty to felony possession of cocaine and carrying a concealed weapon. The remaining charges were dismissed. (R pp 46-49) Mr. Robinson was sentenced to 4-14 months imprisonment, suspended for 12 months supervised probation. (R pp 52-55) Mr. Robinson's attorney objected to the denial of the motion to suppress but failed to give explicit notice of appeal therefrom. (T pp 71, 83-85) A Petition for Writ of Certiorari has been filed to remedy this potential defect.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. Robinson appeals pursuant to N.C.G.S. §§ 7A-27(b) and 15A-979(b) from a final judgment entered in New Hanover County Superior Court.

STATEMENT OF FACTS

On the afternoon of 5 February 2020, Wilmington Police Department Officer Ben Galluppi pulled over the Chrysler Mr. Robinson was driving because its windows were too darkly tinted. (T pp 7-8) When asked, Mr. Robinson provided the vehicle's registration but said he did not have his license with him. (T p 11) When Officer Galluppi ran the registration, he learned that Mr. Robinson's license had been suspended. (T pp 39-40) Based on the window tint violation and driving while license revoked, Officer Galluppi would have written Mr. Robinson a ticket and released him. (T pp 42-45)

However, while speaking with Mr. Robinson, Officer Galluppi detected "a very faint odor of marijuana...coming from the vehicle." (T p 12) In his training as a law enforcement officer, Galluppi learned about "the odor of marijuana and how it was probable cause for searching a vehicle." (T p 13) Based only on the "very faint odor of marijuana," Officer

Galluppi directed Mr. Robinson to step out of his vehicle and sit in the back of Galluppi's police cruiser. (T pp 14-15) Another officer stood with Mr. Robinson while Officer Galluppi searched the Chrysler. (T pp 15-16) A revolver and a pill believed to be MDMA[1] were found in the car. (T pp 16-17) A second similar pill was found during a pat-down of Mr. Robinson. (T p 50) During a strip search at the police station, police recovered a plastic bag which appeared to contain marijuana and crack cocaine. (T pp 18-19)

At the suppression hearing, the trial court took judicial notice of the statutes legalizing hemp and a bulletin of the State Bureau of Investigation. (R pp 28-32; T pp 54-55, 57) The SBI memo observes that the plant which produces legal hemp "is the same species as marijuana." (R p 28) One variety of legal hemp "looks just like marijuana, including the leaves and buds, and it smells the same as marijuana. In fact there is no way for an individual to tell the difference by looking at the plant; one would need a chemical analysis to tell the difference." (*Id.*) Hemp

[1] This pill field-tested positive for MDMA. (T p 17) Although no field test for marijuana was available to Officer Galluppi at the time of Mr. Robinson's arrest, that technology is now in use in New Hanover County. (T pp 30-31)

products are available across North Carolina from hundreds of retailers. (*Id.*)

The SBI memo describes several "issues for law enforcement" arising from the legalization of hemp. (R p 29) According to the SBI, "Hemp and marijuana look the same and have the same odor, both burned and unburned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant." (*Id.*) Because hemp possession is legal, an officer will not have probable cause to believe that an item is evidence of a crime if it could be either hemp or marijuana. (*Id.*) The memo noted that at least one district attorney's office stopped prosecuting marijuana cases because officers were unable to distinguish between marijuana and hemp. (*Id.*) To solve these problems, the SBI memo urged various amendments to existing law, including a ban on smokable hemp. (R pp 30-31)

Defense counsel acknowledged existing caselaw holding that the odor of marijuana provides probable cause for a search of a suspect's vehicle and person. However, she argued, given the subsequent

legalization of hemp and the fact that hemp and marijuana cannot be distinguished on smell, the odor of suspected marijuana alone is no longer sufficient to create probable cause. (T pp 60-61) Because the odor of suspected marijuana was the only reason Mr. Robinson was searched, she argued that all the fruits of that search should be suppressed. (T pp 63-64)

The trial court denied the motion to suppress, stating:

> The fact that hemp is legal in North Carolina does not create a de facto legalization of marijuana. So the odor of marijuana, *until our appellate courts state otherwise*, is a sufficient basis, because marijuana is still an illegal substance. The fact that its illegal nature is not readily apparent is the case with a lot of controlled substances. You don't really know what you've got until you get a lab test back to confirm what it is. So the odor of marijuana is a sufficient basis to conduct a warrantless search under that [sic] automobile exception.

(T pp 69-70, emphasis added) Trial counsel objected to this ruling in open court. (T p 71)

In the trial court's subsequent written order, it found as fact that, "Marijuana and hemp share very similar physical characteristics and it is difficult to tell one from the other either by appearance or by smell." (R p 44) Nonetheless, the trial court made the following conclusions of law:

> 2. That the odor of marijuana emanating from the vehicle provided sufficient probable cause for a warrantless search of the vehicle under the automobile exception to the Fourth Amendment warrant requirement.
>
> 3. The fact that marijuana and hemp share similar characteristics and have a similar odor does not negate the ability of law enforcement to use the odor of a potentially controlled substance as a sufficient basis to establish probable cause for the warrantless search of a vehicle. Marijuana is still an illegal substance in this state.
>
> (*Id.*)

After the motion to suppress was denied, trial counsel objected but failed to give explicit notice of appeal from the denial of the suppression motion. (T pp 71, 83-85) Mr. Robinson changed his plea to guilty and notice of appeal from the judgment was given orally and in writing. (T pp 46-49, 84; R pp 61-62)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS WHERE THE SOLE BASIS FOR THE SEARCH WAS THE VERY FAINT ODOR OF SOMETHING THE OFFICER COULD NOT DISTINGUISH FROM A LEGAL SUBSTANCE.

A. Standard of Review

"The scope of appellate review upon a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of

fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Brown*, 248 N.C. App. 72, 74 (2016) (citation omitted).

B. Core Principles

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject to only a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825 (1982) (cleaned up). A warrantless search of a motor vehicle on a public roadway is not in violation of the Fourth Amendment if it is supported by probable cause. *State v. Isleib*, 319 N.C. 634, 638 (1987).

"Probable cause exists where the facts and circumstances within an officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be

searched." *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364, 370 (2009) (cleaned up). The quantum of certainty necessary for a showing of probable cause is somewhat unclear. *See State v. Crawford*, 125 N.C. App. 279, 281-82 (1997) (reviewing cases describing this amount as "greater than 'reasonable suspicion' but less than 'preponderance of the evidence,'" among other things). To be sure, an officer must have "more than bare suspicion" that a crime has been committed before he can lawfully engage in a warrantless search. *State v. Zuniga*, 312 N.C. 251, 261 (1984) (citation omitted); *see also State v. Mbacke*, 365 N.C. 403, 409 (2012) (probable cause requires more than a reason to believe).

Officer Galluppi detected the "very faint odor" of something that may or may not have been a controlled substance. (T p 12) In the absence of any other evidence to suggest that the source of this odor was illegal in nature, Officer Galluppi had only a bare suspicion that it was marijuana. The trial court erred in denying the motion to suppress all evidence resulting from the search of Mr. Robinson's vehicle and his person.

C. The Legalization of Hemp Necessarily Changes the Probable Cause Analysis.

The odor of marijuana has previously been found sufficient to create probable cause to search both a vehicle, *State v. Greenwood*, 301 N.C. 705, 708 (1982), and a person, *State v. Yates*, 162 N.C. App. 118, 123 (2004). These holdings were predicated on the idea that marijuana has a unique odor unlike any legal substance. This would enable officers to identify marijuana by smell alone, making marijuana "distinguishable from other controlled substances that require more technical analyses for positive identification." *State v. Mitchell*, 224 N.C. App. 171, 179 (2012).

Subsequently, the General Assembly legalized industrial hemp, a plant identical to marijuana in both smell and appearance. (R pp 28-29 (it is "impossible" to tell the two apart in the field)) Marijuana can only be distinguished from hemp through chemical analysis. Legal hemp contains not more than 0.3% delta-9 tetrahydrocannabinol ("THC"). N.C.G.S. § 106-568.51(7). Any substance derived from the cannabis plant containing a greater amount of THC is marijuana, a Schedule IV controlled substance. N.C.G.S. § 90-87(16).

It was merely possible that what Officer Galluppi smelled was marijuana; it could also have been legal hemp. In the absence of some

additional circumstance pointing to Mr. Robinson's involvement in illegal narcotics, the officer lacked probable cause to search his vehicle or his person. An officer does not have probable cause to believe that a crime has occurred when he encounters something that looks and smells the same as a legal substance.

This Court has not squarely confronted the question of whether, in light of the legalization of hemp, the odor of suspected marijuana, standing alone, continues to create probable cause. The only case counsel has identified on the subject is *State v. Vining*, 2020 N.C. App. LEXIS 818 (Dec. 1, 2020) (unpublished) (attached in appendix). In *Vining*, this Court conducted *Anders* review and found no error where the defendant sought to exclude testimony from officers at trial that the substance they seized from his truck was marijuana. *Id.* at *3 (noting that "[t]he record includes no evidence to support his argument at trial that officers cannot distinguish illegal marijuana from hemp.") This case is readily distinguishable. The evidence found lacking in *Vining* was before this trial court in the form of the SBI memo. In addition, in *Vining*, there was other evidence that the substance was marijuana, including the defendant's own admission. (*Id.*) There is no additional evidence here.

Finally, *Vining* recognizes the relevance of an officer's training and qualifications to his ability to identify a substance as marijuana. 2020 N.C. App. LEXIS at *3; *see also Yates*, 162 N.C. App. at 123 (finding probable cause because the officer was qualified to identify the substance). As discussed below, the trial court did not find make any findings regarding Officer Galluppi's training and experience, nor did his testimony support a conclusion that he was qualified to distinguish between hemp and marijuana. (*See* T p 13, Officer Galluppi had to his knowledge only been exposed to hemp once, when he attended a training which "briefly touched base" on the subject)

This case squarely presents the issue of whether the suspected odor of marijuana, standing alone, can provide probable cause in light of the legalization of hemp. Because hemp cannot be distinguished from marijuana without chemical analysis, this Court should conclude that odor alone does not provide the probable cause necessary for a warrantless search under the Fourth Amendment.

D. Findings of Fact

The trial court's fourth finding of fact is, "Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of

marijuana emanating from the vehicle." (R p 43) This is the trial court's only finding regarding the State's evidence in support of probable cause.

While accurate, this finding of fact is incomplete. Officer Galluppi detected the "very faint odor" of what he believed to be marijuana. The strong odor of an impairing substance has frequently been noted by this Court as part of its reasonable suspicion/probable cause analysis. *See, e.g.; Yates*, 162 N.C. App. at 123 (marijuana); *State v. Williams*, 225 N.C. App. 636, 640 (2013) (alcohol). If the strong odor of suspected marijuana weighs in favor of a finding of probable cause, so too should a very faint odor weigh against it. This important fact was omitted from the trial court's order.

The trial court's eleventh finding of fact is as follows, "The Court took judicial notice of the State Bureau of Investigations bulletin regarding the similarities of marijuana and hemp. The court took judicial notice of the bulletin only to the extent that the physical properties and characteristics of the two plants were discussed. Legal conclusions and opinions contained in that bulletin were disregarded as the State Bureau of Investigation does not have legal authority to issue binding opinions on the sufficiency of evidence to establish probable cause. Marijuana and

hemp share very similar physical characteristics and it is difficult to tell one from the other either by appearance or by smell." (R p 44) This is the trial court's only finding regarding the defense's evidence against probable cause.

This finding is not fully supported by competent evidence. The SBI memo does not say that hemp and marijuana are "very similar" or that they are "difficult" to tell apart. The memo says that hemp and marijuana are "the same species," that they "look the same and have the same odor," and that law enforcement officers in the field are completely unable to distinguish between the two. (R pp 28-29) Having taken judicial notice of the SBI memo "only to the extent that the physical properties and characteristics of [hemp and marijuana] were discussed," it was unreasonable of the trial court to make findings of fact inconsistent with how the memo describes those properties and characteristics.

While the SBI memo is not binding authority, official statements of the Bureau are entitled to some weight, and it was unreasonable for the trial court to ignore the memo's discussion of probable cause in its entirety. The State Bureau of Investigation is a law enforcement agency, created by the legislature "In order to secure a more effective

administration of criminal laws of the state." *See* SBI History, available at: https://www.ncsbi.gov/Home/SBI-History. To this end, the SBI conducts its own criminal investigations, provides assistance to local law enforcement agencies, and aids prosecutors in preparing evidence for use in criminal courts. *See* SBI Mission and Values, available at: https://www.ncsbi.gov/Home/SBI-Mission-and-Values. Because of the SBI's expertise in criminal matters, the trial court should have given greater consideration to the SBI's discussion of probable cause.

In addition, the trial court did not make any findings of fact indicating that Officer Galluppi had the training and experience necessary to distinguish between hemp and marijuana – or even that he had the training and experience to support his belief that what he smelled might be marijuana at all. "It is well established that officers with proper training and experience may opine that a substance is marijuana." *State v. Johnson*, 225 N.C. App. 440, 455 (2013) (the trooper had 20 years of experience, including 300 hours of drug interdiction and identification training).

The testimony below shows that Officer Galluppi encountered hemp only once, during a training exercise when the instructor "briefly

touched base on the difference between marijuana and hemp." (T p 13) Officer Galluppi had never encountered hemp in the field, never compared hemp and marijuana in a real-life situation, and did not think he would be able to distinguish between the two if he did. (T p 30) Officer Galluppi's experience with hemp was limited to a single training exercise in which the instructor had a mason jar from which the officers "could take a whiff of hemp." (T p 34) Officer Galluppi testified that there was a "very, very, very slight difference" between the odor of unburnt hemp and the odor of unburnt marijuana[2]. (T p 33) He had never to his knowledge encountered burnt hemp. (T p 34)

Even if the trial court did not credit the SBI's conclusion that law enforcement officers "cannot distinguish between hemp and marijuana," the State's evidence failed to prove otherwise. (R p 30) While Officer Galluppi took "a handful of narcotics classes" and encountered marijuana many times, a single "whiff" of hemp in 2017 or 2018 does not give Officer Galluppi the training and experience necessary to differentiate between

[2] Officer Galluppi appears to have either misremembered parts of this training or been misinformed by the instructor. For example, he testified that there are three different kinds of plant used to make marijuana and one type of plant used to make hemp. (T p 38) According to the SBI memo, there are at least three different kinds of hemp plants. (R p 28)

hemp and marijuana. (T p 6, 13-14, 32-33) Detecting the "very faint odor" or something that smells "very, very, very" similar to a legal substance does not give an officer probable cause to believe that what he smelled was in fact marijuana. (T pp 12, 33) "[A] man of reasonable caution" would require additional "reasonably trustworthy information" to believe that a crime had occurred. *Safford Unified*, 557 U.S. at 370.

E. Conclusions of Law

The trial court's valid findings of fact must in turn support its conclusions of law. *State v. Stanley*, 259 N.C. App. 708, 711 (2018). Conclusions of law "are fully reviewable on appeal and must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Johnson*, 371 N.C. 870, 873 (2018) (internal citation and quotation omitted).

The trial court's second conclusion of law was as follows: "That the odor of marijuana emanating from the vehicle provided sufficient probable cause for a warrantless search of the vehicle under the automobile exception to the Fourth Amendment warrant requirement." (R p 44) This conclusion is based on the assumption that the "very faint odor" Officer Galluppi smelled was, in fact, marijuana. There was no

evidence at the hearing to support this conclusion, nor could Officer Galluppi have known at the time whether what he smelled was a controlled substance. The findings of fact say only that the officer "believed" he smelled marijuana, but the conclusions of law assume that the substance was, in fact, marijuana.

The automobile exception to the Fourth Amendment provides that "[a]n officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband." *State v. Poczontek*, 90 N.C. App. 455, 457 (1988). "An officer has probable cause to believe that contraband is concealed within a vehicle when given all the circumstances known to him, he believes there is a fair probability that contraband or evidence of a crime will be found therein." *State v. Ford*, 70 N.C. App. 244, 247 (1984) (citation and quotation omitted) *See also Isleib*, 319 N.C. at 636-38 (describing the rationales underlying the automobile exception).

Standing alone, the "very faint" odor of something that is indistinguishable from (or at best "very, very, very" similar to) a legal substance gives rise to a *possibility* that a crime has occurred, but not to the *fair probability* required before a warrantless search can commence.

In *State v. Benters*, 367 N.C. 660 (2014), officers received information that a residence was being used as a marijuana growing operation. When the officers arrived, they observed items in plain view such as potting soil and seed starting trays. The Supreme Court concluded that there was not probable cause to search the residence because such supplies could have been used for the fully legal practice of gardening. Similarly, the faint odor Officer Galluppi encountered did not give rise to probable cause because it could have been the fully legal substance of industrial hemp.

The School of Government has examined the impact of the legalization of hemp on marijuana prosecutions. Much like the SBI, the School of Government concluded that, "without a field test or some other way to verify whether something is hemp or marijuana, officers do not have probable cause to seize it or to arrest someone in possession of it without some other reason to believe the substance is contraband." Phil Dixon, Hemp or Marijuana?, *available at*: https://nccriminallaw.sog.unc.edu/hemp-or-marijuana/; see also Phil Dixon, Summer 2020 Hemp Update, *available at*: https://nccriminallaw.sog.unc.edu/summer-2020-hemp-update/ (noting that the probable cause problem remains "unsettled").

Given that there were no other indications that Mr. Robinson was involved in the sale or use of illegal drugs, the totality of the circumstances did not suggest that the car contained contraband. The trial court's order makes no reference to the totality of the circumstances and contains no reference to any circumstance other than Officer Galluppi's questionable olfactory identification. (R p 44) Indeed, Officer Galluppi's testimony was that he did not consider any other circumstances; his decision to remove Mr. Robinson from his vehicle and conduct a search was based on the odor of suspected marijuana alone. (T pp 44-45) Without some additional evidence to suggest that what Officer Galluppi smelled was contraband, this search violated the Fourth Amendment.

The trial court's third conclusion of law was as follows: "The fact that marijuana and hemp share similar characteristics and have a similar odor does not negate the ability of law enforcement to use the odor of a potentially controlled substance as a sufficient basis to establish probable cause for the warrantless search of a vehicle. Marijuana is still an illegal substance in this state." (R p 44) As discussed above, the finding of fact that hemp and marijuana are merely similar as opposed to

indistinguishable outside a laboratory was not supported by competent evidence. In any event, the fact that marijuana is an illegal substance in this state does not necessarily lead to the conclusion that Officer Galluppi's belief that he smelled marijuana gave rise to probable cause. The trial court failed to make any findings or conclusions indicating that this belief was based on "reasonably trustworthy information" or would have led "a man of reasonable caution" to the same conclusion. *Safford Unified*, 557 U.S. at 370.

When an officer observes something that could possibly be illegal, it does not give rise to reasonable suspicion, much less probable cause. *See generally State v. Cabbagestalk*, 266 N.C. App. 106 (2019) (where officer observed defendant drinking a beer and later observed her driving a car, he did not have reasonable suspicion to stop her based on the possibility of impaired driving). "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama*

v. White, 496 U.S. 325, 330 (1990). There was no testimony that Mr. Robinson was in an area known for drug sales, that he was known to Officer Galluppi as a person involved with narcotics, or that Mr. Robinson conducted himself in a manner suggesting illegal activity. There was no drug paraphernalia in plain sight and no admission from Mr. Robinson that he possessed a controlled substance. Officer Galluppi believed that he faintly smelled something which may or may not have been illegal. Absent additional evidence, it was merely possible – but not probable – that a crime had occurred.

Because the officer did not have probable cause to search Mr. Robinson's vehicle, the items later recovered from his person must also be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

Had the trial court allowed Mr. Robinson's motion to suppress all items seized from the search of his vehicle and his person, the State would have had no evidence to support the charges of carrying a concealed gun, possession of a Schedule I controlled substance, possession of a Schedule II controlled substance, possession of marijuana, possession with intent to manufacture, sell, or deliver, possession with

intent to manufacture, sell, or deliver within 1000 feet of a park, or possession with intent to manufacture, sell, or deliver within 1000 feet of a school. Only the charges of window tint violation and driving while license revoked – both class 3 misdemeanors – would remain. Mr. Robinson would not have been convicted of a felony, with all its attendant consequences[3], nor would he have been eligible for prison time. Therefore, he was prejudiced by the trial court's erroneous denial of this motion to suppress.

CONCLUSION

The trial court erred in denying Mr. Robinson's motion to suppress the items seized from his vehicle and his person. For the foregoing reasons and authorities, Mr. Robinson respectfully requests that the trial court's order denying the motion to suppress be reversed and his gun and drug-related convictions vacated.

---

[3] A felony conviction would prevent Mr. Robinson from, among other things, obtaining various occupational licenses, adopting or providing foster care for children, or obtaining public benefits. Collateral Consequences Assessment Tool, *available at*: https://ccat.sog.unc.edu.

Respectfully submitted, this the 1st day of April 2021.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987
P.O. Box 52427
Durham, NC 27717
(919) 695-3127
sarah@holladaylawoffice.com
ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century font and the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word-processing program used to prepare the brief.

This the 1st day of April 2021.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served upon Daniel O'Brien, North Carolina Department of Justice, by electronic means by emailing it to dobrien@ncdoj.gov.

This the 1st day of April 2021.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987

No. COA 21-144 DISTRICT FIVE

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover
	)	
JAQUALYN ROBINSON	)	

****

APPENDIX

****

State v. Vining

Court of Appeals of North Carolina

October 21, 2020, Heard in the Court of Appeals; December 1, 2020, Filed

No. COA 20-51

Reporter
2020 N.C. App. LEXIS 818 *; 850 S.E.2d 624; 2020 WL 7039140

STATE OF NORTH CAROLINA v. BRADLEY CHRISTOPHER VINING, Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER

Prior History: **[*1]** Brunswick County, No. 18CRS50599.

Disposition: NO ERROR.

Counsel: Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

W. Michael Spivey for Defendant-Appellant.

Judges: Inman, Judge. Judges DILLON and YOUNG concur.

Opinion by: Inman

Opinion

Appeal by Defendant from judgment entered 25 July 2019 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 21 October 2020.

Inman, Judge.

Bradley Christopher Vining ("Defendant") appeals his conviction of possession with intent to sell and deliver marijuana. For the reasons set forth below, we find no error.

I. FACTUAL AND PROCEDURAL HISTORY

On 30 January 2018, Defendant was pulled over for a traffic violation while driving near Bolivia, in Brunswick County. Officers smelled the odor of marijuana coming from Defendant's vehicle. Defendant told the officers that he had a bag of marijuana in the trunk, used and sold marijuana, and was planning on selling the marijuana in the trunk. A search revealed an additional bag of marijuana and digital scales behind the glove box.

At trial, the two officers involved in the stop testified as to the events of the arrest and gave their opinions that the substance seized was marijuana. The **[*2]** jury found Defendant guilty of possession with intent to sell and deliver marijuana. Defendant appeals.

II. ANALYSIS

On appeal, Defendant's counsel has been unable to identify any issue with sufficient merit to support a meaningful argument for relief and therefore requests that we conduct an independent review of the record for error under *Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.E. 2d 493 (1967)*. Under *Anders*, a defendant may appeal even if counsel has determined the appeal to be "wholly frivolous." *State v. Dobson, 337 N.C. 464, 467, 446 S.E.2d 14, 16 (1994)*. Counsel must then submit a brief "referring to anything in the record that might arguably support the appeal," inform the defendant of their right to present arguments on appeal, and provide them with copies of that brief, the trial transcript, and the record on appeal. *Id.* Counsel in this case advised Defendant of his right to file supplemental briefing and provided him with a copy of the appellant brief, the trial transcript, and the record on appeal. We hold that Defendant's counsel has complied with *Anders*, and we review the record for error.

Defendant has not submitted supplemental briefing to identify any issues in support of his appeal. Counsel notes that Defendant moved to exclude testimony by the officers that the substance seized was **[*3]** marijuana, and the trial court denied his motion. This denial was proper, as officers with proper training and experience may opine that a substance is marijuana. *State v. Johnson, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013)*. The record includes no evidence to support his argument at trial that officers cannot distinguish illegal marijuana from legal hemp. Additional evidence was introduced at trial that the seized substance was marijuana, including Defendant's statements that there was marijuana in the trunk that he intended to sell.

The evidence at trial was sufficient to support Defendant's conviction, for which the State must prove that (1) Defendant possessed marijuana and (2) intended to sell or deliver it. *N.C. Gen. Stat. § 90-95(a)* (2019); *State v. Ferguson, 204 N.C. App. 451, 459, 694 S.E.2d 470, 476-77 (2010)*. Marijuana was found in Defendant's car, along with digital scales, and Defendant stated that the substance was marijuana that he was planning to sell.

After review of the transcript, record, and briefs we cannot identify any other potential issues on appeal, and we find no error warranting reversal of Defendant's conviction or modification of his sentence. We find the appeal to be wholly frivolous.

NO ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).
