

Nos. 129201 & 129237 (consolidated)

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

VINCENT E. MOLINA,

Defendant-Appellant,

On Appeal from the Illinois Appellate Court,
Fourth Judicial District, No. 4-22-0152.

There Heard on Appeal from the Circuit Court of the Fourteenth Judicial Circuit
Whiteside County, Illinois, No. 2020 TR 5612
The Honorable **Daniel P. Dalton**, Judge Presiding.

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

RYAN SHAVAR DON REDMOND,

Defendant-Appellee,

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On Appeal from the Illinois Appellate Court,
Third Judicial District, No. 3-21-0524

There Heard on Appeal from the Circuit Court of the Fourteenth Judicial Circuit
Henry County, Illinois, No. 2020 CL 27 & 2020 TR 3348
The Honorable **Daniel P. Dalton**, Judge Presiding.

REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

ARGUMENT**I. THE TRIAL COURT CORRECTLY RULED THAT THE ODOR OF RAW CANNABIS ALONE DOES NOT ESTABLISH PROBABLE CAUSE FOR A POLICE OFFICER TO SEARCH A MOTOR VEHICLE.**

In its responsive brief, the Government recites the Illinois probable cause standard as it relates to warrantless searches of automobiles as follows:

“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.” (Internal quotation marks omitted.) *People v. Hill*, 2020 IL 124595, ¶ 23 (citing *People v. Smith*, 95 Ill. 2d 412, 419 (1983)). State. Br. 8.

The Government acknowledges that the totality of the circumstances in this case was the mere odor of cannabis. The Government argues that the odor of cannabis alone demonstrates a fair probability that criminal contraband will be discovered within the motor vehicle.

The Government urges this court to create a bright-line rule by holding that the odor of cannabis, without anything more, *always* demonstrates probable cause to search, even following the legalization of cannabis. Compare *State v. Torgerson*, 995 N.W. 2d 164, 170, 173-74 (2023) (Where possession of cannabis is not always a crime under Minnesota law, the Supreme Court of Minnesota declined the Government’s request to create a bright-line probable cause rule and held that the odor of cannabis is merely a factor to be considered in the totality of the circumstances analysis).

Cannabis has been legalized in the State of Illinois. The odor of cannabis, alone, is therefore evidence that something legal is afoot. The Fourth District’s decision should be reversed, and the trial court’s order granting Mr. Molina’s motion to suppress should be affirmed.

A. *Stout* is no Longer Good Law

The Government begins its argument by asserting that *Stout* remains good law. *People v. Stout*, 106 Ill. 2d 77 (1985). State. Br. 7. Indeed, in the 1980s, when all cannabis possession was illegal, this court created a bright-line rule by holding that the odor of burnt cannabis alone was sufficient to establish probable cause to search a motor vehicle. *Id.* at 87. *Stout* was well-reasoned within the very different legal climate under which it was decided. Since cannabis possession was illegal, the odor of cannabis emanating from an automobile connoted a fair and/or reasonable probability that contraband or evidence of a crime could be found within. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This is no longer the case. Cannabis legalization has fundamentally altered the reasonable probability calculus as it relates to the association of the odor of cannabis with criminal activity. In June of 2019, cannabis possession in the State of Illinois became legalized. *Stout* is no longer good law.

The vast panoply of innocent explanations for the existence of the odor of cannabis in and around a motor vehicle has become limitless. The smell of cannabis demonstrates only the mere possibility, not the probability, that illegal activity is afoot.

Mr. Molina does not argue that probable cause may never exist if there is any legal explanation for the odor of cannabis. Compare *Torgerson*, 995 N.W. 2d at 173. Rather, consistent with this court's decision in *Hill*, the odor of cannabis, burnt or raw, will remain a factor that may contribute to an officer's overall assessment of probable cause. *People v. Hill*, 2020 IL 124595, ¶¶ 18 n.2, 24 (Providing that “[a]lthough we do not reach whether the odor of cannabis, alone, is sufficient to establish probable cause, the smell and presence of cannabis undoubtedly remains a factor in a probable cause determination” and that a finding of probable cause “requires only that the facts available to the officer—including

the plausibility of an innocent explanation—would warrant a reasonable man to believe there is a reasonable probability” that contraband or evidence of criminal activity is present.).

The odor of cannabis, burnt or raw, is not by itself sufficient to establish a reasonable probability of criminal activity. Cannabis has shed its contraband status. Law enforcement officers must not be empowered to disregard the totality of the circumstances analysis and promptly presume guilt based upon the odor of a legal substance. A Government so cynical would invite trespass upon a fundamental constitutional right by erring against, and not in favor of, liberty.

B. Conflict Remains Between Provisions of the Vehicle Code, the Compassionate Use Act, and the Cannabis Regulation and Tax Act.

The Government argues that it is a criminal violation to transport cannabis other than in an odor-proof container. State. Br. 13. The Government premises its argument on the assertion that the relevant provisions of the Vehicle Code (Code) exist in harmony with those of the Compassionate Use Act and the Cannabis Regulation and Tax Act (collectively Acts). State Br. 19-21. The Government asserts that neither the relevant Code provisions nor the Acts were more recently enacted, the Code is more specific than the Acts, and that the Code overrides the Acts. State Br. 21-24.

The language of the Code is not more specific than that of the Acts. The sections of the Code were not more recently enacted than those of the Acts. The legislature did not intend the provisions of the Code to override those of the Acts. Therefore, the Fourth District’s conclusions regarding the purported necessity of an “odor-proof” container are incorrect.

Furthermore, the Government’s argument rests upon premises that are unsupported in the record. Specifically, the Government asks this court to assume that if the odor of cannabis exists in a motor vehicle, then cannabis must be present in the vehicle and must not be contained in an odor-proof container. If the smell of burning leaves is present in a motor vehicle, then a pile of leaves must be burning inside, or so the argument goes. Indeed, the observation of the odor of cannabis emanating from a motor vehicle could give rise to the possibility that it is present in the vehicle and not stored in an odor-proof container. But a mere possibility does not equate to a reasonable probability, particularly where the possibility of an entirely lawful explanation for the odor is at least just as likely.

“Possible cause” is not the legal standard for a vehicle search. The law enforcement officer lacked probable cause to conduct a non-consensual, warrantless search of Mr. Molina’s vehicle, the provisions of the Vehicle Code notwithstanding.

C. The Government Forfeited its Ability to Raise a Good Faith Exception Argument. Moreover, the Good Faith Exception is Inapplicable.

To conclude its brief, the Government argues for the first time since this case’s inception that even if no probable cause existed to justify the search, the good-faith exception to the exclusionary rule should apply. State Br. 26-28. The Government has forfeited this argument by failing to raise it in the trial court or in its appeal before the Fourth District. *People v. Harris*, 228 Ill. 2d 222, 229 (2008) (To preserve an issue for appeal, both an objection at trial and a written posttrial motion raising the issue are required.); *People v. Sophanavong*, 2020 IL 124337, ¶ 21 (The doctrine of forfeiture applies to the Government as well as to the defendant.); *People v. Blair*, 215 Ill. 2d 427,

443 (2005) (Forfeiture represents issues that “could have been raised, but were not, and are therefore barred.” Forfeiture connotes a party’s failure to make a timely assertion of a right, while waiver represents an intentional relinquishment or abandonment of a known right).

If this court exercises its discretion and entertains the Government’s new argument, it should rule that the good faith exception does not apply and the evidence should remain suppressed. *Sophanavong*, 2020 IL 124337, ¶ 21 (Forfeiture is a limitation on the parties, not the court.).

The Government’s good-faith argument relies on *People v. LeFlore*, 2015 IL 116799, ¶ 27. In *LeFlore*, this court adopted the *Davis* good-faith exception that “searches conducted in objectively reasonable reliance on *binding* appellate precedent are not subject to the exclusionary rule.” *Davis v. U.S.*, 564 U.S. 229, 232 (2011). State. Br. 27. The Government narrowly alleges that even after cannabis legalization, *Stout* was binding appellate precedent and the law enforcement officer relied upon it. State. Br. 27.

Stout, a case decided well before cannabis legalization and expressly predicated upon cannabis’s then criminality, was not binding appellate precedent when the police officer searched Mr. Molina’s vehicle. *Stout* involved the odor of burning, not raw, cannabis. *Stout*, 106 Ill. 2d 77, 87 (1985) (holding that that the odor of *burning* cannabis alone establishes probable cause to search a vehicle); *People v. Potts*, 2021 IL App (1st) 161219, ¶ 115 (Binding appellate precedent for a state law enforcement officer includes cases *directly* on point from the state’s appellate courts.). The record does not support the proposition that Trooper Wagand was aware of *Stout*, let alone that he relied on it. Compare *People v. Harris*, 2018 IL App (1st) 151142-U, ¶ 32 (discussing the fact that no evidence was presented that the officers relied on any binding judicial precedent authorizing their conduct). Even if Trooper Wagand had actually testified that he was aware of *Stout*,

understood *Stout*, and relied on *Stout*, subsequent legislative action can moderate, or even totally negate, the impact, the applicability, and the pertinence of prevailing case law. *People v. Redmond*, 2022 IL App (3d) 210524, ¶ 18. It would be unreasonable for a well-trained officer to assume that the same probable cause analysis set forth in *Stout* remained binding following historic legislative actions which served to rid cannabis of its contraband status. This conclusion is bolstered by this court’s remarks in *Hill*, which was decided well before the stop occurred in December 2020. *Hill*, 2020 IL 124595. In its decision, this court presciently provided future guidance on the important difference between decriminalization and the legalization of cannabis, stating:

“([D]ecriminalization is not synonymous with legalization. [Citation.] Because cannabis remains unlawful to possess, any amount of marijuana is considered contraband.”). To hold otherwise leads to the absurd conclusion that persons could have a legitimate privacy interest in an item that remains illegal to possess.” *Id.* ¶ 29; quoting *Commonwealth v. Cruz*, 459 Mass. 459, 473 (2011).

In this, the *Hill* court expressly foreshadowed that *Stout* would be overruled upon the legalization of cannabis. The Court recited the very position Mr. Molina advances in this appeal, by instructing that “the smell and presence of cannabis undoubtedly remains a *factor* in a probable cause determination.” *Hill*, 2020 IL 124595, ¶ 18 n.2. In addition to the enactment of Illinois statutes providing for the lawful possession of cannabis, the binding appellate precedent that existed at the time of the warrantless search in question was that the smell of cannabis could be considered as nothing more than a *factor* in the trooper’s probable cause determination.

At best, the fourth amendment analysis applicable at the time of the traffic stop was unsettled. A law enforcement officer may only act in good faith under *LeFlore* where the appellate precedent is unequivocal and *binding*. That was not the case here.

On November 30, 2023, this court announced its opinion in *People vs. Webb*, 2023 IL 128957. *Webb* involved a defendant's claim of ineffective assistance of counsel, stemming from defense counsel's failure to file a motion to suppress evidence following an alert to the presence of narcotics by a drug-sniffing dog. *Id.* ¶ 10. The Defendant claimed that his counsel should have filed a motion to suppress since cannabis was de-criminalized, though not yet legalized. *Id.* ¶ 10. This court observed that the issue of whether cannabis legalization changed the probable cause analysis concerning the detection of cannabis by drug-sniffing dogs was not before it. *Id.* ¶ 20. In fact, this court in *Webb* reiterated that the determination of probable cause is based upon the totality of the circumstances. *Id.* ¶ 33. Although this court referred to *Stout* as binding authority with regard to its consideration of an ineffectiveness of counsel claim, the court was careful to observe that it was not ruling on the validity of *Stout* following the legalization of cannabis. *Id.* ¶ 34 .

The Government's tardy attempt to obscure this historic issue should be rejected. The Government asks this court to approve of a motor vehicle search in reliance upon a rationale rendered obsolete by a sea change in cannabis regulation. In this, the Government rejects evolution, and advocates stagnation, of the law.

The odor of cannabis emanating from a motor vehicle, burnt or raw, is not by itself sufficient to establish a reasonable probability that criminal activity is afoot. The trial court's order granting Mr. Molina's motion to suppress should be affirmed, and the evidence at issue should be suppressed under the exclusionary rule.

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 or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 8 pages.

 /s/ James W. Mertes
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CERTIFICATE OF SERVICE

James W. Mertes, Attorney for Defendant-Appellant, states that he has electronically filed the Appellant's Reply Brief with the Illinois Supreme Court with the Clerk of the Court on December 5, 2023. Upon acceptance of the filing from this court, persons named below with identified email addresses will be served using the court's electronic filing system. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief and Argument to the Clerk of the above Court.

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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.

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