No. 128957

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DANTE ANTWAN WEBB, Defendant-Appellant.	) On Appeal from the Appellate Court) of Illinois, Fourth Judicial District,) No. 4-21-0726.)) There on Appeal from the Circuit) Court of the Eleventh Judicial) Circuit, McLean County, Illinois,) No. 18-CF-305.)) The Honorable) William A. Yoder,) Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Following a bench trial, defendant Dante Webb was convicted of cannabis trafficking, possession of cannabis with intent to deliver, and possession of cannabis, and the trial court sentenced him to 14 years' imprisonment. C230.[1] The appellate court affirmed, *People v. Webb*, 2022 IL App (4th) 210726-U, and defendant now appeals from that judgment. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether defendant's trial counsel was not ineffective for failing to seek suppression of drug evidence on the ground that police lacked probable cause to search defendant's truck.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. On November 30, 2022, this Court allowed defendant's petition for leave to appeal.

[1] Citations to the common law record appear as "C__," to the Report of Proceedings as "R__," trial exhibits as "Peo. Exh. __," and defendant's brief as "Def. Br. __."

STATEMENT OF FACTS

In March 2018, defendant was charged with cannabis trafficking, unlawful possession of cannabis with intent to deliver, unlawful possession of cannabis, unlawful possession of a firearm, and unlawful possession of firearm ammunition. C25-30. The People ultimately proceeded only on the cannabis-related charges.

Before trial, defendant filed a motion to suppress evidence of cannabis recovered from the cabin of the semi-trailer truck he was driving at the time of his arrest, as well as statements he made after his arrest. C78-82, C128-131. He argued that police (1) lacked reasonable suspicion to stop his truck; (2) impermissibly prolonged the stop in order to conduct a canine free-air sniff; and (3) obtained evidence from his truck as a result of those constitutional violations. *Id.*

At the ensuing suppression hearing in October 2020, Sergeant Johnathan Albee of the McLean County Sheriff's Office testified that on March 24, 2018, he saw a white semi pulling a car hauler driving north on I-55. R136-37. Albee noticed that the semi bore no markings on its driver's side indicating either the company name or its Department of Transportation number, both of which are required by federal regulations. R137. Albee began following the semi and further noticed that it had no registration displayed anywhere, R137-38, and that the semi was only partially loaded with vehicles, which Albee found odd because of how expensive they are to

operate, R138. Based on these observations and violations, Albee stopped the semi. *Id.*

When Albee began speaking with defendant — who had been driving the semi — Albee noticed that defendant was "in a state of panic." R141. Defendant told Albee that there was no co-driver in the truck. R145. Albee noticed that throughout the conversation, defendant would alternately sit down and stand up, that defendant's movements were "very animated," and that defendant provided Albee with unrelated documents — such as a bill for tire repairs — in response to Albee's requests for defendant's license and registration. R141-42. Defendant further volunteered that he had been "stopped several times" along his trip, and that the semi had already been checked for drugs. R141.

Albee asked defendant to step out to the front of the semi. *Id.* Defendant handed Albee an Illinois "cab card, which is the vehicle registration," but the cab card did not match the California license plate on the front of the semi. R142. At that point, Albee requested assistance from another officer. R144. Albee then asked defendant to accompany him to his patrol car so he could write a warning and investigate the semi's registration and do a routine check of defendant's driver's license. R142, 144-45.[2]

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[2] The People introduced a DVD recording taken from the dashcam of Albee's patrol car. R148; *see also* Peo. Exh. 4. As the trial court noted, because the video was taken from the patrol car, it did not capture any of Albee's interaction with defendant while defendant remained in his semi. R230. Thus, defendant's contention that Peo. Exh. 4 "contains audio of Albee's

After deputy Andrew Erickson arrived, Albee performed a free-air sniff with his canine, R146, 176, which was certified to detect odors of crack cocaine, methamphetamine, heroin, ecstasy, and marijuana, R148. Albee's canine sniffed the outside of the semi and positively alerted for narcotics in the area "right behind the driver's seat." R147. When Albee told defendant that he was going to search the semi, defendant admitted that another person was present in the cabin of the semi. R156. Albee put that person in his patrol car, R165, and conducted a search of the semi, where he found a gun and cannabis in the semi's sleeper area, *id.*

The trial court denied defendant's motion to suppress evidence, finding that Albee had reasonable suspicion to stop defendant's semi because the semi displayed no registration, in violation of 625 ILCS 5/3-413(a). R229. The trial court additionally noted that "clearly there was probable cause that existed once the dog . . . positively alerted." R235.

At the ensuing bench trial, the court took judicial notice of Albee's and Erickson's suppression hearing testimony, and the parties stipulated that the cannabis recovered from defendant's semi weighed 2,736 grams. C153-54.[3] Albee additionally testified that during his search, he found cannabis in the semi's bunk area in a plastic bag and a separate plastic container and found

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interaction with" defendant is incomplete, as the exhibit only contained audio of their interactions once defendant was in Albee's patrol car.

[3] During sentencing, the parties stipulated that the estimated street value of the cannabis was $40,000. R438.

ten individual bags of cannabis in a closet located behind the driver's seat. R271-72. The People also published several videos in which defendant admitted to buying the cannabis in Texas, Peo. Exh. 5 at 1:50:30, and that he would likely sell some of it, Peo. Exh. 10 at 5:09:45.

The trial court found defendant guilty of cannabis trafficking, unlawful possession of cannabis with intent to deliver, and unlawful possession of cannabis. C164, R345-46. The court merged the possession counts into the trafficking count, R463, 474, denied defendant's post-trial motion to reconsider the motion to suppress, R388, and sentenced defendant to 14 years in prison, C230.

On appeal, defendant argued that his trial counsel was ineffective for failing to include in the motion to suppress an argument that police lacked probable cause to search defendant's semi. *People v. Webb*, 2022 IL App (4th) 210726-U, ¶ 24. Specifically, defendant argued that following Illinois's passage of medical marijuana legislation in 2014, the positive canine alert was insufficient on its own to provide probable cause to search his semi because some individuals were legally authorized to possess marijuana. *Id.* The appellate court held that defendant could not establish that he was prejudiced by counsel's decision not to make that argument because the trial court would have denied it. *Id.* ¶ 37. The court explained that the law was clear that "a positive canine alert for contraband constitutes probable cause to search a vehicle" even after the medical marijuana statute, citing this

Court's discussion in *People v. Hill*, 2020 IL 124595, that most people were prohibited from possessing cannabis and that cannabis remained "contraband." *Webb*, 2022 IL App (4th) 210726-U, ¶¶ 33-37. Accordingly, because the proposed argument was meritless, defendant could not "show that he was prejudiced by counsel's failure to raise" it. *Id.* ¶ 37.

STANDARD OF REVIEW

Defendant's ineffective assistance claim is governed by *Strickland v. Washington*'s two-part test. 466 U.S. 668, 694 (1984). To show ineffective assistance of counsel, defendant must establish both that (1) counsel's performance fell below "an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Whether a defendant was denied the effective assistance of counsel is reviewed *de novo*. *See People v. Johnson*, 2021 IL 126291, ¶ 52.

ARGUMENT

I. Because Binding Caselaw Held that a Canine Alert was Sufficient to Establish Probable Cause, Counsel's Performance Was Not Deficient.

Defendant asserts that his counsel performed deficiently because counsel should have filed a motion to suppress arguing that the canine's positive alert on his semi did not provide probable cause to search defendant's vehicle. Def. Br. 21-29. But defendant's argument is incorrect because the caselaw at the time established that a canine alert *did* provide

police probable cause to search defendant's vehicle, and, accordingly, defendant's proposed motion would have been denied as meritless.

Counsel does not perform deficiently by "'failing to file a meritless motion to suppress.'" *See In re M.G.*, 2022 IL App (4th) 210679, ¶ 77 (quoting *People v. Rowell*, 2021 IL App (4th) 180819, ¶ 21); *see also People v. King*, 192 Ill. 2d 189, 197 (2000) ("Conduct of a lawyer will not be deemed deficient for his or her failure to make an argument that has no basis in the law."). Importantly, in analyzing whether defendant's proposed motion to suppress would have had merit, this Court must look at the state of the law at the time of counsel's conduct and must make "every effort . . . 'to eliminate the distorting effects of hindsight'" when analyzing that conduct. *People v. Bailey*, 232 Ill. 2d 285, 296 (2009) (quoting *Strickland*, 466 U.S. at 689); *see also People v. Eubanks*, 2021 IL 126271, ¶ 30 (attorney's performance "must be evaluated from counsel's perspective at the time the contested action was taken"). Put differently, "counsel's understanding must be considered in the context of the state of the law at the time," and "counsel is not incompetent for failing to accurately predict that existing law will change." *People v. Davis*, 2014 IL App (4th) 121040, ¶ 23; *see also Rowell*, 2021 IL App (4th) 180819, ¶ 29 ("[E]ffective assistance does not impose a 'duty of clairvoyance,' [and thus] . . . counsel could not be ineffective for his alleged failure to act based upon a development of the law that had not yet occurred.") (quoting *Davis*, 2014 IL App (4th), ¶ 24)).

Here, a motion to suppress arguing that the positive canine alert did not provide probable cause to search defendant's semi would have been denied as meritless, and counsel therefore had no obligation to argue as much. The Fourth Amendment to the United States Constitution and Article I, Section 6 of the Illinois Constitution of 1970 guarantee Illinois citizens the right to be free from unreasonable searches and seizures. *See Katz v. United States*, 389 U.S. 347, 359 (1967); *People v. Gaytan*, 2015 IL 116223, ¶ 20. And while "[g]enerally, a search is *per se* unreasonable if conducted without a warrant," an exception exists "for searches of automobiles, because their transient nature often renders it impracticable to secure a warrant before the automobile escapes the jurisdiction in which the warrant must be sought," and "an immediate intrusion of a vehicle is necessary if police officers are to secure the evidence of a crime or contraband." *People v. Hill*, 2020 IL 124595, ¶¶ 20-21 (citations omitted). Thus, a vehicle search must instead be supported by probable cause, which exists when "the totality of the facts and circumstances known to the officer at the time of the search would justify a reasonable person in believing that the automobile contains contraband or evidence of criminal activity." *Id.* ¶¶ 22-23 (citing *People v. Smith*, 95 Ill. 2d 412, 419 (1983)).

Illinois courts and federal courts have long acknowledged that "a positive alert to the presence of narcotics by a dog trained in the detection of narcotics is a permissible method of establishing probable cause." *People v.*

Pulido, 2017 IL App (3d) 150215, ¶ 46 (citing *People v. Campbell*, 67 Ill. 2d 308, 315-16 (1977)); *see also United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (collecting cases for the proposition that "[a] dog's positive indication alone is enough to establish probable cause for the presence of a controlled substance."); *People v. Thomas*, 2018 IL App (4th) 170440, ¶ 74 ("If a dog smells drugs in a vehicle, the police have probable cause to search the vehicle."); *People v. Neuberger*, 2011 IL App (2d) 100379, ¶ 9 (noting that there "is no dispute that [a] canine alert "supplied probable cause to search the vehicle in which [the] defendant had been traveling"); *People v. Reedy*, 2015 IL App (3d) 130955, ¶ 46 ("An alert by a trained narcotics canine to the presence of narcotics inside a vehicle creates probable cause to search that vehicle.").

Defendant concedes that Illinois precedent established that a canine alert provides probable cause, Def. Br. 18 (citing *Campbell*, 67 Ill. 2d 308), but argues that this caselaw was upended when the General Assembly enacted the Compassionate Use of Medical Cannabis Program Act (410 ILCS 130/1 *et seq*.) (eff. Jan. 1, 2014), and therefore that his counsel should have filed a motion to suppress arguing that the Act required overturning settled precedent.[4] But at the time counsel filed the motion to suppress in 2020, the Illinois Appellate Court had *already* considered the effect of the medical

[4] The Compassionate Use of Medical Cannabis Program Act "allowed those with certain debilitating medical conditions to purchase and possess cannabis." *People v. Stribling*, 2022 IL App (3d) 210098, ¶ 17.

marijuana statute on probable cause and re-confirmed the settled rule that the smell of cannabis provides probable cause to search a vehicle.[5] *See In re O.S.*, 2018 IL App (1st) 171765, ¶ 29 ("We therefore conclude that case law holding that the odor of marijuana is indicative of criminal activity remains viable notwithstanding the recent decriminalization."); *People v. Rice*, 2019 IL App (3d) 170134, ¶ 25 (noting that "the odor of cannabis as indicative of criminal activity remains viable notwithstanding the legislature's decriminalization of the possession of a small amount of marijuana."); *People v. Watkins*, 2019 IL App (4th) 180605, ¶ 37 ("The dog alerted on defendant's vehicle, giving the police probable cause to search the vehicle."); *People v. Wheeler*, 2020 IL App (2d) 180162-U, ¶ 12 ("Thus, notwithstanding the possible possession and use of medical cannabis for medical purposes, the smell of burnt cannabis emanating from inside a vehicle continues to provide probable cause to search that vehicle.").[6]

Indeed, defendant acknowledges that even after the medical marijuana law was enacted, the appellate court consistently found probable cause to

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[5] Although some of these cases considered a police officer smelling marijuana and others considered a canine's alert, this Court does not differentiate between the two. *See Campbell*, 67 Ill. 2d at 315-16 ("It is clear that the detection of narcotics by police smelling the odor is a permissible method of establishing probable cause . . . and we see no significant difference in the use of dogs under identical circumstances.") (citations omitted).

[6] This unpublished decision can be found at https://www.illinoiscourts.gov/Resources/ad6c5fc5-b54c-423b-bee8-9d11b8eda422/2180162_R23.pdf.

search a vehicle based on the smell of cannabis. *See* Def. Br. 27 ("[S]everal Illinois courts have held that new cannabis legislation has not changed the probable cause analysis."). Defendant's assertion that his counsel failed to make a winning argument, Def. Br. 35-36, therefore is contradicted by defendant's own understanding of the state of the law at the time counsel filed the motion to suppress.

Contrary to defendant's suggestion, Def. Br. 21, this Court's decision in *Hill*, 2020 IL 124595, undermines rather than supports his position that his counsel should have argued that the canine alert did not provide probable cause to search defendant's vehicle. In *Hill*, this Court considered the effect of the General Assembly's amendments to Illinois's marijuana laws on probable cause determinations, and explicitly left in place its holding in *People v. Stout*, 106 Ill. 2d 77 (1985), that the smell of cannabis, by itself, provided probable cause to search a vehicle. 2020 IL 124595, ¶¶ 15-18. The Court explained that the smell of cannabis remained a relevant factor in the probable cause analysis because "the decriminalization of possessing small amounts of cannabis did not alter the status of cannabis as contraband." *Id.* ¶¶ 29, 31. Thus, *Hill* does not call into question the appellate court decisions holding that, even after the medical marijuana law, the smell of cannabis provides probable cause to search a vehicle. Accordingly, a motion to suppress arguing that the canine alert did not provide probable cause for the search of defendant's semi would have been denied, and "[d]efendant's trial

counsel was not deficient for declining to pursue the argument," *Bailey*, 232 Ill. 2d at 297.

Defendant's argument that this Court should overrule this well-established precedent and hold that a canine alert does not, by itself, establish probable cause, Def. Br. 30, is misplaced. As noted, to resolve defendant's ineffective assistance of counsel claim, the Court must view counsel's performance under the law as its existed at the time. *Eubanks*, 2021 IL 126271, ¶ 30; *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to . . . evaluate the conduct from counsel's perspective at the time."). Thus, whether the Court might now overturn established law and hold that a canine alert is insufficient to establish probable cause is beside the point.

This Court rejected a similar argument in *Bailey*, 232 Ill. 2d 285. There, Bailey challenged the United States Supreme Court's holding in *New York v. Belton*, 453 U.S. 454 (1981), that police could search the passenger compartment of a vehicle incident to making a lawful custodial arrest of one of the occupants. *Bailey*, 232 Ill. 2d at 297. In particular, Bailey argued that his counsel was ineffective for failing to file a motion to suppress challenging *Belton's* holding based on then-recent developments in the law. *Id*. at 298-99. But this Court explained that Bailey's attempt to have it change *Belton*'s rule through his ineffective assistance claim was "misplaced" because "[w]hether or not this court should adopt a particular application of the *Belton* rule going

forward is irrelevant to the question before this court, *i.e.*, whether defendant's trial counsel was constitutionally ineffective in failing to file a motion to suppress." *Id*. at 299. The Court noted that "the proper focus of our analysis must be on the facts and law known to counsel at the time of defendant's trial." *Id*. And, the Court held, because "case law was clear that" police had the authority to search Bailey's vehicle," counsel was "not deficient for failing to raise this argument in a motion to suppress." *Id*. at 300. Similarly, here, caselaw uniformly held that a positive canine alert provided probable cause to search defendant's vehicle, and counsel thus was not deficient for failing to argue to the contrary in the motion to suppress.

In sum, because the argument defendant faults his counsel for not making was contrary to uniform appellate precedent available to counsel at the time, counsel was not deficient for declining to raise it in the motion to suppress. Defendant's argument that this Court should revisit that precedent cannot demonstrate that counsel performed deficiently because "to rule that under the circumstances here defendant's trial counsel should have known which way the wind would blow . . . despite longstanding Illinois and Federal precedent to the contrary, would be tantamount to imposing a duty of clairvoyance." *People v. Hartfield*, 232 Ill. App. 3d 198, 208 (1st Dist. 1992). Accordingly, counsel's decision not to argue in his motion to suppress that the canine alert did not provide probable cause was not deficient performance.

II. Because Defendant's Proposed Motion to Suppress Would have Been Denied, Defendant Suffered No Prejudice.

Nor can defendant demonstrate that he was prejudiced by counsel's performance. As noted, defendant must show not only that his counsel performed deficiently but also that counsel's allegedly deficient performance prejudiced him. *People v. Henderson*, 2013 IL 114040, ¶ 11 ("A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel.") (citations omitted); *see also Strickland*, 466 U.S. at 697. To establish prejudice here, defendant must show that "the unargued suppression motion is meritorious," *Henderson*, 2013 IL 114040, ¶ 15; meaning that "[i]f a motion to suppress would have been properly denied . . . counsel is not ineffective for failing to file the motion," *People v. Glisson*, 359 Ill. App. 3d 962, 973 (5th Dist. 2005)). Here, the unargued suppression motion would have been denied, for two reasons. First, binding appellate precedent established that a canine alert was sufficient to establish probable cause to search a vehicle, *see supra* Section I, and the trial court would have been bound to deny defendant's proposed argument to the contrary. Second, even if the trial court disregarded clear appellate precedent, the court would have nevertheless denied the suppression motion because the totality of the circumstances provided police with probable cause. Accordingly, because the unargued suppression motion was not meritorious, defendant cannot show that he was prejudiced by his counsel's decision not to argue it.

As noted above, even if counsel had argued that a canine alert was no longer sufficient to establish probable cause after the medical marijuana statute, the trial court would have been bound by precedent that established the opposite.[7] When an appellate court or this Court "'has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision.'" *Yakich v. Aulds*, 2019 IL 123667, ¶ 13 (emphasis in original) (citing *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 61). In other words, although a "trial court is free to question the continued vitality of [binding precedent], it lacks the authority to declare that precedent a dead letter" and "commit[s] serious error by not applying it." *Id.* (citing *Blumenthal*, 2016 IL 118781, ¶ 61). Indeed, it is central to defendant's argument before this Court that it should overrule both *Stout*, 106 Ill. 2d 77, *see* Def. Br. 16, and the appellate court decisions holding that the smell of cannabis provided probable cause to search a vehicle even after the medical marijuana statute, *id.* at 27. Yet the existence of this precedent necessarily means that the trial court would have been required to reject defendant's proposed argument. As this Court noted in *Bailey*, "[w]hether or not this court should adopt a particular application of [the law] going forward is irrelevant to the question before this court, *i.e.*, whether defendant's trial

[7] Indeed, the trial court expressed its understanding that it was subject to this binding precedent when it noted that "clearly there was probable cause that existed once the dog . . . positively alerted." R235.

counsel was constitutionally ineffective." 232 Ill. 2d at 299. Because the trial court would have had no choice but to reject defendant's proposed argument, defendant suffered no prejudice from counsel's decision not to raise it.

Second, even if the trial court could have — as defendant suggests, *see* Def. Br. 36 — overruled well-established caselaw and held that the canine alert did not suffice on its own to establish probable cause, the trial court would have nevertheless denied the suppression motion because the totality of the circumstances provided police with probable cause. Probable cause exists when "the totality of the facts and circumstances known to the officer at the time of the search would justify a reasonable person in believing that the automobile contains contraband or evidence of criminal activity." *Hill*, 2020 IL 124595, ¶ 23 (citing *Smith*, 95 Ill. 2d at 419); *see also United States v. Ross*, 456 U.S. 798 (1982) (same). In making a probable cause determination, "officers may rely on their law-enforcement training and experience to make inferences that might evade an untrained civilian." *Hill*, 2020 IL 124595, ¶ 23 (citations omitted). And because "[p]robable cause deals with probabilities, not certainties," it "does not require an officer to rule out innocent explanations for suspicious facts," but instead only requires "that the facts available to the officer — including the plausibility of an innocent explanation — would warrant a reasonable man to believe" that a search

would uncover contraband or evidence of a crime. *Id*. ¶ 24 (citations and quotations omitted).

Here, Albee noted that defendant's semi did not display any visible registration or licensure — as required by law, R137-38; that defendant was "in a state of panic," R141; that defendant repeatedly failed to provide documents that Albee asked for (or provided patently irrelevant documents, R141-42); that defendant volunteered that he had been "stopped several times" along his trip and checked for drugs, R141; and that defendant's cab card did not match the semi's front-facing California license plate, R142. In fact, Albee testified that even before his canine positively alerted, he suspected that defendant was engaged in criminal activity and requested another officer to provide assistance. R144. Combined with the canine's alert for narcotics "right behind the driver's seat," R147, the totality of the circumstances provided Albee probable cause to believe that defendant possessed illegal contraband, and the search of defendant's vehicle was therefore constitutional. And, because Albee had probable cause, the trial court would have denied defendant's proposed motion.

Defendant's argument the totality of the circumstances did not support probable cause, Def. Br. 30-34, is unavailing. This argument is largely premised on the notion that the medical marijuana statute rendered a canine alert for cannabis irrelevant to the totality of the circumstances test. Def. Br. 21-29. But in *Hill*, this Court held that the smell of cannabis remained a

valid factor within the totality of the circumstances test that could provide probable cause to justify a vehicle search. 2020 IL 124595, ¶ 35.[8] This was so, the Court explained, even though after the enactment of the medical marijuana statute some individuals could legally possess cannabis under a limited set of circumstances. *Id.* ¶ 29 ("[W]hether a defendant is subject to criminal penalties is irrelevant in determining whether an item is contraband"); *People v. Mallery*, 2023 IL App (4th) 220528, ¶ 41 ("[S]imply because cannabis may be legal in some circumstances, does not mean that it is not unlawful in others . . . there are still, among other things, (1) illegal ways to transport it, (2) illegal places to consume it, and (3) illegal amounts of it to possess."); *People v. Molina*, 2022 IL App (4th) 220152, ¶ 41 ("Just because defendant can legally possess some amounts of cannabis under specified conditions does not mean that all forms of possession are presumed to be legal."). Thus, as in *Hill*, the smell of cannabis remained relevant to the totality of the circumstances test, and — considering the totality of Albee's observations — there was probable cause to believe that defendant was engaged in illegal activity or possessed contraband.

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[8] Defendant's request that this Court overturn *Stout*, 106 Ill. 2d 77, is misplaced. Def. Br. 30. Defendant cannot use an ineffective assistance of counsel claim to ask this Court to change the law going forward, *see supra* p. 11-12, and, in any event, as this Court explained in *Hill*, *Stout* is not implicated when an officer "relied on more than the odor" of cannabis. 2020 IL 124595, ¶¶ 15-16. Here, Albee relied on more than the canine alert to make his probable cause determination, and therefore, this Court "need not address the validity of *Stout*." *Id.* ¶ 18.

Defendant's attacks on the credibility and sufficiency of Albee's testimony are unpersuasive. First, defendant's contention that Albee's testimony that defendant appeared "in a state of panic" was contradicted by Peo. Exh. 4 (the video recording taken from the dashcam of Albee's patrol car), and is therefore incredible, misstates the record. Def. Br. 31-32. As the trial court noted, because the video was taken from the dashcam it provided no evidence of what "occurred within" the semi. R230. Thus, Albee's testimony about how defendant behaved within the semi was "unrefuted by the defendant." *Id*. That defendant's voice may have sounded relaxed *after* he was placed in Albee's patrol car, Def. Br. 31-32, does not undermine Albee's testimony about defendant's behavior and demeanor while he was in the semi. Defendant also questions why Albee did not explain with greater specificity why his observations of otherwise lawful behavior led him to believe defendant was engaged in criminal activity. Def. Br. 30-31. But, as noted, the probable cause standard is an objective test, not a subjective one, and asks whether "the facts available to the officer — including the plausibility of an innocent explanation — would warrant a reasonable man to believe" that a search would uncover contraband or evidence of a crime. *Hill*, 2020 IL 124595, ¶ 24. Here, a reasonable officer — relying on "training and experience to make inferences that might evade an untrained civilian," *id.* ¶ 23, could have reasonably concluded that a search would uncover evidence of a crime. After all, probable cause "does not require a law enforcement officer"

to be certain that a crime *is* being committed, but simply "to justify the reasonable belief that the defendant has committed or is committing a crime," without regard for "any showing that such a belief be correct or more likely true than false." *People v. Jones*, 215 Ill. 2d 261, 277 (2005).

Defendant's argument that probable cause did not exist because the canine alert was the *only* basis for the search, Def. Br. 21, is belied by the record. Defendant would separate the facts into two categories — those that clearly indicated that defendant possessed cannabis (the canine alert), and those that Albee reasonably found suspicious (defendant's erratic behavior and improper documentation) — and then have this Court disregard the latter as irrelevant. But this Court has explained that the totality of the circumstances analysis includes considering suspicious facts that might be innocently explained. *Hill*, 2020 IL 124595, ¶ 24 (probable cause "does not require an officer to rule out innocent explanations for suspicious facts"). Indeed, the United States Supreme Court has noted that "innocent behavior frequently will provide the basis for a showing of probable cause" and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Illinois v. Gates*, 462 U.S. 213, 243, n.13 (1983).

Hill is instructive. There, an officer activated his squad car lights to initiate a traffic stop. *Hill*, 2020 IL 124595, ¶ 5. Hill delayed pulling over his

vehicle, which the officer found suspicious because he "knew vehicles that take a little while to stop often are concealing or destroying contraband or producing a weapon." *Id.* When the officer approached Hill's car, he smelled raw cannabis and noticed a "bud" in the backseat, and based on these observations, he conducted a search of the car. *Id.* ¶¶ 5, 10. When assessing whether the officer had probable cause, this Court did not disregard the fact that Hill took longer than usual to come to a stop, but instead incorporated what was merely suspicious conduct — it is possible that, for example, Hill did not notice the officer following him — into the totality of the circumstances test, finding that it along with the other circumstances known to the officer "established probable cause that evidence of a crime was in the vehicle." *Id.* ¶ 35. Here, as in *Hill*, Albee testified about several facts that caused him to suspect that defendant was engaged in illegal activity, only one of which was the canine alert. That some of those facts were susceptible to innocent explanations does not diminish their relevance to the totality of the circumstances test.

For similar reasons, defendant's reliance on cases considering the effect of changing gun laws on the probable cause inquiry, Def. Br. 23-24, is misplaced. Defendant argues that that Albee should have asked him whether he was licensed under the medical marijuana statute before searching his vehicle, Def. Br. 23-24, but this ignores the other circumstances that gave Albee reason to believe defendant might be engaged in criminal

activity. In fact, this Court rejected a similar argument in *Hill*, when it noted that someone with a medical license could nevertheless be in possession of cannabis illegally, and that whether Hill had a medical license card was irrelevant because "the facts here established probable cause that evidence of a crime was in the vehicle." 2020 IL 124595, ¶¶ 34-36. Similarly, in *People v. Thomas*, 2019 IL App (1st) 170474, the case defendant cites, *see* Def. Br. 23, the appellate court found probable cause to suspect the defendant of illegally carrying a gun. While the court noted that police cannot assume someone in possession of a gun is committing a crime merely because they possess a gun, "mere gun possession was not the scenario that presented itself" in that case. *Id*. ¶ 40. Thus, even if an officer cannot assume that an individual is illegally possessing cannabis based only on the smell of cannabis, this case is distinguishable because Albee was presented with more than the smell of cannabis.

Accordingly, because any motion to suppress based on an argument that Albee lacked probable cause to search defendant's semi would have been denied, defendant "suffered no prejudice," and the appellate court correctly denied his ineffective assistance claim. *Hill*, 2020 IL 124595, ¶ 51.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 12, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 23 pages.

s/Mitchell J. Ness
Mitchell J. Ness

PROOF OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 12, 2023, the **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email addresses:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

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