No. 11A22 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

DEFENDANT-APPELLANT'S REPLY BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

No. 11A22 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

DEFENDANT-APPELLANT'S REPLY BRIEF

****

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

STATEMENT OF FACTS

On 5 February 2020, Jaqualyn Robinson was pulled over by Wilmington Police Department Officer Ben Galluppi for a minor traffic infraction. (T pp 7-8) Based only on the "very faint odor" of suspected marijuana, which Officer Galluppi testified he did not think he would be able to distinguish from smokeable help, Officer Galluppi searched both Mr. Robinson's car and his person. (T pp 12-19, 30) Judge Jackson dissented from the dismissal of Mr. Robinson's appeal. (Appx. 1-9)

ARGUMENT

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.

Jaqualyn Robinson is not asking this Court to legalize marijuana. He is simply asking this Court to evaluate probable cause with respect to suspected marijuana the same way it does every other type of case: by examining the totality of the circumstances.

A. This Case is Properly Before this Court.

In his Opening Brief, Mr. Robinson asserted that this Court could reach the merits of his claims through three means: N.C.G.S. § 7A-30(2), N.C. R. App. P. 21, and N.C. R. App. P. 2. (Opening Brief at 13-18) The State relies on the arguments made in its Motion to Dismiss and Response to Defendant's Petition for Writ of Certiorari. (State's Brief at 5) The State makes no argument that review would not be appropriate under Rule 2. At the very least, given the importance of the issue presented here, Rule 2 review by this Court is warranted.

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

Our courts have traditionally found that officers with proper training can identify marijuana based on smell alone because marijuana has a distinctive odor. *State v. Greenwood*, 301 N.C. 705 (1982). In his Opening Brief, Mr. Robinson argued that this rationale can no longer sustain a warrantless search because, with the legalization of hemp, no officer (regardless of training) is capable of distinguishing between marijuana and a legal substance on the basis of smell alone. (Opening Brief at 21-27) Mr. Robinson further argued that while the smell of suspected marijuana might be one factor to consider, probable cause in such cases should be determined by considering the totality of the circumstances – as it would be for any other kind of search. (Opening Brief at 28-31) *See generally State v. Mitchell*, 300 N.C. 305, 310 (1980) (reviewing the warrantless search of a car believed to have been involved in a robbery in the totality of the circumstances).

The State urges this Court to continue to rely on a theory now known to be misguided. (State's Brief at 12-13) Because the assumptions underlying the "plain smell" doctrine no longer hold, this Court should evaluate probable cause in cases of suspected marijuana

under the "totality of the circumstances" standard used for all other suspected contraband.

C. Findings of Fact

Findings of fact four and eleven were not supported by competent evidence. In addition, the trial court did not make other critical findings because there was no evidence to support them.

1. Strength of Odor is a Relevant Consideration

Mr. Robinson argued that when an officer smells what he suspects is marijuana, the strength of the odor is a factor for consideration in the totality of the circumstances. (Opening Brief at 32-33) The State does not argue that this would be an inappropriate factor for courts to weigh if this Court shifted to a totality of the circumstances analysis; it merely points out that no North Carolina court has yet done so. (State's Brief at 17-18) This is unsurprising given that a different standard is currently in effect. As argued below, several of the cases the State cites from other jurisdictions take strength of odor into account as part of their probable cause analysis.

2. Difficult and Impossible Are Not the Same Thing

The trial court found that marijuana and hemp are "similar" when the evidence before the court was that they are "the same." (Opening Brief at 33-34) The trial court also found that hemp and marijuana are "difficult" to tell apart when the SBI memo in fact says this is "impossible" outside a laboratory. (R pp 44, 29) The State feigns ignorance of the English language and asserts that Finding of Fact 11 "accurately summarizes" the information contained in the SBI memo. Ridiculously, the State contends that the words "similar" and "same" have "the same meaning." (State's Brief at 18-19) They do not. *See* OXFORD DICTIONARY OF ENGLISH 1573, 1662 (3d ed 2010) (same: "identical;" similar: "having a resemblance in appearance, character, or quantity without being identical").

It matters that it is *impossible* for an officer in the field to tell the difference between hemp and marijuana because the *Greenwood* jurisprudence is predicated on the now-false idea that in the case of this one controlled substance, officers can reliably discern between legal and illegal items based on smell alone. If it were merely *difficult* for an officer to tell the difference, this difficulty could be overcome by training

and experience. But because marijuana and hemp are *the same* and not merely *similar*, an officer needs some additional evidence to reasonably believe that the substance he has encountered is the former.

3. Training and Experience are Necessary to Show Reasonableness Even Under Existing Law

Even under existing law, probable cause requires not only the officer's belief that what he smells is marijuana, but that the officer's belief be reasonable. *See Taylor v. United States*, 286 U.S. 1, 6 (1932) (distinctive odor is a factor to be considered "but its presence alone does not strip [the defendant] of constitutional guarantees against an unreasonable search"); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (probable cause requires an odor "sufficiently distinctive to identify a forbidden substance" and evidence that the officer is "qualified to know the odor"). Reasonableness is typically established by showing that an officer has the training and experience to distinguish contraband from legal items. (Opening Brief at 35-36)

The State does not argue that the trial court made any findings of fact regarding Officer Galluppi's training and experience; rather it claims that such findings are "implicit" in the finding that Galluppi

"believed" he smelled marijuana. (State's Brief at 19-20) The law requires that an officer's belief be reasonable, not merely that it exist.

The only green leafy substance found in this case was inside a plastic bag, inside another plastic bag, underneath Mr. Robinson's pants. (T p 19) Any odor Officer Galluppi detected must have been very faint indeed. *Johnson* requires both a distinctive smell and that the officer have sufficient training to distinguish it. Neither is present in this case. Terpenes — the chemical giving rise to what Officer Galluppi was trained to recognize as the smell of marijuana — are also present in hemp. Having knowingly encountered hemp just once in his professional life, and then in a controlled environment, Officer Galluppi conceded that in the field he could not tell the difference between illegal marijuana and legal hemp based on smell alone. Regardless of how much training the officer had with marijuana, he had virtually none with hemp and was incapable of distinguishing between the two. Under these circumstances, a reasonable person would consider additional information in deciding whether it was probable — not merely just possible — that Mr. Robinson was engaged in illegal activity.

Because the trial court did not find — and from the evidence presented could not have found — that Officer Galluppi had a reasonable belief he smelled marijuana, the trial court should have granted the motion to suppress.

D. Conclusions of Law

Conclusions of law two and three do not reflect a correct application of legal principles to the facts found.

1. Probable Cause Based on Odor Alone

In his Opening Brief, Mr. Robinson argued that the trial court erred in concluding that the odor of marijuana alone created probable cause to search the car when (a) there was no evidence that the substance was in fact marijuana, and (b) Officer Galluppi could not have formed a reasonable belief that the substance was marijuana when marijuana does not have a distinct smell and Officer Galluppi lacked the ability to distinguish between marijuana and legal hemp based on odor alone. (Opening Brief at 39-44) The only case cited by the State in response is *Greenwood*, which, as discussed, should no longer apply given the legalization of smokeable hemp.

2. Other Jurisdictions

The State points to several cases from other jurisdictions, which as the State observes, are in no way binding on this Court. (State's Brief at 27-33) However, some of these cases warrant further examination. For example, the State cites *United States v. Brooks*, 2021 WL 1668048 (W.D.N.C. Apr. 28, 2021). The underlying facts are spelled out in the Magistrate's Recommendation at 2020 U.S. Dist. LEXIS 252985 (Oct. 23, 2020). In *Brooks*, the officer testified that "North Carolina hemp laws allow for hemp to be used to make rope, clothing, CBD oils, and similar products" and that "there is no reason to burn hemp." *Id.* at *23. Based on the evidence before the court, in the absence of legal smokeable hemp, the "shake" and ash the officer saw and smelled within the vehicle could only have been illegal marijuana. Similarly, the State points to *United States v. Holloman*, 2015 WL 5824031 (M.D.N.C. Oct. 6, 2015). The only legal cannabis product in North Carolina at that time was a non-smokeable extract. *Id.* at fn2. Thus, the "strong smell" observed by officers could not have been hemp. In addition, probable cause was supported by reports of frequent marijuana smoking at the residence, with large numbers of people coming and going during these

episodes. *Id.* at ** 2-3. In the present case, in contrast to *Brooks* and *Holloman*, smokeable hemp was legal and there were no additional indications of criminal activity to support probable cause.

The State also cites *United States v. Harris*, 2019 WL 6704996 (E.D.N.C. Dec. 9, 2019). Again, the facts in the Magistrate's Recommendation are illuminating. *United States v. Harris*, 2019 U.S. Dist. LEXIS 213768 (E.D.N.C. Aug. 30, 2019). The basis for probable cause in *Harris* was much more than a single officer's belief in a very faint odor. The arresting officer knew of the defendant and his prior drug activity at the residence in question. *Id.* at *6. The officer thought he smelled marijuana, left the scene, and returned a short time later with a second officer, who agreed. *Id.* at **7-8. When the officers knocked and asked to speak to the defendant, he retreated into the apartment and slammed the door. *Id.* at **9-10. The officers then heard a commotion, including a large, unrestrained dog attacking the door from the inside. *Id.* at *10. When the defendant finally emerged, the officers were justified in conducting a warrantless protective sweep, both for their own safety and due to exigent circumstances. *Id.* at **12, 27. As to whether the officers had probable cause to believe there was

marijuana in the home, the magistrate noted that multiple officers smelled it over the course of two visits to the home, the officers had information the defendant was a drug dealer, the officers had information the defendant dealt drugs from the home, and the defendant's suspicious behavior in slamming the door and rummaging about the house. *Id.* at **29-30. In other words, probable cause was based not just on one officer's suspicions, but two officers at two different times, and probable cause was further supported by the totality of the circumstances.

The State further relies on several cases from outside North Carolina. In some cases, the strength of the odor of marijuana is of note. For example, in *United States v. Clark*, 2019 WL 8016712 (E.D. Tenn. Oct. 23, 2019), the defendant turned and fled upon seeing a law enforcement officer. When the officer approached the defendant's car, the officer smelled the "strong" odor of marijuana. *Id.* at **1-2. In *United States v. Harrison*, 2018 WL 1325777 (D. Del. Mar. 15, 2018)[1],

[1] More recently in *Juliano v. State*, 260 A.3d 619 (2021) the Delaware Supreme Court found that following the decriminalization of marijuana possession, a reasonable officer would not conclude that a driver had committed a crime based on the odor of marijuana alone.

the odor was "moderate," and the defendant further admitted that he was in fact using marijuana. *Id.* at *2

The strength of the odor appears to be particularly relevant where some form of cannabis possession is legal. In *United States v. Liu*, 2015 WL 163006 (N.D. Cal. Jan. 7, 2015)[2], the driver had a medical marijuana card, but the odor of marijuana in the vehicle was so "strong" that officers nonetheless had probable cause to search the car to ensure what she only possessed an amount of marijuana consistent with personal use. Probable cause should be based not on odor alone, but on "all the surrounding facts." *Id.* at **2, 4.

Similarly, in *United States v. Sisco*, 239 Ariz. 532 (2016)[3], although Arizona law permitted medical marijuana users to grow a very small amount of cannabis, the "strong" and "overpowering" odor of marijuana outside a warehouse enabled officers to obtain a search

---

[2] Possession of small amounts of marijuana is now legal for all persons over the age of 21 in California. CA Health & Safety Code § 11362.1. The statute further provides that "no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest."

[3] Recreational marijuana use has since been legalized for all adults over the age of 21 in Arizona. As such, under current Arizona law, "the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime." A.R.S. §36-2852 (A) and (C).

warrant for the premises. *Id.* at 534. The *Sisco* court emphasized that where some form of cannabis possession is legal, this must be taken into account. "Probable cause is determined by the totality of the circumstances [therefore] a reasonable officer cannot ignore indicia of [medical] marijuana possession or use that could dispel probable cause." *Id.* at 537. Instead of adopting an "odor plus" standard, the Arizona court elected to use "odor unless," that is, an officer will have probable cause to search based on the odor of marijuana *unless* there is some evidence that the possession is lawful. This is simply another flavor of the totality of the circumstances approach Mr. Robinson asks this Court to adopt.

The State's cases demonstrate that the strength of the odor is a relevant factor in the probable cause analysis, especially where some form of cannabis possession is legal. Furthermore, the State's cases show that a totality of the circumstances approach in no way impedes law enforcement's ability to investigate crime, it only helps ensure that they do so in a way that does not unnecessarily infringe upon the rights and freedoms of citizens engaged in lawful activity.

3. Marijuana is Still Illegal

A recent poll showed that the majority of North Carolina voters support the legalization of marijuana for both medicinal and recreational purposes. *See* Cullen Browder, *Most NC Voters Support Legalization of Recreational and Medical Marijuana*, WRAL News Poll Shows, WRAL, April 12, 2022, https://www.wral.com/most-nc-voters-support-legalization-of-recreational-and-medical-marijuana-wral-news-poll-shows/20233047/. Whether and how to legalize marijuana is a decision for the legislature.

Among the numerous bills currently pending before the General Assembly pertaining to marijuana and hemp are S.B. 711[4] ("the Compassionate Care Act") and S.B. 762[5] ("the Farm Act"). The Compassionate Care Act would legalize the possession and use of marijuana for medical purposes under certain circumstances. The Farm Act would make permanent the legalization of hemp and hemp products, as the legislation currently doing so expires on 30 June 2022. Although law enforcement organizations previously opposed the

[4] Available at: https://webservices.ncleg.gov/ViewBillDocument/2021/2736/0/DRS15260-MGfa-26B.
[5] Available at: https://webservices.ncleg.gov/ViewBillDocument/2021/53937/0/DRS45497-TQfa-49.

legalization of hemp, they have not taken a position on The Farm Act. *See* Laura Leslie, *North Carolina Quietly Moves Toward Full Legalization of Hemp*, WRAL, May 24, 2022, https://www.wral.com /north-carolina-quietly-moves-toward-full-legalization-of-hemp/ 20298033/.

This Court's role is to apply the law as it currently exists to the facts presented by Mr. Robinson's case. Mr. Robinson is not asking this Court to declare that marijuana is legal or that the odor of suspected marijuana can never form part of the foundation for probable cause to search. All Mr. Robinson asks is that this Court apply the same standard to suspected marijuana that it applies to all other suspected contraband in similar situations.

In *State v. Crews*, 286 N.C. 41, 44-46 (1974), this Court considered whether an officer could seize pills found in plain sight while executing an order for the defendant's arrest. In addition to the officer's testimony that he had training in drug detection, that he had seen amphetamine pills before, and that these pills looked like amphetamines, this Court determined that the officer was justified in seizing the pills due to several other characteristics signaling that they were a controlled

substance. The pills were contained in a glass bottle much larger than is normally used to contain medication. The bottle contained several hundred pills, again more than one would expect in a lawful situation. Finally, there was no label on the bottle to indicate that it contained a commercially produced product.

Crews illustrates the myriad factors officers could consider if this Court moved to an "odor plus" or "totality of the circumstances" approach to probable cause when marijuana use is suspected. Was the green leafy substance contained in a split-open cigar wrapper, as is often seen with homemade marijuana joints, or was it neatly wrapped in fresh paper, as with pre-rolls purchased from a licensed retailer? Was the odor in question emanating from a car parked in front of a hemp dispensary, or from a car in the parking lot of a Phish concert? Is the suspect known to be involved in the illegal drug trade? Is there other suspected contraband in plain sight? Did the suspect try to run when he saw the police? The totality of the circumstances approach balances police interests in law enforcement and crime prevention with the legitimate interests of farmers, businesspeople, and consumers embodied by the statutes legalizing hemp.

The State complains that shifting to a "totality of the circumstances" standard would "elevate the level of suspicion that is required for probable cause." (State's Brief at 23) To the contrary, it would make the level of suspicion required for probable cause in marijuana cases equal to the level in all other cases. Reasonable officers are not required to eliminate all innocent explanations, but they are required to consider them before engaging in warrantless searches and seizures. Criminal activity must be *probable* and not merely *possible*.

The State further laments that the dissenting opinion has misconstrued this Court's precedent in *State v. Benters*, 367 N.C. 660 (2014), attempting to distinguish this case because *Benters* involved potential marijuana growing equipment in plain sight at a residence rather than the plain smell of potential marijuana emanating from a vehicle. (State's Brief at 26-27) While it may be true that *Benters* had a different factual basis, "it is not the *facts* of [that decision] that make [it] controlling authority — it's the *law*." *State v. Clegg*, 380 N.C. 127, 157 (2022). What is important about *Benters* is its employment of the "totality of the circumstances" standard in a case where an officer "noticed the strong odor of marijuana," among other indications of a

possible marijuana growing operation. 367 N.C. at 663. While the officers' observations may have justified further investigation, they did not establish probable cause. *Id.* at 672.

Finally, the State asserts without citation to any authority that should this Court find error below, "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." (State's Brief at 33) While Mr. Robinson presented this as an alternative remedy in his Opening Brief, it is not this Court's only option. *See generally State v. Salinas*, 366 N.C. 119, 124 (2012) (remand to the trial court is proper where its order contains insufficient findings of fact); *State v. Ellis*, 374 N.C. 340, 344-45 (2020) (where the trial court erred in denying the motion to suppress and the Court of Appeals erred in upholding that denial, remanding to the trial court); *State v. Hammonds*, 370 N.C. 158, 167 (2017) (after remanding for a new suppression hearing, finding that the trial court again erred in denying the motion to suppress and vacating the defendant's conviction).

The Court of Appeals had an opportunity to address this case on its merits. The Court of Appeals regularly decides petitions for writ of

certiorari in suppression cases using full opinions. *See e.g.*, *State v. Maldonado*, 2022-NCCOA-372 (denying petition for writ of certiorari due to lack of merit in an eleven-page opinion). In this case, they elected to use an order, a mechanism which served only to frustrate Mr. Robinson's access to further appellate review. This Court does not require further input from the Court of Appeals; it is the trial court's order that is the subject of this appeal. *State v. Williams*, 366 N.C. 110, 114 (2012).

CONCLUSION

For the reasons argued above and in his Opening Brief, Mr. Robinson respectfully requests that the trial court order denying his motion to suppress be reversed and that his gun and drug-related convictions be vacated. In the alternative, Mr. Robinson asks that this case be remanded to the Court of Appeals and/or the trial court for reconsideration in light of whatever guidance this Court may offer.

Respectfully submitted, this the 31st day of May 2022.

Electronically submitted
Sarah Holladay
Attorney for Defendant-Appellant
P.O. Box 52427
Durham, NC 27717

(919) 695-3127
State Bar No. 33987
sarah@holladaylawoffice.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's New 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, P.O. Box 629, Raleigh, North Carolina 27602, by electronic mail to: nsanders@ncdoj.gov.

This the 31st day of May 2022.

Electronically submitted
Sarah Holladay
North Carolina State Bar Number 33987