Supreme Court of Ohio Clerk of Court - Filed April 10, 2015 - Case No. 2015-0406

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 15-0406
	:	
Plaintiff--Appellant,	:	On Appeal from the Franklin
	:	County Court of Appeals,
	:	Tenth Appellate District
-V-	:	Court of Appeals
	:	Case Nos. 14AP-154
THOMAS C. SMITH,	:	14AP-155
	:	
Defendant--Appellee.	:	

MEMORANDUM OF DEFENDANT-APPELLEE OPPOSING JURISDICTION

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Explanation of Why this Court Should Decline Jurisdiction	1
Statement of the Case and Facts	1
Argument	4
Response to Propositions of Law Nos. 1 & 2	4
129 Sub. H.B. 64 did not create the offenses of trafficking in and possession of controlled substance analogs.	
A. Possession and trafficking in "controlled substance analogs" was not defined as an offense until the General Assembly enacted 129 Sub. H.B. 344.	4
B. R.C. § 3719.013 (Baldwin 2011) did not criminalize the possession and sale of controlled substance analogs.	7
Response to Proposition of Law No. 3	11
It does not violate separation of powers for the judicial branch to say what the law is.	
Conclusion	12
Certificate of Service	13

TABLE OF AUTHORITIES

CASES

City of South Euclid v. Jemison (1986), 28 Ohio St.3d 157, 158-59. 11

Marbury v. Madison (1803), 5 U.S. (1 Cranch) 137, 177. 11

Myers v. Toledo, 110 Ohio St.3d 218, 2006-Ohio- 4353 5

State v. Dickinson (1971), 28 Ohio St. 2d 65, 275 N.E.2d 599, 602 8

State v. Ford, 128 Ohio St.3d 398, 2011-Ohio-765, ¶ 10. 11

State ex rel Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 467 11

State v. Smith, 2014-Ohio-5303 1, 7, 11

OTHER AUTHORITIES

2001 Op. Att'y Gen. No. 2001-014. 9

BILLS, STATUTES AND RULES

129 Sub.H.B. 64 passim

129 Sub.H.B. 344 passim

R.C. § 2901.03 1, 4, 11

R.C. § 2901.04 6

R.C. § 2925.01 5, 6, 7

R.C. § 2925.03 passim

R.C. § 2925.11 passim

R.C. § 3719.01 5, 6, 8

R.C. § 3719.013 7, 9

R.C. § 3719.41 6

R.C. § 3719.43 6

R.C. § 3719.44 6

21 C.F.R. 1308.11 6

21 C.F.R. 1308.12 6

21 C.F.R. 1308.13 6

21 C.F.R. 1308.14 6

21 C.F.R. 1308.15 6

EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves the question: "when did the General Assembly criminalize the possession and sale of controlled substance analogs?"

In August and again in October 2012, Thomas C. Smith was charged with the offenses of possessing and trafficking in controlled substance analogs known as AM 2201 and a-PVP. The trial court and the Tenth District held that the acts allegedly committed by Mr. Smith "were not clearly defined as criminal offenses under the law as it existed at the time." *See*, *State v. Smith*, 2014-Ohio-5303, ¶ 16. In fact, possessing and trafficking in controlled substance analogs known as AM 2201 and a-PVP was not criminalized until the General Assembly enacted 129 Sub. H.B. 344 which "created the offenses of trafficking in and possession of [controlled substance] analogs and enacted an accompanying penalty scheme." *See*, *Amicus Curiae's* Memorandum in Support of Jurisdiction, p. 6; Preamble, 129 Sub. H.B. 334; R,C, §§ 2925.03(A)(1) and 2925.11(A). Which, of course, is what is required under R.C. § 2901.03(B) to define a criminal offense. Thus, review by the Court is unnecessary.

STATEMENT OF THE CASE AND FACTS

Effective October 17, 2011, the General Assembly sought:

> To amend sections 149.43, 149.45, 2925.02, 2925.03, 2925.11, 3719.01, and 3719.41 and to enact section 3719.013 of the Revised Code to add synthetic cannabinoids commonly known as K2 or Spice to the list of Schedule I controlled substances, to prohibit the possession of Spice, to prohibit trafficking in Spice, to provide that if Spice is the drug involved in a violation of the offense of corrupting another with drugs the penalty for the violation will be the same as if marihuana was the drug involved in the offense, to add six synthetic derivatives of cathinone that have been found in bath salts to the list of Schedule I controlled substances, to define a "controlled substance analog" for purposes of the Controlled Substances Law, and to treat controlled substance analogs as Schedule I

> controlled substances, and to specify that the residential and familial information of probation officers and bailiffs is not a public record.

Preamble, 129 Sub. H.B. 64, effective 10/17/11 available at:
http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_64

In August 2012, Thomas C. Smith was indicted on five counts of aggravated trafficking in drugs in Franklin County Common Pleas Case Common Pleas No. 12CR-3898 (Appeals No. 14AP-155). The indictment alleged the offenses occurred on February 8, 2012 and May 2, 2012 and July 25, 2012. The substances involved were AM 2201 and a-PVP which are controlled substance analogs.

In October 2012, Thomas C. Smith was indicted on five counts of aggravated trafficking in drugs and five counts of aggravated possession of drugs in Franklin County Common Pleas Case No. 12CR-5477 (Appeals No. 14AP-154). The indictment alleged the offenses occurred on May 2, 2012 and July 25, 2012. The substance involved was a-PVP.

On November 14, 2012, *Amicus Curiae* Ohio Attorney General Mike DeWine held a press conference at the Rhodes State Office Tower in support 129 Sub. H.B. 334. Attorney General DeWine explained:

* * * *

> Here is why our office and local law enforcement agencies need the tools that Substitute House Bill 334 provides. House Bill 64, which became law in October of 2011, set the groundwork for controlling synthetic drugs. It was a good start, but, frankly, we found people who have been able to get around this law, and we need to deal with that. When House Bill 64 passed, it banned some of the compounds our BCI agents were seeing on the street, but clever chemists stayed one step ahead of us.
>
> Ohio has a synthetic analog statute that was part of House Bill 64. As I said, it was a good start, but we have an evolving threat that we must address or fall further behind. Now chemists tweak the drug recipes, adding several molecules here or changing several molecules there. Just like that, just like magic, chemists have created a brand new drug. These new compounds are designed to evade law enforcement efforts, and that is the only

> reason they are making these changes.

Synthetic Drugs News Conference (Nov. 14, 2012), http://tinyurl.com/n8tuapp at 10:43-11:54.

* * * *

> We need to ban entire classes of these dangerous drugs, not just specifically named compounds. Substitute House Bill 334 will help stop the tweaking of the drugs and the skirting of Ohio law.

Synthetic Drugs News Conference (Nov. 14, 2012), http://tinyurl.com/n8tuapp at 16:02-16:44.

> Effective December 20, 2012, the General Assembly sought to:
>
> To amend sections 2925.01, 2925.03, 2925.11, 2925.55, 2925.56, 2925.57, 2929.01, 3715.05, 3719.013, and 3719.41 and to enact sections 109.89, 3715.051, 3715.052, 3715.053, and 3715.054 of the Revised Code to establish procedures regarding the participation of pharmacies, retailers, and the Attorney General in electronically tracking pseudoephedrine and ephedrine product sales through a national exchange; to specify that certain classes of compounds and individual compounds are schedule I controlled substances; **to create the offenses of trafficking in and possession of controlled substance analogs**; and to declare an emergency.

Preamble, 129 Sub. H.B. 334, (emphasis supplied) available at:
http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_334

On February 8, 2013, Mr. Smith filed a motion to dismiss for failure to state an offense in both cases because it was not until the General Assembly announced its intention, effective December 20, 2012, "to *create* the offenses of trafficking in and possession of controlled substance analogs . . . ." that trafficking in and possession of controlled substance analogs was criminalized. *See,* 129 Sub.H.B. 334, *supra*. The state opposed the motions. The trial court held a hearing on February 19, 2014. Subsequently, the trial court filed a decision and entry sustaining the motion to dismiss. The State timely filed its appeal. The Tenth District affirmed on November 28, 2014, finding that the changes wrought by 129 Sub.H.B. 64 did not "'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)." *State v. Smith*, 2014-Ohio-5303, ¶ 16; State's Memorandum in Support of Jurisdiction, Apx. p. A-008. The court appeals subsequently denied the State's motion for reconsideration on January 27, 2015. Thereafter, the State timely filed its memorandum in support of jurisdiction.

ARGUMENT

Response to State's Propositions of Law Nos. 1 & 2 and *Amicus Curiae's* Proposition of Law: 129 Sub. H.B. 64 did not create the offenses of trafficking in and possession of controlled substance analogs.

A. Possession and trafficking in "controlled substance analogs" was not defined as an offense until the General Assembly enacted 129 Sub. H.B. 344.

Prior to the enactment of 129 Sub. H.B. 344, Ohio criminalized the possession and trafficking of only "controlled substances." See, R.C. § 2925.03(A) as set forth in 129 Sub. H.B. 64, effective 10/17/11. It is Mr. Smith's position that possession and trafficking in "controlled substance analogs" was not defined as an offense until the General Assembly announced its intention, effective 12/20/12, "to *create* the offenses of trafficking in and possession of controlled substance analogs . . . ." that trafficking in and possession of controlled substance analogs was criminalized by inserting the phrase "controlled substance analog" in division (A)(1) & (2) of R.C. § 2925.03 effective December 20, 2012. Preamble, 129 Sub. H.B. 344.

Under Ohio law, no conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code. *See*, R.C. § 2901.03(A) (Baldwin 2014). An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, <u>and</u> provide a penalty for violation of such prohibition or failure to meet such duty. *See*, R.C. § 2901.03(B)(Baldwin 2014). Prior to the enactment of 129 Sub. H.B. 344, R.C. §

2925.03 did not state a positive prohibition against trafficking in "controlled substance analogs." Moreover, prior to the enactment of 129 Sub. H.B. 344, no section of the Revised Code provided a penalty for trafficking in "controlled substance analogs." As a consequence, allegations that Mr. Smith trafficked in "controlled substance analogs" prior to December 20, 2012 did not constitute a criminal offense in Ohio.

Mr. Smith's position, that it was not illegal to possess or traffic in controlled substance analogs on February 8, May 2, or July 25, 2012, is fully supported by the canon of statutory construction *expressio unius est exclusio alterius.* That canon "tells us that the express inclusion of one thing [in the language of a statute] implies that exclusion of the other." *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio- 4353, ¶ 24 *citing* Black's Law Dictionary 620 (8th ed. 2004).

In this case Title XXXVII (Title 37) of the Ohio Revised Code is a set of laws focusing on regulating health and safety. For example, it sets out laws for the department of health, the board of pharmacy, vital statistics, food service, alcohol, building regulations, and even casino and lottery gambling. As part of the chapter regulating licensing and use of controlled substances, Section 3719.01 of Title 37 sets out over 40 definitions. Of these, the edition of the Criminal Title ("Title XXIX" or "Title 29") that was in effect during Smith's alleged sales (pre-December 2012), explicitly adopted 17:

> (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.

Ohio Rev. Code § 2925.01(A) (2011). Conspicuously absent is a definition of "controlled substance analog."

In fact, at all times relevant to this case, no part of Title 29 mentioned "controlled substance analog." In this prior version of the Revised Code, the relevant definitions provided by section 3719.01 of the Health and Safety Title and adopted by section 2925.01 of the Criminal Title were:

> (C) "Controlled substance" means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V.
>
> . . . .
>
> (BB) "Schedule I," "schedule II," "schedule III," "schedule IV," and "schedule V" mean controlled substance schedules I, II, III, IV, and V, respectively, established pursuant to section 3719.41 of the Revised Code, as amended pursuant to section 3719.43 or 3719.44 of the Revised Code.

R.C. § 3719.01(C), (BB) (2011). In other words, according to the definitions explicitly adopted by the "Drug Offenses" chapter of the Criminal Title, something was a controlled substance *if and only if* it was listed in Schedules I through V set out in R.C. § 3719.41 and amended by section 3719.43 or section 3719.44. It is undisputed that neither AM 2201 nor α-PVP was listed on the Ohio Schedules I through V pre-December 2012. *See* R.C. § 3719.41 (2011); Ohio Rev. Code § 3719.43 (1976); R.C. § 3719.44 (2002) or on the federal schedules. *See* 21 U.S.C. § 812 (2006); 21 C.F.R. 1308.11 (2012); 21 C.F.R. 1308.12 (2012); 21 C.F.R. 1308.13 (2012); 21 C.F.R. 1308.14 (2012); 21 C.F.R. 1308.15 (2012). Thus, nothing Smith is alleged to have sold or possessed was, based on the definitions operative at the time, a controlled substance.

Application of the canon *expressio unius est exclusio alterius* in this case is consistent with Ohio's express statutory rule of construction requiring "sections of the Revised Code defining offenses . . . shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. § 2901.04. Here, the General Assembly's definition of "controlled substances" prior to the enactment of 129 H.B. 344 stopped short of including "controlled

substance analogs."

B. R.C. § 3719.013 (Baldwin 2011) did not criminalize the possession and sale of controlled substance analogs.

The State and the Attorney General claim the enactment of R.C. § 3719.013 in 129 H.B. 64, is evidence that the General Assembly intended to criminalize the possession and sale of controlled substance analogs at that time. R.C. § 3719.013 provided:

> 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.

R.C. § 3719.013 (Baldwin 2011). The Tenth District held R.C. § 3719.013 did not incorporate the definition of "controlled substance analog" into the definition of "controlled substance" contained in R.C. § 2925.01. *State v. Smith*, 2014-Ohio-5303, ¶¶ 12-16. In fact, according to the General Assembly, a "controlled substance analog" is a not a "controlled substance":

> (HH)
>
> (2) "Controlled substance analog" does not include any of the following:
>
> (a) A controlled substance;

R.C. § 3719.01 (HH)(2)(a).

The Tenth District recognized that under Ohio law, the definition of a word in a civil statute such as R.C. § 3719.013 does not necessarily import the same meaning to the same phrase in interpreting a criminal statute such as R.C. § 2925.01(A) that only references R.C. § 3719.01 as defining the phrase "controlled substance." *State v. Smith*, 2014-Ohio-5303, ¶ 12. The State resists the proposition that criminal statutes, unlike civil statutes, must be strictly construed against the state. *See*, State's Memorandum in Support of Jurisdiction, pp. 7-10. That is because where two statutes do not expressly state that the word or phrase has the same meaning in <u>both</u>, it

is apparent that it might have different meanings. *State v. Dickinson* (1971), 28 Ohio St. 2d 65, 275 N.E.2d 599, 602 (emphasis added). Here, possession of and trafficking in "controlled substance analogs" not specifically listed on the drug schedules, was first criminalized when the General Assembly inserted the phrase "controlled substance analog" in division (A)(1) & (2) of R.C. § 2925.03 effective December 20, 2012. *See*, 129 Sub. H.B. 344. Thus, Mr. Smith's purported possession of and trafficking in "controlled substance analogs" as alleged in the indictments do not constitute a criminal offenses.

As noted above, Mr. Smith is charged with possession and trafficking controlled substance analogs prior to December 20, 2012. At that time, the Revised Code did not define a "controlled substance analog" as a "controlled substance." Specifically, the General Assembly in 129 H.B. 64 § 1, effective October 17, 2011, amended R.C. § 3719.01 (C) to read "Controlled substance" means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V. At that time, the General Assembly did not define a "controlled substance analog" as a "controlled substance." The General Assembly in 129 H.B. 64 inserted R.C. § 3719.01 (HH)(1)(a) defining "controlled substance analog" as a substance that is (1) substantially similar chemically to drugs that are on schedules I or II; (2) if they produce similar effects on the central nervous system as drugs that are on those schedules; or (3) are intended or represented to produce effects similar to those produced by drugs that are on those schedules. By defining "controlled substance" as a substance actually included in the drug schedules, the General Assembly recognized that"controlled substance analogs" were not included in the drug schedules because an analog is substantially similar chemically to drugs on schedules I or II but not actually listed in the drug schedules.

In addition, the Attorney General's press conference demonstrates that the Attorney General, himself, recognized, no later than November 14, 2012, that the class "unscheduled controlled substance analogs" were not criminalized in 129 Sub. H.B. 64, which is why he supported 129 Sub. H.B. 344. *See,* Synthetic Drugs News Conference (Nov. 14, 2012), http://tinyurl.com/n8tuapp at 10:43-11:54 and 16:02-16:44.

There are three ways to add, transfer or remove a controlled substance from Ohio's schedules. *See*, 2001 Op. Att'y Gen. No. 2001-014. First, the Ohio schedule of controlled substances is subject to modification by the Ohio Board of Pharmacy pursuant to R.C. § 3719.44. Second, when the United States Attorney General adds, transfers or removes a substance from the federal schedule of controlled substances, the corresponding Ohio schedules are automatically amended pursuant to R.C. § 3719.43. Third, the General Assembly may independently act to add drugs to the controlled substance schedules that have not been placed there by federal action or the State Board of Pharmacy. *See, e.g.*, 1991-1992 Ohio Laws, Part II, 2834, 2860 (Am. Sub. H.B. 62, eff. May 21, 1991) (adding anabolic steroids to Schedule III). None of these three ways to add AM 2201 or α-PVP to Ohio's schedules occurred prior to December 20, 2012.

Here, effective October 17, 2011, the General Assembly enacted 129 Sub. H.B. 64 creating R.C. § 3719.013 which provides:

> Except as otherwise provided in section 2925.03 or 2925.11 of 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.

R.C. § 3719.013 (Baldwin 2011). That amendment did not add, transfer or remove any chemical to the controlled substances schedules. Nor did the amendment define "controlled substance

analogs" as "controlled substances." Instead, that amendment indicated that a "controlled substance analog" shall be treated as a schedule I "controlled substance." This distinction is significant because only trafficking in chemicals specifically included on the drug schedules was criminalized under R.C. § 2925.03 during the relevant time period. The General Assembly knew this because 129 Sub.H.B. 64 criminalized specifically named compounds by adding six (6) synthetic cannabinoids and six (6) synthetic derivatives of cathinone to the list of Schedule I controlled substances. It is Mr. Smith's position that 129 Sub. H.B. 64 did not allow unknown iterations of scheduled controlled substances to be prosecuted in the same manner as controlled substances. Conversely, 129 Sub. H.B. 344 criminalized an entire class of dangerous drugs, not just specifically named compounds, by inserting the phrase, "controlled substance analogs" into R.C. §§ 2925.03(A)(1) and 2925.11(A). Thus, 129 Sub. H.B. 344 did allow unknown iterations of scheduled controlled substances to be prosecuted in the same manner as controlled substances.

If one adopts the interpretation advanced by the State of that 129 Sub. H.B. 64 criminalized "controlled substance analogs" that interpretation renders 129 Sub. H.B. 344 provisions criminalizing "controlled substance analogs" wholly superfluous. Following that interpretation, there would simply be no reason to insert the phrase "controlled substance analog" in division (A)(1) & (2) of R.C. § 2925.03 and 2925.11(A) since possession and trafficking of "controlled substance analogs" was already criminalized. The provisions of 129 Sub.H.B. 344 criminalizing the possession or sale of "controlled substance analogs" aren't surplusage because because they actually created the offenses of possession and trafficking in controlled substance analogs. The Court should decline jurisdiction.

Response to State's Proposition of Law No. 3: It does not violate separation of powers for the judicial branch to say what the law is.

The separation of powers "doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *City of South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-59. The General Assembly has the power to pass new laws. Section I, Article 2 of the Ohio Constitution. However, the interpretation of law is a core function of the judicial branch of government. *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 177. In Ohio, "the judicial branch is the final arbiter in interpreting the Constitution and that the General Assembly may not enter upon the judicial business of settling the constitutionality of its own laws, disregard a Supreme Court decision on the subject, reenact legislation previously declared violative of the Constitution, or in any other way exercise, direct, control, or encroach upon the judicial power." *State ex rel Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 467.

In this case, the court of appeals construed the application of R.C. §§ 2925.03 and 2925.11 to "determine whether, at all 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" following the enactment of 129 Sub. H.B. 64. *State v. Smith*, 2014-Ohio-5303, ¶ 16; State's Memorandum in Support of Jurisdiction, Apx. p. A-008. "In Ohio, all criminal offenses are statutory, and the elements necessary to constitute a crime must be gather wholly from the statute." *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, ¶ 10. According to the General Assembly, "[a]n offense is defined when one or more sections of the Revised Code state a postive 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). It is a core function of the judicial

branch to review the Ohio Revised Code to see if, during the relevant time period, the law contained a positive prohibition against the possession or sale of "controlled substance analogs" or a penalty for violating such a prohibition. Here, the court of appeals correctly determined the General Assembly did not criminalize the possession or trafficking in "controlled substance analogs" in 129 Sub. H.B. 64. Therefore, the Court should decline to accept jurisdiction.

CONCLUSION

At all times relevant to this appeal, Ohio law did not contain a positive prohibition against the possession or sale of controlled substance analogs nor provided a penalty for the possession or sale of controlled substance analogs. Thus, it was not a crime for Mr. Smith to possess or sell a-PVP or AM 2201 during the relevant time-frame. Because there are only statutory crimes in Ohio, Mr. Smith submits that the within appeal does not present questions of such constitutional substance or of such great public interest as would warrant further review by the Court. Therefore, the Court should decline to accept jurisdiction.

Respectfully submitted,

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s/ Joseph R. Landusky, II

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