

Cigar Guts:  
The Importance of Articulation  
Legal Question of the Week  
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Brian Beasley  
Articulate Fellow and  
Legal Adviser, HPPD

It is a dark and stormy night.<sup>1</sup> You are a patrol officer, and you have just pulled a vehicle over for a traffic violation. After you have completed the citation, you approach the driver to give him the ticket and return his license and registration. As you do so, you see through the window a plastic grocery bag sticking out of the storage holder on the passenger-side door of the vehicle. You know based on your training and experience that contraband is often found in plastic grocery bags just like this, so you casually ask the driver, “What’s in the bag?” The driver responds, “Cigar guts.” Based on that same training and experience, you know that it is not uncommon for marijuana users to empty the tobacco out of a cigar and replace it with marijuana for smoking. You can’t think of any other reasons why someone would go to the trouble to “gut a cigar.” You are desperately hoping that Cigar is not the last name of the guy your traffic offender just murdered.

The question is this: do you have probable cause to search the vehicle?<sup>2</sup>

The short answer is “no” according to the North Carolina Court of Appeals. In State v. Simmons,<sup>3</sup> decided on January 5, 2010, the court ruled on similar facts that the presence of cigar guts, without more, does not rise to the level of probable cause. In Simmons, a State Highway Patrol Officer stopped the defendant for not wearing his seatbelt<sup>4</sup> while driving his two-tone 1978 Pontiac<sup>5</sup> in Winston-Salem. When the officer

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<sup>1</sup> “It was a dark and stormy night; the rain fell in torrents, except at occasional intervals, when it was checked by a violent gust of wind which swept up the streets (for it is in London that our scene lies), rattling along the housetops, and fiercely agitating the scanty flame of the lamps that struggled against the darkness.” This kind of run-on sentences is the beginning of Paul Clifford, an 1830 novel by Victorian novelist Edward Bulwer-Lytton. I haven’t read it, and based on that first sentence I don’t plan on doing so. I use this phrase as a tribute to Snoopy, who always started this way when attempting to write the next great American novel. That was back when Peanuts was a daily comic strip and not just a Christmas special.

<sup>2</sup> Before we answer this question, I would feel guilty if I didn’t point out that Edward Bulwer-Lytton was also the writer that gave us the line, “The pen is mightier than the sword.” Much more direct and to the point, which actually ties back in to the topic of this legal update.

<sup>3</sup> COA 09-268 (January 5, 2010).

<sup>4</sup> Although not specifically mentioned in the opinion, I am surmising that it was NOT a dark and stormy night.

<sup>5</sup> That’s right – a two-tone 1978 Pontiac. Insert your own joke here.

ran the driver's license it came back revoked and the officer wrote a citation for both offenses.<sup>6</sup>

When the officer went back up to the defendant's car, he noticed a white plastic grocery bag in the door on the passenger's side of the vehicle and the officer had seen contraband contained in similar grocery bags on three prior occasions. Just like in our hypothetical, the officer asked the defendant what was in the bag and the defendant said "cigar guts." The officer took this to mean tobacco that had been removed from a cigar and not the bits and pieces of a recent murder victim named Mr. Cigar.<sup>7</sup>

The officer had learned through his training that marijuana was sometimes placed inside cigars in order to smoke it and that these modified cigars were commonly called "Philly blunts."<sup>8</sup> He was not aware of any other reason a person might remove the tobacco from a cigar. Based on that, he believed that he had probable cause to search the vehicle for contraband. When the officer searched the car, he found 118 grams of marijuana inside the grocery bag.

On the defendant's appeal of his conviction, the N.C. Court of Appeals ruled that probable cause did not exist for a search of the car and that the marijuana seized should have been suppressed. Here is what the court said:

"Although Trooper Byrd testified that cigars from which the tobacco has been removed and replaced with marijuana had become a popular means of consuming controlled substances, that evidence tended to establish the existence of a link between the presence of hollowed out cigars and the presence of marijuana rather than the existence of a link between the presence of loose tobacco and the presence of marijuana. Furthermore, the record is completely devoid of any evidence tending to show that Defendant was stopped in a drug-ridden area or at an unusual time of day or that Trooper Byrd had any basis, apart from Defendant's admission that the plastic bag contained "cigar guts," for believing that Defendant had been involved in the manufacture, use, or distribution of "Philly Blunts." Thus, reduced to its essence, the record does no more than establish that Defendant possessed a legal item without providing any indication that this item was being used in an unlawful manner."

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<sup>6</sup> Let us take a moment, raise a glass, and think fondly of the time long ago before Gant when we would simply arrest the defendant for driving while license revoked and search his vehicle incident to that arrest, thereby avoiding any tough calls about probable cause. Ah, those were the days....

<sup>7</sup> I know I've already made this joke. I also know that not everyone understood it the first time. I'm guessing that some of you still don't get it. That's okay.

<sup>8</sup> "Philly" is a brand of cigar manufactured in Philadelphia, Pennsylvania. "Blunt" is one of the sizes of that particular brand which include the "Black Max" and the "Mexicali Slim." I am told that Blunts come in several different flavors such as cognac, watermelon, tequila, green de menthe, pina colada, grape, and sour apple (which just seems gross to me). However, because they are commonly used as marijuana cigars, the name "Philly Blunt" has become closely associated with marijuana cigars and marijuana use. This must make the "Philly" company very proud. I know it makes the Philadelphia tourism board ecstatic to have their city portrayed in this way.

This was a very close case which teaches us that the presence of loose tobacco by itself is not probable cause of the presence of contraband. But there is a much deeper and more poignant<sup>9</sup> lesson here for all of us. In close cases like this, one or two facts or circumstances may make the difference between conviction or dismissal. In fact, the court seems to indicate in the above paragraph that if there had been evidence that this was a high drug location or an unusual time of day, the result may have been different. This is why it is important for officers to learn and improve their skills of articulation.<sup>10</sup>

### **IMPORTANT DISCLAIMER!**

I do not want to imply in this article that Trooper Byrd did anything wrong or failed to do enough in the Simmons case. He may have done all that he could have done and articulated all the facts and circumstances that were present at the time. Certainly, he seems to have done a good job of testifying to things he knew through his training and experience. He took a chance on a very close case and as it turned out, the Court of Appeals ruled against him. It happens. You play the cards you're dealt. I only use this case as an example of how sometimes very minor facts, if recognized and articulated, can make a big difference. Now to articulate some points about good articulation:

#### **AXIOM ABOUT ARTICULATION #1: IF YOU DON'T KNOW ABOUT IT, YOU CAN'T LOOK FOR IT**

As a law enforcement officer, you go through a large amount of training every year. Some of this training is to help you stay alive, some of it is to help you avoid being sued, and some of it is to make you a more effective crime fighter. When you are being taught about cases like State v. Simmons, you should be interested not only in what the result of the case was and what you can and cannot do constitutionally, you should also study how the court made that particular decision. What facts or circumstances were important in the case?

Your on-the-job experience is also a great instructor. As you face different cases and circumstances, you learn things about how criminals operate and think. Your training and experiences work together to make you a better officer. But unless you actively make an effort to learn from these opportunities, you will miss out on most of this instruction.

The point is this: unless you know what facts and circumstances to look for, you won't see them. Unless you clearly know WHY you are constitutionally allowed to take a particular action, it will be impossible to clearly articulate your reasons to a court of

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<sup>9</sup> Poignant: adjective. (1) painfully affecting the feelings; (2) deeply affecting; (3) designed to make an impression. If you say it over and over, you sound like a dripping faucet. Not that I've done it myself.

<sup>10</sup> Articulate: verb. (1) to give clear and effective utterance to; (2) to utter distinctly; (3) to give definition to. In the Beasley dictionary and for purposes of this legal update, "articulation" is a word used to describe how well an officer is able to clearly communicate the facts and circumstances to paint a complete picture of what happened and why he or she took the actions that he or she took.

law. So become a student of what you do for a living. Strive to learn everything you can. Ask questions. Think about different scenarios. Stay awake for most of the four hour legal update block I teach every year.<sup>11</sup> Read more than just the footnotes. You get my drift.

AXIOM ABOUT ARTICULATION #2:  
IF YOU DON'T NOTICE IT, IT DOESN'T HELP YOU

Now that you know what to look for based on your training and experience, you must actually look for it. If you are conducting a DWI investigation and notice that the driver has slurred speech, but never notice his red and bloodshot eyes or the empty can of Budweiser in the console, your case is weaker than it could be. Be observant and take note of all the facts and circumstances around you. If you don't notice it, it will be like it didn't exist.

AXIOM ABOUT ARTICULATION #3:  
IF YOU DON'T TELL THEM, THEY WON'T KNOW ABOUT IT

Because of all the training and experience you receive, you will learn and know things that most people remain blissfully ignorant about. You will have a much clearer understanding of how criminals operate. You will know things that appellate judges, trial judges, defense attorneys, and even prosecutors don't comprehend or are unaware of. But you won't ever explain it to them, because these things will become so obvious to you that you will forget that not everyone knows them.

For example, you might know that the only reason someone would gut a cigar would be to put marijuana into it.<sup>12</sup> But a judge is not going to know this<sup>13</sup> unless someone tells him or her about it. You might know that a particular area is a high crime or high drug neighborhood, but when you get to court you are going to have to state that fact and explain why you know it. Don't assume that everyone knows what you know – be prepared to tell them and explain it to them.

AXIOM ABOUT ARTICULATION #4:  
IF YOU DON'T WRITE IT DOWN, YOU WON'T REMEMBER TO TELL THEM

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<sup>11</sup> Speaking of my legal update block, you will notice that I point out several times during that highly entertaining four hours the importance of good articulation. Not to be confused with good enunciation, which is also important in communication.

<sup>12</sup> As part of MY quest for knowledge, I read a North Carolina Criminal Law blog produced by the School of Government's Jeff Welty. A commenter who posted on Jeff's blog post about this particular case claims that people often remove the tobacco from cigars and then put it back because (1) it makes the cigar easier to smoke and (2) they believe that the paper inside the cigar causes cancer as part of a government conspiracy. I'm not making this up. He called the process "hying" a cigar. However, a search of the internet for "hying a cigar" turned up no confirmation of these claims and I am therefore convinced it doesn't exist, much like this year's UNC basketball season. You can check out the NC Criminal Law blog at <http://sogweb.sog.unc.edu/blogs/ncclaw/>

<sup>13</sup> Assuming no first-hand knowledge, of course.

Any discussion about articulation would be incomplete without a brief mention of the importance of good note-taking and report writing. Even if you know it and you notice it, if you didn't make a note of it or include it in your report then by the time the case gets to trial, you aren't going to remember it, and therefore you won't tell anybody about it. If these facts and circumstances aren't in your report, the prosecutor who reads the report to decide how to handle the case isn't going to ever know about them either.

I am well aware that most of you did not go into a law enforcement career so that you could complete a lot of paperwork and write a lot of case reports. Most of you became police officers so that you could drive fast, carry a gun, and occasionally help this community and its citizens. The trade-off for getting to do those fantastic things is having to do the ordinary things like writing reports. Strive to be thorough and detailed in your report writing and note taking.

That completes the lecture. Now if you'll excuse me, I'm going to go enjoy a nice mango flavored Philly Titan.

**Brian T. Beasley**

Police Attorney

High Point Police Department