

1979 WL 42866 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 15, 1979

***1 RE: Admissibility during a trial for DUI of testimony that a police officer smelled marijuana on the person of the defendant**

Colonel W. J. Seaborn
Director of Law Enforcement
P. O. Box 191
Columbia, South Carolina 29202

Dear Colonel Seaborn:

Captain Cecil Dilworth has inquired about the admissibility of testimony from a police officer that he smelled marijuana on the person of a defendant during the trial of that defendant on the charge of DUI. Because the answer to the question would appear to be one of general interest to the Patrol, I have addressed my reply to you.

South Carolina courts admit testimony regarding the smell of alcohol in DUI cases. [State v. Gilliam](#), 270 S.C. 345, 242 S.E.2d 410 (1978); [State v. Douglas](#), 245 S.C. 83, 138 S.E.2d 845 (1964). Such evidence is clearly relevant to the facts in issue. Other jurisdictions have admitted an arresting officer's testimony regarding the smell of marijuana in 'drug' related cases. [State v. Curtis](#), 114 Ariz. 527, 562 P.2d 407 (1977); [State v. Cunningham](#), 17 Ariz. App. 314, 497 P.2d 821 (1972). While there are no cases directly on point, the North Carolina courts have admitted testimony of an officer's opinion that an accused was under the influence of marijuana at the time of his arrest. [State v. Walsh](#), 19 N.C. App. 420, 199 S.E.2d 38, cert. denied 284 N.C. 258, 200 S.E.2d 658 (1973); [State v. Cook](#), 273 N.C. 377, 160 S.E.2d 49 (1968); [State v. Fletcher](#), 279 N.C. 85, 181 S.E.2d 405 (1971).

Often, the only way a witness can describe something is by drawing a conclusion from observing facts. In these instances, the witness should be allowed to state his overall conclusions as to the facts he observed. Dreher, [A Guide to Evidence Law in South Carolina](#). Additionally, officers who have had experience in searching for and obtaining marijuana have been allowed to testify that a certain substance was marijuana and other police officers have been held qualified so to testify. 23 C.J.S. [Criminal Law](#) § 864. On the other hand, the testimony of non-expert witnesses that a substance was marijuana has been held by some courts as conclusionary and improper. [Id.](#)

It appears that the admissibility of testimony concerning the odor of marijuana about the person of the defendant would depend to some extent, probably to a great extent, on whether or not the officer had previous experience with marijuana sufficient to make it likely that he would be able to identify the odor with accuracy. It would therefore be desirable to explore the officer's previous experience with marijuana, particularly with its odor, before attempting to elicit testimony relative to the officer's observations of the defendant.

Of course, even if the testimony were excluded, the officer could testify as to the physical characteristics of the defendant, particularly with reference to his apparent intoxication, as well as to the fact that no alcohol smell was noticed. Furthermore, it would be proper for the officer to testify as to whether or not the defendant was in his opinion, intoxicated. [State v. Ramsey](#), 221 S.C. 10, 68 S.E.2d 634 (1952).

***2** It is therefore the opinion of this office that an officer, who has previously had experience with the odor of marijuana, could properly testify that he smelled the odor of marijuana about the person of a defendant who was charged with driving under the influence.

Sincerely yours,

William L. Todd
Staff Attorney

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