



Roll Call Reporter

August 2019

LEGAL UPDATE FOR MARYLAND LAW ENFORCEMENT OFFICERS

The Odor of Burnt Marijuana Emanating from a Vehicle and Probable Cause to Search

Question: Does the mere odor of burnt marijuana emanating from a vehicle give rise to probable cause to arrest the occupants and to search them incident to the arrest?

Answer: No. The mere odor of burnt marijuana emanating from a vehicle gives rise to probable cause to search the vehicle under the automobile exception to the warrant requirement. To search the driver or occupants before the vehicle search, the officer(s) must have probable cause that the driver or occupant(s) is committing a felony or a misdemeanor in the officer's presence.

Case: *Michael Pacheco v. State of Maryland*
Court of Appeals of Maryland
Decided August 12, 2019

The Suspicious Vehicle, the Odor of Marijuana, and the Recovery of the Joint

On May 26, 2016, Officers Groger and Heffley of the Montgomery County Police Department were on routine foot patrol in Wheaton, Maryland. Around 10:00 p.m., they observed a vehicle parked behind a laundromat. They considered the vehicle to be "suspicious" because it was parked in a dark parking spot away from the laundromat, with the windows down. The driver was sitting in the

vehicle, but the engine was not running. There were no passengers. Officer Groger went to the driver's side while Officer Heffley went to the passenger's side. Officer Heffley was within a foot of the vehicle when he smelled the odor of fresh burnt marijuana. Officer Groger also detected the odor of burnt marijuana. Officer Heffley observed a marijuana cigarette in the vehicle's center console, which he knew immediately was less than ten grams. The officer asked the driver, Michael Pacheco, to give him the joint. Pacheco complied.

The Search Incident to Arrest, the Recovery of Cocaine, and the Vehicle Search

The officers ordered Pacheco to exit the vehicle and searched him. During the search, the officers discovered cocaine in Pacheco's left front pocket. Then, they searched the vehicle and found a marijuana stem and two packets of rolling papers. Pacheco was transported to the police station.

The Charge, the Motion to Suppress, and the Conviction

Pacheco was issued a civil citation for possessing less than ten grams of marijuana and was charged with possession of cocaine with intent to distribute. Prior to trial, he moved to suppress the cocaine. He argued that, at the time he was searched, the officers lacked probable cause to believe he possessed ten grams or more of marijuana. The State countered

that the odor of burnt marijuana from the car provided probable cause to search both the vehicle and Pacheco. At the suppression hearing, the officers' testimony differed about the basis for the arrest. Officer Heffley testified that Pacheco was arrested for possessing cocaine. Officer Groger testified that Pacheco was searched "incident to an arrest" based upon the odor of fresh burnt marijuana. Despite the conflicting testimony, the circuit court denied Pacheco's motion. Pacheco was found guilty and appealed.

The Decision of the Court of Appeals

The Court of Special Appeals affirmed the decision of the Circuit Court. However, the Court of Appeals, Maryland's highest court, agreed to review the case. The Court of Appeals reversed the lower appeals court, and directed the circuit court to grant Pacheco's motion to suppress, thereby overturning his conviction. In reaching its decision, the Court of Appeals reviewed the two cases it had decided since Maryland decriminalized the possession of less than ten grams of marijuana in 2014. The first case, *Robinson v. State*, decided in 2017, held the odor of marijuana emanating from a vehicle still gives an officer probable cause to search the vehicle, despite the decriminalization of possession of less than ten grams of marijuana. This is because marijuana is still "contraband," a good that is illegal to possess, regardless of whether possession of the goods is a crime.

In *Robinson*, the court identified three crimes in which the presence of the odor of marijuana and/or a marijuana cigarette could provide the requisite probable cause to believe that the vehicle contained contraband or evidence of a crime: possession of ten grams or more of marijuana; crimes involving the distribution of marijuana; and driving under the influence of a controlled dangerous substance. The second case, *Norman v. State*, was also decided by the Court of Appeals in 2017. In *Norman*, the court held that the mere odor of marijuana emanating from a vehicle is not enough to establish reasonable

suspicion to frisk a vehicle's occupants for weapons.

In Pacheco's case, however, the issue was whether the odor of burnt marijuana emanating from the vehicle alone gave rise to probable cause *to arrest Pacheco and search him incident to arrest*. In answering in the negative, the court ruled that, at the time of Pacheco's arrest and search incident to arrest, the officers did not have probable cause to believe he was committing a felony or a misdemeanor in their presence. They only knew that Pacheco was in a legally parked vehicle from which the odor of burnt marijuana could be detected and that there was a single joint in the console. There was no evidence establishing that Pacheco possessed ten grams or more of marijuana, or that he possessed marijuana with the intent to distribute, or that he operated his vehicle under the influence of a controlled dangerous substance. The court was simply unwilling to accept that the possession of single joint, which the officers knew contained less than ten grams, supported an inference that Pacheco possessed more than the legal amount. As such, Pacheco's conviction was reversed.

Note: Officers can take from this case that the same facts and circumstances that justify a search of an automobile do not necessarily justify an arrest and search incident thereto. Specifically, officers can take from this case that the detection of the odor of burnt marijuana emanating from a vehicle, when combined with the observable presence of what is clearly less than ten grams of marijuana, does not give rise to probable cause to arrest the driver or occupants and search them incident to arrest. It does, however, provide probable cause to search the vehicle. And, if additional evidence is discovered during the vehicle search that indicates that the driver or occupants has committed or is committing a felony or misdemeanor in the officer's presence, then, and only then, is there probable cause to arrest and to search the driver and/or occupants incident to arrest. In Pacheco's case, the vehicle search led to



the discovery of a few items that had no evidentiary value.

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