**Defending Cannabis Cases: What do we know?**

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As we all know by now, the legalization of hemp has forever changed how marijuana cases in Texas are handled and how we should approach them. While each county and geographical region differs in its attitudes toward marijuana prosecutions, this article is about some things we can be sure of when it comes to defending marijuana cases.

**Hemp is legal.** As we all know, the 2018 Farm Bill legalized the commercial production of hemp and authorized states to submit state plans to administer hemp programs. In June of 2019, House Bill 1325 was signed into law in Texas and authorizes the production, manufacture, retail sale, and inspection of industrial hemp crops and products.

**Hemp and Marijuana are the same plant.** Hemp and marijuana are both Cannabis sativa L, a dioicous plant of the Cannabaceae family and it is widely distributed all over the world[[1]](#footnote-1). CBD (cannabidiol) and THC (tetrahydrocannabinol, the mind-altering substance in marijuana) are the most common cannabinoids found in cannabis products and they are found in both marijuana and hemp. Marijuana contains much more THC than hemp, while hemp has a lot of CBD[[2]](#footnote-2). Legally, hemp is defined as “the plant Cannabis sativa L. and any part of that plant…with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” *See* Tex. Agric. Code Ann. § 121.001.

**Even before hemp’s legalization, Texas courts have held that odors coming from a home, standing alone, do not authorize a warrantless search on the home.** Well before hemp’s legalization, in 2002, the Texas Court of Criminal Appeals was presented with a case in which police officers had entered the defendant’s home and arrested everyone in the room after smelling the odor of marijuana after the defendant opened the door. *See State v. Steelman*, 93 S.W.3d 102 (Tex. Crim. App. 2002). There, the Court concluded that the odor of marijuana emanating from a home cannot, by itself, justify a reasonable belief that any particular individual present had committed or was committing any particular offense. *Id.* at 108–10. The Court further noted that “ ‘odors alone do not authorize a search without a warrant.’ ” *Id.* at 108 (quoting *Moulden v. State*, 576 S.W.2d 817, 819 (Tex. Crim. App. 1978). The following year, in 2006, the Texas Court of Criminal Appeals also noted that “[t]he odor of contraband is certainly an important fact which may (or may not) be dispositive, given a specific context, in assessing whether probable cause exists.” *Parker v. State*, 206 S.W.3d 593, 599 (Tex. Crim. App. 2006).

**Before hemp’s legalization, Texas law has long considered the odor of marijuana alone sufficient to constitute probable cause to search a defendant’s person, vehicle, or belongings inside the vehicle.** Texas courts have long recognized that officers who smell the odor of marijuana after justifiably stopping a motor vehicle for a traffic violation have probable cause to conduct warrantless search of the vehicle, belongings in the vehicle, and persons in the vehicle. *See e.g., Moulden v. State*, 576 S.W.2d 817, 819 (Tex. Crim. App. 1978); *Harris v. State,* 468 S.W.3d 248 (Tex. App.–Texarkana 2015); *Rocha v. State, 464 S.W.3d 410* (Tex. App.–Houston [1st Dist. 2015]), *pet. ref’d.* (Aug. 26, 2015); *Jordan v. State*, 394 S.W.3d 58 (Tex. App.–Houston [1st Dist. 2012]), *pet. ref’d.* (Nov. 14, 2012). Likewise, Texas courts have historically held that once a drug-detection dog alerts on a car, officers have probable cause to search the car without a warrant. *See e.g., Branch v. State*, 335 S.W.3d 893 (Tex. App.–Austin 2011), *pet. ref’d.* (Sept. 14, 2011).

**The pre-hemp legalization opinions were drafted during a time in which the odor or plain sight of alleged marijuana were indicative of criminal activity (because nothing legal looked or smelled the same as marijuana).** Now, that is no longer the case. In *Moulden,* when discussing probable cause, the Texas Court of Criminal Appeals noted that “[i]f the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, **and it is one sufficiently distinctive to identify a forbidden substance**, this Court has never held such a basis insufficient to justify issuance of a search warrant. *Moulden v. State*, 576 S.W.2d 817, 819 (Tex. Crim. App. 1978) (emphasis added). Since the legalization of hemp, the odor (or sight) of marijuana is no longer sufficiently distinctive to identify a forbidden substance (marijuana) from a legal substance (hemp), since distinguishing between the two requires scientific testing. The Texas Court of Criminal Appeals has not addressed the issue since hemp’s legalization.

**Law enforcement recognizes the issue.** Law enforcement agencies across the country have now recognized that officers (and even canines) cannot distinguish between legal hemp and illegal marijuana based on sight or smell. For example, in the State of Florida, the State’s Attorney for the Eleventh Judicial Circuit sent a memo to Law Enforcement Agencies within the Eleventh Judicial Circuit of Florida indicating: “Because hemp and cannabis both come from the same plant, they look, smell, and feel the same… Since there is no visual or olfactory way to distinguish hemp from cannabis, the mere visual observation of suspected cannabis – or its odor alone – will no longer be sufficient to establish probable cause to believe that the substance is cannabis[[3]](#footnote-3).” Similarly, the North Carolina Bureau of Investigation recognized that no law enforcement officer can visually tell the difference between the illegal hemp and illegal marijuana, nor can its officers or its canines detect the difference in odor[[4]](#footnote-4).

**The TDCAA recognizes the issue.** More importantly, here in Texas, shortly after hemp was legalized, the Texas District & County Attorneys Association (TDCAA) published an interim update on hemp and conceded the following:

“The distinction between marijuana and hemp requires proof of the THC concentration of a specific product or contraband, and for now, that evidence can come only from a laboratory capable of determining that type of potency—a category which apparently excludes most, if not all, of the crime labs in Texas right now. Various law enforcement agencies—including DPS—and other local or private crime labs will have to purchase new instrumentation and change certain testing procedures to be able to supply that new information to the courts before criminal cases involving marijuana go to trial. Until then, there will be no easy way to determine whether the weed your officers seized is illegal marijuana.”[[5]](#footnote-5)

**What does that mean? File the Motion to Suppress.** A motion to suppress should be filed when the basis for probable cause to search is based on the alleged odor of marijuana or seeing alleged marijuana in plain sight. As noted above, hemp and marijuana are both the same type of plant and can look and smell the same. It’s been widely reported that the only way to distinguish hemp and marijuana is by measuring their THC content, and law enforcement don’t have the testing technology to do so on the spot[[6]](#footnote-6). Moreover, as mentioned above, law enforcement often recognizes that they cannot distinguish between the two. Because they cannot distinguish between the two, the sight or smell of alleged marijuana, standing alone, is no longer necessarily indicative of criminal activity and should no longer provide probable cause to search an accused’s person, vehicle, or belongings. The Texas Court of Criminal Appeals has not meaningfully addressed this issue since the legalization of hemp in the United States and in Texas.

**What’s been happening across the State in lower courts?** There is little to no guidance on the issue, as appellate courts do not seem to have meaningfully addressed the landscape of marijuana cases post hemp legalization. Under Texas Rule of Appellate Procedure 47.7(a), in criminal cases, “opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, ‘(not designated for publication)’.” *See* Tex. R. App. Proc. 47.7. Since the legalization of hemp in 2019, few appellate courts in Texas have released any opinions addressing probable cause based on the alleged sight or odor of marijuana alone. There are, however, a few recent unpublished opinions concerning the issue that are briefly discussed below[[7]](#footnote-7).

***Cortez v. State***, No. 05-21-00664-CR, 2022 WL 17817963 (Tex. App.—Dallas [Dec. 20, 2022] no pet. h.). In *Cortez,* one of the issues the defendant raised on appeal was that the district court erred when it concluded there was probable cause to support the officer’s warrantless search of his vehicle because it was based the officer’s belief that he smelled “illegal marijuana,” which has the same odor as “legal hemp.” *Id.* at \*1. The court noted that the State responded that courts have long held that the smell of marijuana alone is sufficient to constitute probable cause to search a defendant’s person, vehicle, and the objects within the vehicle, and that in Texas, marijuana remains illegal. *Id.* at \*6. In addressing Cortez’s argument that the officer could not distinguish between illegal marijuana and legal hemp, the *Cortez* court noted that “…the possession of marijuana is still a criminal offense under Texas law and a reasonable, even if ultimately erroneous conclusion by an officer on the scene as to the identity of the substance, would be permitted under the Fourth Amendment.” *Id.* at \*7. The court goes on to say “Therefore, we conclude the odor of Cannabis sativa L. emanating from Cortez’s vehicle gave the officer probable cause to search the vehicle as well as its occupants” and cites *Stringer v. State*, 605 S.W.3d 693, 697 (Tex. App.—Houston [1st Dist.] 2020, no pet.). The problem is, though, while the *Stringer* did write that a strong odor of marijuana from a small enclosed area, like a car, gives a peace officer probable cause to make a warrantless search of both the car and its occupants, it cites pre-hemp legalization cases as its authority. Moreover, the defendant in *Stringer* did not challenge probable cause based on the legality of hemp. For these reasons, the Dallas Court of Appeals has no legal authority post hemp legalization to support its conclusion that the odor of Cannabis sativa L. emanating from Cortez’s vehicle gave the officer probable cause to search the vehicle as well as its occupants.

***McAfee-Jackson v. State***, No. 09-19-00430-CR, 2021 WL 3888245 (Tex. App.—Beaumont [Sept. 1, 2021], no pet.). In *McAfee,* one of Appellant’s arguments was that the trial court abused its discretion by denying her motion to suppress evidence seized during law enforcement’s search of Appellant’s vehicle. The Appellant argued that the officer involved testified that he had probable cause to search Appellant’s vehicle during the traffic stop based on the fact that he smelled marijuana, and that the officer conceded that, when presented with Defense Exhibits 1 and 3, which were “zero THC hemp flower bought at a corner store” – he could not tell the difference in either look or smell between that substance and the actual marijuana in State’s Exhibit 2. *See id.* at \*2. Appellant moved to suppress evidence obtained from the search “based on Fletcher's concession that he could not differentiate between the smell of contraband and an entirely legal substance – a hemp plant with no THC.” Appellant moved to suppress the evidence “based on [the officer]’s concession that he could not differentiate between the smell of contraband and an entirely legal substance – a hemp plant with no THC.” *Id.* When it came to the issue of timing, the Appellant argued that her objection was timely because unlike in other typical contraband suppression cases, “the suppression issue in this case did not become apparent until [the officer] testified that he could not differentiate between the contraband and the two containers of legal hemp product.” *Id.* at \*3. The court disagreed and noted the suppression issue was apparent from the beginning of the trial, and Appellant should have objected at the earliest testimony regarding the drugs.” *Id.* The *McAfee-Jackson* court ultimately held that the Appellant’s complaint regarding the denial of the motion to suppress and the introduction of the evidence obtained from the search was not preserved for review and affirmed the trial court’s judgment. *Id.* at \*4. **Take away:** file the motion to suppress early on and object at the earliest law enforcement testimony regarding the sight or odor of marijuana.

***Trevino v. State***, No. 04-21-00185-CR, 2022 WL 16542596 (Tex. App.—San Antonio Oct. 31, 2022, pet. ref’d). In *Trevinio,* the Appellant argued that the State failed to prove she possessed marijuana as that term is now defined by statute, *i.e.*, as having a THC (tetrahydrocannabinol) concentration of more than 0.3%. *Id.* at \*5. There, the *Trevino* court noted that they agreed with their sister courts that “the changes enacted by the [l]egislature in H.B. 1325 apply prospectively to offenses committed after the date it took effect, June 10, 2019 ....” *id.* (external citations omitted). Because Trevino had been arrested in 2017, the Court held that the issue was without merit and overruled.

***Arellano v. State***, No. 08-19-00240-CR, 2021 WL 2678482 (Tex. App.—El Paso June 30, 2021, no pet.). In *Arellano,* Appellant contended that House Bill 1325, which amended the Texas Health and Safety Code, altered the definition of marijuana to require a finding that the substance found in his possession had a THC concentration level of over 0.3 percent, and that the trial court erred in failing to so instruct the jury. *Id.* at \*1. There, the Court concluded that “…because House Bill 1325 contains no specific savings clause, the amendments contained therein apply prospectively in accordance with the general savings clause. So even if Appellant is correct in his argument that the bill altered the definition of marijuana, any such change in the law would not apply to his case, as his offense was committed well before the bill’s effective date. *Id.* at \*5. *See also Smith v. State*, 620 S.W.3d at 453 (concluding that “the changes enacted by the Legislature in H.B. 1325 apply prospectively to offenses committed after the date it took effect, June 10, 2019”); *Childress v. State*, No. 06-19-00125-CR, 2020 WL 697903, 2020 Tex. App. LEXIS 1170 (Tex. App.—Texarkana Feb. 12, 2020, no pet.) (mem. op.) (refusing to apply the amended definition of marihuana to an offense occurring prior to the effective date of H.B. 1325); *Gaffney v. State,* No. 06-19-00189-CR, 2020 WL 465280, 2020 Tex. App. LEXIS 763 (Tex. App.—Texarkana, Jan. 28, 2020, no pet.) (mem. op.) (stating that “at the time of this offense, the Texas Health and Safety Code did not exclude ‘hemp’ from the definition of marihuana”). **Take away**: ask for the jury instruction regarding THC concentration if the defendant’s offense was committed after House Bill 1325’s enactment.

While these opinions may not hold precedential value, they can teach us key take aways to remember when defending our next alleged marijuana case. File the motion to suppress, object to the admission of testimony, preserve the issue for appeal, ask for the jury instruction concerning THC concentration, and remember: hemp and marijuana are the same plant!

1. *See* Federica Pellati, Vittoria Borgonetti, Virginia Brighenti, Marco Biagi, Stefania Benvenuti, Lorenzo Corsi, “Cannabis sativa L. and Nonpsychoactive Cannabinoids: Their Chemistry and Role against Oxidative Stress, Inflammation, and Cancer”, BioMed Research International, vol. 2018, Article ID 1691428, 15 pages, 2018. <https://doi.org/10.1155/2018/1691428> [↑](#footnote-ref-1)
2. *See* DiLonardo, Mary Jo, “CBD vs. THC: What's the Difference?”, WebMD, Dec. 15, 2021, *available at*: <https://www.webmd.com/pain-management/cbd-thc-difference> [↑](#footnote-ref-2)
3. *See* “Interoffice Memo ‘Re: Marijuana Cases in the Wake of the ‘HEMP’ Bill (Senate Bill 1020)’”, Office of the State Attorney for the Eleventh Judicial Circuit, Aug. 5, 2019, *available at:* <https://media.local10.com/document_dev/2019/08/09/Hemp%20Memo%20to%20Law%20Enforcement_1565383103541_22165328_ver1.0.docx> [↑](#footnote-ref-3)
4. *See* “Industrial Hemp/CBD Issues”, North Carolina State Bureau of Investigation, *available at*: <https://www.sog.unc.edu/sites/default/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf> [↑](#footnote-ref-4)
5. *See* “Interim Update: Hemp”, Texas District & County Attorneys Association, 24 June 2019, *available at*: <https://www.tdcaa.com/legislative/interm-update-hemp/>. [↑](#footnote-ref-5)
6. *See,* for example,“Legal hemp, pot’s look-alike, creates confusion for police”, CNBC, 28 Mar. 2019, *available at:* <https://www.cnbc.com/2019/03/28/legal-hemp-pots-look-alike-creates-confusion-for-police.html> [↑](#footnote-ref-6)
7. The authors do not intend to provide a summary of the issues or holdings in the case and only included the portions relevant to this article. [↑](#footnote-ref-7)