No. 11A22 DISTRICT FIVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover County
	)	No. COA21-144
JAQUALYN ROBINSON	)	

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NEW BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

I. DID THE DISSENT IN THE COURT OF APPEALS CORRECTLY CONCLUDE THAT GIVEN THE LEGALIZATION OF SMOKEABLE HEMP, A SUBSTANCE INDISTINGUISHABLE FROM MARIJUANA WITHOUT CHEMICAL ANALYSIS, THE ODOR OF CANNABIS SATIVA, IN THE ABSENCE OF ANY INDICATION OF CRIMINAL ACTIVITY, WAS INSUFFICIENT TO PROVIDE PROBABLE CAUSE FOR A WARRANTLESS SEARCH?

STATEMENT OF THE CASE

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

Mr. Robinson filed a motion to suppress on 11 August 2020. (R pp 14-27) Following a hearing on the motion to suppress, the trial court allowed the motion to suppress with regard to Mr. Robinson's statements but denied the motion with regard to evidence collected as the result of searches of his person and his vehicle. (R pp 43-44; T p 71) Mr. Robinson's attorney objected to the denial of the motion to suppress but did not use the words "notice of appeal." (T pp 71, 83-85)

The trial court then recessed for roughly two and a half hours. Mr. Robinson returned to the courtroom and entered a plea of guilty to felony possession of cocaine and carrying a concealed weapon. The remaining charges were dismissed. (R pp 46-49) Mr. Robinson was sentenced to 4-14 months imprisonment, suspended for 12 months supervised probation. (R pp 52-55)

The next day, Mr. Robinson returned to court. His counsel gave oral notice of appeal and asked that an appellate defender be appointed. The trial court inquired, "You're going to appeal the guilty plea?" Counsel responded, "Judge, it's my understanding that I have to appeal the entire judgment." The same day, trial counsel filed written notice of appeal. (T p 84; R pp 60-62) The trial court then signed the Appellate Entries. (R pp 63-64)

Undersigned counsel was appointed on 5 November 2002. (R p 65) The record on appeal was filed on 2 March 2021. On 24 March 2021, Mr. Robinson filed his Petition for Writ of Certiorari in the Court of Appeals. His opening brief was filed on 1 April 2021. On 6 July 2021, the State filed a motion to dismiss the appeal along with its response to the brief and the petition.

On 28 December 2021, the Court of Appeals issued an order summarily dismissing Mr. Robinson's appeal and directing him to pay costs. Judge Jackson wrote a lengthy dissent. (Attached in appendix, hereinafter "Dissent.")

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Following the dissent in the Court of Appeals, appeal lies to the Supreme Court of North Carolina pursuant to N.C.G.S. § 7A-30(2). If this Court should conclude that Mr. Robinson does not have an appeal of right, Mr. Robinson requests that the Court accept this brief as an amendment to his previously filed Petition for Writ of Certiorari. N.C. R. App. P. 21. *See also* N.C. R. App. P. 2.

STATEMENT OF FACTS

Mr. Robinson was indicted for a litany of offenses stemming from a search incident to a stop for a minor traffic violation. The ultimate question presented by this case is whether that search – based only on the very faint odor of suspected marijuana – was supported by probable cause in light of (a) the legalization of smokeable hemp, (b) evidence that legal hemp and illegal marijuana are indistinguishable based on

scent alone, and (c) the absence of any other indications of criminal involvement.

Evidence at the Suppression Hearing

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

However, while speaking with Mr. Robinson, Officer Galluppi detected "a very faint odor of marijuana…coming from the vehicle." (T p 12) In his training as a law enforcement officer, Galluppi learned about "the odor of marijuana and how it was probable cause for searching a vehicle." (T p 13) Based only on the "very faint odor of marijuana," Officer Galluppi directed Mr. Robinson to step out of his vehicle and sit in the back of Galluppi's police cruiser. (T pp 14-15) Another officer

stood with Mr. Robinson while Officer Galluppi searched the Chrysler. (T pp 15-16) A revolver and a pill believed to be MDMA[1] were found in the car. (T pp 16-17) A second similar pill was found during a pat-down of Mr. Robinson. (T p 50) During a strip search of Mr. Robinson at the police station, police recovered a plastic bag which appeared to contain marijuana and crack cocaine[2]. (T pp 18-19)

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

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

[2] No testing appears to have been done on these items.

to tell the difference." (*Id.*) Hemp products are available across North Carolina from hundreds of retailers[3]. (*Id.*)

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

At the hearing, defense counsel acknowledged existing caselaw holding that the odor of marijuana provides probable cause for a search

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[3] One may legally purchase smokeable hemp within walking distance of this Court. https://hempfarmacy.us/pages/locations

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

The trial court denied the motion to suppress, stating:

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

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

In the trial court's subsequent written order, it found as fact that, "Marijuana and hemp share very similar physical characteristics and it is difficult to tell one from the other either by appearance or by smell."

(R p 44) Nonetheless, the trial court made the following conclusions of law:

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

The Decision of the Court of Appeals

On 28 December 2021, the Court of Appeals issued an order dismissing Mr. Robinson's appeal without explanation[4]. (Dissent, p 1) In relevant part, the majority portion of the order simply states:

> 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.

[4] The dissent suggests that the majority denied certiorari "because they do not find merit in Defendant's argument on appeal." (Dissent, p 1) This Court reviews decisions of the Court of Appeals for errors of law. *In re E.D.*, 372 N.C. 111, 116 (2019).

In the referenced motion, 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)

In dissent, Judge Jackson wrote several pages in the style of a full opinion, ultimately concluding that the trial court erred in denying the motion to dismiss. (Dissent, pp 1-8) As to whether the State had sufficient notice of Mr. Robinson's intent to appeal the denial of his motion to suppress, Judge Jackson observed that Mr. Robinson's counsel contemporaneously objected to the denial of the motion to suppress and that the State did not object when Mr. Robinson gave notice of appeal in open court the next day. (Dissent, p 2)

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. (Dissent, pp 2-8)

ARGUMENT

State and federal laws regarding the legality of marijuana are disparate and rapidly evolving. According to the National Conference of State Legislatures, 18 states, two territories, and the District of Columbia have authorized marijuana for recreational purposes. An additional 18 states have approved marijuana for medical use. Including North Carolina, 11 states have passed laws permitting the use of CBD oil and other cannabis-related products. Only three states have no form of legalized cannabis. State Medical Cannabis Laws, *available at*: https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

Similarly, the law regarding whether the odor of suspected marijuana provides probable cause for a search is also disparate and rapidly evolving. This case presents the question of whether – given the

legalization of smokeable hemp and the inability to distinguish between hemp and marijuana based on smell alone – North Carolina's view of probable cause must also evolve.

As argued in the dissent below, the odor of suspected marijuana no longer automatically provides probable cause; it is instead one factor to be considered in the totality of the circumstances. Because the search in this case was based only on the very faint smell of something that may or may not have been an illegal substance, the officer did not have probable cause and the motion to suppress should have been allowed.

I. THE DISSENT IN THE COURT OF APPEALS CORRECTLY CONCLUDED THAT GIVEN THE LEGALIZATION OF SMOKEABLE HEMP, A SUBSTANCE INDISTINGUISHABLE FROM MARIJUANA WITHOUT CHEMICAL ANALYSIS, THE ODOR OF CANNABIS SATIVA, IN THE ABSENCE OF ANY INDICATION OF CRIMINAL ACTIVITY, WAS INSUFFICIENT TO PROVIDE PROBABLE CAUSE FOR A WARRANTLESS SEARCH.

The trial court erred in denying the motion to suppress because the sole basis for the search was the very faint odor of something that was equally likely to be marijuana or hemp. Odor standing alone has never provided probable cause; courts have long required a showing that the officer had the training and experience necessary to form a reasonable belief that what he smelled was indeed contraband. Not only

did the evidence here fail to support such a finding, with the legalization of hemp, it is no longer possible for an officer to identify marijuana based on smell alone, regardless of his level of experience. (*See* Dissent, p 2) In addition, there were no other indicia of criminal activity. Thus, the totality of the circumstances did not establish probable cause and the order denying the motion to suppress should be vacated for the reasons stated in the dissent.

A. This Case is Properly Before This Court

1. Although Styled as an Order, the Court of Appeals' Determination of Mr. Robinson's Case is Effectively an Opinion Entitling Him to Review Under N.C.G.S. § 7A-30(2).

In *Steingress v. Steingress*, 350 N.C. 64 (1999), this Court reviewed the Court of Appeals' dismissal of an appeal pursuant to N.C.G.S. § 7A-30(2). The Court of Appeals' opinion, as it appears in both LEXIS and Westlaw, is a single word: "dismissed." 1998 N.C. App. LEXIS 568. In its analysis, this Court quotes from a dissenting opinion which does not appear in the online or print reporters. Undersigned counsel contacted both the Supreme Court Library and the office of the Clerk of the Court of Appeals in an attempt to resolve this discrepancy; neither court has retained any records in *Steingress* due to the age of

the case. Outreach to the University of North Carolina Law Library was similarly unsuccessful in finding the "opinion" referred to by this Court. Counsel has thus been unable to determine whether the opinion to which this Court referred was in fact a dissent from an order. In any event, *Steingress* suggests that one has a right to appeal based on a dissent from a dismissal in the Court of Appeals.

In the United States Supreme Court, a dissent from an order is considered an opinion. *See* https://www.supremecourt.gov/opinions/opinions.aspx. The dissent in this case should also be treated as an opinion, entitling Mr. Robinson to review under N.C.G.S. § 7A-30(2). Whatever caption it bears, the dismissal of Mr. Robinson's appeal is a final judgment, not an intermediary step in the Court of Appeals' process. Given the lengthy dissent, it is unclear why the Court of Appeals would style the dismissal as an order rather than an opinion. *Cf. State v. Monroe*, 102 N.C. App. 567, 570 (1991) (dissent from a dismissal), *vacated and remanded at* 330 N.C. 433 (1991). Indeed, captioning the dismissal as an order rather than an opinion appears to have been an arbitrary choice, serving no function other than impeding Mr. Robinson's ability to appeal further.

The Court of Appeals' nine-page order in this case is comparable in length to some of its recent published opinions. *See e.g.*, *Moore v. Trout*, 2022-NCCOA-56 (six pages). Although the majority provided no explanation, the dissent provided all that one would ordinarily find in an opinion: factual and procedural background, a review of precedent, and the application of the law to the facts of this case. So, too, does the dissent provide this Court with all it needs to review the issues presented by Mr. Robinson's case.

2. In the Alternative, This Court Should Issue its Writ of Certiorari.

If there is no appeal of right based on the dissent, this Court should issue its writ of certiorari to hear Mr. Robinson's appeal and decide the merits of his case.

Because the Court of Appeals provided no rationale for its dismissal of Mr. Robinson's appeal or its denial of his Petition for Writ of Certiorari, it is impossible to know whether they abused their discretion by doing so. Did the Court of Appeals fail to recognize that it had the authority to allow certiorari under these procedural circumstances? Was the Court of Appeals aware of its jurisdiction but unpersuaded by Mr. Robinson's arguments on the merits?

It is not for this Court to speculate about what the lower court majority's reasoning might have been. It is, however, fully within this Court's power to issue the writ "for review of orders of the Court of Appeals when no right of appeal exists." N.C. R. App. P. 21(a)(2). Mr. Robinson should not be denied access to the courts to present a meritorious issue where his attorney said, "I object" rather than "I give notice of appeal."

As Judge Jackson observed in his dissent, "it is important to note that…defendant objected to the ruling" denying his motion to suppress. (Dissent, p 2) Thus, the State had some form of notice of his dissatisfaction with that ruling. Furthermore, "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 to give proper notice." (*Id.*) Where the State elected not to complain until after the defendant had no means to preserve his right to appeal, certiorari should issue.

3. As a Final Alternative, This Court Can Reach the Merits Through Rule 2.

If there is no other means for this Court to reach the issue presented, Mr. Robinson asks the Court to invoke Rule 2. Pursuant to N.C. Rule App. 2, this Court may suspend or alter the Rules of Appellate Procedure in order to "expedite decision in the public interest." Over 30,000 people are charged with marijuana-related crimes in North Carolina every year. North Carolina Task Force for Racial Equity in Criminal Justice, Report 2020, page 84, *available at*; https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf. Defendants, prosecutors, and police would all benefit from this Court's guidance on how the legalization of hemp should impact probable cause determinations for tens of thousands of searches conducted across the state every year.

In addition, a finding that police do not have probable cause to conduct searches and seizures based only on the odor of cannabis would further the legislative goal of advancing the hemp industry, both agricultural and retail. Hemp farmers, whose number includes a former senior resident superior court judge, necessarily possess large quantities of something that looks and smells like marijuana. *See*

Retired Judge Turns to Hemp, Mt. Airy News, June 18, 2019, available at: https://mtairynews.com/news/75102/retired-judge-turns-to-hemp. Hemp retailers should not be subject to the seizure of their inventory or the harassment of their customers. *See* Charges Against Essential Hemp Co-Owner Dismissed, Greensboro News and Record, Jan. 3, 2022, available at: https://greensboro.com/news/local/crime-and-courts/charges-against-essential-hemp-co-owner-dismissed-but-hes-still-looking-for-a-proper-conclusion/article_5d69f2ee-6cc0-11ec-92e8-f3ded6631dd0.html (police seized $25,000 worth of inventory from a small business owner; the charges were later dismissed). This Court's guidance is needed far beyond the four walls of this case.

B. Standard of Review

The scope of appellate review upon a motion to suppress is "strictly limited to whether the trial judge's underlying findings of fact are supported by competent evidence, in which case 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 (1982).

C. Core Principles

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject to only a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825 (1982) (cleaned up); *see also* N.C. CONST. ART. I, SEC. 20. A warrantless search of a motor vehicle on a public roadway is a violation of the Fourth Amendment unless it is supported by probable cause. *State v. Isleib*, 319 N.C. 634, 638 (1987).

"Probable cause exists where the facts and circumstances within an officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched." *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364, 370 (2009) (cleaned up). In other words, whether probable cause exists is determined by considering the totality of the circumstances. *State v. Benters*, 367 N.C. 660, 664 (2014).

An officer must have "more than bare suspicion" that a crime has been committed before he can lawfully engage in a warrantless search. *State v. Zuniga*, 312 N.C. 251, 261 (1984) (citation omitted); *see also State v. Mbacke*, 365 N.C. 403, 409 (2012) (probable cause requires more than a reason to believe). Officer Galluppi detected the "very faint odor" of something that may or may not have been a controlled substance. (T p 12) In the absence of any other evidence to suggest that the source of this odor was illegal in nature, Officer Galluppi had only a bare suspicion that it was marijuana. The trial court erred in denying the motion to suppress all evidence resulting from the search of Mr. Robinson's vehicle and his person.

The notion that an officer can identify contraband based on smell alone originates in *Taylor v. United States*, 286 U.S. 1 (1932). The case arose during Prohibition and concerned the search of the defendant's garage and subsequent seizure of one hundred twenty-two cases of liquor. The search began after the agents, standing outside the garage, believed they smelled whiskey. Although the search was thrown out for other reasons, the Supreme Court held for the first time that, "Prohibition officers may rely on a distinctive odor as a physical fact

indicative of a possible crime; but its presence alone does not strip [the defendant] of constitutional guarantees against an unreasonable search." *Id.* at 6.

Taylor was further developed in *Johnson v. United States*, 333 U.S. 10 (1948), wherein officers detected the odor of burning opium and entered a hotel room without a warrant. *Johnson* clarified that in order for an odor to support probable cause, there must be (1) evidence that the odor "is one sufficiently distinctive to identify a forbidden substance," and (2) that the officer is "qualified to know the odor." *Id.* at 13.

D. The Legalization of Hemp Must Necessarily Change the Probable Cause Analysis.

Now that smokeable hemp is legal in North Carolina, marijuana does not have a sufficiently distinct odor as required by *Johnson*. Nor are officers capable of being qualified to distinguish between legal hemp and illegal marijuana based on scent alone.

1. Marijuana Does Not Have a "Sufficiently Distinctive" Odor.

The presumed odor of marijuana has long been found sufficient to create probable cause to search a vehicle. *State v. Greenwood*, 301 N.C.

705, 708 (1982). Such decisions are predicated on the idea that marijuana has a unique odor unlike any legal substance, enabling officers to identify it by smell alone. *See e.g.*, *State v. Mitchell*, 224 N.C. App. 171, 179 (2012) (this property makes marijuana "distinguishable from other controlled substances that require more technical analyses for positive identification.") As Judge Jackson observed in his dissent, "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. However, marijuana is no longer exceptional." (Dissent, p 3)

In 2015, the General Assembly legalized industrial hemp, a plant identical to marijuana in both smell and appearance. (R pp 28-29 (it is "impossible" to tell the two apart in the field)) Marijuana can only be distinguished from hemp through chemical analysis. Legal hemp contains not more than 0.3% delta-9 tetrahydrocannabinol ("THC"). N.C.G.S. § 106-568.51(7). Any substance derived from the cannabis plant containing a greater amount of THC is marijuana, a Schedule IV controlled substance. N.C.G.S. § 90-87(16). THC is an odorless chemical

compound. (Dissent, p 6) Because the chemical that distinguishes legal hemp from illegal marijuana has no smell, probable cause can no longer be based on odor alone.

> Legal hemp and 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. 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. THC, on the other hand, is an odorless chemical compound. 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.

(Dissent, pp 5-6)

The terpenes and sesquiterpenes responsible for the allegedly distinctive odor of marijuana are present in all cannabis plants – whether they be marijuana or hemp. These chemical compounds include caryophyllene, which some drug-sniffing dogs are trained to detect. Cannabis sativa, *available at:* https://en.wikipedia.org/wiki/Cannabis_sativa. Marijuana does not have a distinctive smell; cannabis does. Because not all cannabis products are illegal, smell alone cannot suffice to give an officer probable cause.

> The legalization of smokeable 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 matter being tested. This reality presents a conundrum for law enforcement officers.
>
> (Dissent, p 4)

In lobbying against the legalization of smokeable hemp, the law enforcement community acknowledged that it is "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." (R p 29) The Director of the North Carolina Conference of District Attorneys similarly told a Senate committee that law enforcement "cannot discern the difference between smokeable hemp and marijuana," and would therefore "not be able to seize or arrest" based on sight or smell alone. (R pp 35-36) The legislature heard these pleas but sided with the farmers and small business owners whose livelihoods rely on North Carolina's hemp

industry. (*See* R pp 36, 41; Southeast Hemp Association member businesses, *available at*: http://www.sehemp.org/home)

As the Court of Appeals recently observed, "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." *State v. Parker*, 277 N.C. App. 531, 541 (2021). The *Parker* court did not need to reach the ultimate question, as the facts of that case presented other evidence to support probable cause to search the vehicle, including a passenger's admission that he had just smoked marijuana and the passenger's subsequent production of a partially smoked marijuana cigarette from his sock. *Id.* at 541-42.

Like the Court of Appeals, this Court has not squarely confronted the question of whether, in light of the legalization of hemp, the odor of suspected marijuana, standing alone, continues to create probable cause[5]. This case gives this Court the opportunity to re-examine its precedent in light of new information challenging the assumptions on which those decisions were founded.

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[5] The Court of Appeals recently heard oral argument in a case presenting this issue, among others. *State v. Teague*, COA21-10.

2. No Officer is Capable of Identifying Marijuana Based on Smell Alone, and the Evidence in this Case is Clear that Officer Galluppi Could Not Distinguish Marijuana from Hemp.

It was merely possible that what Officer Galluppi smelled was marijuana; it could also have been legal hemp. The two cannot be distinguished without chemical analysis. This Court should conclude that odor alone does not provide the probable cause necessary for a warrantless search under the Fourth Amendment. An officer does not have probable cause to believe that a crime has occurred when he encounters something that looks and smells the same as a legal substance. In the absence of some additional circumstance pointing to Mr. Robinson's involvement in illegal narcotics, his motion to suppress should have been allowed.

As the SBI memo, the statements of prosecutors and law enforcement officers, and decisions of courts in other jurisdictions demonstrate, hemp and marijuana are indistinguishable based on sight or smell. (Dissent, p 5) The State cannot meaningfully argue otherwise. Neither trained K-9s nor scientists with microscopes can tell the difference between legal hemp and illegal marijuana. Cynthia Sherwood, Even Dogs Can't Smell the Difference: The Death of 'Plain

Smell' As Hemp is Legalized, *available at*: https://www.tba.org/?pg=Articles&blAction=showEntry&blogEntry=51445; Is it Hemp or Is it Pot? Drug Dogs Can't Say, The Columbus Dispatch, Aug, 12, 2019, available at: https://www.dispatch.com/story/news/crime/2019/08/12/is-it-hemp-is-it/4478086007/ (the Ohio Highway Patrol has stopped training K-9s to detect marijuana because they cannot distinguish it from hemp). It is purely magical thinking to think that law enforcement officers are any different.

Furthermore, as the dissent observed, Officer Galluppi testified that his personal experience with hemp was limited to a single training exercise in which officers were directed to "take a whiff" of a fresh hemp bud contained in a mason jar with holes on top. (T pp 33-34, Dissent, p 7) Even in a controlled setting, Officer Galluppi could only discern a "very, very, very slight difference between hemp and marijuana." (T p 33) He had never to his knowledge encountered hemp outside of a training exercise and had never encountered burnt hemp at all. (T p 34) Even if it were theoretically possible to smell the difference between hemp and marijuana, there was insufficient evidence that Officer Galluppi had this capability.

3. Case Law from Other Jurisdictions Points to the Propriety of an "Odor Plus" or Totality of the Circumstances Analysis.

Only a few states have legalized smokeable hemp but not marijuana. In *Gowen v. State*, 360 Ga. App. 234 (2021) the Court of Appeals of Georgia considered whether the smell of burnt marijuana provided probable cause to search a vehicle, in light of that state's legalization of hemp. The Georgia statute specifically excludes "the unprocessed flower or leaves of the hemp plant," i.e., smokeable hemp, from legalization. *Id.* at 238. Therefore, the Georgia court concluded, the smell of burnt marijuana provides probable cause because there is no legal product that produces a similar odor. In North Carolina, by contrast, smokeable hemp is legal to grow, sell, and consume. Because marijuana cannot be distinguished from this completely legal product on smell alone, additional circumstances are necessary to provide probable cause for a search.

In Kansas, CBD oil is the only legal form of cannabis. *See* Cannabis in Kansas, *available at*: https://en.wikipedia.org/wiki/Cannabis_in_Kansas. In *State v. Hubbard*, 309 Kan. 22 (2018), the Kansas Supreme Court considered whether the odor of marijuana alone

provided probable cause to search a residence. Despite there being no legal source for the smell of burnt cannabis, the Court held that probable cause depended instead on the totality of the circumstances surrounding the detection of the odor. "Such circumstances include, but are not limited to, proximity to the odor's source, reported strength of the odor, experience identifying the odor, elimination of other possible sources of the odor, and the number of witnesses testifying to the odor's presence." *Id.* at 969.

States that have legalized marijuana in some forms but not others have reached similar conclusions. In *Commonwealth v. Barr*, the Pennsylvania Supreme Court recently concluded that although it previously subscribed to the "plain smell" doctrine, the legalization of medical marijuana necessitated a change. 2021 WL 6136363[6] In Pennsylvania, "the smell of marijuana alone cannot create probable cause to justify a search under the state and federal constitutions." *Id.* at *12. Because "the smell of marijuana can still signal the possibility of criminal activity," it "may be a factor, but not a stand-alone one, in evaluating the totality of the circumstances for purposes of determining

[6] This case was decided on Dec. 29, 2021. Only the electronic citation is currently available. In LEXIS, the citation is 2021 Pa. 4375.

whether police had probable cause to conduct a warrantless search." *Id.* at *13. In *Barr*, as here, the search was based entirely on the suspected smell of marijuana, which the officer noticed after stopping the vehicle for a minor traffic violation. Thus, the *Barr* court concluded that the motion to suppress should have been granted.

In Minnesota, medical marijuana is legal for persons with certain conditions. For everyone else, the distinction between legal hemp and illegal marijuana is whether the THC concentration is more or less than 0.3% on a dry weight basis. *State v. Dixon*, 963 N.W.2d 724, 730 (Minn. 2021). The Minnesota Court of Appeals concluded that officers had probable cause when, after pulling the defendant over for a traffic violation and smelling the odor of cannabis, the officers also observed that the defendant was slurring his words. In addition, the officers knew that the defendant had several prior controlled substance convictions. Finally, the defendant admitted to having marijuana in his vehicle and to smoking marijuana earlier in the day. *Id.* at 732. *See also State v. Loveless*, 966 N.W.2d 493, 506 (Minn. 2021) (THC content greater than 0.3% is an essential element which must be proven beyond

a reasonable doubt through scientific and/or circumstantial evidence to sustain a conviction).

These cases suggest that in North Carolina, where smokeable hemp – identical to marijuana in smell and appearance, and distinguishable only through chemical analysis of THC levels – is legal, additional circumstances indicative of criminal conduct are necessary for an officer to develop probable cause. Just as the officer in *Barr* could not know by smell whether the defendant was an authorized medical marijuana user, officers in North Carolina cannot know by smell whether suspects possess hemp or marijuana. Smell can be one factor, but it must be combined with others, like those listed in *Dixon*, before a search or seizure is permitted under the Fourth Amendment.

E. Findings of Fact

The U.S. Supreme Court has long held that the "presence of odors" can establish probable cause for a search warrant if the following conditions are met: (1) the issuing judicial officer "finds the affiant qualified to know the odor"; and (2) the odor "is one sufficiently distinctive to identify a forbidden substance." *Johnson v. United States*, 333 U.S. at 13. In this case, the findings of fact establish neither.

Therefore, Officer Galluppi did not have probable cause to search Mr. Robinson or his vehicle, and all evidence obtained from those searches should have been suppressed.

1. The Odor of Suspected Marijuana

The trial court's fourth finding of fact is, "Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle." (R p 43) This is the trial court's only finding regarding the State's evidence in support of probable cause. (Dissent, p 7)

This finding of fact is incomplete in a manner important to the totality of the circumstances analysis. Officer Galluppi detected the "very faint" odor of what he believed to be marijuana. The strong odor of an impairing substance has frequently been noted by the appellate courts as part of their reasonable suspicion and/or probable cause analysis. *See e.g., State v. Williams*, 225 N.C. App. 636, 640 (2013) (alcohol); *State v. Yates*, 162 N.C. App. 118, 123 (2004) (marijuana). If the strong odor of suspected marijuana weighs in favor of a finding of probable cause, so too should a very faint odor weigh against it. In assessing probable cause, the trial court must consider the totality of

the circumstances. *Illinois v. Gates*, 462 U.S. 213, 233 (1983). Had the trial court considered the totality of the circumstances rather than the single factor of odor, it would have reached a different conclusion.

2. Marijuana and Hemp – The SBI Memo

The trial court's eleventh finding of fact is: "The Court took judicial notice of the State Bureau of Investigations bulletin regarding the similarities of marijuana and hemp. The court took judicial notice of the bulletin only to the extent that the physical properties and characteristics of the two plants were discussed. Legal conclusions and opinions contained in that bulletin were disregarded as the State Bureau of Investigation does not have legal authority to issue binding opinions on the sufficiency of evidence to establish probable cause. Marijuana and hemp share very similar physical characteristics and it is difficult to tell one from the other either by appearance or by smell." (R p 44)

As the dissent concluded, this finding of fact is not fully supported by competent evidence. (Dissent, p 7) The SBI memo does not say that hemp and marijuana are "very similar" or that they are "difficult" to tell apart. The memo says that hemp and marijuana are "the same species,"

that they "look the same and have the same odor," and that law enforcement officers in the field are completely unable to distinguish between the two. (R pp 28-29) Having taken judicial notice of the SBI memo "only to the extent that the physical properties and characteristics of [hemp and marijuana] were discussed," it was unreasonable of the trial court to make findings of fact inconsistent with how the memo describes those properties and characteristics.

While the SBI memo is not binding authority, official statements of the Bureau are entitled to some weight, and it was unreasonable for the trial court to ignore the memo's discussion of probable cause in its entirety. The State Bureau of Investigation is a law enforcement agency, created by the legislature "In order to secure a more effective administration of criminal laws of the state." *See* SBI History, available at: https://www.ncsbi.gov/Home/SBI-History. To this end, the SBI conducts its own criminal investigations, provides assistance to local law enforcement agencies, and aids prosecutors in preparing evidence for use in criminal courts. *See* SBI Mission and Values, available at: https://www.ncsbi.gov/Home/SBI-Mission-and-Values. Because of the

SBI's expertise in criminal matters, the trial court should have given some consideration to the SBI's discussion of probable cause.

3. The Absence of Reasonableness

Significantly, the trial court did not make any findings of fact indicating that Officer Galluppi had the training and experience necessary to distinguish between hemp and marijuana. As the dissent observed, this is presumably because no such evidence was presented. (Dissent, pp 7-8) The trial court also did not make any findings of fact regarding Officer Gallupi's training and experience in general.

Our courts have often assumed that qualified officers are capable of identifying marijuana based on sight or smell alone. *See e.g.*, *State v. Grice*, 367 N.C. 753, 754-55 (2015); *State v. Johnson*, 225 N.C. App. 440, 455 (2013) (the trooper had 20 years of experience, including 300 hours of drug interdiction and identification training). Most of these decisions predate the legalization of hemp and all are predicated on what is now known to be a false assumption that marijuana is readily distinguishable from any legal substance. Probable cause requires not only the officer's belief that an item is contraband, but also that the officer's belief be reasonable.

For example, in *State v. Lenoir*, 259 N.C. App. 857, 863 (2018), the Court of Appeals found that the trial court plainly erred in admitting evidence gathered as a result of a search warrant stating only that the officer saw "a smoke pipe used for methamphetamine" in a bedroom of the defendant's house. Because the affidavit underlying the warrant made no mention of the officer's training and experience, nor did it explain the basis of his belief that the pipe was used for smoking methamphetamine as opposed to tobacco, it failed to provide probable cause for the issuance of the warrant. *Id.*

Similarly, *State v. Beaver*, 37 N.C. App. 513, 517-18 (1978) concerned a shot glass containing a film of white powder seen in plain view inside the defendant's vehicle. Where nothing in the officer's testimony established that by virtue of his training and experience, he had a particular reason to believe the white film was an illegal narcotic, he did not have probable cause to seize it. It is not enough that something "*could* have been a controlled substance;" the officer must have a reasonable belief that it is. *Id.* at 518 (emphasis in original).

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

touched base on the difference between marijuana and hemp." (T p 13) Officer Galluppi had never encountered hemp in the field, never compared hemp and marijuana in a real-life situation, and did not think he would be able to distinguish between the two if he did. (T p 30) Officer Galluppi's experience with hemp was limited to a single training exercise in which the instructor had a mason jar from which the officers "could take a whiff of hemp." (T p 34) Officer Galluppi testified that there was a "very, very, very slight difference" between the odor of unburnt hemp and the odor of unburnt marijuana. (T p 33) He had never to his knowledge encountered burnt hemp. (T p 34) Officer Galluppi's belief that what he smelled was marijuana as opposed to hemp was not reasonable; it was merely speculative. Officer Gallupi's prior experience with marijuana is not evidence that he reasonably concluded what he smelled was not hemp. Officer Galluppi is Maslow's hammer, assuming everything is a nail because that is all he knows.

Even if the trial court did not credit the SBI's conclusion that law enforcement officers "cannot distinguish between hemp and marijuana," the State's evidence failed to prove otherwise. (R p 30) While Officer Galluppi took "a handful of narcotics classes" and encountered

marijuana many times, a single "whiff" of hemp in 2017 or 2018 does not give Officer Galluppi the training and experience necessary to differentiate between hemp and marijuana. (T p 6, 13-14, 32-33) Detecting the "very faint odor" or something that smells "very, very, very" similar to a legal substance does not give an officer probable cause to believe that what he smelled was in fact marijuana. (T pp 12, 33) "[A] man of reasonable caution" would require additional "reasonably trustworthy information" to believe that a crime had occurred. *Safford Unified*, 557 U.S. at 370. As the dissent stated, "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." (Dissent, p 5)

F. Conclusions of Law

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

1. Probable Cause Based on Odor Alone

The trial court's second conclusion of law was: "That the odor of marijuana emanating from the vehicle provided sufficient probable cause for a warrantless search of the vehicle under the automobile exception to the Fourth Amendment warrant requirement." (R p 44) This conclusion is based on the assumption that the "very faint odor" Officer Galluppi smelled was, in fact, marijuana. There was no evidence at the hearing to support this conclusion, nor could Officer Galluppi have known at the time whether what he smelled was a controlled substance. The findings of fact say only that the officer "believed" he smelled marijuana, but the conclusions of law assume that the substance was, in fact, marijuana.

In any event, "odors alone do not authorize a search without warrant." *Johnson v. United States*, 333 U.S. at 13. Where, as here, a search is based entirely on an odor and the evidence establishes that the officer either could not distinguish that odor from a legal substance or that he lacked the training to reliably do so, it violates the Fourth Amendment. (Dissent, p 8)

The automobile exception to the Fourth Amendment provides that an officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband. *Isleib*, 319 N.C. at 636-37. An officer has probable cause to believe that contraband is concealed within a vehicle when, based on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found therein. *State v. McKinney*, 368 N.C. 161, 164 (2015). Standing alone, the "very faint" odor of something that is indistinguishable from (or at best "very, very, very" similar to) a legal substance gives rise to a *possibility* that a crime has occurred, but not to the *fair probability* required before a warrantless search can commence.

As the dissent put it, "Although the odor of hemp could be the odor of marijuana and vice versa, the crucial point 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, a search is a greater invasion of privacy…and thus requires a heightened justification." (Dissent, p 4 (emphasis added, cleaned up)) It should go without saying that if an officer has probable cause to believe that a

person is engaged in legal activity, neither the state nor the federal constitution would authorize a search on that basis.

In *Benters*, 367 N.C. at 661, officers received a tip from an anonymous informant that a residence was being used as a marijuana growing operation. In response, the officers secured utility records, which showed electricity usage "indicative of a marijuana grow operation." Officers then traveled to the home and observed items in plain view in the curtilage of the property such as potting soil, seed starting trays, and portable sprayers. Thereafter, the officers approached the house to conduct a "knock and talk," at which point they "noticed the strong odor of marijuana emanating" from an outbuilding. Finally, the officers observed thick plastic covering windows and doors, as is often done to hide the light of indoor marijuana growing operations. *Id.* at 662-63. Based on this information, officers obtained a search warrant which yielded fifty-five marijuana plants, numerous firearms, and $1540 in cash.

This Court determined that the officer's conclusory statement that marijuana growing was the likely cause of the unusual electricity usage was unpersuasive. "These unspecified extremes also may be explained,

however, by wholly innocent behavior such as the defendant intermittently visiting his property. Thus, these circumstances may justify additional investigation, but they do not establish probable cause." 367 N.C. at 672. Similarly, the officer's conclusion that the gardening supplies were indicative of a marijuana growing operation as opposed to normal gardening was not persuasive. *Id.* Finally, this Court determined that an officer's experience, extensive as it may be, is not sufficient to "balance the quantitative and qualitative deficit" left by such evidence. *Id.* at 673. Therefore, this Court concluded that the officers' observations were insufficient to establish probable cause and that the motion to suppress was appropriately granted. *Id.* at 673-74.

Similarly, the faint odor Officer Galluppi encountered in this case did not give rise to probable cause because what he smelled could have been the fully legal and "wholly innocent" substance of industrial hemp. (*See* Dissent, pp 4-5) With no other evidence pointing towards criminal involvement, Officer Galluppi's belief that the substance was marijuana was conclusory and did not give rise to probable cause.

The School of Government, a non-partisan, policy-neutral organization providing support and guidance to judges, prosecutors, and

defense attorneys across the state, has examined the impact of the legalization of hemp on marijuana prosecutions. Much like the SBI, the School of Government concluded that, "without a field test or some other way to verify whether something is hemp or marijuana, officers do not have probable cause to seize it or to arrest someone in possession of it without some other reason to believe the substance is contraband." Phil Dixon, Hemp or Marijuana?, *available at*: https://nccriminallaw.sog.unc.edu/hemp-or-marijuana/; see also Phil Dixon, Summer 2020 Hemp Update, *available at*: https://nccriminallaw.sog.unc.edu/summer-2020-hemp-update/ (noting that the probable cause problem remains "unsettled"). The School of Government suggests that when law enforcement officers encounter a substance they suspect is marijuana, additional circumstances such as "packaging, an admission, or signs of marijuana impairment" will provide sufficient evidence to establish probable cause. Phil Dixon, Carts, Wax, and Oh, My: The New World of Marijuana Extracts, *available at*: https://nccriminallaw.sog.unc.edu/carts-wax-and-oh-my-the-new-world-of-marijuana-extracts/. This is precisely the "odor plus" standard advanced by the dissent below. (Dissent, p 6)

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

2. Marijuana is Still Illegal

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

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

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

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

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

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

marijuana, possession with intent to manufacture, sell, or deliver, possession with intent to manufacture, sell, or deliver within 1000 feet of a park, or possession with intent to manufacture, sell, or deliver within 1000 feet of a school. Only the charges of window tint violation and driving while license revoked – both class 3 misdemeanors – would remain. Mr. Robinson would not have been convicted of a felony, with all its attendant consequences[7], nor would he have been eligible for prison time. Therefore, he was prejudiced by the trial court's erroneous denial of this motion to suppress.

CONCLUSION

For the foregoing reasons and authorities, Mr. Robinson respectfully requests that the trial court order denying his motion to suppress be reversed and his gun and drug-related convictions vacated.

In the alternative, Mr. Robinson asks that this case be remanded to the Court of Appeals. This Court may direct the Court of Appeals to issue a full opinion stating the majority's reasons for their disposition of this case, or to reconsider its decision in light of whatever guidance this

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

Court may provide about the continued use of smell to establish probable cause.

Respectfully submitted, this the 9th day of February 2022.

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CERTIFICATE OF FILING AND SERVICE

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

I further certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served upon Nicholas Sanders, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to nsanders@ncdoj.gov.

This the 9th day of February 2022.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987
COUNSEL FOR JAQUALYN ROBINSON

No. 11A22 DISTRICT FIVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover County
	)	No. COA21-144
JAQUALYN ROBINSON	)	

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APPENDIX

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North Carolina Court of Appeals
EUGENE H. SOAR, Clerk
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Court of Appeals Building
One West Morgan Street
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P. O. Box 2779
Raleigh, NC 27602
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.

. . .

(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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