No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DWAYNE SHERON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER a police officer can utter the magic words "I smelled an odor of marihuana" long after he conducted illegal search of a vehicle to justify said vehicle's search without a warrant and admittedly while acting on just a "hunch".

PARTIES TO THE PROCEEDING

Dwayne Sheron is a resident of Ohio. He is currently incarcerated at FCI Gilmer, in Glenville, West Virginia.

As this is a criminal proceeding, the United States of America was the prosecuting party, and Dwayne Sheron was the defendant in the Northern District of Ohio and the Appellant in the Sixth Circuit Court of Appeals.

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PETITION FOR CERTIORARI

Petitioner, Dwayne Sheron, respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on December 11, 2019.

OPINION BELOW

This opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication and appears at **Appendix A.** *United States v. Sheron*, 787 F.App'x 332 (6th Cir.2019), 2019 U.S. App. LEXIS 36632 ** | 2019 FED App. 0609N (6th Cir.) | 2019 WL 6726204

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 11, 2019. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

U.S. Const. Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, …

STATEMENT OF THE CASE

On February 11, 2018 Cleveland Police Officer Webb (Webb) stopped a red vehicle driven by Dwayne Sharon (Sharon) for not stopping at the stop sign. Webb approached the car from the driver's side. Webb gets Sheron's driver's license, runs it through the system and sees a possible warrant. Webb returns to the red vehicle and asks Sheron to exit, when Sheron does, Webb handcuffed him and puts him in police cruiser. Officer Webb tells Sheron that he will run him through the system again and that if nothing comes back, he will be let go. Officer Webb is not waiting for system's response, but announces to his partner, Cleveland Police officer Aponte (Aponte), that he is going to search the vehicle for weapons. Webb admits that he was acting on a hunch. Webb finds a firearm underneath the seat. Webb returns to the police cruiser, arrests Sheron and only then announces that he smelled weed. Officer Webb admitted that he never, even after Sharon was cuffed and secured in the back of police cruiser, said to anyone, including officer Aponte, that he is looking for weed. He admitted

bringing up the "weed" only after he found the gun.

Only after finding the weapon and returning to his cruiser officer Webb proclaims that he smelled marijuana odor. At that time and for the first time ever during this stop the words "smell" and "marijuana" are uttered. Webb's bodycam Video shows and Webb admitted on cross examination that neither him nor officer Aponte at any time prior to locating the weapon said anything indicative about the odor emanating from the car. Officer Webb's attempts to explain this silence by his alleged effort to hide his investigation from Sheron. Officer Webb stated that he didn't say that he smelled weed when he approached the car the first time. He admitted on cross examination that he never says anything about the weed when he approaches the car the second time. It is noteworthy that Sheron car's window is wide open. Officer Webb further admitted never saying anything about the smell after he cuffs Sheron. He admitted never saying anything to his partner, officer Aponte. He admitted that officer Aponte never told him that he (officer Aponte) smelled weed. Video depicts officer Aponte approaching Sheron's car from the driver side as well. Notwithstanding the fact that

officer Aponte is close to the open window, he never said anything about the smell of marijuana. Officer Webb never advised Aponte that he is going to check Sheron's car for weed. Webb clearly said that he is checking for weapons. Webb admitted never telling Sheron after securing him in the back of the cruiser that he smelled weed and that he is going back to the car to check for weed. Furthermore, officer Webb admitted that he acted on a hunch.

Subsequent search of the car depicted in the body camera video shows officer Aponte allegedly locating what he describes in said video as a marijuana roach and packaging what he found into designated evidence bag. Inexplicably, the government never produced the contents of said bag nor the results of its examination. It just vanished. As such, this allegation of marijuana smell as well as the search cannot be objectively supported by even a stale roach.

On March 7, 2018 Dwayne Sheron was indicted for alleged violation of 18 U.S.C. § 922(g)(1). On August 9, 2018 he filed his Motion to Suppress Evidence Seized During Illegal Search of His Car. The district court issued an oral order on September 13, 2018 denying

Sheron's motion. Subsequent to this ruling, Sheron plead guilty to the charge. He reserved his right to appeal the ruling on his motion to suppress. On January 9, 2019, Sheron was sentenced to 84 months imprisonment.

REASONS FOR GRANTING THE WRIT

We simply need a clear limit on how long after the search of stopped vehicle on a hunch police officer can justify this search with magic words "I smelled marijuana." The day has come to reject the canard of marijuana emanating from a vehicle pretense as an endless continuum for search justification. This Court's review and decision is critical to establishing clear limits on utility of the phrase "I smelled marijuana" in any warrantless setting. This Court's review is necessary to preserve and add heightened level of objective scrutiny beyond the subjective credibility examination by the district judge when officer is acting on a hunch in determining whether the Fourth Constitutional Amendment was violated.

Although the Supreme Court stresses the importance of warrants

and has repeatedly referred to searches without warrants as "exceptional," G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53, 355 (1977), it appears that the greater number of searches, as well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arraignment Procedure have noted "their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance" than searches pursuant to warrants. "[T]he evidence on hand . . . compel[s] the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws." American Law Institute, A Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3 (Philadelphia: 1970), xix. Nevertheless, the Court frequently asserts that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and

well-delineated exceptions.' "Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967))

The exceptions are said to be "jealously and carefully drawn," Jones v. United States, 357 U.S. 493, 499 (1958) and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1948). Although the record indicates an effort to categorize the exceptions, the number and breadth of those exceptions have been growing.

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit in the matter at bar provides:

> To be sure, reasonable minds could disagree about whether Officer Webb really smelled marijuana. For one, Officer Webb announced that he smelled marijuana only *after* he found the gun. For another, he first told his partner he was going to search for *weapons*, not drugs. But the district court considered these facts, weighed them against the others, and decided that Officer Webb's testimony was credible. (Appendix A, page 3)

But district court's determination is clearly erroneous and is contradicted by video footage, testimony of officer Webb and common objectivity. District court's factual finding is clearly erroneous, even if

viewed in light most likely to support its decision. Objective evidence is firm that no probable cause to search Sharon's car existed.

In ruling that officer Webb's detection of marijuana in the vehicle, by itself, provided the necessary probable cause to conduct a lawful search of the vehicle, the district court relied on opinion in United States v. Garza, 10 F.3d 1241, 1245 (6th Cir. 1993). Sheron does not contest that officers had reasonable suspicion to conduct a traffic stop of the vehicle. Thus, because there is no dispute that the initial stop of the vehicle was valid, the focus of this Argument is whether officer Webb Officers had probable cause to search the vehicle.

In Garza, the defendant's semitruck vehicle was pulled over in a traffic stop by federal Drug Enforcement Administration ("DEA") and United States Border Patrol agents, after they conducted a week-long surveillance that suggested the defendant was involved in drug trafficking. Garza, 10 F.3d at 1243-44. After ordering the defendant to exit the truck, a DEA agent noticed a strong odor of marijuana coming from the truck as the agent looked inside the vehicle via a "flapping" open door to confirm that no other individuals were hiding inside. Id. at

1244. The federal agents then conducted a full search of the truck, discovering 150 pounds of marijuana stored in the cab. Id. at 1243. On appeal from the denial of the defendant's motion to suppress, court held that the agents had reasonable suspicion to conduct a traffic stop of the truck, and the DEA agent's "smelling the marijuana then constituted probable cause to believe that there was marijuana in the vehicle. Once this probable cause existed, a search warrant was not necessary." Id. at 1246.

In the case at bar, facts are dramatically different from Garza. Officer Webb's rushed early and out-of-sink answer to government's question on direct examination of whether Sheron produced his driver's license, insurance and address that he "… and I could smell marijuana coming from the vehicle, so I believed at that time with him being so far away he was either buying or selling drugs, one of the two." (Tr. Of Motion Hrg. R. 37, PID# 214.) He needs to get this in almost immediately to demonstrate that he had probable cause to search the car. However, the facts as depicted by his own body camera do not support his statement. DVD depicts that after the stop, officer Webb

approaches Sheron's red car from the driver side. Sheron's window fully open. Officer Webb gets Sheron's driver license, returns to his cruiser, checks the license and then returns to Sheron (2:58) and advises him that there is a possible warrant for his arrest. Officer Webb cuffs Sheron and removes him from the car fully opening cars door. DVD of Body Cam of officer Webb (Exh. and Witness List, R. 19, PIN# 58, Exh.1) Officer Aponte's DVD shows him approaching Sheron's car from the Driver side with window wide open as well. (Exh. and Witness List, R. 19, PIN# 58, Exh.4) Neither officer says anything about the odor of marijuana at any time before finding a weapon. Officer Webb stated that he didn't say that he smelled weed when he approached the car the first time. He admitted that he never says anything about the weed when he approaches the car the second time. He admitted never saying anything about the smell after he cuffs Sheron. He admitted never saying anything to officer Aponte. He admitted that officer Aponte never told him that he (officer Aponte) smelled weed. He never advised Aponte that he is going to check Sheron's car for weed. He admitted never telling Sheron after securing him in the back of the cruiser that he

smelled weed and that he is going back to the car to check for weed. (Tr. Of Motion Hrg. R. 37, PID#233- 236.) On recross examination Officer Webb admitted that he never, even after Sharon was cuffed and secured in the back of police cruiser, said to anyone, including officer Aponte, that he is looking for weed. He admitted bringing up the "weed" only after he found the gun. (Tr. Of Motion Hrg. R. 37, PID# 243-244.)

Officer Webb explains that he doesn't say anything because "I don't want to tip, you know, my cue to them." (Tr. Of Motion Hrg. R. 37, PID# 214.) This makes no sense what so ever as the suspect, Mr. Sheron, is cuffed and secured in the back of police cruiser. Sheron was completely immobilized and cold have not done anything even if he was tipped or cued.

In fact, officer Webb admitted that he acted on a hunch. He testified that he had a hunch that something wasn't right. (Tr. Of Motion Hrg. R. 37, PID# 232.)

Officer Webb went checking for a weapon. Officer Webb initially denied saying "I'm going to check for weapons". (Tr. Of Motion Hrg. R. 37, PID# 236.) But after listening to the tape admitted that he indeed

went looking for weapons. (Tr. Of Motion Hrg. R. 37, PID#236.) Both tapes clearly provide audio and video of officer Webb stating that he is going to check for weapons. (Exh. and Witness List, R. 19, PIN# 58, Exh. 1 and 4) He was not checking for marijuana, he was checking for weapons and weapons only. Nothing prevented him from saying that he was looking for marijuana. Instead he said he is looking for weapons. His actions were based on a hunch.

DVD shows that officer Aponte searches Sheron's car. He locates what he describes as little roach in Sheron's ash tray and describes it as "your probable cause". DVD depicts officer Aponte places the alleged roach in the evidence bag. (Exh. and Witness List, R. 19, PIN# 58, Exh. 4) However, this alleged evidence was never produced or shared with the defense. It just vanished. If it was indeed weed, then there would have been some objective evidence to support the allegation that the smell of marijuana was present. But it all just disappeared. Officer Webb admitted that he doesn't know what happened to the evidence of roach collected from Sharon's car or whether it was tested. (Tr. Of Motion Hrg. R. 37, PID# 226-227.)

There was no probable cause to search Sheron's car. Officer Webb acted on a hunch. "Hunch" doesn't even rise to the reasonable suspicion standard. Illinois v. Gates, 462 U.S. 213 (1983). In the case at bar there is no objective evidence to sustain "reasonable suspicion" or vehicle search. Government's argument that if at any time after searching suspect's vehicle for any reason the officer utters magic words "I smelled marijuana", then any search magically becomes valid should not stand.

District Court clearly erred when it failed to incorporate all available facts in its analysis including officer Webb's clear and unequivocal statement recorded on video that he is "going to look for weapons".

District court should have granted Sheron's Motion to Suppress evidence.

CONCLUSION

Petitioner Dwayne Sheron respectfully petitions the Court for a writ of certiorari to the United States Court of Appeals for Sixth Circuit. This Court's review and decision is critical to establishing clear limits

on utility of the phrase "I smelled marijuana" in any warrantless setting. This Court's review is necessary to preserve and add heightened level of objective scrutiny beyond the subjective credibility examination by the district judge when officer is acting on a hunch in determining whether the Fourth Constitutional Amendment was violated.

Respectfully submitted,

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