Circuit Court for Worcester County
Case No. C-23-CR-23-000051

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1582

September Term, 2023

PHILLIP ANTOINE HICKS

v.

STATE OF MARYLAND

Wells, C.J.,
Friedman,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM
Concurring Opinion by Friedman, J.

Filed: August 14, 2025

*This is a per curiam opinion. Under Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

Convicted by a jury in the Circuit Court for Worcester County of possession of cocaine and cannabis with intent to distribute and related offenses, Phillip Antoine Hicks, appellant, presents for our review a single issue: whether the court erred in denying his motion to suppress. For the reasons that follow, we shall affirm the judgments of the circuit court.

In March 2023, Mr. Hicks was charged by criminal information with the offenses. In April 2023, Mr. Hicks filed a motion to suppress "any . . . illegally seized evidence." Effective July 1, 2023, the General Assembly enacted Md. Code (2001, 2018 Repl. Vol., 2023 Supp.), § 1-211 of the Criminal Procedure Article ("CP"), which states, in pertinent part:

> (a) A law enforcement officer may not initiate a stop or a search of a person, a motor vehicle, or a vessel based solely on one or more of the following:
>
> (1) the odor of burnt or unburnt cannabis;
>
> (2) the possession or suspicion of possession of cannabis that does not exceed the personal use amount, as defined under § 5-601 of the Criminal Law Article; or
>
> (3) the presence of cash or currency in proximity to cannabis without other indicia of an intent to distribute.
>
> * * *
>
> (c) Evidence discovered or obtained in violation of this section, including evidence discovered or obtained with consent, is not admissible in a trial, a hearing, or any other proceeding.

On July 6, 2023, the court held a hearing on the motion to suppress. The State called Ocean City Police Corporal Chris Snyder, who testified that on January 2, 2023, he was in

the parking lot of a 7-Eleven on Coastal Highway when he "noticed that there was a black-colored Kia Sorento small SUV" parked "directly in front of the doors to enter the 7-Eleven." As Corporal Snyder "got closer to the vehicle and the front doors, [he] noticed the odor of marijuana was present." The corporal believed that the odor was coming "[f]rom the Kia," noticed "that there were no other vehicles in the parking lot," and noticed "one passenger in the front seat." Corporal Snyder entered the 7-Eleven and saw Mr. Hicks "standing at the . . . checkout counter." After the corporal exited the store, he "noticed that the odor of marijuana was still present . . . near the vehicle." Mr. Hicks exited the store, "got into the driver's seat of the Kia," and "put it in reverse." Corporal Snyder then "called out on the police radio that [he] wanted an officer to respond to stop the Kia."

The State also called Ocean City Police Corporal Michael Kirkland, who testified that he received the "lookout" for "a dark-in-color SUV . . . related to a controlled dangerous substance violation." Corporal Kirkland subsequently observed the Kia turn south on Coastal Highway. When the vehicle entered "a parking lot behind [a] mini golf" course, the corporal pulled his vehicle "in behind it and activated [his] emergency equipment lights." Mr. Hicks "had exited the driver's seat and was walking around the rear of . . . the Kia." Corporal Kirkland exited his vehicle, approached Mr. Hicks, "and asked him if he could get back into the driver's seat." The "driver's door remained open while [Corporal Kirkland] was conversing with Mr. Hicks," and the corporal "noted the odor of marijuana . . . coming from the interior of the Kia." When Corporal Kirkland stated that Mr. Hicks "was stopped pursuant to a drug investigation, specifically for marijuana, . . . he retrieved a marijuana roach, which was the remnants from a marijuana cigarette,

from the cup holder and said that he was previously smoking weed or marijuana in the vehicle."

Corporal Kirkland "asked [Mr. Hicks] to exit the vehicle" so that the corporal could "conduct a search of the vehicle." Mr. Hicks "went kind of back and forth" with Corporal Kirkland, stating: "[I]t's just marijuana. It's just a couple burnt roaches." The corporal "explained to him that the odor of marijuana, plus . . . seeing the roach that [Mr. Hicks] wanted to hand him, led [him] to believe that there was other marijuana in the car." When Mr. Hicks "started to reach behind the center console," Corporal Kirkland "stopped him from doing so, and . . . told him to get out of the car." Mr. Hicks "eventually" exited the car, and the corporal "conducted a search." During the search, Corporal Kirkland discovered "various amounts of marijuana packaged in ounce quantities, . . . approximately a half ounce of cocaine, psilocybin mushrooms, [and] packaging indicative of possession with intent for those controlled dangerous substances."

Following the hearing, defense counsel argued, in pertinent part, that "the odor of marijuana is not probable cause or reasonable articulable suspicion," and hence, "we don't get to a point where we get to search the vehicle." Defense counsel noted: "[A]t the time of this particular stop, . . . we have the fact . . . that there's a statute or something that will be coming." The court recognized that "during the 2023 session, [the General Assembly] did pass legislation which made it clear that the odor of marijuana could not provide the probable cause to search a vehicle." Nevertheless, the court "[a]cknowledg[ed] that [on] January 2nd, there wouldn't have been any need for the legislation and the law if the odor of marijuana in a vehicle could not provide probable cause to search a vehicle, even though

that's not dispositive on the [c]ourt, what the legislature thought." The court subsequently denied the motion. At trial, the State offered into evidence, and the court admitted, the marijuana and cocaine.

Mr. Hicks contends that the court erred in denying the motion to suppress, because his "case was pending at the time" that CP § 1-211 "went into effect," and the statute "was in effect at the time of the suppression hearing." But, in *Cutchember v. State*, ___ Md. App. ___, No. 1474, Sept. Term 2023 (filed June 2, 2025), we held that "the operative date for determining the applicability of CP § 1-211 is the date of the search," slip op. at 2, and "[b]ecause a search cannot violate a nonexistent statutory right, the exclusionary remedy of CP § 1-211(c) cannot apply to a search that took place before the statute's effective date of July 1, 2023." *Id.* at 16. Here, the search of Mr. Hicks's vehicle occurred prior to July 1, 2023. CP § 1-211 does not apply, and hence, the court did not err in denying the motion to suppress.

We note that in *Cutchember*, the appellant has filed in the Supreme Court of Maryland a petition for writ of certiorari from our decision in his case. No. 212, Sept. Term 2025 (filed July 21, 2025). In light of this development, we exercise our discretion to stay the effective date of our mandate in the instant matter for 30 days from the Court's resolution of the petition.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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I concur in the judgment only.

I am bound by stare decisis to follow the reasoning and rule set forth in our reported opinions in *Kelly v. State*, 262 Md. App. 295 (2024), and *Cutchember v. State*, 265 Md. App. 690 (2025).[1] Those cases held that the Maryland General Assembly, in adopting CP § 1-211, which prohibits "law enforcement officer[s from] initiat[ing] a stop or a search of a person, a motor vehicle, or a vessel based solely on . . . the odor of burnt or unburnt cannabis," CP § 1-211(a)(1), intended for the law to operate prospectively only. *See Kelly*, 262 Md. App. at 308-09; *Cutchember*, 265 Md. App. at 705-06. Under that rule and reasoning, I am compelled to affirm Mr. Hicks's conviction.

In my view, however, these cases were wrongly decided. They were based on the *Kelly* Court's belief that the language in subsection (c) of the statute – "in violation of this section" – reflects a clear indication that the General Assembly meant for the statute to operate prospectively only. *See Kelly*, 262 Md. App. at 308. *See also Street v. Commonwealth*, 876 S.E.2d 202, 207 (Va. Ct. App. 2022) (finding that statutory language that no evidence discovered or obtained pursuant to a violation of a subsection shall be admissible "grants the remedy of exclusion of evidence for a violation of that specific new right," and hence, the statute "does not apply retroactively"). Instead, I think that the General Assembly used (and uses) this language merely to indicate the intended scope of a provision. *See* Dep't of Legis. Servs., *Legislative Drafting Manual*, 37 (2025)

[1] I understand that there are other cases currently pending including *Noah Shane Riley v. State*, No. 1568, Sept 2023 (submitted on brief April 11, 2025).

https://dls.maryland.gov/pubs/prod/legisbilldrafting/legislativedraftingmanual.pdf; https://perma.cc/L9XF-CRP9 (last visited Aug. 12, 2025);[2] *see also* Off. for Pol'y Analysis, *Maryland Style Manual for Statutory Law*, 12 (2018) https://dls.maryland.gov/pubs/prod/legisbilldrafting/marylandstylemanualforstatutorylaw2018.pdf; https://perma.cc/MB4F-6B6W (last visited Aug. 12, 2025). As a result, in my view, the statute simply does not state an intention regarding prospective application.

Absent a clear statement regarding prospective application, we must determine if the law is substantive or procedural. *See Langston v. Riffe*, 359 Md. 396, 406-07 (2000) (explaining difference between legislation that effects substantive and procedural rights). If the legislation is procedural, it applies to all actions – accrued, pending, or future.[3] *See Mason v. State*, 309 Md. 215, 219-20 (1987) ("[d]espite the presumption of prospectivity, a statute effecting a change in procedure only, and not in substantive rights, ordinarily applies to all actions whether accrued, pending[,] or future, unless a contrary intention is expressed" (footnote omitted)); *Muskin v. State Dep't of Assessments and Tax'n*, 422 Md.

[2] I also note that if this legislative language was intended to operate as a statement of prospective only application, it is a funny way of doing so, inconsistent with ordinary legislative practice, and has already rendered (or will soon render) the provision obsolete (or surplusage).

[3] Of course, if the law is substantive, an entirely different set of rules apply. *See Mason v. State*, 309 Md. 215, 220 (1987) (a "statute affecting or impairing substantive rights will not operate retrospectively as to transactions, matters, and events not in litigation at the time the statute takes effect unless its language clearly so indicates" (footnote omitted)); *Beechwood Coal Co. v. Lucas*, 215 Md. 248, 253-54 (1958) (a "general rule of statutory construction is that, in the absence of a clear manifestation of a contrary intent, a statute which adversely affects substantive rights will be assumed to operate prospectively rather than retrospectively" (citations omitted)).

544, 561 (2011) ("[w]e have held consistently that the [General Assembly] has the power to alter the rules of evidence and remedies"); *Philip Morris v. Glendening*, 349 Md. 660, 668-69 n.6 (1998) (describing the effect of retroactive procedural legislation on pending litigation). As the law seems to me to be framed as a procedural right (or evidentiary remedy),[4] I think this interpretive rule requires us to apply it to all cases – accrued, pending, or future – including that of Mr. Hicks.[5]

There are few of these cases and their numbers will, over time, diminish. That does not, however, diminish their importance to the individual defendants. I note that Mr. Cutchember recently filed in the Supreme Court of Maryland a petition for writ of certiorari from our judgment in his case. *Cutchember v. State*, No. 212, Sept. Term 2025 (filed July 21, 2025). I hope the Court will grant review in one of these cases and put this to right.

[4] I might see this differently if the subject of the legislative sentence was a criminal defendant. But here, it is drafted as a limitation on what a law enforcement officer may consider in making a probable cause determination. To me, this clearly suggests that the General Assembly was concerned with police procedure, not creating substantive rights.

[5] I also note that even if the statute is ambiguous about its intended prospective applicability, the rule of lenity might compel us to adopt the same result for which I advocate. *See Oglesby v. State*, 441 Md. 673, 676 (2015) ("[w]hen a court construes a criminal statute, it may invoke . . . the 'rule of lenity' when the statute is open to more than one interpretation and the court is otherwise unable to determine which interpretation was intended by the [General Assembly]," and "[i]nstead of arbitrarily choosing one of the competing interpretations, the court selects the interpretation that treats the defendant more leniently").