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Lost in the “Weed”:

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North Carolina’s Hemp Problem

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In 1619, the first permanent English settlement in the Americas, the Jamestown colony, was finally becoming stable and starting to thrive after over a decade of difficult years. King James I issued a decree that required each of Jamestown’s land owners to grow and export 100 cannabis plants to help support England. The hemp from the cannabis plants was used for rope and sails for ships, as well as cloths, canvas, sacks and paper. Similar decrees would soon follow for colonies in Connecticut and Massachusetts.

Cannabis was not a new discovery – people who study such things¹ trace the plant back to a small island off the coast of China as early as the second century B.C. when clothes were being made from hemp.² George Washington would later grow hemp as one of his three primary crops at Mount Vernon and the plant would play a central role in the establishment of the United States as its use for rope and fabric helped support the country’s expansion throughout the 18th and 19th centuries. Cannabis appeared on the ten dollar bill as late as the year 1900. In the late 1800’s, hashish³ parlors and opium dens were flourishing in every major city on the east coast.⁴

In the early 1900s, cannabis became thought of as synonymous with the drug we know as marijuana and concerns over the effects of the substance led to the passage of the “Marihuana Tax Act of 1937” which effectively outlawed it.⁵ Hemp farming was not banned altogether until the passage of the Controlled Substances Act of 1970. In the last decade, however, there has been a push at many levels to decriminalize industrial hemp for many uses.

Although hemp and marijuana are varieties of the same species of plant, there are important differences between them. For our purposes, the most significant difference is the amount of THC in the plant, since THC is the psychoactive ingredient that produces the “high” associated with marijuana. Marijuana can contain up to 30% THC content by dry weight. Industrial hemp, on the other hand, is cultivated to have a low concentration of THC and a

¹ I’m pretty sure there is not a topic that exists that is not being studied by somebody. These particular “study-ers” believe that cannabis was probably the first ever cultivated plant.

² I learned from an AP article just this week that they were probably smoking it as well. In a 2,500 year old graveyard in China, archaeologists found ten wooden bowls and several stones containing burnt cannabis residue. They believe the heated stones were used to burn the marijuana and people then inhaled the smoke. Coincidentally, the working title for the next George Lucas film is “Indiana Jones and the Legend of the Chinese Hookah.”

³ Hashish as we know it today is made from the resin of the cannabis plant but back then the name was probably used in a more general sense. While we’re on the topic, if there is anyone who knows anything about plants who happens to read this article, please forgive me because I am sure that I am mangling a lot of scientific jargon concerning cannabis, hemp, and marijuana. But in my best Leonard “Bones” McCoy voice, let me say, “I’m a lawyer, not a botanist!”

⁴ From the Baltimore Sun newspaper, March 6, 1884: “A well-dressed young man, who gave the name of Binns, came to the City Hospital. He had yielded to a strange desire to enjoy a dose of hasheesh [sic], a drug that produces curious results. He told the doctor that he had some doubts as to the locality of his face, which to him seemed situated at least two feet from where it really was. Then he was dubious whether he had any legs or was simply walking on his chin. The latter idea seemed to have a firm hold on him, for he stomped his feet on the ground a dozen times. His request to be relieved was pitiful. He feared that some one would steal an arm or leg from him. After medical treatment, Binns felt better.”

⁵ The conspiracy theory version of why this happened is that fears about hemp becoming easier to process than cotton in the early 1900’s caused newspaperman W.R. Hearst, who not only owned the largest newspaper company but many acres of forest that was used to create the papers, to fear that hemp paper would be used instead. In response, he (the theory goes) fabricated stories in the newspaper about “marihuana” and its dangerous effects which eventually led to the passage of this law.

high concentration of cannabidiol, more commonly known as CBD. CBD has recently become very popular because of reports that it can be useful to treat everything from acne to cancer. The only FDA approved use of CBD to date, however, is a CBD drug called Epidiolex which can be prescribed to treat epilepsy.

A 2014 U.S. Farm Bill that modified the federal definition of marijuana to exclude hemp, a North Carolina law passed in 2015 which authorized the growing of industrial hemp, and the U.S. Agricultural Improvement Act passed by Congress and signed by the President last year have acted to effectively legalize hemp and hemp-derived products so long as they contain no more than 0.3% THC. This amount of THC is not enough to get someone “high” or “appreciably impair their mental and/or physical faculties” so no problem, right? Wrong. Here’s the problem:

Legal industrial hemp in plant form looks and smells just like illegal marijuana. K9s alert to the THC in both. Our available field tests test positive for the THC in both. And our state lab does not conduct a test that measures the amount of THC in a substance, so even they won’t be able to tell the difference. As a result, when you (or your K9 companion) sees or smells what you have been taught based on your training and experience is marijuana, there is a chance that it is actually hemp which is legal to possess.⁶ This affects our ability to investigate and prosecute marijuana related offenses in several ways.

Probable Cause based on Odor (or Sight) of Marijuana

As you know, it has long been settled law that the odor of marijuana by itself was sufficient to establish probable cause to search.⁷ If the odor is coming from a vehicle or a person, a warrant is not required before the search is conducted based on exigent circumstances. The cases setting out these legal principles have not been overturned. However, there are those who are now arguing that because the officer might be smelling legal hemp as opposed to illegal marijuana, the officer does not have probable cause to search based on the odor alone.

For what it’s worth, I don’t believe that this conclusion is as legally certain as some would like to think it is. After all, probable cause does not require that the officer know for sure that contraband is present. Probable cause does not even require that under the circumstances, it is more likely than not that contraband is present. Probable cause only requires a fair probability that contraband is present. Consider the following scenarios which have nothing to do with marijuana:

1. Officer walks up to vehicle and sees a Ziploc bag containing a white, powdery substance in plain view in the center console. Based on his training and experience, the officer believes the substance to be cocaine. I believe the courts would hold that the officer had probable cause to search the vehicle even though it’s possible that the white, powdery substance is actually cornstarch or flour which are clearly legal to possess.
2. Similarly, what if the officer sees the handle of what appears to be a gun sticking out from beneath the seat? He would have probable cause to search the vehicle despite the fact that the gun might turn out to be a toy.
3. In the North Carolina Supreme Court case of State v. Simmons,⁸ officers had stopped a car and saw a cardboard box with four plastic jugs inside. He could only see the tops of the jugs, but he testified that it was common to see non-taxpaid whiskey being transported in jugs like these. The court upheld the search and seizure of the jugs even though “[o]bviously, they could not have known with absolute certainty that the liquid in the jars was non-taxpaid liquor.”

Based on these examples, I do not think it is a foregone conclusion that the “legalization” of hemp means that an officer’s smell of or K9’s alert to marijuana no longer amounts to probable cause. HOWEVER, until that question is settled by people smarter than me, my advice to you is to articulate something in addition to the odor of

⁶ I am told that some people are buying hemp in order to smoke it. The feeling in the hemp industry is that once buyers realize they are not going to get high from it, there won’t be many repeat customers for that type of hemp.

⁷ State v. Greenwood, 301 N.C. 705 (1981).

⁸ 278 N.C. 468 (1971).

marijuana as the basis for your probable cause, whenever possible. In other words, “odor plus” something else such as a suspect’s admission that the odor is caused by marijuana, signs of marijuana impairment, large amounts of cash, digital scales,⁹ or packaging consistent with illegal drugs. In addition, legal possessors of hemp will usually have some documentation that the substance is hemp rather than marijuana, so the absence of such paperwork might be a factor you could point to as well, especially if the suspect claims that what he or she has is actually hemp. Remember that your “plus” would need to be present or known by you before your search occurs in order to be used to justify the search.

Other Problems

The problem with identifying the substance in court will present another problem. Officers have been able to visually identify marijuana in court since State v. Fletcher was decided in 1988.¹⁰ This will probably not be sufficient now and as I mentioned earlier, our state lab does not currently offer a test that identifies the quantity of THC in the substance. The N.C. Department of Agriculture has that capability and they also outsource testing to a private lab in Durham.

Finally, defendants will likely argue that even if the substance is proved to be marijuana, they had no knowledge that it wasn’t hemp. North Carolina requires the “knowing” possession of a controlled substance for a crime to have occurred. Circumstantial evidence similar or the same to those I listed above as “odor plus” would help prove that the defendant was aware that they had marijuana instead of hemp.

We will wait and see what the legislature might do to clarify some of these issues or how the appellate courts might weigh in on some of the uncertainty we’ve discussed. As always, I will keep you posted. Before we wrap up, though, I want to give you another word of caution. If I worked in a position that required random drug screenings from time to time (such as law enforcement,) I would be very careful about what I was putting on or in my body.¹¹ With the recent high interest in CBD oils and hemp seeds and products, the demand has possibly exceeded the government’s ability to keep an eye on what the actual THC content is for some of these items that are being sold in stores. A high enough level of THC will cause a positive result on a drug test and a positive result on a drug test will cause a negative result on your employment status. So be careful out there!

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ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith Rodgers, PLLC but he thinks they’re pretty cool guys.



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⁹ I mention scales specifically here, although some other paraphernalia might be relevant as well. The problem is that some of that paraphernalia is also sold to use in connection with hemp so it might not help you with probable cause.

¹⁰ 92 N.C. App. 50 (1988).

¹¹ For example, I’m really regretting that third hot dog I ate at the ballgame the other night.

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