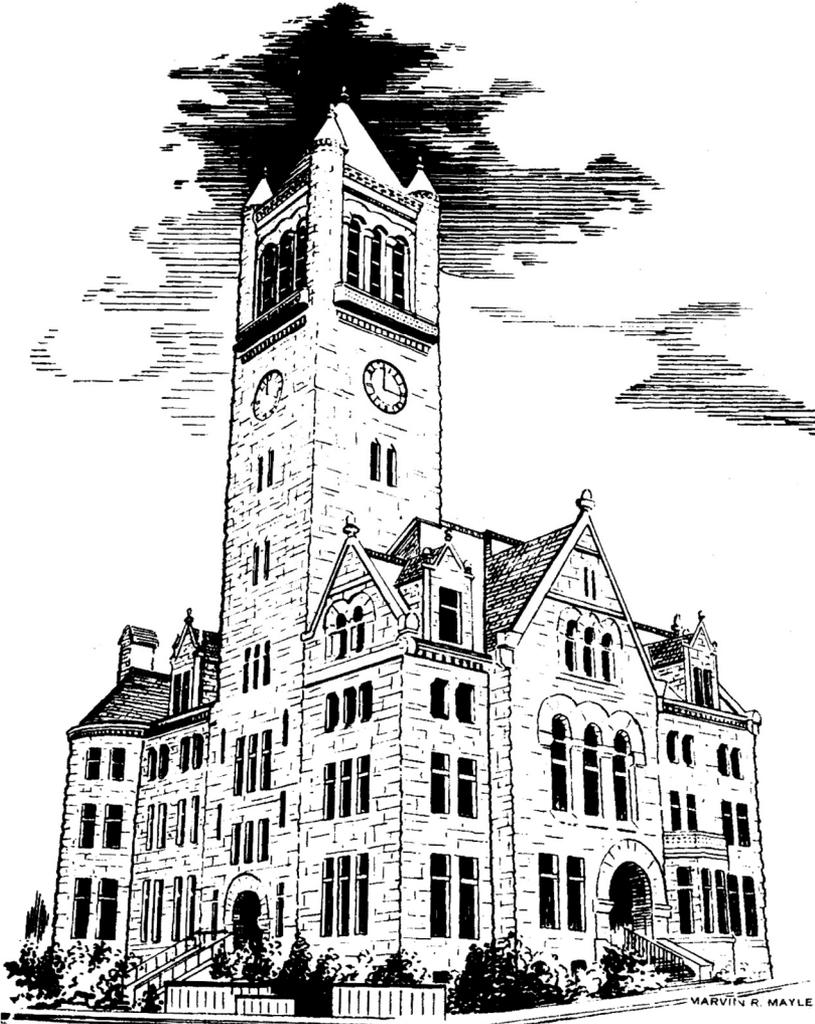


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Third Publication

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Second Publication

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JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :
 :
v. :
 :
XAVIER BROOK WORMACK, : No. 1383 of 2020
Defendant. : Honorable Steve P. Leskinen

OPINION AND ORDER

Leskinen, J.

April 16, 2021

Before the Court is the Defendant's Omnibus Pretrial Motion. After careful review of the evidence and applicable law, the Court hereby grants the Motion.

Factual Background

The Affidavit of Probable Cause and the testimony given at the Omnibus Pretrial Hearing on March 18th, 2021 establish the following: On June 18th, 2019, South Connellsville Police Officer Thomas Leichliter was on patrol in a patrol unit in the vicinity of the intersection of South Pittsburgh Street and East Painters Street in South Connellsville when he observed the Defendant's vehicle turn onto South Pittsburgh Street without using a turn signal. Officer Leichliter followed the Defendant's vehicle and attempted to conduct a traffic stop on it, but testified that the Defendant turned onto and drove down various minor side streets until he (Officer Leichliter) was finally able to conduct a traffic stop on Austin Avenue. Officer Leichliter testified that he approached the Defendant's vehicle and immediately observed a strong smell of marijuana. Officer Leichliter testified that he was not certain whether the smell was of raw or burnt marijuana. Officer Leichliter asked the Defendant why there was a smell of marijuana. Officer Leichliter testified that the Defendant told him that he had recently had a passenger in the vehicle who had smelled of marijuana. Officer Leichliter told the Defendant that the smell of marijuana constituted probable cause to search the Defendant's vehicle. Officer Leichliter then detained the Defendant, placed the Defendant in his patrol unit, and conducted a search of the vehicle. During the Omnibus Pre-Trial Hearing, the following exchange took place:

ATTORNEY RHODES: And why did you search the vehicle?
OFFICER LEICHLITER: Due to the odor of marijuana.

During the search, Officer Leichliter found a bag containing cocaine, marijuana, and L.S.D. The Defendant was charged with two counts of Manufacture, Delivery, or Possession With Intent to Manufacture or Deliver, two counts of Int Poss Contr Subst By Per Not Reg, one count of Poss Of Marijuana, one count of Use/Poss of Drug Paraph, one count of False Report - Falsely Incriminate Another, one count of Fail to Sig-

nal, one count of Failure to Yield to Emergency Vehicle, one count of Fail to Carry Lie, one count of Fail to Carry Register, and one count of Oper Veh W/O Req'd Financ Resp.

Legal Standard, Motion to Suppress

The smell of marijuana, alone, is not sufficient to establish probable cause to conduct a warrantless vehicle search. *Com. v. Barr*, 240 A.3d 1263 (Pa.Super.2020). The Superior Court explained:

In *Barr*, we held that the odor of marijuana emanating from a vehicle during a police traffic stop, alone, is not sufficient to establish probable cause...

...The police officer in *Barr* made a traffic stop for an MVC violation, and conducted a search of defendant's vehicle based on the odor of marijuana emanating from the car's window. *Barr*, 240 A.3d at 1270. In addressing whether the odor alone was enough to establish probable cause, we observed that the "plain smell doctrine," which was premised on "the previously universal fact of marijuana's illegality and its distinctive odor," had been altered and "diminished" by Pennsylvania's Medical Marijuana Act (MMA), 35 Pa.C.S.A. § 10231.101. *Barr*, 240 A.3d at 1275. In finding that the MMA "clearly altered the underlying factual context in which [the] probable cause test applies," this Court held that the "odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity." *Id.* at 1287 (emphasis added). We explained "the odor of marijuana may contribute to a finding of probable cause, as possession of marijuana remains illegal generally," but "the odor alone does not imply individualized suspicion of criminal activity[.]" *Id.* at 1288 (emphasis added); see also *id.* at 1275 (holding that "odor of marijuana is a factor for consideration in a determination of the existence of probable cause." (emphasis in original)). Because the suppression court in *Barr* ruled to the contrary, we vacated the order granting suppression and remanded for reconsideration. *Id.* at 1269 (noting the suppression court failed to give any weight to the odor of marijuana, and "did not appear to evaluate any other factors in conjunction with the odor of marijuana in its probable cause analysis"). The *Barr* Court:

remand[ed] for reconsideration of th[e] motion [to suppress] by the trial court given the deficiencies in the court's opinion identified herein. We instruct the court that while it is not compelled by case law to find that probable cause exists solely on the basis of the odor of marijuana, that fact may, in the totality of the---circumstances, still contribute to a finding of probable cause to believe the marijuana detected by the odor was possessed illegally...

... [T]he court must also consider (or explain why it need not consider) the other factors suggested by the Commonwealth as contributing to a finding of probable cause, such as the Appellee's statements and demeanor during the stop....

Id. at 1289 (emphasis added).

Com. v. Shaw, 2021 PA Super 19 (Pa.Super.2021).

Conclusions of Law, Motion to Suppress

Unfortunately, the Court need not consider other factors suggested by the Commonwealth as contributing to a finding of probable cause, because the Commonwealth did not suggest other such factors. During the Omnibus Pre-Trial Hearing, the following exchange took place:

ATTORNEY RHODES: And why did you search the vehicle?

OFFICER LEICHLITER: Due to the odor of marijuana.

The Commonwealth, therefore, relied on the smell of marijuana, alone, to justify the warrantless vehicle search. The Court finds that this fact pattern falls squarely within the conduct precluded by Barr.

WHEREFORE, the Court issues the following Order:

ORDER

AND NOW, this 16th day of April, 2021, upon consideration of the Defendant's Omnibus Pretrial Motion, it is hereby ORDERED and DIRECTED that it is GRANTED and all evidence derived from the search of the Defendant's vehicle is hereby suppressed. Since the Commonwealth cannot now sustain its burden of proof on Counts 1 through 7, said Counts are hereby DISMISSED.

BY THE COURT:
STEVE P. LESKINEN, JUDGE

ATTEST:
Clerk of Courts

LUNCH & LEARN SERIES

The Fayette County Bar Association's next presentation in its Lunch & Learn Series will be:

- Date: **Wednesday, May 25th from 12:00 p.m. to 1:30 p.m.**
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topics: **On Cross-Examination**
- Presenter: **Samuel J. Davis, Esquire, Melinda K. Dellarose, Esquire, and Brent Eric Peck, Esquire**

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- No charge for attendance with CLE Credit

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