

hearing relative to Defendant's motion was conducted before this Court on July 17, 2019. At the evidentiary hearing, the Commonwealth presented the testimony of Trooper Edward Prentice and Trooper Danielle Heimbach. The Defendant presented the testimony of Dr. David Gordon, M.D., an expert in the field of medical marijuana, as well as the testimony of Patricia Gregory, the Records Custodian for Keystone Canna Remedies. In addition, the dash cam video from the Pennsylvania State Police vehicle⁴ and the body camera from a member of the Allentown Police Department were introduced into evidence and reviewed by this Court. (C. Ex. 1); (C. Ex. 3). Based on the testimony of the aforementioned witnesses and a review of the evidence, we make the following findings of fact.

FINDINGS OF FACT

1. On November 7, 2018, at approximately 12:30 A.M., Trooper Edward Prentice and Trooper Danielle Heimbach of the Pennsylvania State Police, Fogelsville Barracks, Troop M, were on routine patrol in full uniform and in a marked police unit on Emaus Avenue in the area of the Liberty Park at Allentown apartment complex, Allentown, Lehigh County, Pennsylvania.⁵ At that time, Trooper Prentice observed a silver Chrysler 300 sedan making a U-turn in the Liberty Park at Allentown apartment complex on Allenbrook Drive, and then proceeding east on Emaus Avenue. Trooper Prentice turned his cruiser around and decided

⁴ The dash cam video from the Pennsylvania State Police cruiser only recorded the video of the incident. (C. Ex. 1). The dash camera malfunctioned, despite being checked by Trooper Prentice at the beginning of his shift, and there is not audio recording associated with the dash cam video. (C. Ex. 1).

⁵ Trooper Prentice was Trooper Heimbach's mentor, as Trooper Heimbach graduated from the police academy on October 12, 2018. On that night, Trooper Prentice was operating the

to follow the vehicle.⁶

2. The subject vehicle drove eastbound on Emaus Avenue and made a left onto Devonshire Road/Mack Boulevard, Allentown, Lehigh County. Trooper Prentice noted that the vehicle was traveling at a fast rate of speed. However, the vehicle slowed down prior to approaching an overpass on which the vehicles are constrained to pass one at a time. (C. Ex. 1). Trooper Prentice and Trooper Heimbach observed that the subject vehicle failed to stop at the solid white stop line on the road at the stop sign controlling the single lane railroad overpass at Mack Boulevard and South 8th Street, Allentown, Lehigh County, Pennsylvania.⁷ (C. Ex. 1). Consequently, observing this motor vehicle violation, a traffic stop was effectuated. (C. Ex. 1). The subject vehicle pulled over immediately. (C. Ex. 1).
3. As Trooper Prentice was “coaching” or training Trooper Heimbach, Trooper Heimbach took the lead and exited the police cruiser to investigate.⁸ (C. Ex. 1). Trooper Heimbach approached the passenger side of the vehicle to speak with the occupants. (C. Ex. 1). As she approached, she smelled the odor of burnt marijuana. The driver of the vehicle was a white female, later identified as Teri Barr, the Defendant’s wife. The Defendant, Timothy Barr, was seated in the front

police cruiser and was Trooper Heimbach’s training officer.

⁶ No criminal activity was observed at this time. Trooper Prentice based his decision to follow the vehicle on the fact that no other cars were around, the car appeared to be traveling at a fast rate of speed, and the early hour of the night.

⁷ Both the front and rear tires passed over the solid white stop lines prior to slowly rolling through the single lane railroad overpass. (C. Ex. 1). At that time, another vehicle was approaching the railroad pass from a distance from the opposite lane of travel. As this vehicle was far away, no danger or safety risk was present. (C. Ex. 1).

⁸ Trooper Prentice briefly remained in the police cruiser to perform a records check of the vehicle, as well as to notify dispatch of the traffic stop. (C. Ex. 1). The subject vehicle was owned by the Defendant’s mother.

passenger seat and was speaking with Trooper Heimbach.⁹

4. After Trooper Prentice completed his tasks in the police cruiser, he approached the vehicle on the driver's side. (C. Ex. 1). Upon approach, Trooper Prentice could smell the odor of both burnt and raw marijuana through the open window of the vehicle.¹⁰ At that time, Trooper Prentice asked the driver to exit the vehicle so that he could interview her and confirm that she was not under the influence and incapable of safe driving. He stepped back to make room for her egress from the vehicle. (C. Ex. 1). When Trooper Prentice overheard the passenger arguing with Trooper Heimbach and stating that "no one is getting out of this fucking car," Trooper Prentice walked back to the driver's side door. (C. Ex. 1). The argument ensued for approximately two (2) to three (3) minutes, until members of the Allentown Police Department arrived as back up.¹¹ (C. Ex. 3). When members of the Allentown Police Department arrived, the Defendant's attitude changed and he became more cooperative. He exited the vehicle, along with the other occupants. (C. Ex. 1). They were patted down for officer safety. (C. Ex. 1).
5. Trooper Prentice advised the occupants of the vehicle that he could search the

⁹ Co-Defendant Luiz Monteiro was seated in the rear passenger seat behind the Defendant. He appeared to be either passed out or in and out of sleep. There was limited interaction with Mr. Monteiro. Co-Defendant Monteiro did not present a medical marijuana card at the time of the traffic stop.

¹⁰ Trooper Prentice testified that he could smell the odor of raw and burnt marijuana through the open window when he was at the rear of the vehicle. This Court takes issue with this testimony of Trooper Prentice and finds it not to be credible. Indeed, it is only reasonable to conclude that one (1) odor would trump the other odor, and that Trooper Prentice was not able to detect both raw and burnt marijuana. Also, this Court notes that the amount of raw marijuana located in the vehicle in a sealed Ziploc bag was only .79 grams. (C. Ex. 2). It is unfathomable to this Court that Trooper Prentice was able to detect the odor of both raw and burnt marijuana.

¹¹ Trooper Prentice had called for assistance when he realized that the Defendant was not being cooperative and was preventing his wife from complying with his commands and exiting the vehicle.

vehicle pursuant to Commonwealth v. Gary, 625 Pa. 183, 91 A.3d 102 (2014), as the odor of marijuana provided them with probable cause. At that time, the Defendant presented Trooper Prentice with a medical marijuana identification card that allows him to possess and ingest medical marijuana pursuant to this license.¹² (D. Ex. 1). Trooper Prentice admitted that while he knew that green leafy marijuana was legal for medical purposes, he was not familiar with how a person ingests green leafy medical marijuana.¹³ Also, Trooper Prentice was under the misconception that medical marijuana, when ingested through a vaping pen, has no odor.¹⁴

6. Trooper Heimbach and Trooper Prentice then conducted a probable cause search of the vehicle based on the odor of marijuana that they detected therein. (C. Ex. 1). The search of the vehicle yielded marijuana “shake”¹⁵ throughout the cabin area, as well as a sealed Ziploc plastic bag containing marijuana¹⁶ between the front passenger seat and the center console. (C. Ex. 4). The marijuana weighed .79 grams. (C. Ex. 2). The Ziploc plastic bag did not have any markings or barcodes on it that would be indicative of coming from a medical marijuana

¹² At the time of the hearing, the Defendant presented a receipt for medical flower marijuana purchased from a dispensary on November 2, 2018, totaling \$85.00. (D. Ex. 2); (D. Ex. 3). Neither Trooper Prentice nor Trooper Heimbach recalled that the Defendant presented this receipt to them at the time of the traffic stop.

¹³ While in the presence of the Allentown Police Department and captured on the body cam of a member of the Allentown Police Department, Trooper Prentice indicated that “if he’s allowed to have it, I’m fine with that. I’m not going to fucking worry about it.” (C. Ex. 3).

¹⁴ Trooper Heimbach was frank with this Court and stated that she did not know how medical marijuana was ingested. She also indicated that at the time of the preliminary hearing in this matter (and consequently, at the time of the vehicle stop) she was under the misimpression that green leafy marijuana was illegal and not used for medical purposes.

¹⁵ Trooper Prentice explained that marijuana “shake” served as evidence that marijuana was being smoked in the vehicle, but did not amount to a prosecutorial amount. Indeed, generally “shake” is a residual amount of marijuana. No photos of the “shake” were taken at the time of the traffic stop.

dispensary.¹⁷ Trooper Prentice indicated that the odor of burnt marijuana got stronger in the area of the center console of the vehicle.

7. In addition, Trooper Prentice searched the rear of the vehicle. (C. Ex. 1). On the floor of the rear passenger compartment, tucked halfway under the front driver's seat, Trooper Prentice located a jacket with "OBH" markings on it rolled up in a ball. Therein, Trooper Prentice found a loaded black handgun, with one (1) bullet in the chamber and four (4) rounds in the magazine. Trooper Prentice believed the jacket to belong to the Defendant. Consequently, Trooper Prentice advised the members of the Allentown Police Department to detain the three (3) occupants of the vehicle. Further search of the vehicle yielded an Apple logo baggie with new clear plastic baggies therein. These small baggies were located in the trunk of the vehicle. Trooper Prentice testified that they were consistent with the packaging of drugs for distribution, as well as the baggie of marijuana found between the front passenger seat and the center console.
8. David Gordon, M.D., a retired heart and lung surgeon in the Lehigh Valley and an expert in the field of medical marijuana, is one of the pioneer physicians in Pennsylvania to assess patients and determine if they have a qualifying condition under the law to be prescribed medical marijuana. Dr. Gordon was the physician who made the recommendation that the Defendant qualified for a

¹⁶ The suspected marijuana field-tested positive for marijuana.

¹⁷ Trooper Prentice testified that he was trained that medical marijuana has to remain in the original packaging that it is received in from the dispensary, from the time that it is opened until the time that the contents are totally consumed. As the baggie located in the vehicle had no markings on it that were indicative of being medical marijuana, Trooper Prentice grew concerned and skeptical that the contents were medical marijuana. However, Trooper Prentice did acknowledge that he did not know if the packaging of medical marijuana included an inner baggie like the one located in the center console of the vehicle. Similarly, Trooper Heimbach indicated that she did not know how medical marijuana was packaged.

medical marijuana card based on his underlying medical condition/diagnosis.

9. Dr. Gordon explained that there is no distinguishable physical difference between the green leafy medical marijuana and regular marijuana purchased on the streets. Indeed, the chemical compositions are the same. Dr. Gordon further explained how a person lawfully ingests green leafy medical marijuana. He indicated that the green leafy marijuana is placed in a battery-operated vaping pen that heats up the marijuana without combustion, producing a vapor. A person then breathes in the vapors through the vaping pen. Dr. Gordon indicated it is a violation of regulations to smoke medical marijuana without a vaping pen, such as placing it into cigarettes or pipes.
10. Dr. Gordon stated that there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source.
11. Dr. Gordon is familiar with the packaging of medical marijuana and explained that it can be dispensed in a plastic container similar to a pill bottle, which then has a plastic bag in it containing the medical marijuana. Dr. Gordon believed that the inner plastic bag does contain some marking on it to reflect that it was purchased at a medical marijuana dispensary, but he was not certain. Dr. Gordon advises all of his patients to maintain their receipts to evidence what was purchased.
12. As of now, there are more than 143,000 patients in Pennsylvania legalized to obtain, possess, and ingest medical marijuana.
13. Dr. Gordon opined that there is a clear disconnect between the medical community and the law enforcement community with respect to the legalization

of marijuana.

CONCLUSIONS OF LAW

1. Trooper Prentice and Trooper Heimbach did not possess probable cause to conduct a search of the subject vehicle.
2. The search of the subject vehicle was unlawful.
3. The evidence seized as a result of the search of the Defendant's mother's vehicle was unlawfully obtained and must be suppressed.
4. The Commonwealth failed to establish a *prima facie* case of Possession of a Small Amount of Marijuana under 35 Pa. C.S.A. § 780-113(a)(31)(i).

DISCUSSION

The Defendant contends in his Omnibus Pre-Trial Motion that the search of the Defendant's mother's vehicle was unconstitutional because the authorities did not have probable cause to search same. Consequently, the Defendant argues that any alleged evidence seized as a result of the unlawful vehicle search must be suppressed. We agree with the Defendant's position that the search of the Defendant's vehicle was unlawful and that the evidence located therein must be suppressed.

Initially we note that the Fourth Amendment of the United States Constitution provides for "[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures." See Fourth Amendment of the U.S. Constitution. The goal of the Fourth Amendment is to protect a person's right to privacy and freedom from unreasonable intrusions by the government. Therefore, "the prerequisite for a warrantless search of a motor vehicle is

probable cause to search.” Commonwealth v. Gary, 625 Pa. 183, 242, 91 A.3d 102, 138 (2014). Probable cause is a more stringent standard than reasonable suspicion. Commonwealth v. Cook, 558 Pa. 50, 57, 735 A.2d 673, 676 (1999). For probable cause to exist, a police officer must articulate a particularized justification based on the totality of the circumstances, which includes all of the facts, circumstances, and inferences arising therefrom, for believing that the individual is engaged in criminal conduct. United States v. Arvizu, 534 U.S. 266, 273-274, 122 S. Ct. 744, 151 L.Ed.2d 740 (2002).

As further guidance, this Court notes that the Supreme Court of Pennsylvania recently has articulated in Commonwealth v. Hicks, 208 A.3d 916 (2019) that police officers may not infer criminal activity merely from an individual’s possession of a concealed firearm in public, as a firearm may lawfully be carried and, alone, is not suggestive of criminal activity. Hicks, 2019 WL 2305953, 208 A.3d at 939-940. Indeed, it is not a criminal offense for a license holder to carry a concealed weapon in public. Id. Therefore, the Supreme Court of Pennsylvania in Hicks found that reasonable suspicion, a lesser standard than probable cause, of criminal activity did not exist in that case to support a warrantless seizure of a person. The Supreme Court noted that the very conduct for which a person has obtained a license cannot serve “as the sole predicate for the deprivation of [a person’s] liberty.” Hicks, 208 A.3d at 940. When people “are licensed to do something, and violate no law by doing that thing, common sense dictates that the police officer cannot assume that any given person doing it is breaking the law. Absent some other circumstances giving rise to a suspicion of criminality, a seizure upon that basis alone is unreasonable.” Hicks 208

A.3d at 945. Fundamentally, the whole picture must establish probable cause that the individual is engaged in wrongdoing prior to being able to legally perform a search of a vehicle. Unfortunately, that was not the case in the within matter.

In the instant case, on November 7, 2018, at approximately 12:30 A.M., Trooper Edward Prentice and Trooper Danielle Heimbach of the Pennsylvania State Police, Fogelsville Barracks, Troop M, were on routine patrol in full uniform and in a marked police unit on Emaus Avenue in the area of the Liberty Park at Allentown apartment complex. Trooper Prentice observed a silver Chrysler 300 sedan making a U-turn in the Liberty Park at Allentown apartment complex on Allenbrook Drive, and then proceed east on Emaus Avenue. Trooper Prentice turned his cruiser around and decided to follow the vehicle, despite having observed no illegal activity. Trooper Prentice noted that the vehicle was traveling at a fast rate of speed. However, the vehicle slowed down prior to approaching an overpass on which vehicles are constrained to pass one at a time. Trooper Prentice and Trooper Heimbach observed that the subject vehicle failed to stop at the solid white stop line on the road at the stop sign controlling the single lane railroad overpass at Mack Boulevard and South 8th Street, Allentown, Lehigh County, Pennsylvania. Consequently, observing this motor vehicle violation, a traffic stop was effectuated. The subject vehicle pulled over immediately.

Trooper Prentice was the field training officer assigned to Trooper Heimbach, who had less than thirty (30) days on the job. This Court finds that Trooper Prentice, as Trooper Heimbach's "coach," was using this relatively minor infraction as a teaching moment. The vehicle, when first observed by the troopers, was not involved in

any motor vehicle infractions which would cause them to pursue the vehicle. Nevertheless, this Court finds that Trooper Prentice was well-intentioned in the performance of his duties.

As Trooper Prentice was "coaching" Trooper Heimbach who was new to the Pennsylvania State Police, Trooper Heimbach took the lead and exited the police cruiser to investigate. Trooper Heimbach approached the passenger side of the vehicle to speak with the occupants. As she approached, she smelled the odor of burnt marijuana. The driver of the vehicle was a white female, later identified as Teri Barr, the Defendant's wife. The Defendant, Timothy Barr, was seated in the front passenger seat and was speaking with Trooper Heimbach. Co-Defendant Luiz Monteiro was seated in the rear passenger seat behind the Defendant. He appeared to be either passed out or in and out of sleep, and had no involvement with police contact.

After Trooper Prentice completed his tasks in the police cruiser, he approached the vehicle on the driver's side. Upon approach, Trooper Prentice could smell the odor of both burnt and raw marijuana through the open window of the vehicle. At that time, Trooper Prentice asked the driver to exit the vehicle to interview her and to confirm that she was not under the influence and incapable of safe driving. He stepped back to make room for her egress from the vehicle. When Trooper Prentice overheard the passenger arguing with Trooper Heimbach and stating that "no one is getting out of this fucking car," Trooper Prentice walked back to the driver's side door. The argument ensued for approximately two (2) to three (3) minutes, until members of the Allentown Police Department arrived as back up. When members of the Allentown Police Department arrived, the Defendant's attitude changed and he became more cooperative. He exited the vehicle, along with the other occupants. They were patted

down for officer safety.

Trooper Prentice advised the occupants of the vehicle that he could lawfully search the vehicle, because the odor of burnt marijuana provided them with probable cause. At that time, the Defendant presented Trooper Prentice with a medical marijuana identification card that allows him to possess and ingest medical marijuana pursuant to this license. Trooper Prentice admitted that while he knew that green leafy marijuana was legal for medical purposes, he was not familiar with how a person ingests green leafy medical marijuana. Indeed, Trooper Prentice was under the misconception that medical marijuana, when ingested through a vaping pen, has no odor. Similarly, Trooper Heimbach was frank with this Court and stated that she did not know how medical marijuana was ingested. She also indicated that at the time of preliminary hearing in this matter, and consequently, at the time of the vehicle stop, she was under the misimpression that green leafy marijuana was illegal and not used for medical purposes. Once Trooper Prentice was presented with the medical marijuana card, he indicated that "if he's allowed to have it, I'm fine with that. I'm not going to fucking worry about it."¹⁸

Nevertheless, Trooper Heimbach and Trooper Prentice then conducted a probable cause search of the vehicle based on the odor of marijuana that they detected therein. The search of the vehicle yielded marijuana "shake" throughout the cabin area, as well as a sealed Ziploc bag containing marijuana between the front passenger seat and the center console. The marijuana weighed .79 grams. The Ziploc plastic bag did not have any markings or barcodes on it indicative of coming from a medical marijuana

¹⁸ It is unclear to this Court why Trooper Prentice changed his position and conducted the search of the vehicle.

dispensary. Trooper Prentice testified that he was trained that medical marijuana has to remain in the original packaging that it is received in from the dispensary, from the time that it is opened until the time that the contents are totally consumed. As the baggie located in the vehicle had no markings on it that were indicative of being medical marijuana, Trooper Prentice grew concerned and skeptical that the contents were medical marijuana. However, Trooper Prentice did acknowledge that he did not know if the packaging of medical marijuana included an inner baggie like the one located in the center console of the vehicle. Similarly, Trooper Heimbach indicated that she did not know how medical marijuana was packaged.

In addition, Trooper Prentice searched the rear of the vehicle. On the floor of the rear passenger compartment, tucked halfway under the front driver's seat, Trooper Prentice located a jacket with "OBH" markings on it rolled up in a ball. Therein, Trooper Prentice found a loaded black handgun, with one (1) bullet in the chamber and four (4) rounds in the magazine. Trooper Prentice believed the jacket to belong to the Defendant. Consequently, Trooper Prentice advised the members of the Allentown Police Department to detain the three (3) occupants of the vehicle. Further search of the vehicle yielded an Apple logo baggie with unused, clear plastic baggies therein. These small baggies were located in the trunk of the vehicle. Trooper Prentice testified that they were consistent with the packaging of drugs for distribution, as well as the baggie of marijuana found between the front passenger seat and the center console.

David Gordon, M.D., a retired heart and lung surgeon in the Lehigh Valley and an expert in the field of medical marijuana, is one of the pioneer physicians in Pennsylvania to assess patients and determine if they have a qualifying condition under

the law to be prescribed medical marijuana. Dr. Gordon was the physician who made the recommendation that the Defendant qualified for a medical marijuana card based on his underlying medical condition/diagnosis. Dr. Gordon explained that there is no distinguishable physical difference between the green leafy medical marijuana and regular marijuana purchased on the streets. Indeed, the chemical compositions are the same. Dr. Gordon further explained how a person lawfully ingests green leafy medical marijuana. He indicated that the green leafy marijuana is placed in a battery-operated vaping pen that heats up the marijuana, producing a vapor. A person then breathes in the vapors through the vaping pen. This manner of ingestion is preferable for its pulmonary benefits. Dr. Gordon indicated it is a violation of regulations to smoke medical marijuana without a vaping pen, such as placing it into cigarettes, rolling papers, or pipes. In addition, Dr. Gordon stated that there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source. Furthermore, Dr. Gordon is familiar with the packaging of medical marijuana and explained that it can be dispensed in a plastic container similar to a pill bottle, which then has a plastic bag in it containing the medical marijuana. Dr. Gordon believed that the inner plastic bag does contain some marking on it to reflect that it was purchased at a medical marijuana dispensary, but he was not certain. Dr. Gordon advises all of his patients to maintain their receipts to evidence what was purchased. As of now, there are more than 143,000 patients in Pennsylvania legalized to obtain, possess, and ingest medical marijuana. This necessarily means that patients are permitted lawfully to smell like marijuana.

This Court finds that *Commonwealth v. Hicks, supra*, applies to the within matter, and that the "plain smell" of marijuana alone no longer provides

authorities with probable cause to conduct a search of a subject vehicle. As marijuana has been legalized in Pennsylvania for medical purposes, the plain smell of burnt or raw marijuana is no longer indicative of an illegal or criminal act. In this situation, Trooper Prentice and Trooper Heimbach conducted a search of the vehicle based solely on the odor of marijuana that they both detected emanating from the vehicle.¹⁹ However, as in Hicks where the defendant possessed a valid license to carry a concealed firearm, Defendant Timothy Barr has a valid license to possess and ingest medical marijuana. Additionally, as Dr. Gordon opined, there is no distinguishable physical difference between the green leafy medical marijuana and regular marijuana purchased on the streets, and there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source. It is illogical, impractical, and unreasonable for Trooper Prentice and Trooper Heimbach to have concluded that there was criminal activity afoot when the Defendant was able to present them with a valid medical marijuana card which permitted him to possess and ingest marijuana. This Court is not willing to make such an irrational leap based on the within facts and circumstances and utilizing its common sense.

This is not a simple issue of "plain smell" since the legalization of medical marijuana. The smell of marijuana is no longer per se indicative of a crime. With a valid license an individual is permitted, and expected, to leave an odor of marijuana emanating from his or her person, clothes, hair, breath, and therefore, his or her vehicle.

As exemplified by the within case, there is a clear disconnect between the

¹⁹ It also bears noting that the education of these troopers appears to have been limited to walking past a controlled marijuana burn for a few seconds. Although good-intentioned, both

medical community and the law enforcement community. Pennsylvania legislators did not contemplate that people with legal medical marijuana cards would be arrested and prosecuted for possession of marijuana in a package that is not clearly marked with a dispensary name on it. Such actions are merely means of hampering the legalization of marijuana for medical purposes.

Based on the foregoing, this Court concludes that the search of the subject vehicle was unlawful. Consequently, all evidence seized from the vehicle, specifically the small amount of marijuana and the firearm, were unlawfully obtained. Accordingly, the Defendant's Motion to Suppress is granted, and the small amount of marijuana and the firearm are hereby suppressed.²⁰

troopers lacked knowledge about the specifics of legal/medical marijuana and its usage.

²⁰ As a result of this Court's determination and suppression of the evidence seized from the subject vehicle, this Court finds that the Commonwealth failed to establish a *prima facie* case of Possession of a Small Amount of Marijuana under 35 Pa. C.S.A. § 780-113(a)(31)(i). The Defendant's Petition for Writ of Habeas Corpus is granted.