

J9848-1

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NO. 59848-1

81068-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JEREMY GRANDE,
Petitioner.

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

The Honorable David R. Needy, Judge

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
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I. SUMMARY OF ARGUMENT

The Superior Court reviewed a decision of the District Court regarding whether an officer had probable cause to arrest. These decisions are subject to a de novo standard of review. The Superior Court correctly found that the officer had probable cause to arrest Grande based on the odor of marijuana emanating from the vehicle in which Grande was a passenger.

II. ISSUES

1. Does an officer have probable cause to arrest the passenger in a vehicle when such officer is trained in detecting the odor of marijuana, detects the odor of marijuana emanating from the vehicle, and the officer is unable to pinpoint the odor?
2. Does an arrest and search of the passenger in a vehicle violate article I, section 7 of the Washington State Constitution when a properly trained officer who detects the odor of marijuana emanating from a vehicle has probable cause to believe the passenger has committed a crime?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

The defendant was charged with Possession of Marijuana and Possession / Use of Drug Paraphernalia for events that took place on or about April 6, 2006. On June 19, 2006, the Honorable Judge David Svaren presided over a pretrial motion hearing pursuant to CrRLJ 3.6 in order to determine whether probable cause existed to arrest the defendant on the date in question for possession of marijuana.

On July 12, 2006, Judge Svaren issued a written ruling on the issue presented to the Court. In his ruling, Judge Svaren found that the facts present in the instant case, including the odor of marijuana coming from the vehicle, did "not justify a finding of probable cause specific to the Defendant." Judge Svaren then granted the defense motion to suppress. Appendix A. An order dismissing Grande's case was signed and filed on July 17, 2006. Appendix B.

Pursuant to RALJ 2.2, the State appealed Judge Svaren's decision on August 11, 2006. The Honorable Judge David R. Needy heard oral arguments regarding this appeal on January 29, 2007. Judge Needy reversed Judge Svaren's ruling and found that probable cause did exist to arrest Grande. An order for remand was filed on

March 20, 2007, and particularized facts and conclusions were signed and filed on April 26, 2007. Appendix C. Grande filed a notice of discretionary review on April 12, 2007, after filing the motion for discretionary review on March 23, 2007. Oral argument took place on June 15, 2007, before Commissioner James Verellen, who granted review.

2. Statement of Facts

Trooper Hanger came into contact with Jeremy Grande, on April 6, 2006, while he was on duty as a Washington State Patrolman. 6/19/06 RP 2 3.6. Trooper Hanger stopped a vehicle for having "illegal window tint" and Grande was a passenger in the vehicle with one other occupant, the driver. 6/19/06 RP 3 3.6.

Upon contacting the vehicle, Trooper Hanger observed "the odor of marijuana coming from the vehicle." 6/19/06 RP 3 3.6. Grande stated "oh, it's you again" and that the driver of the vehicle "got very agitated." 6/19/06 RP 3 3.6. Trooper Hanger identified the odor as moderate and could not determine where in the vehicle it was coming from. 6/19/06 RP 4 3.6. Trooper Hanger then placed both the driver and the passenger under arrest. 6/19/06 RP 4 3.6. During a search incident to arrest, Trooper Hanger discovered a glass

marijuana smoking pipe with marijuana contained in it. 6/19/06 RP 4 3.6. Trooper Hanger NIK tested the marijuana to be sure, and it tested "positive for marijuana." 6/19/06 RP 4 3.6.

Trooper Hanger was trained at the Washington State Patrol Academy and elsewhere in regard to traffic enforcement and one of his duties is to enforce the traffic laws in the State of Washington. 6/19/06 RP 1,2 3.6.

In addition to basic training, Trooper Hanger has also received training to detect controlled substances. 6/19/06 RP 2 3.6. Specifically, Trooper Hanger has been able to observe marijuana that has been presented during training, and has also been able to smell burnt marijuana when a "small amount is lit" during training. 6/19/06 RP 2 3.6.

Trooper Hanger has practical field experience in detecting marijuana, including "several marijuana arrests, ranging from a small little amount you can hold in your hand up to as much as over 1,800 pounds." 6/19/06 RP 2 3.6. In addition, Trooper Hanger has had over one hundred arrests or stops that involved the odor of marijuana. 6/19/06 RP 2 3.6. Whenever Trooper Hanger has field tested marijuana detected during an arrest, "100% have always come back positive being tested as marijuana." 6/19/06 RP 6 3.6.

IV. ARGUMENT

1. Individualized probable cause to arrest a passenger exists for possession of marijuana and / or use of paraphernalia when he is confined as an occupant in a vehicle in which the odor of marijuana is detected by a trained officer.

RCW 10.31.100 provides statutory authority for warrantless arrests in certain situations. The relevant portion of the statute provides:

...A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving...the use or possession of cannabis...shall have the authority to arrest the person.

This particular portion of the statute was enacted by the Washington State Legislature to enable law enforcement to arrest in broader situations regarding particular misdemeanor and gross misdemeanor offenses, including possession of marijuana and use of drug paraphernalia. It should further be noted that this particular statute has recently been found to be constitutional by the Washington State

Supreme Court. *State v. Walker*, 157 Wn.2d 307, 138 P.3d 1133 (2006).

Washington State Courts, along with courts from numerous other jurisdictions, have held that the odor of marijuana coming from a vehicle is enough to provide probable cause to believe some or all of the individuals within the vehicle are in possession of marijuana or are using marijuana. See *State v. Compton*, 13 Wn. App. 863, 538 P.2d 861 (1975); *State v. Hammond*, 24 Wn. App. 596, 603 P.2d 377 (1979); *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992) review denied, *State v. Huff*, 119 Wn.2d 1007, 833 P.2d 387 (1992); *People v. Olson*, 175 Colo. 140, 485 P.2d 891 (1971); *Dixon v. State*, 343 So.2d 1345 (Fla.App.1977); *People v. Wolf*, 15 Ill. App. 3d 374, 304 N.E.2d 512 (1973); *People v. Laird*, 11 Ill. App. 3d 414, 296 N.E.2d 864 (1973); *People v. Erb*, 128 Ill. App. 2d 126, 261 N.E.2d 431 (1970); see also *People v. Chestnut*, 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974) (Search of passengers based on odor of contraband found to be lawful as the odor constituted probable cause and a warrantless search was justified by the exigent circumstances of a vehicle stopped along the highway whose occupants are alerted to the officer's suspicions).

In 1975, Division Two of the Washington State Court of Appeals addressed the issue of whether the odor of marijuana alone provides sufficient evidence to provide probable cause to believe the crime of unlawful possession of marijuana is being committed. *State v. Compton*, 13 Wn. App. 863, 538 P.2d 861 (1975). The *Compton* court held that a warrantless search of the defendant was lawful when an officer trained in the detection of marijuana smelled the odor coming from the defendant's vehicle. *Id.* at 865. Although the court was examining a contested search of the defendant, rather than an arrest, the court's holding was that *"the odor of marijuana gave [Trooper Owen] sufficient information to form a reasonable belief that the crime of unlawful possession of a controlled substance was being committed in his presence."* *Id.* at 864-65 (Emphasis Added). Such a holding would also have allowed a lawful arrest of the defendant pursuant to RCW 10.31.100.

This question was revisited by Division Two of the Washington State Court of Appeals again in 1979, with the court holding that a warrantless arrest based on the odor of marijuana alone is valid. *State v. Hammond*, 24 Wn. App. 596, 603 P.2d 377 (1979). The court in *Hammond* provided that,

"[w]hen officers trained and experienced in marijuana identification detect its odor in a vehicle stopped along the highway, they do not have to ignore the odor, and have sufficient information to believe that the crime of marijuana possession is being committed in their presence."

Hammond, 24 Wn. App. at 598 (citing *Compton*, 13 Wn. App. 863).

The *Hammond* court indicated that this holds true not only for the driver of a vehicle, but for the passengers as well (as defendant Hammond was alone in the back seat). The court concluded its holding by providing that the "marijuana odor established probable cause to arrest [the defendant] for marijuana possession." *Id.* at 600; See also *State v. Ramirez*, 49 Wn. App 814, 819, 821, 746 P.2d 344 (1987) (Officers possess probable cause to either search or arrest for marijuana possession or use upon smelling the odor of burning marijuana).

Grande attempts to obfuscate the aforementioned line of case law by arguing that *Compton* and *Hammond*, and the line of case law following it, is not consistent with the notion that individualized suspicion is required to establish probable cause. The holdings in *Compton* and *Hammond* are not, however, inconsistent with the long-standing requirement that probable cause be individualized.

In finding individualized probable cause for all individuals within a vehicle, the court in *Hammond* based its decision upon the fact that the odor of marijuana was found within a confined vehicle in which passengers are present. As such, the finding was simply that the odor of marijuana in such a small and confined area creates individualized suspicion to all passengers when the odor cannot be pinpointed, and when no particular individual can be singled out as the guilty party. Such a holding is consistent with the probable cause standard requiring that facts and circumstances exist that are "sufficient to cause a person of reasonable caution to believe that a crime has been committed." *State v. Greene*, 97 Wn. App. 473, 478, 983 P.2d 1190 (1999).

Post *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), the Court of Appeals continued to follow the precedent set above in finding that an odor of controlled substances is enough to arrest vehicle occupants in 1992. *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992) *review denied*, *State v. Huff*, 119 Wn.2d 1007, 833 P.2d 387 (1992). In *Huff*, the court examined whether the passenger in a vehicle was properly arrested due to the presence of the odor of methamphetamine coming from inside the car. *Id.* at 644. The court specifically held that "*probable cause to arrest the*

occupants of a car for possession of a controlled substance exists when a trained officer detects that the odor of a controlled substance is emanating from a vehicle.” Id at 647 (Emphasis Added).

Such a holding is not inconsistent with the requirement of individualized probable cause, as defense counsel argues. The fact that an odor of a controlled substance is coming from a confined area with only a few individuals gives rise to a reasonable suspicion that those individuals are in possession of that same controlled substance or have used paraphernalia in association with that controlled substance due to their proximity to the odor and the confined area.

The court in *Huff* specifically addressed the position taken by Grande that there needs to be something more pinpointing the odor of contraband to a particular individual. In footnote two of the opinion, the court states that:

A few courts have distinguished between whether the smell emanates from the suspect’s person or from the car, holding that probable cause to arrest exists only when the defendant herself smells of narcotics...However, **this is not the rule in Washington.**

Huff, 64 Wn. App. at 647, Footnote 2 (Emphasis Added). The court cites to *Compton* and its progeny, as discussed above, for this prospect. If the court in *Huff* erred, the Washington State Supreme

Court would seemingly have granted the defense petition for review to overturn the Court's reasoning. This did not happen, however, and the Washington Supreme Court instead denied the petition, and left *Huff* as it was decided by the Court of Appeals.

The position taken by Washington courts indicates that the odor of a controlled substance provides individualized suspicion to those who are in direct proximity to the odor, indicating use of paraphernalia or possession of marijuana.

In keeping with the rulings of the aforementioned case law, the Washington State Supreme Court addressed the issue with regard to search warrants, and provided that "a statement that an officer with training and experience actually detected the odor of marijuana provides sufficient evidence, by itself, constituting probable cause to justify a search." *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995) (Citing *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110 (1994)). This is applicable to the instant case as the standards in determining probable cause as to a search are relatively similar to those justifying an arrest, requiring a showing of facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain

location. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213 (1980); *State v. Patterson*, 83 Wn.2d 49, 58, 515 P.2d 496 (1973).

The United States Supreme Court has also provided an opinion that is helpful in this case as it distinguishes the case of *Ybarra*, which Grande relies heavily upon. *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct 795 (2003). In *Pringle*, an officer discovered five baggies of cocaine and a large amount of money behind the back-seat armrest. *Id.* at 372. There were three occupants in the vehicle, and when none of the occupants would admit to knowledge of the drugs, all three were arrested for possession of the cocaine. *Id.* at 368-69. The Supreme Court in *Pringle* found that “there was probable cause to believe [the defendant passenger] committed the crime of possession of cocaine, either solely or jointly.” *Id.* at 372.

The Supreme Court in *Pringle* discussed the requirement of individualized probable cause with respect to the passengers, and stated that “a car passenger - unlike the unwitting tavern patron in *Ybarra* - will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.” *Pringle*, 540 U.S. at 373 (quoting *Wyoming v.*

Houghton, 526 U.S. 295, 304-05, 119 S.Ct. 1297 (1999) (Emphasis added)). In further addressing this issue, the Court provided that "any inference that everyone on the scene of a crime is a party to it must disappear if the Government...singles out the guilty person." *Pringle*, 540 U.S. at 374 (quoting *United States v. Di Re*, 332 U.S. 581, 594, 68 S.Ct. 222 (1948)). Similar to *Pringle*, the government here was unable to single out the guilty person upon observing the odor of marijuana emanating from the vehicle, and probable cause existed to believe that both parties in the vehicle were in possession of marijuana due to the odor emanating from the vehicle until the investigation provided otherwise.

Grande attempts to distinguish *Pringle* from the case at hand by pointing out that the legislature has assigned stiffer penalties to cocaine than it has to marijuana. This argument is without merit. The fact that the legislature chose to punish those who possess cocaine more harshly than those who possess small amounts of marijuana has no bearing on a determination of whether or not an officer has probable cause to arrest an individual when an odor of controlled substances is detected. Marijuana is no less illegal than cocaine and the reasoning from *Pringle* attaches with equal weight to cases involving marijuana.

2. **Grande's arrest and search did not violate art I, sec 7 of the Washington State Constitution when he was a passenger in a vehicle and a properly trained officer had probable cause to believe he had committed a crime either separately or jointly with the driver.**

Article I, section 7 of the Washington State Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Unmistakably, article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). Additionally, Washington has consistently held that a person's right to be free from unreasonable governmental intrusion into one's private affairs encompasses motor vehicles. See, e.g., *State v. Mendez*, 137 Wn.2d 208, 217, 219, 970 P.2d 722 (1999); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988) (citing cases); *State v. Gibbons*, 118 Wn. 171, 187-88, 203 P. 390 (1922) (Washington citizens have a right to the privacy of their vehicles).

The greater protection afforded by article I, section 7 has also been extended to automobile passengers. *Mendez*, 137 Wn.2d at 219, 970 P.2d 722. The Supreme Court in *Mendez* held that the authority to order a driver to remain in or exit a vehicle for officer

safety reasons following a traffic stop did not automatically extend to passengers. *Id.*, at 220. The Court further held that “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.’” *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999), *citing*, *Mendez*, 137 Wn.2d at 220, 970 P.2d 722. As such, an officer may not detain, request identification from, frisk, or search a passenger or his belongings without an independent basis to do so. *Parker*, 139 Wn.2d at 502-03, 987 P.2d 73 (officers may not search items known to be passengers subject to valid arrest of driver); *Mendez*, 137 Wn.2d at 24, 970 P.2d 722 (order that passenger return and remain in vehicle was unlawful where officers had no suspicion that passenger had engaged or was about to engage in criminal activity); *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 provide an officer grounds to request identification from vehicle’s passenger).

The Court has examined cases thus far dealing with passenger protections when the driver has committed a traffic infraction or a crime. In this context, it is easy to see how governmental intrusion into the private affairs of the passengers is

unreasonable. The distinction in Grande's case, however, is that in addition to the driver being suspected of a crime, Grande himself was also suspected of a crime. Trooper Hanger, who was extensively trained to detect the odor of burning marijuana, smelled the odor emanating from a vehicle in which Grande was a passenger. Trooper Hanger arrested and searched Grande based on such odor, not based on the traffic violation committed by the driver.

Grande can not hide behind his status as "passenger" to avoid the fact that Trooper Hanger had probable cause to arrest him for the crime of possession of marijuana or use of paraphernalia associated with marijuana. The odor emanating from such a tightly confined space gave Trooper Hanger probable cause to suspect both the driver and Grande of such crimes separately or jointly.

V. CONCLUSION

Washington State Courts have *repeatedly* held that if the odor of marijuana is coming from a vehicle, probable cause exists to arrest the occupants of the vehicle on suspicion of possession or use of marijuana. In the instant case, Trooper Hanger detected the odor of marijuana coming from a vehicle in which the defendant was a passenger, and suspected both individual occupants of possession of

marijuana. Based upon his observations, Trooper Hanger initiated a warrantless arrest of both occupants under the authority of RCW 10.31.100(1). During a search incident to arrest, drug paraphernalia with marijuana was discovered upon the defendant's person. Pursuant to long standing precedent in Washington State Courts, beginning in 1975, such an arrest and search was lawful under the circumstances. Additionally, the arrest and search of Grande was not in violation of Art 1, Sec 7 of the Washington State Constitution. Trooper Hanger suspected Grande either solely or jointly with the driver of possession of marijuana or use of paraphernalia associated marijuana. Grande can not hide behind his status as a passenger to avoid arrest when a trained officer has probable cause to believe that he has committed a crime. As such, the State respectfully requests this Court affirm the Superior Court's ruling.

DATED this 21st day of December, 2007.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Vickie Mauer, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Zuckerman, addressed as 1300 Hoge Building, 705 2nd Avenue, Seattle, WA 98104. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of December, 2007.


VICKIE MAUER, DECLARANT