No. DISTRICT FIVE

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover
	)	COA21-144
JAQUALYN ROBINSON	)	

****

NOTICE OF APPEAL BASED ON DISSENT

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Jaqualyn Robinson, by and through counsel, hereby appeals to the Supreme Court of North Carolina, pursuant to N.C.G.S. § 7A-30(2), from the order of the Court of Appeals in *State v. Robinson*, COA21-144, (attached) allowing the State's Motion to Dismiss Mr. Robinson's appeal. A Conditional Petition for Writ of Certiorari is filed concurrently with this notice out of an abundance of caution.

N.C.G.S. § 7A-30(2) provides that there is an appeal of right to this Court from any decision "[i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges." A panel of three

judges, one dissenting, decided to allow the State's Motion to Dismiss. As such, Mr. Robinson has an appeal of right.

The Court of Appeals' order consists of a majority by Judges Murphy and Griffin, and a dissent by Judge Jackson. The majority allowed the State's Motion to Dismiss without explanation[1]. The majority further ordered that Mr. Robinson, who has been at all times indigent and represented by appointed counsel, to pay the costs of the appeal. (Order at 1)

In dissent, Judge Jackson argued first that despite the waiver of Mr. Robinson's right to appeal, his Petition for Writ of Certiorari should have been allowed to enable the Court of Appeals to reach the meritorious issue presented. Judge Jackson noted that Mr. Robinson contemporaneously objected to the denial of the motion to suppress and that the State did not object when he gave notice of appeal in open court the next day. (Order at 2)

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[1] The State asked the Court of Appeals to dismiss Mr. Robinson's appeal because, "It was not until the day after the trial court accepted Defendant's plea and sentenced Defendant that Defendant informed the State and the trial court of his intent to appeal. Accordingly, Defendant has waived his right to appeal the trial court's order, and his appeal should be dismissed." (State's Motion to Dismiss Appeal at 2-3)

As to the substantive issue, Judge Jackson found that Mr. Robinson's motion to suppress should have been allowed. Judge Jackson found one of the trial court's findings of fact to be unsupported by competent evidence and two of its conclusions of law to be incorrect. In sum, Judge Jackson found that the odor of suspected marijuana, standing alone, creates only a mere suspicion of criminal activity, as illegal marijuana is indistinguishable from legal hemp on this basis, and therefore the officer in this case lacked probable cause to search Mr. Robinson's car. (Order at 2-8)

The Appellant will bring forward for review the issues which formed the basis of Judge Jackson's dissent.

Respectfully submitted, this the 10th day of January 2022.

By Electronic Submission:

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ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Notice of Appeal Based on Dissent was filed electronically, pursuant to Rule 26, with the Clerk of the Supreme Court of North Carolina.

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

I further hereby certify that a copy of the above and foregoing Notice of Appeal has been duly served upon the Clerk of the North Carolina Court of Appeals, P.O. Box 2779, Raleigh, North Carolina 27602, by first-class mail, postage prepaid.

This the 10th day of January 2022.

By Electronic Submission:

Sarah Holladay

North Carolina Court of Appeals
EUGENE H. SOAR, Clerk
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Court of Appeals Building
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From New Hanover
(20CRS51122 20CRS51123 20CRS51124)

No. 21-144

STATE OF NORTH CAROLINA

v.

JAQUALYN ROBINSON

O R D E R

The following order was entered:

The motion filed in the cause by the State on 6 July 2021 and designated 'Motion to Dismiss Appeal' is allowed. Defendant's appeal is dismissed. Defendant's 24 March 2021 'Petition for Writ of Certiorari' is denied. Appellant to pay costs.

And it is considered and adjudged further, that the Appellant, Defendant Jaqualyn Robinson, do pay the costs of the appeal in this Court incurred, to wit, the sum Sixty Three and 25/100 Dollars ($63.25), and execution issue therefor.

Panel consisting of Judge MURPHY, Judge GRIFFIN, and Judge JACKSON.

JACKSON, Judge, dissenting.

Jaqualyn Robinson ('Defendant') appeals from an order denying his motion to suppress evidence entered by the Honorable R. Kent Harrell on 29 October 2020 in New Hanover County Superior Court. The majority denies Defendant's Petition for Writ of Certiorari and grants the State's Motion to Dismiss Appeal because they do not find merit in Defendant's argument on appeal. I believe Defendant's argument has merit and would grant his Petition for Writ of Certiorari and reach the meritorious issue. Therefore, I respectfully dissent.

I. Factual and Procedural Background

On 5 February 2020, Wilmington Police Department Officer B. Galluppi ('Officer Galluppi') conducted a traffic stop on a Chrysler 300 being driven by Defendant because the car's window tint was too dark. While speaking with Defendant through the driver's side window, Officer Galluppi 'detect[ed] a very faint odor of marijuana . . . coming from inside the vehicle.' After running Defendant's registration, Officer Galluppi had Defendant step out of the Chrysler and sit in Officer Galluppi's patrol car 'due to [his] experience with people who have partaken with [sic] marijuana[,]' Officer Galluppi did not want Defendant to tamper with any evidence inside the car. Officer Galluppi next ran Defendant's license and learned it was suspended.

While discussing the circumstances of his license suspension with Defendant, Officer Galluppi 'could still smell the odor of marijuana coming from his person at that point.' Officer Galluppi asked Defendant if there was a reason his vehicle smelled like marijuana. Defendant told Officer Galluppi 'that he didn't smoke or do anything or have anybody inside his vehicle for that.' (The trial court granted Defendant's motion to suppress these statements as the trial court found that placing Defendant in the patrol car constituted a custodial interrogation and Defendant should have been Mirandized.) After this exchange, Officer Galluppi

then searched the vehicle while another officer remained with Defendant and Defendant was subsequently arrested.

On 29 October 2020, the trial court held a hearing on Defendant's motion to suppress evidence and statements. At the hearing, the trial court took judicial notice of a North Carolina State Bureau of Investigation memo addressing 'Industrial Hemp/CBD Issues' (hereinafter the 'SBI Memo'). The trial court ultimately denied the motion to suppress evidence. Defendant's counsel objected to the denial but did not give explicit notice of appeal from the denial of the suppression motion. The trial court then recessed for approximately two and a half hours after which Defendant entered a plea of guilty to felony possession of cocaine and carrying a concealed weapon and was sentenced to four to 14 months imprisonment, suspended for 12 months of supervised probation. As part of the plea agreement, the State dismissed five other charges and two traffic offenses.

The next day, 30 October 2020, Defendant's counsel gave oral notice of appeal, stating, 'it's my understanding that I have to appeal the entire judgment[]' when the trial court asked whether counsel was appealing the guilty plea. The State did not object to Defendant's notice of appeal and neither did the trial court. The trial court then promptly signed the appellate entries and appointed counsel for Defendant's appeal. The first objection to Defendant's appeal by the State came more than five months later in the State's response to Defendant's Petition for Writ of Certiorari.

I. Petition for Writ of Certiorari

'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. Gen. Stat. sec. 15A-979(b) (2019). Although not included in the statute by the legislature, our Supreme Court later added a notice requirement to N.C. Gen. Stat. sec. 15A-979(b). See State v. Reynolds, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). Under this requirement, a defendant will waive his right to appeal the denial of a motion to suppress unless he 'give[s] notice of his intention to the prosecutor and to the court before plea negotiations are finalized[.]' State v. Tew, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990).

Here, while Defendant objected to the denial of his motion to suppress, there is nothing in the record that reflects he gave formal notice of his intention to appeal the denial until the day after the trial court accepted his guilty plea and sentenced him. Because Defendant did not notice his intent to appeal before plea negotiations were finalized, the State argues that Defendant waived his statutory right to appeal under N.C. Gen. Stat. sec. 15A-979(b).

Despite potentially failing to preserve his appeal as of right, Defendant has petitioned this Court to issue its Writ of Certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, N.C. Gen. Stat. sec. 7A-32(c), and N.C. Gen. Stat. sec. 15A-1444(e), and to review the order denying his motion to suppress evidence. '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). To warrant consideration, Defendant's 'petition for the writ must show merit or that error was probably committed below.' Id. Defendant's petition outlines a meritorious position, as discussed infra, and demonstrates that the trial court likely erred in denying his motion to suppress evidence. Further, it is important to note that Defendant argued his motion to suppress evidence and after the trial court denied the motion, Defendant objected to the ruling. The next day, Defendant noticed his intention to appeal the denial with no objection by the State or the trial court. Had the State objected at that time to Defendant's notice of appeal, Defendant could have moved to withdraw his plea in order to give proper notice.

For these reasons, I would grant Defendant's Petition for Writ of Certiorari.

II. Motion to Suppress

Defendant contends his motion to suppress should have been granted by the trial court because Officer Galluppi did not have probable cause to search his vehicle. Specifically, Defendant argues that the sole basis for the search was Officer Galluppi detecting a 'very faint odor of marijuana' coming from his vehicle and because the odor of illegal marijuana cannot be distinguished from the odor of legal hemp, Officer Galluppi did not have probable cause to search his vehicle. Defendant contends that Officer Galluppi only had a bare suspicion that a crime was being committed, which is insufficient to sustain a warrantless search. Defendant therefore argues that the trial court erred in denying his motion to suppress evidence. I agree.

A. The Impact of Legalizing Hemp on Probable Cause

The Fourth Amendment of the United States Constitution, incorporated to the states through the Fourteenth Amendment, protects 'against unreasonable searches and seizures' and requires government officials to obtain a warrant on a showing of probable cause to search private property. U.S. Const. amend. IV, XIV. The North Carolina Constitution provides similar protection against searches and seizures. N.C. Const. art. I, sec. 20. There are several exceptions to the warrant requirement, however, including the automobile exception established by the United States Supreme Court in Carroll v. United States, 267 U.S. 132 (1925). The rationale for this exception is rooted in the inherent mobility of vehicles and a reduced expectation of privacy in motor vehicles. State v. Isleib, 319 N.C. 634, 637, 356 S.E.2d 573, 576 (1987).

A law enforcement officer must have more than bare or mere suspicion to justify a warrantless search of an automobile on a public highway. Brinegar v. United States, 338 U.S. 160, 175, 177 (1949). In North Carolina, '[a] search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the fourth amendment if it is based on probable cause, even though a warrant has not been obtained.' Isleib, 319 N.C. at 638, 356 S.E.2d at 576. Generally, '[p]robable 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.' Stafford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 370 (2009) (internal marks and citation omitted). 'Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' State v. Riggs, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)) (internal marks omitted).

For forty years, our appellate courts have held that detecting the odor of marijuana from in and around a vehicle gives officers probable cause to search the car. State v. Greenwood, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981). Similarly, this Court has held that a strong odor of marijuana emanating from an individual is sufficient to justify an immediate warrantless search of that person. State v. Yates, 162 N.C. App. 118, 123, 589 S.E.2d 902, 905 (2004). This Court has also held that 'seeing marijuana constitutes probable cause,' State v. Mitchell, 224 N.C. App. 171, 175, 735 S.E.2d 438, 442 (2012), and that the visual identification of a substance as marijuana by a police officer can sustain a marijuana offense conviction, State v. Fletcher, 92 N.C. App. 50, 56-57, 373 S.E.2d 681, 685-86 (1988). Further, this Court recently held that the odor of marijuana in combination with other evidence--there, the suspect's admission that he had smoked marijuana earlier and his production of a partially smoked marijuana cigarette--was sufficient to sustain probable cause. State v. Parker, 2021-NCCOA-217 par. 32.

These past holdings were based in part on an understanding that 'marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification.' Mitchell, 224 N. C. App at 179, 735 S.E.2d at 444. Such uniqueness has allowed officers, until now, to identify with certainty that plant material was in fact marijuana based on smell or sight alone because there was not a similar, readily available legal product that could be mistaken for marijuana. See id. at 178-79, 735 S.E.2d at 444. However, marijuana is no longer exceptional among controlled substances for not requiring technical analysis for identification.

In 2015, the North Carolina General Assembly passed the Industrial Hemp Act which established the Industrial Hemp Commission to oversee the legal growing and sale of industrial hemp within the state. See S.L. 2015-299; N.C. Gen. Stat. sec. 106-568.50 (2019), et seq. Industrial hemp and marijuana are both members of the Cannabis sativa L. plant species. The two differ legally based on chemical composition, namely the amount of tetrahydrocannabinol ('THC') present in the plant. Legal industrial hemp contains very low levels of THC, 'not more than three-tenths of one percent (0.3%) on a dry weight basis.' N.C. Gen. Stat. sec. 106-568.51(7). According to the SBI Memo (that the trial court took judicial notice of), there are several varieties of industrial hemp including, '[o]ne variety [that] looks like marijuana and grows 'buds' just like marijuana. [Cannabidiol or 'CBD'] is extracted from the buds. This type 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.' This particular variety of hemp can be smoked in the way marijuana is smoked (e.g., hemp cigarettes, hemp cigars, and hemp buds that are purchased and later rolled into joints) and, as the SBI Memo points out, most licensed hemp farmers in North Carolina grow this variety due to the popularity of CBD products, which are not psychoactive and are touted for their health benefits.

The legalization of smokable industrial hemp means that any time officers encounter plant material that looks and smells like marijuana, they could be encountering a legal commodity that individuals in North Carolina are free to use whenever and wherever. Contravening the previous justification that marijuana does not require technical analysis for identification, the existence of industrial hemp necessitates the use of advanced chemical analysis that not only detects the presence of THC but also the precise concentration of THC in the plant material being tested. This reality presents a conundrum for law enforcement officers. As the SBI Memo explained:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. 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.
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> . . .
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> Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions, from small amounts to trafficking amounts of plant material. There is at least one District Attorney's Office in NC which is currently not prosecuting marijuana cases due to the inability of law enforcement to distinguish the difference between hemp and marijuana.
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> . . .
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> The North Carolina State Crime Laboratory does not conduct testing to differentiate between hemp and marijuana. The State Crime Lab, as well as most municipal crime labs in NC, perform a qualitative analysis on plant material to determine whether THC is present. All hemp and CBD products contain some level of THC; therefore, the crime labs will report these products as containing marijuana or THC, which are both Schedule VI controlled substances. While it has been suggested that additional funds be allocated to the Crime Lab in order to add additional chemists and equipment to conduct the quantitative analysis described above, this will not resolve the issue. As previously mentioned, law enforcement cannot seize an item without probable cause that the item is evidence of a crime. Not being able to distinguish between hemp and marijuana defeats the previous basis for probable cause to seize items believed to be marijuana.

Today, plant material that looks and smells like marijuana or hemp presents the probability or substantial chance of criminal activity or legal activity. Although the odor of hemp could be the odor of marijuana and vice versa, the crucial point here is that any odor in question has a probable or substantial chance of being the odor of a legal activity. While legal--albeit suspicious--activity can be used as the basis of an investigatory stop by law enforcement officers, see United States v. Perkins, 363 F.3d 317, 326 (4th Cir. 2004), cert. denied, 543 U.S. 1056 (2005), a search is a greater invasion of privacy than an investigatory stop and thus requires a heightened justification. Without the certainty that officers are encountering evidence of what is probably or substantially likely to be criminal activity, law enforcement officers are left with nothing more than mere suspicion of criminal activity. Mere suspicion of criminal activity is insufficient to sustain the probable cause needed to conduct a warrantless search. State v. Braxton, 90 N.C App. 204, 207, 368 S.E.2d 56, 58 (1988); see also Wong Sun v. United States, 371 U.S. 471, 479 (1963).

The totality-of-the-circumstances approach to probable cause also emphasizes that the odor of marijuana standing alone is insufficient to support probable cause given the possibility of an alternate lawful explanation. Commenting on a magistrate's decision to issue a search warrant, the United States Supreme Court articulated the totality-of-the-circumstances analysis as: 'The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' Illinois v. Gates, 462 U.S. 213, 238 (1983). In State v. Benters, 367 N.C. 660, 766 S.E.2d 593 (2014), our Supreme Court reviewed the sufficiency of an affidavit used by a magistrate to issue a search warrant for a suspected marijuana growing operation. Id. at 660-63, 766 S.E.2d at 595-97. In reviewing all the circumstances presented in the affidavit, the Court indicated that when a particular circumstance could equally be an observation of a legal activity or evidence of criminal activity, then that circumstance weighs against finding probable cause. See id. at 672, 766 S.E.2d at 602.

Specifically, the Court concluded that law enforcement officers' observations of multiple gardening

items on a defendant's property were insufficient to support a search warrant application for a suspected marijuana growing operation. Id. The Court explained that the presence of the gardening supplies did not indicate 'a fair probability that contraband or evidence of a crime [would] be found' and that a detective's assertions that the supplies were evidence of a growing operation were 'wholly conclusory allegations.' Id. The gardening supplies could have been used for an innocent activity. 'Thus, amid a field of speculative possibilities,' the magistrate was 'impermissibly require[d] to make what otherwise might be reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances[,]' as the detective gave no information about the state and appearance of the gardening supplies. Id. The Court ultimately held that the affidavit in question was insufficient to establish probable cause. Id. at 673, 766 S. E.2d at 603.

The analysis in Benters suggests that a law enforcement officer asserting that a particular odor is in fact evidence of marijuana is a conclusory allegation weighing against a finding of probable cause because that odor could indicate criminal activity or legal activity given the existence of smokable industrial hemp. Other circumstances, apart from the odor, could be used to find probable cause, but those circumstances must be sufficiently strong to counterbalance the substantial chance that the odor is nothing more than an indication of legal activity. Such circumstances could include the lawfully obtained admission of defendants that they have recently smoked marijuana or an identification by defendants of the plant material as marijuana. If there are no circumstances beyond detecting an odor, then odor standing alone certainly will not support a showing of probable cause.

Ultimately, the case at bar presents the question of whether the faint odor of plant material, which may be hemp, standing alone is sufficient to grant an officer probable cause to search a vehicle without a warrant. The key issue, therefore, is whether law enforcement officers in the field can distinguish between legal hemp and illegal marijuana by sight or smell. If an officer cannot distinguish between hemp and marijuana by sight or smell, then the officer cannot form a reasonable belief that a criminal offense has been or is being committed. In fact, legal hemp and illegal marijuana are indistinguishable by sight or smell.

Again, according to the SBI Memo, '[h]emp and marijuana look the same and have the same odor, both unburned and burned.' In the Summer of 2019, when a ban on smokable hemp was being debated in the General Assembly, the director of the N.C. Conference of District Attorneys told the Senate Agriculture, Environment, and Natural Resources Committee, 'Law enforcement cannot discern the difference between smokable hemp and marijuana, and our State Crime Lab cannot discern the difference because they can't discern the level of the THC that it contains.' Laura Leslie, Law enforcement fears NC's effort to boost hemp industry could essentially legalize marijuana, WRAL (May 31, 2019, 11:46 AM), https://www.wral.com/law-enforcement-fears-nc-s-effort-to-boost-hemp-industry-could-essentially-legalize-marijuana/18421082/. Later in January 2020, as the legislature continued to consider passage of a ban on smokable hemp in the annual farm bill, the North Carolina Sheriff's Association, N.C. Association of Chiefs of Police, N.C. Conference of District Attorneys, and the State Bureau of Investigation stated in a joint position paper that 'smokable hemp and marijuana are indistinguishable by appearance and odor[.]' Wilson Times, Guest Editorial: Banning hemp to fight pot is reefer madness, The Richmond Observer (Jan. 10, 2020, 4:37 PM), https://www.richmondobserver.com/opinion/item/7116-guest-editorial-banning-hemp-to-fight-pot-is-reefer-madness.html.

A survey of other jurisdictions that have confronted issues related to the legalization of industrial hemp establishes that legal hemp and illegal marijuana are indistinguishable by sight and smell as well. See e.g., People v. Cox, 2018 CO 88, par. 21, 429 P.3d 75, 82 (Gabriel, J., concurring) ('[T]he record in this case indicates that marijuana and hemp appear and smell identical[.]'); Lundy v. Commonwealth, 511 S.W.3d 398, 404 (Ky. Ct. App. 2017) ('Hemp and marijuana are visually indistinguishable[.]').

Additionally, a brief look at the chemical makeup of the cannabis plant particularly highlights that legal hemp and illegal marijuana are indistinguishable by smell.

Legal hemp and illegal marijuana are both derived from the Cannabis sativa L. plant species. One of the chemical compounds present in Cannabis sativa L. is called a cannabinoid. THC and CBD are the two main cannabinoids amongst dozens found in the cannabis plant. Cannabis (Marijuana) and Cannabinoids: What You Need To Know, NIH: Nat'l Ctr. for Complementary and Integrative Health, https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know (last updated Nov. 2019). While cannabinoids like THC and CBD give cannabis its psychoactive or medicinal effects respectively, a different group of chemical compounds called terpenes give the cannabis plant its distinct aroma. Jordan J. Zager et al., Gene Networks Underlying Cannabinoid and Terpenoid Accumulation in Cannabis, 180 Plant Physiology 1877, 1879 (2019), https://doi.org/10.1104/pp.18.01506. See also Cynthia A. Sherwood et al., Even Dogs

Can't Smell the Difference: the Death of 'Plain Smell,' as Hemp is Legalized, Tenn. Bar J., Dec. 2019, at 14, 17 (explaining that the terpenes which give cannabis its odor are legal compounds found in many different species of plants).

THC, on the other hand, is an odorless chemical compound. T. Flemming et al., Chemistry and Biological Activity of Tetrahydrocannabinol and its Derivatives, in Bioactive Heterocycles IV 1, 25 (2007), http://dx.doi.org/10.1007/7081_2007_084. Because THC is odorless, the amount of THC present in any given cannabis plant cannot be measured by smell but rather requires advanced chemical analysis to determine the exact percentage that is present. Id. at 25-27.

Here, I will note that in State v. Parker, 2021-NCCOA-217, this Court suggested in dicta that the police officer's 'own subjective belief that the substance he smelled was marijuana was additional evidence supporting probable cause--even if his belief might ultimately have been mistaken.' Id. at par.33. The indistinguishability by smell, however, suggests that it would never be a reasonable mistake for an officer to believe he smelled marijuana because the amount of THC, which distinguishes hemp and marijuana, cannot be detected by smell but requires chemical analysis to measure. If it is impossible for an officer to detect the amount of THC present by smell, then an officer of reasonable caution would not assume, without more, that he smells marijuana because he knows that he is not able to detect the amount of THC by smell.

Such is the significance of the 'odor plus' standard that was our central holding in Parker. Given that the odor of hemp and marijuana are indistinguishable, and the amount of THC cannot be detected without chemical analysis, the odor plus standard provides officers with 'fair leeway' and allows them to be reasonable in a scenario in which officers could never obtain perfection. Heien v. North Carolina, 574 U.S. 54, 60-61 (2014). Maryland adopted the odor plus standard after possession of less than ten grams of marijuana became a civil offense. Lewis v. State, 470 Md. 1, 27, 233 A.3d 86, 101-02 (2020). The high court in Maryland reasoned that because probable cause for a warrantless arrest and search incident to arrest of a person requires belief that a person possesses a criminal amount of marijuana and '[t]he odor of marijuana alone does not indicate the quantity, if any, of marijuana in someone's possession[,]' the odor of marijuana alone emanating from a person does not support probable cause. Id. The odor plus standard thus ensures that an officer has more than mere suspicion of criminal activity to support probable cause.

Because the odor of legal hemp and the odor of illegal marijuana are indistinguishable, the odor of marijuana no longer conclusively indicates the presence of an illegal drug and therefore is insufficient to support the probable cause needed to conduct a warrantless search under the Fourth Amendment.

B. Trial Court's Findings of Fact and Conclusions of Law

The scope of review of an order denying 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. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). 'Conclusions of law, however, 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, 821 S.E.2d 822, 825 (2018) (internal marks and citation omitted).

1. Findings of Fact

Defendant challenges the trial court's fourth and eleventh findings of fact:

> (4) Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle.
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> (11) The Court took judicial notice of a 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 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.

Defendant contends Finding of Fact (4) is incomplete as Officer Galluppi only detected a 'very faint

odor' of what he believed to be marijuana. Defendant argues Finding of Fact (11) is not fully supported by competent evidence as the SBI Memo states industrial hemp and marijuana are the same species and look and smell the same, rather than merely sharing similar physical characteristics. Defendant also highlights that the trial court did not make any findings of fact that Officer Galluppi had the necessary training and experience to distinguish between hemp and marijuana or to identify the odor coming from Defendant's vehicle as marijuana.

Regarding the findings of fact, I would hold Finding of Fact (11) to be unsupported by competent evidence. The SBI Memo states that legal hemp and illegal marijuana smell and look the same and that chemical analysis is required to distinguish between the two plants. Hemp and marijuana cannot be distinguished from one another based on odor or visual identification. Therefore, it is not merely the case that hemp and marijuana are physically 'very similar' and 'it is difficult to tell' the two apart by smell or appearance, rather, a chemical test must be used to determine the amount of THC present in a given sample of plant material.

Notably, Finding of Fact (4) is the only finding by the trial court that pertains to the establishment of probable cause. There is no evidence in this record that Defendant was involved in the use of controlled substances other than the odor detected by Officer Galluppi. Applying the totality-of-the-circumstances approach, there was only one circumstance, odor, to be considered in showing Officer Galluppi had probable cause and that circumstance does not rise above the level of mere suspicion given the substantial chance Officer Galluppi could have been smelling the odor of industrial hemp. Accordingly, the totality-of-the-circumstances approach indicates Officer Galluppi did not have probable cause to search Defendant's vehicle.

Additionally, given that hemp and marijuana are indistinguishable based on smell and sight alone, see supra, Officer Galluppi could not have testified to any training and experience that would have allowed him to distinguish between hemp and marijuana when conducting Defendant's traffic stop. On cross-examination, Officer Galluppi testified that he learned in a 'street drugs for narcotic officers' training in 2017 or 2018 that 'looking at [hemp and marijuana buds] side by side, you can actually see a physical difference' and that '[he's] been shown the differences, so [he] can see the differences when [he's] looking at them.' However, Officer Galluppi ultimately testified to the following:

[DEFENSE COUNSEL]: So it sounds like you have a trained eye; would you - would you agree with that?
[OFFICER GALLUPPI]: I've been shown the difference, so I - I can see the differences when I'm looking at them.
[DEFENSE COUNSEL]: So that means you're able to - you're able to say that, you know, if you were to see hemp and marijuana, you're able to distinguish the difference; is that what you're saying?
[OFFICER GALLUPPI]: I - I would imagine that I could probably do that.
[DEFENSE COUNSEL]: Okay.
[OFFICER GALLUPPI]: I've not actually compared the two myself. I've only - like I said, I've only been through the class. I've not actually had to deal with hemp at this point.
[DEFENSE COUNSEL]: At this point.
[OFFICER GALLUPPI]: Yes.
[DEFENSE COUNSEL]: Were you shown hemp at the class?
[OFFICER GALLUPPI]: Yes.
[DEFENSE COUNSEL]: Okay. If you were to see hemp today, would you be able to distinguish whether or not it was marijuana or hemp?
[OFFICER GALLUPPI]: Just by pure looking at it?
[DEFENSE COUNSEL]: Yes.
[OFFICER GALLUPPI]: Probably not.

Officer Galluppi also testified that he learned in the same training that there is 'a very, very, very slight difference between [the smell] of hemp and marijuana' and he had the opportunity to 'take a whiff' of a fresh hemp bud and a fresh marijuana bud through a mason jar with holes punched in the top. Officer Galluppi ultimately testified, however, that he has never smelled burned hemp or had the opportunity to distinguish between the odor of burned hemp and burned marijuana because the trainer did not have a sample of burned marijuana and burned hemp available.

Based on this testimony, there was not competent evidence available to the trial court for it to find that Officer Galluppi had the necessary training and experience to distinguish between hemp and marijuana,

which is presumably why it did not make such a finding. Despite testifying that there is a physical difference between hemp and marijuana, Officer Galluppi admitted that he could not visually distinguish between hemp and marijuana if he were shown hemp that day. Additionally, although Officer Galluppi testified that he had the opportunity to take a whiff of fresh hemp and fresh marijuana in a training, that training occurred approximately two or three years prior to Defendant's arrest on 5 February 2020. While Officer Galluppi testified that he smelled 'fresh marijuana' coming from Defendant's driver side and that he had previously been trained in the difference between the odor of burned and unburned marijuana, Officer Galluppi having attended one training in which he had the opportunity to briefly smell fresh hemp and fresh marijuana would not constitute competent evidence to support a finding that Officer Galluppi had the training and experience necessary to distinguish between fresh hemp and fresh marijuana, especially considering Officer Galluppi admitted that he had 'not actually had to deal with hemp at this point.' The SBI Memo specifically states, '[h]emp and marijuana look the same and have the same odor, both unburned and burned[,]' again reinforcing that hemp and marijuana are indistinguishable on smell alone and casting doubt on any officer's ability to ever gain the training and experience necessary to distinguish between the odor of hemp and marijuana whether burned or unburned.

2. Conclusions of Law

Defendant challenges the trial court's second and third 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.

Defendant contends that Conclusion of Law (2) is unsupported as there are no findings that the odor Officer Galluppi detected from Defendant's vehicle was in fact marijuana, only that Officer Galluppi believed he smelled marijuana. Defendant argues that Conclusion of Law (3) is unsupported as Officer Galluppi's belief that he smelled marijuana does not give rise to probable cause.

Regarding the conclusions of law, I would hold Conclusions of Law (2) and (3) to be legally incorrect, reflecting an incorrect application of legal principles to the facts found. The odor detected by Officer Galluppi did not provide sufficient probable cause for a warrantless search of Defendant's vehicle. The odor could have been either the smell of legal industrial hemp or illegal marijuana. Although the trial court found that Officer Galluppi believed the odor to be marijuana, there are no findings of fact demonstrating what experience or training Officer Galluppi could have used to develop this belief. The absence of such findings suggests that Officer Galluppi's belief was mere suspicion or a conclusory allegation based solely on his stop of a 23-year-old black male for a window tint violation. Similarly, the fact that hemp and marijuana smell and look the same does negate law enforcement's ability to use the odor of what could potentially be a legal commodity or an illegal substance as a sufficient basis to establish probable cause.

As Finding of Fact (11) was not supported by competent evidence and Conclusions of Law (2) and (3) are legally incorrect, I would hold that the trial court erred in denying Defendant's motion to suppress evidence.

Accordingly, I respectfully dissent.

Certified to the Clerk of Superior Court New Hanover County, North Carolina.

By order of the Court this the 28th of December 2021.

WITNESS my hand and official seal this the 28th day of December 2021.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

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Hon. Jan Kennedy, Clerk of Superior Court