STATE OF NEW YORK COUNTY OF ERIE
NEW YORK STATE SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK

VS.

MEMORANDUM OF LAW

[redacted],

Indictment No.: [redacted]

Defendant.

INTRODUCTION

[redacted] was indicted on 1 count of Criminal Possession of a Weapon, under New York Penal Law §265.03(3). This motion concerns the legality of a seizure of a handgun during the search of the defendant's vehicle after a traffic stop performed by Buffalo Police based on the odor of marijuana.

A four day Ingle/Mapp/Huntley hearing was held on November 30, 2021, January 5, 2022, February 25, 2022, and March 22, 2022. The People called five witnesses, Buffalo Police Officers [redacted] and Caption [redacted]. [redacted] did not call any witnesses.

FACTS OF THE CASE

On February 1, 2021 Officer [redacted] was on routine patrol with his partner [redacted]. in the City of Buffalo, (transcript, hereinafter "tr." 11/30/21 at 13). Officer Hoffsetter made an observation that " a vehicle in front of us clearly smoking marijuana" (tr. 11/30/21 at 14). Officer [redacted] saw no smoke emanating from the car (tr. 11/30/21 at 43, tr. 3/22/22 at 11) and observed no one inside the car smoking marijuana (tr. 11/30/21 at 66; tr. 3/22/22 at 24). The driver committed no VTL infractions and there were no equipment violations on the vehicle (tr. 11/30/21 at 43). [redacted] made no observations that lead him to believe the driver was impaired in any way (tr. 11/30/21 at 44 & 63). Officer [redacted] initiated a traffic stop because of the smell/odor of marijuana (tr. 11/30/21 at 13 & 44).

The occupants of the vehicle, [redacted] and [redacted] and [redacted], were asked to exit the vehicle and were pat frisked (tr. 11/30/21 at 45). Each were placed in patrol cars (tr. 11/30/21 at 17). Officer [redacted] had no reason to believed that [redacted] was armed when he conducted a pat frisk of him (tr. 11/30/21 at 68). The car was then searched and Officer [redacted] located a gun under the driver's seat (tr. 11/30/21 at 17).

After the gun is recovered, the 4 defendants are transported to C District and placed in one of the interview rooms (tr. 11/30/21 at 27). Officer [redacted] transported Eric Hall to the police station house (tr. 2/25/22 at 27), but he did not recall smelling marijuana when he placed him in his patrol vehicle (tr. 2/25/22 at 44-45). While at the door to the station house, Officer [redacted] can be seen on body camera footage asking [redacted] if "had anything on him" (tr. 2/25/22 at 34-35; People's Ex. 5). Once inside the building, in response to the question, Eric Hall told officers he had marijuana in his sweatshirt pocket (tr. 2/25/22 at 46). Officer [redacted] was positioned to see his partner, Officer [redacted] (who did not testify), recover a burnt marijuana cigarette from [redacted] hooded sweatshirt pocket (tr. 2/25/22 at 27-28). Officer [redacted] testified the marijuana cigarette was an inch or two long, and he did not know when it had been burnt (tr. 2/25/22 at 47). Officers [redacted] and [redacted] bagged the marijuana cigarette, and Officer [redacted] submitted it to the lab (tr. 2/25/22 at 28). No field test was performed (tr. 2/25/22 at 36), and no lab report was entered into evidence.

[redacted] entered the interview room, removed his body camera and placed it on the wall of the interview room in order to record the four men (tr. 1/5/22 at 8-9). Officer [redacted] enters the room and reads the 4 men Miranda warnings (tr. 1/5/22 at 21). After a conversation with his co-defendants, [redacted] summons [redacted] into the interview room. (tr. 1/5/22 at 36) and attempts to take responsibility for what is found in the car (tr. 1/5/22 at 37). Captain [redacted] states that [redacted] has to specify what he is taking the blame for but [redacted] is not able to articulate what items were recovered. [redacted] is told by [redacted] that he has to admit to everything specifically or everyone is going down (tr. 1/5/22 at 39). [redacted] cannot do so, [redacted] leaves the room and the 4 men are all charged with Criminal Possession of a Weapon in the 2nd Degree.

LEGAL ANALYSIS

A. Reasonable Suspicion of Criminal Activity Did Not Exist to Stop the Vehicle

It is well settled that a stop of an automobile for a routine traffic check constitutes a seizure under the Fourth Amendment, *People v. Ingle* (1975) 36 N.Y.2d 413, 418. "It is well settled that to conduct a traffic stop, police require either probable cause to believe that a traffic infraction has been committed, or 'reasonable suspicion that the driver or occupants of the vehicle have committed, are committing or are about to commit a crime' " *People v. Hinshaw*, 35 N.Y.3d 427 (N.Y. 2020) and *People v. Robinson*, 277 A.D. 781, 97 N.Y.S.2d 341.

Stops of moving automobiles are never permissible unless reasonable suspicion of criminal activity exists or the stop is made as part of a routine and non-pretextual traffic check (see *People v Spencer* (84 NY2d 749, 753 [1995], cert denied 516 US 905 [1995]). A stop of a moving vehicle amounts to a a level III stop under *De Bour* (40 NY2d at 223) where an officer must have reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor (CPL 140.50 [1]; see T*erry v. Ohio* , 392 US 1 [1968];

There was no testimony provided by either Officer Hoffsetter or Williams regarding their suspicion that one of the occupants of the vehicle was or had committed a crime. Arguably, there would be two crimes related to the odor of marijuana which could possibility justify a level 3 detention in this case, a violation of PL §221.10(1) Criminal Possession of Marihuana in the Fifth Degree (*see*, *e.g.*, *People v Stroud*, 200 AD3d 1629 [4th Dept 2021] or VTL 1192 Driving While Ability Impaired.

Neither officer provided testimony that the reason for the stop was because they had a reasonable suspicion that the driver or occupants of the vehicle were committing either crime. The reason provided by the officers was that they smelled the *odor* of marijuana. Officer Hoffsetter did not specify until cross examination that what he smelled was burning marijuana, but then used the terms burning and burnt interchangeably.

Both officers testified that they observed no one in the vehicle possessing marijuana, no one in the vehicle actively smoking marijuana and saw no smoke emanating from the vehicle.

No occupant was questioned or admitted to possessing marijuana. To the contrary, [redacted] denied that occupants of the vehicle had been smoking.

Furthermore, Officer [redacted] testified that he made no observations that led him to believe that the driver of the vehicle was impaired in any way. He observed no traffic infractions and did not provide any testimony that he observed the driver operating the vehicle in any way that lead him to believe that the driver was intoxicated or impaired. Officer [redacted] also provided no testimony on the topic of intoxication/impairment.

"Reasonable suspicion" has been aptly defined as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand" *(People v Cantor,* People v Cantor, 36 N.Y.2d 106,*supra,* pp 112-113). The requisite knowledge must be more than subjective; it should have at least some demonstrable roots. Mere "hunch" or "gut reaction" will not do. The record here is bare of any objective evidence of criminal activity as of the time of the stop from which flowed the chain of events culminating in the arrest.

The People did not meet their burden in establishing the legality of the traffic stop as neither officer testified that because they smelled the odor of marijuana, the officer had a reasonable suspicion that its occupants of the vehicle had been, are then, or are about to be, engaged in conduct in violation of law.

The Marihuana Regulation and Tax Act Forecloses This Court's Decision in a Suppression Hearing Where the Sole Basis for the Stop/Search was the Odor of Marijuana that Reasonable Cause Existed.

Penal Law § 222.05(3), part of the The Marihuana Regulation and Tax Act (hereinafter "MRTA"), provides that 3. Except as provided in subdivision four of this section, in any criminal proceeding including proceedings pursuant to section 710.20 of the criminal procedure law, no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of the following facts and circumstances, either individually or in combination with each other: a) the odor of cannabis; (b) the odor of burnt cannabis […].

The MRTA constrains this Court's ability to decide the pending suppression motion in this case. The stop and search of the vehicle on February 1, 2021 occurred before the effective date of the MRTA on March 31, 2021 (*see* Pub L 2021, c. 92, § 16). However, this case came before the Court on September 30, 2021 when [redacted] was arraigned on this indictment. Motions, including those seeking hearings and suppression pursuant to CPL §710.20, were filed on October 22, 2021. These motions are now currently before the court for consideration.

This Court must now make a finding of reasonable cause in these proceedings after the effective date of the MRTA (*cf. People v Maldonado*, 86 NY2d 631, 635 [1995] ["Reasonable cause means probable cause"]). To that end, PL §222.05(3) restriction is not worded as controlling law enforcement action; it is worded as shaping what findings a court may make. Today, a finding of reasonable cause by the Court cannot be made solely based on the odor of marijuana or burnt marijuana.

While it is well settled that a stop of an automobile for a routine traffic check constitutes a seizure under the Fourth Amendment *People v. Ingle,* 36 NY2d 413 [1975]. The Appellate Division, Fourth Department held that "police stops of automobiles in this state are legal only pursuant to routine, non-pretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime.... or where the police have probable cause to believe that the driver has committed a traffic violation. See *Deveines v. New York State Dept. of Motor Vehicles Appeals Bd* , 136 A.D.3d 1383, 25 N.Y.S.3d 760. See also *People v. Washburn*, 309 A.D.2d 1271, 765 N.Y.S.2d 554 and *People v. Robinson*, 277 A.D. 781, 97 N.Y.S.2d 341.

In this case, officers involved in the traffic stop both testified that they observed no vehicle and traffic or equipment violations. Therefore, the stop of the vehicle necessarily must be based on reasonable cause that someone in the vehicle was committing a crime (*see generally People v Ingle*).

The warrantless search of the vehicle that followed likewise must be based on probable cause (*see People v Galak*, 81 NY2d 463, 467 [1993]). Where the sole basis for both the stop and the search of the vehicle by police officers was admittedly only the odor of marijuana, this *Court* cannot make the requisite finding of reasonable cause now that PL §222.05 is in effect.

Thus, where a finding of reasonable cause cannot be made, the People cannot meet their initial burden on the motion to show that police action was lawful, and suppression is required as a result.

In two recent cases, *People v Vaughn*, 2022 NY Slip Op 01945, 2022 WL 819090 [4th Dept Mar. 18, 2022], and *People v Babadzhanov*, 2022 NY Slip Op 02273, 2022 WL 1020902 [2d Dept Apr. 6, 2022], the Appellate Division declined to extend PL § 222.05(3) requirements retroactively because both courts engaged wrongly in a retroactivity analysis, rather than a statutory analysis.

Application of PL §222.05(3) does not turn on retroactivity. The application of PL §222.05 is binding on the finding or determinations made by this court, after the statute is already in effect. As already discussed, PL §222.05(3) sets forth what "finding[s]" may be made, and only a court may make findings (*see* CPL 710.60 [court must make "findings of fact" and "conclusions of law" in determining suppression motion]). Moreover, PL §222.05(3) explicitly applies "in any criminal proceeding including proceedings pursuant to §710.20 of the criminal procedure law", language indicating that the statute's effect is not to regulate law enforcement action, but is directed at findings and determinations reached by the court.

This Court must now decide a suppression motion after the effective date of the statute. Retroactivity is not an issue. Cases involving the determination of a suppression motion after March 31, 2021, irrespective of when those cases began or from when the allegations arose, PL §222.05(3) controls on and after that date. Accordingly, because the sole basis for the stop and search was the odor of marijuana, the Court cannot make a finding of reasonable cause to stop and search the vehicle. On that basis, the People cannot meet their burden and the motion should be granted.

Mayor Byron Brown Prohibited The Search of Vehicles By Buffalo Police Via Executive Order Based Solely on the Odor of Marijuana and Officer Testimony that They Were Unaware of the Directive was Not Credible.

After the events that lead to the death of George Floyd, cities around the county took steps to limit physical confrontation between citizens and police officers. Mayor Byron Brown

issued Executive Order 2020-001 (Attached Exhibit A) ordering the Buffalo Police to implement certain policies for their interaction with the public focusing on respect, dignity and de-escalation tools to be utilized by officers.

As a part of that order, the Mayor reiterated language of a February 2019 Order ending the enforcement of low-level marijuana offenses. Brown further directed the Police Commissioner to ensure that the smell or possession of marijuana, on its own, no longer be just cause for the search of a person's residence or vehicle.

Officer Kalczynksi testified that he was aware that the Mayor "came out and stated marijuana was — He didn't want marijuana laws enforced any longer" but that he had no clear directives from the department on how the Mayor's directive applied to searches and seizures (tr. (tr. 2/25/22 at 37-38). When asked directly if he was given a directive not to conduct searches based on the odor of marijuana, Officer Kalczynksi testified that he did not recall any. When asked if the Mayor's directive contained instructions pertaining to searches regarding marijuana, Officer [redacted] testified that he did not recall the details of the instructions (tr. 2/25/22 at 42). Officer [redacted] did not recall any directives either (tr. 3/22/22 at 18-19).

The People also objected to questions regarding the Executive Order during the hearing stating that defense counsel was actually mis-stating the Mayor's directive. Defense counsel had a good faith basis for asking officers questions related to the executive order and was entirely accurate as to the language contained therein, that smell of marijuana was no longer cause for Buffalo Police to conduct a search a person's vehicle.

Executive Order 2020-001 was in effect on February 1, 2021, prohibiting Buffalo Police from searching of a vehicle based solely on the odor of marijuana. Officer testimony that they were unaware of the language and directives of the public order should be scrutinized by the Court as not credible.

Testimony Regarding the Marijuana Odor Was Not Credible

The testimony in support of the stop and search was not credible concerning the supposed presence of the odor of marijuana insofar as it provided probable cause to stop and search the vehicle under pre-MRTA law.

Both Officers Hoffstetter and Williams claimed to smell marijuana coming from the subject vehicle while it was driving. Officer Hoffstetter conceded the smell could have come from another vehicle on the roadway. Officer Hoffstetter and Williams each testified that he saw no smoke coming from the vehicle and saw no one with the vehicle smoking.

The record reveals a single possible source of marijuana: a small, allegedly burnt marijuana cigarette found after the stop, [redacted] hoodie pocket when he was transported to the police station. The recovering officer testified he had no idea when the cigarette was burnt, and there was no testimony about the size of the cigarette in relation to how much of it looked burnt—the testimony was only that it was an inch or two long in total.

There was no testimony or property evidence record admitted regarding the recovery of any cigarette lighter on any defendant or in the car that would lead to the conclusion the tool necessary to smoke marijuana was present in the vehicle. There was no testimony about any of the vehicle's occupants admitting to smoking marijuana, there was no testimony about the vehicle's interior looking smoky (*contra People v Ponder*, 195 AD3d 123, 125 [1st Dept 2021]), and there was no testimony about other drug paraphernalia or packaging observed or recovered in the vehicle (*see People v Ramos*, 122 AD3d 462 [1st Dept 2014]).

Officer Williams conceded that without a lab he couldn't confirm that the cigarette recovered from [redacted] contained marijuana but just assumed it did because he had smelled marijuana. He never handled the cigarette and it was immediately placed into a plastic bag by other officers to be sent to the lab upon its recovery. (tr. 3/22/22 at 15).

No evidence of a field test nor lab report was admitted confirming the presence of marijuana—despite testimony that the marijuana cigarette was submitted to the lab. The Court, may reach a negative inference that a lab report would have showed the cigarette not to contain marijuana. The People would presumably have possession of a laboratory report if it was produced in response to a submitted marijuana cigarette in this case, and if such report indeed showed the presence of marijuana, that conclusion would be harmful to the defendants insofar as it would chemically confirm the presence of marijuana inside the vehicle at some point.

Although not part of the record, a lab report dated February 9, 2021 disclosed in discovery indicates the alleged marijuana cigarette, despite being submitted and received by the

lab with an item number, was not even tested. Thus, the Court has no testimony before it confirming the actual presence of marijuana.

A court's determination on credibility must merely be supported by the record (*see People v Sylvester*, 129 AD3d 1666 [4th Dept 2016]). And a determination that an officer could not have smelled marijuana may be based solely on an assessment of the credibility of the witness (*see People v Howington*, 96 AD3d 1440 [4th Dept 2012]). The sum of this evidence does not support the conclusion that Officers Williams and Hoffstetter credibly smelled marijuana as they followed the subject vehicle without also observing smoke coming from the vehicle. There would not be a source of continuous odor if there was not a continuous burning of marijuana, which would subsequently produce smoke, as officers followed the car.

The People must always show that police conduct was reasonable. Thus, though a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to "the burden of *going forward* to show the legality of the police conduct in the first instance (*People* v. *Malinsky,* 15 N.Y.2d 86, 91, n. 2)" (*People* v. *Whitehurst,* 25 N.Y.2d 389, 391 [emphasis in original]).

"Significant inconsistencies and gaps in memory in the testimony of the police officers who testified at the hearing bear negatively on their overall credibility" (*People v Rhames*, 196 AD3d 510, 513 [2d Dept 2021] [internal quotation marks omitted])."'The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case'" (*People v Maiwandi*, 170 AD3d 750, 751, quoting *People v Garafolo*, 44 AD2d 86, 88 [internal quotation marks omitted]; see 22 NY Jur, Evidence § 649).

The testifying officers had difficulty recalling more than the bare bones facts of the stop related to the recovery of the firearm.

Accordingly, when declining to credit the officer's testimony, the stop of the vehicle and subsequent search did not follow from the respective levels of reasonable suspicion and probable cause. For that reason, the evidence recovered as a result of the police search, i.e. the firearm, should be suppressed as fruit of the poisonous tree (*see generally Wong Sun*, *supra*).

For all the above-stated reasons, [redacted] suppression motion requesting suppression of the handgun recovered from the vehicle should be granted.

[redacted]