Supreme Court of New Jersey

DOCKET NO. 084493

048

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	On Petition for Certification to the Superior Court of New Jersey, Appellate Division.
v.	:	
CORNELIUS C. COHEN,	:	Sat Below: Hon. Ellen Koblitz, J.A.D. Hon. Greta Gooden Brown, J.A.D.
Defendant-Petitioner.	:	

SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S PETITION ON BEHALF OF THE STATE

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COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS

The State relies on the recitation of the relevant facts and procedural history in its Appellate Division brief and in the Appellate Division's opinion, adding only the following.

On February 25, 2022, this Court ordered the parties to file briefs "addressing the impact, if any, of the enactment of L. 2021, c. 16 and/or L. 2021, c. 19, on this matter."

LEGAL ARGUMENT

POINT I

AS DEFENDANT'S CAR WAS SEARCHED OVER FIVE YEARS BEFORE L. 2021, c. 16 AND L. 2021, c. 19 TOOK EFFECT, THOSE LAWS DO NOT AFFECT THIS MATTER.

On February 22, 2021, New Jersey "adopt[ed] a new approach to our marijuana policies" with the enactment of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), L. 2021, c. 16, and L. 2021, c. 19. N.J.S.A. 24:6I-32(a). The legislation distinguished between two terms for the same substance — "cannabis," which is now regulated and legal, and "marijuana," which is neither. See N.J.S.A. 24:6I-33 (defining cannabis as excluding marijuana); N.J.S.A. 2C:35-2 (excluding cannabis from definitions of marijuana and controlled dangerous substance, which includes marijuana); N.J.S.A. 24:6I-32(a).

Through amendments to N.J.S.A. 2C:35-10, the Legislature prospectively decriminalized most marijuana possession, so that "on and after" February 22, 2021, possession of more than six

ounces is a fourth-degree crime and possession of any less is no crime at all. N.J.S.A. 2C:35-10(a)(3)(b), (a)(4)(b). But the Legislature distinguished between pre- and post-legislation conduct and retained the criminality of possession before February 22, 2021. N.J.S.A. 2C:35-10(a)(3)(a), (a)(4)(a).

The Legislature did not similarly decriminalize non-possession offenses, and it remains a crime to manufacture, distribute, dispense, or possess with such intent any marijuana. N.J.S.A. 2C:35-5(b)(10), (11), (12). The Legislature did amend the quantities for third- and fourth-degree distribution, such that distributing exactly one ounce is now the latter, but made clear that this slight change applied only to conduct occurring on or after February 22, 2021. N.J.S.A. 2C:35-5(b)(11), (12).

The Legislature also changed the role of odors in the investigation of criminal activity. In amending the possession and distribution statutes, the Legislature added language to each providing that "[t]he odor of marijuana . . . shall not constitute reasonable articulable suspicion to initiate a search of a person to determine a violation" of the subsections addressing post-legislation possession and fourth-degree distribution. N.J.S.A. 2C:35-5(b)(12)(b)(i); N.J.S.A. 2C:35-10(a)(3)(b)(i). The Legislature also created a new statute providing that, unless on school property or at a detention or correctional facility, "[n]one of the following shall, individually or collectively, constitute reasonable articulable suspicion of a crime":

> a. The odor of cannabis or burnt cannabis;
>
> b. The 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 . . . ; or
>
> c. The 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 . . . , in proximity to any amount of cash or currency.
>
> [N.J.S.A. 2C:35-10c.]

Beyond prospectively legalizing cannabis and largely decriminalizing marijuana possession, the Legislature also provided relief with respect to specific enumerated marijuana offenses committed before February 22, 2021.[1] N.J.S.A. 2C:35-23.1; N.J.S.A. 2C:52-6.1. For those offenses, the Legislature required (a) the non-prosecution and dismissal of pending charges "involving" the enumerated offenses; (b) the vacating of entries of guilt, such as guilty verdicts or pleas, that "solely involved" the enumerated offenses and were entered but not reduced to a formal disposition; (c) the vacating of the conviction and remaining sentence for any person who "is or will be serving a sentence" due to a conviction "solely for" the enumerated offenses. N.J.S.A. 2C:35-23.1. The Legislature also required the expungement of any case that "includes a conviction

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[1] The relief applies to marijuana and hashish offenses in violation of N.J.S.A. 2C:35-5(b)(12), N.J.S.A. 2C:35-10(a)(3), (a)(4), (b), (c), N.J.S.A. 2C:36-2, or N.J.S.A. 39:4-49.1, or subject to conditional discharge under N.J.S.A. 2C:36A-1.

. . . solely for" the enumerated offenses, and the vacating of any remaining sentence. N.J.S.A. 2C:52-6.1.

"The primary goal of statutory interpretation is to determine as best [as possible] the intent of the Legislature, and to give effect to that intent." In re Registrant J.D-F., 248 N.J. 11, 20 (2021) (alteration in original) (citation omitted). In doing so, "courts start with the plain language of the statute, 'which is typically the best indicator of intent.'" State v. Lopez-Carrera, 245 N.J. 596, 612-13 (2021) (citation omitted). If "the Legislature's chosen words lead to one clear and unambiguous result," then "the interpretive process comes to a close" and the law is applied as written. State ex rel. D.M., 238 N.J. 2, 16 (2019) (citation omitted).

Thus, when the language of a statute clearly expresses the Legislature's prospective intent for a statute, the inquiry is over. See State v. J.V., 242 N.J. 432, 444 (2020). But "[w]hen the Legislature does not clearly express its intent to give a statute prospective application, a court must determine whether to apply the statute retroactively." Id. at 443 (citation omitted). A new statute will be applied retroactively only if (1) "the Legislature intended to give the statute retroactive application" and (2) "retroactive application of that statute will [not] result in either an unconstitutional interference with vested rights or a manifest injustice." Id. at 444 (alteration in original) (quoting James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 556 (2014)).

"Generally, new criminal statutes are presumed to have solely prospective application." Id. at 443. To overcome this presumption, this Court "must find the 'Legislature clearly intended a retrospective application' of the statute through its use of words 'so clear, strong, and imperative that no . . . meaning can be ascribed to them' other than to apply the statute retroactively." J.V., 242 N.J. at 443 (alteration in original) (citation omitted). This Court has recognized three exceptions to the presumption of prospective application that warrant retroactive application of a new law:

> (1) the Legislature provided for retroactivity expressly, either in the language of the statute itself or its legislative history, or implicitly, by requiring retroactive effect to 'make the statute workable or to give it the most sensible interpretation'; (2) 'the statute is ameliorative or curative'; or (3) the parties' expectations warrant retroactive application.
>
> [Id. at 444 (citation omitted).]

"But [this Court] look[s] to those exceptions only in instances 'where there is no clear expression of intent by the Legislature that the statute is to be prospectively applied only.'" Ibid. (citation omitted).

Defendant claims that CREAMMA and L. 2021, c. 19, impact his case because "his plea involves marijuana possession" and because the search of his car was based in part on the overwhelming smell of marijuana emanating from it when he was stopped for multiple traffic offenses. He is mistaken. The

legislation took effect five years after the search of his car and two years after his conviction for unlawful possession of a weapon. The legislation is not and never was intended to apply to his case, and particularly not to the seizure of his firearm.

Defendant's first claim is flawed not for reasons related to retroactivity, but because the relief of N.J.S.A. 2C:35-23.1 and N.J.S.A. 2C:52-6.1 simply does not apply to him. Those statutes do provide relief for those convicted of enumerated marijuana offenses committed before February 22, 2021. But defendant was not charged with, did not plead guilty to, and was not convicted of any marijuana offense, let alone one of the enumerated offenses; he was charged with, pleaded guilty to, and was convicted of a weapons offense. Thus, he has no "conviction . . . solely for one or more of the [enumerated] crimes" and is not entitled to have his conviction vacated under N.J.S.A. 2C:35-23.1(b)(2) or expunged under N.J.S.A. 2C:52-6.1.

Moreover, the "involved" language relied on by defendant appears in the subsections addressing marijuana cases that had not reached a final disposition by February 22, 2021 – pending charges and entries of guilt not yet reduced to final judgment. See N.J.S.A. 2C:35-23.1(a), (b)(1). It was not used in the subsection addressing cases, like defendant's, in which a judgment of conviction was entered before February 22, 2021, and thus does not apply to defendant's case. See N.J.S.A. 2C:35-23.1(b)(2). But, to be sure, the Legislature's use of the word "involved" in the subsections addressing non-final cases does

not suggest any intent to extend relief beyond defendants charged with or convicted of marijuana offenses and instead to every defendant for whom marijuana played any role in their investigation. Had the Legislature intended to extend relief to non-marijuana cases that derived from evidence found during a marijuana-related search, it could have and would have done so. But it did not, and that decision cannot be ignored.

Defendant's second claim — that N.J.S.A. 2C:35-10c retroactively invalidates the search of his car because it was based in part on the odor of marijuana — is also mistaken, both because the language on which he relies does not apply and because the new statute was not intended to apply retroactively.

First, consistent with the rest of the legislation, N.J.S.A. 2C:35-10c maintains the distinction between cannabis and marijuana — notably referring to cannabis in subsection (a), and marijuana in subsections (b) and (c) — and provides that it is "the odor of cannabis," not marijuana, that cannot constitute reasonable suspicion. And because there was no cannabis when defendant's vehicle was searched in January 2016, the odor was necessarily marijuana, and thus does not fall under N.J.S.A. 2C:35-10c(a), even if that statute is applied retroactively.

And second, as is clear from both the plain language and legislative context, the Legislature did not intend for N.J.S.A. 2C:35-10c to apply retroactively. CREAMMA provided that the section establishing N.J.S.A. 2C:35-10c "shall take effect immediately," CREAMMA § 87(a)(1) — language this Court has

repeatedly recognized "bespeak[s] an intent contrary to, and not supportive of, retroactive application." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 389 (2016) (alteration in original).

This understanding is further supported by the fact that N.J.S.A. 2C:35-10c refers to the odor of cannabis, not marijuana. The use of the term cannabis demonstrates the Legislature's intent for the statute's prospective application for the same reason it makes the statute inapplicable here: because cannabis is a term reserved for the legal form of the substance, and that form did not exist before February 22, 2021. And because N.J.S.A. 2C:35-10c is limited to the odor of cannabis, it is both necessarily prospective and a clear indication that the Legislature intended as much.

That N.J.S.A. 2C:35-10c is intentionally limited to the odor of cannabis also aligns with the amendments to the possession and distribution statutes addressing the odor of marijuana. Had the Legislature intended N.J.S.A. 2C:35-10c to apply to both cannabis and marijuana despite its plain language indicating otherwise, the amendments to the possession and distribution statutes would have been redundant and unnecessary. And even the Legislature's choice to include express prospective language in the possession and distribution statutes but not in N.J.S.A. 2C:35-10c supports its prospective nature. Unlike N.J.S.A. 2C:35-10c, which needs no such express language because its use of the term cannabis renders it necessarily prospective, the possession and distribution statutes had to specify their

prospective nature, as marijuana refers to the substance's unlawful form that exists both pre- and post-legislation.

Finally, the prospective nature of N.J.S.A. 2C:35-10c is supported by and consistent with settled constitutional precedent. "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.'" State v. Myers, 442 N.J. Super. 287, 295 (App. Div.) (alterations in original) (quoting State v. Walker, 213 N.J. 281, 290 (2013)), certif. denied, 224 N.J. 123 (2016). And our courts have likewise consistently recognized that the reasonableness of police conduct – "[t]he touchstone of the Fourth Amendment and Article I, [P]aragraph 7 of the New Jersey Constitution – is judged according to the circumstances that existed at the time of the search. See State v. Watts, 223 N.J. 503, 514 (2015) (second alteration in original).

To apply N.J.S.A. 2C:35-10c retroactively would ignore the statute's plain language, which limits it to circumstances that could only exist after February 22, 2021, and would hold police to a standard inconsistent with decades of clear precedent in place at the time of their conduct and that endured until the statute's enactment. This would serve no ameliorative purpose, nor would it serve the deterrent purpose of the exclusionary rule, as officers are bound to enforce the law as it exists and cannot be retroactively deterred from acting within its bounds. See Michigan v. DeFillippo, 443 U.S. 31, 38 (1979); State v.

Domicz, 188 N.J. 285, 297 (2006). And it could potentially require revisiting every case in which a search was based in part on the odor of marijuana. Had the Legislature intended such a significant upheaval, surely it would have left some trace of that intent.

Defendant's car was searched in January 2016, at a time when decades of precedent made clear that the odor of marijuana alone could establish probable cause to support the search. As nothing in CREAMMA or L. 2021, c. 19 retroactively impacts the lawfulness of the search, and no substantial question is raised and the matter is not of general public importance, defendant's Petition for Certification should be denied.

CONCLUSION

For the foregoing reasons, and those stated and referenced in the State's previously filed letter, the State urges this Court to deny defendant's Petition for Certification.

Respectfully submitted,

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DATED: April 7, 2022