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***Florida's Fifth District Court of Appeal Holds "Plain Smell" of Cannabis Alone is Insufficient to Establish Reasonable Suspicion for Detention or Probable Cause for Search***

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In a case which the full Fifth District Court of Appeal declared presented "an issue of exceptional importance," the Court examined the continued viability of the "plain smell" doctrine when applied to cannabis in light of recent changes to Florida and federal law regarding hemp.<sup>1</sup> The Court summarized, [b]ecause it is no longer 'immediately apparent' that the smell of cannabis is synonymous with criminal activity, it cannot be the sole basis supporting reasonable suspicion for an investigatory detention. Instead, the smell of cannabis is a factor that may be considered under the totality of the circumstances." It logically follows that if the plain smell of cannabis is insufficient to constitute reasonable suspicion for a detention, it is insufficient to constitute probable cause for a search. This is but the most recent case addressing plain smell in the light of recent changes in the law regarding hemp and contributes to the conflicting law on the issue in Florida.

This case arose from a 2021 consensual encounter in Jacksonville, Florida. An officer on routine patrol observed a vehicle pull into a parking lot of a closed business. The officer initiated a citizen contact for the purpose of determining the driver's presence in the lot based his Department's emphasis on prevention of property crimes on the night shift. Upon making contact, the officer smelled the odor of fresh marijuana and began a criminal investigation. The driver was ordered out of the vehicle, handcuffed, and the vehicle was searched, resulting in the discovery of marijuana and paraphernalia. The motorist was then arrested.

In a motion to suppress hearing, the defendant challenged the detention, and argued that the changes in Florida and federal law legalizing hem required law enforcement officers to develop some indication of criminal activity in addition to the mere smell of cannabis before conducting an investigatory detention, and offered some legal authority in other Florida Districts supporting the position.<sup>2</sup> The State argued that plain smell alone was sufficient to establish probable cause, and offered its own authority supporting its position.<sup>3</sup> The motion to suppress was denied, and the defendant pled nolo contendere to possession of drug paraphernalia, specifically reserving his right to appeal the denial of his dispositive motion to suppress.

The three-judge appellate panel held that the motorist was not initially detained when the officer made contact, and that the officer developed reasonable suspicion

for continued detention based on the totality of circumstances, including the officer's observations of: (1) the motorist pulling into a parking lot of a closed business and backing into a parking spot; (2) the motorist placing something in the back seat when he saw the officer approaching; (3) the smell of marijuana in the vehicle; and (4) the motorist's "dubious" explanation about why he was in the parking lot. The panel reasoned that it need not reach the issue of the sufficiency of plain smell to justify the search because the detention and subsequent search were not authorized by plain smell *alone*. In addition to these facts, the appellate panel considered additional facts developed at the suppression hearing: (1) the motorist denied using marijuana or having a medical marijuana card despite the odor, and (2) the officers observed loose marijuana ("shake") on the motorist. "Taken together," the appellate panel reasoned, "these facts, developed over the course of their brief investigation, provided the officers with the probable cause to search [the motorist's] vehicle."<sup>4</sup> The appellate panel concluded its opinion by noting "[i]n a different scenario, where a search is conducted truly on plain smell *alone*, the outcome might be different."<sup>5</sup>

The defendant petitioned for the entire Fifth District Court of Appeal to evaluate the case which was granted because of its interpretation of the importance of the issues. The *en banc* Court withdrew the panel opinion and replaced it with its own. The *en banc* Court conducted a detailed analysis of changes to Florida and federal law, noting, among other things, the lawful possession of medical marijuana under certain circumstances and changes in federal law removing hemp from the federal definition of marijuana. "These statutory changes are significant and warrant both recognition and proper application by the courts."<sup>6</sup> Applying these changes, and apparently minimizing the additional factors the appellate panel relied upon, the *en banc* Court reached a different conclusion, "under the totality of the circumstances, [the officer] did not develop reasonable suspicion of criminal activity because the degree of suspicion that attached to the observed conduct is too insignificant."<sup>7</sup> The Court went on to note "[t]he record is devoid, in testimony or otherwise, of any circumstances that would have led a reasonable officer to believe that [the motorist] was unlawfully possessing cannabis *at the inception of the investigatory detention*"<sup>8</sup>

This last conclusion is debatable, because the record established, at a minimum, that the officer documented the motorist placing something in the back seat as he approached, inconsistent statements about the motorist's presence in the lot, and, perhaps most relevant, a denial of using marijuana or hemp *despite the smell of marijuana observed by the officer*. A fair analysis of the *en banc* opinion could be critical of the Court's omission of these relevant factors which reasonably disputes its conclusion that the record is "devoid" of evidence suggesting a reasonable suspicion of criminal conduct. Despite the Court's framing of the evidence and analysis of the plain smell doctrine, it held that, at the time of the encounter, the officer reasonably relied on binding precedent, and therefore, the detention and subsequent search were lawful, thus affirming the appellate panel's final conclusion, albeit for different reasons.

The questioning of the Court's rationale was reflected in one judge's concurring opinion. He wrote separately to specifically note that this case was not one addressing plain smell alone. He referenced some of the additional factors supported by the record, such as, pulling into the parking lot of a closed business, the motorist's evasive response to questioning, the placement of something in the back seat upon sight of the officer. Notably, the movement, "[t]aken alone might not be suspicious at all, but when combined with the smell of marijuana, moving the bag might be viewed as an attempt to place contraband out of the view of the approaching officer."<sup>9</sup> Judge McIver recognized that individually these additional factors may be entirely innocent, however, the investigating officer "was not required to reject such inferences in favor of a possible innocent explanation."<sup>10</sup> Similarly, Judge Wallis concurred in result only, noting that the record below was insufficient to establish that hemp and cannabis smell the same, thus rendering this case a poor one to revisit the plain smell doctrine.<sup>11</sup>

On balance, one could reasonably criticize the use of this case to reevaluate the continued viability of the plain smell doctrine in light of the additional articulable factors weighing on the existence of reasonable suspicion for detention. However, such criticism would be academic and the well-reasoned concurring opinions are of no legal effect. It is clear, however, that within the Fifth DCA, plain smell alone is insufficient as a matter of law to articulate reasonable suspicion to detain or probable cause to search. Less clear is the state of the law in other Districts. By way of example only, at least one case in the First District has held that the smell of burnt marijuana was sufficient basis for probable cause to search a vehicle.<sup>12</sup> Ultimately, it will likely require the Florida Supreme Court to resolve the issue with finality.

Given the varied interpretations and inter-District conflict on the continued viability of the plain smell doctrine and its sufficiency to alone create reasonable suspicion or probable cause, Florida's Chiefs and law enforcement executives should actively communicate with their State Attorneys to ensure their policies, procedures, and training comply with the law applicable in their District. As a hedge against future changes in legal interpretation, officers should no longer rely solely on the odor of marijuana alone to justify detentions or searches, but instead, should document the totality of circumstances to support their actions. Individually innocuous conduct, in the aggregate, may provide sufficient articulable facts under the totality of circumstances to justify detention, search, or arrest.

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<sup>1</sup> *Baxter v. State*, 389 So. 3d 803 (Fla. 5th DCA 2024).

<sup>2</sup> *Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020); *State v. Nord*, 28 Fla. L. Weekly Supp. 511, 512-13 (Fla. 20th Cir. Ct. Aug. 8, 2020).

<sup>3</sup> *Johnson v. Sate*, 275 So. 3d 800, 802 (Fla. 1st DCA 2019); *Owens v. State*, 317 SO. 3d 1218, 1220 (Fla. 2d DCA 2021).

<sup>4</sup> *Baxter v. State*, No. 5D23-118, 2023 WL 7096645 \*5 (Fla. 5th DCA Oct. 27, 2023) *withdrawn and replaced by Baxter*, 389 So. 3d 803.

<sup>5</sup> *Id.* (emphasis in the original).

<sup>6</sup> *Baxter*, 389 So. 3d at 811.

<sup>7</sup> *Id.* at 812.

<sup>8</sup> *Id.* at 813.

<sup>9</sup> *Id.* at 816, *Mclver, J., concurring as to result only*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 824, *Wallis, J., concurring as to result only*

<sup>12</sup> *Johnson v. State*, 275 So. 3d 800 (Fla. 1st DCA 2019).