

**IN THE INDIANA COURT OF APPEALS
APPELLATE CASE NO. 18A-CR-02041**

JOHN SOLOMON,)	Marion Superior Court
Appellant (Defendant below),)	Criminal Division 14
)	
vs.)	No. 49G14-1704-CM-13921
)	
STATE OF INDIANA,)	The Honorable
Appellee (Plaintiff below).)	Jose Salinas, Judge

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

Does the statute criminalizing possession of marijuana violate the right to liberty and pursuit of happiness in Article 1, Section 1 of the Indiana Constitution when applied to an adult who is not driving or otherwise impacting the safety or well-being of others?

STATEMENT OF THE CASE

On April 16, 2017, the State charged John Solomon with possession of marijuana, a Class B misdemeanor. App. 14.¹ Mr. Solomon was convicted after a bench trial on August 1, 2018. Tr. 30-31. On June 27, the trial court sentenced him to 20 days in the county jail with 14 days suspended and credit for time served. Tr. 33; App. 10-11.

A notice of appeal was filed on August 27, 2018. App. 2-5. The clerk filed the notice of completion of the transcript on October 17, and a five-day extension of time was requested on November 16 and granted by order dated November 20. This brief was submitted on November 21.

STATEMENT OF THE FACTS

On April 15, 2017, John Solomon accepted a ride to a liquor store from individuals he did not know. Tr. 12, 20-21. Within about a minute, the vehicle was pulled over by the police for “multiple infractions.” Tr. 8, 22. The police officer noticed several syringes in the vehicle, and ordered everyone out of the vehicle when one occupant was seen destroying a syringe. Tr. 10.

¹ All citations to App. are to Volume II of the Appellant’s Appendix. Citations to Tr. are to Volume 2 of the Transcript.

Police found a marijuana blunt “tucked behind” the back passenger seat where Mr. Solomon had been sitting. Tr. 11. A police officer testified that Mr. Solomon told him “nothing in the car was his except for the marijuana blunt.” Tr. 12.

Mr. Solomon was charged with and convicted of possession of marijuana. App. 14, Tr. 30-31. After sentencing him to a time-served, non-probationary sentence, the trial court set a compliance date in light of the small “amount of marijuana . . . in play” Tr. 33. “As long as you have no issues for the rest of the year, I’ll just vacate that sentence.” Tr. 33.

SUMMARY OF THE ARGUMENT

Article 1, Section 1 of the Indiana Constitution provides Hoosiers broad personal autonomy to make personal choices that do not impact the safety or well-being of others. Criminalizing the mere possession of a single marijuana blunt by an adult who is not driving or otherwise impacting others violates Section 1. Mr. Solomon’s conviction for possession of marijuana should therefore be vacated.

STANDARD OF REVIEW

This Court reviews the constitutionality of statutes de novo. *State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017).

ARGUMENT

Criminalizing possession of a small amount of marijuana violates the right to liberty and pursuit of happiness in Article 1, Section 1 of the Indiana Constitution when applied to a Hoosier who is not driving or otherwise impacting the safety or well-being of others.

This case presents a narrow issue of first impression in Indiana: Do Hoosiers have a constitutional right to possess a small amount of marijuana for personal use when that possession does not impact the safety or well-being of others? Article 1, Section 1 of the Indiana Constitution provides robust protection of individual liberty, mirroring the language of the Declaration of Independence, provides in relevant part:

WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the PEOPLE; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.

Ind. Const. art 1, sec. 1.²

The statute criminalizing possession of marijuana, Ind. Code § 35-48-4-11, may well be constitutional in many circumstances. The challenge here is not a facial one but as applied to the facts of this case—an adult who was not driving or impacting others when he possessed a single blunt of marijuana.

Tr. 11. “[T]hose challenging the statute as applied need only show the

² Although this issue was not raised at the trial court, “the constitutionality of a statute may be raised at any stage of the proceeding[.]” *Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992); *but see, e.g., Baumgartner v. State*, 891 N.E.2d 1131, 1135-36 (Ind. Ct. App. 2008) (considering a defendant’s claims on the merits even though “the failure to file a proper motion to dismiss raising the Constitutional challenge waives the issue on appeal”).

statute is unconstitutional on the facts of the particular case.” *Thakar*, 82 N.E.3d at 259 (internal quotation omitted); *accord Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999) (“[A] facially constitutional statute may be unconstitutional *as applied* to a particular” litigant.) (emphasis in original).

Our supreme court’s analytical approach to addressing Indiana Constitutional challenges to statutes

is well established. It requires a search for the common understanding of both those who framed it and those who ratified it. To determine this intent, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. We look to history to ascertain the old law, the mischief, and the remedy.

Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d 1269, 1272–73 (Ind. 2014) (cleaned up).³ Cases decided near the time of the drafting and ratification of the Indiana Constitution are “accorded strong and superseding precedential value.” *Richardson v. State*, 717 N.E.2d 32, 43 (Ind. 1999) (quoting *Collins v. Day*, 644 N.E.2d 72, 76 (Ind. 1994)).

Within a few years of the ratification of the 1851 Indiana Constitution, our supreme court found the liquor act of 1855 unconstitutional under Section 1:

³ “‘Cleaned up’ is a new parenthetical intended to simplify quotations from legal sources. Use of ‘cleaned up’ signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization) without altering the substance

[T]he right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages, so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment. If the constitution does not secure this right to the people, it secures nothing of value.

Herman v. State, 8 Ind. 545, 558 (1855). Even though some may abuse the use of beverages or other substances, “[t]he happiness enjoyed in the exercise of general, reasonably regulated liberty by all, overbalances the evil of occasional individual excess.” *Id.* at 564.

The possession of a single blunt of marijuana by an adult who is not driving or otherwise impacting others falls well within the protections afforded by Section 1, as explained in *Herman*.⁴ Marijuana brings happiness to some people, whether helping to alleviate a medical condition or for recreational purposes. A majority of states—thirty-two—have legalized use of marijuana for medicinal and/or recreational use. Katie Stancombe, *High Chance for Medical Marijuana Debate at Statehouse*, Indiana Lawyer, Nov. 14-27, 2018, at 3. Mr. Solomon’s possession of a small amount of marijuana

of the quotation.” *Chassels v. Krepps*, 174 A.3d 896, 901 n.3 (Md. 2017) (cleaned up).

⁴ *Herman* was distinguished in a challenge to an earlier version of the public intoxication statute. In *Moore v. State*, 949 N.E.2d 343, 345 (Ind. 2011), the Court explained the defendant had “suffered no impingement of any alleged constitutional right to select which beverages to consume. She was subject to the public intoxication statute because of her conduct after consumption, not due to her beverage selection.” Here, in contrast, Mr. Solomon is alleged merely to have possessed a single blunt of marijuana as a passenger in a vehicle in which he temporarily rode. His mere possession—not his conduct—has been criminalized.

as a passenger of a vehicle does not adversely affect anyone else. As a professor at the Indiana University School of Medicine recently wrote, “the harms we know about now are practically nil compared with that of many other drugs, and . . . marijuana’s effects are clearly less harmful than those associated with tobacco or alcohol abuse.”⁵

Moreover, marijuana use was legal in 1851 when the Indiana Constitution was drafted and ratified. George Washington reportedly cultivated marijuana at Mount Vernon, and in the mid-1800s marijuana was “legal in the U.S. and was used for medicinal purposes on a small scale.” Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 Wash. & Lee L. Rev. 779, 793 (2018). When immigrants from Mexico and the West Indies began the practice of smoking marijuana around 1900, states began to criminalize the possession or sale of marijuana in statutes that “stemmed largely from racism and concern that use would spread.” *Id.* at 793-94. The possession of marijuana appears to have been criminalized in Indiana in the 1930s.⁶

Our supreme court has found several statutes to violate Section 1. *See Dep’t of Fin. Insts. v. Holt*, 231 Ind. 293, 309, 108 N.E.2d 629, 637 (1952)

⁵ Aaron E. Carroll, *It’s Time for a New Discussion of Marijuana’s Risks*, The Upshot, May 7, 2018, *available at* <https://www.nytimes.com/2018/05/07/upshot/its-time-for-a-new-discussion-of-marijuanas-risks.html> (last visited Nov. 21, 2018 (summarizing the findings of a 2017 National Academies of Sciences, Medicine and Engineering comprehensive report on cannabis use)).

(invalidating a statute limiting the amount that purchasers of retail installment contracts could agree to pay retail dealers); *Kirtley v. State*, 227 Ind. 175, 179–80, 84 N.E.2d 712, 714 (1949) (striking down statute prohibiting “scalping” of tickets to sports events); *Dep’t of Ins. v. Schoonover*, 225 Ind. 187, 192–94, 72 N.E.2d 747, 749–50 (1947) (invalidating regulation requiring commissions to be paid on insurance sales); *State Bd. of Barber Exam’rs v. Cloud*, 220 Ind. 552, 572–73, 44 N.E.2d 972, 980 (1942) (“The individual’s right to engage in a lawful business, to determine the price of his labor and to fix the hours when his place of business shall be kept open, except as they conflict with the police power, are personal privileges and liberties within the protection of [Article I, Sections 1 and 23 of] the Indiana Bill of Rights.”); *Street v. Varney Elec. Supply Co.*, 160 Ind. 338, 342, 66 N.E. 895, 896–97 (1903) (invalidating minimum wage legislation for public works projects).⁷ Recognizing that “[t]he rights guaranteed by Art. 1, § 1, are cherished rights and not to be surrendered lightly,” *Schoonover*, 225 Ind. at 194, 72 N.E.2d at 750, this case should be another in that line, holding that Section 1 protects the liberty right of adult Hoosiers to possess a single blunt of marijuana.

⁶ See generally *Spight v. State*, 248 Ind. 287, 288, 226 N.E.2d 895, 896 (1967) (citing 1935 Narcotic Act as amended. Acts 1935, Ch. 280, s 2, p. 1351; 1961, Ch. 90, s 2, p. 169, being Burns’ Ind. Stat. Ann., s 10-1350 (Supp. 1956)).

⁷ These cases were helpfully collected and summarized in Justice Boehm’s dissenting opinion in *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 998 (Ind. 2005).

CONCLUSION

John Solomon respectfully requests this Court vacate his conviction for possession of marijuana because the statute criminalizing the offense violates Article 1, Section 1 as applied to adults who are not driving or impacting others.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Appellant was served by electronic filing through the IEFS upon Attorney General Curtis Hill on this 21st day of November, 2018.

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