STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID EDWARD KAZMIERCZAK,

Defendant-Appellee.

UNPUBLISHED
October 20, 1998

No. 208367
Oakland Circuit Court
LC No. 97-150126 FH

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant was arrested and charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15 (7401)(2)(d)(iii), based on evidence that was seized from the trunk of his car following a routine traffic stop. The search was conducted because the arresting officer detected the odor of unburned marijuana. After denial of his motion to suppress the evidence, defendant's application for leave to appeal and motion for immediate consideration were granted by this Court. *People v Kazmierczak*, unpublished order of the Court of Appeals, entered June 30, 1997 (Docket No. 203590). This Court vacated the order denying defendant's motion to suppress and remanded the case for reconsideration in light of *People v Taylor*, 454 Mich 580, 593; 564 NW2d 24 (1997), which held that odor alone is not sufficient probable cause to justify the search of an automobile. After remand, the trial court held an evidentiary hearing and concluded that the odor of marijuana was the sole basis for the police search of defendant's vehicle; therefore, the court granted defendant's motion to suppress the evidence. The prosecution now appeals as of right. We affirm.

Findings of historical fact are reviewed for clear error whereas questions of law are reviewed de novo. *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993); *People v Goforth*, 222 Mich App 306, 310 n 4; 564 NW2d 526 (1997). "A ruling is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *People v Schollaert*, 194 Mich App 158, 168; 486 NW2d 312 (1992). The prosecution argues that the police officer's search was justified by more than just the smell of marijuana; however, the officer's own testimony at the evidentiary hearing was that the odor was his sole justification for the search. Therefore, we are not firmly and definitely convinced that the trial court's factual determination in this case was erroneous. Accordingly, because

our Supreme Court's holding in *Taylor, supra*, is controlling authority, the trial court committed no legal error in suppressing the evidence and dismissing the information.[1]

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] If we were not bound by our Supreme Court's holding in *Taylor, supra*, we would reverse the lower court's decision and hold that odor alone is sufficient probable cause to justify the search of an automobile. Like the majority of courts in other states and jurisdictions, we are persuaded that detection of the odor of either fresh marijuana or marijuana smoke, standing alone, provides probable cause for a warrantless search. See, e.g., *State v Sarto*, 195 NJ Super 565, 574; 481 A2d 281 (1984) (reversing the order of suppression because "the strong odor of unburned marijuana gave police probable cause to search the trunk for evidence of contraband"); *Waugh v State*, 20 Md App 682, 691; 318 A2d 204 (1974) (stating that "[t]rained investigators are entitled to rely upon the sense of smell to establish probable cause, just as surely as they are entitled to rely upon the senses of sight, hearing, touch, or taste"), rev'd on other grounds, 275 Md 22, 30; 338 A2d 268 (1975). See generally the collection of cases catalogued at 68 Am Jur 2d, Searches and Seizures, "Detection of Odor," § 72 (1993) and "Odor of Narcotics as Providing Probable Cause for Warrantless Search," 5 ALR4th 681 (1981).