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Recent Developments: Pacheco v. State

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RECENT DEVELOPMENT

PACHECO V. STATE: POSSESSION OF LESS THAN TEN GRAMS OF MARIJUANA AND THE ODOR OF BURNT MARIJUANA EMANATING FROM A VEHICLE ALONE DOES NOT GIVE POLICE SUFFICIENT PROBABLE CAUSE TO EFFECT A SEARCH OF THE VEHICLE'S OCCUPANT(S).

By: Luke Griffin

In a case of first impression, the Court of Appeals of Maryland held that - police are not authorized to conduct a search incident to arrest for the criminal offenses of possession of more than ten grams of marijuana and possession of marijuana with intent to distribute, based solely on facts indicating that the person is committing the civil offense of possession of less than ten grams of marijuana. *Pacheco v. State*, 465 Md. 311, 311, 214 A.3d 505, 508 (2019). Specifically, the court held that possession of less than ten grams of marijuana coupled with the odor of burnt marijuana does not give police sufficient probable cause to believe an individual is in possession of a criminal amount of this substance. *Id.* at 333, 214 A.3d at 518.

On May 26, 2016, at approximately 10:00 p.m., two Montgomery County Police officers were conducting a routine foot patrol when they noticed a “suspicious vehicle” parked behind a laundromat. As the officers approached the vehicle, they detected an odor of freshly burnt marijuana. The lone occupant of the vehicle, Mr. Michael Pacheco (“Pacheco”), was in the driver’s seat. One of the officers observed a marijuana cigarette in the center console of the vehicle, which he later testified he immediately knew to be less than ten grams. Pacheco surrendered the joint to the officers and was then ordered to exit the vehicle. The officers subsequently searched the vehicle and Pacheco’s person and discovered cocaine in Pacheco’s left front pocket. A search of Pacheco’s vehicle also yielded a marijuana stem and rolling papers. Following the search, Pacheco was taken to the police station where he was issued a civil citation for possessing less than ten grams of marijuana and was criminally charged with possession of cocaine with intent to distribute.

At trial Pacheco moved to suppress the cocaine, arguing that the officers’ warrantless search of his person was illegal because, at the time of the search, the officers lacked probable cause to believe he possessed more than ten grams of marijuana. *Pacheco*, 465 Md. at 318, 214 A.3d at 509. The Circuit Court of Montgomery County denied Pacheco’s motion to suppress and held that the possession of what appeared to the officers to be less than ten grams

of marijuana gave them probable cause to arrest Pacheco and perform a lawful search incident to arrest. *Id.*

Pacheco entered a conditional guilty plea in the Circuit Court of Montgomery County. *Pacheco*, 465 Md. at 319, 214 A.3d at 509. Pacheco then appealed the circuit court's ruling to the Court of Special Appeals of Maryland. *Id.* In an unreported opinion, the intermediate appellate court upheld the search of Pacheco as a search incident to lawful arrest. *Id.*

Pacheco appealed to the Court of Appeals of Maryland for which the court granted certiorari. *Pacheco*, 465 Md. at 319, 214 A.3d at 509. The issue before the court was whether police are authorized to conduct a search incident to arrest of a person for the criminal offenses of possession of more than ten grams of marijuana and the possession of marijuana with intent to distribute, based solely on facts indicating that the person is committing the civil offense of possession of less than ten grams of marijuana. *Id.* at 317, 214 A.3d at 508.

The Court of Appeals began its analysis by addressing the relative novelty of issues concerning the decriminalization of marijuana both in Maryland and nationally. *Pacheco*, 465 Md. at 320, 214 A.3d at 510. The court later discussed the legislative intent of decriminalizing less than ten grams of marijuana, noting that in 2014 the Maryland General Assembly cited concerns over the disproportionate number of African-Americans arrested for marijuana violations compared to whites, despite comparable usage rates, as its justification for decriminalizing the possession of less than ten grams of marijuana. *Id.* at 326-27, 214 A.3d at 514. Due to the General Assembly's decision to decriminalize the possession of less than ten grams of marijuana, the Court was now forced to grapple with the constitutionality of searches based on the odor of marijuana. *Id.* at 320, 214 A.3d at 510.

The court next compared the probable cause standards it was confronted with in the instant case: the automobile exception and the search incident to lawful arrest exception. *Pacheco*, 465 Md. at 323, 214 A.3d at 512. When determining whether the requisite probable cause exists under the automobile exception, courts must examine whether, "there is sufficient enough probable cause to believe the vehicle contains contraband or evidence of a crime." *Id.* at 325, 214 A.3d at 513 (quoting *Johnson*, 458 Md. at 533, 183 A.3d 119.). Comparatively, when determining whether an individual can be lawfully arrested and searched incident to that arrest, the court must focus on the likelihood of the guilt of said individual. *Pacheco*, 465 Md. at 325, 214 A.3d at 513. Ultimately, the court held that the most substantial difference between the two warrant exceptions was due to the, "diminished expectation of privacy that justifies the automobile exception," as compared to the "unique, significantly heightened," constitutional protections afforded to a person to be secure in their person. *Id.* at 325-26, 214 A.3d at 513.

In its analysis of *Pacheco*, the court looked back to two recent cases concerning the application of Fourth Amendment jurisprudence as it relates to, “situations implicating the decriminalization of possession of less than ten grams of marijuana.” *Pacheco*, 465 Md. at 327, 214 A.3d at 514. In *Robinson v. State*, the court held that police have probable cause to search a vehicle emanating an odor of marijuana despite the recent decriminalization because the odor of marijuana gives rise to probable cause sufficient to believe that the vehicle may contain contraband or evidence of a crime. *Id.* at 329, 214 A.3d at 516 (citing *Robinson v. State*, 451 Md. 94, 152 A.3d 661 (2017)). In *Norman v. State*, the Court held that the mere odor of marijuana alone was not enough to establish the requisite reasonable articulable suspicion that the occupants of the vehicle were armed and dangerous and therefore subject to frisk. *Pacheco*, 465 Md. at 329, 214 A.3d at 516 (citing *Norman v. State*, 452 Md. 373, 156 A.3d 940 (2017)).

In the instant case, the court gave great weight to the fact that the officers did not possess any probable cause to believe that Pacheco had committed a felony or a misdemeanor in their presence. *Pacheco*, 465 Md. 311, 330, 214 A.3d at 516. The state unsuccessfully argued that, the mere odor of burnt marijuana was sufficient probable cause to search both Pacheco and his vehicle. *Id.* The court reiterated a Supreme Court holding, stating that a search incident to lawful arrest is only permissible if the arrest itself is lawful. *Id.* at 331, 214 A.3d at 516. If the officers had searched the car before searching Pacheco and they had found evidence of a felony or misdemeanor, the search would have likely been constitutionally permissible. *Id.* at 331-32, 214 A.3d at 516-17. However, in the instant case, Pacheco had a higher level of privacy in his own person and as a result, the possession of less than ten grams of marijuana coupled with the odor of burnt marijuana does not meet the standard for probable cause sufficient to arrest and thereby search Pacheco’s person. *Id.* at 332, 214 A.3d at 517.

Judge McDonald, joined by Judge Watts, concurred with the majority’s findings, arguing that while the opinion was reasonable and thoughtful, it was too limiting in nature. *Pacheco*, 465 Md. 311, 334, 214 A.3d at 518. Judge McDonald expressed concern over the recent increase in marijuana related traffic accidents and that the holding might limit officers who encounter individuals alone in their vehicles with the pungent odor of marijuana fresh in the air. *Id.* at 337, 214 A.3d at 520.

In *Pacheco*, the Court of Appeals of Maryland held that possession of less than ten grams of marijuana, coupled with the odor of burnt marijuana, does not give police sufficient probable cause to arrest an individual and then conduct a lawful search incident to arrest. The court will likely be forced to confront many similar cases in the not too distant future in light of the General Assembly’s decision to decriminalize less than ten grams of marijuana. As

law enforcement grapples with how best to address the increase in legal marijuana consumption and effect searches on vehicles and persons they suspect to be in possession of a controlled dangerous substance, the courts will be forced to hear those cases in kind.