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ONE MINUTE BRIEF

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NUMBER: 2019-04 **DATE:** 01-28-19 **BY:** Devallis Rutledge **TOPIC:** Searching for Marijuana and Major Narcotics DDAs

ISSUE: Can police lawfully search a person or vehicle based on PC to suspect the possession or use of marijuana (“cannabis”), notwithstanding Proposition 64?

Over the years, California has steadily **reduced** the offense-level of possession or use of marijuana, from felony to misdemeanor to infraction to non-criminal, depending on such factors as **total quantity possessed**, location, age, and medical recommendation.

- Proposition 64, effective November 9, 2016, enacted several new provisions defining when possession and use are unlawful, and when they are not. One of these is H&S § 11362.1(a), listing acts by persons 21 or older that are **not criminal** under state law, including the possession of **not more than** 28.5 grams (slightly more than one ounce) of cannabis.

H&S § 11362.1(c) provides that cannabis *“involved in any way with conduct **deemed lawful**”* is not contraband subject to seizure, and that *“no conduct **deemed lawful** by this section shall constitute the basis for detention, search or arrest.”* Does this mean that a person seen in possession of a quantity appearing to be less than 28.5 grams, or a vehicle on which a trained K-9 alerts to the presence of marijuana, cannot be searched?

- Throughout the decades during which criminality of the possession of marijuana changed—**depending on the total quantity possessed**—the jurisprudence has consistently recognized that **until a proper search is made, officers cannot determine whether the total quantity** the person possesses is more or less than a specified amount:

*“[O]ne reasonably believed to be in possession of marijuana [may] be subjected to a search **to determine whether** the quantity he possesses is less than one ounce or a larger quantity.”* *People v. Soberanes* (1979) 97 Cal.App.3d Supp. 21, 27 (full search OK).

*“Knowledge of the **total quantity** of contraband was necessary for the officer to determine whether this was merely a citable offense or something greater.”* *People v. Brocks* (1981) 124 Cal.App.3d 959, 963 (upholding search after one marijuana cigarette observed).

*“[T]he officer is entitled to continue to search and investigate, and **determine whether** the [person] is adhering to the [statutory] limit on possession.”* *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1060 (further search OK, despite medical recommendation).

*“[A search] is not limited to situations where the officer smells or sees more than 28.5 grams.... [T]he observation of **any amount** of marijuana ... establishes probable cause to search....”* *People v. Waxler* (2014) 224 Cal.App.4th 712, 725 (odor justified vehicle search).

Accord, People v. Dey (2000) 84 Cal.App.4th 1318, 1322, and *People v. Hunter* (2005) 133 Cal.App.4th 371, 382 (small amount of marijuana in the passenger compartment is PC to **search the trunk** for more), and see 1MBs 2006-03, 2010-07, 2013-04.

- A post-Proposition 64 appellate opinion has applied these same principles in upholding the validity of a further search of a vehicle and passenger based in part on detection of small amounts of marijuana:

*“The continuing regulation of marijuana leads us to believe that Strasburg and Waxler **still permit officers to conduct a reasonable search to determine whether** the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime.”* *People v. Fewes* (2018) 27 Cal.App.5th 553, 562, *rev. den.* January 16, 2019.

A person might have one “joint” in the passenger compartment and 10 kilos in the trunk. **Until a proper search is completed, it cannot be determined whether a suspect’s conduct can be “deemed lawful” under H&S § 11362.1.** And further investigation may be necessary to assess violations of various restrictions on use and storage. See, e.g., H&S § 11362.3(a)(1)-(8), listing acts prohibited under Proposition 64.

BOTTOM LINE: Justifiable searches to determine whether or not a suspect’s actions can be “deemed lawful” are proper, “irrespective of whether possession of up to an ounce of marijuana is ... an ... offense.” *Fewes, supra*, at 564.

(Citations omitted and emphases added in quoted material.)

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments, and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.