

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff--Appellee,	:	On Appeal from the
	:	Summit County Court
	:	of Appeals, Ninth
-v-	:	Appellate District
	:	
	:	
DANNIELLE HILEMAN,	:	Court of Appeals
	:	Case No. 27133
Defendant--Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DANNIELLE HILEMAN**

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION**

This case presents a substantial question of constitutional law: Whether the possession and sale of Pentedrone, a purported controlled substance analog, was defined as a crime under Ohio law prior to December 20, 2012. The Court has already accepted a certified conflict involving the same issue in *State v. Shalash*, Ohio Supreme Court Case No. 2015-1782.

At the time Appellant was alleged to have possessed and sold Pentedrone on March 23, 2012, the possession or sale of controlled substance analogs was not criminalized. According to the law in effect at that time, the phrase “controlled substance analog” did not include a “controlled substance.” R.C. § 3719.01(HH)(2)(a) (Baldwin 2011). Chapter 2925 of the Revised Code only criminalized the possession and sale of “controlled substances,” it did not criminalize the possession or sale of “controlled substance analogs.” *See, State v. Smith*, 10th Dist., Franklin Nos. 14AP-154 and 14AP-155, 2014-Ohio-5303, jurisdiction declined, *State v. Smith*, Ohio Supreme Court Case No. 2015-0406, 2015-Ohio-3427. Ms. Hileman respectfully requests the Court to accept jurisdiction or, in the alternative, hold her case in abeyance pending the outcome of the *Shalash* case.

STATEMENT OF THE CASE AND FACTS

Harry E. Jackson owns a store in Akron, Ohio known as The Odd Corner. On March 21, 2012, undercover detectives from the University of Akron Police Department purchased a product called “Joy” from store employee Eugene B. Hoover. “Joy” contains a detectable amount of Pentedrone. Following the purchase of “Joy,” the University of Akron Police Department obtained a warrant to search The Odd Corner.

On the morning of March 23, 2012, members of the University of Akron Police Department arrived at The Odd Corner, conducted additional surveillance and observed store manager Dannielle L. Hileman selling “Joy” to multiple customers. Thereafter, the police executed the search warrant discovered almost 100 containers of “Joy” in the back room of the store.

On April 10, 2012, Dannielle L. Hileman was indicted for two (2) counts of trafficking in “bath salts” in violation of R.C. § 2925.03(A) and (C)(1), second degree felonies. On August 17, 2012, the grand jury issued a supplemental indictment charging Dannielle L. Hileman with one count of possession of Pentedrone in violation of R.C. § 2925.11(A) and (C)(1) and one count of trafficking in Penetdrone, in violation of R.C. § 2925.03(A) and (C)(1), both felonies of the fourth degree.

On November 16, 2012, Ms. Hileman filed a motion to adopt the motion of co-defendant Harry E. Jackson to declare the controlled substance analog statutory scheme unconstitutional. Following a hearing, the trial court found the scheme constitutional on its face and as applied.

Prior to trial, Appellant filed a motion to adopt the motion in limine of co-defendant Harry E. Jackson seeking to preclude prosecution experts from testifying because of the

scientifically unreliable methodology they used to determine whether Pentadrone, the controlled substance analog at issue, was substantially similar to controlled substance in schedule I or II. In response, the State filed a motion to bar defense experts from testifying on the basis that their testimony was scientifically unreliable. The trial court trial court denied Ms. Hileman's motion in limine and granted the State's motion precluding the defense experts from testifying at trial because their testimony would have been confusing or misleading and had nothing to do with whether the State had proven its case beyond a reasonable doubt.

Ms. Hileman timely filed her notice of appeal. On direct appeal, Ms. Hileman presented the following assignments of error to the Ninth District Court of Appeals:

1. The Ohio Controlled Substance Analog Statute, as codified in R.C. [3]719.013, is unconstitutionally vague on its face and as applied as it contains insufficient enforcement guidelines and fails to provide adequate notice of the type of conduct prohibited.
2. The trial court erred in permitting Dr. Tabor and Dr. Wyman to testify on behalf of the prosecution because their testimony was based on unreliable methods, in violation of Ohio Evid.R. 702.
3. The trial court violated Appellants Hileman's and Hoover's rights to a fair trial and Due Process when it prohibited the Defense from calling their proffered expert witnesses.
4. The trial court abused its discretion when it took judicial notice of two of the State's exhibits and presented them to the jury without any qualifying instruction, meriting reversal.
5. The State failed to prove beyond a reasonable doubt that Pentedrone was a controlled substance analog and that Appellants Hileman and Hoover believed it was a controlled substance thereby violating their right to Due Process under the Fourteenth Amendment.
6. The verdict was against the manifest weight of the evidence as the evidence relied upon by the State to prove the effect of Pentedrone on the central nervous system was unreliable and the circumstances of the sales did not show intent to sell a controlled substance.

7. The trial court erred in applying the bulk amount definition of R.C. 2925.01(1) to Appellate (sic) Hileman as the Section did not include Pentedrone nor a controlled substance analog.

The Ninth District Court of Appeals overruled all seven (7) of Ms. Hileman's assignments of error and affirmed her convictions and sentences.

ARGUMENT

Proposition of Law No. 1: The Possession and Sale of Pentedrone Was Not Defined as a Crime under Ohio Law in March 2012.

The possession of trafficking in controlled substance analogs such a Pentedrone was not defined as a crime under Ohio law during the period of October 19, 2011 through March 23, 2012. The cases of *State v. Smith*, 10th Dist., Franklin Nos. 14AP-154 and 14AP-155, 2014-Ohio-5303; *State v. Mohammed*, 10th Dist., Franklin No. 14AP-662, 2015-Ohio-1234; and *State v. Mobarak*, 10th Dist., Franklin No. 14AP-517, 2015-Ohio-3007 stand for the proposition that trafficking in controlled substance analogs during the relevant time-frame was not defined as a crime in Ohio.

In *Smith*, the Tenth District held Ohio law did not clearly define possession and sale of "controlled substance analogs" to be criminal offenses within Revised Code Chapter 2925. *State v. Smith*, 10th Dist., Franklin Nos. 14AP-154 and 14AP-155, 2014-Ohio-5303, ¶ 16.

In *Mohammed*, the Tenth District, following *Smith*, held possession of bath salts had not been criminalized at the time alleged in the indictment. *State v. Mohammed*, 10th Dist., Franklin No. 14AP-662, 2015-Ohio-1234, ¶ 13.

In *Mobarak*, the Tenth District, following *Smith* and *Mohammed*, found it was plain error for trial court to find a defendant guilty of conduct that had not yet been criminalized. *State v.*

Mobarak, 10th Dist., Franklin No. 14AP-517, 2015-Ohio-3007, ¶¶ 5-9.

The indictment charged Ms. Hileman with possession and trafficking in Pentedrone on March 23, 2012. In Ms. Hileman’s case, the jury verdict established, as a matter of fact, she possessed and sold Pentedrone but did not establish her legal guilt. *Smith, Mohammed*, and *Mobarak* operationalize Ohio statutory law that 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 H.B. 344 (effective 12-20-12), R.C. § 2925.03 did not state a positive prohibition against trafficking in “controlled substance analogs.” Moreover, prior to the enactment of 129 H.B. 344, no section of the Revised Code provided a penalty for trafficking in “controlled substance analogs.” As such, allegations that Ms.. Hileman trafficked in “controlled substance analogs” prior to December 20, 2012 did not constitute a criminal offense in Ohio.

Because Ms. Hileman was sentenced for a purported crime not defined as an offense under the laws of the State of Ohio, her conviction is void ab initio. “A judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter and may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceeding.” *State v. Cimpritz*, 158 Ohio St. 490, syl 6. (1953). Subject-matter jurisdiction cannot be waived. *State v. Yarborough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶ 4. A lack of subject-matter jurisdiction can be raised at any time and is not subject to waiver or to the res judicata bar merely because it could have been raised in an earlier proceeding. *See State v.*

Wilson, 73 Ohio St.3d 40, 45 (1995), fn. 6 (explaining that defendant's petition for post-conviction relief was not barred by the doctrine of res judicata because his judgment of conviction was void ab initio for lack of subject matter jurisdiction). Thus, the Court should accept jurisdiction.

Proposition of Law II: A Defendant's Right to Present a Defense Is Violated When a Trial Court Refuses to Permit the Defense Experts to Refute Assertions by the State's Expert Witnesses That Pentedrone, a Purported Controlled Substance Analog, Was Substantially Similar to Methcathinone, a Controlled Substance.

In this case, the State's experts testified that Pentedrone, a controlled substance analog, was substantially similar to Methcathinone, a controlled substance. For a substance to be classified as a "controlled substance analog," it must have (1) a chemical structure that "is substantially similar to the structure of a controlled substance in schedule I"; and (2) "a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I * * *." R.C. § 3719.01(HH)(1)(a), (b)(i).

Ms. Hileman advanced the position that the question of "substantially similar" is an element of the purported offenses of possession or sale of a controlled substance analog. As such the Due Process Clause of the Fourteenth Amendment and the incorporated notice guarantees of the Sixth Amendment require that it be (1) formally charged, (2) submitted to the jury (if the case goes to trial) and (3) proved beyond a reasonable doubt. *C.f. Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2362-63 (2000). The jury is the exclusive judge of all questions of fact. R.C. § 2945.11. Thus, the question of "substantially similar" was an issue of fact for the jury to resolve.

At a pretrial motion hearing, the State's expert witness, Anna Tabor, Ohio BCI Chemist, testified that the Ohio BCI chemistry committee¹ developed an analog list and that list contained an entry indicating Pentedrone's chemical structure was substantially similar to the chemical structure of Methcathinone. Prosecution expert witness Dr. John Wyman, Chief Toxicologist at the Cuyahoga Medical Examiner's Office opined Pentedrone would produce pharmacological effects that were similar to Methcathinone

Defense expert witness Lindsay Reinhold, Forensic Chemist, testified that Pentedrone's structure was different from the structure of Methcathinone and that from a scientific point of view the phrase "substantially similar" was over broad and had no universal scientific definition. Defense expert witness, Dr. Alfred Staubus, Pharmacologist, testified on the issue of "substantially similar" effect on the central nervous system. Dr. Staubus testified there is no scientific definition for the phrase "substantially similar" and the phrase lacks precision because there are a number of ways to test similarity.

The trial court held the jury should interpret the phrase "substantially similar" using the common meaning of the phrase and prohibited Defense witnesses Reinhold and Staubus from testifying at trial because their testimony would have been confusing or misleading, under Evid. R. 403 and had nothing to do with whether the State had proven its case beyond a reasonable doubt. This decision deprived Ms. Hileman of her fundamental right to present a defense, as

¹ This committee consisted of 5 chemists and 3 supervisors who were also chemists. Each member of the committee would compare the chemical structure of a given compound with that of a known controlled substance using a two-dimensional model. Then the committee would report its results to 12 other forensic scientists at BCI. If the committee members and the 12 other forensic scientists at BCI unanimously agreed then the compound would be added to the substantially similar analog list. Such a methodology raises a separation of powers issue because the General Assembly never ceded authority to the BCI to define "controlled substance analog."

guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as to questions of fact concerning (1) whether Pentedrone “is substantially similar to the structure of a controlled substance in schedule I” and (2) whether Pentedrone has “a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I.” The trial court likewise misapplied the relevant Rules of Evidence, resulting in prejudicial error and an unfair trial.

The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present the defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. *Washington v. Texas*, 388 U.S. 14, 19 (1967). Ms. Hileman recognizes this right is not unlimited, and does not permit the introduction of testimony that is “incompetent, privileged, or otherwise inadmissible under the standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). But the application of the rules of evidence cannot supersede a defendant’s constitutional rights. State evidence rules are deemed unconstitutionally arbitrary or disproportionate when their application infringes a “weighty interest of the accused.” *Rock v. Arkansas*, 483 U.S. 44, 55 (1987).

Here, Ms. Hileman had a significant interest at stake. From the outset, part of her defense was that Pentedrone was not “substantially similar” to Methcathinone. The State was permitted to present evidence and argument that Pentedrone was “substantially similar” to Methcathinone. At trial, Ms. Hileman sought to refute the State’s two expert witnesses by calling her own qualified experts to testify about “substantially similar.” The trial court excluded her expert witnesses and limited the

defense to cross-examination and argument on this subject. Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 285, 302 (1973). Thus, the trial court interfered with Ms. Hileman's right to present a defense when it erroneously excluded relevant expert testimony. The Court should accept jurisdiction.

Proposition of Law III: a Trial Court Fails to Exercise its Gate-keeper Function When it Permits Unreliable Expert Testimony. *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶16 followed.

In a controlled substance analog prosecution, the question of whether a purported controlled substance analog "is substantially similar to the structure of a controlled substance in schedule I" is beyond the knowledge or experience possessed by lay persons and is a proper subject for reliable expert testimony. When evaluating the reliability of scientific evidence, a trial court must consider several factors: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential error rate, and (4) whether the methodology has gained general acceptance. *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611 (1998).

Here, the State's expert witnesses, Anna Tabor, Ohio BCI Chemist, and Dr. John Wyman, Chief Toxicologist at the Cuyahoga Medical Examiner's Office testified that Pentedrone's chemical structure was substantially similar to the chemical structure of Methcathinone. The State's expert witnesses based their opinions on the comparison of two-dimensional models of Pentedrone and Methcathinone. Dr. Wyman testified that the two-dimension comparison method had not been tested, was not subjected to peer review and was not generally accepted. As to Chemist Tabor, there was no evidence presented that the two-

dimension comparison method had been tested, that outside of the BCI cabal the methodology had been subjected to peer review, that it had a known or potential error rate, or was generally accepted within the scientific community. Absent such testimony, the two-dimensional model comparison of Pentedrone and Methcathinone was unreliable and should have been excluded by the trial court. The Court should accept jurisdiction.

Proposition of Law IV: The State fails to meet its burden of production at trial when the evidence is legally insufficient to support a jury verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), followed.

In this case, Ms. Hileman was charged with trafficking and possession of a controlled substance in violation of R.C. § 2925.03 and R.C. § 2925.11, respectively. Thus, the State was required to prove Pentedrone was a controlled substance under R.C. §§ 2925.03 and .11. The State failed to do that because a controlled substance analog is not a controlled substance. See, R.C. §3719.01(HH)(2)(a) (Baldwin 2011) (“Controlled substance analog” does not include . . . a controlled substance”). Thus, Ms. Hileman’s convictions, as a matter of law, are based upon insufficient evidence. The Court should accept jurisdiction.

CONCLUSION

In light of the Propositions of Law presented herein Appellant requests that the Court accept jurisdiction and review this case on the merits, or, in the alternative, hold this case in abeyance pending the resolution of the certified conflict in *State v. Shalash*, Ohio Supreme Court Case No. 2015-1782.

Respectfully submitted,

s/Keith A. Yeazel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon:

Sherri Bevan Walsh, Summit County Prosecuting Attorney,
Heaven R. DiMartino, Assistant Prosecuting Attorney
53 University Avenue – 6th Floor
Akron, Ohio 44308

by United States Mail, postage prepaid, this 25th day of January, 2016.

s/Keith A. Yeazel

Keith A. Yeazel

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**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION
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CONTENTS OF APPENDIX TO APPELLANT'S BRIEF

1. Decision and Journal Entry of the Summit County Court
of Appeals (December 16, 2015) 1