

Drugs on the Docket Podcast

Season 1.5 Episode 6.5 – Probable cause and marijuana legalization

TRANSCRIPT:

Hannah Miller: From the Drug Enforcement and Policy Center at The Ohio State University, this is Drugs on the Docket. Each episode will tell the story of how U.S. court decisions impact drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller.

From the Drug Enforcement and Policy Center at The Ohio State University, this is Drugs on the Docket each episode will tell the story of how U.S. court decisions impact drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller. On November 7th, Ohio will decide whether to become the 24th state in the nation to legalize recreational marijuana as legalization plays out across jurisdictions deeply entrenched ideas about marijuana. Who uses it, and whether the sight or scent of marijuana signals further criminal activity, are being challenged. And for states that legalized marijuana, some surprising arrest data calls into question whether legalization alone is the solution to disparate law enforcement. If you like what you hear in today's episode, visit go.osu.edu/drugsonthedocket to follow the series.

While we work hard to bring you more content, Doug and I are looking back at topics covered in season one of Drugs on the Docket. Last but not least, we're taking what we learned in episode 6 about police discretion and chatting about some recent developments as it relates to probable cause, drugs, and search and seizures. So, as a quick refresher, the Fourth Amendment of the Constitution protects people from unreasonable search and seizures by the government, but it doesn't necessarily protect from all search and seizures. In episode 6, Professor Ric Simmons from the Moritz College of Law here at The Ohio State University, along with Professor Jack Chin from UC Davis, spun a concerning tale as it relates to police and the discretion they have, and discretion is essentially power. There are a lot of threads we could pull, but let's just start with the most recent development in either state or federal court as it relates to drugs and search and seizures. What do you got, Doug?

Douglas Berman: We've got some recent rulings from some State Supreme Courts and we've seen this in other places previously about how marijuana reform, whether it's medical reform or full legalization in a state, changes the calculation for probable cause for when and how police can use, whether it's the smell of marijuana, seeing marijuana, as a basis to get further into a person's business as it were. And the setting in which this historically comes up most is Police pull over a car for whatever sets of reasons and then smell marijuana in the car. In a world where marijuana is completely illegal, it not only makes sense for the police to think, oh, I've got evidence of a crime afoot, based on the marijuana, but this is the kind of person who's doing something criminal, I better look into their whole car, see if something else criminally problematic is going on with this individual with this car. But obviously, when you now have a jurisdiction, whether it's medical or especially full legalization, not only is that not itself direct evidence of criminality, but the association between somebody who's using marijuana sometimes and they're doing other problematic activity, that's much more severed. And state Supreme Courts have generally been saying, now that it's legalized, the smell of marijuana alone, just simply evidence that marijuana is being used, is not itself probable cause to justify, whether it's a search of a car, search of a person. And more evidence needs to be shown of illegality.

Hannah Miller: Was that a federal court? Was that a state court?

Douglas Berman: There's been a couple state supreme court rulings you know along these lines in recent times and I think it's a growing trend, where just more and more we get these cases that get started with the smell of marijuana because that was so common, and not only so common, but such an absolute given. Police got trained, police understood if I smell marijuana, if I've got a drug dog, whether I'm going up to a person, going up to a car, whatever it is, and they hit and it seems to be the smell of marijuana, that gives me probable cause to now search the car look for more evidence of wrongdoing. And often times those cases involved finding more drugs, finding other criminal activity, but the legal hook, this is where again constitutional law discussed in the episode is the foundation for

this, you got to have probable cause to be able to start searching that person unless they otherwise consent. And that's what courts are now saying in a number of these kinds of cases. Sorry, we don't think that's probable cause. You can't just use the smell of marijuana. Couple nuances to add here. Just about every state that's legalized marijuana, whether medically or recreationally, have possession limits. And of course it's still illegal to sell unless you've got one of the licenses and are otherwise doing it the way you're allowed to in the state. So these cases can get complicated because cops now knowing that that's kind of the trend, to say simply the smell or presence of marijuana doesn't itself create probable cause, have been saying things like, I saw what looked like a lot of marijuana on the floorboard, more than an individual is allowed to possess. I thought they were then a dealer. That's what I had probable cause for, not the marijuana itself, but the quantity that was there. Or I smelled something else along with the marijuana and that gave me probable cause.

Probable cause is a fairly low standard and so these rulings are significant because they're saying marijuana alone, smelling marijuana alone, doesn't establish probable cause. But that doesn't mean marijuana can't be used in a kind of a thicker story for the police to justify these additional intrusions. And so that's where sort of case law continues to evolve in legalization states, which of course are most states these days if we include medical marijuana developments. And I think it's going to continue to be the sort of evolving totality of the circumstances story because that's really fundamentally what the Fourth Amendment has been interpreted to mean. There's no bright lines, oh, this is always probable cause or this is never probable cause. We've got to look at all the circumstances. Though, again, what really is the evolution is most courts in the prohibition era said simply smelling marijuana or claiming you saw marijuana is always going to amount to probable cause. These recent court cases are just part of a growing line in the reform era that says, no, you got to show more.

Hannah Miller: But it is a tale of two cultures. You have states that legalize and you have states that don't. And so Wisconsin recently is an example of a state that it's still illegal to use marijuana. There's no medical program. And recreational use is prohibited. And so they confirm that the smell of marijuana was enough, uh, for probable cause. So, as adult use becomes more common place, I'm not saying that culture can influence a state where something isn't legal yet, but there is not official decriminalization but the de-emphasis of the importance of catching people in the act of illegally using marijuana. But how do you think this wave of legalization is going to impact police tactics and law enforcement in general?

Douglas Berman: I love you bring up culture, because that's the piece, plus practicalities, that always are fundamental to the day-to-day felt reality of the work of police and individuals that they're policing. The most obvious version of this of course, that most of us living in Ohio and elsewhere that drives a lot know well, is people are speeding all the time. Right? If a cops wanted to literally arrest every single person who's speeding they'd have no time to do anything else. And it's kind of well understood that, well, as long you're not speeding too much, you're not going to get pulled over. And that's just sort of part of the necessities of enforcement. We don't want everybody pulled over the minute they go a mile over the speed limit under any sets of circumstances. Well, that culture carries over to drug enforcement in all sorts of ways. Right? We don't have very many police to my knowledge raiding college campuses to get underage drinkers, even though that may be even more prevalent on college campus than speeding. Right? And, you know, likewise we certainly don't have drug raids going on in certain neighborhoods at certain times. The point being that's culture, right? That's not the law.

Hannah Miller: Is it culture or is it bias?

Douglas Berman: You put your finger beautifully on the reality that all sorts of human factors shape culture. Right? And so some of those human factors we might want to call bias, right, other of those human factors we're likely to call good sense, because there's all sorts of reasons why we don't want cops using their time going on college campuses breaking up parties whenever they think there's a 20-year-old going to the keg. That's just not a good use of resources and of course we've set our drinking age at 21 not because we really think it's so terrible for 20 year olds to drink, but because there are other consequences that come from making alcohol available at that point. And I bring up the alcohol analogy because I think we're in a transition period vis-à-vis marijuana. We're at a point where more and more people are thinking not just, it's not a big deal, but that it ought not even in larger quantities be seen as something that's kind of associated with criminality. We ought to kind of leave it alone unless there's some other warning flags, other reasons to be concerned about a person's behavior vis-à-vis themselves or others. And that transition means a culture, whether it's among an older generation that maybe instinctually more than thoughtfully associated marijuana use with other dangerous activities and other criminality, a younger generation that may have their own sets of biases about certain types of marijuana use. We've got biases about certain types of alcohol use. Seeing somebody drinking

wine leads us to have certain cultural reactions that look different than if they're drinking beer, than if they're drinking hard alcohol. It goes as far as if they're drinking alcohol from a bag. That looks different to us than if they're drinking it from a box...

Hannah Miller: Or a heavy bottomed glass.

Douglas Berman: Right. And so you know those are all things that culture defines. it's not the law saying, oh, arrest the guy who's drinking liquor out of a bag, but don't arrest the guy who's drinking liquor out of a box. Right? That's just a variety of culturally-associated expectations and beliefs about use patterns. And I think we've sort of figured that out, but we actually don't think much about the way that functions in alcohol. When it comes to marijuana, which has this long history of prohibition, police are still sort of working their way through this.

Hannah Miller: The Department of Justice has published something in 2020 that looked at the impact of legalization in the state of Washington and it did note that while there was a dramatic shift in terms of the officers' attention being taken away from issues relating to possession and personal use of marijuana, and there was a significant decline in arrests over all, when you looked at the racial component of the arrests you had significantly fewer white arrests compared to those of people of color.

Douglas Berman: And here also we get to important elements of the culture of individuals and communities as well as the culture of policing. And so one for example here, and I think the the data may reflect this especially in kind of the early legalization states, every state that legalized early on and still most states today, still prohibited public use and yet certain individuals, whatever their race, whatever their attitudes, I'm tempted to say young men more than others, would respond to legalization by seeing maybe a law enforcement officer and like going in front of them and smoking and saying haha you can't do anything to me, now it's legal. And of course they don't know that public use is still illegal and I've certainly heard, you know, anecdotes from cops who were just like, I don't want to arrest the person, but I can't let somebody literally in front of me flagrantly violate this law that says it's still illegal to use in public, and so I felt like I had to arrest the person. Right? And again, I don't think that's a big problem. The word gets out over time.

But I emphasize that point not in that kind of extreme example, but there are some cultures, there are some communities, there some neighborhoods, where using outside is going to be more common than using inside. And at the end of the day, even though it's legal, technically using inside is legal and using outside isn't, and if cops want to pick people up, perhaps in part because neighbors are complaining. Right? So again, this gets the culture, right? It's not just, are the cops choosing to enforce in a kind of ticky tack way, our neighbors saying look I know this is illegal and I don't like people smoking in front of my apartment building in public. Please pick them up or arrest them for this activity. We can't know what's behind all of these sets of arrests, but a failure to realize that culture and and deeply ingrained structural realities are necessarily a part of the way police do their jobs. And again, sometimes that can include a set of biases. Those are all factors that I think get captured in not just our police data but in the reality that enforcement's always going to be patchy and understanding with some sophistication the range of factors that influence that patchiness is part of the work and the challenge of those who study in this space.

Hannah Miller: Yeah, exactly as you said, biased enforcement practices, even in a state where something has been legalized.

Douglas Berman: This is another layer of culture though, right? Like, there's plenty of alcohol drinking, but so much of it is being done in indoor spaces. Oh, and let's even, you know, compare and contrast if I go to a restaurant I can order wine, beer, maybe hard alcohol there, and nobody at the next table is going to be like what's that guy doing over there, because it's part of the culture of the restaurant. Whereas if I take out a vape pen and I start vaping during that and then I try to say when somebody gives me a side eye, well, don't worry, it's not cannabis, or don't worry, it is cannabis, right, that's just not a part of what we're supposed to be doing at restaurants. But again, that's culture largely driving that, and it's law a little bit. Obviously, if I pull out my own beer can at McDonald's where they don't have a liquor license, I might get a side eye. Although again I can hide that in a flask perhaps and not get in trouble, or a water bottle would be the more accurate way to describe it, right? And is that the equivalent of somebody who's vaping at McDonald's? Again, we're still sort of sorting this through and I think the average individual wouldn't even be able to answer, wow, if I saw somebody pull out a huge water bottle and then pour some vodka into it while they're having their Big Mac, would I care to call the police? Would I tell somebody about that? I don't know.

But if somebody's lighting up, whatever they're lighting up, yeah, I'm going to complain, because you know that bothers me. But that's again the culture of I've decided to be bothered by cigarette smoke. Forty years ago, not only was that kind of accepted, you were looked at weird if you weren't smoking at the restaurant, or the airplane or wherever it was. Right? So these are all components of the way in which our culture evolves and then police are necessarily both kind of a leading edge and a trailing edge of a lot of that because they help us define what we think of as acceptable behavior and the way they would respond. I don't know how the police would respond if I call 911 and say there's a guy having a huge thing of vodka at McDonald's. They might be like stop bothering me, we got better things to worry about.

Hannah Miller: I'm thinking now about all of the different communities in Columbus and what behavior is acceptable in those communities. You know, when you drive in my neighborhood maybe you do a rolling stop every single time. But if you do that in another neighborhood, that doesn't go down. Or you're having a tailgate party on Saturdays you might be okay with tailgating and loud noises and large groups, you know out in front of lawns, but if it's just a Tuesday afternoon then maybe you're going to look at it a little differently. It's fascinating to think about that.

Douglas Berman: And here's where culture again, culture of communities and culture of police, are such a big deal. If a community has a bunch of people tailgating on Tuesday and they're troubled by that they might be calling the police and saying police get out here and start doing something about that. Whereas, if it's only happening once, you're like whatever, not a big deal. And the police, again, do they have lots of other things to worry about? Do they have the time and the energy in particular communities to police this kind of stuff on a regular basis? Again, marijuana is the great example. Even before legalization, data suggested that, you know, one in 10 people were using, actively using, marijuana in a community and yet that didn't produce nearly that level of arrests. Now you know you may be up to two in 10 people, maybe even three. It's legal, but again there's all sorts of ways that people do it. The rolling stops a great example where they're not following exactly the law, but nobody cares that much and it's just not going to be a big deal until somebody does care...

Hannah Miller: Or somebody gets hurt.

Douglas Berman: Right, exactly. Yeah, so true, and so much a part of how inherently reactive policing has to be and maybe that's a good way to kind of you know sort of wrap up this basic conversation is to some degree marijuana use used to be integral to visions of proactive policing. And in fact, I think this was discussed a little bit in the main episode, policies of stop and frisk and all sorts of like broken windows policing where there was a sense of here's a community that's in trouble. We should really flood with police and among the justifications for that is, if we stop a lot of people and really get into their world, we'll discover drugs and we'll discover guns and we'll discover all this stuff by being proactive. And I think, very much, marijuana was seen as a useful part of that story. Now that marijuana is legal, it's less of a justification for that kind of proactive activity. We may see a lot more reactive policing, but that doesn't necessarily mean it's going to be less biased. Right? I think that's the study you cited earlier. Less enforcement often tends to be more disparate enforcement. The jurisdictions with the lowest incarceration rates tend to have the most people of color disproportionately incarcerated because, as you're shrinking the size of the criminal justice footprint, often it's the privileged who kind of get the benefit of that first. And so whether it's less arrests mean ultimately less arrest of privileged people, not more marginalized folk, less convictions less incarcerations. But at the end of the day, if you're shrinking it so much that lots of people are still benefiting, even if it's not an equal benefit, that's often in my view, the game becomes worth the candle. But those are things to keep in mind is the way in which even reactive policing, even limited policing, that's not going to ensure less disparate policing. It might, statistically speaking, increase the disparity though we have less overall law enforcement criminalization in our lives across the board.

Hannah Miller: Just because weed is legalized, does not mean that police are not going to go looking for illicit activity related to that substance, right? Who's likely to be falling in line with legal practice and illegal practice?

Douglas Berman: And the great variation on this that was well documented coming out of Colorado, uh, right when they were the first state to legalize is arrests of adults dropped precipitously, but juvenile arrests actually went up significantly. And the story being told there was law enforcement is like, not only I'm used to arresting people for marijuana and I'm not able to arrest people for adult use anymore because that's legal, but juvenile use is still illegal and there were plenty of juveniles still using. So their resources got devoted that way. But also, like you're sort of suggesting, there's maybe even some pressure enforced more toughly around the perimeters of what is legal. Right?

Part of how you protect the legal market is to go after the illicit market for those inclined to worry about commercialization and worry about a cannabis industry that hurts more than helps on a lot of these fronts. It's going to be in the legal cannabis business's interest to have the police crack down on illicit markets and communities that are still relying on the illicit markets because they want to push everybody into the legal market. That's their business. And this is the last important point worth emphasizing. Whether it's policing, whether it's overall criminalization, as we see marijuana reform, legalizing something is never complete in this space. There are always going to be pockets of illegality, maybe large pockets of illegality. And if all we end up doing is shifting the policing to hyper focus on the remaining pockets of illegality, we really need to worry about whether we don't have a net gain at all on these sorts of frontiers.

What was interesting in Colorado was upon realizing that juvenile arrests went up like close to double right after legalization, police and community leaders said, we don't want you policing schools even more harshly. Now part of legalization should mean we don't even police at all in schools for this particular substance and we need to reorient our thinking about how even when something remains illegal on the perimeter, it's not subject to significant law enforcement or criminalization. We use other mechanisms to deal with these problems. But that's always going to be an issue in the drug space generally, in the marijuana space in particular. We're always going to have these policing questions and of course that's where we started, right?

What probable cause now means is a little more complicated but there's no rule that says you can never arrest anybody for using marijuana because if they're using it the wrong way, the wrong time, and the wrong place, that's not just a crime but certainly an arrestable crime in some settings. Same is true for alcohol of course. If I'm guzzling down a six-pack while I'm driving down the highway, even at legal speed, I'm subject to arrest, and rightly so, because I'm uh certainly probable cause eligible for drunk driving. Right? The same is even true for cell phone use. All of these issues are going to keep coming up and policing practices, policing culture, policing law are going to be topics that we need to keep talking about because they're going to keep evolving against the backdrop of legal reform.

Hannah Miller: Drugs on the Docket is a production of the Moritz College of Law Drug Enforcement and Policy Center. This episode is produced by me, Hannah Miller, and Holly Griffin. Doug Berman is our editorial adviser. The music is composed by Joe DeWitt.