IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,	)	CR-16-0334-PR
	)	
Appellant,	)	Court of Appeals No.
	)	2 CA-CR 2015-0380
v.	)	
	)	Pima County Superior Court
DARREN CHAD TICHENOR,	)	No. CR-20150939-001
	)	
Appellee.	)	
	)	

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLEE

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INTRODUCTION

In *State v. Sisco II*, 239 Ariz. 532, ¶ 20 (2016), this Court created a corollary to the "plain smell" doctrine applicable to medical marijuana patients, holding that probable cause generally exists based on "smell unless" other facts would suggest to a reasonable person that the marijuana use or possession complies with the Arizona Medical Marijuana Act ("AMMA"), A.R.S. § 36-2801 *et seq*. Because Mr. Sisco was not a registered cardholder, *Sisco II* left unanswered what other facts would negate a finding of probable cause. This case presents the first case involving a *Franks*[1] violation and a search of a known registered qualifying patient's home in the absence of evidence of ***criminal*** activity. *Amicus curiae* Arizona Attorneys for Criminal Justice ("AACJ") asks this Court to grant review to give guidance to the lower courts regarding the factors to determine probable cause under *Sisco II's* "smell unless" standard, and to hold that where police have reason to know that a person has a valid medical marijuana registration card and is authorized to possess and use marijuana, the smell of marijuana, absent additional evidence of ***criminal*** activity, is not probable cause for a warrant to search a residential structure.

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1 *Franks v. v. Delaware*, 438 U.S. 154 (1978).

INTERESTS OF *AMICUS CURIAE*

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 those attorneys who defend them. 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 issues presented concern the application of the Court's newly created "smell unless" corollary applicable to AMMA patients. Arizona courts have the power and the duty to protect Arizona's citizens beyond the federal counterparts when federal law fails to provide just results. This is particularly true in areas such as medical marijuana use and privacy in the home, where Arizona law diverges significantly from federal law. This case provides an opportunity for this Court to give lower courts guidance in applying the "smell unless" factors for AMMA registered qualifying patients who are entitled to statutory presumptions of innocence and immunities.

ARGUMENT

The facts of this case are set out in Appellee's briefs and the memorandum decision. After several days' surveillance turned up no evidence of illegal activity, Detective Ewings pulled the electrical usage information for Mr. Tichenor's house and compared it to neighboring homes. When Detective Ewings conducted a knock and talk, Mr. Tichenor went outside and closed the door behind him. Detective Ewings noted a "strong odor" of fresh marijuana.[2] Mr. Tichenor presented his valid AMMA patient card, and Detective Ewings saw what could have been a large amount of cash in Mr. Tichenor's wallet. Mr. Tichenor claimed he had one ounce of marijuana, and told Detective Ewings that he works on cars out of his garage. Detective Ewings made false statements in a warrant affidavit and omitted material facts, including Mr. Tichenor's explanation for his electric bill. At a *Franks* hearing, Detective Ewings admitted that he made false statements. Based on the Court of Appeals' "smell plus" decision in *State v. Sisco*, 238 Ariz. 229 (App. 2016), and the admittedly false statements and omissions, the trial court found a *Franks* violation. The trial court then determined that the rewritten affidavit did not support a finding of probable cause. *Opinion,* ¶¶ 2-9. The Court of Appeals *Opinion* did not address the AMMA presumptions or immunities, but reversed the trial court's decision.

The issues presented here concern the right of citizens to be free from unreasonable searches and the importance of deterring future police misconduct.

I. This Court can and should interpret the Arizona Constitution independently of the federal Constitution and find that the protections of article II, section 8 of the Arizona Constitution extend beyond those of the Fourth Amendment.

A. Art. II, § 8 provides heightened privacy protections in the home.

Fourth Amendment search and seizure jurisprudence presents a floor. Thus, "'[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.'" *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (quoting *California v. Greenwood*, 486 U.S. 35, 43 (1988)). Indeed, "[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). "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).

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[2] Although "smell alone" is not at issue here, AACJ anticipates the issue whether an officer has sufficient scientific expertise to be able to discern quantity of marijuana or location based solely on scent will be at issue in future cases, as it was in *Sisco*. *See, e.g., Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1059 (Mass. 2014) (Rejecting officer's claims of the scent of burnt marijuana as "strong or very strong" based Dr. Doty's research showing that age and gender affect the sense of smell and concluding, "we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine.").

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's citizens in the face of government power. This Court has a duty to consider state-law and Constitutional protections independent of federal counterparts. In *Pool v. Super. Ct.*, 139 Ariz. 98, 108 (1984), this Court cautioned that Arizona's courts "cannot and should not follow federal precedent blindly." Moreover, resolving cases on state constitutional grounds is more efficient, having the possible effect of avoiding unnecessary litigation if a case is resolved on independent state grounds.

Arizona is one of ten states to explicitly recognize a right to privacy in its constitution. This Court has recognized that "there is no more sacred right." *State v. Mendoza*, 104 Ariz. 395, 399 (1969). Art. II, §8, which provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law," therefore affords heightened protection for the home compared to the Fourth Amendment. *See, e.g., State v. Bolt*, 142 Ariz. 260, 264-65 (1984); *State v. Wilson*,

237 Ariz. 296, ¶ 23 (2015) (noting that the Arizona constitution "more explicitly protects homes than does its federal counterpart."). Our State provisions "are specific in preserving the sanctity of homes *and in creating a right of privacy*." *Ault*, 150 Ariz. at 466 (emphasis added). Importantly here, "special Arizona traditions or customs may require us to interpret provisions of the Arizona Constitution more expansively than the interpretation given to the federal Constitution." *State v. Hurley,* 154 Ariz. 124, 131 (1987). "Our constitutional provisions were intended to give our citizens a sense of security in their homes and personal possessions." *Bolt*, 142 Ariz. at 265-66. The right not to "be disturbed" in one's "private affairs" is more protective than the Fourth Amendment's limited right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Id.*

B. Arizona's right to privacy provides broader protections to AMMA patients beyond the protections afforded by the Fourth Amendment because Arizona has protected an activity that the federal government still recognizes as criminal.

The judiciary's "primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate." *State v. Gomez*, 212 Ariz. 55, ¶ 11 (2006). While this Court left unanswered the question whether to extend the protections of art. II, § 8 to the search in *Sisco II*, this case presents with two distinguishing facts that demonstrate why this Court should apply art. II, § 8 to protect an AMMA patient in his home. First, unlike *Sisco II*, 239 Ariz. 532, ¶ 3, where the Court noted that Sisco had converted part of a storage structure into a

residence, the building in this case is indisputably a home. *Decision*, ¶¶ 2-7. Second, unlike *Sisco II*, 239 Ariz. 532, ¶ 27. Mr. Tichenor possessed his valid AMMA patient registration card authorizing him to use and possess marijuana. *Decision*, ¶¶ 4-5. Thus, Mr. Tichenor was entitled to the separate statutory protections of the presumption of lawful use of marijuana under A.R.S. § 36-2811(A)(1) and statutory immunity under (B)(1). *State v. Fields*, 232 Ariz. 265, ¶ 13 (App. 2013) (noting that AMMA provides two different statutory protections for cardholders).

Accordingly, Mr. Tichenor was not only entitled to the Constitutional protections of art. II, § 8—as guaranteed to any citizen of Arizona—he also was entitled to the additional statutory protections special to AMMA cardholders. The protective purpose of AMMA is stated plainly in Section 2(G) of Proposition 203:

> to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana.

The short title for Proposition 203, the ballot measure that enacted the AMMA, and the Secretary of State's Publicity Pamphlet summary of the measure also explained: "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.) Moreover, A.R.S. § 36-2811(A)(1) includes a presumption that a cardholder in possession of his valid registration card is using the

card legally. This provision clearly is intended to prevent police from harassing lawful users and from treating patients like criminals without any indication that they are breaking the law.

Similarly, under the AMMA, a patient or caregiver "is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau" from state officials, including state courts. A.R.S. § 36-2811(B); *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, ¶¶ 7, 11 (2015). Furthermore, the electorate recently amended article II, § 3 of the Arizona Constitution to require state officials to refrain from using state resources to cooperate with federal actions or programs that are anathema to the will of Arizonans as determined by its legislature, which includes the electorate.

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, ¶ 9 (2015). Deprivation of constitutionally guaranteed privacy rights and statutory presumptions and immunities is unquestionably a penalty and denial of core rights. Of course such deprivation constitutes a penalty and denial of a privilege to a lawful user.

II. The mutual purposes of AMMA and *Franks* are to protect citizens from violations of personal privileges and deter future police misconduct.

Allowing a finding of probable cause to be based on facts which would not lead a person of reasonable caution to believe a crime has been committed is what AMMA sought to protect against:

> "We don't deserve to be jailed for using marijuana."
>
> "Voting yes on this initiative will prevent seriously ill patients from being threatened with arrest for the simple act of taking their doctor-recommended medicine."
>
> "[T]he most important goal of any medical marijuana law [is to] protect seriously ill patients using medical marijuana from arrest and imprisonment."

Arizona Ballot Proposition Guide at 84 (November 2, 2010).

The "prime purpose" of a *Franks* evidentiary hearing likewise "is to deter future unlawful police conduct." *United States v. Janis,* 428 U.S. 433, 446 (1976) (internal quotations omitted). This Court has cautioned, "The policy underlying *Franks* seeks to mitigate the dangers of the ex parte procedure used to obtain a search warrant, and to deter over-zealous officers from supplying false information in their efforts to obtain access to the constitutionally protected privacy of one's home or car." *State v. Buccini*, 167 Ariz. 550, 558 (1991). "Probable cause to conduct a search exists when 'a reasonably prudent person, based upon facts known by the officer, would be justified in concluding that the items sought are connected with *criminal*

activity and that they would be found at the place to be searched." *State v. Spears*, 184 Ariz. 277, 285 (1996) (quoting *State v. Carter*, 145 Ariz. 101, 110 (1985) (emphasis added)).

In the context of reasonable suspicion, the facts must be individualized to the suspect and avoid casting too wide a net and capture a substantial number of innocent patients. *See Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam); *State v. Evans*, 237 Ariz. 231, ¶¶ 10, 17 (2015). The Arizona Supreme Court held in *State v. Serna*, 235 Ariz. 270, ¶ 23 (2014), that knowledge that a person is armed does not give rise to reasonable suspicion that the person was engaged in criminal activity, because large numbers of Arizonans carry concealed firearms legally. In so holding, it rejected a contrary holding in *United States v. Orman*, 486 F.3d 1170 (9th Cir. 2007), because, "in a state such as Arizona that freely permits citizens to carry weapons, both visible and concealed, the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous." *Serna*, 235 Ariz. 270, ¶ 22.

The same is true for medical marijuana users in Arizona, where more than 100,000 people are currently permitted to possess marijuana.[3] It is beyond dispute

[3] By August 2016 (the latest statistics available), there were a total of 108,953 active cardholders, including 105,943 qualifying patients and caregivers. *See* Arizona Department of Health Services, *Arizona Medical Marijuana Program August 2016 Monthly Report* (last visited January 10, 2017). Of those, 1,830 qualifying patients and caregivers also are authorized to cultivate. *Id*.

that probable cause is a higher standard than reasonable suspicion. *Cf. State v. O'Meara*, 198 Ariz. 294, ¶10 (2000) ("By definition, reasonable suspicion is something short of probable cause."). Among the stated purposes of the AMMA is for medical marijuana to be recognized as any other prescription drugs. See Arizona Ballot Proposition Guide at 73 (last visited Jan. 11, 2017).

The probable cause standard for a search or arrest warrant is not met in Arizona unless the facts suggest that not merely any activity, but a *criminal* activity is "more probable than not." *State v. Will*, 138 Ariz. 46, 49 (1983). The circumstances should be "'sufficiently strong *in themselves* to warrant a cautious [person] in believing the accused guilty.'" *State v. Dixon*, 153 Ariz. 151, 153 (1987) (quoting *Monroe v. Pape*, 221 F.Supp. 635, 642-43 (N.D. Ill. 1963) (emphasis added)).

Until *Sisco II*, no Arizona case had addressed whether the AMMA provides protection to the general citizenry from searches and seizures where probable cause was based solely on the smell (or any other sensory perception) of the presence of marijuana. Although probable cause is a nontechnical concept, *Buccini*, 167 Ariz. at 558 (1991), it is not without its limits. As this Court held, "a reasonable officer cannot ignore indicia of AMMA-compliant marijuana possession or use that could dispel probable cause." *Sisco II,* 239 Ariz. 532, ¶ 19.

This Court has established boundaries between circumstances that support a reasonable, justifiable belief in *criminal activity* and those that provide a *mere suspicion* or reasonable cause for further investigation. *Buccini* instructs that caution requires courts to distinguish facts "that would cause the officer to investigate the matter further" from "facts that support a finding of probable cause." *Buccini*, 167 Ariz. at 559. For example, an officer's mere suspicion that a search will reveal items connected to criminal activity is not sufficient to establish probable cause. *United States v. Kandlis,* 432 F.2d 132, 136 (9th Cir. 1970). Rather:

> "The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Buccini, 167 Ariz. at 557 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). However, this Court's decision in *Sisco II* left unanswered the question of what happens when the police encounter an AMMA cardholder in possession of his card, at his residence, who does not consent to let them search his home without a warrant. The plain answer under A.R.S. § 36-2811(A)(1) and § 36-2811(B) is that the police, without evidence that a crime has been committed, must accept the valid AMMA card as evidence of lawful medicinal marijuana use or must conduct further investigation, but cannot use the AMMA card or the smell of marijuana alone as a

basis for obtaining a search warrant to ransack the AMMA patient's home, in clear violation of the spirit and meaning of article II, § 8 and the Fourth Amendment.

Unlike *Sisco II*, Mr. Tichenor was at home when Detective Ewings knocked on his door. Mr. Tichenor answered, and presented Detective Ewings with a valid copy of his medical marijuana registration card showing that he is a registered qualifying patient authorized to possess and use marijuana, and denied Detective Ewings consent to search his home. Having presented a valid registry card, Mr. Tichenor was entitled to the presumption of innocence in § 36-2811(A)(1), the immunities of § 36-2811(B)(1), and the heightened privacy protections in his home afforded by art. II, § 8. After several days of surveillance, the police had obtained no evidence of illegal drug activity.

This case highlights also the importance of the deterrence function of the *Franks* hearing and the need for heightened protection of medical marijuana patients against police officers, who are willing to give false affidavits and to omit exculpatory facts in their zeal to win the next marijuana score, which often comes with monetary and property forfeitures that benefit their departments.[4] Here, there is no dispute that Detective Ewings falsified his affidavit in material ways; he admitted as much at the *Franks* hearing.

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[4] Curt Prendergast, "Tucson-area seized vehicles are returned — for a price," *The Arizona Daily Star*, July 30, 2016 (last visited Jan. 10, 2017).

Thus, in *United States v. Yusuf*, 461 F.3d 374 (3d Cir. 2006), in reviewing a warrant affidavit after removing false information, the Third Circuit declined to insert factual information that had been omitted but which would have been inculpatory rather than exculpatory because to do so would "allow the Government to receive the benefit of its misconduct." The Seventh Circuit took a similar approach:

> [The district court's] consideration of new information omitted from the warrant affidavit should have been limited to facts that did not support a finding of probable cause.... Allowing the government to bolster the magistrate's probable cause determination through post-hoc filings does not satisfy the Fourth Amendment concerns addressed in *Franks*."

United States v. Harris, 464 F.3d 733, 739 (7th Cir. 2006).

The purpose of AMMA is to protect patients who use marijuana medicinally from government harassment and denial of rights and privileges. Among the most sacred rights is the Constitutional right to be secure in one's own home and to be free from unreasonable search and seizure. The purpose of the *Franks* hearing is to deter future officers from repeating precisely the type of conduct that occurred here. Ultimately, the public policy of Arizona requires that all citizens, including AMMA registered patients, be protected from unreasonable searches and seizures, and AMMA provides specific, enumerated presumptions and statutory immunities that

negate a finding of probable cause when a cardholder presents his card and there is no evidence of criminal activity except plain smell.

CONCLUSION

AACJ asks this Court to hold that where police have reason to know that a person has a valid medical marijuana registration card and is authorized to possess and use marijuana, the smell of marijuana, absent additional evidence of criminal activity, is not probable cause for a warrant to search a residential structure.

RESPECTFULLY SUBMITTED this 11th day of January, 2017.

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