No. 124595

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court Illinois, Fourth Judicial District, No. 4-18-0041
Plaintiff-Appellee,	)	
v.	)	There on Appeal from Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 17 CF 896
CHARLES HILL,	)	The Honorable Thomas E. Griffith,
Defendant-Appellant.	)	Judge Presiding

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

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Plaintiff-Appellee People of the State of Illinois

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

Defendant, Charles Hill, appeals from the judgment of the Illinois Appellate Court, Fourth District, reversing the circuit court's suppression of drug evidence obtained in a search of defendant's vehicle and remanding for further proceedings.

ISSUES PRESENTED

1. Whether changes to state law that make the possession of small amounts of cannabis a civil violation subject to a fine, rather than a criminal violation, require this Court to overrule its precedent holding that the odor of such cannabis provides probable cause to search a vehicle.
2. Whether application of the exclusionary rule is inappropriate where an officer acted in good faith by relying on existing precedent to conduct a vehicle search premised on the detectable odor of cannabis.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(a)(1), and 612(b). Defendant timely filed a petition for leave to appeal that this Court allowed on May 22, 2019.

STATEMENT OF FACTS

In June 2017, defendant was charged with possession of less than fifteen grams of a substance containing cocaine. C8.[1] In October 2017, defendant moved to suppress evidence recovered from his car at the time of his arrest, arguing that the police lacked both reasonable suspicion for the traffic stop and probable cause to subsequently search his car. C30-33.

At the suppression hearing, Officer Robert Baker of the Decatur Police Department testified that at 10:00 a.m. on May 29, 2017, he was parked in his squad car when he noticed a silver Chevrolet Monte Carlo that slowed significantly as it passed his location. R13-15, 22. The passenger in the Monte Carlo was leaning back, so Baker could see only the top of his head and hair. R16. Baker testified that through training and experience, he has learned that people who are wanted by police will often recline in this manner to hide their identity. R23. Baker pulled out and caught up with the Monte Carlo so he could get a look at the passenger. R16. Once he pulled alongside the Monte Carlo, Baker thought he recognized the passenger — based on his skin tone, hair, and build — as Duane Lee. R17. Baker had

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[1] "C_" refers to the common law record on appeal; "R_" refers to the report of proceedings; "Def. Br." refers to defendant's opening brief in this Court; and "A_" refers to the appendix to that brief.

seen Lee on the street while patrolling and also in photo records of people wanted by the Decatur Police Department. R19-20. Baker knew that Lee had an outstanding warrant for his arrest. R27. When Baker activated his lights to make a traffic stop, the Monte Carlo did not stop right away but instead "took a couple of blocks to come to a stop." R26. Baker testified that in his experience, when a vehicle takes "a little while to come to a stop," it often means that the occupants are hiding or destroying contraband. *Id.* After stopping the Monte Carlo and approaching the car, Baker discovered that the passenger was not Lee, R19, and he smelled raw cannabis, R26. In searching the car, Baker found cannabis and crack cocaine. R27.

The parties stipulated to the admission of Baker's in-car video of the stop. R28-29. The appellate court summarized the relevant contents of that video:

> Officer Baker said, "I thought [the passenger] was wanted, is why I stopped you, that's why I stopped you." Directing his attention to the passenger, Officer Baker stated, "[A]ctually, to tell you the truth, I thought you were somebody else." Within a matter of approximately 15 seconds, Officer Baker told the occupants he could smell raw cannabis in the car and said he observed a "bud" in the back seat, stating, "I'll show that to you in a minute."

A4-5. Baker described the amount of cannabis he saw in the back seat as "much less than . . . an ounce." R21.

The People introduced photos of Lee and Matthew Anderson, the passenger whom Officer Baker had believed to be Lee. R23-25. The trial court made a factual determination that the photos were "actually quite similar." R42. Nevertheless, the court granted defendant's motion to suppress, holding that the basis for the traffic stop was "too tenuous." *Id.* The court also noted that had the stop been valid, it would have found the evidence admissible, as "the Court does not have any problem with the basis for searching the vehicle." R43.

The People filed a certification of impairment and appealed, C51-55, arguing that the trial court erred in granting defendant's motion to suppress. A6. The appellate court agreed. *Id.* Deferring to the trial court's determination that Lee and Anderson looked very similar, the appellate court concluded that Officer Baker had reasonable suspicion that defendant's passenger had an outstanding warrant, justifying the traffic stop. A12, A16. The appellate court also rejected defendant's argument that because possession of less than ten grams of cannabis is now a civil law violation in Illinois, the smell of cannabis alone cannot support a warrantless search under the vehicle exception to the warrant requirement, reasoning that:

> What [defendant] fails to do is explain how a police officer, confronted with the obvious odor of cannabis when he first approaches a vehicle, is left to discern how much cannabis may be present by its smell alone.

A18-19. The court noted that possession of more than ten grams of cannabis remains a criminal offense and concluded that defendant's argument "would lead to an absurd result where police officers, after performing a traffic stop, smelled the odor of cannabis emanating from the vehicle but could not investigate it further unless they knew the amount involved." A19. Therefore, the court held, "[o]nce Officer Baker smelled the odor of cannabis, probable cause for the search existed." A19.

ARGUMENT

I. Fourth Amendment Principles and Standard of Review

Both the Fourth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, 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 People v. Gaytan*, 2015 IL 116223, ¶ 20. The Fourth Amendment requires that officers obtain a warrant, supported by probable cause, before they may search persons or property. *See People v. James*, 163 Ill. 2d 302, 311 (1994) (citing *Katz v. United States*, 389 U.S. 347, 356-57 (1967)). The United States Supreme Court has recognized an exception to the warrant requirement where there are exigent circumstances and the police have probable cause to undertake the search. *See id.* at 312 (citing *Mincey v. Arizona*, 437 U.S. 385,

392–93 (1978)). One example of this exception is the so-called "automobile exception" under which officers may search a vehicle without a warrant if there is probable cause to believe that it contains contraband or evidence of criminal activity that the officers are entitled to seize. *See id.* (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925)). Probable cause exists when the facts known to the officer at the time of the arrest are sufficient to cause a reasonably cautious person to believe that the arrestee has committed a crime. *People v. Grant*, 2013 IL 112734, ¶ 11. This determination depends upon the totality of circumstances at the time of the arrest. *Id.*

When reviewing a trial court's ruling on a motion to suppress evidence, this Court affords great deference to the trial court's factual determinations, and will reverse them only if they are against the manifest weight of the evidence; the Court reviews de novo the ultimate legal conclusion of whether the evidence should be suppressed. *People v. Almond*, 2015 IL 113817, ¶ 55.

II. Probable Cause Existed to Search Defendant's Vehicle Based on the Totality of the Circumstances at the Time of the Search.

On appeal to this Court, defendant no longer challenges the propriety of the initial traffic stop. Instead, he focuses only on the appropriateness of the subsequent search of defendant's car. Here, the trial court correctly found that there was probable cause at the time of the search to believe that

defendant possessed contraband. R43. Officer Baker smelled cannabis and saw loose cannabis in defendant's car, and he could also reasonably conclude, based on his experience, that in failing to stop for several blocks, the car's occupants were hiding contraband. R26, A4-5. Therefore, he had probable cause to believe that defendant possessed contraband — specifically cannabis, in violation of 720 ILCS 550/4, possibly in greater amounts than were immediately visible. *See People v. Stout*, 106 Ill. 2d 77, 87 (1985) ("A police officer's detection of controlled substances by their smell has been held to be a permissible method of establishing probable cause."). Thus, the search of defendant's car was valid based on the totality of the circumstances, and no Fourth Amendment violation occurred. *See Grant*, 2013 IL 112734, ¶ 11.

It makes no difference that possession of ten grams or less of cannabis is now a civil, rather than a criminal, violation. Decriminalization is not synonymous with legalization. *See In re O.S.*, 2018 IL App (1st) 171765, ¶ 28. Cannabis, even in small amounts, remains illegal. 720 ILCS 550/4(a) (possession of not more than 10 grams of any substance containing cannabis is a civil law violation punishable by a fine between $100 and $200). Indeed, the plain language of the Cannabis Control Act provides that cannabis is still contraband and subject to seizure by the State. 720 ILCS 550/12(h)

("[c]ontraband, including cannabis possessed without authorization under State or federal law, . . . is subject to seizure"). In other words, cannabis, even when its possession can only give rise to a civil violation, still may be the legitimate object of a search, whether pursuant to a warrant or an exception like the automobile exception at issue here — a conclusion consistent with the vast majority of jurisdictions to have considered similar changes to state laws regulating cannabis possession. *See, e.g.*, *State v. Seckinger*, 920 N.W. 2d 842, 850-51 (Neb. 2018) (change in penalty for small amounts of cannabis from criminal to civil not relevant to whether probable cause for search exists); *Robinson v. State*, 152 A.3d 661, 681 (Md. 2017) ("By definition, if law enforcement officers may still seize marijuana, then law enforcement officers may still search for marijuana."); *State v. Smalley*, 225 P.3d 844, 848 (Or. Ct. App. 2010); *State v. Ortega*, 749 N.W. 2d 851, 854 (Minn. Ct. App. 2008) (holding that officer "had probable cause to search [defendant] for a criminally significant quantity of marijuana upon smelling the odor of marijuana emanating from within the vehicle"); *State v. Barclay*, 398 A.2d 794, 797-98 (Me. 1979) ("marijuana, even when its possession can only give rise to a civil violation, can be the legitimate object of a search warrant") (internal citation omitted). *But see Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1059-60 (Mass. 2014) ("[W]e are not confident, at least on this

record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine. In the absence of reliability, a neutral magistrate would not issue a search warrant, and therefore a warrantless search is not justified based solely on the smell of marijuana, whether burnt or unburnt.") (internal quotations omitted).

Under 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 either contraband *or* evidence of criminal activity that the officers are entitled to seize. *See, e.g.*, *People v. Parker*, 354 Ill. App. 3d 40, 45 (1st Dist. 2004) (citing *James,* 163 Ill. 2d at 312, and *People v. Smith,* 95 Ill. 2d 412, 418 (1983)); *Smalley*, 225 P.3d at 848 ("[b]y using the phrase, 'contraband or crime evidence,' the court signaled its understanding that the two things were not identical and that probable cause to believe in the presence of *either* could justify an automobile search") (emphasis added). In sum, even if the "decriminalization" of cannabis meant possession of small amounts was no longer a "criminal" activity, it plainly did not change its status as contraband and therefore did not undermine established precedent allowing the warrantless search of vehicles based on the odor of cannabis.

Defendant's reliance on Colorado case law, Def. Br. 10-11, is unavailing. Colorado, unlike Illinois at present, legalized (rather than decriminalized) possession of small amounts of cannabis. *See People v. Zuniga*, 372 P.3d 1052, 1054 (Colo. 2016). Defendant's argument that the legalization of medical cannabis use is equivalent to the legalization of "recreational" cannabis, Def. Br. 12, is similarly specious. Most possession of cannabis is not yet legal in Illinois.[2] And, while under the Compassionate Use of Medical Cannabis Program Act, some possession of cannabis is no longer unlawful, *see* 410 ILCS 130/7, probable cause does not require a showing that the suspect is in fact guilty of unlawful conduct. Rather, probable cause "requires only a probability or substantial chance" of unlawful activity, "not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983); *see also id.* (existence of probable cause turns on the "degree of suspicion that attaches to particular types of non-criminal acts"). "[T]herefore, innocent behavior frequently will provide the basis for a showing of probable cause." *Id.*

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[2] As of January 1, 2020, possession of small amounts of cannabis will be legal in Illinois. See 410 ILCS 705/10-5; 410 ILCS 705/10-10 (both eff. Jan. 1, 2020).

Thus, notwithstanding the legalization of medical cannabis, the odor of cannabis will ordinarily provide probable cause to believe contraband is present because the medical cannabis act did not legalize cannabis generally. Applying this principle, other States have consistently found that the odor of cannabis provides probable cause even after the legalization of cannabis for medical use. *See, e.g.*, *State v. Sisco*, 373 P.3d 549, 553 (Ariz. 2016) (odor of cannabis provided officers with reasonable belief of probability of criminal activity even though Arizona legislature recently passed medical cannabis statute); *State v. Senna*, 79 A.3d 45, 50-51 (Vt. 2013) (passage of Vermont medical cannabis act did "not undermine the significance of the smell of marijuana as an indicator of criminal activity"). The passage of the medical cannabis act means that additional circumstances might subsequently negate the existence of probable cause — for example, if someone in the car presented a medical cannabis license — but it does not mean that the odor of cannabis no longer provides probable cause to believe that contraband is present.

Defendant argues that the Court should look to *People v. Thomas*, 2019 IL App (1st) 170474, for guidance. Def. Br. 12. But *Thomas* offers defendant no support. There, the appellate court found that the police had probable cause to believe the defendant was engaged in criminal activity based on the

totality of the circumstances. *Id.* at ¶¶ 34, 40. After reaching this holding, the court stated in *dicta* that "police cannot simply assume a person who possesses a firearm outside the home is involved in criminal activity. Likewise, they cannot use a firearm in partial view, such as a semi-exposed gun protruding from the pant pocket of a person on a public street, alone as probable cause to arrest an individual for illegal possession without first identifying whether the individual has the necessary licenses." *Id.* at ¶ 40.

Here, after making a lawful stop, the officer informed the car's occupants that he smelled cannabis. If either occupant had a medical license for the cannabis, he had an opportunity to tell the officer that before the search. Thus, the concern the court articulated in *Thomas* that an officer might arrest someone for carrying a firearm (or, in this case, cannabis) without the person having the opportunity to explain that he has a license is not present in this case.

In any event, unlike firearms, cannabis generally remains contraband under Illinois law. Although Illinois residents may not acquire or possess a firearm without also possessing a valid Firearm Owner Identification Card, 430 ILCS 65/2(a)(1), no law provides that firearms generally are contraband subject to seizure. Moreover, Illinois law requires the State to issue a FOID Card to any applicant not disqualified from gun ownership. 430 ILCS 65/5.

In contrast, in only a very limited set of circumstances might someone obtain a license rendering their possession and use of cannabis lawful. 410 ILCS 130/7. Because Illinois law treats firearm possession differently from cannabis possession, the appellate court's opinion in *Thomas*, assuming it was correctly decided, provides no support here.

Petitioner next relies on *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019), Def. Br. 15, but that Pennsylvania case is also inapposite. There, the court held that the police lacked reasonable suspicion to make a *Terry* stop based on seeing a gun in the defendant's waistband. *Hicks*, 208 A.3d at 947-50. Under Illinois's Firearm Concealed Carry Act, officers can demand to see a license to carry a firearm and require that the firearm be secured during the duration of a *Terry* stop. 430 ILCS 66/10(h) & (h-1). Thus, differences in state law would produce a different result should this case arise in Illinois's courts. Moreover, as explained, because Illinois law treats cannabis and firearms differently, cases addressing firearm possession are not analogous. And, even if they were,

Taylor v. United States, 285 U.S. 1 (1932), and *Johnson v. United States*, 333 U.S. 10 (1948), on which defendant also relies, Def. Br. 21-22, are likewise distinguishable. *Taylor* and *Johnson* involved warrantless searches of a garage and a hotel room, respectively. Thus, unlike this case, they

presented no question regarding the automobile exception to the warrant requirement. This Court has recognized that automobiles, by their nature, are mobile; because automobiles may be driven away, there may not be enough time for law enforcement officers to obtain a warrant. *Stout*, 106 Ill. 2d at 87. In addition, there may be a diminished expectation of privacy in an automobile as compared to a residence. *Id.* For these reasons, the Court has distinguished the search of an automobile from the search of a building. *People v. Wolf*, 60 Ill. 2d 230, 233-34 (1975). In *Taylor* and *Johnson*, which did not involve vehicles, the United States Supreme Court held that an odor of contraband alone did not justify a warrantless search. *See Johnson*, 333 U.S. at 13 (discussing *Taylor*). But *Taylor* and *Johnson* also held that the odor of contraband could be sufficient to obtain a warrant. *Id.* In other words, these cases did not hold that the odor of contraband was insufficient to demonstrate probable cause; they held merely that odor alone did not create an exception to the warrant requirement. Here, however, the automobile exception applied, so Officer Baker was not relying on the odor of contraband to excuse the warrant requirement. Rather, the odor of contraband provided probable cause to believe that a search would uncover contraband.

Indeed, even where the possession of small amounts of cannabis has been legalized, the smell of cannabis can still help establish probable cause.

For example, in *Zuniga*, a Colorado trial court held that because possession of one ounce or less of cannabis is legal under Colorado law, the odor of cannabis cannot contribute to a determination of probable cause. 372 P.3d at 1057. The Colorado Supreme Court disagreed. *Id.* at 1058. It held that "[a] possible innocent explanation or lawful alternative may add a level of ambiguity to a fact's probative value in a probable cause determination, but it does not destroy the fact's usefulness outright and require it to be disregarded." *Id.* The Court noted that while Colorado law now allows legal possession of one ounce or less of cannabis, a substantial number of other cannabis-related activities remain unlawful. *Id.* at 1059. It held that the odor of cannabis is, therefore, still suggestive of criminal activity, relevant to the totality of the circumstances test, and can contribute to a probable cause determination. *Id.*

In this case, even if the odor of cannabis alone were insufficient to establish probable cause — though the People contend it was — the totality of the circumstances established probable cause for the search. When Officer Baker attempted to stop defendant, he "took a couple of blocks to come to a stop," which, in his experience, often means the occupants are hiding contraband. R26. Then, as soon as Baker approached the car, he smelled cannabis. R26. He also saw a cannabis "bud" in the back seat. A4-5. Thus,

either alone or in conjunction with the other facts known to Baker, the odor of cannabis provided probable cause to believe that defendant had contraband at the time of the search, making the search of defendant's vehicle valid under the Fourth Amendment and Article I, Section 6 of the Illinois Constitution. Therefore, the evidence obtained from the search should not have been suppressed.

III. If Probable Cause Did Not Exist, the Good-Faith Exception Applies, and the Evidence Obtained Should Not Be Suppressed.

Even if this Court were inclined to depart from established precedent and declare for the first time that, as a result of the decriminalization of small amounts of cannabis, the odor of cannabis no longer furnishes probable cause to support a vehicle search, it should apply the good-faith exception to the exclusionary rule and allow the People to use the evidence obtained during the search of defendant's vehicle.

The question of whether evidence must be suppressed is distinct from whether the search was legal. *People v. Sutherland*, 223 Ill. 2d 187, 227 (2006). The United States Supreme Court fashioned the exclusionary rule as a deterrent to future violations of the Fourth Amendment. *See People v. LeFlore*, 2015 IL 116799, ¶ 17 (citing *Arizona v. Evans*, 514 U.S. 1, 10 (1995)). But application of the exclusionary rule is restricted to those "unusual cases" where it would serve the objective of deterring future violations. *Id.* ¶ 22

(internal quotation marks omitted). Exclusion of evidence should be a "last resort," not a "first impulse," *id.* (internal quotation marks omitted), because the exclusionary rule exacts a "heavy toll" on the judicial system and society at large by requiring courts to ignore reliable, trustworthy evidence bearing on a defendant's guilt, and often sets a criminal loose in the community without punishment, *id.* ¶ 23. For these reasons, even when a Fourth Amendment violation has occurred, the resulting evidence will not be suppressed where the good-faith exception applies. *Id.* ¶ 17. Where an officer acts with an objective good-faith belief that his conduct is lawful, the deterrent effect of the exclusionary rule "loses much of its force and exclusion cannot pay its way." *Id.* ¶ 24.

To determine whether the good-faith exception applies, this Court asks "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.* ¶ 25. The governing law at the time of the search in this case was *Stout's* holding that an officer's detection of cannabis by its odor was a permissible method of establishing probable cause. 106 Ill. 2d at 87. A well-trained officer determining whether he had probable cause to search defendant's car could not predict that this Court might be asked to overrule *Stout* based on a change in the penalty for possessing small amounts of cannabis. Therefore, applying the exclusionary

rule here would not serve the purpose of the rule. *See LeFlore*, 2015 IL 116799, ¶ 27. Accordingly, even if the Court were inclined to depart from *Stout*, it should decline to apply the exclusionary rule.

CONCLUSION

This Court should affirm the appellate court's judgment.

November 13, 2019

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Plaintiff-Appellee
People of the State of Illinois

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) 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 eighteen pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

PROOF OF FILING AND 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 November 13, 2019, the foregoing **Appellee's Brief**, was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

Zachary A. Rosen
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 W. Monroe St., Suite 303
Springfield, Illinois 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellant
Charles Hill

/s/ Garson S. Fischer
Counsel for Plaintiff-Appellee
People of the State of Illinois