

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11967

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

THOMAS GERHARDT,
Defendant-Appellant.

ON QUESTIONS REPORTED BY A JUSTICE OF
THE WORCESTER DISTRICT COURT

BRIEF OF *AMICUS CURIAE*, NATIONAL ORGANIZATION FOR THE
REFORM OF MARIJUANA LAWS,
IN SUPPORT OF APPELLANT - GERHARDT

Steven S. Epstein (BBO#: 546862)
P.O. Box 266
Georgetown MA 01833-0366
Telephone: 978-352-3300
Email: Epeggs@aol.com

Marvin Cable (BBO#: 680968)
P.O. Box 1630
Northampton, MA 01061-1630
Telephone: 413-268-6500
E-Mail: marvin@marvincable.com

Attorneys for *Amicus Curiae*, the
National Organization for the
Reform of Marijuana Laws (NORML)

Dated: December 20, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

REASONS WHY AN AMICUS BRIEF IS DESIRABLE 2

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

STATEMENT OF FACT 3

ARGUMENT 3

 I. FUNDAMENTAL CONSTITUTIONAL PRINCIPLES REQUIRE
 THAT PROSECUTIONS OF SUSPECTED OPERATING WHILE
 IMPAIR-ED FOLLOWING MARIJUANA CONSUMPTION BE
 PROSECUTED AS OPERATING NEGLIGENTLY SO AS TO ENDANGER
 G.L. c. 90 § 24(2)(a). 3

CONCLUSION: RELIEF REQUESTED 6

CERTIFICATIONS 8

TABLE OF AUTHORITIES

CASES

Commonwealth v. Cruz, 459 Mass. 459 (2011) 6
Commonwealth v. Humberto H., 466 Mass. 562 (2013) 7
Commonwealth v. Kelley, 359 Mass. 77 (1971) 7
Commonwealth v. Rivera, 460 Mass. 139, 141 (2011) 7

OTHER AUTHORITIES

R. Compton & A. Berning, Drug and Alcohol Crash Risk,
TRAFFIC SAFETY FACTS RESEARCH NOTE, NHTSA (Feb. 2015)
..... 3
Randy E. Barnett, Restoring the Lost Constitution,
Princeton University Press at 251 - 269 (2004). 6

TREATISES

Massachusetts Evidence Guide, sec. 201 (b) (2) 5

CONSTITUTIONAL PROVISIONS

Article 12 to the Massachusetts Constitution 6
Article 14 to the Massachusetts Constitution 6
Article 18 of the Declaration to Rights to the
Massachusetts Constitution 5

INTEREST OF AMICUS CURIAE

The National Organization for the Reform of Marijuana Laws, Inc. (NORML) is a nonprofit educational corporation organized in 1971 under the laws of the District of Columbia, with its primary office located in Washington, D.C. NORML has more than 13,000 dues paying members, 1.3 million internet-based supporters, and 154 state and local chapters from Hawaii to Maine, including the Massachusetts Cannabis Reform Coalition, Inc. (organized under Massachusetts law), its local state affiliate.

A consumers' advocacy organization, NORML participates in the national debate over the efficacy and reform of state and federal marijuana prohibition laws. NORML advocates for adult marijuana consumers' rights and regulated marijuana cultivation and commerce.

Counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

With passage of Question 4 (Legalization, Regulation, and Taxation of Marijuana) at the state election on November 8, 2016¹ effective December 15 marijuana is no longer prohibited to persons 21 years of age and older. This Amicus Brief addresses the fundamental issue necessary to prevent innocent marijuana consumers from being arrested and prosecuted for operating a motor vehicle while impaired.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Given the factual finding that the current state of science does not establish a reasonable inference of impairment based upon Standardized Field Sobriety Tests, where there is probable cause that the operator of a motor vehicle recently consumed marijuana must there be observation of unsafe or erratic operation to establish probable cause to arrest/for a complaint to issue alleging violation of C. 90, §24(1)(a)(1).

STATEMENT OF THE CASE

NORML adopts the Statement of the Case contained in Appellant Gerhardt's Supplemental Brief.

¹ Certified on December 14, 2016 by the Governor's Council.

STATEMENT OF FACT

NORML adopts the findings of the Honorable Andrew M. D'Angelo.

ARGUMENT

- I. FUNDAMENTAL CONSTITUTIONAL PRINCIPLES REQUIRE THAT PROSECUTIONS OF SUSPECTED OPERATING WHILE IMPAIR-ED FOLLOWING MARIJUANA CONSUMPTION BE PROSECUTED AS OPERATING NEGLIGENTLY SO AS TO ENDANGER G.L. c. 90 § 24(2)(a).

The specter of adult marijuana impaired drivers causing death and destruction on the road is overblown when the science is examined.

The only scientific fact adverse to the marijuana consumer found by the trial court is "that marijuana consumption can impair a person's ability to drive a car." Requested Findings On Remand From Supreme Judicial Court at pg. 3². This finding is tempered by the findings of R. Compton & A. Berning, *Drug and Alcohol Crash Risk*, TRAFFIC SAFETY FACTS RESEARCH NOTE, NHTSA (Feb. 2015) Appellant's Supplemental Exhibit I, that the adjusted crash risk of marijuana consumers is statistically the same as that for non-drug, non-alcohol positive drivers. As they report driving with a blood alcohol level of greater than .05

² The Requested Findings On Remand From Supreme Judicial Court shall hereafter be referred to as "RFR" at .

is a scourge, while studies of driving after consuming marijuana are equivocal with some finding a modest "increased risk associated with marijuana use by drivers, many studies have not found increased risk."

Id.

The state of the science as found by the trial court prevents introduction of observations and opinions of a person's performance of Standardized Field Sobriety Tests, admissible in prosecutions for operating under the influence of alcoholic beverages, RFR at pgs. 8 - 18. Therefore, Amici submit that recent marijuana consumers may only be prosecuted for operating negligently so as to endanger when evidence of recent marijuana consumption is accompanied by evidence of operation in "a negligent manner so that the lives or safety of the public might have been endangered."

This is constitutionally necessary if the law is to be consistent with primary guiding principle of the Constitution to protect the liberties of the individual from the fallibility of those acting for the people in the legislative, executive and judicial branches of government and those serving on juries.

Article 18³ of the Declaration to Rights confirms that protecting individual liberty is the prime directive of the Constitution. There it is declared:

A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth. These words are not hortatory.

They establish as a rule of construction a "Presumption of Liberty" applicable to a determination of the constitutionality of a law on its face and as applied and to determine whether an executive act violates rights secured by the constitution including Articles 12 or 14. See, Randy E. Barnett, *Restoring the Lost Constitution*, Princeton University Press at 251 - 269 (2004).

³ Whether by serendipity or intent this article bears the number 18, which is the Hebrew word *chai* (חי), meaning "life." Judicial notice of the translation is appropriate. See, Massachusetts Evidence Guide, sec. 201 (b)(2).

The executive branch's power to detain, question and search persons is clearly defined and limited by the legislative and judicial branches generally, and explicitly. Since, Commonwealth v. Cruz, 459 Mass. 459, 472 (2011) and its progeny the mere presence of marijuana and the odor of it, whether burned or unburned is no longer an articulate fact indicative of a crime and with passage of Question 4 by a person 21 years of age or older, not even a civil violation.

In the absence of evidence of unsafe or erratic operation a complaint application for OUI marijuana fails to present probable cause of an essential element of the crime and the complaint properly dismissed. Commonwealth v. Humberto H., 466 Mass. 562, 564-566 (Mass., 2013). Furthermore, if lack of such evidence in the complaint application is not fatal, it would be fatal to the prosecution as "it would leave an essential element of the crime to a jury's conjecture, surmise, or guesswork. Commonwealth v. Kelley, 359 Mass. 77, 88 (1971)." Commonwealth v. Rivera, 460 Mass. 139 (2011).

CONCLUSION: RELIEF REQUESTED

For the foregoing reasons, this Court should affirm Judge D'Angelo's findings and hold that where

there is evidence of recent marijuana use the consumer may only be prosecuted for operating negligently so as to endanger and then only when there is evidence of negligent, unsafe or erratic operation in combination with recent ingestion of marijuana. This Court should also hold that testimony regarding the physical characteristics of marijuana use must be accompanied by a jury instruction that such testimony is limited to establishing recent consumption and by itself does not constitute negligent operation.

Respectfully Submitted,



Steven S. Epstein (BBO#: 546862)
P.O. Box 266
Georgetown MA 01833-0366
Telephone: 978-352-3300
Email: Epeggs @ aol.com



Marvin Cable (BBO#: 680968)
P.O. Box 1630
Northampton, MA 01061-1630
Telephone: 413-268-6500
E-Mail: marvin@marvincable.com

Attorneys for *Amicus Curiae*, the
National Organization for the
Reform of Marijuana Laws (NORML)

CERTIFICATIONS

Mass. R.App.P. 16(k) CERTIFICATION: I hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) ("Any written or oral findings or memorandum of decision by the court pertinent to an issue on appeal included as an addendum to the brief"); Rule 16(e) (references to the record); Rule 16(f) ("If determination of the issues presented requires consideration of constitutional provisions, statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end"); Rule 16(h) (length of briefs); Rule 18 (appendix to the briefs); and Rule 20 (form of briefs, appendices, and other papers).

CERTIFICATE OF SERVICE: I hereby certify under the penalties of perjury, and pursuant to Mass. R.App.P. 13 and 19, that on this date I served United States Priority Mail postage prepaid: two copies of this brief upon appellant's and appellee's counsel; one copy to Amicus Curae National College For DUI Defense's counsel and an original and 17 copies to this Court, this date being within the time fixed for filing no later than two weeks before the first day of the sitting in which the case is scheduled for argument.

Dated: December 20, 2016



Steven S. Epstein