Go to Table of Contents

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee/Petitioner, v. RONALD JAMES SISCO, II, Appellant/Respondent.	)	S.Ct. No. CR-15-0265-PR Arizona Court of Appeals No. 2 CA-CR 2014-0181 Pima County Superior Court No. CR-20131500-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RONALD JAMES SISCO, II

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Go to Table of Contents

TABLE OF CONTENTS

Page

Go to Table of Contents

TABLE OF AUTHORITIES

Page

Cases

Statutes

Go to Table of Contents

Other Authorities

Go to Table of Contents

INTRODUCTION

The State asks this Court to limit the privacy rights of all Arizonans, in particular the rights of lawful users and cultivators of medical marijuana. The Court of Appeals correctly held that mere evidence that marijuana is present, without information suggesting unlawful activity, cannot justify a search consistent with Arizona's constitutional right to privacy under article II, section 8. Because Arizona voters approved the medical use of marijuana, our courts may neither take away the constitutionally granted right to privacy nor the citizen-granted right to use medical marijuana; nor may the courts condition one right upon the surrender of the other.

The Court of Appeals correctly decided that although the smell of marijuana may *contribute* to a finding of probable cause, "plain smell" cannot on its own, consistent with the Arizona Medical Marijuana Act (AMMA) and the Arizona Constitution, establish probable cause for a search. There is probable cause only if there is some indication that the marijuana use is *not* lawful. This Court should accordingly deny review in this case, or should grant review and reach the same conclusion as the Court of Appeals.

Go to Table of Contents

INTERESTS OF AMICUS CURIAE

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issue presented concerns the right of citizens to be free from unreasonable searches, one of the bedrock protections of the Bill of Rights and a protection especially robust under the Arizona Constitution. The Court of Appeals correctly recognized that continuing to allow the smell of marijuana alone to justify a search, with no indication of criminal activity,

would gut this essential protection for tens of thousands of law-abiding Arizonans.

Arizona courts have the power and the duty to offer expanded protections for Arizona citizens and to recognize the extension of state constitutional provisions beyond their federal counterparts when federal law fails to provide just results. This is especially true in areas, such as marijuana use, where Arizona law diverges significantly from federal law. This case provides an opportunity for this Court to recognize that article II, section 8 of the Arizona Constitution protects all Arizonans from unreasonable searches, including those who choose, consistent with the demonstrated will of the voters, to avail themselves of the medical treatment options authorized by the AMMA.

ARGUMENT

The facts of this case are set out in Respondent's briefs in this Court and in the Court of Appeals and in the Court of Appeals' opinion. The determinative facts are quite simple: a police SWAT team searched Mr. Sisco's home pursuant to a warrant issued on the sole fact that police smelled marijuana coming from the building.

Regardless of anything else the police may have observed or believed, they obtained a search warrant based on smell alone.

The Court of Appeals, after thorough analysis, recognized that (1) the only relevant facts were those presented to the magistrate who issued the warrant, i.e., that police had detected an odor of marijuana, and (2) both the United States and Arizona Constitutions thus forbade this search. The opinion discussed the Arizona Constitution at multiple junctures. *See* Ct. App. Op. ¶¶ 41, 46, 53. Accordingly, the court below clearly recognized the import of the Arizona Constitution in deciding this essential privacy question.

I. This Court can and should interpret the Arizona Constitution independent of the federal Constitution.

Justice Brandeis famously wrote that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This much-quoted principle serves to remind states that they need not limit themselves to the programs and protections

mandated by the federal government; rather, they can, within the boundaries of the U.S. Constitution, strike out to explore and recognize new frontiers in running a free and just society.

In its bold protection of individual rights, Arizona's Constitution reflects the courage invoked by Justice Brandeis: "The Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens." *State v. Ault*, 150 Ariz. 459, 463, (1986). As one Arizona Supreme Court Justice has put it, ours is "an exceptionally progressive constitution providing several protections that appear to be broader than those available at the federal level." Rebecca White Berch *et al.*, *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468 (2012).

Notably, the Arizona Constitution is highly democratic and is especially protective of the will of the voters, including direct-democracy provisions for initiative, referendum, and recall. *See* Ariz. Const. art. IV, pt. 1 §§ 1-6. It "was arguably the most Progressive of the day: the secret ballot, the direct primary, the initiative, the referendum, and the recall were adopted, along with many other

structural features designed to reduce the power of elected officials and increase the role of the citizenry." Toni McClory, *Understanding the Arizona Constitution* 24 (2d ed. 2010). Our state Constitution is deeply concerned with protecting the wishes of Arizona citizens in the face of government power.

This Court has a duty to consider our state-law protections independently. *See Pool v. Super. Ct.*, 139 Ariz. 98, 108 (1984) ("We acknowledge that uniformity is desirable. However, the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly."). Our state Constitution gains force and vigor through interpretation and application. Moreover, resolving cases on state constitutional grounds is more efficient, having the possible effect of avoiding unnecessary litigation if a case is resolved on state grounds.

II. The state Constitution is especially relevant in this area because of the inconsistency between state and federal law.

Marijuana use remains prohibited under federal law.[1] Arizona voters chose to diverge from federal law in this area, clearly expressing a disagreement with federal policy. The passage of the AMMA, a citizen initiative, is a prime example of Arizona citizens using the powers bestowed on them by our Constitution to determine our state's laws. In other words, Arizonans used their constitutionally given voice to express the view that marijuana use should not be criminal in every instance, but rather should be treated as lawful when used in limited ways for medical purposes.

Treating all marijuana use as *per se* criminal, as the police did here and as a continued plain-smell-alone rule would do, ignores our voters' clear decision to diverge from federal law on this issue. The Arizona Constitution, more than the federal Constitution, strongly protects privacy, and strongly protects the right of the voters to choose their laws. This case implicates both of these essential rights,

[1] This does not justify the search in this case because police were investigating a potential violation of Arizona, not federal, law.

and thus requires the Court to pay special attention to the Arizona Constitution's protections.

III. The Arizona Constitution stringently protects individual privacy and forbids a search based on plain smell alone.

The Arizona Constitution has long been recognized to provide special protection, beyond that provided by the Fourth Amendment, for individual privacy, especially in the home. Unlike the United States Constitution, the Arizona Constitution explicitly recognizes the right to privacy: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art II, § 8. This text reflects Arizona's heightened protections, especially where the home is concerned. As this Court has explained,

> [W]e are [] aware of our people's fundamental belief in the sanctity and privacy of the home and the consequent prohibition against warrantless entry. We believe that it was these considerations that caused the framers of our constitution to settle upon the specific wording in Article 2, § 8.

State v. Bolt, 142 Ariz. 260, 264-65 (1984) (internal citation omitted). Thus, in *Bolt*, this Court recognized that a very recent United States Supreme Court case with similar facts, *Segura v. United States*, 468 U.S. 796 (1984), interpreted the Fourth Amendment to allow police to

secure a premises from within rather than using a perimeter stakeout. Yet, the Court reached precisely the opposite conclusion under article II, section 8.

The requirement that police obtain a warrant supported by probable cause before instituting a search embodies this core constitutional protection. Like the Fourth Amendment, article II, section 8 requires that the police meet a standard before conducting a search. That stringent standard is probable cause that an *offense* has been committed.

This principle is a constitutional one, broadly conceived to apply consistently, even as statutes come and go. Thus, when the statutes change, the new situations must be measured against the enduring constitutional principle. This principle requires an assessment of whether facts clearly indicate criminality, or rather could be completely innocent. *See, e.g.*, *State v. Valenzuela*, 121 Ariz. 274, 276 (1979) ("[I]t cannot be concluded that there was probable cause for an arrest. These facts are consistent with innocent activity . . . ."). Because our statutes define criminality, when the statutes change what is criminal, a new analysis must take place;

courts cannot rely on heuristics and short-cuts developed in a different legal landscape.

Indeed, this is not the first time that there has been a significant change in the law governing the legality of a substance. For instance, there was a period in this nation's history when alcoholic beverages were illegal, and the government could seize and destroy any alcohol being transported on the highways; reliable evidence of the presence of liquor could be, at that time, probable cause for a search or seizure. *See Carroll v. United States*, 267 U.S. 132, 155-56 (1925). The probable-cause standard has endured and adapted; an officer's reasonable belief that someone is transporting liquor in his car is no longer probable cause for a search or seizure.

The State refers to the Court of Appeals' decision as "a new probable cause standard." (Pet. for Rev. at 4.) This phrase encapsulates the State's error here: the standard for justifying a search is, and has always been, probable cause itself, which the cases consistently define as "when reasonably trustworthy information and circumstances would lead a person of reasonable caution to believe *an offense has been committed* by the suspect." *State v. Moorman*, 154

Ariz. 578, 582 (1987) (emphasis added). The question is not what the standard is, but rather whether the smell of marijuana alone, with no indication of the nature of the possession or use, meets that standard.

Now, many thousands of Arizonans may lawfully possess marijuana, without any offense being committed at all, just as adults may now possess and transport liquor. *See State v. Okun*, 231 Ariz. 462, 465 ¶ 9 (2013) ("Arizona voters decided that a qualified patient does not commit a criminal offense by possessing an allowable amount of marijuana."). Applying the same standard courts have applied for more than a century, the Court of Appeals correctly concluded that a scent indicating that marijuana is present is not, under current Arizona law, probable cause to believe that anyone has committed a criminal offense.

To be sure, before the AMMA's passage, the scent of marijuana—which was illegal in every circumstance—was reliable evidence of criminal activity, allowing courts and police to use plain smell as a shortcut in the probable cause analysis. Thus, in *State v. Decker*, the Court explained that "[t]he odor of burned marijuana afforded probable cause to believe that the hotel room contained

marijuana and that a felony had been or was being committed." *State v. Decker*, 119 Ariz. 195, 197-98 (1978). At that time, there was no innocent or lawful explanation for the smell, and "the police officer could have a reasonable belief that the occupant or occupants of the room were probable offenders." *Id.* Similarly, in *State v. Harrison*, 111 Ariz. 508, 509 (1975), the Court approved a search of an automobile based on scent because that constituted "probable cause that contraband will be found." But it is no longer the case that all marijuana is contraband.

The plain-smell cases, premised on the uniform illegality of marijuana possession and use, simply do not apply when the scent is not a *per se* indicator of criminality.

IV. Voters did not intend to subject medical marijuana users to broad searches at will by the police.

The courts' interpretation of statutes adopted by initiative must "give effect to the intent of the electorate." *State v. Gomez*, 212 Ariz. 55, 57 ¶ 11 (2006). When considering the AMMA together with article II, section 8, it is apparent that Arizona voters did not contemplate

the wholesale surrender of privacy rights as the price for lawfully using a substance to treat a debilitating medical condition.

This Court has recognized the importance and breadth of this state constitutional privacy right again and again. *See, e.g.*, *Ault*, 150 Ariz. at 463; *State v. Martin*, 139 Ariz. 466, 473 (1984) ("Indeed, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' The Arizona Constitution is even more explicit in safeguarding this fundamental liberty.") (internal citation and marks omitted). It was against this backdrop that voters proposed and approved this law.

The short title for Proposition 203, the ballot measure that enacted the AMMA, and the Secretary of State's summary of the measure, began: "The Arizona Medical Marijuana Act *protects* terminally or seriously ill patients from state prosecution for using limited amounts of marijuana on their doctor's recommendation." (Emphasis added).[2] Similarly, the law contains a presumption that cardholders are using the substance legally. *See* A.R.S. § 36-2811(A).

[2] The text of these documents has been compiled and maintained at http://ballotpedia.org/Arizona_Medical_Marijuana_Question,_Proposition_203_(2010)#cite_note-13.

This provision was clearly intended to prevent police from harassing lawful users and from treating these patients like criminals without any indication that they were breaking the law. It is absurd to suggest that a law intended to protect seriously ill patients should instead strip them of our Constitution's protection from unjustified searches.

Similarly, the Act provides, "A registered nonprofit medical marijuana dispensary agent is not subject to arrest, prosecution, search, seizure or penalty in any manner and may not be denied any right or privilege . . . for working or volunteering for a registered nonprofit medical marijuana dispensary." A.R.S. § 36-2811(F). If the plain smell of marijuana could justify a search, dispensary agents *would* be subject to search for working for the dispensary, as they could be searched any time police detected the smell of the product they are specifically authorized to dispense.

The State suggests that the AMMA does not alter the criminality of marijuana possession, but merely provides a defense if prosecution is initiated. (Pet. for Rev. at 6-7.) This, too, is clearly at odds with the statute's text, which explicitly states that a "registered qualifying patient . . . is not subject to arrest, prosecution or penalty

in any manner" for possessing the permitted amount. A.R.S. § 36-2811(B)(1). The State's suggestion that the statute merely provides a defense that could be used in a prosecution simply cannot be reconciled with this explicit protection against arrest, which obviously precedes prosecution and the raising of defenses.[3] *See also Okun*, 231 Ariz. at 465 ¶ 9 ("Arizona voters decided that a qualified patient does not commit a criminal offense by possessing an allowable amount of marijuana.").

This Court has previously recognized that "voters established as public policy that qualified patients cannot be penalized or denied any privilege as a consequence of their AMMA-compliant marijuana possession or use." *State ex rel. Polk v. Hancock*, 237 Ariz. 125, 145-46 ¶ 9 (2015). Deprivation of privacy rights is unquestionably a penalty and a denial of a core constitutional right. Of course it constitutes a penalty and the denial of a privilege to subject a lawful user to a

[3] The State's suggestion that marijuana use remains criminal in all instances and the AMMA merely provides a defense to prosecution is thus an unhelpful exercise in semantics; if an act cannot subject the actor to arrest or prosecution, it cannot fairly be said to be criminal.

search of his home by a SWAT team simply based on the scent of marijuana.

Constitutional rights can be waived. But they cannot be waived inadvertently; "the knowing, voluntary, and intelligent waiver standard . . . applies to the waiver of *any* constitutional right." *State v. Conroy*, 168 Ariz. 373, 375 (1991). Medical marijuana cardholders, caregivers, and cultivators have not, by their participation in this lawful activity, made any kind of knowing or voluntary waiver of their privacy rights. Indeed, the Act *does* provide for administrative searches of dispensaries, which are allowed to engage in that business but are required to submit to inspection by the Department of Health Services. *See* A.R.S. § 36-2806(H). Thus, where voters intended to require submission to searches, they said so.

In sum, subjecting patients to search at will by police any time they are lawfully using their medication, or dispensary agents or cultivators when they are simply doing their jobs, is directly at odds with the plain text of the statute, with the stated will of the voters, and with this Court's previous interpretation of the AMMA.

V. A rule to the contrary would be disastrous.

The rule advocated by the State—that a search may be justified by the smell of marijuana alone, with no further evidence that its use is criminal—would deprive tens of thousands of Arizonans who are doing nothing wrong of one of their most essential constitutional rights. Cardholders include patients suffering from cancer, seizures, glaucoma, Alzheimer's disease, and Crohn's Disease, among other chronic and debilitating conditions. As of the end of 2014, they included more than 1300 children and more than 1700 adults over the age of 81.[4] At the time of the search of Mr. Sisco's home, there were 37,614 cardholders.[5] Today there are at least 83,615.[6] Under the State's proposed rule, all of these people, all who care for them or live with them, and all who earn their living by providing treatment for them,

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[4] *See* Arizona Medical Marijuana Act End of Year Report, 2015, *available at* http://azdhs.gov/documents/licensing/medicalmarijuana/reports/2014/ arizona-medical-marijuana-end-of-year-report-2014.pdf.

[5] *See* Medical Marijuana Monthly Report for March, 2013, *available at* http://azdhs.gov/ documents/licensing/medical-marijuana/reports/2013/130312-patient-application-report.pdf.

[6] *See* Medical Marijuana Monthly Report for August, 2015, *available at* http://azdhs.gov /documents/ licensing/medicalmarijuana/reports/2015/2015-august-monthly-report.pdf.

have lost the Arizona constitutional right to privacy against government intrusion.

There are many objects and substances that can be used lawfully or unlawfully. The Court of Appeals observed that this is the case with prescription drugs. Other items that have both lawful and unlawful uses include fireworks (A.R.S. § 36-1601 *et seq.*) and firearms (A.R.S. § 12-448.01). Under the State's logic, police detecting the presence of one of these items would be free to call in a SWAT team because the use might be illegal. Instead, the Court should recognize that the same principle that governs these situations should continue to govern in the realm of marijuana: there must be reason to believe not only that a person possesses an object that can be used illegally, but also that an *offense* has been committed.

The Court of Appeals' opinion did not change the standard required to justify a search; it simply recognized that a judicially blessed shortcut that police and magistrates could once use—the plain-smell doctrine—no longer serves to provide a ready answer to the probable-cause inquiry. Because probable cause is tied to the commission of an offense, a change in what constitutes an offense

necessarily alters the analysis. But the fundamental framework governing what the State must establish before it can invade citizens' homes and private affairs remains the same. Courts and law enforcement have worked with this standard for many years, applying it flexibly on a case-by-case basis, without the catastrophe the State suggests would ensue. They can, and must, continue to do so now.

CONCLUSION

The Court of Appeals correctly concluded that after the AMMA rendered some marijuana use lawful, the plain smell of marijuana alone no longer satisfies the probable-cause standard to justify a search. This Court should deny review because the opinion below is correct, or alternatively should grant review and reach the same conclusion as the Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of October, 2015.

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Go to Table of Contents

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