IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JASON HASSAN BAXTER,

Appellant,

Case No. 5D23-0118
LT Case No.: 16-2021-MM-014027

v.

STATE OF FLORIDA,

Appellee.

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AMICUS CURIAE BRIEF OF THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF THE STATE OF FLORIDA

The Florida Prosecuting Attorneys Association, Inc., (“"FPAA”"), is a nonprofit corporation whose members are 19 of the 20 elected State Attorneys as well as over 2,000 Assistant State Attorneys and was created to serve the needs of prosecutors and the administration of justice as prescribed by the Florida Constitution and laws of Florida. The FPAA submits this Amicus Curiae Brief In Support Of the State of Florida and in the interest of the administration of justice statewide.

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SUMMARY OF ARGUMENT

While a single observation of non-criminal activity is insufficient to justify an investigatory stop, as few as two non-criminal observations are sufficient where, together, they provide an officer with an articulable basis to believe that criminal activity is afoot. By their nature, nearly every investigatory detention is based upon observations of purely legal behavior. The Fourth Amendment permits such detentions, even while recognizing that they sometimes result in the temporary detention of innocent citizens.

Unlike the controlled substance cannabis, hemp is a highly regulated agricultural commodity. As such, raw hemp is not frequently possessed or transported in the same quantities or manner as raw cannabis. Where an officer observes the odor of cannabis *and* its presence in a private passenger vehicle, reasonable suspicion for an investigatory detention exists, because normal, law-abiding citizens in possession of raw hemp do not typically transport it in that manner.

ARGUMENT

An officer's belief that the smell coming from inside a private passenger vehicle is cannabis is sufficient to establish reasonable suspicion of criminal activity for an investigatory detention, despite Florida laws allowing for the possession and use of hemp.

Florida courts have long held that the odor of cannabis is sufficiently distinct and readily identifiable to amount to both reasonable suspicion for an investigatory detention and probable cause for a search of a person or vehicle. *See*, *e.g.*, *State v. Williams*, 967 So. 2d 941 (Fla. 1st DCA 2007). As discussed in this Court's panel members' opinions prior to rehearing, the majority of this precedent predates statutory amendments in 2017[1] and 2019[2], which created categories of *legal* substances that smell identical to the controlled substance "cannabis," specifically medical marijuana and hemp.

[1] Laws of Florida, ch. 2017-232 (exempting lawfully manufactured, obtained, and possessed medical marijuana from the definition of "cannabis" in F.S. 893.02).

[2] Laws of Florida, ch. 2019-132 (exempting hemp and industrial hemp from the definition of "cannabis" in F.S. 893.02).

I. The presence of medical marijuana continues to provide reasonable suspicion for an investigatory stop in all circumstances, and this Court appropriately limits its analysis to the issue of hemp.

Unlike hemp and industrial hemp, which are excluded from the definition of the controlled substance "cannabis" under both Florida law *and* federal law, medical marijuana as defined in section 381.986, F.S., remains an illegal controlled substance in all circumstances under federal law. *See* 21 U.S.C. § 802(16)(B)(i). As such, the presence of medical marijuana continues to constitute reasonable suspicion (and likely probable cause), regardless of its status under chapter 893 of Florida Statutes. Additionally, while "hemp-derived cannabinoids"—including the trace amounts of tetrahydrocannabinol ("THC") contained in hemp—are specifically exempted as controlled substances under section 518.217(2)(b), the THC in medical marijuana is still controlled under section 893.03(1)(c)(190)(a).

While one may obtain a prescription to legally possess medical marijuana (and thus the THC in it), the existence of a valid prescription is an *affirmative defense* to possession of a controlled substance under section 893.13(6). The absence of a prescription is not an element of the offense. F.S. § 893.10(1); *see also* Fla. Std. Crim. Jury Inst. 3.6(n) (2023). In other words, the odor of cannabis is always evidence of the presence of either a

controlled substance or hemp. As such, this Court correctly limits the question to whether the circumstances provide sufficient evidence of non-hemp cannabis to authorize an investigative detention.

II. While a single observation of non-criminal activity is insufficient to justify an investigatory stop, as few as two non-criminal observations are sufficient if, together, they provide an officer with an articulable basis to believe that criminal activity is afoot.

In its order granting rehearing of this matter *en banc*, this Court asked whether an officer's belief that "the smell coming from inside a stopped vehicle" is cannabis is sufficient by itself to create reasonable suspicion for an investigatory stop. This Court directed the parties to address the issue in light of *Burnett v. State*, 246 So. 3d 516 (5th DCA 2018), and *Kilburn v. State*, 297 So. 3d 671 (1st DCA 2020), which each address an analogous issue: whether evidence of the carrying of a firearm by itself is sufficient justification for an investigative stop. In both cases, the court found that it is not. *Burnett*, 246 So. 3d at 519; *Kilburn*, 297 So. 3d at 676.

Importantly however, the respective courts each found that the *only* factor considered by the officers in conducting the investigatory stops in question was the carrying of a concealed firearm. *Id.* No additional factor or factors were alleged or found to have contributed in any way to the officers' determination that reasonable suspicion of criminal activity existed. *See id.*

Had there been even one additional factor considered by the officers at the time of their respective stops, there may (or may not, depending on the factor) have been constitutionally sufficient reasonable suspicion. In fact, both opinions discussed the Florida Supreme Court's decision in *Mackey v. State*, 124 So. 3d 176 (Fla. 2013), where the importance of that distinction is highlighted. As *Burnett* points out in distinguishing its facts from those in *Mackey*, the Florida Supreme Court "considered the totality of the circumstances, and explained:

> 'When the person blatantly lied to the police officer here about possession of a firearm while he was in a geographic area well known for illegal narcotics and firearms with the weapon in view, we conclude that the officer had a reasonable, articulable suspicion that the person may have been engaged in illegal activity, and this brief detention to further investigate whether a crime was being committed is constitutionally valid.'"

Burnett, 246 So. 3d at 519 (citing *Mackey*, 124 So. 3d at 184).

This Court rightly asks not whether the odor of cannabis by itself amounts to reasonable suspicion, but whether the odor of cannabis *emanating from within a passenger vehicle* by itself amounts to reasonable suspicion. While "find[ing] reasonable suspicion based on [a] single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch," (*Teamer v. State*, 151 So. 3d 421, 427 (Fla. 2014)),

the reasonable suspicion necessary to justify nearly every investigatory stop is based upon an officer observing purely legal behavior—because, of course, where an officer observes even a single criminal act, *probable cause* immediately exists and obviates the need for a reasonable suspicion analysis at all. As the United States Supreme Court said in *United States v. Sokolow*:

> Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion. We said in *Reid v. Georgia*, "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." Indeed, *Terry* itself involved "a series of acts, each of them perhaps innocent" if viewed separately, "but which taken together warranted further investigation." We noted in *Gates*, that "innocent behavior will frequently 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 noncriminal acts." That principle applies equally well to the reasonable suspicion inquiry.

490 U.S. 1, 9 (1989) (referencing *Reid v. Georgia*, 448 U.S. 438 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968); *Illinois v. Gates*, 462 U.S. 213 (1983)).

The United States Supreme Court again reminded us of the purpose of investigatory stops and their constitutional justification in *Illinois v. Wardlow*, stating simply that

> [i]n allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

528 U.S. 119, 126 (2000).

Here, as in the vast majority of circumstances where law enforcement develops reasonable suspicion based upon the odor of cannabis, it is not the odor alone that gives rise to the suspicion. It is the odor *and* the circumstance in which the odor is detected.[3] Indeed, courts have recognized that the coupling of just two otherwise lawful circumstances not only amounts to reasonable suspicion, but may even form the basis for bright line rules. *See*, *e.g.*, *Wardlow*, 528 U.S. at 124-125 (holding that unprovoked flight at the sight of law enforcement coupled with a person's presence in a high crime neighborhood is reasonable suspicion for an investigatory stop, even

[3] It is without question, for example, that the odor of cannabis in a lawfully licensed hemp field would be insufficient to provide reasonable suspicion of criminal activity. Likewise, the odor of cannabis in a commercial vehicle of the style generally used to transport agricultural products would likely be insufficient in the absence of other factors contributing to reasonable suspicion.

though neither factor alone would be sufficient). Thus, the appropriate question here is whether the odor of cannabis and its presence in a private passenger vehicle together amount to reasonable suspicion to support an investigatory stop.

III. The totality of the circumstances surrounding the odor of cannabis *and* its presence in a private passenger vehicle gives rise to a reasonable suspicion that criminal activity is afoot, because normal, law-abiding citizens in possession of raw industrial hemp do not typically transport it in that manner.

Florida has an elaborate regulatory scheme for the lawful cultivation, processing, and transportation of hemp and industrial hemp. *See* F.S. §§ 581.217, 1004.4473; F.A.C.R. 5B-57.013, 5B-57.014). The regulations are requirements for compliance are myriad:

The state's promulgated program must be approved by the United States Department of Agriculture. F.S. 581.217(4). Cultivation of hemp is illegal without a license. *Id.* at (5). An application for a license to cultivate hemp requires a full set of fingerprints and a background check. *Id.* "A person seeking to cultivate hemp must provide to the department the legal land description and global positioning coordinates of the area where hemp will be cultivated." *Id.* The Florida Department of Agriculture is "authorized to enter any public or private premises during regular business hours in the performance of its duties relating to hemp cultivation," and is required to

perform inspections of these facilities on a regular basis. *Id.* at (11). Only designated laboratories that are accredited, registered with the Federal Drug Enforcement Agency, and have entered into compliance agreements with the Florida Department of Agriculture may test hemp to ensure its compliance with statute, and analysis must be performed according to strict rules. F.A.C.R. 5B-57.014(8). Licensees must comply with the Florida Department of Agriculture's "Hemp Waste Disposal Manual" comporting with the requirements of the Federal Code of Regulations. *Id.* at (5) (referencing C.F.R. Title 40 – Protection of Environment, Parts 261.3 and 273, Subpart A). Licensees must "[m]aintain documentation describing the varieties of hemp cultivated for three (3) years from the date of harvest." *Id.* They must "[u]se only Certified hemp seed, Pilot project hemp cultivars, or Pilot project hemp seed as defined in Rule 5E-4.016, F.A.C., or nursery stock that was grown from Certified hemp seed, Pilot project hemp cultivars, or Pilot project hemp seed," and must maintain the label and receipts of such seed or stock for three full years from the date of harvest. *Id.* "Any Person transporting propagative parts of hemp, live hemp plants, [p]rocessed hemp plant material, and [u]nprocessed hemp plant material within the state of Florida [must transport it] in a fully enclosed vehicle or container when being moved between noncontiguous locations." *Id.* at (11). They must also "[h]ave in

their possession a bill of lading or proof of ownership, documentation showing the name, physical address, Lot designation number, and license number of the originating licensed cultivator, and the name and physical address of the recipient of the delivery when transporting between non-contiguous locations." *Id.* They must "[s]top and submit for inspection while passing any official agricultural inspection station." *Id.* And "[e]very state attorney, sheriff, police officer, and other appropriate county or municipal officer shall enforce, or assist any agent of the department in enforcing," all of these requirements. *Id.*

As the statute and rules note, "[h]emp is an agricultural commodity." F.S. 581.217(2)(a). It is not merely a plant that one grows in a pot on their front porch. Unlike the controlled substance cannabis, which is regularly transported in small quantities on an individual person or in a passenger vehicle, hemp simply isn't. It is transported on trucks, in bales, with required bar codes, and with a driver in possession of paperwork to prove its nature and origin.

Because the odor of cannabis is always evidence of the presence of either a controlled substance or hemp, and the presence of that odor in a private passenger vehicle is overwhelmingly more likely to be associated with criminal activity (possession of the controlled substance) than non-

criminal activity (possession of hemp). Thus, an officer necessarily has reasonable suspicion for an investigative detention when he or she smells the odor of cannabis emanating from a private passenger vehicle.

CONCLUSION

The totality of the circumstances surrounding the odor of cannabis and its presence in a private passenger vehicle gives rise to a reasonable suspicion that criminal activity is afoot sufficient to authorize an investigatory detention.

/s/ Arthur I. Jacobs

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed using Arial 14-point font and contains 2,759 words, and therefore complies with the applicable font and word-count limit requirements in Florida Rules of Appellate Procedure 9.045(b) and 9.370(b).

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