IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CR-139

Jesse R. Bunnell,
Appellant

–v–

State of Indiana,
Appellee

Argued: June 10, 2021 | Decided: September 2, 2021

Appeal from the Greene Superior Court
No. 28D01-1804-F6-83
The Honorable Dena A. Martin, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CR-981

Opinion by Chief Justice Rush

David and Slaughter, JJ., concur.
Goff, J., concurs in result.
Massa, J., concurs with separate opinion.

Rush, Chief Justice.

Weed, grass, herb, endo, chronic—despite its many nicknames, no other substance has the distinct, pungent, and pervasive odor of raw marijuana. And law enforcement officers are specifically taught to detect this odor as part of Indiana's standard police academy training—training they frequently put into use in the field.

With those considerations in mind, we must answer a question of first impression: whether an officer who attests only that they possess the necessary training and experience to detect the smell of raw marijuana allows a warrant-issuing judicial officer to infer that the affiant is qualified to recognize this odor. Because trained and experienced law enforcement officers require no exceptional olfactory acuity to identify the distinctive scent of raw marijuana, an officer seeking a search warrant on this basis need not detail their qualifications—beyond their "training and experience"—to identify the drug's smell. We therefore affirm the trial court's denial of Bunnell's motion to suppress.

Facts and Procedural History

Jesse Bunnell lived in a rental home with Amber Richardson and her two children. In April 2018, police responded to the home for a welfare check after receiving a report that Bunnell had battered Richardson.

Deputy David Elmore was the first to arrive. After knocking on the home's two ground-level doors and receiving no response, he continued up a set of exterior stairs to another door. There, he noticed two things: a security camera with wires passing through the door jamb and the smell of raw marijuana emanating from the door. Deputy Elmore asked Deputy Christopher Anderson, who had arrived to assist, for "a second opinion"; Deputy Anderson agreed that he smelled raw marijuana.

After contacting Richardson and confirming that she and the children were safe at a domestic violence shelter, Deputy Elmore applied for a search warrant to further investigate the marijuana odor. The affidavit affirmed, under penalty of perjury, that Deputy Elmore "observed

through [his] training and experience the smell of raw [m]arijuana emitting from the door" and that Deputy Anderson "advised through his training and experience he smelled raw [m]arijuana as well." The affidavit sought authorization to search the residence, two vehicles parked on the property, and a detached garage. The judge granted the search warrant for the house only; and a subsequent search of the premises revealed approximately nine pounds of raw marijuana, multiple marijuana plants under grow lights, smoking pipes, a scale, and other drug paraphernalia.

The State charged Bunnell with dealing in marijuana, possession of marijuana, and maintaining a common nuisance—all Level 6 felonies—and one count of Class C misdemeanor possession of paraphernalia. Bunnell moved to suppress the seized items, arguing that the search violated the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 11 of the Indiana Constitution because the affidavit failed to specify the deputies' "training and experience" in detecting a specific smell. After a hearing, the trial court denied Bunnell's motion to suppress.

On Bunnell's interlocutory appeal, the Court of Appeals reversed, holding that the search-warrant affidavit failed to adequately detail the deputies' relevant training or experience in detecting the odor of raw marijuana. *Bunnell v. State*, 160 N.E.3d 1142, 1151 (Ind. Ct. App. 2020). Finding that issue dispositive, the Court of Appeals declined to address two other issues Bunnell raised. *Id.* at 1146 n.2.[1] The State petitioned for

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[1] Bunnell also argued that the exterior stairwell and upstairs door were not the normal means of entry or exit to the home, rendering Deputy Elmore's detection of marijuana within this area a warrantless search. Bunnell further contended that the affidavit failed to establish the credibility of the source who reported a domestic battery and requested a welfare check.

Upon our grant of transfer, we assume jurisdiction over the appeal and all issues as if originally filed in the Supreme Court. Ind. Appellate Rule 58(A). We find that Bunnell's additional two arguments lack merit. As to the normal-means-of-entry issue, the lack of response at the front and back doors did not end the deputies' legitimate purpose—to conduct a welfare check on Richardson and her children—and the presence of a security camera outside the upstairs entrance supported a reasonable inference that guests had used this door in the past. *See Shultz v. State*, 742 N.E.2d 961, 964 (Ind. Ct. App. 2001) (holding that when police enter private property for a legitimate purpose "and restrict their movements to

transfer, which we granted, vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

We apply a deferential standard of review to a warrant-issuing judge's probable-cause finding, affirming if the judge has a "substantial basis" for determining that probable cause existed. *Heuring v. State*, 140 N.E.3d 270, 273 (Ind. 2020). Our focus is "whether reasonable inferences drawn from the totality of the evidence support" the finding of probable cause. *Id.* (quoting *Query v. State*, 745 N.E.2d 769, 771 (Ind. 2001)). However, to the extent a motion to suppress raises constitutional issues, we review the trial court's decision de novo. *Osborne v. State*, 63 N.E.3d 329, 331 (Ind. 2016).

Discussion and Decision

The parties agree that a search warrant must be based on probable cause. They dispute, however, whether the assertions in the affidavit sufficiently detailed the deputies' expertise in identifying the odor of raw marijuana to support the probable-cause determination. Bunnell argues the assertions were not sufficient; the State argues they were.

We agree with the State. Because the scent of raw marijuana is so distinctive, and because marijuana is one of the most ubiquitous drugs in today's society, we hold that a trained officer seeking a search warrant on this basis need not further detail their qualifications to recognize this odor beyond their basic "training and experience."

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places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment.") (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 506–08 (3d ed. 1996) (footnotes omitted)), *trans. denied*. As to the credibility issue, the deputies' presence at the home was an exercise of their caretaking function in aid of a concerned parent, not an independent ground upon which to establish probable cause. *See McIlquham v. State*, 10 N.E.3d 506, 510 (Ind. 2014).

But before we explore this issue in depth, we provide a brief background on the doctrine requiring a judge to find a substantial basis for probable cause before issuing a search warrant.

I. A warrant-issuing judge must have a substantial basis for finding probable cause.

Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution require search warrants to be based on probable cause. U.S. Const. amend. IV; Ind. Const. art. I, § 11. This federal and state constitutional requirement is further codified in the Indiana Code, which lists the information that must be included in an affidavit supporting a search warrant. *See* Ind. Code § 35-33-5-2 (2021). Although the statute requires the affiant to provide the "facts known to the affiant through personal knowledge," it does not go so far as to require the affiant to explain **how** they learned those facts. *Id.* § -2(a)(3).

In deciding whether to issue a search warrant, the judge's task is to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Spillers*, 847 N.E.2d 949, 952–53 (Ind. 2006) (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). The duty of the reviewing court—whether a trial court ruling on a motion to suppress or an appellate court evaluating that decision—is to determine whether the warrant-issuing judge had a "substantial basis" for concluding that probable cause existed. *Id.* at 953; *see also McGrath v. State*, 95 N.E.3d 522, 527 (Ind. 2018). A substantial basis requires the reviewing court, with significant deference to the warrant-issuing judge's determination, "to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause." *Spillers*, 847 N.E.2d at 953 (citing *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997)).

With those principles in hand, we now explore whether a substantial basis for probable cause existed here.

II. Officers who attest they detected the odor of raw marijuana based on their "training and experience" may present a substantial basis for probable cause.

The Supreme Court of the United States has long held that the "presence of odors" can establish probable cause for a search warrant if the following conditions are met: (1) the issuing judicial officer "finds the affiant qualified to know the odor"; and (2) the odor "is one sufficiently distinctive to identify a forbidden substance." *Johnson v. United States*, 333 U.S. 10, 13 (1948).

The question presented then, is this: Can a warrant-issuing judicial officer reasonably infer that a law enforcement officer is qualified to recognize the odor of raw marijuana if that officer attests, without elaboration, that they possess the requisite training and experience to detect the smell? Our answer is yes. This is because Indiana law enforcement officers receive specialized training on the detection and identification of raw marijuana—training that is frequently used in the field—and raw marijuana has its own unique smell that is ubiquitous and unlike any other substance. We explain our holding in detail below.

Indiana law enforcement officers undergo mandatory training at the Indiana Law Enforcement Academy. I.C. §§ 5-2-1-1, -9. This basic training includes modules on search and seizure and drug identification, including instruction on detecting the odor of both raw and burnt marijuana. *See generally* Indiana Law Enforcement Academy, *Basic Training—Tier I,* https://www.in.gov/ilea/about-the-academy/basic-training-tier-i[2]; *Basic Course Re-Start Virtual,* https://www.in.gov/ilea/files/Basic-Course-224-Re-Start-Weeks-8-13.pdf.[3] And officers who are trained out of state and later hired by an Indiana law enforcement agency, like Deputy Anderson here, must complete a 40-hour pre-basic course while awaiting enrollment in the full 600-hour basic training course. Indiana Law Enforcement Academy, *Frequently Asked Questions*, https://www.in.gov/ilea/frequently-

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[2] https://perma.cc/636A-32XA.

[3] https://perma.cc/NBF6-K9WM.

asked-questions/#another%20state.[4] *See generally* I.C. § 5-2-1-9(f). Those who have at least one year of paid full-time service as a police officer in another state may be eligible for a partial waiver of the 600-hour requirement—but they must provide a copy of their basic course's curriculum as well as a list of other completed courses that they deem their most significant training to date. Indiana Law Enforcement Academy, *Frequently Asked Questions*, *supra*. This helps ensure that all officers serving in Indiana have received the same or similar training.

Apart from training, raw marijuana has an unmistakable odor unique to that particular drug. "It appears to be generally accepted that the smell of marijuana in its raw form . . . is sufficiently distinctive to come within the rule of the *Johnson* case." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.6(b) (6th ed. 2020) ("[C]ourts have found probable cause to search when the distinctive odor of marijuana is found emanating from a particular place . . . .").

Thus, under *Johnson*, Indiana's law enforcement training requirements—often coupled with officers' frequent encounters in the field with raw marijuana—and the drug's distinctive odor can allow even a general reference to an officer's training and experience to provide a substantial basis for a probable-cause determination. *See* 333 U.S. at 13. Here, Deputy Elmore went through basic training in Indiana, including instruction on detecting the odor of raw marijuana. Deputy Anderson received his training in another state but was sufficiently trained to meet Indiana's requirements for out-of-state officers. And to bolster their specialized training, the deputies testified to nearly ten years of combined law enforcement experience. Accordingly, the search-warrant affidavit stating that both deputies "observed through [their] training and experience the smell of raw [m]arijuana emitting from the door" was sufficient for the warrant-issuing judge to find a substantial basis to conclude that probable cause existed.

It thus follows that requiring a search-warrant affidavit to also contain a phrase like "including police academy training in detecting this odor," is not necessary. While it is better practice to provide additional detail, the

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[4] https://perma.cc/H8YN-P8V2.

absence of such detail does not defeat probable cause under these narrow circumstances. *See, e.g.*, *Vasquez v. State*, 741 N.E.2d 1214, 1216 (Ind. 2001) (holding that "[t]he opinion of someone sufficiently experienced with [a] drug may establish its identity, as may other circumstantial evidence").[5]

This approach is consistent with other state and federal courts, many of which have upheld probable-cause findings based on raw marijuana's distinctive odor and trained officers' ability to identify it. *See United States v. Beard*, 708 F.3d 1062, 1066 (8th Cir. 2013) (finding the search of a vehicle lawful under the automobile exception to the warrant requirement when the officer "smelled raw marijuana immediately after" the defendant rolled down his car window); *United States v. Conklin*, 154 F. Supp. 3d 732, 737–38 (S.D. Ill. 2016) (holding that under a totality-of-the-circumstances analysis, informant's tip and officer's "sniff of [raw] cannabis" were sufficient to support search warrant and that "implicit in an officer's statement that he smelled marijuana is that he knows what marijuana smells like by virtue of his law enforcement experience"); *State v. Otto*, 840 N.W.2d 589, 595 (N.D. 2013) (finding probable cause for warrantless sweep of camper parked in parking lot when officers observed a "very strong odor of raw marijuana" emanating from it); *State v. Cuong Phu Le*, 463 S.W.3d 872, 879–80 (Tex. Crim. App. 2015) (finding probable cause where citizen's tip was corroborated by officer's observations, including the odor of raw marijuana at the front door).

In rejecting the "categorical presumption that every law-enforcement official is adequately trained in detecting and distinguishing the smell of marijuana," the Court of Appeals here relied on *Johnson* for its mandate that a warrant-issuing judge find the affiant "qualified to know the odor," which must be decided "based on the facts of each case." *Bunnell*, 160 N.E.3d at 1149 (cleaned up). We recognize that probable cause is a "fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. At the same time, probable cause "turn[s] on the assessment of probabilities in particular factual contexts." *Id.* So, if the

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[5] Because we find that Deputy Elmore's affidavit demonstrated a substantial basis to find probable cause for the search, we need not address whether the deputies relied on the warrant in good faith.

odor of an illicit substance, like raw marijuana, is highly distinctive, a warrant-issuing judge evaluating the totality of the circumstances may require less detail on the affiant's training and experience to conclude that the affiant is qualified to identify the odor. *Cf. Johnson*, 333 U.S. at 12 (finding probable cause when agents traced the "distinctive and unmistakable" odor of burning opium to a hotel room); *Davis v. State*, 202 S.W.3d 149, 155–56 (Tex. Crim. App. 2006) (holding that it is reasonable for a magistrate to infer that an officer has previous experience with the odor of manufacturing methamphetamine even when officer did not delineate his previous experience or credentials in the affidavit).

Like the Court of Appeals, we reject any "categorical presumption" that every law enforcement officer can distinguish and detect the smell of raw marijuana. *Bunnell*, 160 N.E.3d at 1149. Instead, we find that officers—like Deputies Elmore and Anderson here—who **assert** their training and experience as the basis of their ability to detect the scent of raw marijuana can present a substantial basis for probable cause. This satisfies the requirement that warrant-issuing judges and magistrates consider the reasonable inferences drawn from the totality of the evidence. *See Spillers*, 847 N.E.2d at 953.

This holding stands in tension with some prior Court of Appeals decisions that have suggested or held that an officer's general statement to this effect may not suffice for a probable-cause determination. *See Alexander-Woods v. State*, 163 N.E.3d 902, 910 (Ind. Ct. App. 2021), *trans. denied*; *Bean v. State*, 142 N.E.3d 456, 463–64 (Ind. Ct. App. 2020), *trans. denied*; *State v. Hawkins*, 766 N.E.2d 749, 751–52 (Ind. Ct. App. 2002), *trans. denied*. To the extent these cases conflict with today's holding, we disapprove them.

In sum, our decision today hinges on the unique scent of raw marijuana and the experience and training officers need to identify this odor. Indeed, officers who assert their training and experience as a basis to detect drugs other than marijuana by smell and who seek a search warrant on this basis must provide enough detail to support a conclusion that they're qualified to identify this odor **and** that the odor is "sufficiently distinctive to identify a forbidden substance." *Johnson*, 333 U.S. at 13. Furthermore, defendants who wish to challenge probable cause remain free to inquire as to officers' training and experience, though the overarching inquiry

remains whether the warrant-issuing judge had a substantial basis to determine that probable cause existed.[6]

Conclusion

Today we hold, as an issue of first impression, that an officer who affirms that they detect the odor of raw marijuana based on their training and experience may establish probable cause without providing further details on their qualifications to recognize this odor. We therefore affirm the trial court's denial of Bunnell's motion to suppress.

David and Slaughter, JJ., concur.
Goff, J., concurs in result.
Massa, J., concurs with separate opinion.

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[6] A defendant who makes a substantial preliminary showing that a warrant affidavit included a false statement that is necessary to the probable cause finding may challenge this statement at a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

Massa, J., concurring.

I fully concur in the reasoning of the Court's opinion and its result but write separately to note a cautionary tale for law enforcement.

The Court of Appeals decision we vacated might have been summarized thusly: The boilerplate magic words in a search warrant application in these circumstances require more than just "based on my training and experience." Some further elaboration was required describing said training and experience.

Our holding today makes clear those six magic words suffice in cases involving the odor of raw marijuana. In support, we cite a neighboring federal court decision that found, "**implicit** in an officer's statement that he smelled marijuana is that he knows what marijuana smells like by virtue of his law enforcement experience." *United States v. Conklin*, 154 F. Supp. 3d 732, 738 (S.D. Ill. 2016) (emphasis added). In my judgment, that ought to be enough; it is "implicit." The next case may well entail an application where an officer says, "I smelled raw marijuana," but omits the six magic words. Suppression, then, would seem to follow from today's holding, despite the affiant's implicit knowledge that many would recognize. Detectives and magistrates should heed the lesson.