



# Police Law Bulletin



City Attorneys' Office

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## NORTH CAROLINA APPELLATE COURT DECISIONS



### **Generalized Odor of Marijuana Emanating From Vehicle Does Not Establish Probable Cause to Search Occupant**

*State v Pigford, No. COA15-1047 (2 August 2016).*

On April 5, 2014, Michael Pigford was stopped at a driver's license checkpoint. Defendant was driving the vehicle and Annie Dudley was riding in the front passenger seat. The stopping officer detected the odor of marijuana emanating from the vehicle's front driver's-side window, but was unable to establish the odor's exact location. The officer ordered the defendant out of the vehicle and searched him, finding cocaine residue on a dollar bill and a straw in defendant's back pocket. The officer arrested defendant, placed him in a patrol car, and proceeded to search the vehicle where he found a bag of marijuana under the driver seat and a stolen handgun in the pouch on the back of the passenger seat.

Prior to trial, defendant moved to suppress the evidence of cocaine found on his person. The court denied the motion, concluding that the odor of marijuana established probable cause to search the defendant. The defendant was convicted of possession of cocaine and possession of a firearm by a convicted felon. He also pleaded guilty to attaining habitual felon status. Defendant appealed maintaining that the officer lacked probable cause to conduct a warrantless search of his person because there was no individualized suspicion. More specifically, although the officer smelled marijuana emanating from the vehicle, there was no evidence that the odor was attributable to defendant personally.

The Court of Appeals first noted that it was not contested that the officer had probable cause to search the defendant's vehicle, including possessions within it reasonably capable of concealing the contraband.

The court stated, however, that under *State v. Malunda*, 230 N.C. App. 355 (2013), probable cause to search the vehicle and its possessions based on the generalized odor of marijuana emanating from a vehicle does not include a search of the passengers, absent additional facts linking marijuana to a

particular passenger. In *Malunda*, officers during a lawful traffic stop ordered the defendant-passenger out of the car and detained him on the curb. They went back to the driver's side of the vehicle and noticed a strong odor of marijuana that they had not smelled on the passenger side. They removed the driver and searched the vehicle, and they found marijuana in the driver's-side door. Officers then searched the defendant-passenger and found crack cocaine on him. The *Malunda* court ruled that the odor of marijuana provided probable cause to search the vehicle, but not the defendant-passenger. And because there was nothing linking the marijuana to the defendant-passenger beside his presence in the vehicle, the search of his person was not supported by probable cause particularized to him.

The court distinguished the ruling in *State v. Yates*, 162 N.C. App. 118 (2004), in which the odor of marijuana on the defendant supported probable cause to search his person. There the defendant walked by an officer twice, each time emanating a strong odor of marijuana. The court in *Pigford* noted that, unlike in *Yates*, the State did not offer any evidence that the marijuana odor was attributable to the defendant. The officer testified that when he stood next to the driver's-side window, he smelled marijuana "inside the car," though his description of the source of the odor was no more precise. He could not recall whether the other vehicle windows were rolled down, nor did he approach the passenger's-side window where the odor could have been just as potent. He did not testify whether he smelled marijuana on the defendant after ordering him out of the car. The court stated that to the extent the odor could have been attributed to the defendant, it could have been equally attributable to the front-seat passenger or somewhere else inside the vehicle. Thus, the court concluded that although the officer may have had probable cause to search the vehicle, he did not have probable cause to search the defendant.

Finding that the search violated defendant's Fourth Amendment rights, the Court of Appeals ruled that the trial court erred in denying the motion to suppress and granted defendant a new trial. Despite the defendant's winning argument on the search issue and being awarded a new trial, the Court of Appeals on its own raised the issue that the inevitable discovery exception to the Fourth Amendment's exclusionary rule could be applicable making the illegally-seized evidence admissible at the new trial.

*Note: Because the officer had probable cause to search the vehicle based on the odor of marijuana, if that had been done initially instead of searching the defendant, then the officer would have discovered the bag of marijuana under the driver's seat. And then, the officer would have had probable cause to arrest the defendant-driver and search him incident to arrest, resulting in the lawful discovery of the cocaine in the defendant's back pocket.*

*If there is a generalized odor of marijuana from a vehicle and no other incriminating facts (e.g., incriminating evidence in the vehicle or incriminating statements or behavior by a vehicle occupant) to point to an occupant's connection to the marijuana, then it is unlikely that a court will find probable cause to uphold a search of that occupant. Under these circumstances, an officer may detain the occupant(s), conduct a frisk if justified, and search the vehicle for marijuana. Depending upon what, if anything, is found will dictate what additional actions are justified.*

### **Although Search of Defendant's Vehicle Was Not Proper As A Search Incident to Arrest, It Was Justified Under the Automobile Exception**

***State v. Armstrong, No. COA14-162 (2 September 2014).***

About 1:45 a.m. on February 13, 2012, Officers Scher and Carr of the Gastonia Police Department observed a black Chevrolet Impala execute a three-point turn in the middle of an intersection, strike a

parked vehicle, and continue traveling on the left side of the road. The officers activated their blue lights to initiate a traffic stop. Before the driver stopped the Impala, the officers observed a brown beer bottle thrown from the driver's side window. The officers approached the Impala. Defendant, the driver, and his passenger complied with the officers' order to exit the vehicle. When the officers checked the vacant Impala, they detected an odor of alcohol and marijuana emanating from inside and discovered a partially consumed bottle of beer located in the center console. Officer Carr also detected an odor of alcohol on defendant's breath, and observed defendant's eyes, which he described as "red, glassy [and] bloodshot." Defendant was arrested for hit and run and possession of an open container of an alcoholic beverage. Both defendant and his passenger were restrained in handcuffs and secured in the back of the officers' patrol vehicle. Officer Carr then retrieved the beer bottle that had been thrown from the Impala while Officer Scher searched the vehicle. Officer Scher found the beer bottle in the center console and a grocery bag with three unopened beers on the floorboard of the passenger area. He also found a "plastic baggie containing several white rocks" in the glove compartment. Defendant was subsequently charged with felony possession of cocaine, hit and run with failure to stop when property damage occurred, reckless driving to endanger, driving while license revoked, possession of an open container of an alcoholic beverage in the passenger area of a vehicle while consuming alcohol, and drinking beer while driving.

Defendant filed a motion to suppress all the evidence that was obtained as the fruit of an illegal search of his vehicle. After a hearing, the trial court entered an order granting defendant's motion. The State appealed contending the search of defendant's vehicle was based upon probable cause, therefore the trial court mistakenly concluded that the extensive search went beyond a valid and lawful search incident to arrest. Therefore, the issue for determination by the Court of Appeals was whether the officers had probable cause to justify the warrantless search.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. Amend. IV. Generally, a warrant is required for every search and seizure, with particular exceptions. Two specific exceptions include a search incident to a lawful arrest and the "automobile exception."

The United States Supreme Court has held that law enforcement may search a vehicle incident to a suspect's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Arizona v. Gant*, 556 U.S. 332, 343, 173 L. Ed. 2d 485, 496 (2009) 1 S.E.2d 218, 222 (2012).

In addition, it is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway or in a public vehicular area may take place. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonable 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. The mere odor of marijuana or presence of clearly identified paraphernalia constitutes probable cause to search a vehicle.

In the instant case, the trial court found that defendant and his passenger were restrained with handcuffs and secured inside the officers' patrol vehicle before the officers searched the Impala, and that the officers did not see any contraband in plain view before the search. The trial court was correct in concluding that since defendant was restrained in handcuffs and secured in the officers' patrol vehicle before Officer Scher began searching the Impala, *Gant* did not permit a search of the Impala because defendant was neither unsecured nor within reaching distance of the passenger compartment of the

vehicle at the time of the search. However, *Gant* also recognized that there are other exceptions to the warrant requirement that would permit a vehicle search, including the automobile exception. The officers testified, and the trial court found, that the officers detected the odor of both alcohol and burning marijuana emanating from within the passenger compartment of the Impala. At the hearing, Officer Carr testified that he could “smell a strong odor of marijuana coming from inside the vehicle.” Officer Scher testified that after detecting the odor of alcohol and marijuana in the Impala and placing defendant and his passenger in the back of the patrol vehicle, he “proceeded to conduct a probable cause search of the [Impala].” Since the officers had probable cause to search the Impala based upon the odor of marijuana, the officers could lawfully search every part of the Impala where marijuana might reasonably be found, including the glove compartment.

Therefore, the trial court was mistaken because it failed to take into account the officers’ probable cause to search for contraband. The Court of Appeals reversed the trial court’s order granting defendant’s motion to suppress and remand the case back to the trial court for a ruling consistent with the Court of Appeals’ decision.

### **Discovery Of Marijuana On A Passenger Provided Probable Cause To Search A Vehicle**

#### ***State v. Mitchell*, No. COA12-499 (Dec. 4, 2012).**

On March 26, 2011, defendant and Ms. Harris, his girlfriend, were traveling in a rental car along Interstate 85/40 near Graham. Officer Lovette, a K-9 officer with the Graham Police Department, stopped defendant for speeding. When he asked defendant for his license, defendant produced an identification card, but not a license. After looking up defendant’s information, Officer Lovette discovered defendant’s license was revoked. At that point, Officer Lovette asked defendant and Ms. Harris to step out of the vehicle. Officer Lovette informed them that he intended to write defendant a citation for driving with a revoked license, but that he was going to walk his canine around the car first. Defendant then told Ms. Harris to take the blunt out of her pants, which Officer Lovette identified as a burnt marijuana cigarette. After retrieving the blunt, Officer Lovette began to search defendant’s vehicle. Defendant indicated to him that there was a gun in the glove compartment. Lovette also discovered 79.3 grams of marijuana inside a piece of luggage in the trunk.

While Lovette was searching the vehicle, a second responding officer received defendant’s consent to search his person. During that search, the officer found a small scale with flakes of marijuana on it in defendant’s vest pocket and \$2,320 in currency.

Defendant was indicted for felonious possession of marijuana, possession of a firearm by a felon, being a habitual felon, and misdemeanor possession of drug paraphernalia. Defendant pled guilty to the paraphernalia charge but requested a jury trial on the remaining charges. At trial, defendant moved to suppress the marijuana found in the car’s trunk. The trial court denied the motion to suppress. The jury found defendant guilty of felonious possession of marijuana and possession of a firearm by a convicted felon. Defendant then pled guilty to being a habitual felon. Defendant appealed challenging the officer’s search of the rental car’s trunk, claiming that because defendant and Ms. Harris were not under arrest and not threatening the officers, there was no exigency to justify the warrantless arrest.

The Court of Appeals noted that this was not a search incident to arrest, but rather a warrantless search pursuant to the automobile exception. While it is a cardinal principle that searches conducted without a warrant are per se unreasonable under the Fourth Amendment, there are a few specifically established and well-delineated exceptions. One such exception is the automobile exception. A police officer may search an automobile without a search warrant when there is probable cause to believe that the automobile contains evidence of a crime. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. In this case, the discovery of marijuana on Ms. Harris, a passenger in the vehicle, supported probable cause that the automobile contained contraband materials. The Court noted that it has previously held that the mere odor of marijuana or presence of clearly identified paraphernalia constitutes probable cause to search a vehicle. Clearly if the odor of marijuana alone is sufficient to constitute probable cause, seeing marijuana constitutes probable cause as well. Therefore, Officer Lovette could legally search wherever marijuana might reasonably be found, including the trunk and the luggage therein. The judgment of the trial court was affirmed.