

into the defendant's vehicle and noticed what he believed was a hand-rolled cannabis cigarette on the passenger-side floorboard of the vehicle within the defendant's reach. On the basis of the odor of burnt cannabis, coupled with the presence of the potential cannabis cigarette in the vehicle, Officer Rinehart asked the defendant to exit the vehicle. At some time during this traffic stop, Officer Rinehart sought backup coverage by another officer. In response to that request, Deputy Sheriff David Clark arrived at the scene.

¶ 5 Outside the vehicle, the defendant began to make anxious movements trying to reach into his pockets. Officer Rinehart asked him to keep his hands out of the pockets. He put the defendant in handcuffs placing him in custody for possession of cannabis. The officer's rationale for placing the defendant under arrest was based on the two cannabis-related events—the smell and the discarded cannabis cigarette—as well as based upon the defendant's attempts to reach into his pockets.

¶ 6 In the search pursuant to this arrest, the officer located an amount of cocaine. The defendant was charged with the knowing and unlawful possession of less than 15 grams of cocaine—a Class 4 felony. 720 ILCS 570/402(c) (West 2006). The discarded cigarette butt was not field-tested at the scene, nor was it tested later to confirm the officer's suspicion that the cigarette contained cannabis. The defendant was not formally charged with possession of cannabis. The decision to forego testing on the cigarette was based upon the misdemeanor nature of any resulting charge if the substance was confirmed to be cannabis.

¶ 7 The defendant filed a motion to suppress evidence arguing that he had not failed to use his left turn signal and thus the purpose of the traffic stop was improper. He also stated that he did not give consent to search his vehicle and that the State did not have a warrant or other exigent circumstances necessary to justify a search of his vehicle. The hearing on this motion was held on August 10, 2009. The defendant did not testify at this hearing, but Officer Carroll Rinehart and Deputy Sheriff David Clark did testify.

¶ 8 On April 9, 2010, Judge Milton Wharton denied the defendant's motion to suppress, stating on the record:

"It's the opinion of the court that the officer had, at first, reasonable suspicion to believe that a traffic violation had been committed by the defendant. Upon approaching the car, smelling cannabis, and seeing what he believed to be a hand-rolled cigarette, that gave the officer probable cause to make an arrest."

¶ 9 The State's case against the defendant continued to trial on September 13, 2010. At the end of the trial, the jury was instructed on the law. At the conclusion of the jury deliberations, the defendant was found guilty. On December 7, 2010, Judge Randall Kelley sentenced the defendant to three years of probation and imposed a \$100 drug fine.

¶ 10 The defendant appeals from the denial of his pretrial motion to suppress and from the credit amount allocated to his sentence.

¶ 11 LAW AND ANALYSIS

¶ 12 Motion to Suppress

¶ 13 The defendant argues that neither the smell of burnt cannabis nor the visualization of a "cannabis cigarette" within his reach inside his vehicle provided sufficient probable cause to arrest him. Without probable cause to arrest him, the search of his person would not have occurred, and the cocaine he held would not have been found. Because all of the evidence supportive of the cocaine charge resulted from this arrest—which the defendant characterizes as unlawful—he argues that his conviction must be reversed.

¶ 14 On appeal from a denial of a motion to suppress, a bifurcated standard of review is utilized. Factual findings will only be reversed if they are found to be contrary to the manifest weight of the evidence. *People v. Gherna*, 203 Ill. 2d 165, 175, 784 N.E.2d 799, 805 (2003). In reviewing the facts of the case on appeal, the court is allowed to conduct "its own assessment of the facts in relation to the issues presented and may draw its own

conclusions when deciding what relief should be granted.' " *Id.* at 175-76, 784 N.E.2d at 805-06 (quoting *People v. Crane*, 195 Ill. 2d 42, 51, 743 N.E.2d 555, 562 (2001)). Ultimately, however, the determination of whether suppression was proper given the factual circumstances at issue is a legal question and is reviewed on a *de novo* basis. *People v. Pitman*, 211 Ill. 2d 502, 512, 813 N.E.2d 93, 101 (2004).

¶ 15 Our Constitution guarantees freedom from unreasonable searches and seizures. U.S. Const., amend. IV. Generally speaking, a reasonable search and/or seizure involves a warrant obtained with probable cause. *People v. Long*, 99 Ill. 2d 219, 227-28, 457 N.E.2d 1252, 1255 (1983). Warrantless arrests are constitutional if the officer has reasonable grounds to believe that the person is committing or is about to commit a crime. 725 ILCS 5/107-2(c) (West 2006); *People v. Robinson*, 167 Ill. 2d 397, 405, 657 N.E.2d 1020, 1025 (1995). However, a warrantless search and/or seizure incident to an arrest is only proper if the arrest itself was constitutionally sound. *Johnson v. United States*, 333 U.S. 10, 17 (1948). To determine if the underlying arrest is constitutional, the court must analyze the evidence in its totality. *People v. Adams*, 131 Ill. 2d 387, 396-97, 546 N.E.2d 561, 565 (1989).

¶ 16 In arguing that the arrest for possession of cannabis was invalid, the defendant isolates each component of the evidence that was considered in support of the arrest.

¶ 17 Smell of Cannabis

¶ 18 The defendant contends that the mere smell of cannabis is insufficient to support an arrest for possession of cannabis. The defendant asks us to consider *People v. Stout*, 106 Ill. 2d 77, 477 N.E.2d 498 (1985), in which the Illinois Supreme Court held that the officer's detection of the smell of "burning" cannabis, without additional evidence, supported a warrantless search of the occupants of the vehicle. Like the facts in this case, the case in *People v. Stout* began with a traffic stop. *Id.* at 81, 477 N.E.2d at 499. Upon approaching

the vehicle and defendant Stout, who had already exited the vehicle, the officer detected the odor of "burning" cannabis. *Id.* at 81, 477 N.E.2d at 500. Because of a split in the districts about whether uncorroborated testimony from the arresting officer about cannabis odor detection was adequate probable cause to justify a search, the supreme court addressed the issue. *Id.* at 82, 477 N.E.2d at 500. The supreme court held that the odor of cannabis, even without additional evidence, was sufficient probable cause to warrant a search. *Id.* at 88, 477 N.E.2d at 503. The supreme court specifically overruled two cases from the Third District Appellate Court "and any other case dealing with this issue." *Id.* (citing *People v. Wombacher*, 104 Ill. App. 3d 812, 433 N.E.2d 374 (1982); *People v. Argenian*, 97 Ill. App. 3d 592, 423 N.E.2d 289 (1981)).

¶ 19 The defendant acknowledges the holding in *People v. Stout* but argues that these facts are distinguishable because Officer Rinehart testified that he detected the odor of "burnt" cannabis—not "burning" cannabis. The defendant argues that the distinction is important because a burnt smell would not necessarily indicate the present presence of cannabis. The defendant cites no authority on this argued distinction between a "burnt" or "burning" odor of cannabis. However, the defendant cites to a case from our court involving the scent of burning cannabis that predated *People v. Stout* to support this argument. In *People v. Harshbarger*, 24 Ill. App. 3d 335, 321 N.E.2d 138 (1974), the court found that the warrantless arrest of the defendant (one of four persons in the room) solely on the basis of the detected odor was unconstitutional. *Id.* at 338, 321 N.E.2d at 141. The court explained that there was no additional corroborating evidence that a crime had been committed, commenting that the defendant did not "by his actions, furtive or otherwise, give any indication that he may have been violating any law." *Id.* at 338, 321 N.E.2d at 140-41. Although not specifically named as a case overturned by the supreme court in *People v. Stout*, we believe that *People v. Harshbarger* is no longer good law on that point. *Stout*

stood for the proposition that the odor alone can be sufficient probable cause, in contradiction to the holding in *Harshbarger*.

¶ 20 Additionally, we note that the supreme court explained the persuasive evidence of distinctive odors supporting probable cause. *Stout*, 106 Ill. 2d at 87, 477 N.E.2d at 502 (citing *People v. Campbell*, 67 Ill. 2d 308, 315-16, 367 N.E.2d 949, 953 (1977)). In *People v. Campbell*, the court held that the use of trained dogs to detect the odor of illegal drugs was permissible. *Campbell*, 67 Ill. 2d at 315-16, 367 N.E.2d at 953. Citing a case decided by the United States Supreme Court which held that distinctive odors can constitute persuasive evidence of probable cause, the court in *People v. Campbell* stated that "the detection of narcotics by police smelling the odor is a permissible method of establishing probable cause." *Id.* (citing *Johnson v. United States*, 333 U.S. 10, 13 (1948)).

¶ 21 Hand-Rolled Cigarette Found in Vehicle

¶ 22 The defendant also argues that the mere observation of a hand-rolled cigarette butt on the passenger-side floorboard of the vehicle did not provide the requisite probable cause to arrest the defendant for possession of cannabis. He argues that factually, it would have been difficult for Officer Rinehart to have seen the cigarette butt, and to have adequately discerned its unlawful nature. The defendant also argues that the physical characteristic of the cigarette being hand-rolled is not significant to warrant the assumption that the cigarette contained cannabis.

¶ 23 The defendant cites to the case of *People v. Damon*, 32 Ill. App. 3d 937, 337 N.E.2d 262 (1975) (per curiam), as support for his argument that the presence of the hand-rolled cigarette butt was insufficient to establish probable cause. In *People v. Damon*, the defendant was arrested after the officer, in responding to a call regarding the presence of a suspicious-looking man, witnessed the defendant drop a hand-rolled cigarette to the ground. *Id.* at 937-38, 337 N.E.2d at 262-63. The officer retrieved the cigarette and arrested the

defendant because he believed that the cigarette contained cannabis. *Id.* at 938, 337 N.E.2d at 262-63. The defendant sought to suppress evidence (heroin) as a result of his claimed illegal arrest for cannabis possession. *Id.* at 938, 337 N.E.2d at 263. The court agreed that the cannabis arrest was illegal because the officer did not explain why he suspected that the cigarette contained cannabis and the officer did not testify to his experience with identifying cannabis. *Id.*

¶ 24 Having reviewed *People v. Damon*, we do not reach the same conclusion that the defendant argues. While the presence of a hand-rolled cigarette without additional facts was found lacking in that case, the court did not indicate that the presence of a hand-rolled cigarette could never be found to present probable cause for an arrest. The court found that the State failed to present evidence supporting the officer's thought process and his experience. In this case, Officer Rinehart presented ample testimony about his experience and the location of the discarded cigarette butt within the compartment of the vehicle, along with the smell of burnt cannabis.

¶ 25 Totality of the Circumstances

¶ 26 To determine the validity of the arrest, we must look to the totality of the factual circumstances. *Adams*, 131 Ill. 2d at 396-97, 546 N.E.2d at 565. The court cannot isolate the facts as the defendant asks us to do. In this case, Officer Rinehart detected the odor of cannabis and saw a discarded cigarette butt on the floor of the passenger side of the vehicle. Officer Rinehart testified to his background and established that this type of hand-rolled cigarette often contains cannabis. In addition to these two facts, upon asking the defendant to exit the vehicle, the defendant began to fidget and reach into his pockets. He was asked to stop this behavior and ultimately was arrested in order to keep from continuing his furtive actions. Subsequent to the arrest, he was searched, and cocaine was discovered. We conclude that the evidence presented at the motion to suppress clearly established probable

cause to arrest the defendant for the possession of cannabis. Accordingly, we affirm the trial court's denial of the motion to suppress.

¶ 27 \$15 Credit Towards Fine

¶ 28 The defendant next argues that he was not properly credited for days spent in custody prior to sentencing, and that as a result he was denied a \$15 credit against his fine. The State concedes this issue. 725 ILCS 5/110-14(a) (West 2010). The issue may be raised for the first time on appeal, and cannot be waived. *People v. Rivera*, 378 Ill. App. 3d 896, 898, 882 N.E.2d 1169, 1171 (2008). We have the authority to direct the clerk of the circuit court to make the necessary amendment to the mittimus. *Id.* (citing *People v. Hernandez*, 345 Ill. App. 3d 163, 171, 803 N.E.2d 577, 583 (2004)). Accordingly, we order the amendment of the mittimus to reflect the proper credit.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed. We order the clerk of the circuit court of St. Clair County to amend the mittimus to reflect a \$15 credit against the fine assessed against the defendant.

¶ 31 Affirmed; mittimus amended.