NO. COA21-144 **FIFTH DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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

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STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE NORTH CAROLINA COURT OF APPEALS

NOW COMES the State of North Carolina, by and through the undersigned counsel, and responding to Petitioner's petition for writ of certiorari filed 24 March 2021, requests that the petition be denied.

PROCEDURAL HISTORY

1. On 28 May 2020, Jaqualyn Robinson ("Petitioner") was indicted for 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 (PWIMSD) a Schedule II 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 p. 11–13)

2. On 13 August 2020, Petitioner filed a motion to suppress evidence discovered by law enforcement during the initial stop. Specifically, Petitioner argued law enforcement lacked probable cause to search his vehicle because "[s]ince the enactment of N.C. Gen. Stat. § 106-568.50 et seq., the sight or odor of Cannabis sativa does not indicate with any certainty that the Defendant was engaged in, or about to engage in any illegal activity[.]" (R pp. 14–22)

3. Pursuant to a hearing held on 29 October 2020, and by subsequent written order, the trial court denied the motion to suppress. (T pp. 69–71)

4. Petitioner subsequently pled guilty that same day to possession of cocaine and carrying a concealed gun, and, pursuant to a plea arrangement, the State dismissed the remaining charges. (R pp. 46–49) In accordance with the plea arrangement, the trial court sentenced Petitioner to a minimum 4, maximum 14 months of imprisonment, and it suspended the sentence and placed Petitioner on supervised probation for 12 months. (R p. 52)

5. On 2 November 2020, Petitioner filed written notice of appeal from the 29 October 2020 judgment. (R p. 61) On 2 March 2021, Petitioner filed a record on appeal. (See Docket Sheet in No. COA21-144)

6. On 24 March 2021, Petitioner filed the instant petition for writ of certiorari seeking review of the trial court's order denying his motion to suppress. (See Docket Sheet in No. COA21-144)

7. On 1 April 2021, Petitioner filed his appellant brief. (See Docket Sheet in No. COA21-144) The State's appellee brief is currently due on or before 4 May 2021.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The writ of certiorari "is a discretionary writ, to be issued only for good and sufficient cause shown." State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), cert. denied, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." Id. Absent such a showing, a petition for writ of certiorari should be denied. State v. Rouse, 226 N.C. App. 562, 567, 741 S.E.2d 470, 473, disc. review denied, 367 N.C. 220, 747 S.E.2d 538 (2013).

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C.G.S. § 15A-979(b) (2019). However, "when a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal

of right provisions of the statute." State v. Tew, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990).

Both "our Supreme Court and this Court have stressed the importance of a defendant's prior notice of intent to appeal as a way to alert the State, during the plea bargaining process, that the defendant may seek to appeal the denial of the motion to suppress." State v. Killette, 268 N.C. App. 254, 257, 834 S.E.2d 696, 698 (2019). This Court has explained:

> Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the state once judgment is final. If the defendant may first strike the plea bargain, "lock in" the State upon final judgment, and then appeal a previously denied suppression motion, it gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

State v. McBride, 120 N.C. App. 623, 626, 463 S.E.2d 403, 405 (1995).

In Killette[1], the "wisdom of this reasoning [was] plainly evident." Killette, 268 N.C. App. at 257, 834 S.E.2d at 699. In that case, the defendant pled guilty to two counts of manufacturing methamphetamine pursuant to a plea agreement wherein the State dismissed all other charges, and a consolidated judgment was entered. Id. This Court stated:

> Defendant knew his motions to suppress were denied. He received the full benefit of his bargain and failed to place the

[1] On 3 February 2021, our Supreme Court allowed the defendant's petition for discretionary review in that case. State v. Killette, 853 S.E.2d 150 (N.C. 2021).

> State or the trial court on any notice he intended to reserve the right to appeal. Defendant's failure to provide the required notice to the State and the trial court damages the integrity of the plea bargaining process. If defendants can so easily circumvent the fairness requirement that the State be informed of a defendant's intent to appeal prior to concluding the plea agreement, the State may offer fewer plea bargains.

Id. This Court acknowledged its "appellate jurisdiction to exercise [its] discretion on a petition for writ of certiorari"; however, it stated it was not compelled to allow the petition for writ of certiorari given the "clearly unmeritorious facts before [it]." Id. at 258, 834 S.E.2d at 699. Therefore, the defendant's appeal was dismissed and the petition for writ of certiorari denied. Id.

In the present case, Petitioner has waived his right to appeal the trial court's order denying his motion to suppress. Petitioner's motion to suppress was denied after a hearing, and he subsequently pled guilty to two charges pursuant to a plea agreement with the State. Per that agreement, the State dismissed seven other charges. (R pp. 47, 49) Furthermore, the two convictions were consolidated for judgment, and Petitioner received a suspended sentence. (R pp. 48, 52) Petitioner, however, did not "give notice of his intention to the prosecutor and to the court before plea negotiations [were] finalized" that he would appeal the denial of the motion to suppress. See Tew, 326 N.C. at 735, 392 S.E.2d at 605. It was not until a day after the trial court

accepted the plea and sentenced Petitioner that Petitioner informed the State and the trial court of his intent to appeal. (T p. 84) Therefore, Petitioner "received the full benefit of his bargain and failed to place the State or the trial court on any notice he intended to reserve the right to appeal." Killette, 268 N.C. App. at 257, 834 S.E.2d at 699. Accordingly, Petitioner waived his right to appeal the denial of his motion to suppress.

The petition for writ of certiorari seeking review of the trial court's order denying the motion should be denied. Petitioner argues the petition has merit because the law enforcement officer lacked probable cause to search the vehicle, arguing that "[g]iven that the smell of marijuana is indistinguishable from the smell of hemp, and that there was no other evidence suggesting that [Petitioner] was involved with controlled substances, it was not probable that the 'very faint' odor detected by Officer Galluppi was marijuana, it was merely possible." (See Petition p. 16) As will be more fully discussed in State's forthcoming brief, Defendant's argument is meritless, and the trial court did not err by denying the motion to suppress. Because the petition lacks merit, it should be denied. See Grundler, 251 N.C. at 189, 111 S.E.2d at 9; Rouse, 226 N.C. App. at 567, 741 S.E.2d at 473.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576 (1967) (footnotes omitted). "One such exception, the 'automobile exception,' allows an officer to conduct a warrantless search of a lawfully stopped vehicle if probable cause exists to believe it contains contraband or evidence of a crime." State v. Pigford, 248 N.C. App. 797, 799, 789 S.E.2d 857, 860, disc. review denied, 369 N.C. 189, 793 S.E.2d 692 (2016). "Both our Supreme Court and this Court have held 'the odor of marijuana to be sufficient to establish probable cause to search for the contraband drug in an automobile.'" State v. Malunda, 230 N.C. App. 355, 359, 749 S.E.2d 280, 283, disc. review denied, 367 N.C. 283, 752 S.E.2d 476 (2013).

The trial court concluded that the necessary probable cause existed to allow law enforcement to search Petitioner's vehicle:

> Based on the forgoing findings of fact, the Court concludes as a matter of law:

> 1. That Officer Galluppi had reasonable suspicion for the stop of the vehicle based on the possible window tint violation.
>
> 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.

(R p. 44) The trial court did not err in so concluding.[2] As stated above, the odor of marijuana is sufficient to establish probable cause to search for the contraband in a vehicle. Malunda, 230 N.C. App. at 359, 749 S.E.2d at 283. That marijuana and legal hemp share similar characteristics, including odor, does not change this. As the United States Supreme Court has explained, "[o]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." Illinois v. Gates, 462 U.S. 213, 235, 76 L. Ed. 2d 527 (1983). Indeed, other courts have reached the same conclusion. See United States v. Harris, No. 4:18-CR-57-FL-1, 2019 WL 6704996, *3 (E.D.N.C.

[2] Similarly, the trial court correctly assessed that a State Bureau of Investigation (SBI) memorandum on "Industrial Hemp/CBD Issues" is not authoritative, as the courts determine the existence of probable cause.

Dec. 9, 2019) ("Second, the smell of marijuana alone, particularly where corroborated here by two officers at separate times, supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law."). Accordingly, the trial court did not err in denying the motion to suppress, and the petition for writ of certiorari should be denied.

CONCLUSION

WHEREFORE, the State of North Carolina respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Electronically submitted this the 6th day of April, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
Nicholas R. Sanders
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6500
State Bar No. 53594
nsanders@ncdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

Sarah Holladay
Email: sarah@holladaylawoffice.com

Electronically submitted this the 6th day of April, 2021.

Electronically Submitted
Nicholas R. Sanders
Assistant Attorney General