

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-41346  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID WAYNE DURKE,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 1:99-CR-168-1

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August 31, 2001

Before GARWOOD, BARKSDALE and DEMOSS, Circuit Judges.

PER CURIAM:\*

David Wayne Durke (Durke) appeals his conviction for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a). Durke challenges the district court's denial of his motion to suppress. He argues that the search of his vehicle was unconstitutional because, *inter alia*, the officers only had a "hunch" that he would have marihuana in the vehicle.

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\*Pursuant to 5TH CIR. R. 47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

As noted in *United States v. Reed*, 822 F.2d 147, 149 (5th Cir. 1989), the distinct odor of burnt marihuana, by itself, will provide probable cause to search a vehicle. Moreover, the detection of the odor of marihuana justifies a search of the entire vehicle, including locked compartments where contraband is likely to be concealed. *Id.* See also *United States v. McSween*, 53 F.3d 684, 686-87 (5th Cir. 1995).

In reviewing a ruling on a motion to suppress, this court reviews factual findings for clear error. *United States v. Jordan*, 232 F.3d 447, 448 (5th Cir. 2000). This court must view the evidence in the light most favorable to the prevailing party. *Id.* As in *Reed*, "the resolution of this issue simply boiled down to a credibility choice," *Reed*, 882 F.2d at 149, and the district court's express choice to believe the officers' testimony that they smelled a burned marihuana odor coming from the vehicle, and thus to deny the motion to suppress, was not clear error. "It is not controlling that the substance eventually discovered in the vehicle was [methamphetamine], and that no marihuana was ever found." *Id.* "It is settled that the presence or absence of probable cause to search is not determined by what the search does or does not ultimately reveal." *Id.* See also *McSween supra*.

Durke's conviction is AFFIRMED.