



In this issue:

Totality of Circumstances Provided Probable Cause for Seizure of Substance Which Appeared to be Marijuana – Pgs. 1-2

Stem Pipe, Along with Corroboration of Tip, Provided Probable Cause to Search Car – Pgs. 2-4

Probable Cause Supported Issuance of Search Warrants – Pgs. 4-6



North Carolina Court of Appeals



Totality of Circumstances, Including K-9 Alert and Additional Evidence, Supported Probable Cause to Seize Substance Which Appeared to be Marijuana During Traffic Stop

State v. Highsmith, No. COA 21-593 (August 16, 2022).

On August 31, 2017, Detective Mobley and Lieutenant Smith of the Duplin County Sheriff's Office witnessed a vehicle leave a residence after receiving numerous complaints of narcotics being sold there. The officers followed the vehicle, noted it had a broken brake light, and observed the vehicle illegally cross a yellow line. The officers initiated a stop of the vehicle.

Defendant was sitting in the vehicle's front passenger seat. The officers quickly recognized Defendant from past encounters and arrests involving marijuana, and at that point contacted a nearby K-9 unit. Meanwhile, Detective Mobley approached Defendant's side of the vehicle and immediately noticed a box of ammunition sitting behind Defendant in the rear passenger seat. The officers spoke separately with Defendant and the driver of the vehicle, who gave inconsistent stories about where they were headed and from where they were coming. The officers further noted the vehicle was not registered to any occupant of the vehicle.

When the K-9 unit arrived, the dog sniffed the exterior of the vehicle and alerted to the possible presence of drugs. Defendant was removed from the vehicle and the officers searched the vehicle. The officers located what they believed to be marijuana in a vacuum-sealed bag underneath the passenger seat. Officers also found on Defendant's person cash totaling \$1,200.00, along with a digital scale and a flip cellphone.

Detective Mobley testified Defendant stated that the marijuana and the other items found inside of the vehicle were his. Defendant did not mention anything about hemp or otherwise lead the detectives to believe he was referring to legal hemp instead of illicit marijuana. The officers

seized the items, which were sent to the State Crime Lab for analysis. Lab results subsequently confirmed the officers' suspicions that the seized substance consisted of 211.28 grams of marijuana. (Note that it is unclear from the record whether Defendant had himself used the term "marijuana" when speaking with the officers or whether the officer was summarizing Defendant's statements regarding what was later confirmed to be marijuana).

Defendant was indicted for felony possession with intent to sell, manufacture, or deliver a controlled substance, felony possession of a controlled substance, possession of marijuana and drug paraphernalia, manufacture of a controlled substance, and attaining the status of habitual felon. Defendant filed a motion to suppress, challenging the lawfulness of the search and subsequent seizure of the marijuana. Defendant premised his argument on the emerging industry of legal hemp. Hemp is another plant that looks and smells the same as illegal marijuana but is legal in North Carolina. Defendant argued that given the shared appearance and scent of marijuana and hemp, the sight or scent alone cannot support a finding of probable cause to seize a substance that appears to be marijuana.

The State argued that the K-9 alert was not the only factor giving rise to the officers' probable cause to believe Defendant was engaged in criminal activity; that this was "a K-9 sniff plus" case. Other factors cited by the prosecutor were the inconsistent statements made to officers by Defendant and the driver of the vehicle, the fact that neither the driver nor Defendant was the registered owner of the vehicle, and the officers' knowledge of Defendant's prior arrests related to marijuana.

Agreeing with the State, the trial court denied Defendant's motion to suppress. The jury returned a guilty verdict against Defendant. Defendant gave notice of appeal.

On appeal, Defendant argued that the trial court's conclusions only addressed the legality of the search of the vehicle, and not the legality of the seizure of the marijuana found during the search. The Court of Appeals disagreed, noting that the trial court found that the officer's search revealed not only marijuana, but also additional items including a digital scale, over one thousand dollars in folds of money, ammunition, and a flip cellphone. Under the totality of the circumstances: a vacuum-sealed bag of what appeared to be marijuana, hidden under the seat and found with these items, without any evidence that Defendant claimed to the officers the substance was legal hemp, the officers' suspicions were bolstered, amounting to probable cause to believe the substance at issue was in fact illicit marijuana and not hemp.

For these reasons, the Court of Appeals found that the trial court did not err in denying Defendant's motion to suppress.



Fourth Circuit Court of Appeals



“Stem Pipe” Provided Probable Cause to Search Car Despite Possibility That the Pipe Could Have Been Used to Ingest Legal Hemp Products

U.S. v. Runner, 43 F.4th 417 (Aug. 8, 2022).

Local law enforcement in the Northern District of West Virginia received an anonymous tip that a woman was using intravenous drugs in a car in a Wal-Mart parking lot. The caller described the color and model of the car and stated that the car had Ohio plates. A responding officer found the car and saw a woman exit the passenger side as he approached. The woman denied using drugs, was not impaired, and showed the officer her arms to demonstrate the lack of recent needle marks. Another officer arrived on scene. He noticed scars on the woman’s arms consistent with prior intravenous drug use but did not see any indications of recent use. The woman consented to a search of her purse but refused to consent to a search of the car, stating that it belonged to the defendant, who was inside of the store. While waiting for the man to exit the store, officers saw a glass “stem” pipe sitting in plain view within the center console. The officer could not tell if the pipe had been used or what, if anything, had been in the pipe. An officer then went inside the store to find the defendant. The officer told the defendant to come outside with him and that he was not free to leave. More officers arrived on scene and the defendant was asked for consent to search the car. He declined. Officers then informed the defendant that the pipe provided probable cause to search, so the defendant then unlocked the car for the search. Methamphetamine and other drugs were found inside, along with a firearm, clip, ammo, and more meth in the trunk.

The defendant was indicted for being a felon in possession of a firearm and moved to suppress. He argued that the pipe did not provide probable cause because its contraband nature was not immediately apparent to the officer. At suppression, officers testified that a pipe like the one observed was commonly used to ingest hard drugs such as crack cocaine and meth. A witness for the defendant testified about the increase in popularity of hemp products like CBD and stated that his hemp store sold pipes like the one at issue here for purposes of ingesting legal hemp. The district court ultimately denied the suppression motion, finding that officer properly observed the pipe in plain view and that, despite the existence of legal hemp, its contraband nature was nonetheless still immediately apparent. The defendant entered a guilty plea, preserving his right to appeal denial of his suppression motion. On appeal, a unanimous panel of the Fourth Circuit affirmed.

The court noted that plain view observations by law enforcement do not amount to a search. Where law enforcement can clearly observe an item from a place the officer is lawfully entitled

to be and the contraband nature of the item is immediately apparent to the officer, that observation falls within the plain view exception to the warrant requirement. The court acknowledged that it had not decided whether a pipe, standing alone, could give rise to probable cause, but distinguished this situation from a “pipe-only” case. Officers were responding to an anonymous tip about intravenous drug use in a public place, and one officer—trained as a drug recognition expert—thought the pipe was contraband. “On its face, that evaluation meets the admittedly low standard: that the facts available warrant that items *may be* contraband or stolen property. The court distinguished cases from other circuits where the alleged contraband seized in plain view was “intrinsically innocent” items which could not fairly be cast as immediately recognizable contraband. According to the court:

A stem pipe is not such an object. . . [T]he predominate purpose of stem pipes has been—and continues to be—to smoke illegal substances. Despite the increased use of glass pipes to ingest legal substance such as CBD oil, it is still reasonable to a police officer would reach the belief that a glass pip was evidence of a crime supporting probable cause.

The court noted that, a pipe alone may not qualify, and that this case presented a “close question.” However, the tip (albeit for drug use via a different method) was at least partially corroborated, as far as the woman with a history of drug use and the specific description of the car. That, coupled with the drug recognition officer’s “expertise,” was enough to establish probable cause. The district court was therefore unanimously affirmed.

Probable Cause Supported Issuance of Search Warrants for Cell Phone and Flash Drives

U.S. v. Orozco, 41 F.4th 403 (July 25, 2022).

Corporal Lucas and Deputy Winstead with the Harnett County Sheriff’s Office sat at an intersection in separate patrol cars. As passing cars slowed down to cross the nearby railroad tracks, the officers checked license plates to identify any outstanding warrants. When a blue Lexus passed, Corporal Lucas ran its plate and discovered that its registered owner had a suspended driver’s license. The two officers followed the car and pulled it over after it swerved twice across the yellow line.

When the officers approached, the driver explained that he did not have a driver’s license, but produced a Mexican consular ID card identifying himself as David Orozco. Orozco had a smartphone in his lap displaying a GPS navigation app. When asked where he was headed, Orozco quickly exited the app but could not come up with an answer to where he was going. After a bit of pressing, Orozco glanced at some nearby fields and indicated that he was looking for farm work. Cpl. Lucas noticed that Orozco was sweating profusely despite the car’s blasting A/C and was shaking nervously. He also noticed that the dashboard was not flush and bore tool marks, suggesting someone previously pried it open.

Officers called in a K-9 unit. After first alerting to the driver’s side door, the K-9 was placed inside the vehicle and alerted to the dashboard near the tool marks. Officers opened the dashboard and found grocery bags filled with \$111,252 in cash. The defendant then volunteered

that he was hired to drive the car and disclaimed ownership of the money. Cpl. Lucas contacted the DEA and provided them with Orozco's cell phone number. The DEA advised that the number was linked to an ongoing investigation. Orozco was taken into custody for driving without a license and failure to maintain lane control. Later, in a "money line up," a drug-sniffing dog confirmed the presence of drug residue on the money.

At the station, Cpl. Kimbrough searched Orozco. He found a folded \$100 bill in his shoe. As he unfolded it, five micro-SD cards fell out. Orozco quickly scooped up two of the cards and shoved them into his mouth. Kimbrough managed to recover one SD card – though chewed and inoperable; Orozco apparently swallowed the other.

Based on these circumstances, officers obtained a search warrant for the defendant's phone and the remaining SD cards. The warrant authorized a search for "records of illegal drug activities, documents, photographs and other evidence of drug trafficking." Narcotics officers began searching one SD card and immediately saw what they believed to be child pornography. A second warrant was then obtained for the SD cards. Two of the cards were found to contain several hundred images and videos of child pornography. A third warrant was issued for the smartphone. It contained five child pornography images.

The defendant was charged with possession of child pornography and moved to suppress, arguing that the initial warrant to search the phone and SD cards were not supported by probable cause to believe they would contain evidence of drug trafficking. The district court disagreed and denied the motion. The defendant was then convicted at trial and sentenced to twelve years.

On appeal, Defendant argued that the warrant application failed to establish probable cause to believe that he was involved in drug trafficking. Defendant argued that "cash is not contraband" and that it "is not illegal to be paid to drive a car." The court noted that, while true, here there was a large amount of money with drug residue on it, wrapped in grocery bags, hidden behind the dash of the car. Coupled with the defendant's quick closure of the GPS app on his phone, and his excessive sweating and nervous behavior, officers had probable cause to believe the defendant was involved in drug trafficking.

Defendant further argued that the warrant application failed to establish probable cause that any drug-related evidence would be found on the SD cards and smartphone. The court agreed with the general principle that probable cause that a person is engaged in criminal activity is not *carte blanche* to search all of their personal effects. There must be some nexus between the suspected crime and the place to be searched. However, they disagreed with Defendant's assertion that the officers, in this case, had failed to demonstrate a nexus between the SD cards and the crime of drug trafficking. The court noted that even if finding the SD cards hidden in the defendant's shoe was not enough of a nexus on its own, that the defendant attempted to destroy the cards by ingesting them upon discovery by the officers supplied the necessary nexus. Officers also had probable cause to believe that the defendant's phone would reveal evidence of the crime, given that officers had probable cause to believe the defendant was trafficking drugs and the phone was seemingly being used to navigate at the time officers encountered the defendant.

Therefore, the Fourth Circuit Court of Appeals unanimously affirmed, calling the case “a model example of a proper investigation under the Fourth Amendment.” The officers submitted a comprehensive affidavit with detailed facts showing drug trafficking. The magistrate combined those facts with commonsense inferences and determined that probable cause existed. And when the officers discovered evidence of other crimes, they immediately went back and obtained additional warrants to search and seize those files.