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Court of Appeals No. 59848-1  
Skagit County Superior Court No. 06-1-00654-1

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

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JEREMY GRANDE,  
Defendant/Appellant,

v.

STATE OF WASHINGTON,  
Plaintiff/Appellee.

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FILED  
COURT OF APPEALS  
DIVISION ONE  
STATE OF WASHINGTON  
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REPLY ON MOTION FOR DISCRETIONARY REVIEW

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## I. STATEMENT OF THE CASE

The State's statement of the facts is no different in any material way from the one submitted by Grande.

Grande submitted along with his motion for discretionary review the findings and conclusions of superior court Judge Needy. The State then apparently obtained a new and more detailed version of the findings and conclusions, which it has included as Appendix C to its brief. Such a practice raises concerns that the State is attempting to tailor the findings to counter the claims raised on appeal. Here, however, it does not appear that the new findings and conclusions could change this Court's analysis. As with the original findings, Judge Needy "accepts the facts from the District Court hearing." The new version includes a much lengthier discussion of the law, much of which seems redundant, but this Court reviews legal conclusions *de novo* in any event.

## II. ARGUMENT

The question presented is whether the moderate smell of marijuana in a vehicle, standing alone, gives rise to probable cause to arrest all occupants of the vehicle. The State's position is that there is no basis for review because it is well-established that the answer to this question is "yes." In fact, the only Washington case to clearly adopt such a rule is that of Division Two in State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979). The other cases cited by the State are not directly on point.

In State v. Compton, 13 Wn. App. 863, 906 P.2d 925 (1995), 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. Thus, there was no issue of individualized probable cause.

In State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992), the officer did indeed arrest a passenger. But the arrest was not based solely on the smell of drugs in the car. Rather, the passenger made furtive gestures as the officer attempted to pull the car over, and then lied to the officer about her identity. Id. at 648. This suspicious behavior suggested that the passenger was involved in the illegal drug activity. (In fact, the officer could have arrested her solely for obstructing his investigation by lying about her identity.) Similarly, in State v. Olson, 175 Colo. 140, 485 P.2d (1971), the arrest of the passengers was based not only on their being present in a car but also on their individual, suspicious behavior. The Wisconsin Supreme Court has noted that both Huff and Olson turned on the suspicious behavior of the passengers and not merely on the general smell of marijuana. See Wisconsin v. Secrist, 224 Wis. 2d 201, 216, 589 N.W. 2d 387, cert. denied, 526 U.S. 1140, 119 S. Ct. 1799, 143 L. Ed. 2d 1025 (1999).

The remaining cases cited by the State are all from other jurisdictions, and were all decided prior to the United States Supreme Court decision in Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), which established the requirement of individualized

suspicion to support a drug arrest. See State's Response at 7. In fact, three of the cases cited by the State are from the Illinois state courts, which were clearly laboring under an unconstitutional standard prior to Ybarra. In any event, all but one of the cases are distinguishable.

In Dixon v. State, 343 So.2d 1345 (Fla. App. 1977), the officer "observed a great deal of smoke coming from the vehicle and as he approached it detected a strong odor of burning marijuana" before searching the driver. Thus, the occupants must have been actively engaged in smoking marijuana. Here, by contrast, the moderate smell of marijuana – with no indication of smoke – could have lingered from a time long before Mr. Grande entered the car.

In People v. Wolf, 15 Ill. App. 3d 374, 304 N.E.2d 512 (1973), the officer found, in addition to the smell of marijuana, 16 baggies of marijuana and nearly \$3,000 in cash. This suggested a joint enterprise of drug dealing. The only issue apparently contested by the defendant was whether the officer properly entered the car in the first place in order to check the vehicle identification number. Id. at 375-76.

In People v. Laird, 11 Ill. App. 3d 414, 296 N.E.2d 864 (1973), the only issue was whether the smell of marijuana justified a search of a vehicle. Because the search turned up marijuana, the defendant driver did not contest that existence of probable cause to arrest him at that point. Here, by contrast, Mr. Grande was arrested immediately after the officer smelled marijuana, and the evidence at issue was found on his person during the search incident to arrest.

In People v. Erb, 128 Ill. App.2d 126, 261 N.E. 2d 431 (1970), the police could detect the smell of marijuana specifically emanating from Ms. Erb after she exited a car. Further, an officer saw her throw a packet into the bushes after the officers approached. “[D]efendant Erb's suspicious movements and the finding of the packet near her, gave probable cause for her detention and search.” Id. at 134.

The majority opinion in People v. Chestnut, 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974), does appear to endorse the proposition for which it is cited. The dissenting opinion, however, foreshadows Ybarra's requirement of individualized probable cause. “While the record establishes probable cause that *someone* in the automobile *had been* in possession of marijuana, there is no probable cause for present possession since none of the occupants was smoking when the troopers stopped and approached the automobile.” Id. at 263 (emphasis in original).

The State also relies on State v. Ramirez, 49 Wn. App. 814, 819, 746 P.2d 344 (1987) as a case allegedly following Hammond. While the Ramirez court did mention Hammond at one point, that was not necessary to its decision. The Ramirez court actually *suppressed* the evidence at issue, finding that the smell of marijuana did *not* justify the officers' search of a hotel room.

The State also relies on State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995), for the proposition that the smell of marijuana creates probable cause for a search. In fact, the search warrant in Cole was based not merely on the smell of marijuana but also on an informant's tip that the

defendant was growing marijuana and on power records consistent with a marijuana grow operation. Id. at 286. In any event, as the U.S. Supreme Court explained in Ybarra, probable cause to search a particular place does not give rise to probable cause to search or arrest every person who happens to be present at that place. Even assuming for the sake of argument that the officers in this case could have searched Ms. Hurley's car after detecting an odor of marijuana in it, that does not mean they had probable cause to arrest and search a passenger in that car.

Thus, the State's position in this case is truly supported by only one Washington case, State v. Hammond, and perhaps by one old case from another state. The issue presented in this case has never been addressed by Division One, has never been addressed by any Washington appellate court subsequent to the U.S. Supreme Court's decision in Ybarra, and has never been addressed under the standards of article I, section 7 of the Washington Constitution. This Court should take review to decide this important constitutional question.

DATED this 13<sup>th</sup> day of June, 2007.

Respectfully submitted,



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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 the foregoing Reply on Motion for Discretionary Review on the following:

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I also sent a courtesy copy to deputy prosecuting attorney Toni T.

Guzzo via e-mail.

JUNE 13, 2007  
Date

Christina Alburas  
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