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NO. 28 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

TIMOTHY OLIVER BARR II,
Appellant.

BRIEF FOR *AMICUS CURIAE* PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the Order dated September 25, 2020, of the Superior Court, No. 2347 EDA 2019, affirming the order entered August 2, 2019, in the Court of Common Pleas, Lehigh County, at CP-39-CR-0000279-2019.

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<u>STATEMENT OF *AMICUS CURIAE*</u>

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of issues involving the factors to be considered when assessing probable cause, the interplay of the Medical Marijuana Act and Pennsylvania criminal law and/or the interpretation of evidentiary rules in criminal matters is of special interest to district attorneys throughout Pennsylvania.

<u>CERTIFICATION PURSUANT TO Pa.R.A.P. 531(b)(2)</u>

No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

(1) Whether the enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq*., impacts the significance of the odor of marijuana in determining probable cause where the Act only creates a narrow exception for legal marijuana use and does not purport to diminish the significance of the odor of marijuana to probable cause determinations?

(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*.?

COUNTERSTATEMENT OF THE CASE

The Commonwealth has set forth the facts and relevant procedural history and *Amicus* joins in those recitations.

SUMMARY OF ARGUMENT

In Pennsylvania, the passage of the Medical Marijuana Act does not negate the odor of marijuana as a factor in determining probable cause. The possession and use of marijuana remain criminal acts in the Commonwealth of Pennsylvania. The Medical Marijuana Act creates narrow exceptions wherein persons can become authorized to possess and use marijuana for valid medical reasons. The Act does not purport to legalize the use and possession of marijuana in Pennsylvania. That is clearly not the intent of the Legislature.

Other jurisdictions that have addressed the use of the odor of marijuana as a factor in determining probable cause in relation to laws which provide for the medical use of marijuana have found that the odor remains a factor in evaluating whether probable cause exists. There are also jurisdictions that have determined that odor remains a factor in determining probable cause even where the law decriminalizes the use or possession of certain amounts of marijuana for not just medicinal use. Pennsylvania should follow the majority of its sister jurisdictions and find that the odor of marijuana remains a factor in determining probable cause. Further, the possession of a medical marijuana card should be a factor in

determining probable cause. Possession of said card should not mean that the inquiry ends as other factors could be present, including odor, which would support a finding that probable cause exists.

Finally, it is for the Legislature to determine whether the use and possession of marijuana should be legalized to any extent in Pennsylvania. The backdoor attempt at decriminalization or other legalization by saying that the odor of marijuana can no longer support probable cause should not be condoned.

ARGUMENT

I. The enactment of the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.*, does not eliminate the odor of marijuana as a factor to be considered when determining probable cause and the odor of marijuana is not a less significant factor in determining whether probable cause exists.

Appellant argues that the odor of marijuana should no longer be a factor in the determination of probable cause because the enactment of the Medical Marijuana Act (hereinafter "MMA" or "the Act"), 35 P.S. § 10231.101 *et seq*., means that the possession and use of marijuana is no longer *per se* illegal in the Commonwealth. He contends that as a result, police and the courts should no longer be able to use the odor of marijuana when assessing whether probable cause is present to justify a search and/or arrest. In addition, Appellant's *Amici* join Appellant in his contention that the odor of marijuana should carry little to no weight in a probable cause analysis. Appellant's claims, and those of his *Amici*, are, respectfully, without merit. In support of said conclusion, and in support of the Commonwealth and its reasons advocating same, *Amicus* offers the following argument.

In 2016, Pennsylvania authorized the use of marijuana in limited, medical circumstances. The stated purpose of the Act was to permit the

safe use of medical marijuana in specifically delineated situations. 35 P.S. § 10231.102. The structure of the Act sets forth a detailed regulatory scheme specifically designed to limit authorized marijuana use to individuals who will benefit from it to treat symptoms of specific illnesses, diseases, and conditions. In advocating for eliminating the odor of marijuana as a factor in the probable cause analysis, Appellant and his *Amici* are effectively asking this Honorable Court to find that that the specifically delineated rules about medical marijuana effectively decriminalized or even legalized recreational marijuana possession in Pennsylvania. This position is untenable.

Under the Act, a person can possess and use marijuana in specific, limited circumstances. For a person to be able to use and possess marijuana under the Act, they must have a certification that they suffer from one of the medical conditions set forth in the act or approved by the MMA Advisory Board and possess a valid MMA identification card. 35 P.S. §§ 10231.103 & 10231.303(1)(i). When a person has medical marijuana in their possession, they must have their valid identification card and keep the medical marijuana in the container in which the medical marijuana was given to them from the dispensary. The container must set forth where the marijuana was dispensed and information related to the type of

medical marijuana that was dispensed, including the percentages of "…tetrahydrocannabinol and cannabinol…." 35 P.S. § 10231.303(6)-(8).

Medical marijuana can be dispensed in the following forms: "… pill; … oil; … topical forms, including gels, creams or ointments; … a form medically appropriate for administration by vaporization or nebulization, excluding dry leaf or plant form until dry leaf or plant forms become acceptable under regulations adopted under section 1202; … tincture; or … liquid." 35 P.S. § 10231.303(2). "Unless otherwise provided in regulations adopted by the department under section 1202, medical marijuana may not be dispensed to a patient or a caregiver in dry leaf or plant form." 35 P.S. § 10231.303(3).

It is unlawful to use medical marijuana if a person is not authorized pursuant to section 303, section 704, and Chapters 19 and 20 of the Act. 35. P.S. § 10231.304(a). It is also unlawful to "…[s]moke medical marijuana[;]…[e]xcept as provided under subsection (c), incorporate medical marijuana into edible form[;]…[g]row medical marijuana unless the grower/processor has received a permit from the department under this act[;]…grow or dispense medical marijuana unless authorized as a health care medical marijuana organization under Chapter 19[;]…[and] dispense medical marijuana unless the dispensary has received a permit from the

department under [the Act].” 35 P.S. § 10231.304(b).

A person commits a misdemeanor of the second degree, or first degree if a second or subsequent offense, if a person, knowing that they are not privileged to do so, obtains, or attempts to obtain medical marijuana while possessing an identification card; possessing an identification card falsely stating that the person is able to possess medical marijuana; or possessing an identification card with any false information. 35 P.S. § 10231.1305(a). A person commits a misdemeanor of the second degree, or first degree if a second or subsequent offense, if he or she “…adulterates, fortifies, contaminates or changes the character or purity of medical marijuana from that set forth on the patient's or caregiver's identification card.” 35 P.S. § 10231.1306. Outside of the MMA, it remains a criminal offense in Pennsylvania to possess a small amount of marijuana for personal use or to possess larger amounts of marijuana. 35 P.S. §780-113 (a)(16), (30) & (31).

While the MMA has provided an avenue for the lawful use of marijuana for some persons in the Commonwealth, the avenue is a narrow one. The MMA does not unequivocally legalize marijuana possession and use in the Commonwealth. It does not, as suggested by Appellant, undercut the illegal possession of marijuana by the majority of persons in

the Commonwealth. Thus, as addressed below, the odor of marijuana is a valid factor in determining whether probable cause exists.

"In this Commonwealth, the standard for evaluating whether probable cause exists is the "totality of the circumstances" test set forth in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)." *Commonwealth v. Rodriguez*, 526 Pa. 268, 272 (Pa. 1991). This Honorable Court has previously stated that:

> …the odor of marijuana alone, particularly in a moving vehicle, is sufficient to support at least reasonable suspicion, if not the more stringent requirement of probable cause. *See United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) (odor may be sufficient to establish probable cause); *see also Commonwealth v. Copeland*, 955 A.2d 396, 401-03 (Pa. Super. 2008) (same); *Commonwealth v. Stoner*, 236 Pa.Super. 161, 344 A.2d 633, 635-36 (1975) (same).

In Interest of A.A., 649 Pa. 254, 268 (Pa. 2018). This Honorable Court has yet to address the impact of the MMA on the use of the odor of marijuana as factor in the probable cause analysis. Consideration of the analysis done by other jurisdictions makes it clear that the MMA does not preclude using the odor of marijuana as a factor in assessing the existence of probable cause.

Arizona addressed the use of the odor of marijuana as a factor to establish probable cause in *State v. Sisco*, 239 Ariz. 532 (2016). Arizona

has a medical marijuana act, the AMMA. In *Sisco,* the Arizona Supreme Court held that:

> …the general proscription of marijuana in Arizona and AMMA's limited exceptions thereto support finding probable cause based on the smell or sight of marijuana alone unless, under the totality of the circumstances, other facts would suggest to a reasonable person that the marijuana use or possession complies with AMMA. This "odor (or sight) unless" standard comports with the Fourth Amendment standard prescribed in *Gates* and gives effect to AMMA's exceptions by precluding officers or magistrates from ignoring indicia of AMMA-compliant marijuana use or possession when assessing probable cause.

Id. at 538.

In determining that the AMMA did not prohibit the use of the odor of marijuana as a factor in determining probable cause, the Court considered that the AMMA made the use and possession of marijuana legal in certain circumstances and as such meant that "…the odor of marijuana no longer necessarily reflects criminal activity under Arizona law." *Id*. at 536. The question before the Court, however, was not the guilt of a particular party, it was the determination of probable cause.

> Probable cause, however, does not turn on the innocence or guilt of particular conduct, but instead on the degree of suspicion that attaches to particular types of non-criminal acts…. [P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.... [T]herefore, innocent behavior frequently will provide the basis for a showing of probable cause.

Id. (internal citations and quotations omitted).

The AMMA did not decriminalize marijuana in general. Thus, the odor of marijuana would lead a reasonable person to believe that a crime was likely being committed. *Id.* Since the AMMA only applied in limited circumstances and required strict compliance for its protections to apply, "…when an officer detects marijuana by sight or smell, the degree of suspicion that attaches remains high…." *Id.* (internal quotation omitted).

The Arizona Supreme Court went on to set forth that "[b]ecause probable cause is determined by the totality of the circumstances,…and marijuana possession or use is lawful when pursuant to AMMA,…a reasonable officer cannot ignore indicia of AMMA-compliant marijuana possession or use that could dispel probable cause." *Id.* at 537, (internal citations omitted). The Court went on to state that while presentation of a valid AMMA identification card could indicate lawful possession, the totality of the circumstance must still be considered to determine whether that is the case. *Id.*

Florida's intermediate appellate courts have also addressed the use of the odor of marijuana in determining probable cause. Florida also allows for the use of medical marijuana. In *Johnson v. State*, 275 So.3d 800 (Fl. 1st DCA 2019), the Florida appellate court held that the odor of marijuana

supported a finding of probable cause.

In considering whether the enactment of a medical marijuana statute meant that the odor of marijuana could no longer support probable cause, the court set forth that prior to the medical marijuana statutes, the odor of burnt marijuana was sufficient to support a finding of probable cause. *Id.* at 801. The court found numerous issues with defendant argument that the enactment of medical marijuana statutes now meant that odor could not be considered: the medical marijuana law did not allow for marijuana to be smoked; the law did not allow for use of marijuana in a vehicle except for low-THC cannabis; possession of marijuana remains a crime under federal law; and even if smoking marijuana was legal defendant was driving a car and driving while impaired by drugs was illegal. *Id.* at 801-802.

Finally, the court set forth that "…even putting all of this aside, the *possibility* that a driver might be a medical-marijuana user would not automatically defeat probable cause…" and it was not unreasonable for police to conclude that "…there is a fair probability that someone driving around at 2:00 a.m., smelling of marijuana, is acting unlawfully." *Id.* at 802; *see also Owens v. State*, 317 So.3d 1218 (Fl. 2nd DCA 2021).

In *State v. Fry,* 168 Wash.2d 1 (2010) the Washington Supreme

Court found that the production of documentation purporting to authorize the use of marijuana did not mean that police did not have probable cause to obtain a search warrant. Under the relevant Washington law at the time, compassionate use of marijuana was allowed and having authorization to use marijuana was an affirmative defense to marijuana related crimes. *Id.* at 7. Possession of marijuana was crime in Washington and based on the odor of marijuana the police had probable cause to believe there was a crime being committed. The purported authorization created a potential affirmative defense, but it did not negate probable cause. It was not for the police to determine if the legal standard for the affirmative defense had been met. *Id.* at 9-10. *See also People v. Strasburg*, 148 Cal. App. 4th 1052 (2007)(superseded by statute as stated in *People v. Hall*, 57 Cal.App.5th 946 (2020)); *State v. Roberson*, 492 P.3d 620, 623 (OK 2021) ("The decriminalization of marijuana possession for those holding medical marijuana licenses in no way affects a police officer's formation of probable cause based upon the presence or odor of marijuana."); *U.S. v. Fieck*, 54 F.Supp.3d 841 (W.D. Mich. 2014) (The fact that a defendant had a medical marijuana card granting him the right to grow and consume medical marijuana pursuant to the Michigan Medical Marijuana Act (MMMA) did not alter the nature of the evidence required to support

the issuance of a search warrant by requiring showing that his marijuana-related activities were specifically not legal under the MMMA).

The Vermont Supreme Court addressed the interplay of its medical marijuana law and the odor of marijuana as it relates to probable cause in *State v. Senna*, 194 Vt. 283 (2013). Under Vermont's law, police had the ability to check a secure database to see if a person was authorized to have marijuana. Defendant contended that the police had not checked the registry so the odor of marijuana could not support probable cause. The Court set forth that "Vermont's medical marijuana law does not purport to decriminalize the possession of marijuana; it merely exempts from prosecution a small number of individuals who comply with rigid requirements for possession or cultivation. In that sense, the law creates a defense to prosecution." *Id*. at 288-289, (internal citations and quotations omitted).

In states where the possession of marijuana has been decriminalized, courts have also found that the odor of marijuana can still support a finding of probable cause. *See People v. Moore,* 278 Cal. Rptr. 3d 776, 783 (2021)("…while a lawful amount of marijuana is not, *on its own*, enough to establish probable cause, such a lawful amount may establish probable cause where coupled with other factors contributing to an officer's

reasonable belief the defendant may be in violation of other statutory regulations of marijuana possession.")(emphasis in original); *People v. Hill*, 162 N.E.3d 260, 264–68 (IL 2020)(" While we agree that the Act somewhat altered the status of cannabis as contraband, we nevertheless find the officer here had probable cause to search defendant's vehicle."); *State v. Perez*, 173 N.H. 251, 261 (2020)("… although the possession of a small amount of marijuana is now no longer criminal in New Hampshire, the odor of marijuana *may* serve as a basis for a reasonable suspicion that activities involving marijuana, that are indeed criminal, are underway, when considered among the totality of circumstances.)(emphasis in original and internal quotations omitted)*; In re O.S.,* 112 N.E.3d 621 (IL App (1st) 2018)(finding that case law holding that an odor of marijuana was indicative of criminal activity was still good law despite the decriminalization of possessing not more than 10 grams of marijuana); *People v. Zungia*, 372 P.3d 1052 (Co. 2016)(odor of marijuana relevant to the totality of the circumstances analysis even though possession of an ounce of less of marijuana allowed under Colorado law); *Robinson v. State*, 451 Md. 94 (Md. 2017)(odor of marijuana can be used to determine if probable cause exists even though possession of 10 grams or less of marijuana was now a civil offense); *but see Commonwealth v. Cruz*, 459

Mass. 459 (2011); *In the Matter of T.T.,* 308 Or.App. 408 (2021).

As has been detailed above, it is clear other jurisdictions that have addressed the interplay between medical marijuana statutes and the reliance on an odor of marijuana to establish probable cause have determined that medical marijuana statutes do not make the possession and/or use of marijuana by the majority of a state's citizens legal and therefore eviscerate the use of the odor of marijuana as a factor in the determination of probable cause.

Pennsylvania's MMA makes it permissible for a limited class of people to use marijuana for limited purposes. Once a person has the authorization to use medical marijuana, the MMA limits the way a person can consume this medical marijuana. The Act prohibits use of marijuana outside the scope of the MMA for those who are authorized users. This is similar, if not the same, as the jurisdictions addressed above. As the Vermont Supreme Court found in *Senna*, the MMA exempts a small group of persons from prosecution if the comply with the MMA and does not purport to decriminalize the use of marijuana by all those in Pennsylvania. Additionally, there are jurisdictions that still find that odor is a factor in determining probable cause, even with decriminalization that goes further than medical use.

Appellant has completely failed to address any case from other jurisdictions addressing the interplay between a medical marijuana statute and marijuana odor in probable cause determinations. His argument boils down to the idea that the MMA makes marijuana more legal than not and as result, odor can never indicate illegal activity. This is simply untrue.

Appellant's contention that the MMA means that odor of marijuana can no longer be considered as a factor in determining probable cause also completely ignores the various issues that would arise from such a holding. For example, if an officer smells an odor of burnt marijuana when approaching a vehicle solely occupied by the driver, that likely means that the driver is smoking marijuana while driving or smoked marijuana shortly before driving. Smoking marijuana is prohibited under the Act. Assuming, *arguendo*, that the person was ingesting the marijuana in a manner consistent with the Act, it cannot be seriously argued that the Legislature intended for people to drive around smoking marijuana – any more than it can be seriously argued that people should drive around drinking alcohol. If, as in the instant matter, a MMA identification card is produced, there is no way for the officer to determine if the card is valid. While police can check the validity of a license, or even a concealed carry

permit, they cannot check the validity of a MMA identification card. 35 P.S. § 10231.302. Had the Legislature wanted to prevent police from relying on marijuana odor, it could have provided them with a way to determine the validity of identification cards presented during police interactions. Rather, while the possession of a valid card may be an ultimate bar to prosecution, assuming all other aspect of the MMA are complied with, the production of a MMA card is a factor to consider in determining probable cause but does not immediately end the inquiry.

Appellant's *Amici* contend that if the odor of marijuana is to be a factor in determining probable cause, it should carry little to no weight, particularly if it stands alone. The bulk of *Amici's* argument is based off its own data collection and analysis of its own cases in Philadelphia. *Amici* contends that based on its data, from its cases, an officer's ability to smell marijuana is inherently unreliable.

First and foremost, it cannot be ignored that *Amici*'s arguments are directly tied to its own interpretation of its own case load. While *Amici* have provided their "data" with their brief, the conclusions drawn from their analysis are extremely self-serving. Further, there is no way to guarantee that the conclusions drawn, and analysis performed, were not clouded by the desired outcome of *Amici*. For example, while *Amici* sets

forth in its analysis of its own data that there are millions of stops/encounters which occurred during the period of its analysis, the focus appears to be on one particular police officer and an attempt to discredit the work done by this officer. It is clear that during the course of its work, *Amici* had as its goal to either target this one officer or picked what it believed to be the best example to achieve its desired conclusion. There is also no indication that there was any independent review of *Amici*'s work. This singular focus on one officer is inadequate at best and selective bias at worst and makes *Amici*'s study unreliable.

In addition to the questionable underpinnings of the data analysis, *Amici*'s claims regarding the unreliability of marijuana odor, namely that police are often mistaken regarding the presence of odor, or deliberately mistaken about its presence so that encounters with individuals in certain minority groups can be justified, are based solely off their claimed experiences in one county, and more specifically with one officer. There are 67 counties in Pennsylvania, not to mention thousands of police officers. Many of those counties are vastly different than Philadelphia County, where *Amici* are located. Assuming, *arguendo*, that the data analysis and conclusions drawn by *Amici* regarding the reliability of marijuana odor are accurate in anyway, it is only representative of one

county in the Commonwealth and not the entire state. *Amici* has chosen to include an "analysis" of one county, one out of 67 counties. It cannot and in fact does not make any representations about the other counties because *Amici* and Appellant decided not to undertake and include such an analysis. Therefore, to the extent that the study has any value, notwithstanding the significant lack of statistical integrity and rigor as discussed above, it is extraordinarily limited in scope and is glaringly unrepresentative of the rest of the Commonwealth.

Amici has also failed to set forth any cases or law in other jurisdictions which would support its position that the odor of marijuana should have little to no bearing on probable cause determinations. To the contrary, the cases outlined above demonstrate that other jurisdictions rely on an odor of marijuana in making probable cause determinations. In some, it is considered with other factors. In others, it can be a determining factor in and of itself. What is clear, however, is that it remains a factor.

Finally, the argument of both Appellant and his *Amici*, that odor of marijuana is no longer relevant in probable cause determinations, is merely a backdoor attempt to decriminalize or otherwise legalize marijuana use in Pennsylvania. If the odor of marijuana had little to no impact on probable cause determinations, that is tantamount to saying

that marijuana use has no consequence in the Commonwealth. The MMA does not decriminalize or legalize marijuana use. Had the Legislature intended to decriminalize or legalize the use of marijuana it would have done exactly that. Instead, the Legislature made the determination that in limited, medical circumstances, persons can be authorized to use marijuana. Outside of those limited circumstances, the use and possession of marijuana remains illegal in Pennsylvania. The backdoor attempts to produce another outcome should not be given credence.

The odor of marijuana remains a factor to be considered when determining whether probable cause is present. This Honorable Court should, respectfully, follow the lead of the majority of its sister jurisdictions and hold as such. This Honorable Court should also find that the enactment of the MMA does not diminish the significance of the presence of an odor of marijuana and that the possession of an MMA card is yet another factor to be considered when determining probable cause and not the determining factor as to whether probable cause ultimately exists. The MMA should not be expanded to allow people to smoke and/or otherwise use marijuana with impunity and this Court should uphold the limits placed upon the possession and use of marijuana by the Legislature.

This Honorable Court should, respectfully, affirm the order of the

Superior Court which found that the odor of marijuana remains a factor to be considered in determining probable cause and remand the instant matter to the trial court for further proceedings.

CONCLUSION

WHEREFORE, the Pennsylvania District Attorneys Association, *amicus curiae*, respectfully requests that the Superior Court's Judgment and Order be affirmed.

Respectfully submitted,

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Certification

I hereby certify pursuant to Pa.R.A.P. 531 (b)(3) that this amicus brief does not exceed the 7,000-word count limit.

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.

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I, Maureen Flannery Spang, hereby certifies that on September 8, 2021, the foregoing amicus brief was filed through this Court's PACFILE electronic filing system and thereby served the following parties:

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