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“The Nose Knows” is Going Up in Smoke



by
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With the legalization of hemp, law enforcement is faced with a new challenge as the smell and appearance of hemp is indistinguishable from cannabis.

In the State of Florida, more than two years after voters approved medical marijuana, the passage of SB 1020¹ authorizes the legalization of hemp and its derivatives. Effective July 1, 2019, this new law approving a state hemp program redefines cannabis and amends Fla. Stat. §893.02.² In doing so, the traditional method of establishing cause for search and arrest is changing as we speak. Until now, the smell of cannabis alone would be sufficient for law enforcement to establish probable cause to perform a warrantless search of a vehicle and for law enforcement to bring charges on any subsequent discovery, including unrelated incriminating evidence such as weapons, contraband, and illicit drugs.

In *State v. Betz*, 815 So2d 627 (Fla.

2002), defendant Betz was stopped due to one of the vehicle’s headlights being out. The investigating officer smelled a “very strong odor of marijuana” coming directly out of the vehicle’s rolled-down window which prompted the officer to search Betz’s person and his vehicle where marijuana was found. The Florida Supreme Court held “As the odor of previously burnt marijuana certainly warranted a belief that an offense had been committed, this unquestionably provided the police officers on the scene probable cause to search the passenger compartment of the respondent’s vehicle.” *Id.* at 633.

Some defendants have attempted to argue, without much luck, that the holding in *Betz* became irrelevant after Florida authorized medical marijuana. In *Johnson v. State*, 275 So2d 800 (Fla. 1st DCA, 2019), another case involving a pretextual traffic stop for a blown headlight, officers smelled burnt marijuana, detained defendant Johnson, and conducted a warrantless search of the car. Inside the car, officers found an illegal concealed firearm. Defendant Johnson argued in his motion to suppress that while the officer’s “search based on

the odor of marijuana was constitutional prior to the enactment of [§381.986, Fla. Stat.], now that medical marijuana is legal, it is no longer a sufficient basis for probable cause.” *Id.* at 801. The 1st DCA rejected the argument on several grounds including “...even if smoking marijuana were legal altogether, the officers would have had probable cause based on the fact that Johnson was operating a car.” *See* §316.193(1)(a), Fla. Stat. (criminalizing driving under the influence of drugs). *Id.* at 802.

Currently, there is no way for law enforcement to distinguish between illegal cannabis and legal hemp. This inability to distinguish applies to canine trained drug dogs as well. Hemp and marijuana are just two different parts of the same plant. Although they smell and look alike, Tetrahydrocannabinol (THC) levels are the key difference between the two. THC is the psychoactive compound in cannabis that gets one high. Law enforcement must now distinguish which part of the plant they have obtained, based on the level of THC.

Hemp, now defined under a new section of Florida Statute 581.217(3)(d), is the “plant *Cannabis sativa* L. and any part

of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9-tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis.”³ Cannabinoids extracted from hemp, such as cannabidiol (CBD) fall under this new legal category of cannabis, as well.

Test kits currently in use by law enforcement are not sophisticated enough to distinguish the levels of THC between hemp and marijuana, and neither can the Florida Department of Law Enforcement (FDLE). Right now these agencies can only test for the presence of cannabis, not whether the level of THC is less than the legal limit of 0.3 percent. Without lab tests quantifying the percentage of THC in a substance, prosecutors are unable to establish proof beyond a reasonable doubt that the substance in question is illegal in nature.

Currently, Syndicate Chemistry based out of Orlando is the only company in the United States that claims to market a field test for hemp.⁴ This third-party company claims their field tests can accurately distinguish between legal hemp and illegal cannabis. However, assuming this is an accurate claim, individual agencies are still responsible for the expense of paying for the concentration of THC lab testing. And even if agencies pay for this new test kit, it will still need to be a joint effort, as the findings will need to be validated by state labs, such as FDLE, for reliability. Not to mention the very real challenge of increased submissions of a specific nature requiring additional personnel, equipment, and related funding.

To be blunt, all of this means that law enforcement can no longer rely on smell or sight alone to determine probable cause to conduct a warrantless search. Those old techniques cannot determine if the substance is legal hemp versus illegal cannabis. Certainly, the presumption cannot be that it is illegal cannabis. No, the presumption must be innocence. Law enforcement should not assume that a positive field test of cannabis provides

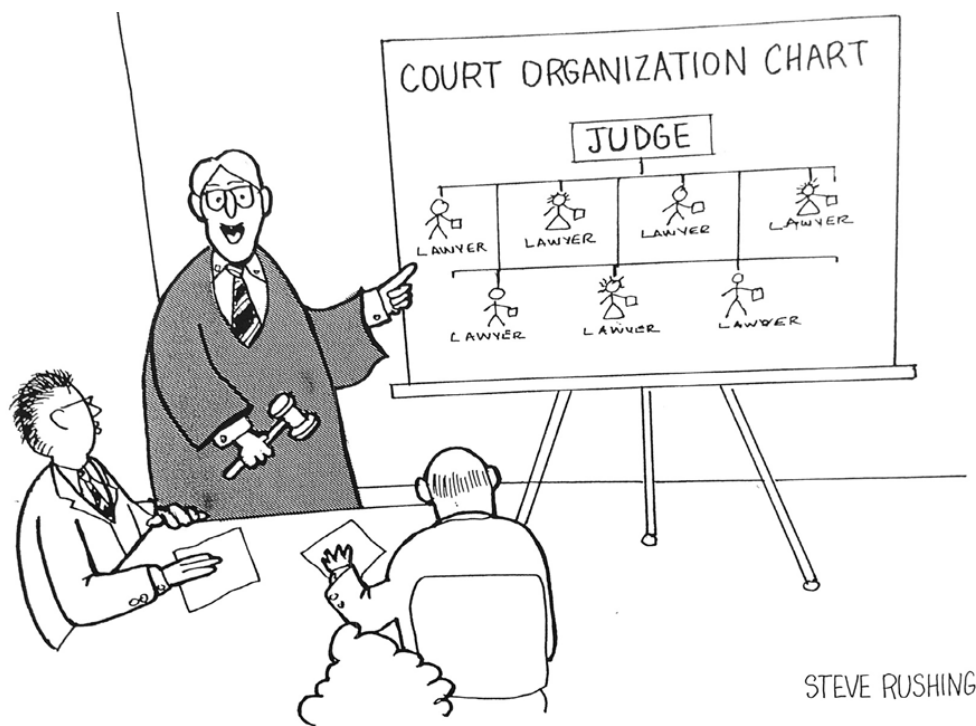
probable cause to search for marijuana or to make an arrest.

In fact, some agencies have already begun warning their officers not to make arrests for suspected marijuana at all. A memorandum sent out by Seminole-Brevard State Attorney Phil Archer states his office will not file charges in cases involving suspected marijuana until there is a lab test done to prove the THC level in the substance. In the memo, Archer wrote that “FDLE state labs have stated they are not able to test the percentage of THC in a sample and there is no current plan to do so.”⁵

In a similar statement, Orange-Osceola State Attorney Aramis Ayala said, “While cases will continue to be presented to our office and each will be evaluated on its individual merits, it is not only foreseeable, but highly likely that in most cases Assistant State Attorneys will lack a good-faith basis to believe a case can be proven beyond a reasonable doubt without scientific analysis from an accredited independent testing laboratory. Therefore, prior to filing cases involving suspected cannabis, a lab report with results indicating that the tested substance’s THC concentration exceeds 0.3 percent on a dry-weight basis

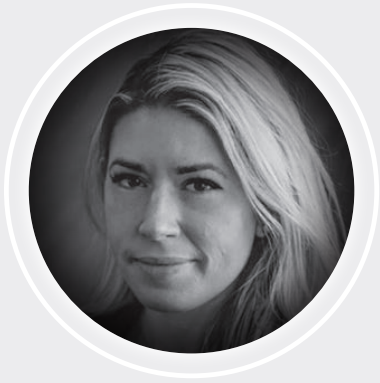
is required. Without a corresponding lab result, no ASA is authorized to prosecute these cases.” Orange County Sheriff’s Office sent a legal bulletin stating that until further notice, presumptive tests may not be used to determine whether a substance is illegal cannabis. The bulletin goes on to state, “Please note while a deputy can establish probable cause to believe a substance is marijuana and subsequently make an arrest, the State Attorney will not prosecute the case without a lab report indicating the suspected substance’s THC concentration exceeds 0.3 percent.”⁶

In similar statements, Palm Beach County State Attorney David Aronberg advised law enforcement that they “will not be able to prosecute any marijuana or THC oil cases without a test from an accredited lab indicating that the THC content is over 0.3 percent,”⁷ and Indian River-Martin-Okeechobee-St. Lucie State Attorney Bruce Colton echoed similar sentiment in a memorandum advising all law enforcement agencies of the 19th Judicial Circuit that “Since there is no way to visually distinguish hemp from cannabis, the mere presence of suspected cannabis or its odor will no longer suffice to establish probable cause to believe that



STEVE RUSHING

“It’s really quite simple.”



RACHEL CURTIS

Rachel's greatest strength as an attorney has always been her compassion for people. She began her career at the Miami-Dade State Attorney's Office where she initially was responsible for prosecuting a myriad of offenses until she found her niche as an attorney in the Sexual Battery Unit. In this specialized unit is where her dedication to, not only the victims, but also to ensuring that the accused was treated fairly throughout the judicial process, was fully on display. After five years as an assistant state attorney, she joined Ratzan & Faccidomo where she has focused her attention on defending those accused of criminal and regulatory offenses. Her compassion and ability to relate to people has served her well in connecting with clients and, ultimately, offering her wealth of knowledge that she obtained through her hard work as a prosecutor. When she is not serving her clients, Rachel dedicates her time to time to FACDL, FACDL-Miami, Miami-Dade FAWL, and Temple Beth Shalom. 🏡

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the substance is cannabis.”⁸

Likewise, the Daytona Beach Police Department sent a memo to all of their sworn personnel instructing them that, “As of midnight July 1, 2019, no officer shall make a custodial arrest for cannabis.”⁹

In Florida, the prosecution is moving towards an “odor-plus” or “sniff-plus” totality of the circumstances type standard in determining probable cause. Here, the search is only justified if the smell or look of the substance is observed in addition to other factors such as furtive movements, scales or cash that would indicate dealing or trafficking, air fresheners (a very weak argument supposing that there is no need to mask the scent of legally possessed cannabis), impairment of the individual, type of packaging, the quantity of the substance, and so forth. With this very subjective approach, it will be up to the courts to weed out the good factors from the bad.

However, it remains a constant that if your client pipes up and confesses, or consents to a search, they could really take a hit. As we all know, if law enforcement receives consent from the suspect, the officer may move forward with a warrantless search. Possession of Cannabis with over 0.3% THC is still very much illegal in the state of Florida, with the exception of approved medicinal marijuana. Our clients should be mindful that consent to search will all but eliminate our motion to suppress argument that the search lacked probable cause and violated their Fourth Amendment rights. Although there is still a lot up in the air right now, I have high expectations that the courts will hash it out and will continue to

distinguish these relevant criminal statutes as cases proceed. 🏡

¹The Florida Senate, CS/CS/SB 1020: State Hemp Program, www.flsenate.gov/Session/Bill/2019/01020.

²The 2019 Florida Statutes, Fla. Stat. §893.02, www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0893/Sections/0893.02.html.

893.02(3) “Cannabis” means all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. The term does not include “marijuana,” as defined in s.381.986, if manufactured, possessed, sold, purchased, delivered, distributed, or dispensed, in conformance with s.381.986. The term does not include hemp as defined in s.581.217 or industrial hemp as defined in s.1004.4473. The term does not include a drug product described in s.893.03(5)(d).

³The 2019 Florida Statutes, Fla. Stat. §581.217(3)(d), www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&SearchString=581&URL=0500-0599/0581/Sections/0581.217.html.

⁴Syndicate Chemistry, The First Hemp/Marijuana Field Test Kit in America, <https://syndicatechemistry.com/>.

⁵Karla Ray, “How Local Law Enforcement Agencies are Handling Florida’s New Hemp Law,” WFTV, www.wftv.com/news/9-investigates/how-local-law-enforcement-agencies-are-handling-florida-s-new-hemp-law/969539930.

⁶“Orange County Sheriff’s Office, Legal Bulletin re: Hemp Legalization and Probable Cause,” https://media.clickorlando.com/document_dev/2019/08/05/19-11%20-%20Hemp_1565037576480_22153579_ver1.0.pdf.

⁷David Aronberg, email re: Hemp bill, www.documentcloud.org/documents/6190912-Hempemail.html.

⁸Bruce H. Colton, Memorandum re: Marijuana Prosecutions, www.documentcloud.org/documents/6190913-Marijuana-Prosecutions.html.

⁹Craig A. Capri, Chief of Police, Memorandum re: Cannabis Investigation Procedures, https://media.clickorlando.com/document_dev/2019/08/05/Cannabis%20Investigation%20Procedures_1565037660717_22153580_ver1.0.docx.

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