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RECENT DEVELOPMENT

LEWIS V. STATE: THE ODOR OF MARIJUANA IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR A SEARCH INCIDENT TO ARREST, AND THEREFORE EVIDENCE OBTAINED AS A PRODUCT OF THAT SEARCH IS NOT ADMISSIBLE.

By: Rebecca Guay

The Court of Appeals of Maryland held that the odor of marijuana alone is not sufficient to meet the burden of probable cause to perform a search incident to arrest, and therefore any evidence retrieved is inadmissible as the product of an illegal search. *Lewis v. State*, 470 Md. 1, 27, 233 A.3d 86, 101-102 (2020). The court further held that the odor of marijuana cannot determine the amount, if any, of the contraband. *Lewis*, 470 Md. at 23, 233 A.3d at 99. A search or seizure made by law enforcement officers based on the odor of marijuana is unlawful as it violates a person's Fourth Amendment protections from unreasonable searches. *Id.* at 26, 233 A.3d at 101. Consequently, a search by police without probable cause cannot produce evidence admissible in court. *Id.* at 17, 233 A.3d at 95.

On February 1, 2017, Officer David Burch ("Burch") of the Baltimore City Police Department received a tip about a potentially armed person. Burch notified the monitors at CitiWatch, which identified a person matching the description entering Bag Mart. Burch was familiar with the area known as an "open air drug market" and knew Bag Mart as a regular distribution market for marijuana.

Six officers responded and entered the crowded store which smelled like marijuana. When Rasherd Lewis ("Lewis"), who matched the description, passed immediately in front of Burch, the officer smelled marijuana coming from Lewis's person. Burch testified that he stopped Lewis because of the tip and the odor of marijuana. After stopping him, Burch's colleague, Officer Curtis, grabbed Lewis's hands and handcuffed him. Once handcuffed, Burch made a complete search of Lewis, first searching Lewis's bag where he located a handgun. Then, he searched Lewis's person and found marijuana in a sealed, one-inch plastic baggie inside his pocket.

At a suppression hearing, the Circuit Court of Baltimore City denied Lewis's motion to suppress the handgun, marijuana, and other items seized during the arrest and subsequent search. Lewis contended the police lacked probable cause to believe he either committed a felony or was committing a felony. The state argued that the odor of the drug was enough to establish the necessary probable cause because, although decriminalized, marijuana in any amount is evidence of a crime. The court determined that the odor of marijuana was enough to establish the belief that Lewis carried evidence of a crime and therefore denied his motion to suppress.

At trial, the Circuit Court for Baltimore City found Lewis guilty of possession of a handgun. The Court of Special Appeals of Maryland affirmed the ruling. The majority agreed with the circuit court that the odor of marijuana emanating from a person, similar to the odor coming from a vehicle was sufficient to establish probable cause to perform a search incident to arrest. The dissent drew a distinction between the types of searches noting that there are several benign reasons one might smell like marijuana without having the contraband on their person. Lewis, on appeal, argued that his arrest, based solely on the smell of marijuana on his body, lacked probable cause and made the handgun found upon search of his person inadmissible. The Court of Appeals of Maryland granted certiorari to examine whether probable cause existed to allow a search incident to arrest based solely on the odor of marijuana.

The Court of Appeals of Maryland framed the analysis within the recent decriminalization for possession of less than 10 grams of marijuana. *Lewis*, 470 Md. at 9, 233 A.3d at 91 (citing MD. Code Ann., Crim. Law § 5-601(c)(2) (West 2014)). The court then highlighted the established rights of citizens “to be secure in their person” against unreasonable searches and seizures afforded by the U.S. Constitution’s Fourth Amendment. *Lewis*, 470 Md. at 17-18, 233 A.3d at 96 (citing U.S. Const. amend. IV). A warrantless search is deemed unconstitutional if determined to be unreasonable. *Lewis*, 470 Md. at 18, 233 A.3d at 96. To withstand the scrutiny of the Fourth Amendment guarantees, the character of a reasonable search is based on the totality of circumstances surrounding that particular search and seizure. *Lewis*, 470 Md. at 18, 233 A.3d at 96 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). This protection from unreasonable searches is subject to a small number of exceptions. *Lewis*, 470 Md. at 18-19, 233 A.3d at 96 (quoting *Grant v. State*, 449 Md. 1, 16-17, 141 A.3d 138, 146 (2106)).

These exceptions include vehicle searches and search incident to arrest. *Lewis*, 470 Md. at 18-19, 233 A.3d at 96. A vehicle is subject to a search if police have “probable cause to believe the automobile contains either contraband or evidence of a crime.” *Lewis*, 470 Md. at 19-20, 233 A.3d at 97 (quoting *State v. Johnson*, 458 Md. 519, 533, 183 A.3d 119, 127 (2018)). The justification for this exception lies in the mobility of the car coupled with a diminished expectation of privacy in one’s vehicle. *Lewis*, 470 Md. at 20, 233 A.3d at 97 (citing *California v. Carney*, 471 U.S. 386, 391 (1985)). Probable cause to justify a search incident to arrest must be based on the belief the person has either committed, or is committing, a felony. *Lewis*, 470 Md. at 20, 233 A.3d at 97 (citing *Maryland v. Pringle*, 540 U.S. 366, 369-70 (2003)). This exception is grounded in the need to confiscate weapons and prevent the destruction of evidence. *Lewis*, 470 Md. at 20-21, 233 A.3d at 97-98 (citing *Riley v. California*, 573 U.S. 373, 383 (2014)). The odor of marijuana that permits the search of one’s car does not apply to

search incident to arrest. *Lewis*, 470 Md. at 25, 233 A.3d at 100. Although similar in respect, the prerequisites for the two search exceptions diverge. *Id.* at 21, 233 A.3d at 98. The distinct difference is founded on a person's constitutional protection to be secure in their body, in contrast to limited privacy rights afforded to one's automobile. *Id.* at 22, 233 A.3d at 98.

The relevant exception in this case is the search incident to arrest. *Lewis*, 470 Md. at 18, 233 A.3d at 96. *Lewis* argued on appeal that the search was unlawful because the police, at the time of the arrest, did not have probable cause to believe *Lewis* had committed a felony or was in the act of committing a felony. *Id.* at 12, 233 A.3d at 93. When determining if probable cause exists for a search incident to arrest, the court must look to the likelihood law enforcement believed the arrestee committed a felony. *Lewis*, 470 Md. at 22, 233 A.3d at 98 (citing *Pacheco v. State*, 465 Md. 311, 325, 214 A.3d 505, 513 (2019)).

With regard to marijuana, law enforcement agents must have probable cause the arrestee is in possession of a criminal amount of the drug prior to the search. *Lewis*, 470 Md. at 22-23, 233 A.3d at 99 (citing *Pacheco*, 465 Md. at 332-33, 214 A.3d at 517-18). The court determined that the odor of marijuana does not make it possible to conclude the amount of marijuana present and therefore law enforcement officers cannot be sure a criminal amount is present. *Id.* at 23, 233 A.3d at 99. Without the certainty of the actual amount of marijuana present, law enforcement cannot be sure an attempted felony, felony, or misdemeanor has occurred and therefore the court held that they lack probable cause for a search incident to arrest. *Id.*

The Court of Appeals of Maryland held that the inability of an officer to determine if a criminal amount of marijuana exists – based solely on odor – does not constitute probable cause to perform a search incident to arrest. Following this decision, courts must deny admissibility of evidence produced by a search based solely on the odor of marijuana emanating from a person. It is unclear what the immediate impact of this decision will be. Historically, courts have developed measures to balance the rights of citizens against the reach of law enforcement officers to apprehend suspects. This decision tilts in favor of the protection afforded to individuals from unreasonable searches and seizures by the Fourth Amendment. While the shift to narrow the state's ability to collect evidence may increase Fourth Amendment protections for citizens, it simultaneously eliminates the arguably legitimate suspicion of criminal behavior – based on the odor of a marijuana – from the toolbox of trained police officers. This limitation on law enforcement may have unintended consequences in their attempt to decrease drug related crimes.