Oooh, That Smell![1]

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The Plain Smell Doctrine

By Brian Beasley, The Nose That Knows and Legal Adviser, High Point PD

It's ACC Tournament time and the games are going on, so let's get right to today's topic without a whole lot of senseless humor.[2]

A good law enforcement officer is alert to his or her surroundings and uses all of his or her faculties and senses to solve crimes and catch criminals. Along those lines, I hope that all of you are aware of the plain view doctrine. For those of you that are not aware and are ashamed to admit it, here's a refresher:

Basically, if you find yourself in a place where you are constitutionally permitted to be, what you see is not a search under the Fourth Amendment. Makes sense, right? However, if you manipulate something in order to see another part of it, you have conducted a search that must be justified by probable cause and a warrant or an exception to the warrant requirement. In the well known case of Arizona v. Hicks, 480 U.S. 321 (1987), officers properly entered an apartment where a shooting had occurred to search for the shooter or any victims. While inside, they saw some expensive stereo components. However, the Court ruled that they conducted a search when they moved a turntable[3] to read the serial number. The Court did rule that the officers had not "searched" the components that had serial numbers which were visible without being touched, since they were in plain view.

The plain view doctrine also allows a warrantless seizure of an item if (1) you are in a place where you are constitutionally permitted to be, (2) your discovery of the item was inadvertent,[4] (3) the item was immediately recognizable by you as seizable,[5] and (4) the item was in plain view – you could see it.

But just like Marsha Brady,[6] plain view gets all of the attention while the other senses get ignored like annoying younger sisters. Today we will discuss the plain smell doctrine in some detail, but this

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[1] With apologies to Lynyrd Skynyrd. "Oooh, that smell. Can't you smell that smell? Oooh, that smell. The smell of death surrounds you." Try getting THAT song out of your head now.

[2] I was all set to point out the unpleasant odors that tend to drift down the hallways of our police department from time to time, but when I found out they usually originate from the violent crimes office, I decided to keep quiet about them.

[3] I am all too aware that some of our younger officers do not know what a turntable is. Just google it for a history lesson. While you're at it, you might want to google "rotary telephone" as well.

[4] In other words, you did not have probable cause to believe it was there when you entered, and if you entered with a search warrant, that warrant did not name the item as one for seizure.

[5] In other words, when you saw it you had probable cause to seize it without unconstitutional manipulation. (Footnotes – they're not just for humor anymore.)

[6] Ok – google this, too. Wow, I'm really showing my age today.

update would not be complete without mentioning the doctrines of plain feel, plain sound,[7] and even plain taste.[8] That covers all five senses.[9]

The plain smell doctrine states that if you are in a place where you are constitutionally permitted to be and you smell something that you know, based on your training and experience, is evidence of the presence of something illegal, you have probable cause to search for that contraband. You still have to get a warrant to perform the search, unless there is an exception to the warrant requirement that fits your circumstances.

Let's look at three cases to see this doctrine in action:

The U.S. Supreme Court case on this point is United States v. Johns,[10] 469 U.S. 478 (1985). Federal officers investigating a drug-smuggling operation saw two pickup trucks travel to a remote airstrip. The officers approached the trucks, smelled the odor of marijuana emanating from them, and ended up doing a warrantless search of the trucks which turned up (surprise!) marijuana. The Supreme Court held that the officers had probable cause to search because of what they smelled, and they could do a warrantless search of the vehicle because of the Carroll doctrine (the automobile exception to the warrant requirement).

In North Carolina, one of the leading cases on point is from High Point. In State v. Greenwood,[11] High Point Police Officer M. L. Simpson was called to the Church of God at 209 West Ward Street in High Point to investigate a report that a suspicious person was on the premises. Upon his arrival at the church, Officer Simpson was directed by some people standing nearby toward a particular vehicle parked in the corner of the church parking lot, which Officer Simpson observed as a 1966 blue Ford Mustang. Defendant was sitting in the driver's seat of the vehicle.

Officer Simpson approached the vehicle and directed defendant to roll the window down, and defendant complied. At this time, the officer detected the odor of marijuana in and around the vehicle. He asked the defendant to get out of the vehicle, and then told him that he was going to search his car. Officer Simpson found several fragments of cigarette butts which were later determined to contain marijuana and a "roach clip" with some marijuana residue on it. He also found a stolen pocketbook, which led to additional charges for Breaking and Entering a Motor Vehicle and Larceny. The court ruled that the officer acted appropriately.

Don't get the idea that the plain smell doctrine is limited to marijuana. In my favorite North Carolina case on point, a deputy sheriff lawfully searched a disabled van parked on the roadside after

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[7] In U.S. v. Jackson, 588 F.2d 1046 (5th Cir. 1979), the Fifth Circuit held that officers did not conduct a search when they listened to a conversation taking place in an adjoining motel room by lying on a motel room floor and pressing their ears to the crack at the bottom of a connecting door. Now that's solid policework!

[8] Bob Farb writes in his Arrest, Search, and Investigation book that "An officer who lawfully possesses a mason jar of liquid – believing it to be nontaxpaid liquor – probably does not conduct a search or seizure if the officer tastes the liquid to determine if it is liquor or not." Before you get too excited about this opportunity to drink on the job, I'm pretty sure you are going to be able to make this determination with one sip. It will be difficult to convince your disciplinary board that you had to drink the whole thing as part of your investigation.

[9] There is currently no plain ESP, plain "spidey sense," or plain "I see dead people" doctrine.

[10] Think it's a coincidence that the leading case on plain smell is a case about "johns?" I think it's proof that God has a sense of humor.

[11] 47 N.C. App. 731 (1980), *reversed on other grounds*, 301 N.C. 705 (1981).

smelling the telltale odor of white liquor. In State v. Corpening,[12] our tragic hero Mr. Corpening had traveled from his home in Burke County and was driving his 1979 Chevy van (in 1993) down Highway 62 in Alamance County when his right rear tire burst into flames.[13] Thinking quickly, Corpening pulled off the highway into the lot of an old store, found a water hose, and extinguished the fire.

A volunteer firefighter arrived, followed by a wrecker, and then a deputy sheriff. As the deputy walked around the van, he observed (through plain view) that the rear area of the van had been burned and the window glass was missing but a fresh piece of cardboard had been put in the window so that the interior of the van was not visible.[14] The deputy, however, detected an odor coming from the van that he recognized as the odor of “white liquor.” He testified that he had been a law enforcement officer for thirteen years and had smelled "white liquor" on a number of occasions.[15]

The deputy then asked Mr. Corpening if he could look inside the van and Corpening’s reply was “Well, I’d rather you didn’t.” The deputy looked anyway based on the probable cause he had smelled and found 451 gallon jugs of non-taxpaid whiskey. Some of the jugs at the rear of the van had been damaged by the fire, and the contents had spilled onto the floor of the vehicle. The court again ruled that the deputy acted appropriately.

Don’t forget that while your olfactory senses may give you probable cause to search, you still may need a warrant to conduct the search based on that probable cause. Here are some common scenarios:

1. VEHICLES: When you smell drugs after a vehicle stop – you do not need a warrant to search because of the vehicle exception to the warrant requirement. You may search the passenger area and the trunk as well, along with any containers found in either place.

2. PERSONS: When you develop probable cause based on an odor coming from a person, you have two options. You can politely ask the person to stay put while you go get a warrant or you can go ahead and search him. I suggest the second option because the first one seldom if ever works. Keep in mind that the odor has to be sufficiently strong to develop probable cause that your suspect has contraband currently on his or her person.

3. HOUSES: When you smell contraband while legally in someone’s house and that contraband is not also in plain view, you will need a search warrant to search for it or consent from “a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of the premises.”[16]

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[12] 109 N.C. App 586 (1993).
[13] I’m not making this up. And speaking of smells, rubber on fire (literally “burning rubber”) is not my favorite.
[14] This is what we call, in the business, a “clue.”
[15] I’ll bet he had.
[16] N.C.G.S. 15A-222(3).

All right, that about sums it up. Go enjoy the games and let's hope my favorite team doesn't stink it up too badly. And after the tournament is over, get out there and follow your nose![17]

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[17] Remember Toucan Sam? Fruit Loops was one of my favorite breakfast cereals growing up. My mother always said the red ones made me hyper. I'm sure it had nothing to do with the 16 grams of sugar in every spoonful.