

ORIGINAL

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS C. SMITH,

Defendant-Appellee

Case No.

15-0406

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case Nos. 14AP-154
14AP-155

**MEMORANDUM OF PLAINTIFF-APPELLANT STATE OF OHIO
SUPPORTING JURISDICTION**

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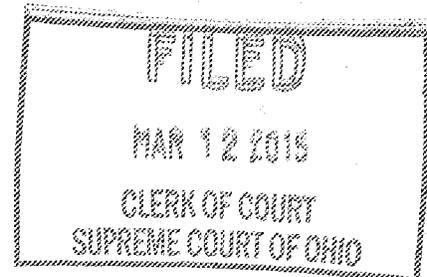


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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

In the effort to combat the problem of designer drugs having a substantially similar chemical structure and effect as drugs already listed in Schedule I or II, the General Assembly passed Sub.H.B. 64 effective 10-17-11. The Act defined when a substance would be deemed a “controlled substance analog” and specifically provided in far-reaching language that such analogs must be treated as Schedule I controlled substances for purposes of any provision in the Revised Code.

A controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

The legislative intent to penalize the trafficking and possession of a controlled substance analog was clear. The General Assembly was providing a specific definition for analogs and was specifying that, for the purposes of *any* provision in the Revised Code, an analog *shall* be treated “as a controlled substance in Schedule I.”

Under this “shall be treated” language, any provision in the Revised Code referring to “Schedule I” would be treated as referring to Schedule I controlled substances, *including* analogs. Anywhere the term “Schedule I” would exist in the Revised Code, the term “Schedule I” would include analogs within its reach.

When R.C. 2925.01 referenced “Schedule I,” it necessarily included analogs.

When R.C. 2925.03 and R.C. 2925.11 prohibited and penalized the trafficking and possession of “controlled substances” in “Schedule I,” those statutes necessarily included analogs, which “shall be treated” as Schedule I controlled substances. The “shall be treated” provision operated hand-in-glove with these “Schedule I” provisions in R.C.

2925.03 and R.C. 2925.11, thereby allowing prosecution for trafficking and possession of analogs. The analog definition and the “shall be treated” requirement took effect on October 17, 2011, long before defendant’s acts in 2012.

But the lower courts constructed artificial barriers to defeat the plain, broad language of Sub.H.B. 64. They focused on the fact that the analog definition was set forth R.C. 3719.01(HH). They argued that the “shall be treated” provision was only set forth in R.C. 3719.013. Their arguments all boiled down to the contention that the General Assembly did not make it clear enough that the analog concept would apply to the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11. Their chief complaint was that the “shall be treated” language of R.C. 3719.013 was only contained in R.C. Chapter 3719, rather than in R.C. Chapter 2925.

This ostrich-like approach to statutory construction amounted to judicial nullification of the General Assembly’s plainly-stated intent. On the question of whether the analog concept applied beyond R.C. Chapter 3719, the language in R.C. 3719.013 was crystal clear. Analogs *shall* be treated as Schedule I controlled substances for purposes of *any* provision in the *Revised Code*. The phrase “any provision” could not get any broader and therefore included the provisions in the trafficking and possession statutes. And it is beyond dispute that the trafficking and possession statutes fell within the “Revised Code.” R.C. 1.01 (“Revised Code” is all permanent statutes). Indeed, the Tenth District *nineteen* times used the “R.C.” reference for *R.C.* 2925.03 and *R.C.* 2925.11, thereby conceding that those provisions are in the “Revised Code.” So R.C. 3719.013 was clear in applying the analog concept to the entire Revised Code, including R.C. 2925.03 and R.C. 2925.11. There is no other way to “interpret” R.C. 3719.013, and,

in fact, the Tenth District did not even try to parse or construe that broad language.

Instead, the Tenth District complained that the “shall be treated” requirement was not explicitly included within R.C. Chapter 2925. Decision, ¶¶ 13, 14, 15 (“did not amend R.C. 2925.03 or 2925.11 to expressly prohibit” analogs; “did not amend any part of Chapter 2925 to explicitly refer to” analogs; “no cross-references or any other indicators in Chapter 2925”; “failed to incorporate any explicit cross-references in Chapter 2925”).

All of this was true but insignificant. The General Assembly *did* incorporate analogs into Chapter 2925 by adopting R.C. 3719.013, which provided overarching definitional language indicating that analogs shall be treated as controlled substances in Schedule I for purposes of *any* provision in the *Revised Code*. Since R.C. 3719.013 accomplished the General Assembly’s intent of applying the analog concept to Chapter 2925, there was no need to adopt a redundant “cross-reference” in Chapter 2925. The General Assembly only needed to state its intent once, not multiple times.

The Tenth District disregarded the broad reach of R.C. 3719.013 by applying its own preferences as to how the General Assembly should have set up the statutory scheme. The Tenth District thought that it would have been better or clearer if the General Assembly had included a cross-reference in Chapter 2925. The Tenth District thought it was better that Congress included the federal definition of “analog” in “the same portion of federal law.” But these are organizational and stylistic complaints, not real doubts about the General Assembly’s intent in R.C. 3719.013 to treat analogs as controlled substances in Schedule I for purposes of *any* provision of the entire Revised Code. The Tenth District’s failure to parse the explicit text of R.C. 3719.013 reflected an

implicit concession that the General Assembly meant what it said in that statute. The court simply chose to disregard R.C. 3719.013 because it was not a “cross reference” in a specific location or because it was not in the “same portion” of law.

The State raises three propositions of law arising from the Tenth District’s flawed analysis. First, the Tenth District misapplied the doctrine of strict construction by making no real effort to construe what the General Assembly had expressed in R.C. 3719.013. The Tenth District merely noted a potential “ambiguity” and stopped there. More is required in construing a statute.

The State’s second proposition of law arises from the plain language of R.C. 3719.013, indicating that analogs shall be treated as Schedule I controlled substances.

The State’s third proposition of law sets forth the lower courts’ violation of separation of powers by failing to give effect to the General Assembly’s plainly-stated intent. The Tenth District never addressed the State’s separation-of-powers challenge to what the common pleas court had done and to what the Tenth District was doing.

Defendant might argue that review should not be granted because the issue potentially affects only offenses occurring from October 17, 2011 to December 19, 2012. Effective on December 20, 2012, the General Assembly amended R.C. 2925.03 and R.C. 2925.11 to include express references therein to analogs. The Tenth District’s locational criticisms do not affect the current scheme as to trafficking and possession. But the Tenth District’s flawed analysis still warrants review for several reasons.

First, the lower courts have done grave injury to the doctrine of separation of powers by disregarding the General Assembly’s plainly-stated intent and by misapplying the rule of lenity. These errors create precedents that could potentially affect how the

Tenth District will address other criminal statutes in the future.

Second, this defendant faced first-degree and second-degree felonies. Other cases in Franklin County and in other counties will potentially be affected as well. The stakes are high, even if the problem were limited to a specific 14-month time frame.

In any event, the Tenth District's errors will continue beyond December 2012 by affecting the operation of other drug statutes in R.C. Chapter 2925. While the December 2012 amendments expressly inserted "analog" language into the trafficking and possession statutes, the General Assembly did not do so as to other drug statutes like R.C. 2925.02 (corruption of another or minor with drugs), R.C. 2925.04 (illegal manufacture), and R.C. 2925.041 (illegal assembly of precursors). The General Assembly was still counting on R.C. 3719.013 to incorporate the analog concept into those statutes. The Tenth District's analysis will continue to affect the operation of those statutes.

This felony case presents a substantial constitutional question and presents questions of public and great general interest that warrant granting leave to appeal.

STATEMENT OF FACTS

In Common Pleas No. 12CR-5477 (Appeals No. 14AP-154), the grand jury indicted defendant Thomas Smith on five counts of aggravated trafficking in drugs and five counts of aggravated possession of drugs. The indictment alleged that the controlled substance involved in all of the offenses was "a controlled substance included in Schedule I, to wit: a-PVP, which is a controlled substance analog, as defined in section 3719.01 * * *." The aggravated trafficking counts alleged that defendant had knowingly prepared for shipment, shipped, transported, etc. the substance with the knowledge or reasonable belief that the substance was intended for sale or resale by defendant or

another. The aggravated possession counts alleged that defendant knowingly possessed the substance. The a-PVP substance was alleged to be “commonly known as Bath Salts.”

The indictment indicated that offenses occurred on May 2, 2012 and July 25, 2012. Two of the trafficking counts and two of the possession counts were first-degree felonies because the amounts exceeded 50 times bulk and 100 times bulk.

In Common Pleas No. 12CR-3898 (Appeals No. 14AP-155), the grand jury indicted defendant on two counts of “trafficking in spice” and three counts of aggravated trafficking in drugs. The “trafficking in spice” counts (Counts One and Two) were fifth-degree felonies and alleged that defendant had knowingly sold or offered to sell “a controlled substance included in Schedule I, to wit: AM 2201, which is an analog controlled substance as defined in section 3719.01 * * *.” Both counts alleged that the offenses occurred on February 8, 2012.

The aggravated trafficking counts (Counts Three, Four, Five) were fourth-degree felonies and alleged that defendant had knowingly sold or offered to sell “a controlled substance included in Schedule I, to wit: a-PVP, which is a analog controlled substance as defined in section 3719.01 * * *.” Counts Three and Four were alleged to have occurred on February 8, 2012, and Count Five was alleged to have occurred on May 2, 2012.

The defense filed a motion to dismiss, alleging that the indictments failed to charge an offense because it had not yet been made a crime to traffic or possess analogs at the time. The State filed a memorandum opposing the motion.

The common pleas court ruled that the General Assembly had not sufficiently incorporated the “controlled substance analog” definition into the Criminal Code. The court filed a decision and entry sustaining the motion to dismiss, and the State timely

appealed in both cases, which were consolidated on appeal.

The Tenth District affirmed on November 28, 2014, and denied reconsideration on January 27, 2015.

ARGUMENT

Proposition of Law No. 1: The concept of “strict construction,” also known as the rule of lenity, comes into operation at the end of the process of construing what the legislative body has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. Courts must exhaust all available means of construction before arriving at the conclusion that the statutory text is so grievously ambiguous as to require strict construction.

The Tenth District relied heavily on the concept of “strict construction,” contending that the State could prevail only if the statutory scheme “clearly” made it punishable to traffic and possess analogs. Claiming “ambiguity,” the court concluded that the statutes were not “clear” and therefore the charges were properly dismissed.

The Tenth District committed obvious error in this “strict construction” analysis. The mere existence of real or possible “ambiguity” does not mean that the defendant prevails. A court does not merely conclude there is an “ambiguity” and end the analysis there. Even if the statutory language is “ambiguous,” which the State does not concede here, the statutory law still must be *fully* analyzed to attempt to determine its meaning.

Strict construction is not necessary “merely because it [is] possible to articulate a construction more narrow than that urged by the Government.” *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). “[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute * * *.” *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 132 S.Ct. 1670, 1682, 182 L.Ed.2d 678 (2012).

The rule of strict construction, otherwise known as the rule of lenity, “is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.”

Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (internal quotation marks and brackets omitted).

“[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended.” *Marachich v. Spears*, 133 S.Ct. 2191, 2209, 186 L.Ed.2d 275 (2013) (quoting another case). “Only where the language or history of [the statute] is uncertain after looking to the particular statutory language, the design of the statute as a whole and to its object and policy, does the rule of lenity serve to give further guidance.” *Id.* at 2209 (quoting in part another case).

Ohio follows the federal precedents in this area. See, e.g., *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 40 (same); *State v. Sway*, 15 Ohio St.3d 112, 116, 472 N.E.2d 1065 (1984).

The Tenth District merely found there was an “ambiguity.” It did not engage in a full analysis of the statutes to try to resolve the supposed ambiguity. Only grievous ambiguities that cannot be resolved with statutory construction are strictly construed against the State. As this Court has recognized, the rule of lenity “comes into operation at the end of the process of construing what [the legislature] has expressed, not at the

beginning as an overriding consideration of being lenient to wrongdoers”. *Elmore*, ¶ 40 (quoting another case). The mere existence of an “ambiguity” at the start of the process does not dictate strict construction; rather, it calls for an analysis of the statutory text, other statutory indicators, and the application of various rules of statutory construction to resolve the “ambiguity,” and only then would strict construction apply if the language cannot be sufficiently resolved.

This Court has said the same thing in other cases. “The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.” *Sway*, 15 Ohio St.3d at 116. “[A]lthough criminal statutes are strictly construed against the state, they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent.” *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20 (citation omitted); *In re Clemons*, 168 Ohio St. 83, 87-88, 151 N.E.2d 553 (1958) (“rule of strict construction is subordinate to the rule of reasonable, sensible and fair construction according to the expressed legislative intent, having due regard to the plain, ordinary and natural meaning and scope of the language employed.”).

In the present case, the Tenth District did not exhaust all of the textual clues in the statutory scheme and did not apply all pertinent canons of statutory construction. Because the court never fully engaged in an attempt to resolve the supposed “ambiguity,” the court never reached the proper point where it could apply the rule of lenity. The State’s first proposition of law warrants review.

Proposition of Law No. 2: As effective October 17, 2011, R.C. 3719.013 mandated that “controlled substance analogs” shall be treated as Schedule I controlled substances for purposes of any provision in the Revised Code. The trafficking and possession statutes were part of the Revised Code and therefore were subject to this broad incorporation of analogs into the Revised Code.

Although the Tenth District quoted R.C. 3719.013, it engaged in no effort to parse that language. While the court asserted that there was “ambiguity” as to whether the “shall be treated” requirement in R.C. 3719.013 extended beyond R.C. Chapter 3719, the language itself answered this question. R.C. 3719.013 explicitly provided that the “shall be treated” requirement applied to “*any* provision of the *Revised Code*.”

The State had pointed out the broad reach of the word “any” in the phrase “any provision.” “Any” means “all”, i.e., “without limitation.” *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997); *Citizens’ Bank v. Parker*, 192 U.S. 73, 81, 24 S.Ct. 181, 48 L.Ed. 346 (1904); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40, 78 N.E.2d 370 (1948). The Tenth District completely failed to address this point.

The State also noted that the phrase “Revised Code” is defined in R.C. 1.01 to include *all* titles, chapters, and sections in the Revised Code as a whole, including the Criminal Code in R.C. Title 29. This definition of “Revised Code” plainly supports the State’s position that the “shall be treated” requirement in R.C. 3719.013 extended to “all statutes,” including the trafficking and possession statutes. But the Tenth District did not bother to parse “Revised Code” and failed to acknowledge R.C. 1.01.

The language in R.C. 3719.013 was the key to the case, and yet the Tenth District failed to make any effort to parse “any” or “Revised Code.”

The State had also invoked various canons of statutory construction, including the

canons that every part of a statute is presumed to have effect and that courts cannot insert or delete words. See, e.g., *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26; *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969); *State ex rel. Bohan v. Indus. Comm.*, 147 Ohio St. 249, 251, 70 N.E.2d 888 (1946).

The Tenth District never mentioned these canons and never sought to apply them. The phrase “any provision of the Revised Code” in R.C. 3719.013 was unqualified. It was unlimited. It readily reached into the Criminal Code. The Tenth District violated these basic canons by superimposing limitations on the statute’s broad, unqualified reach.

The only canon referenced by the Tenth District was “expressio unius est exclusio alterius,” but, even then, the court still failed to fully resolve it, saying only that the canon “arguably” applied. Decision, ¶ 12. As the State pointed out, this canon is merely a rule of statutory construction that *sometimes* creates an inference that a listing of items excludes other items not listed. The inference is drawn only when it is sensible to do so, and the maxim cannot be used to defeat apparent legislative intent or unambiguous text. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶¶ 35-36; *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12; *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 455, 764 N.E.2d 418 (2002).

Such legislative intent is easily shown here by R.C. 3719.013, which provided overarching definitional language indicating that a “controlled substance analog” shall be treated as a controlled substance in Schedule I for purposes of *any* provision in the Revised Code. There was no need to include “controlled substance analog” in the

definitions incorporated into R.C. 2925.01 because the General Assembly had already accomplished such incorporation via R.C. 3719.013.

Another incomplete aspect of the Tenth District's analysis arises from its selective quotation of the preamble to House Bill 64. It quoted a part of the preamble that it thought was "suggest[ive]" of a narrow construction. But the quotation was substantially misleading because it did not quote the other parts of the preamble favoring the State's position. In fact, the preamble *also* stated that the purpose of the Act was "to enact section 3719.013" and "to treat controlled substance analogs as Schedule I controlled substances * * *."

The Tenth District's emphasis on a lack of cross-references in Chapter 2925 also violated the standard for construing statutes *in pari materia*. While claiming there was ambiguity about whether the analog definition applied to R.C. Chapter 2925, the Tenth District avoided parsing the very provision in the Revised Code that addressed that issue, R.C. 3719.013. As this Court has recognized, the inquiry into legislative intent cuts across *all* statutes, and so courts cannot cordon off entire chapters and sections from that inquiry. *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35, 567 N.E.2d 1018 (1991). And cross-references are unnecessary. "Statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph two of the syllabus.

The Tenth District also mentioned a supposed lack of "notice" that R.C. 3719.013 required that analogs would be treated as controlled substances in Schedule I. But the

enactment of R.C. 3719.013 gave sufficient notice. “It is an ancient maxim that all are conclusively presumed to know the law.” *State v. Pinkney*, 36 Ohio St.3d 190, 198, 522 N.E.2d 555 (1988).

Also flawed was the Tenth District’s effort to draw a distinction between the “civil” regulation in R.C. Chapter 3719 and the “criminal” enforcement in R.C. Chapter 2925. The Tenth District cited R.C. 3719.02, 3719.05, and 3719.06 as examples of this “civil regulation” aspect. But, actually, in R.C. 3719.99, R.C. Chapter 3719 sets forth *criminal* penalties for violations of eleven statutes in that chapter, including R.C. 3719.05 and .06. So even these statutes are reflective of “criminal enforcement.” And while R.C. 3719.99 does not set forth a criminal penalty for violating R.C. 3719.02, compliance with the manufacturer-licensing requirements in R.C. 3719.02 serves as an exemption from criminal liability for trafficking and possession under Chapter 2925. See R.C. 2925.03(B)(1); R.C. 2925.11(B)(1).

There is an obvious and frequent interplay between the provisions in R.C. Chapter 3719 and R.C. Chapter 2925 so that both chapters are part of an integrated statutory scheme regulating controlled substances and controlled substance analogs. Calling R.C. Chapter 3719 “civil” is simply inaccurate and does nothing to counter the plain language in R.C. 3719.013 incorporating the analog concept into R.C. Chapter 2925. And even “civil” definitions will carry over to the Criminal Code when the General Assembly so provides, as it did here. *State v. Dickinson*, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971).

Indeed, even if R.C. 3719.013 had been expressly limited to R.C. Chapter 3719, it *still* would have entered into the definition of “Schedule I” via R.C. 3719.01 and R.C. 3719.41, both of which must be treated as including analogs whenever they refer to

“Schedule I.” When R.C. 3719.41 mentioned “Schedule I,” and when R.C. 3719.01 referred to “Schedule I,” the provisions therein were required to be treated as including analogs as well. Thus, when R.C. 2925.01(A) incorporated the definition of “Schedule I” from R.C. 3719.01, it was necessarily incorporating analogs into that definition as well. The State made this point in its briefing, but the Tenth District never addressed it.

Space limitations prevent a full accounting of the Tenth District’s numerous errors here. The State’s second proposition of law warrants review.

Proposition of Law No. 3: In applying a statute, the judicial branch has a duty under the doctrine of separation of powers to apply the clearly-expressed legislative intent of the General Assembly regardless of the judicial branch’s own preferences regarding organization or manner of expression. It violates the separation of powers for the judicial branch to disregard the broad reach of R.C. 3719.013 making controlled substance analogs applicable to any provision in the Revised Code.

The Tenth District’s disregard for R.C. 3719.013 was so violative of legislative intent as to violate the separation of powers. The Tenth District’s approach consisted of organizational and stylistic complaints about where the “shall be treated” language was located. By disregarding R.C. 3719.013 in this way, the Tenth District committed the same error that the trial court committed by invading the prerogatives of the General Assembly and thereby violating the separation of powers. The Tenth District never addressed the State’s separation-of-powers objection to this outcome.

As the State argued below, courts must honor the General Assembly’s intent because the General Assembly has plenary law-making authority to pass *any* law unless specifically prohibited by the federal or state constitutions. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶¶ 10-11. Accordingly, the General Assembly had the plenary power and

prerogative to choose to express its legislative intent as it saw fit, including in R.C. 3719.013 rather than in a “cross reference” in Chapter 2925. A court cannot use an artificial stylistic rule to defeat the General Assembly’s manner of expression.

The people “vested the legislative power of the state in the General Assembly,” and courts “must respect the fact that the authority to legislate is for the General Assembly alone * * *.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶¶ 43, 48, 52. “The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, * * *.” *Id.* ¶ 44 (quoting another case).

The judiciary cannot disregard one manner of legislative expression merely because it believes that the General Assembly should have chosen a different manner of expression. Courts must honor the legislature’s intent to treat analogs as Schedule I controlled substances as of October 17, 2011, well before defendant’s acts in 2012.

Respectfully submitted,



STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on March 12, 2015, to Joseph Landusky, 901 South High Street, Columbus, Ohio 43206-2534, counsel for defendant.



STEVEN L. TAYLOR

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-154
	:	(C.P.C. No. 12CR-5477)
v.	:	No. 14AP-155
	:	(C.P.C. No. 12CR-3898)
Thomas C. Smith,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 28, 2014

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Joseph R. Landusky, II, for appellee.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the state"), appeals from a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss the charges and indictments against defendant-appellee, Thomas C. Smith ("appellee"). Because we conclude that, at the times relevant to the indictments, Ohio law did not clearly define the acts alleged in the indictments to be criminal offenses, we affirm.

{¶ 2} Appellee operates several shops in Columbus, Ohio, which are involved in the sale of products that might be referred to as "adult novelties." In August and October of 2012, appellee was indicted on multiple criminal charges related to the sale of certain products at those shops. In common pleas case No. 12CR-3898, filed in August 2012, appellee was indicted on two counts of "trafficking in spice," with the charges asserting that, on or about February 8, 2012, appellee knowingly sold or offered to sell "a controlled substance included in Schedule I, to wit: AM 2201, which is an analog controlled

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substance as defined in section 3719.01 of the Ohio Revised Code, as defined in section 2925.01 of the Ohio Revised Code." The indictment in 12CR-3898 also charged appellee with three counts of aggravated trafficking in drugs, asserting that on or about February 8 and May 2, 2012, he knowingly sold or offered to sell "a controlled substance included in Schedule I, to wit: a-PVP, which is an analog controlled substance as defined in section 3719.01 of the Ohio Revised Code, as defined in section 2925.01 of the Ohio Revised Code." In October 2012, appellee was indicted in common pleas case No. 12CR-5477 on five counts of aggravated possession of drugs and five counts of aggravated trafficking in drugs. These charges alleged that, on or about May 2 and July 25, 2012, appellee knowingly possessed or distributed "a controlled substance included in Schedule I, to wit: a-PVP which is a controlled substance analog, as defined in section 3719.01 of the Ohio Revised Code, commonly known as Bath Salts."

{¶ 3} Appellee moved to dismiss the indictments and charges in both cases, asserting that, at the times relevant to the indictments, sale or possession of a controlled substance analog were not defined as criminal offenses under Ohio law. Following a hearing, the trial court found that, at the time of appellee's alleged acts, the statutory definition of controlled substance analog was not incorporated into criminal law, effectively concluding that possession or sale of controlled substance analogs were not criminal offenses. The trial court entered a judgment granting appellee's motion to dismiss the indictments and charges against him.

{¶ 4} The state appeals from the trial court's judgment, assigning one error for this court's review:

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS WHEN THE STATUTORY SCHEME IN EXISTENCE AT THE TIME OF THE OFFENSES PROHIBITED TRAFFICKING AND POSSESSION OF SCHEDULE I SUBSTANCES THAT WERE CONTROLLED SUBSTANCE ANALOGS.

Standard of Review

{¶ 5} We review de novo a trial court's legal conclusions in granting a motion to dismiss criminal charges. *State v. Wilson*, 10th Dist. No. 13AP-205, 2013-Ohio-4799, ¶ 4; *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶ 9. At issue in this appeal is

whether Ohio law defined possession or sale of a controlled substance analog as a criminal offense during the period from February through July of 2012 when appellee is alleged to have possessed and sold compounds referred to as AM 2201 and a-PVP. In granting the motion to dismiss, the trial court concluded that, at the relevant times, the law did not define these acts as criminal offenses. "When an appellate court is called on to review a trial court's interpretation and application of a statute, the 'appellate court conducts a de novo review, without deference to the trial court's determination.'" *State v. Willig*, 10th Dist. No. 09AP-925, 2010-Ohio-2560, ¶ 14 (citations omitted).

Regulation of "Controlled Substance Analog" Chemicals or Compounds

{¶ 6} In 1986, the United States Congress acted to address the problem of "underground chemists who tinker with the molecular structure of controlled substances to create new drugs that are not [classified as] scheduled [controlled substances]" by enacting the Controlled Substance Analogue Enforcement Act of 1986 as part of the Anti-Drug Abuse Act of 1986. *United States v. Forbes*, 806 F.Supp. 232, 236 (D.Colo.1992). See *United States v. Klecker*, 348 F.3d 69, 70 (4th Cir.2003) ("Congress enacted the Analogue Act to prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances.") See also Anti-Drug Abuse Act of 1986, Subtitle E—Controlled Substance Analogue Enforcement Act of 1986, P.L. 99-570. As part of that act, Congress created a definition of "controlled substance analogue."¹ 21 U.S.C. 802(32). Congress further provided that, for purposes of federal law, a "controlled substance analogue" shall be treated as a controlled substance in schedule I. 21 U.S.C. 813.

{¶ 7} The Ohio General Assembly enacted a similar measure, Substitute House Bill 64 ("House Bill 64"), in 2011. 2011 Sub.H.B. No. 64. Under that legislation, the General Assembly created a definition of "controlled substance analog" in R.C. 3719.01(HH). The legislation provided that "[a] controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the

¹ We note here a minor difference in the spelling of one of the key terms relevant to this decision. Federal law refers to a chemical substance "analogue," while the Revised Code refers to a chemical substance "analog." For purposes of this decision, we will employ the same spelling chosen by each legislative body-i.e., "analogue" when referring to federal law and "analog" when referring to the Revised Code.

Revised Code as a controlled substance in schedule I." 2011 Sub.H.B. No. 64. The legislation also made certain changes that will be discussed more fully below to R.C. 2925.03 and 2925.11, related to the possession and sale of certain chemicals referred to as "spice." The amendments and new statutes enacted under House Bill 64 became effective on October 17, 2011. The General Assembly subsequently passed additional legislation in 2012 amending many of the sections of law relevant to this appeal, but those amendments became effective on December 20, 2012. 2012 Sub.H.B. No. 334. Therefore, at the time of the alleged acts giving rise to the charges against appellee, the law as amended by House Bill 64 controlled.

Application of R.C. 2925.03 and 2925.11 Following Enactment of House Bill 64

{¶ 8} As the Supreme Court of Ohio has recognized, "all conduct is innocent unless there is a statute that criminalizes it." *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, ¶ 8. In order for an act to constitute a crime under Ohio law, it must be defined as an offense in the Ohio Revised Code. R.C. 2901.03(A). "An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty." R.C. 2901.03(B). *See also State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, ¶ 10 ("In Ohio, all criminal offenses are statutory, and the elements necessary to constitute a crime must be gathered wholly from the statute."). Accordingly, we must determine whether, at the times relative to this appeal, the law contained a positive prohibition on the possession or sale of "controlled substance analogs" and provided a penalty for violating that prohibition.

{¶ 9} Courts apply the "rule of lenity" when faced with ambiguity in a criminal statute. *See State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, ¶ 10 ("This canon of strict construction, also known as the rule of lenity, is codified in R.C. 2901.04(A), which provides that sections of the Revised Code that define offenses or penalties 'shall be strictly construed against the state, and liberally construed in favor of the accused.' "). "Under the rule [of lenity], ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is *clearly* proscribed." (Emphasis added.) *Id.* *See*

also *Columbus v. DeLong*, 173 Ohio St. 81, 83 (1962) ("[P]enal statutes or ordinances are to be interpreted strictly against the state or a municipality and liberally in favor of an accused.").

{¶ 10} The state argues that possession and sale of controlled substance analogs were prohibited at the time of appellee's alleged acts because the law contained a definition of "controlled substance analog" and provided that, "for purposes of any provision of the Revised Code," a controlled substance analog would be treated as a schedule I controlled substance. See R.C. 3719.01(HH) and 3719.013 (2012). The state further asserts that House Bill 64 demonstrates clear legislative intent to prohibit and penalize possession and sale of controlled substance analogs.

{¶ 11} Between the two criminal cases, appellee was charged with eight counts of aggravated trafficking in drugs in violation of R.C. 2925.03 and five counts of aggravated possession of drugs in violation of R.C. 2925.11. The caption of the indictment in case No. 12CR-3898 indicates that appellant was also charged with two counts of "trafficking in spice" in violation of R.C. 2925.03. This will be discussed more fully below. With respect to the charges of aggravated trafficking in drugs, at the times relevant to this appeal, R.C. 2925.03 prohibited "sell[ing] or offer[ing] to sell a controlled substance." R.C. 2925.03(A)(1) (2012). The law also prohibited "prepar[ing] for shipment, ship[ping], transport[ing], deliver[ing], prepar[ing] for distribution, or distribut[ing] a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." R.C. 2925.03(A)(2) (2012). With respect to the charges of aggravated possession of drugs, at the times relevant to this appeal, the law provided that "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(A) (2012).

{¶ 12} At the time of these alleged acts, Chapter 2925 of the Revised Code, governing criminal drug offenses, defined certain terms by incorporating the definitions contained in Chapter 3719 of the Revised Code:

As used in this chapter:

(A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacturer," "official written

order," "person," "pharmacist," "pharmacy," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meanings as in section 3719.01 of the Revised Code.

(B) "Drug dependent person" and "drug of abuse" have the same meanings as in section 3719.011 of the Revised Code.

* * *

(AA) "Marihuana" has the same meaning as in section 3719.01 of the Revised Code, except that it does not include hashish.

R.C. 2925.01 (2012). Notably, the list of definitions contained in R.C. 2925.01(A) at the time did not expressly incorporate the definition of "controlled substance analog" created in House Bill 64 and codified as R.C. 3719.01(HH). "The canon [of statutory construction] *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other." *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶ 24. Thus, arguably, by creating a definition of "controlled substance analog" in R.C. 3719.01(HH) under House Bill 64 but failing to incorporate that definition into R.C. 2925.01, the General Assembly *excluded* that definition from applying in the context of the criminal drug offense statutes. *See, e.g., Hoops v. United Telephone Co. of Ohio*, 50 Ohio St.3d 97, 101 (1990) ("The General Assembly is presumed to have known that its designation of a remedy would be construed to exclude other remedies, consistent with the statutory construction maxim of *expressio unius est exclusio alterius*."). R.C. 3719.01 expressly states that the definitions contained therein, including the definition of "controlled substance analog" under R.C. 3719.01(HH) apply "[a]s used in this chapter"—i.e., Chapter 3719 of the Revised Code. *See, e.g., Morgenstern v. Nationwide Agribusiness Ins. Co.*, 78 Fed.Appx. 485, 491 (6th Cir.2003) ("Further indication that § 2744.01 is inapplicable is its express limitation of the definition of 'employee' to 'as used in this chapter.'"). Moreover, the preamble to House Bill 64 indicated that one of the purposes was "to define a 'controlled substance analog' for purposes of the Controlled Substances Law," suggesting that the definition created in the legislation was limited to that portion of the Revised Code. 2011 Sub.H.B. No. 64.

{¶ 13} The ambiguity under the law as amended by House Bill 64 is also demonstrated by comparing the treatment of controlled substance analogs with the treatment of certain chemical compounds referred to as "spice." Under House Bill 64, the General Assembly amended R.C. 2925.03 to provide that, if an individual sold certain specified chemical compounds, as defined in the law, the individual was guilty of "trafficking in spice." R.C. 2925.03(C)(8) (2012). The legislation likewise amended R.C. 2925.11 to provide that, if an individual possessed those specified chemical compounds, the individual was guilty of "possession of spice." R.C. 2925.11(C)(8) (2012). House Bill 64 also added those specified compounds to the list of schedule I drugs. R.C. 3719.41(C)(35)-(39) (2012). By contrast, the General Assembly did not amend R.C. 2925.03 or 2925.11 to expressly prohibit the sale or possession of controlled substance analogs and did not amend any part of Chapter 2925 to explicitly refer to controlled substance analogs and, as relevant to this case, AM 2201 and a-PVP.

{¶ 14} The state argues that R.C. 3719.013, providing that a controlled substance analog "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I," necessarily incorporated controlled substance analogs into all parts of the Revised Code addressing schedule I controlled substances, including R.C. 2925.01, 2925.03, and 2925.11. However, we note that Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement. *See, e.g.*, R.C. 3719.02 (providing for licensure as manufacturer of controlled substances), R.C. 3719.021 (providing for licensure as wholesaler of controlled substances), R.C. 3719.05 (providing rules for dispensation of controlled substances by pharmacists), and R.C. 3719.06 (providing rules for prescription of controlled substances by licensed health professionals). Moreover, at the relevant time, there were no cross-references or any other indicators in Chapter 2925 to provide notice that the treatment of controlled substance analogs under Chapter 3719 also applied to Chapter 2925. Also confusing is R.C. 3719.01(HH)(2)(a), which states that "'controlled substance analog' does not include any of the following: (a) A controlled substance," seemingly contradicting R.C. 3719.013.

{¶ 15} As noted above, House Bill 64 was similar to the federal Controlled Substance Analogue Enforcement Act of 1986. However, the placement of the relevant provisions within the overall statutory structure also demonstrates a notable distinction

between the two measures. Under the Controlled Substance Analogue Enforcement Act of 1986, all of the relevant provisions, including the definition of "controlled substance analogue" and the requirement that such analogues be treated as controlled substances, were placed into the same portion of federal law that contained the prohibitions on possession and sale of controlled substances—i.e., Subchapter I ("Control and Enforcement") of Chapter 13 ("Drug Abuse Prevention and Control") of Title 21 ("Food and Drugs") of the United States Code. *See* 21 U.S.C. 802(32) (defining "controlled substance analogue"); 21 U.S.C. 813 (providing that controlled substance analogues shall be treated as controlled substances); and 21 U.S.C. 841(a)(1) (prohibiting the manufacture, distribution, or dispensation of controlled substances, or possession of controlled substances with intent to manufacture, distribute, or dispense). By contrast, House Bill 64 placed the controlled substance analog provisions in Chapter 3719 separate from the prohibitions and penalties set forth in Chapter 2925, and failed to incorporate any explicit cross-references in Chapter 2925 to the controlled substance analog provisions.

{¶ 16} Applying the rule of lenity, which requires us to construe ambiguity in criminal statutes strictly so as to apply only to conduct that is *clearly* proscribed, we conclude that, during the period from February through July of 2012, R.C. 2925.03 and 2925.11 did not adequately "state a positive prohibition * * * and provide a penalty for violation of such prohibition" on the sale or possession of controlled substance analogs. *See* R.C. 2901.03(B). Accordingly, the acts appellee is alleged to have committed were not clearly defined as criminal offenses under the law as it existed at the time. The trial court did not err by granting appellee's motion to dismiss the indictments against him.

"Trafficking in Spice" Charges

{¶ 17} The caption of the indictment against appellee in common pleas case No. 12CR-3898 indicates that he was charged with two counts of "trafficking in spice." As explained above, House Bill 64 amended R.C. 2925.03 to create the offense of "trafficking in spice." R.C. 2925.03(C)(8) (2012). Thus, the state argues that, even if the trial court correctly dismissed the charges against appellee for possession and sale of chemical substance analogs, the motion to dismiss should have been denied as to the two counts of trafficking in spice.

{¶ 18} The state did not argue before the trial court that Counts 1 and 2 of the indictment alleging trafficking in spice in the caption should be differentiated from Counts 3, 4, and 5 of the indictment. Rather, the state argued that trafficking in AM 2201 and a-PVP, as controlled substance analogs, was prohibited at the time of offense. The state also did not move to amend the indictment to conform to the body of Counts 1 and 2 of the indictment to the caption. Accordingly, the state has waived this argument.

{¶ 19} Nevertheless, we note that there is no dispute that trafficking in spice was clearly prohibited at the times relevant to this appeal. The prohibition on the sale of "spice" provided as follows:

If the drug involved in the violation is 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol or a compound, mixture, preparation, or substance containing 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, whoever violates division (A) of this section is guilty of trafficking in spice.

R.C. 2925.03(C)(8) (2012).

{¶ 20} Under this provision, the offense of trafficking in spice was limited to the sale of one of several explicitly defined chemicals or a compound, mixture, or substance containing one of those chemicals. Those chemicals constituting "spice" drugs were also contained in the list of schedule I controlled substances. R.C. 3719.41(C)(35)-(39) (2012).

{¶ 21} Although the caption of the indictment in case No. 12CR-3898 indicates that appellee was charged with two counts of trafficking in spice, as noted above, the body of the indictment alleges with respect to both counts that appellee sold or offered for sale "AM 2201, which is an analog controlled substance." Likewise, a laboratory report from the Bureau of Criminal Identification and Investigation contained in the record indicates that a tested sample contained 1-(5-fluoropentyl)-3-(1-naphthoyl)indole, parenthetically identified as AM 2201. The report further indicated that the AM 2201 sample had a

chemical structure that was "substantially similar" to 1-pentyl-3-(1-naphthoyl)indole. Thus, contrary to the caption of the indictment, appellant was not actually charged with selling or offering to sell one of the "spice" chemicals whose sale was prohibited under R.C. 2925.03(C)(8) but, rather, with selling or offering to sell an analog of one of those chemicals. Under the same reasoning set forth above, we conclude that, at the relevant time, the law did not clearly state a positive prohibition on the sale of analogs of the chemicals defined as part of the prohibition on trafficking in spice under R.C. 2925.03(C)(8). Therefore, the trial court did not err by granting appellee's motion to dismiss with respect to these two charges.

{¶ 22} For the foregoing reasons, we overrule the state's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and O'GRADY, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-154
	:	(C.P.C. No. 12CR-5477)
v.	:	No. 14AP-155
	:	(C.P.C. No. 12CR-3898)
Thomas C. Smith,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 28, 2014, appellant's assignment of error is overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

DORRIAN, CONNOR & O'GRADY, JJ.

/s/JUDGE

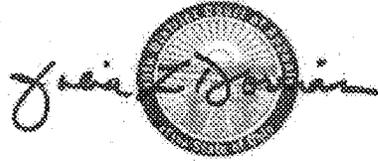
Judge Julia L. Dorrian

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Nov 28 2:35 PM-14AP000154

Tenth District Court of Appeals

Date: 11-28-2014
Case Title: STATE OF OHIO -VS- THOMAS C SMITH
Case Number: 14AP000154
Type: JEJ - JUDGMENT ENTRY

So Ordered

A handwritten signature in cursive script, reading "Julia L. Dorrian", is written over a circular, textured seal. The seal appears to be an official court seal, though the text within it is illegible due to the texture and resolution.

/s/ Judge Julia L. Dorrian

Electronically signed on 2014-Nov-28 page 2 of 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-154
	:	(C.P.C. No. 12CR-5477) and
v.	:	No. 14AP-155
	:	(C.P.C. No. 12CR-3898)
Thomas C. Smith,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on January 27, 2015

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Joseph R. Landusky, II, for appellee.

ON APPLICATION FOR RECONSIDERATION

DORRIAN, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the state"), has filed an application for reconsideration of this court's decision in *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303. In that decision, we overruled the state's sole assignment of error and affirmed a judgment of the Franklin County Court of Common Pleas granting a motion filed by defendant-appellee, Thomas C. Smith ("appellee"), to dismiss the indictments and charges against him. *Id.* at ¶ 22. We concluded that "the acts appellee is alleged to have committed [i.e., possession and sale of controlled substance analogs] were not clearly defined as criminal offenses under the law as it existed at the time [that he allegedly committed the acts]." *Id.* at ¶ 16.

{¶ 2} "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious

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error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus. Reconsideration will be denied where the moving party simply seeks to "rehash the arguments [the party] made in its appellate brief." *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117, 127-28 (10th Dist.1992). "Importantly, an appellate court will not grant '[a]n application for reconsideration * * * just because a party disagrees with the logic or conclusions of the appellate court.'" *State v. Harris*, 10th Dist. No. 13AP-1014, 2014-Ohio-672, ¶ 8, quoting *Bae v. Dragoo & Assoc., Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶ 2.

{¶ 3} In its application for reconsideration, the state asserts that this court committed obvious error by applying the rule of lenity without attempting to construe the relevant statutory provisions. The state cites to various statutory provisions and canons of statutory construction, arguing that these lead to a different result than the one reached in this court's prior decision. Ultimately, the state argues that the portion of R.C. 3719.013 providing that a controlled substance analog "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I" was sufficient to incorporate controlled substance analogs into the existing laws prohibiting the possession and sale of schedule I controlled substances at the times relevant to this case.

{¶ 4} The state also argues that the court mischaracterized the nature of R.C. Chapter 3719 and erred by distinguishing Chapter 3719 from Chapter 2925. In our decision at ¶ 12, we noted that the General Assembly defined the term "controlled substance analog" under R.C. 3719.01 but did not incorporate that definition by reference into R.C. 2925.01. We also stated that "Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement." *Smith* at ¶ 14. In its application for reconsideration, the state points out that R.C. 3719.99 provides criminal penalties for violations of certain portions of Chapter 3719. While we acknowledge that Chapter 3719 contains limited provisions providing for criminal penalties, the general tenor of the statutes contained in Chapter 3719 is related to regulation. The characterization of Chapter 3719 in our prior decision does not constitute obvious error meriting reconsideration.

{¶ 5} Although it is clear that the state disagrees with this court's prior decision, a party's disagreement with a decision is not a sufficient basis for granting reconsideration. See *Harris* at ¶ 8. Many of the arguments asserted in the application for reconsideration reiterate those presented in the state's briefs on appeal. Beyond disagreeing with the result of the prior decision, the state has failed to call to our attention any obvious error that would merit granting reconsideration. See *Wissler v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-569, 2010-Ohio-4123, ¶ 4 ("[A]ppellant's contention that we failed to consider certain facts or that we reached certain factual conclusions with which she disagrees does not establish an obvious error for reconsideration."). Thus, the state's application for reconsideration simply rehashes arguments that this court previously considered and fails to demonstrate an obvious error in the prior decision or to raise an issue that we failed to consider or fully consider in reaching the prior decision. Accordingly, we deny the state's application for reconsideration.

Application for reconsideration denied.

CONNOR, P.J., and BRUNNER, J., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-154
	:	(C.P.C. No. 12CR-5477) and
v.	:	No. 14AP-155
	:	(C.P.C. No. 12CR-3898)
Thomas C. Smith,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on January 27, 2015, it is the order of this court that appellant's application for reconsideration is denied. Costs are assessed against appellant.

DORRIAN, J., CONNOR, P.J., & BRUNNER, J.

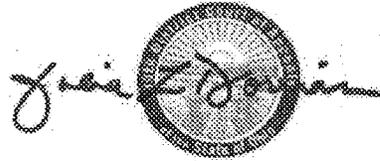
/S/ JUDGE_____

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Jan 28 10:24 AM-14AP000154

Tenth District Court of Appeals

Date: 01-28-2015
Case Title: STATE OF OHIO -VS- THOMAS C SMITH
Case Number: 14AP000154
Type: JOURNAL ENTRY

So Ordered



/s/ Judge Julia L. Dorrian

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