IN THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

JASON HASSAN BAXTER,
Appellant
vs.
STATE OF FLORIDA,
Appellee.
_____/

Case No. 5D23-0118
Lt. No. 2021-MM-14027

On en banc review by order of the Court

Brief of Amicus Curiae for the Florida Public Defender Association, Inc., in Support of Appellant.

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Statement of Identity and Interest

Identity: The Florida Public Defender Association, Inc., ("FPDA") consists of 19 elected public defenders, hundreds of assistant public defenders, and support staff. FPDA members are appointed counsel for thousands of indigent defendants faced with government prosecution in trial and appellate courts. Public defenders proudly represent the majority of people facing criminal cases in Florida.

Interest: FPDA members litigate suppression issues for diverse clients all throughout the state. As such, the FPDA has particular interest and expertise in the issues this Court will hear en banc. Public defenders must navigate the rapidly changing legal landscape regarding marijuana and hemp to zealously advocate for their clients. To that end, FPDA seeks to assist the Court with reaching the appropriate result in this case.

Summary of the Argument

This Court should reverse Appellant's judgment and sentence because the police obtained the evidence against him in violation of the Fourth Amendment. This Court should also provide clarity for the bench and bar on whether the plain smell doctrine is still good law. This Court's order dated November 16, 2023, which solicited amicus support, posed three questions, paraphrased as follows: (I) whether the smell of suspected marijuana alone is enough to establish reasonable suspicion in light of the Legislature's decision to legalize hemp; (II) whether the totality of the circumstances test should still be used; and (III) whether the facts here established reasonable suspicion. The FPDA argues as follows:

I. An officer's belief that the smell coming from inside a stopped vehicle is marijuana is no longer sufficient to establish reasonable suspicion of criminal activity for an investigative detention. Simply put, the plain smell doctrine is no longer good law due to Florida's legalization of hemp because the illegal nature is not immediately apparent.

II. The abrogation of the outdated plain smell doctrine will not require this Court to recede from the longstanding totality of the

circumstances test for reasonable suspicion. The smell of fresh marijuana, *in conjunction with other factors*, may establish reasonable suspicion on a case-by-case basis. This position is consistent with Judge Kilbane's concurrence in part. Baxter v. State, 2023 WL 7096645 (Fla. 5th DCA Oct. 27, 2023) at 6-10.

III. The facts presented in the four corners of Baxter's majority opinion do not support a finding of reasonable suspicion under a totality of the circumstances. While counsel for Appellant is in the best position to answer this question with record support, the facts as set forth in the decision show the officer suspected Mr. Baxter of criminal activity solely because of the scent of marijuana. It was the critical factor for the officer, with nothing else supporting a finding of criminal activity at the time the officer smelled it. On these facts, there was no reasonable suspicion before the officer ordered Appellant to step out of his vehicle. Therefore, there was not probable cause to support the subsequent search of his car without his permission.

Argument

I. THE PLAIN SMELL OF MARIJUANA NO LONGER ESTABLISHES REASONABLE SUSPICION AS A MATTER OF LAW.

The search of Appellant's vehicle violated the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, Section 12 of the Florida Constitution. Due to Florida's legalization of hemp, an agricultural commodity which smells identical to marijuana, the smell of what could be either substance coming from inside a stopped vehicle alone is not enough to establish reasonable suspicion of criminal activity for an investigatory detention.

Historically, the alleged odor of burnt marijuana coming from a vehicle provided an officer with probable cause to detain a motorist and conduct a warrantless search. State v. Williams, 967 So.2d 941, 944 (Fla. 1st DCA 2007). In Johnson v. State, 275 So.3d 800 (Fla. 1st DCA 2019), the First District Court of Appeal analyzed this issue. It held that the odor of burnt marijuana provides probable cause even after Florida legalized medical marijuana. The DCA found that at the time of Johnson's traffic stop, the law did not allow for smokable medical marijuana. Id. at 801-02. But, after

Johnson, the Florida Legislature changed the medical marijuana statute to legalize the practice of smoking medical marijuana. See § 381.986(1)(j), Fla. Stat. (2019). As of July 1, 2019, patients can smoke medical marijuana.

Johnson held (1) the medical marijuana law did not authorize smokable marijuana; (2) it did not allow use in a vehicle other than low-grade THC marijuana; (3) marijuana remains a crime under federal law; and (4) officers would have had probable cause for a traffic stop because Johnson was operating a vehicle and it is a crime to operate it under the influence. Id.

Johnson is no longer good law due to numerous changes since it was decided. First, Florida law no longer prohibits smokable medical marijuana, and hemp may be smoked as a legal substance. See § 581.217(2)(b), Fla. Stat. (2023). Second, the medical marijuana law and the state hemp program law do not require users to make odor-prevention efforts before entering a vehicle. Third, there is no statute that prohibits hemp from being smoked while driving. Fourth, hemp has been severed from the federal law prohibiting marijuana possession. See 21 U.S.C. § 812(c)(17). If a substance can be either legal or illegal and that cannot be

determined by sight, smell, or touch, then to allow a seizure based on the potential illegality, until proven otherwise, would be antithetical to the Fourth Amendment. Like with the interpretation of statutes or penalties, any ambiguity should favor the defendant under the rule of lenity. Borjas v. State, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001). A seizure based on smell alone would be based on no standard other than the officer's discretion and what potential crimes he/she can articulate.

In Kilburn v. State, 297 So.3d 671, 672 (Fla. 1st DCA 2020), an officer approached a parked truck with the driver's door open to give the driver a verbal warning about his license plate. The officer observed the butt of a firearm sticking out of the defendant's waistband and immediately detained him. Id. The First District Court of Appeal held that the detention based solely on an officer seeing a firearm sticking out Kilburn's waistband did not provide reasonable suspicion because carrying concealed firearms is legal in Florida with a concealed weapons license. Id. at 675-76. The First DCA adopted the rationale in Regalado v. State, 25 So. 3d 600 (Fla. 4th DCA 2010).

In Regalado, officers detained and searched a defendant based on a tip that someone was "flashing a gun to a couple of friends" and an observation of a bulge in the defendant's waistband. Id. at 601-02. The Fourth District Court of Appeal reasoned that possession of a concealed firearm is not illegal in Florida unless the person does not have a concealed weapons permit, a fact that an officer cannot glean by mere observation. Id. at 606. As such, stopping a person solely on the ground that the individual possesses a gun violates the Fourth Amendment. Id.

The same is now true of the odor of marijuana emanating from a vehicle. To put it plainly, "[p]robable cause does not exist when the circumstances are equally consistent with noncriminal activity as with criminal activity." E.B. v. State, 866 So.2d 200, 204 (Fla. 2d DCA 2004); see also M.L. v. State, 47 So. 3d 911, 913 (Fla. 3d DCA 2010) (officer's observation of a pipe, without more, cannot constitute probable cause because it could be a tobacco pipe or other lawful object.")

As Judge Bilbrey of the First DCA recognized, Kilburn's reasoning applies to hemp. Hatcher v. State, 342 So. 3d 807, 813 (Fla. 1st DCA 2022) (Bilbrey, J. concurring). Although the facts of

that case supported a stop and search, in that there was reasonable suspicion that Hatcher was driving under the influence and did not have a valid license, Judge Bilbrey explained that "[a]s in Kilburn, an officer's perception of a potentially lawful substance cannot be the sole basis for a search. And the changes in Florida and federal law following the search in Johnson [cited above] have made hemp legal to possess." Id. at 814. He further reasoned that, because the State has the burden in a criminal prosecution, a defendant does not need to prove that the substance was legal. Id.

Just as the visual observation of a gun sticking out of a defendant's waistband could be legal activity, the smell of (what could be) marijuana could be legal activity. Since Kilburn was decided, the law for concealed carry changed and now Floridians do not even need a permit. Therefore, the legal analysis in Kilburn is even more relevant. Officers have no reason to ask anybody whether they have a concealed carry permit, because as of July 1, 2023, it is no longer required. § 790.053(1), Fla. Stat. (2023). The same is true for hemp- it is completely decriminalized, and, unlike medical marijuana, does not require a permit.

Similarly, this Court has held police did not have reasonable suspicion to stop and frisk a defendant who had a gun in his waistband in a restaurant. Burnett v. State, 246 So. 3d 516 (Fla. 5th DCA 2018). In Burnett, the tipster who called police did not see the defendant brandish the gun, the arresting officer did not see any threatening activity, the defendant was not in high-crime area, and he did not flee or act suspicious upon seeing the officer. Id. at 520. Of importance to the Court's analysis in Burnett was the lack of any other factors, in conjunction with the gun, to support reasonable suspicion. As in Burnett, the instant case involves an officer observing something that may very well be legal, in conjunction with the observation of unremarkable, everyday activities. There is nothing in the opinion suggesting it happened in a high-crime area. The holding of Burnett should be extended to the facts of the instant case.

The plain view doctrine is a helpful analogy here. This Court summarized that test as follows:

> The plain view doctrine generally provides the police authority to seize illegal contraband after entry is made under exigent circumstances. Under the plain view doctrine, an item may be seized without a warrant if 1) the police are legitimately in a place

> where the item may be viewed; 2) the incriminating character of the item is immediately apparent; and 3) the police have a lawful right of access to the item. In order to satisfy the second requirement, the police must have probable cause to associate the item with criminal activity.

Davis v. State, 834 So. 2d 322, 327 (Fla. 5th DCA 2003) (citations omitted).

This Court applied the plain view doctrine in State v. Fischer, 987 So. 2d 708, 712 (Fla. 5th DCA 2008). There, after stopping the driver for an improper tag, "[t]wo well-trained and experienced deputies observed in open view what they each identified as cocaine on the seat of Fischer's car." Id. at 713. This Court reversed the trial court's suppression order, which misunderstood the applicable law, but noted that that whether the officers "knew for certain it was cocaine or whether it was within the realm of possibilities that the substance could have been something other than cocaine is not the standard; the proper standard is whether 'the facts available to the officer would lead a reasonable man of caution to believe that certain items may be contraband.'" Id. (quotations omitted).

The plain smell doctrine, like its visual counterpart, rests on the premise that an officer can immediately determine the illegal

nature of the of the contraband. That is what makes the suspicion *reasonable*. The Legislature's decision to legalize hemp renders that premise obsolete here: no amount of "training and experience" can discern between the smells, so there must be some other affirmative indication(s) of criminal activity to establish reasonable suspicion.

After a lawful stop, an officer may smell an odor, just as they might observe a bag with a substance sitting on a passenger seat. If the chance of the substance being an illegal substance is the same as the substance being legal hemp, based on smell *alone*, it can no longer serve as reasonable suspicion for a search. E.B., 866 So. 2d at 204. That is, under a scenario like Fischer, there would be no surrounding circumstances or training that would tip the scale towards illegal marijuana over legal hemp.

The Legislature's recent amendment to § 790.053(1), Florida Statutes (2023) will likely lead to a similar analysis, as discussed in Kilburn, which predated the amendment. Whereas an officer could previously require an individual to show a license, much like the smell of marijuana could serve as reasonable for a search, the Legislature has decided to give citizens more freedom and the government must modify its law enforcement practices accordingly.

See Burns v. State, 361 So. 3d 372, 378 (Fla. 4th DCA 2023) (granting "stand your ground" immunity under the amended statute where defendant displayed a firearm on his property).

"The Fourth Amendment exclusionary rule is a creature of judicial decisional policy. Broadly stated, its purpose is to deter illegal police conduct by denying the state the benefit of improperly obtained evidence." State v. Dodd, 419 So. 2d 333, 335 (Fla. 1982), citing Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule is meant to be prophylactic and deter law enforcement from violating the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 12 (1968).

Burnett and Kilburn make clear that reasonable suspicion is not established just because a civilian observer or officer sees part of a gun in a person's waistband. The same rationale should be extended to the smell of marijuana, given that the Florida Constitution protects a person's ownership of property that is not otherwise illegal, such as hemp. Art. I, § 2, Fla. Const. Allowing searches based on possible possession of a lawful substance would force hemp and medical marijuana users to accept a lesser version of Fourth Amendment protections.

In conclusion, the legalization of hemp in Florida renders the plain smell doctrine obsolete. This Court should adopt the reasoning of Judge Bilbrey's concurring opinion in Hatcher, 342 So. 3d at 813, which the majority opinion discussed. Baxter v. State, 2023 WL 7096645 (Fla. 5th DCA Oct. 27, 2023) at 4-5.

II. THE TOTALITY OF THE CIRCUMSTANCES TEST REMAINS VALID FOR ESTABLISHING REASONABLE SUSPICION.

At the outset, the FPDA is not suggesting that courts can no longer apply the longstanding "totality of the circumstances" test to establish reasonable suspicion. J.L. v. State, 727 So. 2d 204, 207 (Fla. 1998) (citing Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412, 110 L.ed.2d 301 (1990)). However, this Court should make that clear that the smell of marijuana, *without more*, no longer establishes reasonable suspicion under that test.

In light of legislative changes, this Court should consider the smell of marijuana/hemp the same way it does nervousness: a factor, but not enough on its own. Cowart-Darling v. State, 256 So. 3d 250, 252 (Fla. 1st DCA 2018) (reasonable suspicion "cannot be based on mere nervousness."); State v. Barnes, 979 So. 2d 991, 993 (Fla. 4th DCA 2008) ("Although he appeared nervous and attempted to place his hands in his pockets as the officer approached, Barnes's actions were insufficient to give rise to a reasonable suspicion that he was armed. The officer did not observe a bulge in Barnes's pocket, nor did Barnes engage in any violent behavior that

could give rise to a reasonable belief that a weapon might be present. Accordingly, the trial court properly concluded that the frisk was illegal.").

Specifically, this Court should hold that the mere smell of marijuana plus *any* circumstance an officer encounters that may seem slightly questionable does not automatically morph into reasonable suspicion. The instant case is a perfect example of this- the officer only noticed Appellant because he had pulled his car into the parking lot of a closed convenience store, and something as innocuous as setting a backpack in the backseat before continuing on the road turned was used against him to find probable cause. Reasonable suspicion should not be so simple as the smell of marijuana/hemp plus a driver who makes any kind of movement in his car while pulled into an area readily accessible to the public. It must also be noted that if a driver remained perfectly still in their car due to nervousness during a traffic stop, a reasonable officer may also find that suspicious.

Suspicion must be *reasonable*, instead of based on hunches. The Florida Supreme Court said it best in State v. Teamer, 151 So. 3d 421 (Fla. 2014). In Teamer, the Court found the fact that a

bright green car did not match the color on its vehicle registration was unusual, but not enough to give rise to reasonable suspicion for a traffic stop. Id. at 427-28. The Court elaborated on factual determinations to demonstrate reasonableness:

> The law allows officers to draw rational inferences, but to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch. Doing so would be akin to finding reasonable suspicion for an officer to stop an individual for walking in a sparsely occupied area after midnight simply because that officer testified that, in his experience, people who walk in such areas after midnight tend to commit robberies. Without more, this one fact may provide a "mere suspicion," but it does not rise to the level of a reasonable suspicion. Neither does the sole innocent factor here—a color discrepancy—rise to such level. The deputy may have had a suspicion, but it was not a reasonable or well-founded one, especially given the fact that the driver of the vehicle was not engaged in any suspicious activity. Moreover, "the government provided no evidence to tip the scales from a mere hunch to something even approaching reasonable and articulable suspicion, despite attempting to justify a detention based on one observed incident of completely innocent behavior in a non-suspicious context." United States v. Uribe, 709 F.3d 646, 652 (7th Cir. 2013).

Teamer, 151 So.3d at 428.

While the totality of the circumstances test remains valid, Teamer explains any suspicion from the scent of marijuana must be reasonable. Because of Florida's new hemp law, the FPDA submits

reasonable suspicion will be a high bar. Ultimately, courts must decide whether reasonable suspicion exists on a case-by-case basis.

For example, the following hypotheticals explain how this test will play out moving forward. Although the smells are indistinguishable, the scenarios will refer to the smell of marijuana to illustrate the relevant analysis, recognizing that the smell could be hemp.

The first scenario shows how the longstanding test is undisturbed. An officer conducts a lawful stop because they see a driver's vehicle swerving and running through a stop sign. After the officer activates their lights, the driver does not stop immediately. Upon reaching the vehicle, the officer smells marijuana. The driver has bloodshot eyes, is slurring their speech, and seems disoriented. The officer observes paraphernalia and a bag with a leafy green substance on the passenger seat. Nothing amici advocates would prohibit that officer from conducting a lawful search.

This scenario, however, shows how the analysis will be different. An officer pulls a vehicle over because their taillight was out. The driver promptly pulls over and the officer smells marijuana. The driver responds coherently and does not appear

intoxicated. Because there is no indication that there was any unlawful activity other than the taillight, there is no reasonable suspicion and the driver is free to leave when the officer completes the citation.

In sum, while amici submit that the totality of the circumstances test still applies, reasonable suspicion now requires "smell plus." While the smell of marijuana alone may raise an officer's eyebrow, the Fourth Amendment does not permit a search unless there is another basis to believe there is unlawful activity.

III. THE FACTS OF APPELLANT'S CASE DO NOT ESTABLISH REASONABLE SUSPICION.

Counsel for Appellant is in the best position to brief this issue because they have reviewed the record; FPDA's comments are based on the facts as set forth in the opinion. That said, the facts as set forth in the opinion do not support a finding of reasonable suspicion under a totality of circumstances. The majority found that Appellant's detention and subsequent search were not authorized by plain smell *alone*. Baxter v. State, 2023 WL 7096645 (Fla. 5th DCA Oct. 27, 2023) at 4. However, while the majority concluded that a reasonable person would feel free to terminate the encounter, it recognized that the officer activated his lights before approaching Baxter's vehicle and only asked for identification *after* Baxter said he was about to leave. Id. at 1. He was then ordered out of the car and the officer searched his vehicle without permission. Id. at 2. Baxter was not free to leave at that point, which this Court should also reconsider en banc. Popple v. State, 626 So. 2d 185, 187 (Fla. 1993) (discussing consensual encounters with law enforcement); Fla. R. App. P. 9.331.

Furthermore, the circumstances cited by the majority opinion give rise to a mere hunch, at most. As Judge Kilbane ably points out, some of these factors (inconsistent answers to questions regarding marijuana and hemp, and the "shake" on Appellant's leg) are irrelevant to the reasonable suspicion analysis because they occurred *after* the officer told him to exit his vehicle. Id. at 7, n.1. Furthermore, the majority opinion's reliance on the legal significance of the officer observing Appellant put his backpack in the back seat appears to lack record support. Id. n. 2.

With all that in mind, the instant case is not a case with the smell of fresh marijuana "plus more." In contrast, the plain smell of marijuana was all the officer had to go on at the point Appellant voluntarily rolled down his window. There was nothing illegal about pulling into the parking lot of a closed business. There was also nothing suspicious or illegal about Appellant placing a backpack in the back seat during what he initially believed would be a brief stop in the parking lot.

In addition, there is nothing from the facts set forth in the opinion that officer safety or evidence preservation concerns were at play. See Arizona v. Gant, 556 U.S. 332 (2009) (police must have an

actual and continual threat to officer safety or a need to preserve evidence related to the crime of arrest from tampering by the arrestee to justify a warrantless search incident to arrest conducted after the occupants have been arrested and secured); State v. Rabb, 930 So. 2d 1175, 1190-91 (Fla. 4th DCA 2006) ("Such an 'ends justifies the means' approach to the Fourth Amendment is simply not what the Founders intended.").

Contrary to the conclusion of the majority opinion, the instant case is ripe for this Court to decide the issue of whether the plain smell doctrine still applies in Florida. If it reaches that question, this Court should rule in favor of Appellant on the issue of reasonable suspicion. "Reasonableness [] depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" Commonwealth of Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (quoting Brignoni–Ponce, 422 U.S. at 878, 95 S.Ct. 2574). In sum, the liberty interests of Floridians must outweigh the government's minimal interest in continuing to rely on outdated case law that does not reflect the legal landscape in Florida as it exists today.

Conclusion

In a concurring opinion, Judge Wallis would have certified a question of great public importance as to whether the plain smell doctrine still applies for the scent of marijuana. The FPDA could not agree more with Judge Wallis' conclusion that law enforcement officers need guidance from the judicial branch so that they can do their jobs while ensuring individual citizens' constitutional rights. Baxter v. State, 2023 WL 7096645 (Fla. 5th DCA Oct. 27, 2023) at 6. An opinion addressing this important Fourth Amendment issue would also provide clarity for defense attorneys who must zealously advocate for their clients, prosecutors who typically have the burden at suppression hearings, and trial court judges who must apply the law after making factual findings.

For the reasons set forth in Issues I and II, this Court should hold the plain smell doctrine has been rendered obsolete by changes to federal and Florida law. The FPDA submits the legal analysis of Judge Kilbane's opinion in Baxter should be adopted by the full Court on rehearing. As to Issue III, this Court should find the officer did not have reasonable suspicion under the totality of the circumstances to initiate an investigatory detention of

Appellant. Accordingly, this Court should reverse his judgment and sentence for possession of drug paraphernalia.

Certificates

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on AAG Christina Piotrowski, at crimapptlh@myfloridalegal.com; Trisha Meggs Pate, Assistant Attorney General, at crimapptlh@myfloridalegal.com; Adam B. Wilson, at Adam.wilson@myfloridalegal.com; the 4th Circuit PD pd4duvalappeal@pd4.coj.net; and APD Elizabeth Hogan Webb, at ehw@pd4.coj.net, on December 18, 2023.

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