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No. 59848-1-I
Skagit County Superior Court No. 06-1-00654-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff/Appellee,

v.

JEREMY GRANDE,
Defendant/Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENT OF ERROR

The superior court erred in reversing the district court's suppression of the evidence seized in this case.

II.
ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Does the moderate smell of marijuana in a vehicle, without more, create probable cause to arrest all occupants of the vehicle?

III.
STATEMENT OF THE CASE

On April 6, 2006, Jeremy Grande was charged by citation in Skagit County District Court with possession of less than 40 grams of marijuana and possession of drug paraphernalia. See Stipulation to Supplement Record. On June 19, 2006, the Honorable David Svaren held a suppression hearing under CrRLJ 3.6. The only testimony at the suppression hearing came from Washington State Patrol Trooper Brent Hanger. CP 72-77. He testified that he was familiar through experience and training with the odor of burning marijuana. CP 73.

On April 6, 2006, Trooper Hanger stopped a car for improper window tint. CP 73-74. He had observed the car for only a short time before stopping it. CP 76-77. The driver was a "Ms. Hurley" and the passenger was Jeremy Grande. CP 74. Upon contact, Hanger noted an odor of marijuana coming from the car. Id. He described the strength of the odor as "Kind of moderately [sic]." He could not determine where in the car it was coming from. CP 75. He immediately arrested both

occupants. Id. Another trooper then searched Grande incident to arrest and found in his pocket a marijuana pipe containing a small amount of marijuana. Id. Trooper Hanger conceded that did not know how long Grande had been in the car before he stopped it. CP 77.

In a written order dated July 12, 2006, the district court found the search of Mr. Grande to be unlawful and suppressed the evidence. CP 49.

There was no evidence other than the odor, prior to the arrest, that would lead the officer to his probable cause conclusion. The officer conducted no investigation and made no particular observations of defendant that would confirm or dispell [sic] the conclusion of probable cause. Instead, the officer made an arrest and proceeded to search defendant. While the officer may have been justified in concluding that someone had smoked some marijuana, this does not justify a finding of probable cause specific to Defendant.

Id.

On July 17, 2006, the district court found that suppression had the practical effect of terminating the cause and dismissed the charges. CP 50. On the State's appeal to the Skagit County Superior Court, the Honorable Dave Needy reversed. CP 91-94. Judge Needy accepted the factual findings of the district court but believed himself to be bound by State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979), in which Division Two held that the smell of marijuana justified the arrest of all occupants of a vehicle.

On June 21, 2007, Commissioner James Verellen issued a Ruling Granting Review.

**IV.
ARGUMENT**

A. THE ARREST AND SEARCH OF MR. GRANDE VIOLATED THE FOURTH AMENDMENT

This case turns on whether Trooper Hanger had probable cause to arrest Mr. Grande based solely on the odor of marijuana in the car. If so, then the troopers could lawfully perform a search incident to arrest. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). There was no probable cause here, however, because Trooper Hanger had no individualized basis for believing that Mr. Grande had committed a crime.

“[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91.

In this case, the moderate smell of marijuana in a car driven by Ms. Hurley cannot provide particularized probable cause to arrest her passenger. Trooper Hanger never claimed that an odor of marijuana specifically emanated from Mr. Grande, or that Mr. Grande acted suspiciously in any other way.

Grande does not dispute that marijuana has a distinctive and powerful odor. Certainly, the odor of marijuana in the car was sufficient to conclude that *someone* had probably smoked marijuana in the car *at some time*. Because the odor was only “moderate,” however, there was no basis to believe that the smoking had occurred very recently. The smell may have lingered for hours, days, or even weeks, just as the smell of tobacco smoke lingers in a car long after the last cigarette was smoked. Because Trooper Hanger had no idea when Mr. Grande entered the car as a passenger, he had no basis to believe even that the smoking took place while Grande was in the car. It is not illegal to enter a car in which marijuana has been smoked. Nor, for that matter, is it illegal to remain in a car while the driver smokes marijuana. Trooper Hanger simply had no basis to believe that Mr. Grande had any involvement in creating the odor that Hanger detected.

The superior court believed itself to be bound by State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979). In that case, Division Two did indeed hold that the smell of marijuana in a car justifies arresting and searching all the occupants. Its ruling was not based, however, on any controlling Washington or federal authority. Further, the Hammond court did not have the benefit of Ybarra, which was decided a few weeks later. This Court should conclude that Hammond was incorrectly decided because it fails to acknowledge the requirement that probable cause must be specific to the person arrested.

As the Commissioner noted, courts from several other states have declined to find probable cause on facts like these. See Ruling Granting Review at 3, citing 2 Wayne R. LaFave, Search and Seizure § 3.6 at 314 n.43 (4th ed. West 2004).

Although merely a particular illustration of the general rule . . . that bare association with an incriminated person or place does not constitute grounds for arrest, it is well to note here that the detection of the odor of marijuana in a certain *place* will not inevitably provide probable cause to arrest a *person* who is at that place.

LaFave at p. 313 (emphasis in original). In view of this principle, “it has been held . . . that a passenger in an automobile may not be arrested simply because the odor of marijuana is emanating from the car.” Id. at 314.

These propositions are supported by numerous cases from various states, some of which are cited in LaFave. The courts have noted that the smell of marijuana, while distinctive, cannot generally specify the time that the marijuana was smoked or the person who smoked it.

In People v. Hilber, 403 Mich. 312, 269 N.W.2d 159 (1978), the driver and sole occupant of a car was stopped for speeding. Id., 403 Mich. at 319. The officer smelled a “distinct, strong odor of marijuana coming from the car.” Id. at 321. Although the officer believed that the marijuana had been smoked “quite recently,” id. at 322, the Michigan Supreme Court found no basis for that opinion.

A persistent automobile odor may be strong and appear to be recent although it has lingered for hours, days or even longer. (Where, for example, beer has been spilled or a large number of cigars have been smoked in an automobile there will be a strong odor even though no beer or cigars

have been consumed for a considerable time.) . . . [I]t is not reasonable to infer present use of marijuana, or to conduct a search for it, on the basis of past use of marijuana evidence solely by a residual odor of marijuana in an automobile occupied by the defendant, absent determination with reasonable accuracy of the time frame of use in relation to defendant's occupancy.

Id. at 326-26.

The Montana Supreme Court adopted similar reasoning in State v. Schoendaller, 176 Mont. 376, 578 P.2d 730 (1978). After detecting the "strong" odor of marijuana coming from a stopped car, officers ordered the occupants to exit and searched the car. Id. at 377, 381. The court found no probable cause for the search because the odor could linger "for more than a day." Id. at 382. "[T]o hold that an odor alone, absent evidence of visible contents, is deemed equivalent to plain view might very easily mislead officers into fruitless invasions of privacy where there is no contraband." Id.

In People v. Taylor, 454 Mich. 580, 564 N.W.2d 24 (1997), the Michigan Supreme Court discussed the second problem with relying solely on the smell of marijuana: it is not specific to the person who possessed the drug. In Taylor, an officer smelled the odor of burnt marijuana coming from a parked car containing five people. Id. at 583. This could not, in itself, justify the arrest or search of any occupant because "[t]he smell of smoke, whether from tobacco or from marijuana, can linger *and can attach to someone coming into a vehicle*, regardless of whether that person ever had possession of it, or whether it was smoked in that vehicle." Id. at

594 (emphasis added). It is different when an officer sees or feels contraband because “he knows it is present and he can tell who has possession of that contraband.” Id. See also, State v. Valenzuela, 121 Ariz. 274, 276, 589 P.2d 1306 (1979) (“From the fact that there was the odor of marijuana about appellant’s person and that he had placed his hand in his pocket, it cannot be concluded that there was probable cause for an arrest.”); Kansas City v. Butters, 507 S.W.2d 49 (1974) (“medium to strong” odor of marijuana in car did not justify the arrest of any occupant); People v. Harshbarger, 24 Ill. App. 3d 335, 321 N.E.2d 138 (1974) (strong smell of burning marijuana in living room did not justify arrest of any occupant).

The Wisconsin Supreme Court took a middle ground in Wisconsin v. Secrist, 224 Wis. 2d 201, 589 N.W.2d 387, cert. denied, 526 U.S. 1140, 119 S. Ct. 1799, 143 L. Ed. 2d 1025 (1999). It found that the odor of marijuana in a vehicle could support probable cause for an arrest only if the officer could “link the unmistakable odor of marijuana or some other controlled substance to a specific person or persons.” Id. at 216-17. “The link must be reasonable and capable of articulation.” Id. at 217. In Secrist itself, the “strong” odor of marijuana provided probable cause to arrest the “driver and sole occupant of the vehicle.” Id. at 218. On the other hand, “[t]he probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.” Id. The court noted that the odor coupled with a passenger’s suspicious

behavior could be sufficient. Id. at 216, citing Colorado v. Olson, 175 Colo. 140, 485 P.2d 891 (1971) and State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992).

As the Secrist court noted, the arrest of a passenger in the Washington case of Huff was based not only on the smell of marijuana in the car, but also on the passenger's furtive behavior and lying to the police. See Secrist at 217 n. 10; Huff, 64 Wn. App. at 648. Similarly, in State v. Compton, 13 Wn. App. 863, 538 P.2d 861 (1975), a trooper detected a strong odor of marijuana coming from a car and then searched the driver. The Court did not suggest that anyone else was present in the car, so there was no issue of individualized probable cause. Thus, with the exception of Hammond, Washington courts have taken at most a middle ground, finding probable cause only when there is some basis in addition to the smell of marijuana to link the defendant to the crime of possession.

As discussed above, several courts found no probable cause to arrest even when the smell of marijuana was strong and was coming directly from the suspect, or when the suspect was the sole occupant of a car containing the strong smell of marijuana. Grande agrees with the reasoning of those cases. But the Court need not go that far to find that Grande's arrest was improper. Here, Grande was merely a passenger in a car, the officer admitted that he could not identify the source of the "moderate" smell of marijuana, the officer did not claim to be able to determine how long the smell might have lingered in the car, and the officer admitted he had no idea when Grande had entered the car. Grande

made no furtive gestures or false statements. The officer did not observe Grande to be intoxicated and saw no contraband in his possession. Thus, the evidence supporting probable cause was much thinner in this case than in *any* of the cases discussed above except possibly for Hammond. Only under the apparent “bright line” rule of that case could a court find probable cause.

In its response to Grande’s motion for discretionary review, the State relied on Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). That case is readily distinguishable. In Pringle, a police officer stopped for speeding a car occupied by three men. Id. at 367. Upon searching the car by consent, the officer “seized \$763 of rolled-up cash from the glove compartment and 5 glassine baggies of cocaine from between the back-seat armrest and the back seat.” Id. at 368. When all three men denied ownership of the cocaine and money, the officer arrested them all. Id. The Court upheld the arrest based on the following reasoning:

Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.

Id. at 373.

This rationale does not apply to Mr. Grande for at least three reasons. First, in Pringle, the police actually found drugs and other evidence of drug dealing in the car before arresting the defendant. There

was no question that the defendant was present in the car at the time of the illegal activity. Here, on the other hand, there was no evidence that Mr. Grande was even present in the car when a crime was committed. The driver could have finished smoking marijuana long before picking up Mr. Grande.

Second, the crime involved in Pringle was quite serious. Mr. Pringle, after all, received ten years without the possibility of parole for his involvement in cocaine dealing. Pringle, 540 U.S. at 369. On such facts it may be reasonable to assume that no occupant would permit an innocent person to ride in the car as a potential witness. Possession of small quantities of marijuana, by contrast, is not a terribly serious crime in Washington, so an offender would not have the same fear of prosecution. Further, many citizens are tolerant of marijuana smoking even if they do not engage in it themselves, and would not be inclined to report the conduct to the police. For these reasons, many drivers would be willing to pick up an innocent passenger even though the car smelled of marijuana. In fact, some drivers would smoke marijuana in front of a passenger.

Third, in Pringle the contraband was quite valuable. The car contained over \$700 in drug proceeds and the remaining five baggies of cocaine would presumably have fetched considerable additional money. A drug dealer would not likely let anyone else within reach of such valuables unless that person was a buyer or an accomplice to the selling. Here, there was no suggestion that the car contained anything so valuable that the driver would be worried about theft.

Other courts have distinguished Pringle on similar grounds. In In re T.H., 898 A.2d 908 (D.C. Ct. App. 2006), a police officer observed fireworks in the back compartment of a car behind the rear passenger's seat. Id. at 910. The officer then arrested T.H., who was sitting in the rear passenger's seat, as well as the passenger in the front seat. In a search incident to the arrest the officer found a handgun in T.H.'s pocket. Id. The court found the search illegal because there was no probable cause to arrest T.H. The court distinguished Pringle in part because the presence of fireworks in a vehicle is not so "obviously criminal" as to make the driver of the car "unlikely to admit an innocent person with the potential to furnish evidence against him." Id. at 914, quoting Pringle, at 373.

In Idaho v. Gibson, 141 Idaho 277, 108 P.3d 424 (2005), the officers brought in a drug-sniffing dog after a traffic stop. The dog alerted to the smell of illegal drugs. The police then arrested the driver (Gibson) and found methamphetamine in his wallet. Id. at 280. The court suppressed the evidence because there was no probable cause to believe that Gibson possessed drugs. The court distinguished Pringle because in that case drugs were actually found in the car. In Gibson, on the other hand, the dog's sensitive nose proved only that drugs had once been in the car. Id. at 284.

Thus, under Fourth Amendment jurisprudence, the arrest and search of Mr. Grande was unconstitutional.

C. THE ARREST AND SEARCH VIOLATED ARTICLE I,
SECTION 7

Even if the arrest and search of Mr. Grande did not violate the Fourth Amendment, it violated article I, section 7 of the Washington Constitution. Under this provision, the Washington Supreme Court has found enhanced protection for automobile passengers as well as an enhanced requirement of individualized suspicion of illegal activity.

Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision differs from the Fourth Amendment in that article I, section 7 “clearly recognizes an individual's right to privacy with no express limitations.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). See also State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).¹ Beginning at least 85 years ago, the Washington Supreme Court has frequently applied the phrase “private affairs” to riding in an automobile. See, e.g., State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999); State v. Mendez, 137 Wn.2d 208, 217-19, 970 P.2d 722 (1999); State v. Hendrickson, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996) (citing cases); City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988)

¹ There is no need for an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), because the Washington Supreme Court has already established that article I, section 7 provides greater protection than does the Fourth Amendment. See State v. Parker, 139 Wn.2d 486, 493 n.2, 987 P.2d 73 (1999). In fact, as discussed below, the Supreme Court has already decided that this provision specifically provides greater protection to passengers in cars.

(citing cases); State v. Kennedy, 107 Wn.2d 1, 4-5, 726 P.2d 445 (1986); State v. Gibbons, 118 Wn. 171, 187-88, 203 P. 390 (1922).

Specifically, the Washington Supreme Court has held that article I, section 7 “affords law enforcement officers more limited authority over vehicle passengers” than does the Fourth Amendment. See State v. Mendez, 137 Wn.2d at 218, citing State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980) (“[A] stop based on a parking violation committed by the driver does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers.”) The Mendez Court noted that the U.S. Supreme Court “has developed a strong policy in its Fourth Amendment jurisprudence conferring considerable authority upon police officers at the scene of a traffic stop.” Id. at 214-15. In particular, the U.S. Supreme Court held that the Fourth Amendment permitted an officer to order all passengers out of a car after lawfully stopping the vehicle. Id. at 216, citing Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). The Mendez Court, however, found that article I, section 7 prohibited an officer from ordering a passenger to exit or remain in a car when the officer had only probable cause to detain the driver for an infraction. Mendez at 211. Officers must articulate an “objective rationale” to support their actions with regard to a passenger in order to prevent “groundless police intrusions on passenger privacy.” Id. at 220.

Similarly, in State v. Parker, *supra*, the Washington Supreme Court held that article I, section 7 prohibits the police from automatically searching the possessions of non-arrested passengers incident to the arrest of the driver. It based this holding in part on article I section 7's "*greater protection for passengers* than the Fourth Amendment." Id. at 495, quoting Mendez, 137 Wn.2d at 219 (emphasis in Parker).

Parker was based not only on Washington's enhanced protection for vehicle passengers, but also on its enhanced requirement of individualized suspicion of illegal activity.

Under article I, section 7, we have specifically recognized that "[r]egardless of the setting ... 'constitutional protections [are] possessed *individually*.'" State v. Broadnax, 98 Wash.2d 289, 296, 654 P.2d 96 (1982) (quoting Ybarra v. Illinois, 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)) (second alteration in original). Accordingly, a person's "mere presence" in a place validly to be searched does not justify a search of that person. Broadnax, 98 Wash.2d at 295, 301, 654 P.2d 96; *see* State v. Worth, 37 Wash.App. 889, 892, 683 P.2d 622 (1984). Merely associating with a person suspected of criminal activity "does not strip away" individual constitutional protections. Broadnax, 98 Wash.2d at 296, 654 P.2d 96. Thus, where officers do not have articulable suspicion that an individual is armed or dangerous and have nothing to *independently* connect such person to illegal activity, a search of the person is invalid under article I, section 7. *See* Broadnax, 98 Wash.2d at 296, 654 P.2d 96.

State v. Parker, 139 Wn.2d at 497-98 (emphasis in Parker). Although Broadnax relied in part on federal precedent, its holding was also based on

article I, section 7. See Parker, 139 Wn.2d at 498 n.4, citing Broadnax, 98 Wn.2d at 304.²

City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988), which invalidated random stops at “sobriety checkpoints” was also based on article I, section 7’s requirement of individualized suspicion. The Court recognized that such stops might be permissible under the Fourth Amendment in view of Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

State v. Hammond, the sole Washington case supporting the State’s position, did not address article I, section 7 at all. The result in that case cannot be squared with the Washington Supreme Court’s analysis of the Washington Constitution, discussed above, that has evolved since Hammond was decided.

Thus, whether or not this Court finds that the arrest and search of Mr. Grande violated the Fourth Amendment, it should find that it violated article I, section 7.

V. CONCLUSION

This Court should find that Mr. Grande’s arrest was not supported by probable cause. It should therefore reverse the Superior Court and affirm the order of the District Court suppressing evidence and dismissing the charge.

² Broadnax was abrogated on other grounds by Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

DATED this 31st day of August, 2007.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David B. Zuckerman". The signature is written in black ink and is positioned above a horizontal line.

David B. Zuckerman, WSBA #18221
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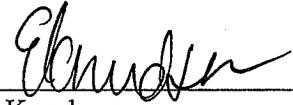
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

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