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28 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 28 MAP 2021

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

TIMOTHY OLIVER BARR, II,
Appellant

BRIEF FOR APPELLEE

Appeal from the Pennsylvania Superior Court's Order at 2347 EDA 2019, dated September 25, 2020, Vacating and Remanding for Reconsideration the August 2, 2019 Order Granting the Motion to Suppress entered in the Lehigh County Court of Common Pleas in Case No. CP-39-CR-0279-2019.

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   (The Superior Court properly determined that the odor of marijuana is a factor to consider along with the totality of the circumstances).

2. To what extent does this Court's decision in Commonwealth v. Hicks, 652 Pa. 353, 208 A.3d 916 (2019), apply to probable cause determinations involving the possession of marijuana following the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq*.? (Answered in the affirmative by the court below).

   (The Superior Court properly determined that Hicks does not apply notwithstanding enactment of the MMA).

COUNTER-STATEMENT OF CASE

Following a lawful stop and vehicle search supported by probable cause, defendant was arrested and charged with Person Not to Possess Firearm, Possession of a Firearm without a License, and Possession of a Small Amount of Marijuana for Defendant. Defendant subsequently filed a Motion to Suppress and Petition of Writ of Habeas Corpus with regard to Count 3 - Possession of a Small Amount of Marijuana for Defendant. At the Suppression Hearing, defendant clarified that he WAS NOT challenging the traffic stop of the vehicle, but only the search of the vehicle and whether or not the marijuana recovered was legally possessed. N.T. 7/17/19, 5.

Following the hearing, the prosecutor requested the opportunity to provide the lower court with a brief. The lower court refused informing the prosecutor:

> How about you just appeal it? Because I'm not interested in reading your brief because I know exactly what it is going to say. And you can just save it for the Superior Court because that's where the law needs to be changed.

Id. at 202.

Subsequently, prior to the lower court's ruling, the prosecutor again requested the opportunity to provide the lower court with a brief. The lower court did not respond. On August 2, 2019, the lower court granted defendant's Motion to Suppress and Petition for Writ of Habeas Corpus.

This order effectively terminated the Commonwealth's prosecution and, thus, the Commonwealth appealed. On appeal, the Superior Court vacated the lower court's order granting suppression and habeas relief, and remanded the case for reconsideration consistent with the analysis set forth in its opinion. Commonwealth v. Barr, 240 A.3d 1263 (Pa.Super. 2020), *appeal granted*, 252 A.3d 1086 (Pa. 2021).

In its opinion, the Superior Court determined that the smell of marijuana alone cannot establish probable cause to support a search. Rather, probable cause requires analysis of the totality of the circumstances, which may include the odor of marijuana, because although medical marijuana may be legal when possessed or used consistent with the regulations set forth in Pennsylvania's Medical Marijuana Act ("MMA"), marijuana remains presumptively illegal. The MMA is an exception to the Controlled Substance Act ("CSA").

The Superior Court further determined that the lower court's reliance on this Court's decision in Commonwealth v. Hicks, 208 A.3d 916 (Pa. 2019) to support its determination that the odor of marijuana could be afforded no weight in the probable cause analysis in light of the MMA, was an abuse of discretion. Specifically, the Superior Court stated:

> That extreme view is not justified by the *Hicks* decision. The general illegality of marijuana under the CSA cannot simply be

> ignored merely because it is lawfully used in limited circumstances under the MMA and, thus, we must reject the trial court's conclusion that the odor of marijuana provides no indication of criminal activity.

Barr, 240 A.3d at 1281.

Defendant filed a petition seeking allocator in this Court. On April 28, 2021, this Court granted allocator limited to the following issues:

(1) What weight, if any, should the odor of marijuana be given in determining whether probable cause exists for a warrantless vehicle search, in light of the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq*.?

(2) To what extent does this Court's decision in *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019), apply to probable cause determinations involving the possession of marijuana following the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq*.?

The Commonwealth herein responds.

SUMMARY OF ARGUMENT

The Superior Court correctly determined that the smell of marijuana is a relevant factor to consider when applying the totality of the circumstances test to establish probable cause. The enactment of the Medical Marijuana Act ("MMA") in Pennsylvania does not alter the relevance of the smell of marijuana, but rather is another factor for an officer to consider. The same is true of the presentation of a MMA card. The MMA and/or an MMA card are relevant considerations, along with the smell of marijuana and any other factors that support probable cause. The MMA does not alter the well established test for probable cause, which is a review of the totality of the circumstances consistent with the guidelines established by our United States Supreme Court and this Court's precedence.

The Superior Court properly determined that Commonwealth v. Hicks does not alter the test for probable cause or render the smell of marijuana irrelevant. Nor does Hicks in conjunction with the MMA provide justification to negate consideration of the smell of marijuana along with other factors when reviewing probable cause. Hicks is simply inapposite and does not support restricting Fourth Amendment jurisprudence in this regard.

ARGUMENT

I. THE ODOR OF MARIJUANA SHOULD BE AFFORDED THE SAME WEIGHT AS ANY OTHER FACTOR WHEN DETERMINING WHETHER A SEARCH IS SUPPORTED WITH PROBABLE CAUSE, NOTHWITHSTANDING THE ENACTMENT OF THE MEDICAL MARIJUANA ACT, 35 P.S. § 10231.101 *et seq*.

"Article I, Section 8 and the Fourth Amendment each require that search warrants be supported by probable cause."[1] Commonwealth v. Jones, 988 A.2d 649 (Pa. 2010).

> In *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court established the "totality of the circumstances" test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause. In *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (1986), this Court adopted the totality of the circumstances test for purposes of making and reviewing probable cause determinations under Article I, Section 8.

Jones, 988 A.2d at 655 (Pa. 2010). *See also* Commonwealth v. Clark, 735 A.2d 1248, 1252 (Pa. 1999)(in determining whether probable cause exists, Court applies a totality of the circumstances test).

[1] At the time of this case, District Attorneys and Police followed this Court's holding in Commonwealth v. Gary, 91 A.3d 102, 138 (Pa. 2014), which adopted the federal automobile exception to the warrant requirement, permitting police officers to search a motor vehicle without a warrant when there is probable cause to do so. Id., 91 A.3d at 104. Six years later and subsequent to this case, in Commonwealth v. Alexander, 243 A.2d 177 (Pa. 2020), this Court reversed Gary, holding that Section 8 "affords greater protection to our citizens than the Fourth Amendment," and reaffirming its prior decisions that "the Pennsylvania Constitution requires both a showing of probable cause and exigent circumstances to justify a warrantless search of an automobile." Id., 243 A.3d at 181.

Our Supreme Court in D.C. v. Wesby, 138 S.Ct. 577, 590 (2018) observed that "probable cause" is "incapable of precise definition or quantification into percentages." Id., at 590, *quoting* Maryland v. Pringle, 540 U.S. 366, 371 (2003). "[I]t is 'a fluid concept' that 'deals with probabilities and depends on the totality of the circumstances[.]' It 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' Wesby, 138 S. Ct. at 586, *quoting* Pringle, *supra*, Gates, 462 U.S. at 232, 243–244, n. 13.

This Court, as does our United States Supreme Court, follows the standards and principles set forth in Gates, *supra*, which are now well-established:

> "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[2] Our observation in *United States v. Cortez,* 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard:
>
> > The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

[2] Citing Brinegar v. United States, 338 U.S. 160, 175 (1949).

> As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.
> …
>
> Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

Gates, 462 U.S. at 231-32, 235 (citations omitted). *See, e.g.*, Commonwealth v. Thompson, 985 A.2d 928, 931 (Pa. 2009).

In this case, police had probable cause to search the vehicle in which defendant was a passenger. The trial court erred when it concluded otherwise and granted defendant's motion to suppress the marijuana and firearm recovered from the car. On appeal, the Superior Court determined that the lower court improperly afforded "no weight to the odor of marijuana as a contributing factor to a finding of probable cause based on its misapplication or overstatement of *Hicks'*s applicability" and failed to consider other factors "in addition to the odor of marijuana, in determining whether police possessed probable cause to search Appellee's vehicle." The Superior Court further instructed:

> while it is not compelled by case law to find that probable cause exists solely on the basis of the odor of marijuana, that fact may, in the

> totality of the circumstances, still contribute to a finding of probable cause to believe the marijuana detected by the odor was possessed illegally. The court may consider Appellee's presentation of an MMA card as a factor that weighs against a finding of probable cause, as it provides at least some evidence tending to suggest the marijuana in question was possessed legally.[11] However, the court must also consider (or explain why it need not consider) the other factors suggested by the Commonwealth as contributing to a finding of probable cause, such as Appellee's statements and demeanor during the stop, as well as the nature of the location of the stop.

Barr, 240 A.3d at 1285–89.

The Superior Court's remand order, further instructed the lower court to apply the accepted and well-established "totality of circumstances" test in determining the existence of probable cause. The Superior Court's conclusion that the odor of marijuana is relevant to this assessment and that the presentation of a MMA card is merely another factor to consider within this assessment is consistent with the well-established principles and application of Fourth Amendment jurisprudence in Pennsylvania, which are also in harmony with opinions of the United States Supreme Court.

A. The Medical Marijuana Act, 35 P.S. § 10231.101 *et seq*.

In 2016, Pennsylvania enacted the Medical Marijuana Act ("MMA"). Under the Act, the use or possession of medical marijuana within the provisions set forth within the Act is lawful. 35 P.S. § 10231.303. In order to legally purchase, possess, or use medical marijuana a person must:

- be a resident of the Commonwealth;

- be a patient diagnosed with one of the serious medical conditions approved by the Advisory Board[3];
- Register online with the PA Department of Health (DOH) – Medical Marijuana Registry
- See a DOH approved practitioner to get certified;
- Pay for your medical marijuana ID card; and
- Purchase from a licensed dispensary.

35 P.S., Ch. 64, *et seq*.

> Medical marijuana may only be dispensed in the following forms:
>
> (i) Pill
> (ii) Oil
> (iii) Topical Forms, including Gel, Creams, or Ointments
> (iv) A form medically appropriate for administration by vaporization or nebulization, including dry leaf or plant form
> (v) Tincture
> (vi) Liquid

35 P.S. § 10231.303(b)(2). When in possession of medical marijuana, a patient or caregiver must possess their DOH identification card and any "medical marijuana that has not been used by the patient shall be kept in the original package in which it was dispensed." 35 P.S. § 10231.303(b)(6) and (7). This packaging must "identify the name of the grower/processor, the name of the dispensary, the form and species of medical marijuana, the percentage of tetrahydrocannabinol and cannabinol contained in the product

[3] A caregiver as defined by the MMA may also purchase and possess medical marijuana consistent with the provisions of the MMA.

and any other labeling required by the department."[4] 35 P.S. § 10231.303(b)(8).

In addition to the lawful uses of medical marijuana, the MMA also sets forth what constitutes the unlawful use of medical marijuana. "Except as provided in section 303, section 704, Chapter 19 or Chapter 20 [of the MMA] the use of medical marijuana is unlawful and shall, in addition to any other penalty provided by law, be deemed a violation of the act of April 14, 1972 (P.L. 233, No. 64),[2] known as The Controlled Substance, Drug, Device and Cosmetic Act." 35 P.S. § 10231.304(a). It is unlawful to:

- ***Smoke medical marijuana***
- Incorporate into an edible form except if done so by a patient or caregiver in order to aid in ingestion of the medical marijuana.
- Grow medical marijuana without a permit
- Grow or dispense medical marijuana unless authorized as a health care medical marijuana organization under Chapter 19.
- Dispense medical marijuana without a permit

35 P.S. § 10231.304(b) (emphasis added).

The MMA further requires:

> (h) When a dispensary dispenses medical marijuana to a patient or caregiver, the dispensary shall provide … a safety insert. ... The insert shall provide the following information:
>
> (1) Lawful methods for administering medical marijuana in individual doses.

…

[4] The warning label must include the following statement, "This product might impair the ability to drive or operate heavy machinery."

(i) The labeling shall contain the following:

…

(4) A warning stating:

"This product is for medicinal use only. Women should not consume during pregnancy or while breastfeeding except on the advice of the practitioner who issued the certification and, in the case of breastfeeding, the infant's pediatrician. This product might impair the ability to drive or operate heavy machinery. Keep out of reach of children."

(5) The amount of individual doses contained within the package and the species and percentage of tetrahydrocannabinol and cannabidiol.

(6) A warning that the medical marijuana must be kept in the original container in which it was dispensed.

(7) A warning that unauthorized use is unlawful and will subject the person to criminal penalties.

35 P.S. § 10231.801.

B. Probable Cause and the MMA

The Superior Court in its opinion determined, "The MMA did not legalize marijuana nor did it render possession or use of marijuana presumptively legal." Barr, 243 A.3d at 1285-1286. This conclusion is well supported.

Enactment of the MMA did not abrogate the Controlled Substance Act. Marijuana remains a prohibited substance under the Controlled Substance Act. 35 P.S. § 780-104(1)(iv) (Marihuana is a Schedule I controlled substance). *See also* Commonwealth v. Batista, 219 A.3d 1199 (Pa.Super. 2019); Commonwealth v. Handley, 213 A.3d 1030, 1035 (Pa.Super. 2019); Commonwealth v. Jezzi, 208 A.3d 1105, 1115 (Pa.Super.

2019). Similarly, the MMA also has not altered the Motor Vehicle Code's prohibition on driving under the influence of controlled substances, including marijuana. *See* 75 Pa.C.S.A. § 3802(d)(1)(i) (providing that "[a]n individual may not drive, operate or be in actual physical control of the movement of a vehicle," where the individual's blood contains *any* amount of a Schedule I controlled substance, as defined in the CSA). Rather, the MMA simply "provides a very limited and controlled vehicle for the legal use of medical marijuana by persons qualified under the MMA. Outside the MMA, marijuana remains a prohibited Schedule I controlled substance for the general citizenry who are unqualified under the MMA." Commonwealth v. Jezzi, 208 A.3d 1105, 1115 (Pa.Super. 2019).

Accordingly, the MMA does not alter the applicability of the "totality of the circumstances" test in assessing probable cause. In applying this test, police officers must be permitted to consider all relevant factors, which may include the smell of marijuana, and also assess the credibility and/or the implication of statements or explanations provided by individuals present on the scene – for example, an assertion of innocence or presentation a purported MMA card. In other words, police officers in Pennsylvania must be permitted to apply this Court and the United States Supreme Court's

well-established and consistent precedents that are readily understood and applied by them nearly every day in real world situations.

In determining the existence of probable cause, a reviewing court must follow "two basic and well-established principles of law." Wesby, 138 S. Ct. at 588. **First,** the reviewing court must NOT evaluate each fact "in isolation." Id., *citing*, Pringle, 540 U.S. at 372. "The 'totality of the circumstances' requires courts to consider 'the whole picture' and "precludes a divide-and-conquer analysis" Wesby, *supra*[5] ("Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation.").

Second, a reviewing court must NOT "dismiss outright any circumstances that were "susceptible of innocent explanation." Id.[6] "Probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts. As we have explained, "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." Id.[7]

[5] Citing, Cortez, *supra*, at 417; United States v. Arvizu, 534 U.S. 266, 277–278 (2002).
[6] Citing, Arvizu, 534 U.S. at 277.
[7] Quoting, *Gates*, 462 U.S., at 244, n. 13.

When reviewing the totality of the circumstances, the Commonwealth observes that the "central requirement" and "touchstone" of the Fourth Amendment is reasonableness. Illinois v. McArthur, 531 U.S. 326, 330 (2001); Ohio v. Robinette, 519 U.S. 33, 39 (1996). Probable cause "is not a high bar." Kaley v. United States, 571 U.S. 320,338 (2014). When reviewing the totality of the circumstances, a reviewing court must do so from the perspective of a police officer, as opposed to an ordinary citizen or the Court's own hindsight evaluation from the bench. Florida v. Harris, 568 U.S. 237, 249 (2013); Ornelas v. U.S., 517 U.S. 690 (1996); Thompson, 985 *supra*. *See also* Arvizu, *supra*. The reviewing court should also give "due weight … to the specific reasonable inferences [the officer] is entitled to draw from the facts in light of his experience." Terry v. Ohio, 392 U.S. 1, 27 (1969). *See also* Thompson, *supra*. It is NOT reasonable to require officers to ignore their experience, common-sense, and the totality of the circumstances, and instead accept at face value innocent protestation regarding a smell of a substance that remains inherently (more likely than not) illegal and the presentation of a MMA card that an officer in Pennsylvania has no ability to validate. 35 P.S. § 10231.302.

As previously noted, probable cause is a "fluid concept." Harris, 133 S. Ct. at 1056. It does not require certainties but rather probabilities with

due consideration to the practicalities of everyday life and the realities faced by police officers. Gates, *supra*. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality opinion) (Probable cause does not "deal with hard certainties, but with probabilities," nor does it demand that an officer's reasonable belief of possible criminal activity "be correct or more likely true than false."). *See also* New York v. Belton, 453 U.S. 454 (1981) (Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and not: 'qualified by all sorts of ifs, ands, and buts'"); Thompson, 985 A.2d at 218 (Castille, J. dissenting opinion) ("reminder of the limited quantum of proof required for probable cause as well as the practical, realistic nature of the probable cause inquiry under the Fourth Amendment").

In the real world, police officers must be permitted to consider the totality of all of the factors present in determining whether or not probable cause exists. This analysis includes factors which may arguably be "innocent".

> … probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands. … In

> 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 non-criminal acts.

Gates, 462 U.S. at 245 n. 13.

An on-scene officer may have to make a Fourth Amendment and/or probable cause determination in an environment that is often uncertain, evolving, and sometimes dangerous. In such circumstances, the officer will have only limited, circumstantial evidence that criminal activity may be afoot. Moreover, more often than not, a suspect will proffer an innocent explanation for his or her suspicious behavior. *See e.g.,* Wesby, *supra*, *citing* Ramirez v. City of Buena Park, 560 F.3d 1012, 1024 (9th Cir. 2009) ("[r]arely will a suspect fail to proffer an innocent explanation for his suspicious behavior."); Thompson, 985 A.2d at 218 (Castille, J. dissenting opinion). Accordingly, an officer must be permitted to assess the credibility of such assertions and take this into consideration along with the totality of other circumstances. In doing so, they must be able to employ their experience, common sense, and observations of all of the factors before them to determine whether such a claim is credible and whether or not they have probable cause supporting a search.

Our United States Supreme Court observed, "officers are free to disregard either all innocent explanations,[10] or at least innocent explanations

that are inherently or circumstantially implausible … innocent explanations—even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect." Wesby, 138 S. Ct. at 592 (footnote and citations omitted). Were it otherwise, those engaged in apparent criminal activity would be permitted to generally avoid a search or even arrest simply by asserting an innocent explanation. This would be an absurd result.[8]

A police officer presented with the odor of marijuana emanating from a vehicle and a driver or passenger presenting a MMA card must be permitted to consider these factors in conjunction with the totality of other factors to determine probable cause. Indeed, odor and a license permitting ingestion are not new facts or considerations police must confront and assess. An officer conducting a traffic stop may sense an odor of alcohol emanating from a vehicle and the driver may present a license stating he or she is over the age of twenty-one (21). Notwithstanding that the police officer can verify the validity of the driver's license, unlike an MMA card, the officer is faced with an odor of a possibly legal substance. The officer cannot simply ignore this fact particularly if he is faced with other factors

[8] *Accord* Baker v. McCollan, 443 U.S. 137, 145-46 (1979) ("we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free

that would objectively lead a reasonable police officer based on his common sense and experience to suspect criminal activity may be afoot. Nor should the officer simply ignore a driver's assertion that he only had two drinks of alcohol and is not impaired. Similarly, the officer should not be required to accept the assertion that the burnt marijuana he or she smelled was legally possessed because a person says so or based on an unverifiable MMA card.

As cogently observed by Superior Court Judge Stabile in his concurring opinion in an unpublished opinion, Commonwealth v. Yeager, 242 A.3d 435 (Pa.Super. 2020) (unpublished memorandum opinion):

> Marijuana continues to be designated a Schedule I controlled substance pursuant to the Controlled Substance Act, 35 P.S. § 780-104, and our Motor Vehicle Code prohibits driving, operating, or controlling a motor vehicle when "[t]here is in the individual's blood any amount of a [ ] Schedule I controlled substance ... or metabolite" of a Schedule I controlled substance. 75 Pa.C.S.A. § 3802 (d)(1)(i) and (iii) (emphasis added).
>
> Driving under the influence, whether of alcohol or controlled substances, endangers and kills lives. Like alcohol, while medical marijuana may now be legal, smoking, vaping, or otherwise ingesting marijuana that contains THC can still impair someone who is operating a vehicle. The continued prohibition against driving with any marijuana or metabolites in one's blood is a reflection of that fact. As the Court recognized in *Chase*, "Pennsylvanians also have a significant interest in having the Vehicle Code enforced." *Id.* at 119 . While stated in the context of DUI roadblocks, the Court "determined the Commonwealth has a compelling interest in detecting and removing intoxicated drivers because they may cause death, injury, and property damage."

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investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.").

> *Id.* (citation omitted). I believe that compelling interest applies equally in the context of persons under the influence of marijuana, whether illegal marijuana or medical marijuana.
>
> … Like alcohol, medical marijuana is legal. However, while legal, both can impair driving. Our statutes prohibit driving with certain levels of alcohol in one's system. Similarly, our statutes prohibit driving with any level of marijuana or metabolites in one's system. 75 Pa.C.S.A. § 3802 (d)(1)(i) and (iii). Simply stated, it is illegal to smoke or vape marijuana and drive. Therefore, the odor of marijuana emanating from a moving vehicle provides enough reasonable suspicion to make a vehicle stop and further investigate whether the driver is impaired.

Commonwealth v. Yeager, 242 A.3d 435 (Pa.Super. 2020) (unpublished opinion) (Stabile, J., concurring).

Accordingly, the odor of marijuana and/or an individual's presentation of a MMA card is simply one more factor for police and a reviewing court to consider along with other relevant factors when assessing probable cause to support a search. *See, e.g.*, Wesby, 138 S.Ct. at 587 (Taken together, factors allowed the officers to make several "'common-sense conclusions about human behavior' and infer criminal conduct may be afoot"); Ornelas, 517 U.S. at 700 (explaining that "a police officer may draw inferences based on his own experience in deciding whether probable cause exists"); Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (explaining that the police can take a suspect's "nervous, evasive behavior" into account).

II. THIS COURT'S DECISION IN COMMONWEALTH V. HICKS, 652 Pa. 353, 208 A.3d 916 (2019) IS INAPPOSITE TO THE APPLICATION OF PROBABLE CAUSE DETERMINATIONS NOTHWITHSTANDING THE MMA.

The Superior Court determined that the lower court misapplied or overstated the applicability of Hicks in this case when it "failed to consider other factors "in addition to the odor of marijuana, in determining whether police possessed probable cause to search Appellee's vehicle." Specifically, the court concluded:

> [T]he trial court's direct application of *Hicks* to the circumstances of this case constituted an abuse of discretion. First, as is obvious, the holding in *Hicks* could not directly apply because it concerned what constitutes reasonable suspicion of criminality justifying a *Terry* stop when possession of a concealed firearm is observed, not whether probable cause to search a vehicle exists based on the odor of marijuana alone. Moreover, even assuming the trial court merely adopted the reasoning of *Hicks*, the respective conduct is not sufficiently analogous to compel an identical result. The possession of a firearm is generally legal, with limited exceptions. The possession of marijuana, by contrast, remains generally illegal, but for the limited exception of lawful possession of medical marijuana pursuant to the MMA.
>
> Thus, we simply cannot sustain the trial court's conclusion, based on *Hicks*, that because "marijuana has been legalized in Pennsylvania for medical purposes, the plain smell of burnt or raw marijuana is no longer indicative of an illegal or criminal act." TCO at 15. The odor of marijuana may still be indicative of an illegal or criminal act, because the possession of marijuana remains generally illegal. This is especially true when other circumstances suggest that the detected marijuana cannot be in compliance with the MMA, such as was the case in *Batista*.

Barr, 240 A.3d at 1286. The Superior Court's determination that Hicks was not applicable to this case is correct. Moreover, Hicks does not alter the well-established probable cause jurisprudence and the totality of the circumstances test as set forth in opinions by our Supreme Court and followed in Pennsylvania.

In Commonwealth v. Hicks, 208 A.3d 916 (Pa. 2019), this Court held that carrying a concealed weapon in public alone does not establish reasonable suspicion to stop and seize a person. The Court compared the concealing of a firearm in public to the act of driving of a car, and concluded that just as police cannot determine that a driver may be unlicensed based on the act of driving, "officers had no way of determining from Hicks' conduct or appearance that he was likely to be unlicensed and, thus, engaged in criminal wrongdoing." Id. at 945. "[A]n individual licensed to carry a firearm may do so in public, openly or concealed, within a vehicle or without, throughout every municipality in Pennsylvania." Id. at 926. Thus, there "is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity." Id. at 937.

Hicks is inapposite. First and foremost, this Court in Hicks instructed,

> ***Our holding is confined to the lawfulness of seizures based solely upon the possession of a concealed firearm***—conduct that is widely

> licensed and lawfully practiced by a broad range of people. …. We in no way hold that the Fourth Amendment prohibits the arrest or prosecution of an individual suspected of a crime for which he may have a valid affirmative defense of ... Rather, we merely hold that, with respect to the conduct at issue ... that conduct alone is an insufficient basis for reasonable suspicion that criminal activity is afoot.

Id., at 945 (emphasis added).

Importantly, unlike the plain language and elements set forth in the firearm statute at issue in Hicks, the Controlled Substance Act prohibits any possession or use of marijuana. As previously noted, the MMA did not abrogate the Controlled Substance Act. Rather, the MMA carved out a limited exception to this general rule. Thus, marijuana is not like a firearm or driving, and remains presumptively *ILLEGAL* in Pennsylvania.[9]

The MMA exception to the Controlled Substance Act does not render the general rule that marijuana is illegal obsolete. Nor does it require the restructuring of Pennsylvania Fourth Amendment law or overrule decades of precedent that the smell of marijuana is a relevant factor in the totality of the circumstances test to determine probable case. Although purchase, possession, and use of medical marijuana consistent with the MMA is legal for those with a valid card, it remains illegal for millions of others in

[9] Moreover, unlike a driver's license or firearms license, there is no way for police to determine whether an MMA card is, in fact, valid. In Pennsylvania, the identity of

Pennsylvania. Thus, the odor of marijuana has not lost its "incriminating" smell by virtue of its legality for some, because it in fact remains illegal for the vast majority of Pennsylvania residents. The narrow exception of the MMA cannot be allowed to swallow the general rule of the CSA that marijuana is presumptively illegal.[10]

As previously noted, the relevant inquiry in determining probable cause "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts […] "[i]nnocent behavior frequently will provide the basis for a showing of probable cause" Gates, 462 U.S. at 243 n. 13. An officer is not required to eliminate every possible explanation to have probable cause.

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registered medical marijuana card holders is confidential and access to the registry is specifically restricted from law enforcement. 35 P.S. § 10231.302.

[10] *See also, e.g.,* State v. Reis, 351 P.3d 127 (Wash. 2015) (where statute establishes limited exception to the general prohibition against marijuana, it is an affirmative defense and does not implicate probable cause analysis); State v. Boly, 149 P.3d 1237, 1239 (OR 2006), *citing* State v. Vasquez Rubio 917 P.2d 494 (OR 1996) ("when a statutory provision is plainly set out as an exception that stands apart from the description of the elements of an offense, the state is not required to negate the exception; rather, the exception constitutes an affirmative defense, which the defendant must establish to prevail"); People v. Fisher, 96 Cal.App.4th 1147, 1148-49 (2002) (once probable cause to search was established, the officers were entitled to search the premise was for the defendant to subsequently raise any exceptions under the [medical marijuana act] as an affirmative defense"; Investigation of the truth and legal effect of defenses to criminal charges is what motions and trial are for to hold otherwise would create disorder and confusion."); Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123,128 (2d Cir. 1997) ("Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest."); U.S. v. Reed, 220 F.3d 476,479 (6th Cir. 2000) (noting that there was no requirement in the Sixth Circuit to negate an affirmative defense when determining whether probable cause existed).

This Court's decision in Hicks does not alter well-established probable cause analysis. To conclude otherwise would create confusion, disorder, and inconsistency particularly where there is no way in Pennsylvania for a law enforcement officer to readily determine the validity of possession, purchase, or use of medical marijuana. *See, e.g.*, Commonwealth v. Strickler, 757 A.2d 884, 899 (Pa. 2000) ("As the United States Supreme Court has emphasized, rules fashioned by courts to implement constitutional precepts that regulate police activities should be expressed in terms that are readily understandable and applicable in daily encounters. Reciprocally, law enforcement officers can tailor their conduct in ways that will assist trial and appellate courts in the performance of their essential functions, with the corollary benefit of enhancing consistency and predictability of results in judicial proceedings."), *citing* Belton, 453 U.S. at 458.

III. THE SEARCH CONDUCTED IN THIS CASE WAS SUPPORTED BY PROBABLE CAUSE.

On November 7, 2018, Pennsylvania State Police Troopers Prentice and Heimbach were working the midnight shift.[11] Part of their patrol, which

[11] N.T. 7/17/19, 14.

was in a marked vehicle, took them to Emaus Avenue, Lehigh County.[12] Trooper Prentice was familiar with this "corridor," as he had investigated several drug dealing cases involving methamphetamine, cocaine, and marijuana, as well as stolen vehicle cases, stolen license plate cases, and fugitives from justice.[13] Trooper Prentice testified that Allenbrook Apartments and Liberty Village Apartment along that "corridor" was where a number of his stolen gun and drug dealing investigations originated.[14]

Trooper Prentice further testified that he has been employed by the Pennsylvania State Police since 2014.[15] He was initially trained by the Baltimore City Police for six months and was then a police officer with the City of Annapolis, Maryland 2009-2014.[16] While in Annapolis, Trooper Prentice worked with "FLEX," which involved investigations of serious crimes and narcotics.[17] He investigated marijuana crimes on a daily basis and during his over ten (10) year career he has made over 200 marijuana arrests.[18] Trooper Prentice testified to his training as to the odor of

[12] Id. at 12-13.
[13] Id. at 13-14
[14] Id. at 14.
[15] Id. at 7.
[16] Id. at 7-8.
[17] Id. at 8.
[18] Id. at 8-9.

marijuana, both burnt and raw, while in Annapolis and Pennsylvania.[19] Additionally, he has trained in highway interdictions.[20]

During patrol on November 7, 2018, Trooper Prentice observed a vehicle stopped on Allenbrook Drive.[21] The vehicle then turned onto Emaus Avenue.[22] While following the vehicle, Trooper Prentice observed the subject vehicle commit a traffic violation.[23] As a result, Trooper Prentice lawfully stopped the vehicle. Trooper Heimbach approached the passenger side of the vehicle first, while Trooper Prentice remained in his marked vehicle to radio in the stop and enter information into the police server.[24] Trooper Prentice then approached the driver's side of the stopped vehicle.[25] Defendant's wife, Teri Barr, was the driver, defendant the passenger, and a third individual was in the back seat of the vehicle.[26]

When Trooper Prentice approached the driver's side, he detected an odor of burnt marijuana emanating from the open windows.[27] Trooper Heimbach corroborated Trooper Prentice's detection of the odor of burnt

[19] Id. at 9-10.
[20] Id. at 10-11.
[21] Id. at 15.
[22] Id. at 16.
[23] Id. at 16-19.
[24] Id. at 25.
[25] Id.
[26] Id. at 26-28, 111.
[27] Id. at 26.

marijuana.[28] Both Troopers Prentice and Heimbach testified to their training and experience and that based on both, they recognized the smell of burnt marijuana emanating from the vehicle.

First and foremost, notwithstanding the enactment of the MMA and defendant's presentation of a MMA card, the ***most likely*** and ***most reasonable*** explanation for the odor of burnt marijuana emanating from the car was that defendant or one of the other individuals in the car had been smoking it. Whether it was medical marijuana or street marijuana, smoking it is illegal. That there was some other legal possibility does not erase that. *See* Commonwealth v. Moss, 543 A.2d 514, 518 (Pa. 1988) (in assessing probable cause, the fact that other inferences *could* be drawn from circumstances does not demonstrate that the inference that was drawn by police was unreasonable). *Accord*, Mackey v. State, 83 So.3d 942, 947 (Fla. Dist. App. 2012) (to "require that a police officer not only have reasonable suspicion of criminal activity, but reasonable suspicion of the non-existence of an affirmative defense to the crime," would be "contrary to both precedent and common sense").

In addition to the odor of burnt marijuana, there were ample other uncontradicted factors that when considered in their totality and objectively,

[28] Id. at 113, 118-119.

and in light of the Trooper's training, experience and common sense, provided police with probable cause to support the search of the vehicle.[29]

- Trooper Prentice has training in the odor of burnt and raw marijuana, as well as highway interdiction. N.T. 7/17/19, 7-10.

- Trooper Prentice is an experienced officer who has conducted hundreds of narcotic investigations and well over 200 narcotic arrests during his ten years as a police officer. *Id*.

- Trooper Prentice has conducted stolen firearm as well as drug dealing investigations that originated in the same "corridor" in which the subject vehicle was legally stopped. *Id*. at 13-15.

- Trooper Heimbach and Trooper Prentice testified as to the smell of burnt marijuana emanating from the car. *Id*. at 26, 113.

- Defendant was in the passenger seat and was arguing with Trooper Heimbach from the inception of the stop and informed her, "We are not getting out of this car." *Id*. at 27.

- In the backseat was a third individual who appeared "in and out of it." *Id*. at 28, 111.

- When Trooper Prentice requested that the driver exit the vehicle to discuss the reason for the stop and to also interview her to determine if she was driving under the influence based on the smell of burnt

[29] It is well settled that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'" Arkansas v. Sullivan, 532 U.S. 769, 772 (2001), *quoting* Wren v. United States, 517 U.S. 806, 813 (1996). "Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." Maryland v. Macon, 472 U.S. 463, 470-471 (1985), *quoting* Scott v. United States, 436 U.S. 126, 136 (1978). *See also* Commonwealth v. Strickler, 757 A.2d 884 (Pa. 2000) (although officer testified that his reason for requesting defendant's consent to search was "[t]o see if there was anything illegal in his car," the search was based on the totality of the circumstances and the objective test).

marijuana, defendant refused to let her exit.[30] Trooper Prentice attempted to open the driver side door to escort the driver out of the car, but the door was locked. *Id*. at 29-30; 69-70.

- Defendant repeated to Trooper Prentice, "Nobody is getting out of this fucking car." *Id*. at 30.

- The arguing continued for the next 2-3 minutes during which, defendant told the Trooper to "do my job and to just issue me a ticket." *Id*. at 31.

- Arguing continued until Allentown Police Officer responded to the scene to assist the Troopers. At that time, defendant's "attitude changed." *Id*.

- Trooper Prentice testified that based on his training, when a passenger takes over a traffic stop and becomes argumentative, there is more than just a traffic violation going on. *Id*.

- Trooper Prentice further testified that when a stopped party asks for the Trooper to issue a ticket and just move on, this is another indicator of criminal activity. *Id*. at 32

- Trooper Prentice testified that the smell of burnt marijuana along with all of the above "added up" that something criminal was going on. *Id*. at 31-32; 69.

Based on these facts, evaluated objectively, in their totality and not in isolation, the Trooper's search of the vehicle was supported by probable cause. To rule otherwise would be myopic and an exercise in the analysis this Court and our United States Supreme Court has rejected.

[30] *See, e.g.*, Robinette, *supra*, *citing* Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6 (1977) ("once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.").

CONCLUSION

For all of the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the Superior Court's decision vacating the lower court's order granting defendant's Motion to Suppress and Motion for Dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 210 Pa. Code Rule 2135(d)

I, HEATHER F. GALLAGHER, Attorney for Appellee, hereby certify that the attached *Brief for Appellee* contains 6,354 words, based on word count from Microsoft Office Word 2003, which complies with the word count limit pursuant to 210 Pa. Code Rule 2135(d).

Date: September 8, 2021

/s/ Heather F. Gallagher
Chief of Appeals
Office of the District Attorney
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: September 8, 2021

/s/ Heather F. Gallagher
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