No. COA 21-144 DISTRICT FIVE

NORTH CAROLINA COURT OF APPEALS

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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In addition to the arguments and authorities in his Opening Brief, Mr. Robinson submits the following reply in response to the State's Brief:

REVIEW OF FACTS

Officer Ben Galluppi pulled over Jaqualyn Robinson's vehicle for a window tint violation. (T pp 7-8) While speaking with Mr. Robinson, Officer Galluppi noticed what he believed was "a very faint odor of marijuana…coming from the vehicle." (T p 12) Based only on this "very faint odor," Officer Galluppi directed Mr. Robinson to step out of his car and conducted a search. (T pp 14-16) A revolver, two pills believed to be

MDMA, and a bag containing suspected marijuana and crack cocaine were subsequently recovered. (T pp 16-19, 50)

At the suppression hearing, the trial court admitted into evidence a memo from the State Bureau of Investigation, stating that marijuana is indistinguishable from legal hemp by smell; chemical testing is required to tell the difference. (R pp 28-29) In light of this, Mr. Robinson's counsel argued that odor alone cannot supply probable cause to support a search. (T pp 60-61, 63-64) The trial court disagreed and denied the motion to suppress. (T pp 69-70; R pp 43-44)

Mr. Robinson then entered a plea of guilty to felony possession of cocaine and carrying a concealed weapon at the 26 October 2020 Criminal Session of New Hanover County Superior Court. (R pp 46-49) Although he objected to the denial of the motion to suppress, Mr. Robinson's attorney failed to give explicit notice of appeal prior to the entry of the guilty plea. (T pp 71, 83-85) Accordingly, Mr. Robinson filed a Petition for Writ of Certiorari.

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.

In his Opening Brief, Mr. Robinson argued (a) the trial court's findings of fact were incomplete and/or not supported by competent evidence, (b) the conclusions of law were not supported by the facts found, and (c) given the legalization of hemp, the conclusions did not reflect a correct application of legal principles to the facts found. (Brief at 10-22) Because the trial court erred in denying the motion to suppress, the trial court's order should be reversed.

Findings of Fact

In Finding of Fact 4, the trial court stated, "Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle." (R p 43) In his Opening Brief, Mr. Robinson characterized this statement as "accurate [but] incomplete." (Brief at 13) The State appears to interpret this as a concession. (State's Brief at 12) It is not. That which is accurate may nonetheless be misleading because it omits a crucial point.

Officer Galluppi's testimony was that he smelled only the "very faint odor" of what he suspected was marijuana. (T p 12) Whether the odor was faint or strong is relevant to the reasonableness of Officer Galluppi's belief that a search of the vehicle was likely to produce evidence of a crime. Where the odor was very faint, it decreases confidence in the officer's ability to be certain that he correctly identified both the scent and its origin.

The State attempts to stretch Officer Galluppi's testimony that he verified that the odor was coming from inside the car as proof that the odor was marijuana. (State's Brief at 12, T pp 12-13) Wherever the smell came from, however, the fact remains that Officer Galluppi barely detected it and was in any event incapable of distinguishing marijuana from hemp. (R pp 28-29; T p 30)

The State also suggests that this Court frequently refers to the strength of an odor in its probable cause/reasonable suspicion analysis even though this factor is irrelevant. (State's Brief at 13) *See generally*, *State v. Tappe*, 139 N.C. 33, 38 (2000) (listing strong odor among other factors in support of a finding of probable cause); *State v. Cole*, 262 N.C. App. 466, 478 (2018) (same). While there is no requirement that the

odor of an impairing substance be strong, the strength of the odor plainly factors into the reasonableness of a search. *See State v. Finney*, 2021-NCCOA-255 ¶¶ 23-24 (distinguishing that case, which involved a strong odor of alcohol, from another which involved a faint odor).

In Finding of Fact 11, the trial court took judicial notice of the "physical properties and characteristics of" marijuana and hemp as discussed in the SBI memo. (R p 44) The court then proceeded to misstate the contents of that memo, finding that marijuana and hemp are "similar" and "difficult" to tell apart when the memo describes them as "the same" and "impossible" to tell apart. (R pp 44, 28-29) In his Opening Brief, Mr. Robinson argued that the trial court's characterization was not supported by the evidence. (Brief at 14)

The State claims the discrepancy is of no import because the words "similar" and "the same" have "functionally…the same meaning." (State's Brief at 14) Not to put too fine a point on it, their meanings are similar but not the same. The definition of "similar" is, "having a resemblance in appearance, character, or quantity, without being identical." Oxford English Dictionary 1662 (3d ed. 2010). If two things are the same, they are "identical." *Id.* at 1573. Along the same lines,

"difficult" and "impossible" are not as interchangeable as the State would have them be[1]. The distinction is important because an officer's presumed infallible ability to reliably identify marijuana has been the underpinning of this Court's jurisprudence for decades. If the courts' premise than an officer can identify marijuana based on smell is false, courts must revisit their analysis rather than continue to employ false logic for the sake of inertia.

In addition, Mr. Robinson argued that it was unreasonable of the trial court to completely disregard the SBI's opinion that odor alone cannot be the basis of probable cause given the SBI's uncontested expertise. (Brief at 14-15) The SBI is a law enforcement agency relied upon by the State in many criminal prosecutions. It is curious for the State to argue that the SBI's view merits no consideration here.

This Court recently addressed the SBI memo in a published opinion, *State v. Parker*, 2021-NCCOA-217. In *Parker*, the defendant was stopped for not wearing a seat belt. In speaking with the defendant, the officer smelled what he believed to be the odor of burnt

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[1] "Difficult" is defined as "needing much effort or skill to accomplish, deal with, or understand." "Impossible" means "not able to occur, exist, or be done." Oxford English Dictionary 488, 879.

marijuana emanating from the vehicle. The officer then conducted a search of the car and its occupants. As in this case, the defense in *Parker* introduced the SBI memo into evidence and cross-examined the officer about its contents. ¶¶ 2-6.

On appeal, the defendant in *Parker* argued as Mr. Robinson does that because hemp and marijuana are indistinguishable based on scent, the officer's impression that he smelled marijuana was insufficient to support probable cause. 2021-NCCOA-217 at ¶ 26. This Court fully engaged with the SBI memo, reviewing the history of the legalization of hemp, the chemical distinction between hemp and marijuana, the SBI's statement that law enforcement cannot distinguish between the two based on appearance or odor, and the SBI's statement that this renders officers unable to develop probable cause in the absence of additional evidence. ¶¶ 27-28.

Recognizing precedent predating the legalization of hemp which found appearance and odor alone sufficient to support probable cause, this Court observed:

> Defendant's appeal raises the possibility that these holdings may need to be re-examined. If the scent of marijuana no longer conclusively indicates the presence of an illegal drug

> (given that legal hemp and illegal marijuana apparently smell the same), then the scent of marijuana may be insufficient to show probable cause to perform a search. Likewise, if the sight of marijuana no longer conclusively identifies the presence of an illegal drug (given that legal hemp plants and illegal marijuana plants look identical), then a police officer may not be able to rely on a visual identification of marijuana alone to support probable cause.

2021-NCCOA-217 ¶ 30.

The Court ultimately determined that it did not need to reach these questions in *Parker* because there was additional evidence to support probable cause. 2021-NCCOA-217 ¶ 31. When the officer told the defendant in *Parker* that he smelled marijuana, the passenger in the car admitted that he had recently smoked marijuana and produced a partially smoked marijuana joint from his sock. *Id.* at ¶ 4. Combined, these three factors were sufficient to provide probable cause. *Id.* at ¶ 32. In this case, however, there is no additional evidence – the search was based on odor alone. (*See* T p 15, Mr. Robinson denied smoking or possessing marijuana.) All that remains is the reasonableness of Officer Galluppi's belief that he smelled marijuana.

Critical to reasonableness is whether Officer Galluppi had the training and experience necessary to distinguish marijuana by smell.

However, the trial court failed to make any findings of fact regarding this key point. There is no finding of fact that the officer was capable of distinguishing between hemp and marijuana, or that he had the skills and ability to reliably identify marijuana at all. The State asserts that a finding that Officer Galluppi was capable of identifying marijuana is "implicit" in the trial court's finding that Galluppi "detected what he believed to be an odor of marijuana." (State's Brief at 15) Training and experience are not prerequisites to holding a belief. The constitutional question is whether the officer's belief was reasonable, not whether he had one.

The State recites the officer's training and experience regarding marijuana, while scrupulously avoiding any mention of the dearth of evidence that he could reliably distinguish marijuana from hemp. (State's Brief at 15) Officer Galluppi encountered hemp a total of one time in his career, during a training exercise. (T p 34) He described the smell of hemp as being "very, very, very" similar to marijuana, and stated that he did not think he would be able to distinguish between the two. (T pp 33, 30) There was no evidence from which the trial court

could conclude that Officer Galluppi had probable cause to believe Mr. Robinson's vehicle contained marijuana as opposed to hemp.

Conclusions of Law

In his Opening Brief, Mr. Robinson challenged the trial court's conclusion that "the odor of marijuana emanating from the vehicle provided sufficient probable cause for a warrantless search of the vehicle." (R p 44; Brief at 17-20) Mr. Robinson also challenges the trial court's third conclusion of law, that because marijuana and hemp are "similar," law enforcement can continue to use the odor of marijuana alone as a basis for probable cause. (R p 44; Brief at 20-22) Absent findings of fact that Officer Galluppi's impression that he smelled marijuana was reasonable and supported by his training and experience, these conclusions were not adequately supported.

Furthermore, the legalization of hemp, a substance which cannot be distinguished from marijuana based on smell, requires this Court to revisit the rule established in *State v. Greenwood*, 301 N.C. 705, 708 (1982) that odor alone can supply probable cause.

By statute, legal hemp is a product of the cannabis plant containing not more than 0.3% delta-9 tetrahydrocannabinol ("THC"),

while illegal marijuana is a product of the cannabis plant containing a greater percentage. N.C.G.S. §§ 106-568.51(7); 90-87(16). There is no reasonable basis for the conclusion that an officer can distinguish 0.3% THC from 0.4% THC with his nose. When an officer smells something that might be legal, he does not have probable cause to search unless there is some additional indication of criminality to tip the scales in favor of infringing upon the citizen's Fourth Amendment rights. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (a probable cause determination requires consideration of "the totality of the circumstances" and whether a "substantial basis" supported the belief that contraband would be found).

The State's argument that the legalization of hemp does not impact the probable cause analysis for suspected marijuana is predicated on the notion that marijuana and hemp are merely similar, which as discussed above is not accurate. (State's Brief at 17) The State also appears to believe that a "probability" and "possibility" are interchangeable. (*Id.*) Courts regularly distinguish between the two. *See e.g. State v. Best*, 376 N.C. 340, 349 (2020); *State v. Malachi*, 371 N.C. 719, 737 (2018). It is not enough that what Officer Galluppi smelled

could have been marijuana; there needed to be a reason to think it probably was.

The State relies on *State v. Eutsler*, 41 N.C. App. 182, 183 (1979), for the correct proposition that an officer need not be absolutely certain his search will produce what he seeks in order to have probable cause. *Eutsler*, however, highlights the weakness of the evidence is in this case. The officers in *Eutsler* obtained a search warrant for the defendant's home, which was located directly across the street from seven marijuana patches. A path bearing footprints led directly from the patch to the home, and there were no other homes for a quarter mile in any direction. A box of fertilizer found next to one patch was purchased at the Marine commissary; the residents of the home were the only military personnel in the area. *Id.* at 183-84. At the time, cannabis sativa in all forms was completely illegal. The officers in *Eustler* had abundant reasons to believe that evidence related to the growing, use, or distribution of an illegal substance would be found in the home. Here, Officer Galluppi had nothing more than a suspicion that what he faintly smelled might be an illegal drug.

While the SBI memo and the School of Government blog are not binding authority on this Court, (State's Brief at 18-19), neither are the many federal and out-of-state decisions cited by the State. (State's Brief at 19-23) It is true that marijuana remains illegal in North Carolina. The question is whether Officer Galluppi had probable cause to believe that what he smelled was marijuana. Where the officer detected only the very faint odor of something he testified he could not distinguish from a legal substance and there were no additional circumstances indicating that Mr. Robinson was involved in illegal activity, the officer had a bare suspicion, not probable cause.

Although the odor of suspected marijuana can be *part* of the probable cause analysis, given the legalization of hemp it cannot be the *entire* analysis. The trial court erred in concluding otherwise. Accordingly, the denial of the motion to suppress should be reversed, and the plea and judgment that followed should be vacated. *See State v. Ladd*, 246 N.C. App. 295, 296 (2016).

CONCLUSION

For the foregoing reasons and authorities, Jaqualyn Robinson, the Defendant-Appellant herein, respectfully requests that the trial court's order denying his motion to suppress be reversed, or other such relief as this court deems appropriate.

Respectfully submitted, this the 21st day of July 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(B)

Undersigned counsel hereby certifies that this Reply Brief is in compliance with N.C.R. App. P. 28(j)(2)(B), in that it is printed in 14-point Century font and contains no more than 3,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the Brief.

This the 21st day of July 2021.

By Electronic Submission:

Sarah Holladay

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Reply Brief of Defendant-Appellant was filed electronically, pursuant to Rule 26, with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Reply Brief was served on Nicholas Sanders, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to nsanders@ncdoj.gov.

This the 21st day of July 2021.

By Electronic Submission:

Sarah Holladay