# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

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**Forward: This issue will review three relevant cases which were decided in May from the Supreme Court of the United States, the United States Court of Appeals for the Fourth Circuit and the North Carolina Court of Appeals. This issue also includes reminders about the process for obtaining a search warrant or court order from Superior Court Judges, as well as probable cause and the odor and/or sight of marijuana.**

## CASE BRIEFS:

### UNITED STATES SUPREME COURT

**Fourth Amendment/Community Caretaking Exception: Caniglia v. Strom, 141 S. Ct. 1596 (2021).**

**Issue:** Did the community caretaking exception justify the officers' warrantless entry into a home to seize the firearms of an individual who was taken to the hospital for a mental health evaluation?

**Holding:** No, the community caretaking exception did not justify the officers' warrantless entry into the home.

**Facts:** Mr. Caniglia had an argument with his wife in their home in Rhode Island. At some point during the argument he took a handgun from their bedroom, placed it on the dining room table and instructed his wife to "shoot me now and get it over with." His wife refused his request, left the house and spent the night at a hotel. The next morning after she was unable to reach her husband by phone, she called the police and requested a welfare check. Officers along with his wife went to the home where they found Mr. Caniglia on the front porch. Mr. Caniglia confirmed what had happened the prior evening, but denied that he was feeling suicidal. The officers believing him to be a danger to himself or others called for an ambulance, and Mr. Caniglia agreed to go to the hospital for an evaluation on the condition that the officers promised not to confiscate his firearms. However, after the ambulance left the officers entered the home with his wife and seized two of his handguns.

Mr. Caniglia subsequently sued the officers alleging they violated his 4th Amendment rights. The trial court granted summary judgment for the


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officers and on appeal the United States Court of Appeals for the First Circuit affirmed the decision finding that the seizure of his firearms fell within the community caretaking exception to the 4th Amendment's search warrant requirement.

**Discussion:** A unanimous Supreme Court rejected the First Circuit Court's extension of the community caretaking exception to the home. When officers have an objectively reasonable basis to believe a weapon is located in an impounded vehicle, the community caretaking doctrine justifies a warrantless search of the vehicle to prevent the possibility of an intruder obtaining the weapon and endangering the public. In analyzing this case the Court reviewed Cady v. Dombrowski, 413 U. S. 433 (1973). In Cady, the Supreme Court held that a warrantless search of a vehicle's interior and trunk while the defendant was in the hospital and under arrest for driving while impaired, was reasonable under the 4th Amendment to protect public safety. The officer had a reasonable belief that a weapon was inside the vehicle and the search was justified as a proper community caretaking function to protect the public from the possibility that an unauthorized person might retrieve the weapon. The vehicle had been towed and was being stored at a private lot.

The Court stated that while the search in Cady and this case both involved a search for firearms, there was a constitutional difference in the locations of the two searches. While the exception applies in the motor vehicle context, it does not apply to searches of homes. The Court concluded that "[w]hat is reasonable for vehicles is different from what is reasonable for homes" and that it has repeatedly refused to extend the scope of exceptions to the 4th Amendment's search warrant requirement to allow warrantless entry into the home (internal citation omitted). It is important to note that the Supreme Court did not consider whether another justification, such as exigent circumstances or consent, would have justified the officers' actions since the Circuit Court based its decision solely on the community caretaking exception.

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**FOURTH CIRCUIT**

**Fourth Amendment/Search Incident to Arrest: U.S. v. Davis, 997 F.3d 191 (4th Cir. 2021).**

**Issue:** Was the warrantless search of the defendant's backpack reasonable under the 4th Amendment when the defendant was handcuffed and lying face down on the ground?

**Holding:** No, the warrantless search was unreasonable since the defendant was secure and not within reach of the backpack at the time of the search.

**Facts:** On March 1, 2017, a Holly Springs Police Department Officer stopped the defendant's vehicle for a window tint violation. After speaking with the defendant and getting his driver's license and insurance card, he discovered that the defendant had a history of felony drug charges and convictions. Two additional officers arrived and within a few minutes the defendant made a motion with his hand to indicate he was leaving and sped off without his license and insurance card. Officers initiated a vehicle

pursuit which ended when the defendant drove down a dead-end street, went between two houses and into a backyard. The defendant jumped out of the vehicle with a backpack and ran into a swamp where he got stuck. The Officer pursued the defendant on foot and ordered him out of the water. The defendant came out, dropped the backpack next to himself and lied down on his stomach. The Officer patted the defendant down and discovered a large amount of cash. The defendant was arrested and handcuffed with his hands behind his back. The Officer then opened the backpack and located more cash and two plastic bags containing cocaine. The defendant's vehicle was searched and a digital scale and bag with more cash were found. Officers also located a firearm the defendant had thrown out of his vehicle during the pursuit. The defendant was indicted in federal court and made a pretrial motion to suppress the evidence on the basis that the warrantless search of his backpack and vehicle were in violation of his 4th Amendment rights. The trial court denied the motion and the defendant was convicted at trial and sentenced to 420 months.

**Discussion:** Warrantless searches are generally invalid unless they fall within one of the exceptions to the 4th Amendment's search warrant requirement. One recognized exception is the search incident to arrest which allows officers to search the arrestee's person and the area within his or her immediate control (lunge area). This type of warrantless search is reasonable under the 4th Amendment because of concerns for officer safety and the preservation of evidence. A search incident to arrest prevents an arrestee from using a weapon to harm officers and from hiding or destroying evidence. In Arizona v. Gant, 556 U.S. 332 (2009), the Supreme Court held that in the motor vehicle context a search incident to arrest is reasonable only when (1) the arrestee is unsecured and within reaching distance of the vehicle's compartment at the time of the search, or (2) when it is reasonable to believe the vehicle contains evidence related to the crime of arrest (internal citations omitted).

In this case, the Fourth Circuit extended the rationale underlying the first holding in Gant to containers and concluded that that "police officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search'" (internal citation omitted)(emphasis added). In applying this rule to the case, the Court concluded that the warrantless search of the defendant's backpack was unreasonable because the defendant was lying face down on the ground with his hands cuffed behind his back at the time the backpack was searched. The defendant was secured and not within reaching distance of the backpack.

The Court similarly concluded that the warrantless search of the vehicle was unreasonable because the defendant was secured and not within reaching distance of the vehicle at the time it was searched. The Court further stated that it was unreasonable to believe the vehicle contained evidence related to the crimes of arrest (traffic violations, felony flee to elude and RDO). Additionally, the Court concluded that the motor vehicle exception did not justify the warrantless search of the vehicle because without the evidence obtained from the backpack (cash and two bags of cocaine), the remaining evidence officers had at the time (flight, arrest and the cash located on the defendant) was insufficient to support probable cause.

This case does not impact the ability of officers to search a person incident to arrest. While officers can still search the lunge area incident to arrest and seize items of evidence within it, they can no longer

search any containers found within it based on the search incident to arrest rationale unless the suspect is unsecured and could reasonably access the container at the time of the search. As this is unlikely to occur when an arrestee is in handcuffs, in order to search containers officers are advised to obtain consent, a search warrant, or to perform an inventory search pursuant to policy when the arrestee is processed. Additionally, officers may search such containers when an arrestee denies ownership of the container and has abandoned the property.

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**NORTH CAROLINA COURT OF APPEALS**

**Fourth Amendment/Motor Vehicle Exception/Odor of Marijuana: State v. Parker, ___ N.C. App. ___, ___ S.E.2d ___ (2021).**

**Issue:** Was there probable cause to conduct a warrantless search of the defendant's vehicle?

**Holding:** Yes, probable cause existed to justify the warrantless search of the defendant's vehicle based on the odor of marijuana coming from the vehicle, the passenger's admission to having recently smoked marijuana and the partially smoked marijuana cigarette produced by the passenger.

**Facts:** In January 2018, a Kannapolis Police Department Officer stopped the defendant's vehicle after noticing the defendant was not wearing a seatbelt while operating it. In addition to the defendant, there was a front seat passenger in the vehicle. After approaching and requesting the defendant's license and registration, the Officer detected an odor of burnt marijuana coming from the vehicle. After additional officers arrived to assist with a search of the vehicle, the defendant was informed by the Officer that he could smell marijuana and that if the defendant turned over the contraband, he would be issued a citation for misdemeanor possession and the passenger would be released. The passenger then replied that he had recently smoked a marijuana cigarette and pulled a partially smoked joint from his sock. During the search of the vehicle two digital scales and a pill in a plastic bag were located in the center console. An "open pack of cigarillos containing a plastic bag with a green leafy substance" that the Officer believed was marijuana was located in the driver's side door compartment, along with two rock-like substances suspected to be narcotics that were found inside a cloth in the cup holder. The defendant was arrested and denied knowledge of the substances.

At trial the defendant moved to suppress the evidence arguing that the Officer lacked probable cause to search the vehicle based solely on the odor of burnt marijuana in light of North Carolina's legalization of hemp and the fact that the burnt odors of the two substances were indistinguishable. The trial court denied the motion to suppress finding that the odor of burnt marijuana plus the passenger's admission to having recently smoked marijuana justified the search. The defendant was ultimately convicted on the felony possession of controlled substances charges and admitted to his habitual felon status, receiving an active sentence of 43-64 months.

**Discussion:** On appeal the defendant challenged the denial of his motion to suppress on several grounds, including the argument that the trial court erred by failing to address the issue of the indistinguishable odors of marijuana and legalized hemp. In analyzing this challenge, the Court of

Appeals first noted that the motor vehicle exception to the search warrant requirement allows for a search of a vehicle on a public street or public vehicular area when probable cause exists for the search (internal citation omitted). With probable cause officers are authorized to search every part of the vehicle where the object of the search could be located including the trunk. To support his argument in this case the defendant relied on a North Carolina State Bureau of Investigation (SBI) memo which discussed some of the legal issues that arose after the State legalized hemp in 2015. The SBI memo states in relevant part that:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.
> …
> [W]hen a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions[.]

The Court of Appeals acknowledged that the issues raised by the legalization of hemp have not yet been addressed by the appellate courts, but that prior to its legalization the courts had held that the odor of marijuana alone was sufficient to establish probable cause. The Court further stated that while the "[d]efendant's appeal raises the possibility that these holdings may need to be re-examined", it declined to answer the question of "whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle." The Court declined to do so in this case because the Officer had more than just the odor of marijuana. It concluded that here there were three pieces of evidence which supported probable cause to search the defendant's vehicle: (1) the odor of what the Officer believed to be burnt marijuana coming from the vehicle; (2) the passenger's admission he had recently smoked marijuana; and, (3) the partially smoked marijuana cigarette the passenger pulled from his sock. This combination of factors was sufficient to establish probable cause to justify the warrantless search of the defendant's vehicle.

*Please Note: Additional information concerning odor/sight of marijuana and the "plus" factors to establish probable cause is discussed further in the Reminders section which follows.

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## REMINDERS

### Superior Court Judge Search Warrant/Court Order Process

Officers and detectives seeking to approach, contact, or set up an appointment with a Superior Court Judge to have a search warrant or court order reviewed and signed in their presence **must** seek the approval of the Police Attorney's Office prior to contacting a Superior Court Judge or one of the Judges' assistants. This process was established by Senior Resident Superior Court Judge W. Robert Bell and it is required that all officers and detectives proceed accordingly. Please be sure to contact one of the Police Attorneys for review of your search warrant or court order.

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### Odor/Sight of Marijuana "Plus"

Due to the legalization of hemp and hemp extract (cannabidiol (CBD)) products in North Carolina and the fact that hemp, CBD and marijuana cannot be distinguished from one another without chemical analysis, Officers will need additional evidence beyond the sight or smell of marijuana to establish probable cause (PC). Hemp and hemp extract can contain up to 0.3 % THC and 0.9% THC respectively, and our currently available testing only detects the presence of THC, not the amount. Below are some examples of additional evidence that can be used to establish PC that the substance is marijuana.

**PC for Marijuana = Odor/Sight "Plus"**
**Examples of the "Plus" include**:

- suspect statements/admissions (implied admission by lack of response to officer's statement "I smell MJ")
- suspect's behavior (evasive, nervous)
- evidence of impairment
- evidence of PWISD (packaged in corner bags)
- sprays/scents used to mask the odor of marijuana
- drug paraphernalia (but NOT CBD/hemp paraphernalia)
- suspect's prior history (arrests/convictions)
- shipments/packages – evidence of illegality of substance inside (no return address; listed recipient denies knowledge of package; knowledge that legal CBD/hemp package lacks these indicia)

Please note that additional evidence will be required for K9 hits as our dogs are also unable to distinguish between hemp, CBD and marijuana.

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