



Roll Call Reporter

December
2017

LEGAL UPDATE FOR MARYLAND LAW ENFORCEMENT OFFICERS

Probable Cause to Arrest for Possession of Marijuana When the Exact Amount Possessed is Unknown

Question: Does a police officer who has reason to believe that an individual is in possession of marijuana have probable cause to effectuate an arrest, even if the officer is unable to determine whether the amount is more than 9.99 grams?

Answer: Yes. A requirement that an officer need to be absolutely sure that the amount of marijuana involved is more than 9.99 grams before there is probable cause to arrest is inconsistent with the concept of probable cause, which requires only facts sufficient to warrant a prudent person in believing that an individual is committing a crime.

Case: *Anthony Barrett v. State of Maryland*
Court of Special Appeals of Maryland
Decided November 29, 2017

The Odor of Marijuana, the Traffic Stop, and the Search of the Passenger

On November 24, 2014, Detectives Brian Salmon and Jason Leventhall, members of the Baltimore City Police Department, were on patrol in a marked SUV. Detective Salmon saw a Honda Accord with an approximately foot-long crack in the front

windshield. He had stopped the same vehicle the previous month for the same violation (cracked windshield), and he gave the driver of the vehicle at that time, Anthony Barrett, a verbal warning and told him to get the windshield fixed. When the officers passed the vehicle on November 24, they immediately smelled the strong odor of marijuana. The detectives initiated a traffic stop of the vehicle, which was occupied by three people.

The detectives exited their vehicle and Detective Salmon approached the driver's side of the stopped vehicle. As he approached, Detective Salmon detected a strong odor of burnt marijuana emanating from the vehicle. Detective Salmon had encountered the odor of burnt marijuana hundreds of times, and was an expert in the sale, packaging, and recognition of marijuana. Detective Leventhall approached the passenger side of the vehicle and asked Anthony Barrett, who was in the front passenger seat, if there was marijuana in the car. Barrett said that they were smoking marijuana, and handed Detective Leventhall a brown hand-rolled cigar containing green plant material.

The officers asked the driver and Barrett to exit the vehicle. When Detective Salmon walked over to Barrett, he could smell the strong odor of marijuana coming from Barrett and inside the car. However, Detective Salmon could not discern from the odor the quantity of suspected marijuana. Detective

Salmon searched Barrett, recovering a loaded 9-millimeter handgun from Barrett's pants.

The Arrest, Charges, and Prosecution

Barrett was placed under arrest. At the station, Barrett gave a recorded statement in which he admitted that he "got caught with a handgun."

Barrett was charged with possession of a firearm by a prohibited person; wearing, carrying, or transporting a handgun on the person; and wearing, carrying, or transporting a handgun in a vehicle. He moved to suppress the evidence, namely the handgun recovered from his person and the statement. The court denied the motion to suppress and Barrett was convicted. He appealed.

The Decision on Appeal

Barrett argued two points on appeal: (1) that there was no valid search of his person incident to arrest because the search took place before his arrest, and (2) because the officer did not know the exact amount of marijuana, this was merely a citation offense for which no arrest could be made. The State, on the other hand, argued that there was reasonable suspicion for the detective to conduct a "protective frisk" of Barrett, or that the search of his person was a search incident to arrest based on probable cause to arrest.

The Court of Special Appeals rejected the State's justification of a protective frisk for weapons because, in *Norman v. State* (2017), the Court of Appeals of Maryland had held that the odor of marijuana emanating from a vehicle does not, by itself, justify a frisk of an occupant for weapons. The Court agreed, however, that the search of Barrett's person was incident to arrest because the officers had probable cause to believe Barrett was in possession of marijuana. The probable cause was not based solely on the odor of marijuana emanating from the vehicle, but also upon the odor emanating from Barrett's person, Barrett's admission of marijuana use, and his handing the officer the cigar containing suspected marijuana. Under these

circumstances, there was ample probable cause to arrest Barrett for possession of marijuana. The probable cause was not negated by the fact that the officers did not know the exact amount of marijuana possessed by Barrett. Simply stated, just as with probable cause to search a vehicle, officers are not required to know, determine, or guess the actual amount of marijuana involved. Despite the decriminalization of possession of less than ten grams of marijuana, possession of marijuana in *any* amount remains illegal in Maryland. Thus, the possession of any amount of marijuana suggests criminal activity and is relevant to the probable cause determination. In this case, the odor of marijuana, which could have been indicative of felony CDS violations, combined with Barrett's admission and handing over the cigar, amounted to probable cause to arrest. And, once probable cause was established to arrest, Barrett was subject to search incident to his arrest.

Note: In this case, the court ruled that it did not matter that the formal arrest occurred *after* the search of Barrett's person. The Supreme Court has made it clear that a search may qualify as a search incident to arrest even if, sequentially, the search occurs prior to the arrest. If the arrest quickly follows the search, it should be upheld. Here, the arrest was announced immediately after the search.

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