CALIFORNIA'S CHANGING MARIJUANA LAWS & ITS EFFECT ON SEARCH & SEIZURE

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Well, it's here California….full blown "commercial for-profit" marijuana activities. It's a brave new world for us, *those in law enforcement*, in the State of California as we now must navigate ourselves through new Health and Safety and Business and Professions Code sections as they pertain to legalized marijuana. Along with these new marijuana laws and regulations come a few changes to how we now can investigate these marijuana crimes and/or the contacts we have with those individuals that are possessing marijuana for *personal recreational or medicinal* use.

One of the most significant changes, if not THE most significant change, is that to "search and seizure" as it pertains to possession or transportation of marijuana. Due to the fact there are "legal" amounts of marijuana that someone 21 years old or older can now possess, use, obtain, cultivate or transport there are different ways we have to handle search and seizure guidelines. It also should be noted that persons 21 years old or older can claim to be both, a recreational pot user and a medicinal marijuana qualified patient, as long as they possess a Proposition 215 Doctor's Recommendation.

Here are the very basics of what someone 21 years old or older can now legally partake in as it pertains to recreational-adult use of marijuana.

Legalized use of marijuana by persons 21 years old and older for non-medical purposes.

- **Non-concentrate** – Possess, process, transport, purchase, obtain, or give away no more than 28.5 grams.
- **Concentrate**- Possess, process, transport, purchase, obtain, or give away no more than 8 grams.
- **Plants**- Possess, plant, cultivate, harvest, dry, or process no more than 6 plants + cannabis produced from plants.
- May smoke or ingest, and may possess, transport, purchase, obtain, use, manufacture, or give away accessories to persons over 21.

Having the above information in mind there is a section written in Proposition 64 that attempts to deal with marijuana that is "legally" possessed, etc. This verbiage now dramatically effects the way we investigate marijuana crimes. Specifically, 11362.1 (c) of the Health and Safety Code reads:

> *Cannabis and Cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.*

Essentially, what this section is saying, is if someone 21 years old or older is legally possessing marijuana within the scope of the law as it describes in Proposition 64, then a "probable cause" search / investigation most likely will not apply to them even though they are possessing a drug (marijuana).

If that is the case then we, as law enforcement, have to make sure we are conducting a thorough investigation to make sure this "recreational pot user" is possessing, transporting, etc. an amount of marijuana within the guidelines of Proposition 64. I'm going to make a very bold statement here…because of the language in 11362.1(c) HS and legal amounts of marijuana that are now being possessed in public…it is my belief and I think very fair to say, *"Gone are the days of JUST "plain smell" as they pertain to marijuana investigations."* We must now have something criminal or in addition to "plain smell" to conduct our probable cause searches. Let's call it... "*plain smell plus one".* Let's look at some "plus ones" that can help us in our investigations and hopefully establish *reasonable suspicion and/or probable cause*.

In contacting someone who is possessing or transporting marijuana in public we must now first obtain some information from them that can help us determine if they are possessing/transporting personal-use *recreational or medicinal* marijuana. Here are a couple questions you can start your contact with:

1) **Is the marijuana you are smoking /possessing "medical" or "recreational" pot?** *(Search and seizure, amounts lawfully possessed and charging sections are different based off of what their answer is to this question.)*

2. **How old are you?** *(18 years old and older for "medicinal" and 21 years old and older for "recreational "… If subject claims medical privileges then he/she must have a Doctor's Recommendation.)*

Let's first deal with the medicinal marijuana and the person that claims Proposition 215 privileges. Remember, the amount they possess must be reasonably related to their current medical needs. This is a subjective standard and will vary from qualified patient to qualified patient. The reasonableness standard comes from the 1997 case of *People v. Trippet*.

For example, if a qualified patient claims to use 2 grams of marijuana a day for their medical needs it would be reasonable for them to possess about 2 ounces a month or about 1.6 pounds for their yearly medical needs. Now they cannot possess all that marijuana on their person or in their car at any one time, only that amount that is reasonable for the current medical needs. Search and seizure is very clear as it pertains to medical marijuana possession/transportation and the abilities you have in investigating these contacts.

There are two bench-mark cases that give great clarity to the courts, prosecutors and law enforcement officers regarding search and seizure and transportation amounts. The two cases are *People v. Waxler (2014)* and *People v. Wayman (2010).* Based off of these two cases nothing prevents a law enforcement officer from conducting a thorough search to determine if the qualified patient contacted is possessing or transporting an amount of marijuana that is reasonably related to their current medical needs.

Waxler deals with and discusses the search of a person or vehicle when a person claims medicinal marijuana privileges. In affirming the trial court's decision, the Appellate Court stated the search was good. Based on smell alone, an officer cannot know how much MJ is in a vehicle until they search it. The vehicle exception to the search warrant rule still applies. Also Propositon 215 is *"not a shield from reasonable investigation.* In other words, just because someone claims "215 privileges" doesn't mean an officer must cease his/her investigation into someone's possession of MJ regardless of how much or little someone claims to possess. Deputies were entitled to investigate how much MJ was in the vehicle to make sure Waxler's possession was within compliance of the "reasonableness standard" set forth by the Strasburg case.

Wayman deals with and discusses the amount of medical marijuana a person can transport as it relates to their current medical needs. The court instructed the jury in *Wayman* that the amount of marijuana transported must be reasonably related to the qualified patient's current medicinal needs. They should also consider whether the method, timing, and distance of transportation were reasonably related to the qualified patient's current medicinal needs. The court held *"by its terms, it provides immunity from criminal liability only when a qualified patient transports marijuana for his or her own personal medicinal use"*.

Simply put, if someone claims medicinal privileges then "plain smell" alone applies and you can conduct a thorough search to determine if the marijuana they are possessing or transporting is reasonably related to the patient's current medical needs. If not, then it's criminally possessed/transported, etc.

Okay, now back to the pink elephant in the room…*recreational marijuana and search and seizure*. Remember what we discussed earlier, "plain smell" is not enough. We now need a "plus one" to go with it. Also, the person contacted must be 21 years old or older. Let's talk about some "plus ones" that can be added to the "plain smell" of marijuana during a contact. These "plus ones" are evidence to show that recreational marijuana possession/transported is illegal.

1) Possession under age 21
- *Recreational marijuana is only for persons 21 years old or older. If they are under 21 years old the possession or transportation of recreational marijuana is illegal.*

2) Smell of burnt MJ
- *Recreational marijuana CANNOT be smoked or ingested in public. If use occurs in public it is illegal.*

3) Loose marijuana in car/open container
- *Marijuana MUST be transported in a closed container. If loose marijuana is in the car or if the container the marijuana is stored in is not sealed and closed then it is being transported illegally.*

4) Consent to search
- *The person you contact gives you consent to search their person or vehicle for marijuana/drugs.*

5) Possession more than 28.5 grams (MJ plant material) and 8 grams (concentrated cannabis)
- *Anything over the personal use amounts is illegal to possess or transport.*

6) DUI investigations

- *The person contacted appears under the influence of drugs then a search of the vehicle can be conducted for evidence of that crime.*

7) Overwhelming odor (plus articulable facts)

- *The odor of "fresh/green" (not burnt) marijuana is so pungent that you can articulate in your report that the amount had to be over one ounce stored in a sealed/closed container.*

8) Use in public place/school

- *Recreational marijuana cannot be smoke or ingested in public. If use occurs in public it is illegal.*

Listed in the "plus ones" above we mentioned the term "opened container". Let's take some time now to talk about what constitutes the definition of an "open container" as defined by the State in the California Vehicle Code as well as the Health and Safety Code. The sections for this, respectively, are 23222(b)(1) CVC and 11362.3(a)(4) HS. Here's what they say.

> **23222(b)(1) CVC:** Except as authorized by law, every person who has in his or her possession on his or her person, while driving a motor vehicle upon a highway or on lands, as described in subdivision (b) of Section 23220, any receptacle containing any cannabis or cannabis products, as defined by Section 11018.1 of the Health and Safety Code, which has been opened or has a seal broken, or loose cannabis flower not in a container, is guilty of an infraction. (DRIVER ONLY)
>
> **11362.3(a)(4) HS:** Possess an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation, is guilty of an infraction. (DRIVER or PASSENGER)

Following these definitions and the specific language in 23222(b)(1) CVC we can see a "closed container" is some sort of storage container that HAS NOT been "opened" or one where the seal "HAS NOT been broken". The analysis of 23222(b)(1) CVC is based off of what we already know about 23222(a) CVC and the definition of an "open container" of alcohol.

Let's take this new knowledge of what an "open container" is and couple that with some of the new packaging requirements set forth by the California Bureau of Cannabis Control and the California Department of Public Health as they pertain to State-licensed marijuana distributors and manufacturers.

The State is requiring these distributors and manufacturers use some type of packaging or containers for their marijuana as it makes its way to the retailer, who in turn, sells it to the consumer. The State standard is that packaging must be resealable, tamper-evident and child-resistant. Please note that one layer of packaging must meet the State standard. So if the package holding the product itself does not meet the State standard, it may be placed in an outer package that meets the State standard for packaging.

From what I've heard this packaging will resemble beef jerky-style bags, prescription pill bottles or the metal cans which contain peanuts, but nothing is set in stone yet. These examples are just a few of the types of "packaging" we may see. These containers will have been "factory-sealed" by the distributor or manufacturer. The bags will probably contain a heat-seal, the pill bottles will probably have the sealed paper top over the opening and the cans will probably have a metal "pop" top. The bags, pill bottles and cans, etc. will have a way to be re-sealed via the "Zip-Loc" style seal, a twist top lid or a plastic lid.

Marijuana will be sold at the retailers already packaged from the distributors and manufacturers with the factory seals on them. No more "loose marijuana" at the retailers. The consumer will purchase the sealed "containers" of marijuana from the retailer and then will be responsible for transporting the marijuana in its "sealed" state. Only at their destination can they remove the factory seal. If the consumer breaks the factory seal in transport or drives around with marijuana packaging where the factory seal is broken then, by definition, they possess an "open container", even if the container of marijuana is closed.

The State of California and the Bureau of Cannabis Control are allowing for a grace period on these packaging requirements. There is so much excess pot already packaged (shocker!) that is not in compliance with the new State-issued guidelines that the State is allowing marijuana distributors, manufacturers and retailers to diminish their supplies of this marijuana before enforcing the new packaging guidelines. This grace period may extend into the summer months. As of the date of writing this article (March 2018), no date has been announced for State-licensees to come into compliance with the packaging guidelines.

There's something else I'd like you to think about when conducting these marijuana investigations and possible searches of persons or vehicle. Let's try to look at the BIGGER picture. I am all about seizing dope and getting that poison off the streets, but there might be other evidence in that car or on that person you contact that might lead to other serious crimes…a loaded gun, bloody clothes, DNA, etc. Please keep that in mind.

My analysis of search and seizure, the "plain smell" of marijuana and conducting these investigations might be a little conservative for some, but at this point, with no guidance from the courts or case law to define some of these ideas/points we discussed in this article I think we need to error on the side of caution. I am confident that being conservative now and "seeing the bigger picture" during your investigations it might just save us from some headaches later if bad case law or case law that differs from our current interpretation is made as it related to search and seizure and marijuana.

I hope this article finds you well. If you have any questions for me regarding Prop. 64, Prop. 215, etc. please do not hesitate to contact CPOA and they will be able to put you in touch with me. Also, "Thank you" CPOA for allowing me the opportunity to write this article.