

*Criminal Law – Search and Seizure—Controlled Substances—Statutory
Interpretation—Commercial Transactions*

ELEMENTS DISTRIBUTION, LLC. v. STATE OF GA., 894 S.E.2d 641 (Ga.
Ct. App. 2023)¹

Decided by the COURT OF APPEALS OF GEORGIA, FIFTH DIVISION
on NOVEMBER 2, 2023.²

Counsel for ELEMENTS DISTRIBUTION, LLC., Plaintiff–Appellant:
Thomas Daniel Cedron Church, THE CHURCH LAW FIRM, ATLANTA,
GEORGIA.³

Counsel for STATE OF GEORGIA, Defendant–Appellee: Patsy Austin-
Gatson, DISTRICT ATTORNEY, GWINNETT, GEORGIA; Brandon M.
Delfunt, ASSISTANT DISTRICT ATTORNEY, GWINNETT, GEORGIA.⁴

Before Hon. McFadden, J., Hon. Markle, J., and Hon. Brown, J.⁵ Opinion
authored by McFadden, J. with Brown, J. concurring.⁶

KEY ISSUES PRESENTED

Elements Distribution, LLC. v. State of Ga. illustrates the present
conflict among district attorneys’ interpretations of how the Georgia Hemp
Farming Act and the Georgia Controlled Substances Act should be applied
to the sale of products containing Delta-8-tetrahydrocannabinol (“Delta-8-
THC”) and Delta-10-tetrahydrocannabinol (“Delta-10-THC”).⁷ The Georgia
Controlled Substances Act expressly excludes “hemp or hemp products”
containing a concentration of 0.3% or less of Delta-9-THC from being
considered a controlled substance.⁸ The Georgia Hemp Farming Act excludes

¹ *Elements Distribution, LLC. v. State of Ga.*, 369 Ga. App. 844 (2023).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Elements Distribution, LLC.*, 369 Ga. App. 844.

⁷ *Id.*

⁸ O.C.G.A. § 16-13-25(3)(P).

THC infused food products that have not been approved by the Food and Drug Administration from its definition of “hemp products.”⁹ *Elements Distribution, LLC. v. State of Ga.* required the Court of Appeals of Georgia, Fifth Division, to determine whether food products infused with Delta-8 and Delta-10-THC should be considered a controlled substance under Georgia Law.¹⁰

PROCEDURAL HISTORY & POSTURE

In January 2022, Gwinnett County District Attorney Patsy Austin-Gatson gave a press release in which she stated that products containing Delta-8 and Delta-10-THC derivatives were illegal in the state of Georgia.¹¹ Element Distribution is a Gwinnett County smoke and vape establishment. On February 22, 2022, Gwinnett County police executed a warrant to search Elements Distribution’s warehouse and to seize business records, currency, and both edible and nonedible items containing Delta-8-THC and Delta-10-THC.¹² No criminal charges were filed or arrests made.¹³ The Gwinnett County District Attorney’s Office returned the non-edible items to Elements Distribution on April 21, 2022.¹⁴ On June 23, 2022, Elements Distribution filed an action in Gwinnett County Superior Court, petitioning for the return of the edible products.¹⁵ The trial court found the edible items being held by the state were controlled substances, and thus illegal, because they did not fall within an exclusion for “hemp products” within Schedule I of the Georgia

⁹ O.C.G.A. § 2-23-3(6).

¹⁰ *Elements Distribution, LLC.*, 369 Ga. App. 844.

¹¹ *Id.* at 845; and Rebecca Grapevine, *Delta-8 products targeted by Gwinnett County DA selling ‘like hotcakes’ in DeKalb*, DECATURISH.COM (Mar. 24, 2022), <https://decatrish.com/2022/03/delta-8-products-targeted-by-gwinnett-county-da-selling-like-hotcakes-in-dekalb>.

¹² *Elements Distribution, LLC.*, 369 Ga. App. 844 at 845.

¹³ *Id.*

¹⁴ *Id.* at 846.

¹⁵ *Id.*

Controlled Substances Act.¹⁶ Elements Distribution filed an appeal with the Georgia Court of Appeals on January 11, 2023.¹⁷

SUBSTANTIVE FACTS

In January, 2022, Gwinnett County District Attorney Patsy Austin-Gaston took the position that Delta-8 and Delta-10 products were illegal in the state of Georgia.¹⁸ Acting under this directive, a Gwinnett County police officer, after learning of Elements Distribution’s involvement in the sale of Delta-8 and Delta-10 products, filed for a warrant to search and seize products containing Delta-8 and Delta-10-THC.¹⁹ In his affidavit, the officer asserted that “probable cause exists to believe Elements Distribution LLC is engaged in, and will continue to engage in, the sale and distribution of Delta-8/10 products, which are a Schedule I controlled substance in the state of Georgia.”²⁰ Acting on the warrant, the police raided Elements Distribution’s warehouse and seized 6,130 packages of Delta-8 and Delta-10 edibles and \$271,253.00 in U. S. currency.²¹

Shortly after the raid, other businesses selling Delta-8 and Delta-10 products challenged Austin-Gaston’s position in Fulton County Superior Court.²² On March 18, 2022, the Fulton County Court granted a temporary restraining order barring Austin-Gaston’s office “from directing her office or agents to initiate or continue any criminal enforcement action or civil asset forfeiture proceeding against any individual or business based on their alleged possession, sale, or distribution of products containing hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-

¹⁶ Brief of Appellee at 5, *Elements Distribution, LLC v. State of Ga.*, 369 Ga. App. 844, (Ga. Ct. App. 2023), No. A23A0842.

¹⁷ Court Docket, *Elements Distribution, LLC v. State of Ga.*, 369 Ga. App. 844, (Ga. Ct. App. 2023), No. A23A0842.

¹⁸ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 845.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 846.

²² *Id.* at 845.

THC.”²³ The prohibition was later extended and ordered to remain in effect while the case against Austin-Gatson was pending.²⁴

On April 5, 2022, Austin-Gaston stated in an affidavit she had advised her staff that non-edible products containing less than 0.3% of Delta-9-THC were not controlled substances in the state of Georgia, regardless of “whether they contain Delta-8-THC, Delta-10-THC, or another cannabinoid.”²⁵ The Gwinnett County District Attorney’s Office returned all previously seized, non-food products to Elements Distribution on April 21, 2022.²⁶ The State conceded at trial that non-edible products containing Delta-8 and Delta-10-THC were legal, but the State maintained, both at trial and on appeal, that food products containing Delta-8 and Delta-10-THC are controlled substances under Georgia law.²⁷

LEGAL ANALYSIS LEADING TO THE COURT’S DISPOSITION

A. Prior Relevant Law

The asserted probable cause supporting the search warrant for Elements Distribution’s warehouse was based on an alleged violation of OCGA § 16-13-30 (b), which provides “except as authorized by this article, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance.”²⁸ Georgia law defines a “controlled substance” as “a drug, substance, or immediate precursor in Schedules I through V of Code Sections 16-13-25 through 16-13-29 and Schedules I through V of 21 CFR Part 1308.”²⁹ However, Georgia law excludes THC from being considered a controlled substance when found in hemp or hemp products “as defined by the Georgia Hemp Farming Act.”³⁰ The Georgia Hemp Farming Act

²³ *Id.*

²⁴ *Id.*

²⁵ Elements Distribution, LLC., 369 Ga. App. 844 at 846.

²⁶ *Id.*

²⁷ *Id.* at 848.

²⁸ Elements Distribution, LLC., 369 Ga. App. 844 at 847; and O.C.G.A. § 16-13-30(b).

²⁹ O.C.G.A. § 16-13-21(4).

³⁰ O.C.G.A. § 16-13-25(3)(P).

considers any part of the Cannabis sativa plant containing the federally defined THC level for hemp (or a lower level) as “hemp” under Georgia law.³¹ The federally defined THC level for hemp is not more than a concentration of .3% of Delta-9-THC on a dry weight basis.³² The Georgia Hemp Farming Act further defines “hemp products” to exclude THC infused products that have not been approved by the FDA.³³

B. Changes, Modifications, Clarifications, & Extensions to Georgia Law Made in ELEMENTS DISTRIBUTION, LLC. v. STATE OF GA.

In *Elements Distribution, LLC. v. State of Ga.*, the Court of Appeals of Georgia reasoned that the prosecution misinterpreted not only the Georgia Controlled Substances Act but also the Georgia Hemp Farming Act.³⁴ The State conceded that non-edible Delta-8 and Delta-10 products are “hemp or hemp products” under the Georgia Hemp Farming Act and, therefore, could not be considered controlled substances under the Georgia Controlled Substances Act.³⁵ However, the State argued Elements Distribution’s Delta-8 and Delta-10-THC infused edible products did not fall under the Georgia Controlled Substance Act’s Schedule I “hemp products” exclusion because the Georgia Hemp Farming Act excludes THC infused food products that are not FDA approved from its definition of “hemp products.”³⁶

The Court determined both Delta-8 and Delta-10-THC are derivatives of the cannabis plant.³⁷ The Court further reasoned that, so long as neither are combined with a concentration of more than 0.3% Delta-9-THC, Delta-8 and Delta-10-THC fall under the Georgia Hemp Farming Act’s definition of “hemp.”³⁸ The State’s argument that THC infused edible products are not “hemp products,” and thus not subject to the Georgia Controlled Substance

³¹ O.C.G.A. § 2-23-3(5).

³² O.C.G.A. § 2-23-3(3).

³³ O.C.G.A. § 2-23-3(6).

³⁴ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 848-849.

³⁵ *Id.* at 848; and Brief of Appellee at 3, *Elements Distribution, LLC. v. State of Ga.*, 369 Ga. App. 844, (Ga. Ct. App. 2023), No. A23A0842.

³⁶ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 848 ; O.C.G.A. § 2-23-3(6).

³⁷ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 848.

³⁸ *Id.*

Act's Schedule I exclusion, was based on an erroneous "conjunctive" interpretation of OCGA § 16-13-25 (3) (P) rather than the appropriate "disjunctive" interpretation.³⁹ The plain language of OCGA § 16-13-25 (3) (P) excludes THC from Schedule I when found "in hemp *or* hemp products."⁴⁰ The Court reasoned that, when used as a disjunctive, the word "or" expands statutory coverage rather than limit it.⁴¹ Therefore, the State's argument that Delta-8 and Delta-10-THC infused edibles must meet the statutory definition of "hemp products" has no merit because Delta-8 and Delta-10-THC already meet the definition of "hemp" under the Georgia Hemp Farming Act.⁴² Because "hemp" is excluded from a Schedule I classification under the Georgia Controlled Substances Act, the Court held products containing Delta-8 and Delta-10-THC, non-edible or otherwise, are not controlled substances when the products do not also contain a concentration of more than 0.3% Delta-9-THC.⁴³

IMPACT UPON GEORGIA CRIMINAL LAW PRACTICES

The Court's decision in *Elements Distribution, LLC. v. State of Ga.* was celebrated by both legal practitioners and business owners.⁴⁴ Delta-8 and Delta-10-THC products are very popular, with one business owner claiming she sells the products "like hot cakes."⁴⁵ The raid of Elements Distribution's

³⁹ *Id.* at 848-849.

⁴⁰ *Id.* at 849; O.C.G.A. § 16-13-25(3)(P).

⁴¹ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 848-849; Reply Brief of Appellant at 3, *Elements Distribution, LLC v. State of Ga.*, 369 Ga. App. 844, (Ga. Court of Appeals 2023), No. A23A0842.

⁴² *Id.* at 849; O.C.G.A. § 2-23-3(5).

⁴³ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 849; O.C.G.A. § 2-23-3(5); O.C.G.A. § 16-13-25(3)(P); O.C.G.A. § 2-23-3(3); O.C.G.A. § 16-13-21(4).

⁴⁴ Christopher King, *Georgia court rules hemp distributor can keep selling its products*, FOX5ATL (November 3, 2023), <https://www.fox5atlanta.com/news/georgia-court-rules-hemp-distributor-can-keep-selling-its-products>; and Alex Anteau, 'An Unqualified Win': Ga. Intermediate Court Releases First Merits Ruling on Delta-8 Legality, LAW.COM DAILY REPORT (Nov. 03, 2023, 4:07 PM), <https://www.law.com/dailyreportonline/2023/11/03/an-unqualified-win-ga-high-court-releases-first-merits-ruling-on-delta-8-legality>.

⁴⁵ Rebecca Grapevine, *Delta-8 products targeted by Gwinnett County DA selling 'like hotcakes' in DeKalb*, DECATURISH.COM (Mar. 24, 2022), <https://decatrish.com/2022/03/delta-8-products-targeted-by-gwinnett-county-da-selling-like-hotcakes-in-dekalb>.

warehouse, and others like it, had businesses selling Delta-8 and Delta-10-THC products concerned for their own proprieties regarding the legality of distributing the products.⁴⁶ The decision also brought relief to users of the products, some of whom use the products as substitutes for other illegal drugs or for pain relief.⁴⁷ “My back’s messed up and everything. And this helps a whole lot more than anything else. And I’ve tried, like, a lot of stuff,” one Delta-8-THC consumer said.⁴⁸ These users, as well as businesses that sell the products, rely on the products’ continued legality.⁴⁹ “These are business owners; these aren’t drug dealers. They want to do things right and they want to comply with the law,” said Church, the attorney for Elements Distribution.⁵⁰ However, it is possible other businesses selling Delta-8 and Delta-10 THC products may not directly benefit from the decision in *Elements Distribution, LLC. v. State of Ga.*, as two of the three judges on the panel concurred in judgment only.⁵¹ “Judges Todd Markle and Trenton Brown concurred in the judgment but did not join the rationale of the majority opinion and didn’t really offer their reasoning for why,” claimed Thomas Church.⁵² Therefore, Church called the ruling an “unqualified win,” as the decision does not create binding precedent for future cases that are similarly situated.⁵³ Additionally, *State v. Sass Grp., LLC*, the case that challenged Austin-Gatson’s position that Delta-8 and Delta-10-THC are controlled substances, was dismissed by the Georgia Supreme Court due to procedural errors, leaving the case’s merits untouched.⁵⁴

⁴⁶ *Id.*

⁴⁷ Sophia Choi, *Georgia Appeals Court rules Delta-8, Delta-10 are legal despite health warnings from doctors*, WSB-TV (November 3, 2023, 5:38 p.m.), <https://www.wsbtv.com/news/local/atlanta/georgia-appeals-court-rules-delta-8-delta-10-are-legal-despite-health-warnings-doctors/LNJSLNK7JJDFHD6MS6AYD6DYHU/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 850; and Alex Anteau, ‘*An Unqualified Win*’: *Ga. Intermediate Court Releases First Merits Ruling on Delta-8 Legality*, LAW.COM DAILY REPORT (Nov. 03, 2023, 4:07 PM), <https://www.law.com/dailyreportonline/2023/11/03/an-unqualified-win-ga-high-court-releases-first-merits-ruling-on-delta-8-legality>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *State v. Sass Grp., LLC*, 315 Ga. 893, 885 S.E.2d 761 (2023).

However, *Elements Distribution, LLC. v. State of Ga.* remains significant because it is the first time a Georgia high court weighed in on the legality of Delta-8 and Delta-10-THC.⁵⁵ Though a rationale was not completely agreed upon, the reversal of the trial court's judgment could only be reached by finding probable cause for the warrant did not exist because Delta-8 and Delta-10-THC do not carry criminal liability, regardless of the rationale as to why.⁵⁶ Moreover, the Court's decision follows several Georgia superior courts' rulings regarding the legality of Delta-8 and Delta-10-THC products, Church claimed, "so it's not necessarily a surprise that the Georgia Court of Appeals agreed with us."⁵⁷ Therefore, there seems to be a positive trend toward a uniform legal application regarding Delta-8 and Delta-10 in the state of Georgia.⁵⁸

Lower court decisions, coupled with the decision of *Elements Distribution, LLC. v. State of Ga.*, are likely to provide Georgia defense attorneys with sufficiently persuasive precedent to make a compelling argument in similarly situated cases.⁵⁹ However, no high court to date has created a binding determination on the issue, and the Georgia legislature is well within its power to intervene and pass legislation that renders Delta-8 and Delta-10-THC unlawful.⁶⁰ To that end, momentum for tighter THC restrictions may already be picking up steam.⁶¹ During the 2023 legislative session, Georgia lawmakers introduced Senate Bill 22, which aimed to amend the Georgia Hemp Farm Act and treat all THC containing products the same, regardless of classification or concentration levels.⁶² Senate Bill 22 passed in the Senate, but it did not pass in the House.⁶³ However, future legislation may

⁵⁵ Alex Anteau, *supra* note 51.

⁵⁶ *Elements Distribution, LLC.*, 369 Ga. App. 844 at 850.

⁵⁷ Alex Anteau, *supra* note 51.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Orlando Montoya, *Georgia Supreme Court rules in Delta-8, Delta-10 case*, GPB (Mar. 17, 2023, 2:44 PM), <https://www.gpb.org/news/2023/03/17/georgia-supreme-court-rules-in-delta-8-delta-10-case>; and S.B. 22, 157Th Gen. Assemb., Reg. Sess. (As substituted by Comm. Ga. 2023), https://legiscan.com/GA/text/SB22/id/2699067/Georgia-2023-SB22-Comm_Sub.pdf (last visited Mar. 16, 2024).

⁶² *Id.*

⁶³ Orlando Montoya, *supra* note 61.

prove more successful, and the decision in *Elements Distribution, LLC. v. State of Ga.* may be rendered a mere false hope for businesses distributing Delta-8 and Delta-10 THC products.⁶⁴

Prepared by: *Anthony Zahn*

⁶⁴ *Elements Distribution, LLC.*, 369 Ga. App. 844.