

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 RECONSIDERATION

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MEMORANDUM IN OPPOSITION TO RECONSIDERATION

A. Smith's Memorandum Opposing Jurisdiction Contained a Typographical Error.

The State correctly points out counsel incorrectly set forth the wrong version of the R.C. § 3719.013 on page 9 of Mr. Smith's memorandum in opposition to jurisdiction. (Motion to Reconsider at 3). Mr. Smith's counsel was unaware of this mistake until it was brought to his attention in the State's motion for reconsideration. Regretfully, undersigned counsel cut and pasted the wrong version of the statute into to the argument set forth on page 9 of the memorandum opposing jurisdiction. This mistake was not made in the Tenth District and had no effect on their decision. Counsel in no way meant to mislead the Court. In the end, it was an unfortunate typographical error for which counsel, alone, takes responsibility.

B. The Tenth District's Decision in *State v. Smith* Is Not Flawed.

The Tenth District got it right when is found that it was legal to possess and sell a-PVP and AM 2201 prior to December 20, 2012. Possession and trafficking in "controlled substance analogs" was not defined as an offense until the General Assembly enacted 129 Sub. H.B. 344, available at: http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_334

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 available at:

http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_64. It is Mr. Smith's position, and as born out by the Tenth District's decision in *Smith*, that possession and trafficking in "controlled substance analogs" was not defined as an offense 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 by inserting the phrase “controlled substance analog” in division (A)(1) & (2) of R.C. § 2925.03. 129 Sub. H.B. 344.

The enactment of R.C. § 3719.013 in 129 Sub. S.B. 64 did not add, transfer or remove any chemical to the controlled substances schedules. Nor did the amendment define “controlled substance analogs” as “controlled substances.” In fact, according to the General Assembly, a “controlled substance analog” is 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).

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 were 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. 64 did not allow unknown iterations of scheduled controlled

substances to be prosecuted in the same manner as controlled substances.

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, and 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 possession of and 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 the possession of and trafficking in “controlled substance analogs.” As a consequence, allegations that Mr. Smith possessed and trafficked in “controlled substance analogs” prior to December 20, 2012 did not constitute a criminal offense in Ohio.

Finally, 8 judges of the Tenth District Court of Appeals, without any dissenters, have agreed with this analysis. *State v. Smith*, 10th Dist. No. 14AP-154, 155, 2014-Ohio-5303 (Judges Dorrian, Connor & O’Grady); *State v. Mohammed*, 10th Dist. No. 14AP-662, 2015-Ohio-1234 (Judges Tyack, Brown, & Sadler); *State v. Mobarak*, 10th Dist. No. 14AP-517, 2015-Ohio-3007 (Judges Brown, Klatt, & Horton).

C. *McFadden v. United States*, 576 U.S. ___, 135 S.Ct. 2298 (2015) does Not Provide the Rule of Decision.

First, the Court was aware of *McFadden* when it declined jurisdiction. A review of the electronic docket sheet shows that the State filed supplemental authority listing *McFadden* on June 19, 2015 over two months prior to the Court entering its decision.

Second, the issue in *McFadden* was “how the mental state requirement under the CSA for knowingly manufacturing, distributing, or possessing with the intent to distribute ‘a controlled

substance’ applies when the controlled substance is in fact an analogue.” 135 S.Ct. at 2305. The *McFadden* court was not asked to interpret the “shall be treated” language in the Controlled Substance Analogue Enforcement Act of 1986. The United States Supreme Court did not address the question of whether the analogs at issue (MDPV, MDMC, and 4-MEC) were, defined by law as, controlled substances.

Third, the federal requirement contained in 21 U.S.C. § 813, that analogues be treated as controlled substances, is in the same title and chapter of federal law containing criminal prohibitions against the possession and sale of controlled substances – 21 U.S.C. § 841. In this case, prior to December 20, 2012, unlike federal law, the Revised Code did not define a “controlled substance analog” as a “controlled substance.” Specifically, the General Assembly in 129 Sub. 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. The General Assembly in 129 Sub.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. This is significant because “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).” *State v. Smith*, 2014-Ohio-5303, ¶12. Thus, the General Assembly’s statutory framework as expressed through 129 Sub. H.B. 64 operated differently than the federal framework for regulating controlled substance analogs.

Finally, the Tenth District’s contrast between “civil” regulation of controlled substances in Chapter 3719 and the “criminal” regulation in Chapter 2925 is in accord with Ohio law. The Court has adopted a rule of construction stating where two statutes do not expressly state the word or phrase has the same meaning in both, it is apparent that it might have different meanings. *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599, 602 (1971). So a reviewing court is obligated to determine whether the meaning is the same or different. *See, also, State v. Blankenship*, 192 O.App.3d 639, 10th Dist., 2011-Ohio-1601, ¶¶ 9-19 (while time spent under electronically monitored house arrest (“EMHA”) as a condition of post conviction probation is defined as “confinement” under R.C. § 2929.01(P) it does not constitute “confinement” under R.C. 2949.08(C) for purposes of jail credit.); R.C. § 1.05. Here, the Tenth District determined the meaning was different when it held “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.” *State v. Smith*, 2014-Ohio-5303, ¶14. In contrast, the federal law at issue in *McFadden*, requiring that analogs be treated as controlled substances, is in the same title and chapter of federal law containing criminal prohibitions against the possession and sale of controlled substances. Thus, *McFadden* does not provide the rule of decision in this case.

CONCLUSION

The issue of whether or not the General Assembly criminalized the possession or sale of controlled substance analogs prior to December 20, 2012 is not a technicality. There are no common law crimes in Ohio. 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 did it provide a penalty for the possession or sale of controlled substance analogs. Thus, it was not a crime for Mr. Smith to sell or possess a-PVP or AM 2201 during the relevant time-frame. The Court should overrule the State's Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon:

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by regular United States Mail, postage prepaid, this 17th day of September, 2015.

s/ Joseph R. Landusky, II

Joseph R. Landusky, II