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7th Circuit: Pot smell doesn't justify cops entering home without warrant

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In the early morning hours of March 9, 2010, Winnebago County Sheriff's Deputy Tammie Stanley stopped Nancy Hille for an expired vehicle registration sticker.

Unable to confirm whether there was a problem with the sticker due to the hour, Stanley let Hille go and followed up later that afternoon, when she confirmed the sticker on Hille's car was stolen.

Since possession of a stolen sticker is a Class 4 felony, Stanley went to Hille's home to arrest her and enlisted Sheriff's Deputy Thomas Morrison for backup.

The deputies did not have a warrant, and when they knocked on the door, Hille's boyfriend, James White, told them they could not enter. But Stanley and Morrison smelled marijuana burning inside the house and entered without obtaining consent.

Once inside, the deputies got into an altercation with White and arrested him for resisting or obstructing a peace officer. The criminal charge was later dismissed.

White filed a federal civil rights lawsuit against the deputies for false arrest and excessive force. Following discovery, U.S. District Judge Frederick J. Kapala denied the deputies' motion for summary judgment on the false arrest claim because, he concluded, it was clearly established that the mere smell of burning marijuana was insufficient to constitute an exception to the Fourth Amendment warrant requirement. The deputies appealed.

In *White v. Stanley, et al.*, No. 13-2131, 2014 WL 929049 (7th Cir. Ill. March 11, 2014), the 7th U.S. Circuit Court of Appeals reversed. Writing for the court, Judge Joel M. Flaum initially agreed with Kapala's conclusion that the officers' entry violated the Fourth Amendment:

"Typically, the Fourth Amendment requires police to have probable cause and a warrant to enter a home. *Payton v. New York*, 445 U.S. 573, 586 (1980). [But] police have authority to enter a home without a warrant to render emergency assistance, pursue a fleeing felon or prevent the destruction of evidence. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) … [I]n *Johnson v. United States*, 333 U.S. 10 (1948) … federal narcotics officers approached a hotel room on a tip and smelled odors of burning opium outside. …

"Though the officers had no warrant, one of the officers demanded that the suspect open her door so that they could search her room. She complied. The Supreme Court concluded that the officers should have obtained a warrant because the mere smell of burning opium outside a hotel room was insufficient to excuse the requirement despite the fact that the opium odors would dissipate. Id. at 15.

"The court's holding of the police to the warrant requirement in *Johnson* suggests that the smell of burning marijuana is no exigency here, either."

Flaum also relied on the decision in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), to support his conclusion that the concern that evidence would dissipate while obtaining a warrant did not always trigger the exception to the warrant requirement:

"[In *Welsh*, a] suspect was arrested for drunk[en] driving after the police found his abandoned car near his home and entered his home without a warrant to administer a test for blood alcohol level. 466 U.S. at 742-43. At the time, Wisconsin deemed it a minor offense to drive under the influence. The state claimed it had a right to enter the home without a warrant to prevent the destruction of evidence, i.e., the dissipation of the suspect's blood alcohol level.

"But the Supreme Court rebuffed this argument and counseled that suspicion of minor offenses should give rise to exigencies only in the rarest of circumstances because the state's interest in gathering evidence of a minor offense is generally not strong enough to overcome the weighty interest in home sanctity." Id. at 753."

In light of *Johnson* and *Welsh*, the appellate court agreed with Kapala that the deputies could not dispense with the warrant requirement:

"The possession of a small amount of marijuana is far from that rare case. In all of the states in this circuit, mere possession is only a misdemeanor. See 720 ILCS 550/4; Wis. Stat. Section 961.41(3g)(b); Ind. Code Section 35-48-4-11.

"In fact, in Illinois, possession will soon no longer be per se illegal under state law, as Illinois has begun implementing regulations to permit the use of medical marijuana for qualifying individuals. See Medical Cannabis Pilot Program, illinois.gov/gov/mcpp /Pages/default.aspx (visited March 5, 2014).

"Thus, once this regulatory scheme is in place, the smell of burning marijuana will not necessarily be indicative of any wrongdoing under Illinois law.

"The upshot of all this is that police who simply smell burning marijuana generally face no exigency and must get a warrant to enter the home."

But that finding did not end the court's inquiry because the deputies asserted an affirmative defense of qualified immunity, which would defeat White's claim unless it could be determined that the deputies' violation of White's Fourth Amendment rights was "clearly established" at the time their entry into the home. See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

On that question, the deputies prevailed:

"The necessary inquiry in this case is whether it was clearly established on March 9, 2010, that the smell of burning marijuana, standing alone, was no exigency. During the court's discussion of whether or not the smell of burning marijuana established an exigency, it noted that 'courts who have addressed [the issue] have answered that question in varied and conflicting ways, and there does not appear to be a universal, or even majority, approach to this question.'

"The district court was right — federal and state courts have been all over the map on this issue [citations omitted] … In light of this fractured case law, we cannot say that 'at the time of the challenged conduct, the contours of [White's] right [were] sufficiently clear' such that 'every reasonable official would have understood' that entering the home after smelling the burning marijuana violated the right. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) … It follows that the deputies are entitled to qualified immunity."

The court closed with a cautionary note:

"Future police officers faced with a situation like the one confronting Stanley and Morrison should not feel emboldened to act as the deputies did here. Henceforth, officers who make a warrantless entry under the circumstances found in this case should expect no shelter from liability."