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POST

Failing the Sniff Test: Using Marijuana Odor to Establish Probable Cause in Illinois Post-Legalization

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Imagine that a convicted felon in Illinois is pulled over by the police. He hasn't smoked all day. Stuffed in his coat pocket, however, is a baggy containing marijuana residue—a remnant from several days prior. During the stop, the officer lawfully conducts a canine sniff using a canine trained to alert for marijuana. The canine alerts to the residue in the baggy, establishing probable cause for the officer to search the car. His search uncovers a pistol in the backseat. Suddenly, a prosecutor charges the man under § 18 U.S.C. 922(g), which criminalizes a felon's possession of a firearm. Now, the man faces a prison sentence of up to ten years.

The man is justifiably perplexed. How could the police establish probable cause through a canine's alert to the presence of a legal drug?

On January 1, 2020, Illinois became one of nineteen states that have legalized marijuana for recreational use. Much of the focus has been on the economic impacts of legalization, but far less attention has been paid to legalization's effects on criminal law and privacy. This Essay will outline those implications, compare reactions to legalization in various states, and analyze the current state of the law in Illinois. Ultimately, Illinois's approach to probable cause when marijuana is involved is less developed—and, so far, a clear outlier—compared to its sister states who have also legalized marijuana.

I. The Fourth Amendment and Probable Cause

Understanding legalization's implications requires a short overview of U.S. doctrine on police searches and privacy. The Fourth Amendment grants people a right to be free from unreasonable searches and seizures, and evidence uncovered during unconstitutional searches can be suppressed in court. Despite a general right to privacy, the Supreme Court has long recognized an exception for vehicular searches when an officer has probable cause to believe that a vehicle contains contraband.

Officers can establish probable cause in several ways. First, most states allow officers to establish probable cause through the plain view or plain smell test. For example, the Illinois Supreme Court held in *People v. Stout* (Ill. 1985) that a marijuana odor emanating from a car gives officers probable cause to conduct a search, provided that the officers are trained to recognize the smell. Before legalization, police officers frequently used the plain smell test to justify warrantless searches of vehicles during traffic stops.

Second, officers can also lawfully establish probable cause by conducting canine sniffs. *Rodriguez v. United States* (2015), however, limited an officer's ability to conduct a canine sniff to two scenarios. The first is when an officer has independent reasonable suspicion that a crime has occurred. The reasonable suspicion test—which governs most stops and was initially set out in *Terry v. Ohio* (1968)—considers the totality of the circumstances and requires the officer to have “specific and articulable facts . . . [that] reasonably warrant th[e] intrusion.” Second, *Rodriguez* allows for canine sniffs during traffic stops even if officers lack reasonable suspicion, provided they do not prolong the stop “beyond the time reasonably required to complete th[e] [stop’s] mission.” The stop’s “mission” includes activities typical of traffic stops—like checking the driver’s license, searching for outstanding warrants, and writing tickets—as well as certain “negligibly burdensome” safety precautions.

The gradual legalization of marijuana implicates both methods of establishing probable cause for vehicle searches. When it was illegal, officers could rely on the plain smell of marijuana for probable cause, reasoning that the odor alone was evidence of a crime—and that individuals had no right to maintain the privacy of their criminal activity. But in states that have legalized marijuana, the smell of marijuana alone no longer implies criminal activity. Though an individual could still possess a quantity over the legal limit, an officer has no way of telling the quantity based on smell alone.

The legalization of marijuana similarly poses issues for probable cause by canine sniff. Many police canines are trained to detect marijuana—oftentimes in conjunction with other drugs. And in states with legalized marijuana, a canine’s alert does not distinguish between marijuana and illegal drugs the canine is also trained to alert for. Retraining canines not to detect marijuana is expensive, often ineffective, and can be inhumane.

II. The Plain Odor Test

States vary in their response to legalization's effects on Fourth Amendment searches, and the doctrine in many states is still evolving. Several states have laws specifically prohibiting officers from using the plain odor test. In Virginia, for example, lawmakers passed a statute in 2020 providing that “no law-enforcement officer may lawfully

stop, search, or seize any person, place, or thing solely on the basis of the odor of marijuana.” The New York law legalizing marijuana similarly outlawed relying on marijuana odor as the sole basis for establishing probable cause.

Where state legislatures have failed to act, courts have sometimes stepped in to fill the gaps. In *Lewis v. State* (Md. 2020), Maryland’s highest court unanimously found that more than the odor of marijuana is necessary to establish probable cause to search a vehicle. Since the police officer who smelled marijuana had no information “indicating possession of a criminal amount of marijuana,” the odor alone could not justify a search. Massachusetts’s Supreme Judicial Court reached a similar conclusion, as have lower courts in states where the issue has yet to reach the highest court. Vermont’s highest court found that a “faint smell of burnt marijuana” was not enough to establish probable cause, but it left open the possibility that a more overpowering odor could be sufficient.

By contrast, whether the plain odor test is an adequate basis to establish probable cause in Illinois remains unresolved. In *People v. Hill* (Ill. 2020), the Illinois Supreme Court considered whether a police officer had probable cause to search a defendant’s car after the officer smelled raw cannabis and testified to observing a “bud” in the back seat. Significantly, though the decision was reached after marijuana was legalized, the incident took place in 2017—after marijuana was decriminalized but before it was legalized for recreational use. Thus, the court never answered the question of whether odor alone could establish probable cause post-legalization. Instead, it held that since cannabis possession at the time “remained illegal,” the “decriminalization of possessing small amounts of cannabis did not alter the status of cannabis as contraband.” Moreover, since the officer in *Hill* “relied on more than the odor of raw cannabis,” the court found it “unnecessary to address [the] narrow legal issue” of whether its holding in *Stout* was still good law.

One Illinois trial court decision addressed the question in a case where an Illinois State Trooper had searched a car after smelling raw marijuana. In November 2020, Judge Daniel P. Dalton of the Fourteenth Judicial Circuit ruled that since “there are a number of wholly innocent reasons a person or the vehicle in which they are in may smell of raw cannabis,” marijuana odor alone cannot establish probable clause. To rule otherwise—according to the court—would put anyone twenty-one or older “in a position where they could exercise their rights under The Cannabis Regulation and Tax Act only to forfeit their rights under the . . . United States Constitution.” If the state appeals the decision, it could eventually reach the Illinois Supreme Court and force the court to clarify whether marijuana odor alone can establish probable cause post-legalization.

III. Canine Sniffs

In the canine sniff context, the effect of marijuana legalization depends on state laws governing how marijuana is transported. The vast majority of states that have legalized marijuana do not require it to be transported in an odor-proof container. Instead, many have laws analogous to open container laws for alcohol. In Washington, for example, drivers can keep unsealed marijuana in the trunk of the vehicle or, in cars without trunks, in another area of the vehicle “not normally occupied or directly accessible by the driver or passengers.” Sealed packages, however, may be kept within a driver or passenger’s reach.

California, Colorado, Minnesota, Mississippi, and New Jersey each have laws nearly identical to Washington's. Vermont and Massachusetts also have very similar laws but allow opened marijuana packages to be kept in a locked glove compartment. Other states like Alaska, Oregon, and Maine have no analogous open container laws for transporting marijuana. In those states, drivers can legally possess marijuana in any part of the car.

In states where marijuana can be transported in a non-odor-proof container, marijuana-detecting canines should logically be forbidden from conducting sniffs. In such cases, a canine who alerts to the smell of marijuana has merely identified a perfectly legal activity. Even in states with open container laws, canines cannot distinguish between open marijuana stored in the trunk of the car versus any other part of the car. Under these circumstances, marijuana-sniffing canines are simply no longer a tool that should be at law enforcement's disposal.

Police forces in many of these states have reacted accordingly. Many are retiring marijuana-detecting canines. In Virginia, for example, state police have retired at least thirteen canines. In their place, police are training new canines to detect ecstasy, cocaine, heroin, and methamphetamines. In Colorado, less than twenty percent of the state's current police canines detect marijuana odors. But even that wasn't enough for the state's Supreme Court. In 2019, it held that because a canine was trained to sniff for marijuana—a legal drug in Colorado—the canine's alert was not enough to establish probable cause justifying a search.

Illinois's law for transporting marijuana is an outlier compared to its sister states who have also legalized marijuana. Instead of allowing drivers to transport unsealed marijuana or requiring that it be stored in a trunk, Illinois's vehicle code provides that drivers must store marijuana in a "secured, sealed or resealable, odor-proof, child-resistant cannabis container that is inaccessible." The code also provides that failure to follow these laws is a Class A misdemeanor. Thus, if an individual in Illinois transports marijuana in a non-odor-proof container, and a canine alerts to that marijuana, the alert still indicates criminal activity because transporting marijuana in a non-odor-proof container is itself a crime.

On the other hand, Illinois changed its Police Training Act in 2019 to allow agencies to opt out of training police canines to detect marijuana. Thus, state agencies can now choose whether to train their canines to sniff marijuana. Guidance on the Illinois Association of Chiefs of Police website nonetheless maintains that marijuana-detecting canines do not *have* to be retired. In doing so, it states that a canine's detection of cannabis may still indicate "contraband per se" since it is not stored in an odor-proof container.

Though the Illinois State Police has committed to phasing out its marijuana-sniffing canines, thirty-nine of its fifty-one narcotic-detecting canines are trained to detect marijuana. And data about local departments across the state is hard to come by. Thus, the issue in Illinois is here to stay until either the Illinois Supreme Court or legislature decides otherwise.

Until such a decision, one might ponder why the legislature chose to require an odor-proof container and thereby generate uncertainty for both marijuana users and police. There could be several reasons. For one, police resort to searches of personal vehicles as the primary tool for confiscating and prosecuting the possession of contraband,

including the firearms at the root of Illinois's gun violence epidemic. Since marijuana use is so widespread, cannabis odor provides police with reliable means to establish probable cause where Fourth Amendment doctrine would otherwise bar a search. The justification may also be economic. Since attempts to retrain canines can be unsuccessful, police forces often start over with brand new canines. The canine alone can cost anywhere from \$2,500 to \$4,000. In addition to the canine, training can cost as much as \$15,000 and take as long as four months. Keeping the current marijuana-detecting canines in the police force avoids these costs.

IV. Barring the Use of Marijuana Odor to Establish Probable Cause

The Illinois legislature should make several changes to bring its marijuana laws in line with other states. First, the state should clarify that marijuana odor cannot serve as the sole basis for probable cause to search a vehicle during a traffic stop. Second, the state should ban the use of marijuana-detecting canines and suppress any evidence found in a search premised on a marijuana-detecting canine's alert. These reforms would align with the reasonable expectations of Illinoisans, provide fair notice to potential lawbreakers, and limit the ability of law enforcement to act on biases—especially given the general ineffectiveness of drug-sniffing canines.

Absent these reforms, Illinois's policies and jurisprudence on searches and marijuana contradict the reasonable expectations of Illinois drivers. Once Illinois legalized recreational marijuana, a reasonable driver would not expect that a baggy with residue would result in a complete forfeiture of privacy. Instead, a reasonable person might expect officers to treat marijuana like alcohol, allowing open containers but requiring that they be kept in the trunk. It is illogical to allow officers to use marijuana—a legal and widespread drug—to gain access to the private lives of Illinois drivers without other evidence of wrongdoing.

Amending the vehicle code for marijuana transportation would also provide fair notice to Illinois residents about their fundamental privacy rights. Though ignorance of the law is no excuse for violating it, the state of the law in Illinois is unclear. Can the smell of marijuana alone provide a police officer probable cause to search a vehicle? What about a marijuana-detecting canine's alert? The lack of action from the state legislature has left Illinoisans without answers.

Criminalizing common behavior like transporting marijuana in a non-odor-proof container also enables police to enforce the law in an arbitrary and biased way. One ACLU of Illinois study found that Illinois State Police troopers are over twice as likely to perform canine sniffs on Hispanic motorists compared to white motorists. At the same time, white motorists are 64 percent more likely than Hispanics motorists to be found with contraband if searched after a canine alert. Research also shows a racial disparity in erroneous canine alerts. In the same ACLU study, white motorists subjected to a search post–canine sniff possessed contraband 53 percent of the time compared to only 33 percent for Hispanic motorists. While this data alone is alarming, it also comports with widely documented racial disparities in who Illinois police choose to pull over in the first instance. Allowing police to use a legal drug to establish probable cause exacerbates these discriminatory practices.

Aside from exacerbating biased policing, the general ineffectiveness of drug-sniffing canines may independently justify narrowing their use. One Chicago Tribune analysis of suburban police department data found that only 44 percent of canine alerts led to the discovery of drugs or paraphernalia. Supreme Court justices too have recognized that the “infallible dog [] is a creature of legal fiction.” Experts suggest that canines often make mistakes by reacting to unconscious cues from their handlers who themselves may exhibit implicit or explicit racial bias. These concerns compound the issues of people’s expectations, fair notice, and biased enforcement that already taint the use of marijuana odor as a means of establishing probable cause.

V. Conclusion

Without clear guidance from the state legislature or the Illinois Supreme Court, Illinoisans are in the dark over whether police can use the plain smell of marijuana to establish probable cause. State leaders should step in to fill this gap. There is no sensible justification for a law requiring legal amounts of marijuana to be kept in odor-proof containers other than to exploit widespread marijuana use to search cars that would otherwise be off-limits. Maintaining the status quo will only exacerbate dubious police tactics steeped in a long history of racially biased enforcement. Subject to its own sniff test, Illinois law on this issue would surely fail.

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