

## **In re D.W.**

(2017) \_\_ Cal.App.5th \_\_ [2017 WL 3334592]<sup>1</sup>

### **Issue**

If officers have probable cause to believe that a person possessed an ounce or less of marijuana, may they search him for the marijuana as a routine incident to the arrest?

### **Facts**

Two San Francisco police officers on patrol saw several young men standing on a corner in a high crime area. Because some of the men were known gang members, the officers decided to stop and talk with them. One of the men was a minor who was identified here as D.W. When an officer smelled the odor of marijuana coming from D.W.'s clothing and breath, he said, "Man, you smell like marijuana," and D.W. responded by admitting that he had just smoked some. Consequently, the officer searched D.W. for more marijuana and found a revolver under his backpack. After D.W. was charged, he filed a motion to suppress the gun, and the motion was denied. He appealed.

### **Discussion**

D.W. argued that the search constituted an illegal search incident to arrest, and the court agreed. This ruling was based on the settled law that officers may search an arrestee incident to an arrest only if they would be transporting him to a police station, jail, or other place of confinement.<sup>2</sup> The problem in *D.W.* was that the defendant could not be legally transported from the scene because, at the time, possession of one ounce or less of marijuana was merely an infraction which must ordinarily be disposed of by means of citation and release. (Now it's not a crime at all.)

Consequently, the court ruled that the search of D.W. could not be upheld as a search incident to arrest because the officers had no reason, and thus no authority, to transport D.W. from the scene. Said the court, "Here, the search fails to satisfy the Fourth Amendment because when officers decided to search D.W., they had neither cause to make a custodial arrest nor evidence that he was guilty of anything more than an infraction."

### **Comment**

*D.W.* was decided before the Marijuana Legalization Initiative (Proposition 64) became law last year. Still, the court's fundamental ruling still applies: Officers cannot conduct searches of an arrestee as an incident to the arrest unless, in addition to having probable cause to arrest, they were going to transport the suspect from the scene. So, applying this rule to the post-Proposition 64 law, it appears that officers will not, under any circumstances, be permitted to conduct searches incident to arrest for straight possession of recreational marijuana because such possession is no longer a crime.

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<sup>1</sup> **NOTE:** This previously depublished case was ordered published on August 2, 2017.

<sup>2</sup> See *Birchfield v. North Dakota* (2016) \_\_ US \_\_ [136 S.Ct. 2160]; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1212. **NOTE:** The rationale is that the danger to officers "is far greater in the case of the extended exposure which follows the taking of a suspect into custody," especially because of the "attendant proximity, stress and uncertainty." *United States v. Robinson* (1973) 414 U.S. 218, 234, 35, fn.5.

There is, however, another type of search whose validity depends solely on whether officers have probable cause to believe there are illegal drugs in the suspect's possession in any amount. Thus, the search in *D.W.* might have been upheld as a probable cause search because straight possession of marijuana was still an infraction when the search occurred. But, for some reason, that theory was not considered.

So, how do things stand now that possession of recreational marijuana is no longer a crime in California? Although the courts have not yet had an opportunity to address the issue, it appears that officers will still be able to conduct probable cause searches for marijuana in a suspect's possession—but only if they also have probable cause to believe the marijuana was possessed under circumstances that made possession illegal under the terms of Proposition 64. What are those circumstances? There are six of them, and they have now been incorporated into the Health and Safety Code, as follows:

**More than an ounce:** As noted earlier, possession of marijuana remains an infraction if the amount exceeded one ounce.<sup>3</sup> Proof as to the amount of marijuana can probably be satisfied if officers actually saw or smelled the marijuana and made a reasonable judgment that the amount exceeded one ounce. But what if the odor was detected by a K-9? This issue was recently discussed by a court in Colorado, which also permits possession of small amounts of recreational marijuana. Specifically, in *People v. McKnight* the court ruled that an alert by a K-9 who is sniffing a vehicle will not automatically provide officers with probable cause to search the vehicle because K-9's cannot determine whether the quantity of marijuana they have detected exceeds one ounce.<sup>4</sup> Although this ruling is not binding authority in California, it seem consistent with the court's observation in *D.W.* that "even if the officers could reasonably conclude that the smell of marijuana and D.W.'s admission that he just smoked some meant he had more, it would have been mere conjecture to conclude that he possessed enough to constitute a jailable offense."

**Minor in possession:** A minor cannot possess any amount of marijuana.<sup>5</sup> So, if officers had probable cause to believe the suspect was a minor, a search based on probable cause would be permitted.

**Open container:** If officers saw an open container of marijuana in an occupied vehicle, a probable cause search to seize the container would be permitted because possession of an open container of marijuana is just as illegal as an open container of alcohol.<sup>6</sup>

**Ingesting in vehicle:** A search would be permitted if officers had probable cause to believe that the driver or a passenger in a vehicle was smoking or ingesting marijuana.<sup>7</sup>

**Impaired driver:** A search of a vehicle for marijuana would be permitted if officers had probable cause to believe the driver was impaired as the result of smoking or ingesting marijuana.<sup>8</sup>

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<sup>3</sup> See Pen. Code §§ 11362.1(a), 11357.

<sup>4</sup> (2017) \_\_ P.3d \_\_ [2017 WL 2981808].

<sup>5</sup> See Health & Saf. Code §§ 11362.1(a)(1).

<sup>6</sup> See Health & Saf. Code §§ 11362.3(a)(4).

<sup>7</sup> See Health & Saf. Code §§ 11362.3(a)(8), 11362.45(a).

<sup>8</sup> See Health & Saf. Code §§ 11362.45(a).

**Marijuana in public places, schools:** Finally, a search for and seizure of marijuana would be lawful if officers had probable cause to believe the arrestee was smoking it in a public place or at a school.<sup>9</sup>

In summary, if any of these circumstances existed, the marijuana in the suspect's possession would almost certainly constitute "contraband," which would mean that a search based on probable cause would be permitted. POV

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<sup>9</sup> See Health & Saf. Code § 11362.3(a)(1), 11362.3(a)(5).