

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Anthony Allen Thompson,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

August 8, 2023

Court of Appeals Case No.  
22A-CR-2924

Appeal from the Henry Circuit  
Court

The Honorable Bob A. Witham,  
Judge

Trial Court Cause No.  
33C01-2010-F5-84

**Memorandum Decision by Chief Judge Altice**  
Judges May and Foley concur.

**Altice, Chief Judge.**

## **Case Summary**

- [1] Anthony Allen Thompson challenges his convictions of Level 6 felony possession of cocaine, Class B misdemeanor possession of synthetic urine, and Class C misdemeanor possession of paraphernalia. He contends that the trial court committed fundamental error when it admitted evidence discovered during a warrantless search of his vehicle.
- [2] We affirm.

## **Facts & Procedural History**

- [3] On September 30, 2020, Officer John Buckingham with the New Castle Police Department stopped Thompson for speeding. Thompson was the only occupant of the vehicle and was operating with a suspended license. As Officer Buckingham spoke with Thompson, he smelled the odor of marijuana emanating from Thompson's vehicle. Officer Buckingham had Thompson step out of the car and then asked Thompson whether he had smoked marijuana recently. After an initial denial, Thompson indicated that he had smoked marijuana the day before. Another officer on the scene confirmed that he smelled marijuana as well.
- [4] Officer Buckingham placed Thompson in handcuffs and then proceeded to search the vehicle based on the odor of marijuana. The search resulted in the discovery of cocaine, drug paraphernalia, and a bottle of synthetic urine, among other things.

- [5] Following a jury trial on October 17, 2022, Thompson was convicted of Level 6 felony possession of cocaine, Class B misdemeanor possession of synthetic urine, and Class C misdemeanor possession of paraphernalia. The trial court sentenced him to a fully suspended sentence of one and one-half years.
- [6] Thompson now appeals, challenging the admission of the evidence discovered during the search of his vehicle. Additional information will be provided below as needed.

## **Discussion & Decision**

- [7] Thompson argues that the warrantless search – based only on the odor of marijuana – was unconstitutional under both the federal and state constitutions. Acknowledging that he did not object on this ground below, Thomson argues that the trial court’s admission of this evidence constituted fundamental error.
- [8] “On rare occasions, appellate courts may analyze an issue under the fundamental error doctrine to examine an otherwise procedurally defaulted claim.” *Matter of Eq. W.*, 124 N.E.3d 1201, 1214 (Ind. 2019). Such review is “extremely narrow” and is “available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* at 1214-15.
- [9] We recently addressed the applicability of this doctrine in cases such as this.

Our Supreme Court has long circumscribed fundamental-error review in cases involving allegations of unconstitutional searches.

*See, e.g., Swinehart v. State*, 268 Ind. 460, 376 N.E.2d 486, 491 (1978) (“That the evidence may have been obtained in violation of the defendant’s constitutional rights to be protected against unlawful search and seizure does not elevate the issue to the status of fundamental error that may be raised for the first time on appeal.”); *see also Membres v. State*, 889 N.E.2d 265, 272 (Ind. 2008) (observing that “the exclusionary rule that prohibits introduction into evidence of unlawfully seized materials is an example of a rule that does not go to the fairness of the trial”). The Court has observed that “improperly seized evidence is frequently highly relevant” and “its admission ordinarily does not cause us to question guilt.” *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). Accordingly, the admission of unlawfully seized evidence is not per se fundamental error. *See id.*

Rather, the Supreme Court has approved of the application of the fundamental error exception for illegally seized evidence only where there is “[a] claim of fabrication of evidence or willful malfeasance on the part of the investigating officers [or a] contention that the evidence is not what it appears to be.” *Id.* Bailey makes no such claims here, asserting only a generalized claim of fundamental error. Thus, the claimed error in this case does not rise to the level of fundamental error. *See id.* at 208 (“Brown makes no similar contention that he did not receive a fair trial, other than his assertion that the evidence was the product of an unconstitutional search and seizure.”).

*Bailey v. State*, 202 N.E.3d 485, 490 (Ind. Ct. App. 2023), *trans. denied*.

[10] As in *Bailey*, Thompson has made nothing more than a generalized claim of fundamental error based on the admission of unlawfully seized evidence. Such does not amount to fundamental error.

[11] Besides, our court just rejected the precise argument made by Thompson on the merits. That is, in *Moore v. State*, 211 N.E.3d 574 (Ind. Ct. App. 2023), Moore argued that the officer lacked probable cause to search his car because the odor of marijuana cannot be distinguished from that of lawful substances, such as hemp. We observed that “[p]ertinent to Moore’s claim is that our General Assembly has amended state law to recognize the legality of some forms of cannabis containing low levels of THC.” *Id.* at 579 (citing Ind. Code § 15-15-13-6 (defining “hemp” as any part of the cannabis plant, including derivatives and extracts, with a delta-9-tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%))). Despite this legislative change, we held that an officer’s detection of the odor of marijuana from a vehicle may still provide probable cause to search the vehicle under both the Fourth Amendment to the U.S. Constitution<sup>1</sup> and Article 1, Section 11 of the Indiana Constitution.<sup>2</sup>

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<sup>1</sup> Regarding the Fourth Amendment, after surveying recent federal cases, we applied a “fair probability” test:

Although it was equally possible that the strong odor emanating from the vehicle and detected by [the officer] was hemp as it was marijuana, these circumstances created a fair probability – that is, “a substantial chance” – that the vehicle contained contraband. We thus conclude that [the officer’s] detection of the odor of marijuana immediately upon his arrival at the open window of the car driven by Moore provided probable cause for him to search the car.

*Moore*, 211 N.E.3d 574 at 581 (citation omitted).

<sup>2</sup> For our Indiana constitutional analysis, we explained in relevant part:

The argument is this: given the concept that illegal marijuana and legal hemp cannot be distinguished by their smell due to the similarity of their odors, it can no longer be said that marijuana has a “distinct smell” that indicates criminal activity. We disagree.

Marijuana is not the only substance whose legality cannot be detected by human senses alone. For instance, innocuous substances such as talcum powder, flour, and sugar have a white powdery appearance similar to cocaine. But that does not mean that an untested white powder can never indicate criminal activity. *See, e.g., Lamagna v. State*, 776 N.E.2d 955 (Ind. Ct. App. 2002) (ruling that police had probable cause to arrest defendant based solely on observations of his possession, transfer, and abandonment of packets of white powder). Similarly, an officer’s discovery of unidentified pills may indicate criminal activity, although some pills are not contraband because they either are not controlled substances or because the person possessing

We do not feel the need to revisit this issue, especially where it has not been preserved below.

[12] Judgment affirmed.

May, J. and Foley, J., concur.

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them has a valid prescription. *See Strangeway v. State*, 720 N.E.2d 724 (Ind. Ct. App. 1999) (ruling that police officer had probable cause to arrest driver after passenger exited car and officer saw on seat of vehicle a cellophane wrapper containing white pills that he suspected were controlled substances); Ind. Code § 35-48-4-6(a) (2014) (defining offense of possession of narcotic as requiring possession of schedule I or II narcotic by a person “without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice”).

It therefore is not convincing that the marijuana odor could be caused by legal hemp. Although the legal landscape for cannabis-derived substances is ever-changing, one thing remains true: some types of marijuana possession remain illegal in Indiana. It follows then that the odor of marijuana reasonably may indicate criminal activity. Therefore, in the consideration of the constitutionality of a search based on the odor of marijuana, as the law stands now it is of no moment that legal hemp smells similar to illegal marijuana because law enforcement’s conduct must be reasonable under the circumstances and such reasonableness does not require conclusive proof that a defendant committed a crime.

*Id.* at 582-32.