



MARCH 30, 2015

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State v. Kazmierczak

Court of Appeals Rules That Odor of Marijuana Alone is Sufficient Probable Cause to Obtain a Search Warrant for a Home

In *State v. Kazmierczak*, A14A2046 (March 30, 2015) (en banc), Kazmierczak was charged with manufacturing marijuana and possession of marijuana with intent to distribute. The evidence showed that officers went to Kazmierczak's residence to do a "knock and talk" after receiving a complaint concerning growing marijuana. The officers encountered Kazmierczak's mother, the homeowner, at the door and she directed the officers to meet her in the garage. When the officers entered the garage, they immediately smelled raw marijuana. Although Kazmierczak was not home, his mother consented to allow the officers to come inside. Immediately upon entering the residence, the officers detected a stronger "overwhelming" odor of marijuana. Based on this odor, and without venturing further into the residence, the officers sought and obtained a search warrant for the residence.

Kazmierczak filed a motion to suppress. Citing controlling caselaw, the trial court concluded that the odor of marijuana alone could not serve as the basis for the search warrant for the residence. The State appealed and an en banc Court reversed in a 9-2 decision.

The Court acknowledged the cases cited by the trial court supported its ruling. But, the Court stated, "over the years we have issued opinions that misapplied the law in this area, or have been misinterpreted, and must now correct our rulings." Specifically, the Court found, its opinions have seemingly "establish[ed] two different standards for probable cause based on the presence of distinctive odors — one standard for a warrantless search of a vehicle where the presence of such odors alone would be sufficient probable cause ...and another, more stringent standard for the issuance of a search warrant where the presence of such odors alone would be insufficient to establish probable cause." However, the Court found, this "double standard" is inconsistent with the principle that a warrantless search of an automobile must be based on the same degree of probable cause that would otherwise be sufficient for a search warrant to issue. Thus, "[a]s the law in Georgia is clear that the odor of marijuana alone may constitute sufficient probable cause to justify a warrantless search of a vehicle....it follows that such an odor alone would likewise be sufficient to justify the issuance of a search warrant."

Accordingly, the Court held, "if the affidavit for the search warrant contains sufficient information for a magistrate to determine that the officer who detected the odor of marijuana emanating from a specified location is qualified to recognize the odor, the presence of such an odor may be the sole basis for the issuance of a search warrant.... To the extent that our holdings in *Patman v. State*, 244 Ga.App. 833 (537 S.E.2d 118) (2000), *Shivers v. State*, 258 Ga.App. 253 (573 S.E.2d 494) (2002), *State v. Fossett*, 253 Ga.App. 791 (560 S.E.2d 351) (2002), *State v. Charles*, 264 Ga.App. 874 (592 S.E.2d 518) (2003), *Boldin v. State*, 282 Ga.App. 492 (639 S.E.2d 522) (2006), and *Martinez-Vargas v. State*, 317 Ga.App. 232 (730 S.E.2d 633) (2012), could be interpreted as support for the premise that the odor

State Prosecution Support Division



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of raw marijuana emanating from a particular location cannot be the sole basis for the issuance of a search warrant for that location, such interpretations are hereby disapproved. To the extent that, *State v. Pando*, 284 Ga.App. 70 (643 S.E.2d 342) (2007), holds that the presence of odors can never be the sole basis for the issuance of a search warrant, it is overruled.”

Nevertheless, in so holding, the Court emphasized that the judicial officer issuing the warrant would still be required to consider all facts and circumstances contained in the affidavit. Thus, in determining whether probable cause exists to issue a search warrant based solely on the odor of marijuana, the judicial officer could consider 1) whether the affidavit establishes that the officer was qualified to recognize the odor based on his or her training and experience; 2) whether the officer was able to determine the particular location where the odor was originating from; and 3) whether the officer detected the odor from a place where he or she was legally entitled to be.