NO. 11A22 **FIFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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

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NEW BRIEF FOR THE STATE
(Appellee)

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NEW BRIEF FOR THE STATE
(Appellee)

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ISSUES PRESENTED

I. WHETHER THE COURT OF APPEALS ABUSED ITS DISCRETION BY DENYING DEFENDANT'S PETITION FOR WRIT OF CERTIORARI WHERE DEFENDANT FAILED TO SHOW MERIT OR THAT ERROR WAS PROBABLY COMMITTED BELOW IN THE DENIAL OF HIS MOTION TO SUPPRESS.

STATEMENT OF THE CASE

On 28 May 2020, Jaqualyn Robinson ("Defendant") was indicted by a New Hanover County grand jury for possession with intent to manufacture, sell, or deliver (PWIMSD) a Schedule II controlled substance (cocaine) within 1,000 feet of a public park; PWIMSD a Schedule II controlled substance (cocaine) within 1,000 feet of an elementary school; PWIMSD a Schedule II controlled substance (cocaine); possession of a Schedule II controlled substance (cocaine); possession of a Schedule I controlled substance (MDMA); possession of marijuana; carrying a concealed gun; driving while license revoked; and a window tint violation. (R pp. 11–13)

On 13 August 2020, Defendant filed a motion to suppress arguing that, due to the "adoption of N.C.G.S. § 106-568.50 et seq. and the subsequent legalization of industrial hemp, an officer cannot rely on sight and smell of what he believes to be marijuana to form the basis of probable cause to search or seize." (R pp. 14–22) The matter came on for hearing on 29 October 2020 at the 26 October 2020 Criminal Session of Superior Court, New Hanover County, before the Honorable R. Kent Harrell, Judge Presiding. (T p. 1) The trial court orally denied the motion as to this issue and subsequently recorded its ruling in a written order entered the same day. (R pp. 43–44; T pp. 69–70)

Also on 29 October 2020, Defendant pled guilty to felony possession of cocaine and carrying a concealed gun pursuant to a plea agreement with the State. (R p. 47) In exchange, the State dismissed the remaining charges and agreed that Defendant would receive a sentence of 4 to 14 months' imprisonment to be suspended for a period of supervised probation for 12 months.[1] (R p. 48) The trial court accepted Defendant's guilty plea and sentenced him according to the plea agreement. (R pp. 52–55) On November 2020, Defendant entered written notice of appeal. (R pp. 61–62; T pp. 84–85)

Defendant filed a petition for writ of certiorari seeking the review of the denial of his motion to suppress on 24 March 2021 and an appellant brief arguing that denial was erroneous on 1 April 2021. (See Docket Sheet in No. COA21-144) On 6 July 2021, the State filed a motion to dismiss the appeal given that Defendant waived his right to appeal the denial of his motion to suppress, a response in opposition to the petition for writ of certiorari, and an appellee brief. (See Docket Sheet in No. COA21-144) The Court of Appeals entered an order on 28 December 2021 allowing the State's motion to dismiss

[1] The plea agreement also contained other conditions, such as Defendant enrolling in and successfully completing the Treatment Accountability for Safer Communities (TASC) program, completing twenty-four hours of community service, being "subject to frequent drug screens and warrant-less searches conducted by the Division of Community Corrections," and forfeiting the firearm seized. (R p. 48)

the appeal and denying Defendant's petition for writ of certiorari. In the order, Judge Jackson explained that he would have allowed the petition for writ of certiorari and reached Defendant's arguments. In this explanation, Judge Jackson stated that "[b]ecause the odor of legal hemp and the odor of 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." He therefore "would [have] h[e]ld that the trial court erred in denying Defendant's motion to suppress evidence." (See 12/28/2021 Order)

Defendant filed in this Court a notice of appeal based on what he contends is Judge Jackson's dissent and an alternative petition for writ of certiorari on 10 January 2022. On 24 January 2022, the State filed a motion to dismiss the appeal to this Court and a response in opposition to the alternative petition for writ of certiorari. The motion to dismiss and the alternative petition remain pending. (See Docket Sheet in No. 11A22)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

For the reasons discussed in the State's previously filed motion to dismiss the appeal and response to the alternative petition for writ of certiorari, both of which are incorporated herein, the State contends this appeal should be dismissed because Defendant lacks a right to appeal to this Court, and the writ of certiorari should not be issued.

STATEMENT OF THE FACTS

Officer Ben Galluppi with the Wilmington Police Department was on patrol the afternoon of 5 February 2020. (T pp. 6–8) While he was "observing traffic[,]" Officer Galluppi "saw a dark colored Chrysler 300 traveling eastbound with dark window tint[.]" (T p. 8) The tint caught "caught [his] attention" because he could not see inside the vehicle. (T p. 8) Believing that the window tint was darker than permitted by law, Officer Galluppi pulled out behind the vehicle and initiated a traffic stop. (T pp. 8–10)

As he approached the vehicle, Officer Galluppi confirmed that the vehicle did not have an exemption sticker issued by the Division of Motor Vehicles that would have permitted a window tint darker than the legal limit. (T pp. 10–11) Officer Galluppi asked Defendant, who was the driver and sole occupant of the vehicle, for his license and registration. (T p. 11) Defendant could not provide his license. (T p. 11) While talking with Defendant about the window tint,

Officer Galluppi, who had both training and experience in narcotics offenses, detected "a very faint odor of marijuana – what [he knew] to be marijuana coming from inside the vehicle." (T p. 12) Because Defendant was speaking "very softly" and turning away while speaking, Officer Galluppi had to "lean[ ] in to verify [Defendant's] date of birth. (T p. 12) When Officer Galluppi leaned closer, he "verified that it was marijuana that [he] was smelling – coming from inside the vehicle and not from the surrounding area." (T pp. 12–13)

Not wanting any possible evidence "tampered with or destroyed[,]" Officer Galluppi had Defendant step out of the vehicle and sit in the passenger seat of the patrol vehicle while Officer Galluppi ran Defendant's license information.[2] (T pp. 14–15) Officer Galluppi learned that Defendant's license was suspended. (T p. 15) During this time, Officer Galluppi "could still smell the odor of marijuana coming from [Defendant's] person[.]" (T p. 15)

Another officer arrived to provide backup and stayed with Defendant while Officer Galluppi began to search Defendant's vehicle. (T pp. 15–16) Officer Galluppi discovered a firearm, a .44 Charter Arms revolver, in the center armrest of the vehicle. (T p. 16) Defendant was handcuffed, and the other officer found a pill on Defendant's person while searching Defendant

[2] The trial court granted Defendant's motion to suppress the statements that he made while in the patrol vehicle. (R p. 44)

before placing him in the patrol vehicle again. A similar pill was then found on the side of Defendant's vehicle. Officer Galluppi believed the pills were MDMA, and a field test returned a positive result for that substance. (T p. 17)

Defendant was transported to the Wilmington Police Department for processing. (T p. 18) A search was performed on Defendant's person, and as Defendant was removing his pants, a clear plastic baggie fell from the area between Defendant's pants and the black shorts that he had on underneath. (T p. 19) The baggie contained "a rock-like substance[,]" which Defendant later stipulated as "crack cocaine or cocaine base." (T pp. 19, 80) Also inside the baggie was "a green leafy substance" that was packaged separately. (T p. 19)

STANDARD OF REVIEW

This Court reviews a decision of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); State v. Melton, 371 N.C. 750, 756 (2018). In this case, the Court of Appeals dismissed Defendant's appeal and denied his petition for writ of certiorari. Because the decision whether to allow a petition for writ of certiorari is discretionary, this Court reviews the denial of such a petition by the Court of Appeals for abuse of discretion. State v. Ricks, 378 N.C. 737, 740, 2021-NCSC-116, ¶ 5; see also State v. Bursell, 372 N.C. 196, 201 (2019) (a discretionary determination is reviewed for abuse of discretion "regardless of whether the Court of Appeals invokes it or declines to invoke it"). An abuse of

discretion only occurs where "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." State v. Whaley, 362 N.C. 156, 160 (2008) (cleaned up).

While Defendant does not contest this Court's standard of review when the Court of Appeals exercises its discretion to deny a petition for writ of certiorari, elsewhere in his petition he states "it is impossible to know whether [the Court of Appeals] abused their discretion" due to the summary order. (Def's Br p. 15) To the extent Defendant is suggesting the Court of Appeals did not exercise discretion in the first instance, this argument fails. There is no indication that the Court of Appeals acted under any misapprehension that it did not have the discretion to allow or deny the petition for writ of certiorari. This Court has stated it "will not assume error when none appears in the record[.]" State v. Kornegay, 313 N.C. 1, 19 (1985). Furthermore, to accept this argument would mean that any time our appellate courts issue a summary order declining discretionary review, it would not be apparent that the court actually exercised its discretion. This is, of course, not true. In this case, the Court of Appeals exercised its discretion to deny the petition for writ of certiorari; therefore, this Court reviews that decision for abuse of discretion.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION WHEN BY DENYING A PETITION FOR WRIT OF CERTIORARI THAT FAILED TO SHOW MERIT OR THAT ERROR WAS PROBABLY COMMITTED BELOW.

Defendant lost his right to appeal the order denying his motion to suppress and, thus, could only seek appellate review of that order through a petition for writ of certiorari. This Court has explained that certiorari is a "discretionary writ, to be issued only for good and sufficient cause shown." State v. Grundler, 251 N.C. 177 (1959). "[A] petition for the writ must show merit or that error was probably committed below." Id. Absent such a showing, the petition should be denied. State v. Rouson, 226 N.C. App. 562, 567, disc. review denied, 367 N.C. 220 (2013). For the reasons discussed below, Defendant failed to show in his petition merit or that error was probably committed when the trial court denied his motion to suppress. Therefore, the Court of Appeals' exercise of discretion to deny the petition for writ of certiorari was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." See Whaley, 362 N.C. at 160.

A. The Fourth Amendment permits an officer to conduct a warrantless search of a vehicle if probable cause exists to believe the vehicle contains contraband.

The Fourth Amendment to the United States, applicable to the states through the Fourteenth Amendment, ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend IV; Mapp v. Ohio, 367 U.S. 643, 655 (1961). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant" upon "the showing of probable cause[.]" Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

However, "the warrant requirement is subject to certain reasonable exceptions." Kentucky v. King, 563 U.S. 452, 459 (2011). One such exception is the "automobile exception[,]" which permits a warrantless search of a vehicle if it "is readily mobile and probable cause exists to believe it contains contraband[.]" Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (per curiam). This exception to the warrant requirement was recognized due to the unique aspects of automobiles—that is, "their inherent mobility and the decreased expectation of privacy in them." State v. Isleib, 319 N.C. 634, 639 (1987).

Probable cause exists "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that

contraband or evidence of a crime will be found[.]" Ornelas v. United States, 517 U.S. 690, 696 (1996). Stated differently, it 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) (emphasis added). "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists." Ornelas, 517 U.S. at 700. And those inferences are given "due weight" by reviewing courts. Id. at 699. The United States Supreme Court has repeatedly emphasized "that the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Maryland v. Pringle, 540 U.S. 366, 370 (2003) (cleaned up).

Equally important in determining whether probable cause exists is what is not required. Because "probable cause requires only a probability or substantial chance of criminal activity," "an actual showing of such activity" is not required. Gates, 462 U.S. at 238, n. 13; accord State v. Arrington, 311 N.C. 633, 636 (1984) ("Probable cause does not mean actual and positive cause nor import absolute certainty."). Indeed, the evidence need not even amount to a prima facie showing of criminal activity. Gates, 462 U.S. at 235. To require more than only a fair probability of criminal activity would "go[ ] much too far in confusing and disregarding the difference between that is required to prove

guilt in a criminal case and what is required to show probable cause for arrest or search." See Brinegar v. United States, 338 U.S. 160, 172–73 (1949).

In North Carolina it is a criminal offense for an individual to possess a controlled substance, including marijuana. N.C.G.S. §§ 90-94, 90-95(a)(3) (2021). The North Carolina Controlled Substances Act defines marijuana as:

> all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. . . .

N.C.G.S. § 90-87(16) (2021) (emphasis added).

It is well established that when a law enforcement officer detects what he or she recognizes to be "the smell of marijuana" emanating from an automobile, there is "probable cause to search the automobile for the contraband drug." State v. Greenwood, 301 N.C. 705, 708 (1981). Nothing else is required to establish probable cause in this situation. See id.; accord United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004) ("We have repeatedly held that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place. In United States v. Scheetz,

293 F.3d 175, 184 (4th Cir. 2002), for example, we held that the smell of marijuana emanating from a properly stopped automobile constituted probable cause to believe that marijuana was in the vehicle, justifying its search.").

B. North Carolina has legalized hemp in limited circumstances, but marijuana remains illegal.

In 2015, the General Assembly enacted Session Law 2015-299 "to establish an agricultural pilot program for the cultivation of industrial hemp" in North Carolina. See An Act to Recognize the Importance and Legitimacy of Industrial Hemp Research, to Provide for Compliance with Portions of the Federal Agricultural Act of 2014, and to Promote Increased Agricultural Employment, S.L. 2015-299, codified as, N.C.G.S. § 106-568.50 (2019).[3]

The North Carolina Industrial Hemp Commission was established by this Act to not only enact the pilot program, but also regulate the cultivation of industrial hemp. N.C.G.S. § 106-568.52 (2019). The Commission has the authority to "issue licenses allowing a person, firm, or corporation to cultivate industrial hemp for research purposes to the extent allowed by federal law." N.C.G.S. § 106-538.53(2) (2019). It is also empowered to "adopt rules necessary to carry out the purposes" of Chapter 106, Article 50(e), including those related

[3] The United States Congress passed the federal Agricultural Act in 2014 which permitted state departments of agriculture to establish pilot programs for the cultivation of industrial hemp. P.L. 113-79.

to testing "industrial hemp during growth to determine tetrahydrocannabonil" (THC) levels, the "verification of the type of seeds and plants used and grown by licensees[,]" and the "production and sale of industrial hemp[.]" Id. at (8).

Given these regulations, only the following is "industrial hemp":

> All parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the Commission, whether growing or not, that contain a delta–9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis.

N.C.G.S. § 106-568.51 (2019).

Session Law 2015-299 also amended the definition of "marijuana" under the North Carolina Controlled Substances Act to exclude "industrial hemp as defined in G.S. 106-568.51, when the industrial hemp is produced and used in compliance with the rules issued by the North Carolina Industrial Hemp Commission." N.C.G.S. § 90-87(16). The Act did not otherwise change the definition of marijuana or change the illegality of marijuana. Id. Therefore, "all parts of the plant of the genus Cannabis" remain a controlled substance unless the (1) the part or variety of the Cannabis plant contains a THC concentration of 0.3% or less, (2) it is cultivated or possessed by a grower that is licensed by the North Carolina Industrial Hemp Commission, and (3) it is produced and used in compliance with the Commission's rules.

C. In his petition for writ of certiorari, Defendant failed to show merit or that error was probably committed when the trial court concluded Officer Galluppi had the requisite probable cause to search Defendant's vehicle.

1. The trial court's findings of fact were supported by competent evidence.

An appellate court reviews a trial court's findings of fact in an order ruling on a motion to suppress to determine whether the findings are supported by competent evidence. State v. Biber, 365 N.C. 162, 167 (2011). If so, the findings of fact are binding on appeal. State v. Brooks, 337 N.C. 132, 140 (1994). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal." Biber, 365 N.C. at 140.

The trial court made the following findings of fact relevant to the existence of probable cause to search Defendant's vehicle:

> 2. Officer Galluppi was stationary when he saw a blue Chrysler 300 drive by on Dawson Street that had extremely dark tint on the windows which he believed were in violation of the statute [N.C.G.S. § 20-127].
>
> 3. Officer Galluppi pursued the vehicle and activated his blue lights. The vehicle pulled over near 15th [street].
>
> 4. Upon approaching the vehicle, Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle.
>
> 5. The defendant was the driver of the vehicle. He had no license but provided his vehicle registration.

> . . .
>
> 9. Officer Galluppi then conducted a search of the vehicle with the assistance of another officer. The search revealed a handgun in the console and a non-descript pill under the back seat.
>
> 10. The defendant was then placed under arrest and transported to the Wilmington Police Department for processing. While at the police department, the defendant was strip searched. While removing his clothing, a plastic pouch fell from the defendant's pants which contained two separate baggies; one containing a green leafy substance and the other containing a white rock like substance.
>
> 11. The Court took judicial notice of a State Bureau of Investigations bulletin regarding the similarities of marijuana and hemp. The court took judicial notice of the bulletin only to the extent that physical properties and characteristics of the two plants were discussed. Legal conclusions and opinions contained in that bulletin were disregarded as the State Bureau of Investigation does not have legal authority to issue binding opinions on the sufficiency of evidence to establish probable cause. Marijuana and hemp share very similar physical characteristics and it is difficult to tell one from the other either by appearance or smell.

(R pp. 43–44)

a. Finding of Fact 4.

Defendant argues the trial court's finding of fact that "Officer Galluppi detected what he believed to be an odor of marijuana emanating from the vehicle" is "incomplete[.]" Specifically, he contends Officer Galluppi testified that he "detected the 'very faint' odor" of marijuana and that "a very faint odor"

should weigh against a finding of probable cause because our appellate courts have on occasion noted the strength of the odor of a substance. (Def's Br p. 32)

This finding of fact is not incomplete when Officer Galluppi's testimony is viewed in full. To be sure, Officer Galluppi testified that as he was speaking with Defendant at Defendant's vehicle, he smelled "a very faint odor of marijuana . . . coming from inside the vehicle." (T p. 12) However, immediately after this, Officer Galluppi testified that he "leaned in closer" to verify Defendant's date of birth because he could not hear what Defendant was saying. When Officer Galluppi did so, he "verified that it was marijuana that [he] was smelling – coming from inside the vehicle and not from the surrounding area." (T pp. 12–13)

In any event, whether the odor of marijuana was faint or stronger would not impact the probable cause analysis in the way that Defendant argues it does. To be sure, the Court of Appeals has used the term "strong" in reference to odors of substances while discussing evidence that gives rise to reasonable suspicion or probable cause. See State v. Yates, 162 N.C. App. 118, 123 (2004) ("In this case, Deputy Aleem testified defendant walked by him twice, once going in, the other time out of the Waffle House, emanating a strong odor of marijuana, and each time defendant was alone."); State v. Williams, 225 N.C. App. 636, 640 (2013) ("The findings of fact support the trial court's conclusion

of law that '[b]ased on the Defendant's proximity to the car involved in an accident, no one else was in the area, strong odor of alcohol, slurred speech, bloodshot eyes, and extremely unsteady [sic] on his feet. Officer Miller had probable cause to arrest the Defendant for Driving While Impaired[.]" (brackets in original)). However, neither the Court of Appeals nor this Court, more importantly, has qualified the rule that "the smell of marijuana [gives an] officer probable cause to search [an] automobile for the contraband drug" based on the strength of the odor. See Greenwood, 301 N.C. at 708.

b. Finding of Fact 11.

Defendant, as well as Judge Jackson in the order below, argues that the trial court's finding of fact regarding the State Bureau of Investigation (SBI) memorandum is "not fully supported by competent evidence." Specifically, Defendant argues "it was unreasonable of the trial court to make findings of fact inconsistent with" the memorandum. He points to the trial court's statement that "[m]arijuana and hemp share very similar physical characteristics" and are "difficult to tell" apart "by appearance or smell" and the memorandum's statement that the two "look the same and have the same odor[.]" (Def's Br pp. 33–34) While the trial court did not directly quote or use the exact terms of the SBI memo, the finding of fact accurately summarizes the proposition of the SBI memo about the similarities of industrial hemp and

marijuana. Defendant fails to show that the trial court's use of other words which functionally have the same meaning renders the finding of fact unsupported by competent evidence.

Defendant also argues "the trial court should have given some consideration to the SBI's discussion of probable cause." (Def's Br pp. 34–35) The portion of the memorandum that Defendant relies on states that the shared appearance and odor of marijuana and hemp "make[s] 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." (R p. 30) Besides stating that the SBI is a law enforcement agency that assists others local agencies, Defendant provides no authority for why this memorandum was "entitled to some weight" such that the trial court was required to rely on it. This Court has never held that a court is bound by a law enforcement agency's interpretation of Fourth Amendment jurisprudence. Probable cause is solely a judicial determination.

c. Findings regarding Officer Galluppi's training and experience.

Defendant argues "[t]he trial court did not make any findings of fact regarding Officer Galluppi's training and experience in general." (Def's Br p. 35) The trial court, however, found that "Officer Galluppi detected what he

believed to be an odor of marijuana emanating from the vehicle[.]" (R p. 43) Implicit in this finding is that Officer Galluppi knew, by virtue of training and experience, what marijuana smelled like in the first instance. And the evidence presented at the suppression hearing supports this implicit finding. Officer Galluppi testified that he attended multiple narcotics classes administered by the North Carolina State Crime Lab which included in the curriculum the odor of marijuana. (T p. 13) Officer Galluppi also testified that throughout his career, in both North Carolina and Hawaii, that he had at approximately 400 encounters with marijuana. (T p. 14) Given this training and experience, Officer Galluppi explained that he is able to determine the odor of marijuana when it is both burned and unburned, and he described the differences between the two. (T p. 13)

Defendant, as well Judge Jackson, also argue "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." (Def's Br p. 35; Order pp. 7–8) No such finding of fact was required to support the trial court's conclusion that Officer Galluppi possessed probable cause to search the vehicle for marijuana when he detected the odor of such. The relevant inquiry in this case is not whether Officer Galluppi had the training and experience to definitely distinguish hemp and marijuana but rather whether he had the

training and experience to identify the odor of marijuana. For the reasons that discussed in the following section, the odor of marijuana is sufficient to establish probable cause regardless of the similarities it shares with hemp.

2. The trial court's findings of fact supported its conclusions of law.

Based upon its findings of fact, the trial court concluded:

> 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, Conclusion of Law #2)

The trial court did not err in so concluding. Defendant was the driver of the vehicle and its sole occupant. (T p. 11) When Officer Galluppi approached Defendant at the driver window, he detected what he recognized as an odor of marijuana "coming from inside the vehicle[.]" (T pp. 12–13) This detection was based on multiple trainings in narcotics and experience in approximately 400 marijuana cases wherein Officer Galluppi smelled both burned and unburned marijuana. (T pp. 13–14) Officer Galluppi continued to smell the marijuana on Defendant's person after he was removed the vehicle. (T p. 15) It is well established that the odor of marijuana, an illegal substance in this State, gives an officer probable cause to believe that the vehicle contains the contraband and permits the officer to conduct a warrantless search for the

contraband. Greenwood, 301 N.C. at 708. The trial court did not err by applying this Court's well-settled precedent to this case to conclude that Officer Galluppi had the requisite probable cause to search Defendant's vehicle based upon the detection of what he recognized as the odor of marijuana.

The trial court also properly concluded:

> 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, Conclusion of Law #3)

The General Assembly did not legalize marijuana or make sweeping changes to the statutory definition of that substance when it created the industrial hemp pilot program. It only excluded from the definition of marijuana industrial hemp that contains a THC concentration of 0.3% or less by dry weight, is cultivated by a licensed grower, and is produced and used in compliance with the rules of the North Carolina Industrial Hemp Commission. See N.C.G.S. §§ 90-87(16), 106-568.51(7). Aside from limited traditional exceptions, such as the mature stalk of the plant, all other "parts of the plant of the genus Cannabis" containing higher THC levels are still marijuana. Therefore, when an officer detects what she recognized based on her training

and experience to be marijuana, there is still a "fair probability" that the contraband will be found in that particular place. Probable cause does not require "a prima facie showing" of criminal activity, much less an actual showing that the substance emanating the odor is definitely marijuana and not industrial hemp that complies with the THC concentration, licensing, and production and use requirements. See Gates, 462 U.S. at 235. Therefore, the trial court did not err in rejecting Defendant's argument.

3. The arguments by Defendant and the "dissenting" judge below are erroneous.

Judge Jackson, echoed by Defendant in his new brief, argued that "[b]ecause the odor of legal hemp and the odor of 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." (Order p. 6; see also Def's Br p. 21) This argument fails for multiple reasons.

First, this argument erroneously seeks to elevate the level of suspicion that is required for probable cause. Neither the United States Supreme Court nor this Court have held that probable cause to believe that contraband is in a particular place requires "conclusive[ ]" indications of such. To the contrary, as previously discussed, these Courts have expressly rejected such a

heightened standard. See Gates, 462 U.S. at 235 ("[I]t is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."); Arrington, 311 N.C. at 636 ("Probable cause does not mean actual and positive cause nor import absolute certainty."). In a similar vein, the probable cause standard does not require a law enforcement officer to conclusively dispel any possible innocent alternative explanation. See District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018) ("But probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts."). The inquiry is only whether "the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]" Ornelas, 517 U.S. at 696.

In fact, the probable cause standard contemplates that there may be situations in which facts establish a probability of criminal activity but could turn out to have innocent explanations. For example, an officer may have lawfully stopped a vehicle and observed in plain sight a baggie of white powder which a laboratory analysis finds to simply be powdered sugar. Or, more relevant to the present case, an officer may have probable cause to believe, based on odor, that a cigarette being smoked by an individual contains marijuana when it in fact it may only contain legal hemp. The initial probability of criminal activity based on the facts known to the officer is not

negated by the possibility of a factual mistake. For example, the United States Court of Appeals for the Second Circuit, reviewing a decision by the United States District Court for the Southern District of New York, explained:

> It is true that police lab tests ultimately showed that [the defendant's] cigarette did not contain marijuana. That fact does not require us to unsettle the District Court's ruling, however, because probable cause may exist even when a suspect is in fact innocent. The standard for probable cause is lower than that for conviction, we have explained. Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. For similar reasons, the District Court's probable-cause finding is not undermined by the fact that [the defendant] repeatedly told the arresting officers that he was smoking hemp, not marijuana. Where, as here, the facts and circumstances of the arrest provide a reasonable basis for believing that probable cause existed, an officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause.

United States v. Bignon, 813 F. App'x 34, 37 (2d Cir. 2020) (cleaned up); cf. Heien v. North Carolina, 574 U.S. 54, 57 (2014) ("The Fourth Amendment prohibits 'unreasonable searches and seizures.' Under this standard, a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake.").

Second, the argument put forth by Defendant and Judge Jackson in the order below overstates the legality of hemp. As has been previously discussed, industrial hemp must meet specific requirements to be excluded from the

definition of marijuana—it must have a THC concentration of 0.3% or less, it must be cultivated by a licensed grower, and it must have been produced and used in compliance with the Industrial Hemp Commission's rules. This means that when an officer encounters the odor of marijuana, there is still a fair probability that what the officer is smelling is, in fact, marijuana, which is generally defined as any part of the Cannabis plant that does meet these limited exclusions. The situation is not the reverse where the Cannabis plant is legal in most situations but only illegal in certain circumstances.

Lastly, both the Defendant and Judge Jackson erroneously rely on this Court's decision in State v. Benters, 367 N.C. 660 (2014), to support their argument. In Benters, officers received an anonymous tip that the defendant was growing marijuana, and "the corroborating evidence proffered by the police consisted of: (1) utility records of power consumption for the target residence; (2) gardening equipment observed at the target residence (coupled with the apparent absence of significant gardening activity); and (3) the investigating officer's expertise and knowledge of the defendant." State v. Lowe, 369 N.C. 360, 365 (2016) (citing Benters, 367 N.C. at 661–62, 669). This Court held that this was insufficient to establish probable cause. Benters, 367 N.C. at 673. Benters, however, was not a case where an officer detected an odor of marijuana emanating from a vehicle, which this Court has held gives

rise to probable cause to believe that marijuana is present in the vehicle. Greenwood, 301 N.C. at 708.

D. Other jurisdictions who have addressed this issue have rejected Defendant's argument.

While neither this Court nor the Court of Appeals have previously addressed this issue, courts in other jurisdictions have in either the same or analogous situations. The decisions by those courts, sampled below, have overwhelmingly rejected the argument that the legalization of hemp (or even some amounts of marijuana) prohibits probable cause based on what a trained and experienced officer recognizes as the odor of marijuana. While these decisions are, of course, not binding on this Court, they are instructive and further demonstrate that the Court of Appeals' exercise of discretion to deny the petition for writ of certiorari was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision."[4]

Perhaps most directly applicable to the issue raised in this case, each of the federal district courts of North Carolina have concluded that probable

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[4] Judge Jackson looked to other jurisdictions on this issue and stated that "a survey of other jurisdictions that have confronted issues related to the legalization of hemp establishes that legal hemp and illegal marijuana are indistinguishable by sight and smell as well." (See Order p. 5) However, he did not acknowledge or discuss the weight of out-of-jurisdiction courts who have rejected Defendant's argument regarding probable cause.

cause exists when an officer smells marijuana despite the legalization of industrial hemp pursuant to Session Law 2015-299.[5] In United States v. Brooks, No. 3:19-CR-00211-FDW-DCK, 2021 WL 1668048 (W.D.N.C. Apr. 28, 2021), the defendant was charged with multiple narcotics offenses and filed a motion to suppress, arguing "that the smell [the law enforcement officer] detected could have been from a legal source[.]" Id. at *4. The defendant in Brooks, like Defendant in this case, relied on the "North Carolina State Bureau of Investigation report that seems to suggest that marijuana and hemp look and smell almost identical." Id. The defendant thus argued that "since none of the material found in the vehicle were tested[,]" the court should have found "that there was no smell of marijuana." Id. The United States District Court for the Western District of North Carolina rejected this argument:

> Assuming, *arguendo*, hemp and marijuana smell "identical," then the presence of hemp does not make all police probable cause searches based on the odor unreasonable. The law, and the legal landscape on marijuana as a whole, is ever changing but one thing is still true: marijuana is illegal. To date, even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana

[5] See State v. McDowell, 310 N.C. 61, 74 (1984) ("State courts are no less obligated to protect and no less capable of protecting a defendant's federal constitutional rights than are federal courts. In performing this obligation a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command.").

> giving law enforcement probable cause to search has not been overturned. Therefore, if hemp does have a nearly identical smell to marijuana — and hemp was present — it would suggest to this court that [the officer] was even more reasonable to believe evidence of marijuana was present.

Id. (footnotes omitted).

The United States Districts Courts for the Eastern and Middle Districts of North Carolina have reached similar conclusions. See United States v. Harris, No. 4:18-CR-57-FL-1, 2019 WL 6704996 (E.D.N.C. Dec. 9, 2019) ("[T]he smell of marijuana alone, particularly where corroborated here by two officers at separate times, supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because '[o]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" (quoting Gates, 462 U.S. at 235)); cf. United States v. Holloman, No. 1:15CR246-1, 2015 WL 5824031, *4, n. 2 (M.D.N.C. Oct. 6, 2015) (despite legalization of hemp extract at the time for limited medical treatment, marijuana remained illegal, and "[i]t is the fact that possessing marijuana is a crime that gives rise to probable cause.").

Indeed, federal courts in other jurisdictions where hemp has been legalized have also concluded that an officer continues to have probable cause to believe that marijuana is present in a place where the officer detects the odor of such. For example, in United States v. Boggess, 444 F. Supp. 3d 730

(2020), the United States District Court for the Southern District of West Virginia noted that the "Fourth Circuit has generally held that the odor of marijuana can provide probable cause to believe marijuana is present in a particular place, thereby providing probable cause for a search." Id. at 736. The court rejected the defendant's argument "that this precedent should be revisited because the rationale of this line of cases no longer exists as it is lawful to grow, cultivate, possess and sell hemp products." Id. The defendant claimed, as Defendant does here, "that because marijuana and hemp come from the same plant the difference between the two are impossible to discern with the naked eye or distinguished by smell[, and] [t]hus, marijuana no longer has a distinct smell that indicates a crime is being committed." Id. at 736–37. However, the court explained that "possession of marijuana is still a criminal offense under West Virginia state law and federal law[;] [t]herefore, the officer's belief that there was likely illegal contraband present in [the d]efendant's jeep was reasonable based on the odor of marijuana emanating from the vehicle." Id. at 737 (cleaned up); see also United States v. Clark, No. 3:19-CR-64-PLR-HBG, 2019 WL 8016712 (E.D. Tenn. Oct. 23, 2019), report and recommendation adopted, No. 3:19-CR-64-2, 2020 WL 869969, *4–*5 (E.D. Tenn. Feb. 21, 2020) ("The possession and use of marijuana is illegal in Tennessee and under Federal law. The active odor of marijuana gave [the

officer] probable cause to search the vehicle. [The d]efendant's argument that hemp and marijuana are 'the same plant,' and that hemp is legal in Tennessee, does not change the fact that [the officer] testified that he smelled marijuana."); United States v. Vereen, No. 20-CR-566, 2021 WL 3771989 (S.D.N.Y. Aug. 23, 2021) (officer credibly smelled marijuana despite another officer's acknowledgement on cross-examination during a suppression hearing of "the possibility that the roach could have contained a legal variety of cannabis such as hemp[.]").

Defendant nevertheless argues that "case law from other jurisdictions points to the propriety of an 'odor plus' or totality of the circumstances analysis." (Def's Br p. 28) (capitalization altered). The decisions in State v. Hubbard, 309 Kan. 22 (2018), and State v. Dixon, 963 N.W.2d 724 (Minn. 2021), only stand for the proposition that other circumstances may be considered at the probable cause analysis—they do not hold that odor of marijuana alone can never establish probable cause after the legalization of certain forms of hemp. Furthermore, Commonwealth v. Barr, 266 A.3d 25 (Pa. 2021), is unavailing. There, the Supreme Court of Pennsylvania held that "the smell of marijuana alone cannot create probable cause" and is instead to be considered as one factor within the totality of the circumstances. Id. at 41. However, the law that was the premise for this change was the Pennsylvania

Medical Marijuana Act, which permitted patients to "legally possess and consume various forms of medical marijuana, including the plant itself." Id. Marijuana has not been legalized in North Carolina, only hemp that contains a THC concentration of 0.3% or less and meets several requirements.

In fact, the Pennsylvania Supreme Court's decision is an outlier in other jurisdictions where marijuana has been legalized for medical purposes or decriminalized in small possessory amounts. For example, the Fourth Circuit has stated:

> The odor of marijuana alone provides probable cause to believe that evidence of marijuana possession would be found in [the defendant's] residence. [The defendant] argues, however, that [Virginia's] limited exception allowing citizens to possess marijuana for medical reasons undermined the magistrate's probable cause finding. We reject this contention. Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. This is especially the case so long as marijuana possession is prohibited by federal law, without exception.

United States v. Mitchell, 720 F. App'x 146, 152 (4th Cir. 2018) (cleaned up); see also United States v. Harrison, No. 17-59-GMS-1, 2018 WL 1325777, *3 (D. Del. Mar. 15, 2018) ("The decriminalization of marijuana does not affect the court's reliance on well-established precedent that the smell of marijuana establishes probable cause. Even if marijuana has been decriminalized in some instances in Delaware, every possession and usage of marijuana was not

made legal."); United States v. Liu, No. 2:13-CR-00050-KJM, 2015 WL 163006, *3-5 (N.D. Cal. Jan. 7, 2015) ("the strong odor of marijuana gave [the officer] probable cause to search the car's trunk to determine whether [the defendant] in fact possessed the marijuana" in accordance with California's medical marijuana laws); Arizona v. Sisco, 239 Ariz. 532, 538 (2016) (rejecting "odor (or sight) plus" standard and stating "the general proscription of marijuana in Arizona [and the Arizona Medical Marijuana Act's] limited exceptions thereto support finding probable cause based on the smell or sight of marijuana alone unless, under the totality of the circumstances, other facts would suggest to a reasonable person that the marijuana use or possession complies with [the Medical Marijuana Act].").

E. In the event this Court disagrees, the sole appropriate remedy is remand to the Court of Appeals.

Defendant fails to show that the Court of Appeals abused its discretion when it denied his petition for writ of certiorari seeking review of the trial court's suppression order. However, in the event this Court disagrees, the sole appropriate remedy is to remand to the Court of Appeals with instructions to allow the petition for writ of certiorari and address the merits of Defendant's arguments in an opinion.

CONCLUSION

For the reasons discussed herein, Defendant fails to show the Court of Appeals abused its discretion by denying the petition for writ of certiorari. In the event that this Court does not dismiss the appeal and deny the alternative petition for writ of certiorari, the decision by the Court of Appeals be affirmed.

Electronically submitted this the 13th day of May, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

Ms. Sarah Holladay
Email: sarah@holladaylawoffice.com

Electronically submitted this the 13th day of May, 2022.

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