

**FILED**

**AUG 15 2011**

NO. 295672-III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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THE STATE OF WASHINGTON, Respondent

v.

DALE RAY HIGHTOWER, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 10-1-00063-5

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BRIEF OF RESPONDENT

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### **STATEMENT OF THE CASE**

On January 13, 2010, Officers Slocombe and Montebianco responded to an anonymous tip that there was a smell of marijuana in an apartment complex. (RP 3). Upon arrival to the apartment complex, the Officers confirmed that the hallway smelled of burnt marijuana, and based upon their experience, ascertained that the scent originated from apartment number nine. (RP 4-5). The Officers knocked on the door of the apartment, but received no answer. (RP 5). The officers backed off, returning to the apartment stairwell, and encountered the defendant and another individual walking up the stairs. (RP 5). The Officers questioned the individuals whether apartment nine was theirs, and the defendant said that it was. (RP 5). At this point, the Officers approached the defendant and his companion. (RP 5).

The Officers immediately determined that an additional smell of fresh marijuana was emanating

from the defendant and/or his companion. (RP 5). The Officers advised both individuals that they were being detained, and Mirandized them. (RP 5). Both individuals indicated they understood their rights, and neither invoked them. (RP 8-9). Upon separating the individuals, the smell was determined to be emanating from the defendant. (RP 5-6). The defendant's companion was released, as he appeared to have no connection with the apartment, nor was there any odor of marijuana on his person. (RP 6).

The Officers questioned the defendant, who admitted he had marijuana on his person. (RP 9). The defendant denied that there would be additional marijuana in the apartment, but admitted a bong and other paraphernalia for the use of marijuana were contained inside the apartment. (RP 9). Officer Slocombe then sought and obtained a search warrant, citing the smell emitting from the apartment, the smell from the defendant, and the marijuana on the defendant's

person as justifications for the search. (RP 10).  
The search warrant was obtained, and additional  
contraband was located in the apartment. (RP 10).

The defendant was tried and convicted in the  
Superior Court of Benton County of the crimes of  
Possession of a Controlled Substance - Cocaine,  
and Possession of Marijuana. (CP 69, 73).

#### **ARGUMENT**

**A. Officer Slocombe possessed the  
expertise necessary to identify the  
scent of Marijuana, under these  
circumstances.**

The lynchpin of the defendant's argument is  
the contention that there is an affirmative rule  
that in order for an officer's testimony  
identifying marijuana to be used as the basis of  
probable cause, the officer must have training in  
the identification of marijuana by scent. This  
is not a proposition grounded in case law, and  
contradicts all authority on the subject.

What is and is not probable cause is  
difficult to say. The United States Supreme

Court, when speaking about probable cause, summarized it as such:

Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." [citations omitted]

*Ornelas v. U.S.*, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

The State finds it difficult to believe that Mr. Hightower has managed to define what the Supreme Court of the United States believed it could not. Probable cause is an amorphous concept, changing with what must be proved, and the factual circumstances existent in each case. *Id.* The Appeals Courts have elected to leave the decision making with regards to probable cause up to the issuing court, absent an abuse of discretion. *State v. Remboldt*, 64 Wn. App. 505, 509, 827 P.2d 282 (1992). (A magistrate's

determination that a warrant should issue is given deference and, since the issuance of the warrant is a matter of judicial discretion, it is reviewed under the abuse of discretion standard.)

The defendant relies extensively on *State v. Johnson*, 79 Wn. App. 776, 904 P.2d 1188 (1995) to establish this rule. However, in the State's reading of the case, nowhere is there established a rule that an officer must have training and experience in the identification of marijuana by scent. *State v. Johnson* was a challenge to a search warrant, just as this case is. *Id.* at 777. The officers in that case claimed to have smelled marijuana from outside a home, without intruding upon the curtilage. *Id.* at 779. In light of the difficulty of this task, the Court concluded that the agents 'expertise' was critical to the decision of whether probable cause existed or not. *Id.* at 780. The Court was not simply attempting to discover if the officers met some imaginary two-part test, showing 'training and

experience.' The Court was attempting to discover if the agents' capabilities, taken together, justify the Magistrate's opinion that their observations formed the basis for probable cause, in terms of the particular circumstances. The Court then reviewed the agents' training and experience, as the defense harps on so, and found that the Court believed the agents had training and experience, and that their observation of the smell of marijuana provided sufficient quanta of proof to justify the search warrant. *Johnson*, in fact, ends with a caution against the exact type of reasoning the defendant attempts here:

Johnson's interpretation of *Remboldt* is incorrect. The factors referred to in *Remboldt* are offered only as reasons why the affidavit in that case was sufficient, they do not express an immutable standard. As the court in *Remboldt* stated: "In dealing with probable cause ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

*State v. Johnson*, 79 Wn. App. at 783.

There is no case law showing that an officer must have both training and experience in identifying marijuana by smell in order to use said observation as a basis for a search warrant. There is no bright-line rule which tells when there is probable cause, and when there is not. The Officer's expertise, taking into account all factors, must render the observation reliable to form the basis of probable cause in those particular circumstances.

Cases the defendant neglected to cite show this quite clearly. In *State v. Ibarra*, 61 Wn. App. 695, 702, 812 P.2d 114 (1991), the Court stated, "In our opinion, the affidavit must show either (1) that the observer had the necessary skill, training **or** experience to identify the controlled substance. . . ." (emphasis added). Indeed, the Court has expressed profound skepticism that officers could fail to be capable of identifying the smell: "Considering the

widespread use of marijuana, the general familiarity with the drug by most qualified officers and this officer's training and experience, it is hard to conceive that he would not recognize the odor and associated paraphernalia." *State v. Roth*, 30 Wn. App. 740, 743, 637 P.2d 1013 (1981) (overruled on other grounds).

It is the State's contention that Officer Slocombe clearly had the training and experience necessary to identify the scent of marijuana in this circumstance. The scent pervaded the hallway, penetrated the air system, and negatively affected those in nearby apartments. (CP 39). The smell of it on Mr. Hightower was even more obvious. (RP 5-6). This is not an occasion where officers smelled a faint whiff, or briefly caught the odor. The scent was obvious and apparent. (CP 39). Untrained, inexperienced individuals, without the expertise of Officer Slocombe, identified the scent as marijuana. (CP

39). This information was all provided to Judge Butler when she was making her decision regarding the search. (CP 39-40). These factors naturally influence the appropriate level of proof necessary.

Furthermore, Detective Slocombe was extremely experienced in the detection of marijuana. (CP 39). Detective Slocombe had been an officer since March 2005 with the Kennewick Police Department. (CP 39). While at the Academy, he received training in narcotics investigation. (though the State concedes that he did state during cross examination that the smell of marijuana was never part of his training). (CP 39). Detective Slocombe stated he had extensive experience with marijuana, having been involved in numerous investigations related to the seizure of it, and other narcotics. (CP 39).

The trial court, exercising its discretion, found the following: "Officer Slowcombe [sic] by virtue of his training and experience in law

enforcement can detect the odor of both burnt, and fresh marijuana." (CP 62, Finding No. 2). There is no reason to suspect that Officer Slocombe was not capable of doing so. Officer Slocombe's identification of the odor formed the basis for the probable cause to arrest, and the probable cause for the issuance of a search warrant. His experience as an officer was sufficient to convince the trial court that, in these circumstances, Officer Slocombe's identification of the odor was enough to form the basis for a finding of probable cause. There was no abuse of discretion.

As such, both the arrest of Mr. Hightower, and the search of his apartment were properly performed and executed in line with the law, and all the fruits of such are admissible. Mr. Hightower's confession cannot be tainted by a lawful arrest, and so the statements he made while under arrest, are also admissible.

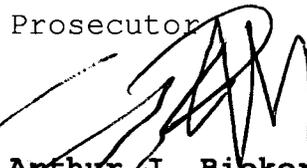
**CONCLUSION**

As the trial court correctly found that probable cause to arrest the defendant, as well as search his apartment, existed, there is no basis for the request for evidence to be suppressed. As such, the State respectfully requests this Court affirm the lower court's ruling.

**RESPECTFULLY SUBMITTED** this 11th day of August 2011.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Dale Ray Hightower  
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U.S. Regular Mail,  
Postage Prepaid

Signed at Kennewick, Washington on August  
11, 2011.



Pamela Bradshaw  
Legal Assistant