NO. 11A22 **FIFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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

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STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI

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FACTUAL AND PROCEDURAL HISTORY

On 5 February 2020 at approximately 4:09 p.m., Officer Ben Galluppi of the Wilmington Police Department was on routine patrol. (T pp. 6–8) Officer Galluppi noticed a Chrysler 300 drive by with such a "dark window tint" that Officer Galluppi "couldn't see inside the vehicle." (T p. 8) After pulling behind the vehicle and confirming it did not have an exemption sticker from the DMV for the dark tint, Officer Galluppi effectuated a traffic stop. (T pp. 10–11)

Defendant was the driver of the vehicle, and Officer Galluppi asked him for his license and registration. (T p. 11) Defendant could not provide his license. (T p. 11) While talking with Defendant, Officer Galluppi, who had both training and experience in narcotics offenses, detected "a very faint odor of marijuana -- what [he] kn[e]w to be marijuana coming from inside the vehicle." (T p. 12) Because Defendant was speaking "very softly[,]" Officer Galluppi had to lean in to properly hear Defendant. (T p. 12) When he did so, he "verified that it was marijuana that [he] was smelling -- coming from inside the vehicle and not from the surrounding area." (T pp. 12–13) Not wanting any possible evidence "tampered with or destroyed[,]" Officer Galluppi had Defendant step out of the vehicle and sit in the passenger seat of the patrol vehicle while Officer Galluppi ran Defendant's license information, which was

suspended. (T pp. 14–15) Officer Galluppi "could still smell the odor of marijuana coming from [Defendant's] person at that point." (T p. 15)

Another officer arrived to provide backup and stayed with Defendant while Officer Galluppi began to search Defendant's vehicle. (T pp. 15–16) Officer Galluppi asked Defendant whether he had any weapons in the vehicle, and Defendant "crossed his arms and shook his head 'no'[.]" (T p. 16) Officer Galluppi, however, discovered a firearm—a .44 Charter Arms revolver—in the center armrest of the vehicle. (T p. 16) Defendant was handcuffed, and the other officer found a pill on Defendant's person while searching Defendant prior to placing him in the patrol vehicle. A similar pill was found on the side of Defendant's vehicle. Officer Galluppi believed the pills looked like MDMA, and a field test returned a positive result for MDMA. (T p. 17)

Defendant was transported to the Wilmington Police Department for processing. (T p. 18) A search was performed on Defendant's person, and, as he was removing his pants, a clear plastic baggie fell from the area between the pants and the black shorts Defendant had on underneath. (T p. 19) Inside the baggie was "a rock-like substance in addition to like a green leafy substance inside packaged separately." (T p. 19)

Defendant was indicted for possession with intent to manufacture, sell or deliver a Schedule II controlled substance, possession of a controlled

substance within 1000 feet of a park, possession of a controlled substance within 1000 feet of a school, possession of a Schedule I controlled substance, possession of a Schedule II controlled substance, possession of marijuana (up to one-half ounce), carrying a concealed gun, driving while license revoked, and a window tint violation. (App. pp. 1–2)[1]

On 13 August 2020, Defendant filed a motion to suppress arguing that due to the "adoption of N.C.G.S. § 106-568.50 et seq. and the subsequent legalization of industrial hemp, an officer cannot rely on sight and smell of what he believes to be marijuana to form the basis of probable cause to search or seize." (App. pp. 4–22) On 29 October 2020, the matter came on for hearing at the 26 October 2020 Criminal Session of Superior Court, New Hanover County, before the Honorable R. Kent Harrell, Judge Presiding. (T p. 1) The trial court denied the motion to suppress. (App. pp. 23–24; T pp. 69–70)

Defendant pled guilty to felony possession of cocaine and carrying a concealed gun; pursuant to a plea agreement with the State, the State dismissed all remaining charges, and Defendant was to receive a suspended sentence of 4 to 14 months and be placed on supervised probation for 12 months. (App. p. 27) The trial court accepted the plea and sentenced

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[1] The appendix to the instant petition for writ of certiorari will be cited to as "(App. p. __)."

Defendant in accordance with the plea agreement. (App. p. 29) Defendant filed a written notice of appeal. (App. pp. 34–35)

Defendant filed an appellant brief arguing the trial court erred in denying the motion to suppress and a petition for writ of certiorari seeking review of the trial court's order due to his failure to give notice of intent to appeal the suppression denial during plea negotiations. The State filed a motion to dismiss the appeal due to this failure to give notice of intent to appeal, a response to the petition for writ of certiorari requesting that the Court of Appeals deny the petition, and an appellant brief on the merits. On 28 December 2021, the Court of Appeals entered an order dismissing Defendant's appeal and denying his petition for writ of certiorari. (App. pp. 39–47) Judge Jackson dissented from the order with explanation as to why he would have granted the petition for writ of certiorari.[2] (App. p. 39)

Defendant filed a notice of appeal and a conditional petition for writ of certiorari in this Court on 10 January 2022. (See Docket Sheet in No. 11A22)

[2] That Defendant lacked a right to appeal the denial of his motion to suppress, warranting dismissal, is therefore uncontested.

REASONS WHY THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

I. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S PETITION FOR WRIT OF CERTIORARI AFTER IT DISMISSED THE APPEAL.

Certiorari is a discretionary writ which is "to be issued only for good and sufficient cause shown." State v. Grundler, 251 N.C. 177, 189 (1959). Therefore, "[a] petition for the writ must show merit or that error was probably committed below." Id. Because the decision whether to allow a petition for writ of certiorari is discretionary, this Court reviews the denial of such a petition by the Court of Appeals for abuse of discretion. State v. Ricks, 378 N.C. 737, 740, 2021-NCSC-116, ¶ 5; see also State v. Bursell, 372 N.C. 196, 201 (2019) (a discretionary determination is reviewed for abuse of discretion "regardless of whether the Court of Appeals invokes it or declines to invoke it"). An abuse of discretion only occurs when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." In re R.L.O., 375 N.C. 655, 663 (2020).

A. The exercise of discretion to deny the petition for writ of certiorari was not manifestly unsupported by reason.

1. After receiving the full benefit of his plea bargain without giving notice that he intended to appeal the denial of his motion to suppress, Defendant attempted to get a "second bite at the apple" on appeal.

A guilty-pleading defendant has the right to appeal an order denying a motion to suppress evidence; however, this right appeal is "conditional, not absolute." State v. McBride, 120 N.C. App. 623, 625 (1995), aff'd, 344 N.C. 623 (1996). "[W]hen a defendant intends to appeal from the denial of a suppression motion pursuant . . . , 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." State v. Tew, 326 N.C. 732, 735 (1990). "The rule in this state is that notice must be specifically given." McBride, 120 N.C. App. at 625.

The Court of Appeals, affirmed per curiam by this Court, explained the importance of this rule:

> 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.
>
> We have previously observed that "it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction" in circumstances like those before us. Reynolds, 298 N.C. at 397, 259 S.E.2d at 853. The appeals process is not meant to be played like three-card monte, as guessing games in this setting upset basic notions of fairness, and threaten the efficient administration of justice.

McBride, 120 N.C. App. at 626.

In this case, Defendant'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. Furthermore, the two convictions were consolidated for judgment, and Defendant received a suspended sentence. (App. pp. 27–28; 29) Defendant, 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. It was not until a day after the trial court accepted the plea and sentenced Defendant that Defendant informed the State and the trial court of his intent to appeal. Therefore, Defendant received the full benefit of his plea bargain with State without giving the State or the trial court any notice that he intended to exercise a right to appeal the suppression order. While Defendant's failure to give notice of intent to appeal does not completely foreclose his ability to seek discretionary review, it is a factor that may be considered in whether to allow that review.

2. Defendant failed to show merit or that error probably occurred below.

The Fourth Amendment provides:

> The 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. The Fourth Amendment's protection "extends to occupants of automobiles." State v. Corpening, 109 N.C. App. 586, 589 (1993). While the Fourth Amendment generally requires that a warrant be secured to effectuate a search, "the warrant requirement is subject to certain reasonable exceptions." Kentucky v. King, 563 U.S. 452, 459 (2011). One such exception is the "automobile exception," which provides that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (per curiam).

Probable cause exists "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690, 696 (1996). A law enforcement officer "may draw inferences based on his own experience in deciding whether probable cause exists." Id. at 700. Determining whether an officer has probable cause looks to the totality of the circumstances. Maryland v. Pringle, 540 U.S. 366, 371 (2003). The United States Supreme Court has emphasized "that the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical

considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id. at 370 (internal citations and quotation marks omitted).

Equally important in determining whether probable cause exists is what is not required. "The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent[.]" State v. Eutsler, 41 N.C. App. 182, 183, disc. review denied, 297 N.C. 614 (1979). Indeed, the evidence need not even amount to a prima facie showing of criminal activity. Illinois v. Gates, 462 U.S. 213, 235 (1983); State v. Phillips, 300 N.C. 678, 684 (1980). Rather, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Gates, 462 U.S. at 243, n.13.

It is well settled that "[w]hen an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana." State v. Smith, 192 N.C. App. 690, 694, disc. review denied, 363 N.C. 380 (2009), cert. denied, 560 U.S. 925 (2010) (citing State v. Greenwood, 301 N.C. 705, 708 (1981)); see also United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004) ("We have repeatedly held that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place. In United States v. Scheetz, 293 F.3d 175, 184

(4th Cir. 2002), for example, we held that the smell of marijuana emanating from a properly stopped automobile constituted probable cause to believe that marijuana was in the vehicle, justifying its search.").

In this case, the trial court made the following relevant findings of fact:

> 4. Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle.
>
> 5. The defendant was the driver of the vehicle. He had no license but provided his vehicle registration.
>
> . . .
>
> 9. Officer Galluppi then conducted a search of the vehicle with the assistance of another officer. The search revealed a handgun in the console and a non-descript pill under the back seat.
>
> 10. The defendant was then placed under arrest and transported to the Wilmington Police Department for processing. While at the police department, the defendant was strip searched. While removing his clothing, a plastic pouch fell from the defendant's pants which contained two separate baggies; one containing a green leafy substance and the other containing a white rock like substance.
>
> 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 smell.

(App. pp. 23–24)

Defendant argues, and Judge Jackson would have concluded, that Finding of Fact 11 is "not supported by competent evidence" because the trial court stated that marijuana and hemp have "very similar physical characteristics" and that it is "difficult to tell one from the other either by appearance or smell" rather than using the terms in the SBI memo that the two look the same and have the same odor. (See Petition p. 22; App. p. 45) While the trial court did not use the exact terms of the SBI memo or provide direct quotations, the trial court's finding of fact accurately summarizes the proposition of the SBI memo about the similarities of industrial hemp and marijuana. Both Defendant and the dissent from the order fail to show that the trial court's use of other words which functionally have the same meaning renders the finding of fact unsupported by competent evidence.

Based upon its findings of fact, 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.

(App. p. 24)

The evidence, as described in the trial court's findings of fact, establish that when Officer Galluppi began to speak with Defendant at Defendant's vehicle, he detected an odor of marijuana coming from the vehicle. (App. p. 23) Furthermore, Officer Galluppi testified at the suppression hearing that he has attended multiple narcotics classes administered by the North Carolina State Crime Lab which included in the curriculum the smell of marijuana, both burned and unburned, and that he has encountered marijuana approximately 400 times in his experience as an officer. (T pp. 13–14) It is well established that the odor of marijuana, an illegal substance in this State, gives an officer probable cause to believe that the vehicle contains the contraband. Greenwood, 301 N.C. at 708; Smith, 192 N.C. App. at 694; State v. Corpening, 200 N.C. App. 311, 315 (2009). Applying this well-settled case law, the trial court did not err in concluding that Officer Galluppi had probable cause to believe that, based on the odor of marijuana coming from Defendant's vehicle, the vehicle contained marijuana.

The trial court also did not err by concluding that the legalization of industrial hemp does not negate this well-settled precedent. The legalization of hemp containing less than 0.3 THC does not change the illegal status of marijuana. The fact that hemp, a legal substance, and marijuana, an illegal substance, share a similar smell does not prevent a law enforcement officer from gaining probable cause to believe that a vehicle contains marijuana when he or she detects the odor of marijuana. This is because probable cause is only "a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238 (emphasis added). Probable cause does not require a prima facie showing of criminal activity, much less an actual showing that the substance emanating the odor is definitively marijuana. See Eutsler, 41 N.C. App. at 183. When an officer detects an odor of marijuana coming from a vehicle, there is still a "fair probability" that there is marijuana in the vehicle, despite the fact that it could be legal industrial hemp.

Furthermore, the Fourth Amendment did not require Officer Galluppi to definitively determine whether the odor was from marijuana or legal industrial hemp. There are numerous scenarios where facts and circumstances form probable cause to believe that contraband is present but turn out to be a factual mistake. As the United States Supreme Court has explained:

> The Fourth Amendment prohibits "unreasonable searches and seizures." Under this standard, a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake. An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment.

Heien v. North Carolina, 574 U.S. 54, 57 (2014). Thus, the fact that the substance that Officer Galluppi smelled could have been industrial hemp does not make the search here unreasonable.

B. The dissent from the order denying the petition is erroneous.

In his dissent from the order dismissing the appeal and denying the petition for writ of certiorari, Judge Jackson stated that he would have concluded that Conclusions of Law 2 and 3 were "legally incorrect":

> 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.

(App. p. 46)

At the outset, the evidence presented at the suppression hearing and the trial court's findings of fact establish that Officer Galluppi did have the training and experience to detect the smell of marijuana—he had training from the North Carolina State Crime Lab and had encountered both burned and unburned marijuana approximately 400 times in his career.[3] (App. p. 23; T pp. 13–14) Officer Galluppi was not required to have training or experience in or the ability to definitively determine whether an odor of marijuana is actually marijuana or legal hemp. For the reasons discussed above, probable cause only requires an officer to have a fair probability that contraband will be found in a place. In accordance with well-established case law, Officer Galluppi's detection of the smell of marijuana provided that fair probability and allowed him to search the vehicle.

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[3] And implicit in the trial court's finding that "Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle" is a finding that Officer Galluppi knew, by virtue of training and experience, what marijuana smelled like in the first instance.

Notably, the dissent from the order denying the petition for writ of certiorari does not cite any case law to support its conclusion that Officer Galluppi lacked probable cause based on odor of marijuana due to the legalization of hemp. To the contrary, while our appellate courts have not directly addressed this issue, the federal district courts of North Carolina have concluded that probable cause exists when an officer smells marijuana despite the legalization of industrial hemp in this State. See United States v. Brooks, No. 3:19-CR-00211-FDW-DCK, 2021 WL 1668048 (W.D.N.C. Apr. 28, 2021) ("Assuming, arguendo, hemp and marijuana smell 'identical,' then the presence of hemp does not make all police probable cause searches based on the odor unreasonable. . . . [I]f hemp does have a nearly identical smell to marijuana—and hemp was present—it would suggest to this court that TFO Newman was even more reasonable to believe evidence of marijuana was present."); United States v. Harris, No. 4:18-CR-57-FL-1, 2019 WL 6704996 (E.D.N.C. Dec. 9, 2019) ("[T]he 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. This is because only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." (cleaned up)); United States v. Holloman, 1:15CR246–1, 2015 WL 5824031, *4 n.2 (M.D.N.C.

Oct. 6, 2015) (despite legalization of hemp extract at the time for limited medical treatment, possession of marijuana remained illegal, and "[i]t is the fact that possessing marijuana is a crime that gives rise to probable cause."). Courts in other jurisdictions where hemp has been legalized have also concluded that an officer has probable cause to believe that marijuana is present in a place where he or she detects an odor of marijuana. United States v. Clark, 3:19-CR-64-PLR-HBG, 2019 WL 8016712 (E. D. Tenn. Oct. 23, 2019); United States v. Boggess, 444 F. Supp. 3d 730 (S.D. W. Va. 2020).

CONCLUSION

For the reasons stated herein, Defendant has not shown that the Court of Appeals abused its discretion by denying his petition for writ of certiorari. The State therefore respectfully requests that this Court deny the instant petition for writ of certiorari seeking review of the Court of Appeals' order.

Electronically submitted this the 24th day of January, 2022.

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CERTIFICATE OF SERVICE

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

Ms. Sarah Holladay
Email: sarah@holladaylawoffice.com

Electronically submitted this the 24th day of January, 2022.

Electronically Submitted
Nicholas R. Sanders
Assistant Attorney General