No. 124595

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHARLES D. HILL Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-18-0041. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 17-CF-896. Honorable Thomas E. Griffith, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

ADDITIONAL STATUTES AND RULES INVOLVED

720 ILCS 550/12 (eff. July 29, 2016 to June 30, 2018):

"(a) The following are subject to forfeiture:

(1) all substances containing cannabis which have been produced, manufactured, delivered, or possessed in violation of this Act;"

720 ILCS 550/12 (eff. Dec. 20, 2018):

"(a) The following are subject to forfeiture:

(1) (blank);

* * *

(h) Contraband, including cannabis possessed without authorization under State or federal law, is not subject to forfeiture. No property right exists in contraband. Contraband is subject to seizure and shall be disposed of according to State law."

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When Illinois decriminalized cannabis, it necessarily changed the interpretation and application of Mr. Hill's Fourth Amendment rights.

Contraband is defined as "[g]oods that are unlawful to import, export, produce, or possess." Black's Law Dictionary (11th ed. 2019). But when Illinois decriminalized cannabis, the possession of cannabis became a "civil law violation". 720 ILCS 550/4 (2016). And under certain instances, the possession and production of cannabis was not only legal but encouraged under the "Compassionate Use of Medical Cannabis Pilot Program Act" and the "Opioid Alternative Pilot Program." 410 ILCS 130 (2014); 410 ILCS 130/62 (2018). These laws allow for the production and possession of cannabis in Illinois. That means that under the Black's Law Dictionary definition of contraband, in Illinois, cannabis is not contraband when the amount possessed is less than ten grams, or when the cannabis is possessed for medical purposes. Thus, since the possession of small amounts of cannabis is not in violation of criminal laws, cannabis was not contraband when the officer relied on its alleged presence as grounds for searching Mr. Charles Hill's car. Therefore, the search was improper and the subsequently discovered evidence must be suppressed.

The State argues that cannabis is still contraband, and to support its conclusion the State cites to the explicitly defined section that labels cannabis as contraband in the statute. (St. br. at 7-8) The State cites to subsection (h), which states that "[c]ontraband, including cannabis possessed without authorization under State or federal law, is not subject to forfeiture." 720 ILCS 550/12(h) (eff. Dec. 20, 2018) (See Additional Statutes and Rules Involved, quoted *supra* at 1).

However, this statute was not the applicable law when Mr. Hill was arrested on May 29, 2017. (C. 12) In fact, the law that applied when Mr. Hill's car was unlawfully searched did not label cannabis as contraband; the section the State cites did not exist on the day that Mr. Hill was arrested. See 720 ILCS 550/12 (eff. July 29, 2016 to June 30, 2018) (See Additional Statutes and Rules Involved, quoted *supra* at 1). The applicable statute did not include a section (h); that section was added over a year after Mr. Hill's arrest. In fact, the applicable statute when Mr. Hill was arrested communicated that cannabis *was* subject to forfeiture, which in turn meant that a person could have a possessory interest in cannabis and that cannabis was not necessarily contraband. See 720 ILCS 550/12(a)(1) (eff. July 29, 2016 to June 30, 2018). Therefore, the State cannot rely on Illinois statutory law to support the errant conclusion that cannabis was contraband when Mr. Hill was arrested, in fact, the opposite was true.

Instead, the State must rely on Illinois case law that defines cannabis as contraband at a time in this state's history when no possession of cannabis was legal. See *People v. Stout*, 106 Ill.2d 77, 83-84 (1985). That case says a police officer has probable cause to search a car where the totality of the circumstances known to the officer at the time of the search would cause a reasonably prudent person to believe that a crime occurred. See *Stout*, 106 Ill.2d at 86. The State also correctly cites that "[u]nder the automobile exception, police officers may conduct a warrantless search of a vehicle if they lawfully stop the vehicle and have probable cause to believe that the vehicle contains contraband or evidence of criminal activity that the officers are entitled to seize." *People v. Parker*, 354 Ill.App.3d 40, 45 (1st Dist. 2004); (St. br. at 9); see also *People v. James*, 163 Ill.2d 302, 312 (1994).

But, because the possession of medical cannabis and less than ten grams of cannabis was not contraband, and because possession of less than 10 grams of cannabis was not a crime, the alleged presence or scent of cannabis did not give the officer probable cause to search Mr. Hill's car.

In an attempt to expand on what constitutes probable cause to search, the State edits its quote of *Illinois v. Gates*, "probable cause 'requires only a probability or substantial chance' *of unlawful activity*, 'not an actual showing of such activity[,]'" but in doing so, it alters the meaning of the probable cause standard expressed in that case. (St. br. at 10) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)) (emphasis added). The State tries to expand the probable cause to search standards by substituting its words, "unlawful activity", for the words "criminal activity" in the court's opinion. See *Gates*, 462 U.S. at 243 n. 13. The substitution is significant because it greatly changes the standards of when an officer has probable cause to search. The State's argument attempts to expand probable cause to instances where all unlawful activity is occurring, not just the criminal activity standard expressed in the case. The correct standard, that an officer has probable cause to search when he believes that the vehicle contains contraband or evidence of criminal activity that the officers are entitled to seize, holds the State to a much higher burden when overriding constitutional protections. See *James*, 163 Ill.2d at 312.

Therefore, because medical cannabis and small amounts of cannabis were not contraband under the applicable law at the time of the arrest, and because the officer did not articulate any other circumstances that led to a reasonable belief that a crime had occurred, not just unlawful activity, the officer did not have probable cause to search and the evidence should be suppressed.

Since cannabis was not contraband on the day that Mr. Hill's car was searched, the officer could have only had probable cause to search the car if the totality of the circumstances known at the time of the search would cause a reasonably prudent person to believe that a crime occurred. See *Stout*, 106 Ill.2d at 86. Mr. Hill does not ask this Court to make a credibility determination of the officer's testimony, but this Court must consider all of the facts when weighing the totality of the circumstances to determine whether the officer had probable cause to search the car.

The officer testified that Mr. Hill "took a couple of blocks to come to a stop." (R. 26) The State presents this fact and considers it as part of the totality of circumstances that led to the officer's determination that he had probable cause to search the car. (St. br. at 7, 15) But Mr. Hill did not take more than a reasonable amount of time to safely bring his car to a stop; he was stopped less than one minute after the police car lights were activated. (Def. Ex. 1 at 0:00-1:00) The video does not show Mr. Hill decelerating abruptly, as suggested by the officer, nor does it look like he was traveling drastically slower than the surrounding traffic. Therefore, a reasonably prudent individual would not expect more evidence of criminal activity to be found inside the car as a result of how Mr. Hill stopped the car.

The officer also testified that he smelled raw cannabis. (Def. Ex. 1 at 2:39) He said, "I see a bud in the back seat, I'll show that to you in a minute." (Def. Ex. 1 at 3:35) The State relies on this fact and considers it as part of the totality of circumstances that led to the officer's determination that he had probable cause to search the car. (St. br. at 7, 15) However, the officer never showed that cannabis bud to Mr. Hill, nor was it ever collected as evidence. The dashboard video recording does not show a bud of cannabis and does not show any officer collecting the bud of cannabis that was allegedly in plain view inside Mr. Hill's car.

While the officer remembered that there was much less than a pound or an ounce in the car, he did not answer whether only residue was recovered; but despite smelling a strong odor of raw cannabis, only residue was found. (R. 21-22); (C. 12, 31) And despite smelling a strong odor of raw cannabis, Mr. Hill was never charged with possession of any amount of cannabis, let alone the "civil law violation" amount that would result from possessing cannabis residue. See 720 ILCS 550/4 (2017).

Therefore, because the dashboard video recording discredits the officer's testimony about how the stop was initiated, and because the officer did not collect the cannabis that he allegedly saw and smelled, these facts should not be given much weight in considering whether the totality of the circumstances would cause a reasonably prudent individual to believe that criminal activity was afoot. The alleged cannabis bud was not collected, and so it was either lost by the police or was never present at all. See *People v. Campbell*, 2019 IL App (1st) 161640, ¶ 23 (citing *U.S. v. Janis*, 428 U.S. 433, 447-48 n.18 ("exclusionary rule tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence") (citation omitted)). Ultimately, "[a] police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime had even taken place." *BeVier v. Hucal*, 806 F2d 123, 128 (7th Cir. 1986).

Nonetheless, even if this Court does not find that the officer's credibility negatively affects the totality of the circumstances, this case does not present enough facts for a reasonably prudent individual to suspect criminal activity.

The State relies on *People v. Senna*, 2013 VT 67, to support the argument that the odor of cannabis alone was sufficient to establish probable cause. (St. br. at 11, 15) But if the facts of this case are compared to the facts of that case, it is clear that the *Senna* court had more substantive circumstances to consider that would lead a reasonably prudent person to believe that a crime had occurred:

> "The facts as found by the trial court and unchallenged by defendant on appeal are as follows. Responding to a report of a screaming child, a City of Burlington police officer visited defendant's apartment. The officer knocked on the door, and when defendant answered she informed the defendant and his partner of the complaint. The officer saw that there were two children inside the home who did not appear to be in distress. When the officer approached the residence she noted the odor of fresh marijuana approximately two feet from the front door. A second officer who arrived shortly thereafter also made this same observation, noting that the scent got stronger as the officer approached the door.
>
> After spending some time in the home, the first officer left defendant's residence and spoke with a next-door neighbor who identified herself to the police. She reported that in the past she had seen defendant and his partner use heroin in front of their children. She told the officer that defendant and his partner had told her that they sell marijuana and heroin out of their home, that every day she observes a great deal of foot traffic of unfamiliar individuals in and out of the home at all times of day, and that frequently people mistaking her residence for theirs knock on her door looking to purchase marijuana or heroin.

> Following these encounters, the officer obtained a warrant to search defendant's apartment. On the basis of evidence obtained in the search, the State charged defendant with cultivation of more than twenty-five marijuana plants and possession of marijuana." *Senna*, 2013 VT 67, ¶¶ 2-4.

The differences between the cases are stark. In *Senna*, the officers responded to a tip, smelled cannabis, corroborated criminality with neighbors, obtained a warrant, and eventually collected more than 25 cannabis plants. *Id*. In Mr. Hill's case, the officer stopped the car on the basis of the mistaken identity of the passenger, allegedly smelled and saw cannabis, and decided to search the car based on that smell alone, but the officer did not collect any cannabis. (R. 21-22); (C. 12, 31) The *Senna* case exhibits a comprehensive investigation where the scent of cannabis was just one small factor that led to the officer's development of probable cause to search with a warrant. In contrast, Mr. Hill's case exhibits the actions of an officer eager to make the arrest; an officer that said to a handcuffed Mr. Hill, "You're the one jammed up, not me, I've got nothing to lose, you're jammed up like a mother fucker." (Def. Ex. 1 at 43:38)

The State also tries to diminish the applicability of *Johnson v. U.S.*, 333 U.S. 10 (1948), and *Taylor v. U.S.*, 285 U.S. 1 (1932), by arguing that the cases are inapplicable because those cases dealt with the search of a garage and a hotel room, instead of a car, and so the warrant requirement applied in those cases but does not apply here. (St. br. at 13-14) But the State does not address that while the officer would not have gotten a warrant in this case because the odor emanated from a car, the standard used to determine whether a warrantless search is valid is the same standard used by a magistrate considering the application for a search warrant; and so, the *Taylor* and *Johnson* holdings are applicable. See *Whiteley v. Warden*, 401 U.S. 560, 566 (1971).

And so it is applicable here that the *Johnson* court clarified its holding that the odor must be "distinctive to identify a forbidden substance[.]" But as addressed in the previous section, cannabis has not been a forbidden substance in Illinois for years. See *Johnson*, 333. U.S. at 13; see also 720 ILCS 550/4(a) (2016); 410 ILCS 130 (2014). That means that while the odor of cannabis was always indicative of a forbidden substance, contraband, and criminal activity when *Stout*, 106 Ill.2d 77, 83-86, was decided back in 1985, that odor was no longer "distinctive to identify a forbidden substance" when Mr. Hill was stopped because cannabis was not always contraband, and its possession was not always criminal. See 720 ILCS 550/4 (2016).

The officers did not have a warrant in either the *Taylor* or *Johnson* cases, but needed the warrant. The officer here did not need a warrant, but did need to articulate probable cause to search. But in all cases, the officers failed their duties and thus, "the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." *Johnson*, 333 U.S. at 16-17.

Finally, the State argues that the good-faith exception to the exclusionary rule should apply in this case. (St. br. at 16-18) First, Mr. Hill responds that the exception should not apply because the officer was not acting in good faith when he did not collect the cannabis he allegedly smelled and saw inside the car. Alternatively, Mr. Hill argues that the exception should not apply because there was not binding precedent that specifically authorized the officer's precise conduct; his decision to search the car based on the odor of cannabis, despite its decriminalization, is not specifically authorized in or supported by precedent.

The standard explains that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *People v. LeFlore*, 2015 IL 116799, ¶ 27 (citations omitted). It is important that the binding precedent specifically authorizes the precise conduct under consideration. See *LeFlore*, 2015 IL 116799, ¶ 47; see also *People v. Burns*, 2016 IL 118973, ¶¶ 50, 55, 62, 68. As a response, the State relies on the *Stout* case, "holding that an officer's detection of cannabis by its odor was a permissible method of establishing probable cause." (St. br. at 17) (citing *Stout*, 106 Ill.2d at 87). However, that nearly 35-year-old precedent does not specifically authorize the precise conduct under consideration in this case because the statute that decriminalized cannabis did not become law until 31 years after the *Stout* precedent was decided. See 720 ILCS 550/4 (2016).

Moreover, "[t]he expansion of the protections guaranteed by the state constitution can be brought about *** by the enactment of statutes by the General Assembly." *Illinois v. Caballes*, 221 Ill.2d 316, 316-17 (2006). Thus, when the Illinois legislature decriminalized cannabis, it turned the previously criminal possession of cannabis into a mere "civil law violation" and it expanded the protections of the constitutional right to be free from unlawful searches and seizures to the possession of small amounts of cannabis. 720 ILCS 550/4 (2016). However, when *Stout* was decided, all possession of cannabis was contraband and all contraband was connected with criminal activity. That holding was no longer the law when Mr. Hill was subjected to a roadside search and seizure.

Therefore, for these reasons and for the reasons stated in his opening brief, Mr. Hill asks this Court to uphold the circuit court's decision to suppress evidence, albeit on other grounds, and to issue guidance to prevent other law-abiding people from suffering the same experience.

CONCLUSION

For the foregoing reasons, Charles D. Hill, petitioner-appellant, respectfully requests that this Court affirm the trial court's suppression of evidence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is eleven pages.

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 26, 2019, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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