

STATE OF NEW JERSEY

Respondent/Plaintiff,

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SUPREME COURT OF
NEW JERSEY

DOCKET NO.: 084493

CRIMINAL ACTION

SUPERIOR COURT OF
NEW JERSEY

APPELLATE DIVISION

Vs.

DOCKET NO.: A-2354-18T2

Sat Below:

CORNELIUS C. COHEN

Hon. Ellen Koblitiz, J.A.D.
Hon. Hon. Greta Gooden-
Brown, J.A.D.

Appellant/Defendant.

APPELLANT/DEFENDANT'S SECOND SUPPLEMENTAL BRIEF

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PREMINARY STATEMENT¹

In its Supplemental Response to Defendant Cornelius C. Cohen's (Appellant/Defendant) contention that the enactment of the "New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act" (CREAMMA) L. 2021, c. 16 and the "Marijuana Decriminalization Act" (Decriminalization Act) L. 2021, c. 19 (hereinafter "Acts") are applicable to his case, the State argues, in sum, that as the Defendant's conviction involved a non-cannabis, marijuana or hashish offense and marijuana, not cannabis, was the odor resulting in the Defendant's search, the provisions of the Acts should not apply retroactively to his case.

It is the Defendant's contention that the State's arguments have no merit as this Court may find limited retroactivity and apply the Acts to matters on direct appeal like Mr. Cohen's case and would be consistent with the legislature's intent to encompass acts occurring prior to the effective date of the Acts. In addition, as the search involving the Defendant's case arose out of an ongoing investigation and allegedly involved the smell of

¹ "1T" refers to the transcript for the hearing on December 20, 2017.

"2T" refers to the transcript for the hearing of April 19, 2018

"3T" refers to the transcript for the Oral Argument of June 15, 2018.

Db refers to Defendant's Appellate Division brief.

Da refers to Defendant's Appellate Division brief appendix.

DPA refers to Defendant's Petition for Certification appendix.

marijuana amounting to personal use, the Criminal Investigation statute 2C:35-10c would bar the search in this case. Further, the Defendant contends that this statute is consistent with this Court's precedents in State v Pitino and State v. Witt and, as such, the Appellant respectfully contends that the Acts are applicable and the Appellate Division's decision should be reversed.

PROCEDURAL HISTORY/STATEMENT OF FACTS

The Defendant relies upon his Procedural History and Statement of Facts as previously submitted which is incorporated herein by reference. Db2-14.

LEGAL ARGUMENT

I. THE LANGUAGE AND INTENT OF CREAMMA AND THE DECRIMINALIZATION ACT SUPPORTS THE RETROACTIVE APPLICATION TO THE DEFENDANT'S CASE

In its Supplemental Response, the State contends that the "New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act" (CREAMMA) L. 2021, c. 16 and the "Marijuana Decriminalization Act" (Decriminalization Act) L. 2021, c. 19 (hereinafter "Acts") should not be applied retroactively to the Defendant's case. First, the State contends that the relief

provided under the Act does not apply to the Defendant as he was sentenced pursuant to a conditional negotiated plea agreement to Second Degree Possession of a Weapon in violation of N.J.S.A. 2C:39-5(b) and not a marijuana, cannabis or hashish related offense. *State's Supp Brief* at 6-7. Further, the State also argues that the Criminal Investigation provision (N.J.S.A. 2C:35-10c) should not apply retroactively as only the smell of cannabis is prohibited; would hold law enforcement to a standard inconsistent with precedent; would not serve any ameliorative purpose; and would not serve as a deterrent to law enforcement. *Id.* at 7-10.

As to retroactivity, the Defendant contends that this Court may decide to apply pipeline retroactivity which would allow for the application of the Acts to his case and others that are on direct appeal when the laws became effective. *State v. G.E.P.*, 234 N.J. 362, 370 (2020). *Def First Supp. Br.* at 10. Indeed, the legislature was clearly aware the ameliorative effect of the Acts as it sought to correct perceived injustices suffered by those persons arrested, charged and/or convicted involving personal use amounts of marijuana, cannabis and hashish that is now decriminalized:

Former State Senate President Steve Sweeney

"This is a historic reform that will have a real-life impact on social justice, law enforcement and the state's

economy,. "We can now move forward to correct social injustices at the same time that marijuana is made legal for adults. This will launch a new cannabis industry with the potential to create jobs and generate economic activity at a time when it is desperately needed. The decriminalization law is the most sweeping measure of its kind in the country and is a groundbreaking step in our continued effort to make criminal justice reforms that are fairer and more effective. This will help reduce the racial disparities and social inequities that have long plagued our criminal justice system.""

. . . .

Assemblyman Jamel Holley

With legalization comes an unprecedented opportunity for residents to clean the slate with expungement provisions and for communities to grow their economic base with businesses," . "A key component of cannabis legalization is addressing social justice concerns. The fact that Black New Jerseyans are 3 or 4 times more likely to be arrested on cannabis charges has contributed to the disenfranchisement of black communities. We have the opportunity here to also right the wrongs in our society in regards to past criminal possession of cannabis. No matter where you stand in the legalized marijuana debate, there has been a clear understanding that minorities within our urban communities have been hit hardest in the so-called War on Drugs. During this entire campaign for legalization, there has been one united vocal stance: There was harm done in the past and it must be corrected."

Governor Murphy Signs Historic Adult-Use Cannabis Reform Bills Into Law, Feb. 21, 2021, <https://www.nj.gov/governor/news/562021/20210221a.shtml>, June 24, 2022.

In fact, the relief provided by the legislators, which includes dismissals, expungements and post-conviction relief, by its very nature comprised a substantial number of cases and the subset of cases referenced by the State that involved traffic stops

by police officers and subsequent searches of automobiles based upon the smell of marijuana. *State's Supp. Br.* at 5-6. See, *State v. Walker*, 213 N.J. 281, 290 (2013) (quoting *State v Nishina*, 175 N.J. 502, 515-516 (2003) ("New Jersey courts have [long] recognized that the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'"). See also, *Glenn A. Grant, J.A.D. Notice to Bar, July 1, 2021, Automated Process for Certain Marijuana and Hashish Cases in Accordance with Marijuana Decriminalization Law* at 1 ("Approximately 360,000 cases in the Superior and Criminal Court (Criminal and Family) fall within this statutory direction").

Therefore, whether a court previously determined that a search was valid or not under our laws at the time of the search is not determinative as to the applicability of the relief under the Acts for an arrest, charge, plea or conviction involving marijuana, cannabis and hashish that are currently lawful for personal use thus evidencing the legislators' intent for retroactive application of the Acts. *Def. Supp. Br.* at 4-7.

**A. THE CHARGES AGAINST THE DEFENDANT FALL
WITHIN N.J.S.A. 2C:35-23.1**

As to the State's contention that the Defendant's offense of conviction is not covered by the Acts, pursuant to N.J.S.A. 2C:35-

23.1 (Certin Crimes not to be Pursued; dismissal) the statute notes that the State shall not pursue "any charge" involving applicable subsections of N.J.S.A. 2C:35-5; N.J.S.A. 2C:35-10; and N.J.S.A. 2C:36-2. *Id.*; *State's Supp. Br.* at 5-6.

As to an individual's conduct, "[t]he prosecutor is the chief law enforcement officer of the county and as such has responsibility to investigate criminal conduct, charge violation of criminal statutes, present matters to the county grand jury and prosecute those accused of crimes." *State v Gomez*, 341 N.J. Super 560, 771 (App. Div. 2001). A prosecutor has "great discretion and power particularly in the charging function." *Id.* However, "[t]he absence of any evidence to support the charges would render the indictment 'palpably defective' and subject to dismissal." *State v Morrison*, 188 N.J. 2, 12 (App. Div. 2006) (quoting *State v Hogan*, 144 N.J. 216, 228-229 (1996))

As a result of a prosecutor's discretion as to what offense could be charged, the legislature's edict to decriminalize conduct equating to offences involving personal use marijuana or cannabis and provide relief as to conduct occurring prior to the effective date of the Acts, may result in evidence that would support other crimes applicable to an accused's conduct being inadmissible. See, *State v. Badessa*, 185 N.J. 303, 311 (2005) (Under the exclusionary rule, "the State is barred from introducing into evidence the "fruits" of an unlawful search or seizure by the police...[t]hose

"fruits" include not only "tangible materials" seized, but also "testimony as to matters observed" in the course of a Fourth Amendment violation"). Conversely, in some cases, the amount of marijuana or cannabis may exceed personal use, or there existed separate probable cause supporting evidence of other contraband and N.J.S.A. 2C:35-23.1 would not apply. See, State v. Birkenmeier, 185 N.J. 552, 563 (2006) (the smell of marijuana and the observation of laundry bag corroborated information from a confidential informant that the defendant would be driving to make a large delivery of over 30 pounds of marijuana).

Therefore the language of the dismissal of "any charge" and "involving" subsections of N.J.S.A. 2C:35-5, N.J.S.A. 2C:35-10 and N.J.S.A. 36-2, reflects the legislature's intent to encompass conduct that occurred prior to the effective date of the Acts, and does not limit what charges that are withdrawn or dismissed involving said conduct that is now lawful.

As discussed in his prior submission, the Defendant reserved his right to appeal a search "invovling" the subsection refenced in N.J.S.A. 2C:35-23.1(b)(1). *Def Supp. Br.* at 7-8. To the extent that the State contends that N.J.S.A. 2C:35-23.1(b)(2) does not apply to the Defendant as his conviction was as a result of a conditional plea agreement for a weapon offense and not "solely" for violation(s) of the listed offences, the Criminal Investigation provision (2C:35-10c) of the Acts cannot be

interpreted in such a restrictive manner and the State's arguments as to this provision's retroactive application to the Defendant case, as hereinafter discussed, has no merit.

**B. N.J.S.A. 2C:35-10c IS APPLICABLE TO
TO THE DEFENDANTS' CASE**

A brief review of the facts of Defendant's case highlights the flaws in the States' arguments as to N.J.S.A. 2C:35-10c (Criminal Investigation) applicability and demonstrates the disconnects of the State's argument with our search and seizure law. Sometime in December 2015, Detective Joseph Czech of the New Jersey State Police commenced his investigation of the Defendant and in early January 2016, he was provided with information by a confidential informant that the Defendant was allegedly transporting weapons. *Db 2-3,7.* On or about January 15, 2016, the informant provided additional information noting a particular trip the Defendant was allegedly making to obtain weapons. A BOLO (Be On The Lookout) was issued however a warrant was not obtained. NJSP Trooper Charles Travis IV received the BOLO noting the alleged information from the confidential source and identified the automobile driven by the Defendant, follows the vehicle for miles and conducted a traffic stop due to alleged motor vehicle violations. *Db 3-5.*

As to the Criminal Investigation provision, N.J.S.A. 2C:35-10c, the State first argues that this statute is limited to the smell of cannabis only and not marijuana, and as the latter was allegedly observed in the Defendant's case, the statute is not applicable. *State Supp. Br.* at 7-8. This argument finds no support in the actual wording of the statute itself. In fact, N.J.S.A. 2C:35-10c contains broader language as it prohibits "[t]he possession of or the suspicion of possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis items which may be lawfully possessed pursuant to section 46 of P.L.2021, c.16 (C.2C:35-10a)" to be used as reasonable articulable suspicion of criminal conduct without evidence of an unlawful quantity. N.J.S.A. 2C:35-10c(b) (emphasis added).

Concerning what may constitute "the possession or suspicion of possession" of marijuana, our courts have long recognized that the smell of raw or burnt marijuana may serve as a reasonable articulable suspicion of possession. State v. Myers, 442 N.J. Super. 287, 297 (App. Div. 2015); State v. Judge, 275 N.J. Super. 194, 202-03 (App. Div. 1994).

In addition, the existence of air fresheners may serve as a reasonable articulable suspicion of possession. State v Nelson, 237 N.J. 540, 555 (N.J. 2019) (finding that an "overwhelming smell of air freshener" along with the officers observations may provide

reasonable suspicion of criminal conduct); United States v Garner, 961 F.3d 264, 272 (3d Cir. 2020) (finding that a police officer had reasonable suspicion to extend a traffic stop when he also "smelled a strong odor of air freshener and saw air fresheners clipped on every vent"); United States v Pena-Gonzales, 618 F. App'x 195, 202 (5th Cir. 2015) ("We have long recognized that the presence of air fresheners, let alone four of them placed throughout an SUV, suggests a desire to mask the odor of contraband.").

Lastly, in a law enforcement officer's view of the totality of the circumstances in an encounter with an accused, "a group of innocent circumstances in the aggregate can support a reasonable suspicion finding." State v. Bard, 445 N.J. Super. 145, 160 (App. Div. 2016) (citing State v. Stovall, 170 N.J. 346, 368 (2002)).

Therefore, whether it is the alleged smell of marijuana, observing an air freshener in the automobile or "shake" in a man's beard, paragraph b of N.J.S.A. 2C:35-10c would bar such items as supporting a reasonable articulable suspicion of possession of marijuana without prior evidence supporting possession of an unlawful amount. *Id.* See, *Db 3-5* (Trooper Travis allegedly smelled marijuana, observed air fresheners and "shake" in Mr. Cohen's beard prior to arresting the Defendant and thereafter searching the automobile.)

In contrast to the argument proffered by the State, this provision by its own language does not contain any limitations as

to offenses that may be subject to the statute. Consequently, the smell of marijuana equating to personal use cannot be used as a reasonable articulable suspicion of a crime thus, eliminating the potential for misconduct by law enforcement to extend a search beyond what would have otherwise been reasonable under the circumstances in a criminal investigation. See State v. Patino, 83 N.J. 1 (1980) (holding that the smell of marijuana in the interior of an automobile amounting to personal use did not authorize the search of the trunk "as "[a] police officer must not only have probable cause to believe that the vehicle is carrying contraband but the search must be reasonable in scope."); State v. Murray, 151 N.J. Super. 300, 307 (App. Div. 1977) (holding an officer's discovery of a "roach clip" and vials of hashish in an automobile's interior did not provide sufficient probable cause to remove the driver's seat and open a container found underneath it).

Most importantly, pursuant to N.J.S.A. 2C:35-10c, the smell of marijuana or cannabis cannot be unreasonably employed in an effort to "create" an exigent circumstance as the Criminal Investigation provision requires prior evidence that the amount in possession is unlawful which Defendant submits, is consistent with this Court's search and seizure jurisprudence. State v. Witt, 223 N.J.409, 431-32 (2015) ("The language in Alston ensured that police officers who possessed probable cause well in advance of an automobile search sought a warrant. Police officers could not sit

on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant.").

The Defendant respectfully contends that the New Jersey State Troopers failed to adhere to this Court's search and seizure rulings including its decisions in Pitino, Alston and Witt and the Criminal Investigation provision, like the exclusionary rule, seeks to protect "the constitutional right to be free from unreasonable searches." State v. Novembrino, 105 N.J. 95, 157 (1987). Our legislature's ameliorative efforts via the Acts to address perceived inequities both retrospectively and prospectively should encompass the Defendant's case.

CONCLUSION

For all of the above stated reasons and previous submissions, Defendant respectfully requests that this Court reverse the Appellate Division's decision.

Respectfully Submitted,

/s/ Raymond L. Hamlin
Raymond L. Hamlin, Esq.

Dated: July 5, 2022

cc.

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