

Pennsylvania v. Barr (2021). Chief Justice Baer authored majority opinion. Justice Wecht joined majority opinion.

Background: In 2018, state troopers stopped a vehicle for a minor traffic violation. Approaching the car, they smelled marijuana. The driver and passenger produced valid medical marijuana cards, but officers searched the car, recovering a small amount of marijuana in unmarked packaging and a handgun. The trial court suppressed the evidence, holding odor alone was insufficient post-MMA. The Superior Court agreed odor alone was insufficient but remanded for reconsideration of other factors.

Majority Holding: The majority held that after enactment of the Medical Marijuana Act (MMA), the odor of marijuana alone does not establish probable cause to conduct a warrantless search of a vehicle. The smell may be considered as one factor in a totality-of-the-circumstances analysis, but individualized suspicion of criminal activity is still required. The Court reinstated the trial court's suppression order because the search in this case was based solely on odor.

Issue: Whether, in light of the MMA, the smell of marijuana can provide probable cause for a warrantless vehicle search, and to what extent *Commonwealth v. Hicks* applies to lawful medical marijuana possession.

Majority Analysis: Under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, warrantless searches are presumptively unreasonable if not supported by probable cause under the totality of the circumstances. Historically, under the "plain smell" doctrine (p. 9), marijuana was per se illegal under the Controlled Substance Act, and its odor alone was sufficient to establish probable cause for a vehicle search. The Court found that the MMA changed this framework by removing the per se illegality of marijuana, eliminating situations where the smell alone could signify lawfulness of such activity.

The Court looked to *Commonwealth v. Hicks*, which held that lawful possession of a licensed firearm could not, standing alone, justify an investigative stop. By analogy, the Court reasoned that lawful possession of marijuana under the MMA similarly cannot, standing alone, justify a warrantless search. The Court concluded that the trial court correctly found the search was based solely on odor, and thus suppression of the evidence was warranted. The Court rejected the Commonwealth's arguments, finding that the trial court reasonably dismissed them. The trial court also noted the troopers' limited marijuana training, deeming the "high-crime area" claim (p. 12) irrelevant, and found the defendant's behavior did not suggest criminal activity.

Partial concurrence and dissent (Dougherty): Justice Dougherty, joined by Justice Mundy, agreed with the majority that the smell of marijuana can be a factor, not the sole factor, in determining probable cause for a warrantless search. However, he dissented from the majority's decision to reinstate the trial court's suppression order instead of remanding for further consideration as ordered by Superior Court.

Dougherty Analysis: Dougherty emphasized that even after enactment of the Medical Marijuana Act (MMA), marijuana odor can indicate criminal activity, such as smoking marijuana, possessing marijuana outside its original dispensary packaging, or driving under the influence.

He stressed that the smell, when combined with other factors—such as evidence of paraphernalia, packaging violations, or signs of impairment—can supply probable cause. He found the trial court failed to consider other important facts, including the defendant's hostile behavior, refusal to let passengers exit, the need for additional police backup, the car's departure from a location known for stolen guns and drugs, and the presence of a passenger who appeared impaired and lacked a medical marijuana card. He concluded that the case should have been remanded for the trial court to evaluate probable cause in light of all relevant facts, rather than reinstating suppression.

Partial concurrence and dissent (Mundy): "Justice Sallie Updyke Mundy joined the other justices in concluding that the smell of marijuana can no longer be a stand-alone factor in determining probable cause. But she would not have suppressed the evidence at this stage, since '[t]he trial court's entire probable cause analysis began and ended' with whether plain smell can be sufficient in supplying it. In Justice Mundy's view, there was 'no assessment of the totality of the circumstances' by the trial court. As such, Justice Mundy, like Justice Dougherty, would have remanded for reconsideration rather than require that the evidence be suppressed." (Bidwell, Anya. "State Court Docket Watch: *Commonwealth v. Barr*." *The Federalist Society*, 18 Apr. 2022, <https://fedsoc.org/scdw/state-court-docket-watch-commonwealth-v-barr>)

Applicable laws:

- Medical Marijuana Act (35 P.S. §§ 10231.101–10231.2110) – legalizes possession and use of marijuana for certified patients; takes precedence over the CSA where in conflict.
- Fourth Amendment, U.S. Constitution & Article I, § 8, Pennsylvania Constitution – protect against unreasonable searches; require probable cause for a search, with warrantless searches presumptively unreasonable.
- *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019) – lawful licensed conduct (concealed carry) cannot alone justify a stop; supports analogous treatment for lawful medical marijuana use.