

One Minute Brief

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TOPIC: Auto Searches Based on Marijuana

ISSUE: When does evidence of the presence or use of marijuana in a vehicle provide probable cause to conduct a warrantless search under the automobile exception to the Fourth Amendment?

A warrantless search of an automobile is permissible so long as a peace officer has probable cause to believe the vehicle contains evidence or contraband. *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1225.

In 2016, the voters approved Prop 64, the Control, Regulate, and Tax Adult Use of Marijuana Act, which legalized the use of cannabis and the possession and transportation of modest amounts of cannabis by persons 21 years of age or older in statutorily prescribed circumstances. [H&S 11362.1.] However, there is marijuana activity that remains illegal under Prop 64 including the following:

- Possession of any amount of marijuana by a person under age 21. [H&S 11357.]
- Possession of open containers or packages 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. [H&S 11362.3(4).]
- Smoking or ingesting cannabis or cannabis products while driving or operating a motor vehicle vessel, aircraft or other vehicle used for transportation. [H&S 11362.3(7).]
- Smoking or ingesting cannabis or cannabis products while riding in the passenger seat or compartment of a motor vehicle vessel, aircraft or other vehicle used for transportation. [H&S 11362.3(8).]
- Smoking or ingesting marijuana or any marijuana product while driving or while riding as a passenger in a motor vehicle. [VC 23220.]
- Possession *on the person* while driving, of cannabis in an opened or unsealed receptacle, or loose cannabis flower not in a container. [VC 23222.]
- Driving under the influence of any drug, including marijuana. [VC 23152(f).]

Subsequent court opinions have made clear that lawful activity under Prop 64 cannot support a warrantless auto search. Only unlawful activity under Prop 64 can support a warrantless search.

Unlawful activity that DID justify a warrantless search:

- A minor in possession of marijuana. *In re Randy C.* (2024) 101 Cal.App.5th 933.
- A marijuana blunt in a vehicle is an "open container." *In re Randy C.* (2024) 101 Cal.App.5th 933.

- A lawful amount of marijuana in an unsealed bag on the person of a passenger in a car. *People v. McGee* (2020) 53 Cal.App.5th 796.

Lawful activity that did NOT justify a warrantless search:

- A lawful amount of marijuana in a closed package in possession of driver. *People v. Lee* (2019) 40 Cal.App.5th 853.
- A lawful amount of marijuana in a plastic bag that was knotted at the top was not in an “open container.” *People v. Johnson* (2020) 50 Cal.App. 5th 620.

Ambiguous activity that was NOT enough to justify a warrantless search:

- Sole evidence was smell of burnt marijuana emanating from car and neither detective could determine if marijuana was freshly burnt. *Blakes v. Superior Court* (2021) 72 Cal.App.5th 904.
- Plastic baggie of a legal amount of marijuana in the center console, where no evidence was presented as to whether baggie was sealed or unsealed. *People v. Hall* (2020) 57 Cal.App.5th 946.
- Driver’s possession of 1.14 grams of loose cannabis flower in an unsealed plastic tube in the center console along with admission he had some “bud,” and officer’s observation of strong smell of both fresh and freshly burnt marijuana, which officer testified may linger on clothes or car upholstery for a week or more after it was smoked, was insufficient to support probable cause. *People v. Shumake* (2019) 45 Cal.App.5th Supp. 1.

Activity that DID justify a warrantless search under a totality of the circumstances test:

- Evidence of the smell of recently burned marijuana and a half-burned blunt held by the driver of the vehicle supported a reasonable inference that the driver was illegally driving under the influence, or, at the very least, driving while in possession of an open container of marijuana. *People v. Fews* (2018) 27 Cal.App.5th 553.
- Based on a strong odor of burnt marijuana, the underage driver’s admission that he had smoked marijuana two hours earlier, and the fact that all occupants were under age 21, officers had probable cause to search vehicle for evidence of crime, e.g. marijuana possessed by someone under 21. *People v. Castro* (2022) 86 Cal.App.5th 314.

BOTTOM LINE:

- The smell of burnt marijuana in a car, where there is no other evidence to indicate it had been recently smoked within the car, cannot, by itself, provide probable cause to search the vehicle. Look for other indicia of immediacy of marijuana use relative to the time of driving as it is the use of marijuana while driving or being under the influence while driving that makes the activity illegal.
- If marijuana is in a container, be prepared to describe the container, whether it is sealed or unsealed, and how easily the container can be opened to access the marijuana.

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.