

ORIGINAL

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,

Case No. 16-0179

Plaintiff-Appellant,

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

-vs-

EDREESE MUSTAFA
& MOHAMMAD MUSTAFA,

Court of Appeals
Case Nos. 15AP-465
15AP-466

Defendant-Appellees.

MEMORANDUM OF PLAINTIFF-APPELLANT STATE OF OHIO
SUPPORTING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

The Tenth District has issued its memo decision agreeing there is a certifiable conflict in these consolidated *Mustafa* cases. However, the State is awaiting the journal entry certifying the conflict. The State will eventually file a certified-conflict appeal based thereon, and the present discretionary appeal should be eventually consolidated with that certified-conflict appeal.

The present discretionary appeal also should be considered a companion to three other cases. In *State v. Mohammad*, Sup.Ct. No. 15-774, and *State v. Mobarak*, Sup.Ct. No. 15-1259, this Court has accepted review over the State's discretionary appeals in those cases. The State is raising the same propositions of law in those cases, and this Court has accepted the second proposition of law in *Mobarak* and accepted all three propositions of law in *Mohammad*.

This Court has ordered that the *Mohammad* and *Mobarak* appeals be held pending the outcome of a certified-conflict appeal arising from Warren County, *State v. Shalash*, Sup.Ct. No. 15-1782. In *State v. Shalash*, 12th Dist. No. CA2014-12-146, 2015-Ohio-3836, the Twelfth District rejected the Tenth District's case law and held that controlled substance analogs were criminalized as of October 17, 2011. The Twelfth District certified a conflict, and this Court has agreed that a conflict exists and accepted review of *Shalash*.

Sub.H.B. 64 was enacted by the General Assembly effective 10-17-11 in an effort to combat designer drugs having a substantially similar chemical structure and effect as drugs already listed in Schedule I or II. H.B. 64 banned the substances by defining what is deemed to be a "controlled substance analog" and by requiring such analogs to be treated as "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.

Given the “shall be treated” provision in H.B. 64, the legislative intent to penalize the trafficking and possession of a controlled substance analog was crystal clear as of 10-17-11. Any provision in the entire Revised Code referring to “controlled substances” would be treated as a matter of law as including analogs within its reach. Thus, the “shall be treated” provision operated hand-in-glove with the “controlled substance” provisions in R.C. 2925.03 and 2925.11, thus allowing prosecution for trafficking and possession.

But the Tenth District has used a “strict construction” analysis to erect artificial barriers to defeat the plain, broad language of H.B. 64. Its arguments boil down to the contention that the analog definition and “shall be treated” provision were only set forth in R.C. 3719.01(HH) and R.C. 3719.013, respectively, and that nothing within R.C. Chapter 2925 formally incorporated analogs into the latter chapter.

These locational observations amount to nullification of the General Assembly’s plainly-stated intent. Under R.C. 3719.013, 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). The Tenth District *nineteen* times in *Smith* 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.” *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303. The *Mobarak* and *Mustafa* panels used the same “R.C.” reference a total of *ten* times. *State v.*

Mohammad, 10th Dist. No. 14AP-662, 2015-Ohio-1234; *State v. Mobarak*, 10th Dist. No. 14AP-517, 2015-Ohio-3007. 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.

Thus, 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*. No further “cross-reference” was needed anywhere else.

The State raises three propositions of law. First, the Tenth District continues to misapply the doctrine of strict construction by making no real effort to construe what the General Assembly expressed in R.C. 3719.013. Second, the language of R.C. 3719.013 plainly incorporated analogs into the possession and trafficking statutes. Third, the lower courts are violating the separation of powers.

The State’s arguments are substantially aided by the United States Supreme Court’s decision last year in *McFadden v. United States*, 135 S.Ct. 2298 (2015). *McFadden* addressed 21 U.S.C. 813, which is nearly identical to former R.C. 3719.013. Language in *McFadden* shows that the nearly-identical federal law provisions regarding controlled substance analogs operate in exactly the same fashion as the State contends here.

The Tenth District in *Mobarak* wrongly brushed off *McFadden* by contending that the Court in that case “merely assumed” that the controlled substance analog was included as a controlled substance. *Mobarak*, ¶ 10. *McFadden* did not just “assume” that analogs must be treated as controlled substances. Rather, the Court specifically discussed the interplay between 21 U.S.C. 813 and the other federal drug statutes, and it repeatedly referred to Sec. 813 as *mandating* that analogs be treated as controlled substances for

purposes of any federal law. This was a holding, not an assumption. And, contrary to *Mobarak*, the *McFadden* Court was directly asked to interpret and apply Sec. 813 in that way. Brief in *McFadden v. U.S.*, 2015 WL 881768, at 6-7, 16, 21, 24, 25, 40-41.

H.B. 64 was patterned after the federal law discussed in *McFadden*, and so *McFadden*'s discussion of 21 U.S.C. 813 should carry great weight in addressing the nearly-identical language in former R.C. 3719.013. See, e.g., *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶¶ 8, 13; *In re Morgan's Estate*, 65 Ohio St.2d 101, 103-104 (1981).

McFadden shows that the "shall be treated" requirement applies by operation of law. It plugs analogs into other statutes and thereby extends those statutes to include analogs. This is how the *McFadden* Court reached the conclusion that the knowledge requirement for distribution of "controlled substances" in § 841 applied to analogs.

In contrast to the clarity in *McFadden*, the Tenth District's reasoning has become a moving target. In *Smith*, the Tenth District touted the federal statutes as clearly indicating that analogs must be treated as controlled substances because "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 * * *." *Smith*, ¶ 15. *Smith* conceded that the purpose of the federal analog provision was to make analogs "subject to the restrictions imposed on controlled substances." *Id.* ¶ 6. But now, with *McFadden* repeatedly relying on the federal provision to equate analogs with "controlled substances," the Tenth District expresses doubts in *Mobarak* about whether the federal analog provision accomplished anything, contending that the *McFadden* Court "merely assumed". *Mobarak*, ¶ 10.

Defendant might argue that discretionary 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, including the harm done to separation of powers.

Most importantly, though, the Tenth District's errors will continue to have ramifications 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 these parts of the statutory scheme. The Tenth District's analysis will hamstring the operation of those statutes in a county having 1.2 million people.

For example, under the Tenth District's flawed analysis, an analog trafficker can provide analogs to *children* and escape the heightened mandatory sentence for a second-degree felony that would otherwise apply to such offenses under R.C. 2925.02(C)(1).

This felony case presents a substantial constitutional question and presents questions of public and great general interest that warrant granting leave to appeal. The certified-conflict appeal in *Shalash* and the acceptance of the discretionary appeals in *Mohammad* and *Mobarak* provide further reason to accept review here.

STATEMENT OF FACTS

In Common Pleas No. 13CR-536 (which became Appeals No. 15AP-466), the grand jury indicted Mohammad Mustafa on various counts alleging trafficking or possession of controlled substance analogs occurring on February 8 and 15, 2012, and May 2, 2012. The same indictment was also docketed under Common Pleas No. 13CR-537 (Appeals No. 15AP-465) and named Edreese Mustafa as a co-defendant for the trafficking and possession offenses occurring on February 15, 2012, and May 2, 2012.

Each defendant filed a motion to dismiss contending that it was not a crime at the times in question to traffic or possess in the named analogs, and the trial court eventually filed a decision and entry in each case granting dismissal, relying entirely on the Tenth District's decision in *Smith*.

The State timely appealed in both cases, and the cases were consolidated. On December 22, 2015, the Tenth District affirmed the orders of dismissal based on *Smith*, *Mohammad*, and *Mobarak*.

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.

While the Twelfth District's decision in *Shalash* adequately debunks the Tenth District's illogic in *Smith*, it is still helpful here to reiterate the Tenth District's serial errors, beginning with its heavy reliance on the concept of “strict construction.” Claiming “ambiguity,” the *Smith* panel concluded that the statutes were not “clear” and

therefore the charges were properly dismissed. The *Mobarak* panel likewise insisted that the rule of lenity “requires the court to construe ambiguity in criminal statutes so as to apply only to conduct that is clearly proscribed * * *.” *Mobarak*, ¶ 7.

But 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 text is “ambiguous,” 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 (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 (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 (1991) (quote 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 (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, ¶ 40; *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). 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 canons to resolve the “ambiguity,” and only then would strict construction apply if the language cannot be sufficiently resolved.

“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, ¶ 20 (citation omitted); *In re Clemons*, 168 Ohio St. 83, 87-88 (1958) (“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.”).

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. The court thus never reached the proper point where it could apply the rule of lenity.

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.

While the Tenth District in *Smith* 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 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 phrase “any provision.” “Any” means “all”, i.e., “without limitation.” *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40 (1948). 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. The text in R.C. 3719.013 was the key to the case, and yet the Tenth District has repeatedly failed 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, ¶ 26; *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969); *State ex rel. Bohan v. Indus. Comm.*, 147 Ohio

St. 249, 251 (1946). But 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 canons by superimposing limitations on the statute’s broad reach.

The only canon referenced by the Tenth District in *Smith* was “expressio unius est exclusio alterius,” but, even then, the court still failed to fully resolve it, saying only that the canon “arguably” applied. *Smith*, ¶ 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, ¶¶ 35-36; *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 12; *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 455 (2002).

Such legislative intent is easily shown by R.C. 3719.013, which provided overarching definitional language indicating that a “controlled substance analog” shall be treated as a “controlled substance” for purposes of *any* provision in the *Revised Code*. There was no need for R.C. 2925.01 to incorporate the analog definition because the General Assembly had already accomplished such incorporation via R.C. 3719.013.

Another problem is the *Smith* panel’s selective and misleading quotation of the preamble to H.B. 64 as supposedly being “suggest[ive]” of a narrow construction. In fact, the preamble favored the State’s position because 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 *Smith* panel'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 that addressed that issue, R.C. 3719.013. The inquiry into legislative intent cuts across *all* statutes, and so courts cannot cordon off entire chapters from review. *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35 (1991). And cross-references are unnecessary when construing statutes in pari materia. *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956).

The *Smith* panel contended that the "shall be treated" requirement was "confusing" and created a "seeming[] contradict[ion]" because analogs are not "controlled substances" under R.C. 3719.01(HH) and yet R.C. 3719.013 requires that they be treated as "controlled substances" for purposes of other statutes. But there is no real confusion or contradiction. Yes, analogs are knock-offs of "controlled substances" listed in schedule I or II, and such analogs are not themselves already listed in any schedule. But, legally, R.C. 3719.013 operates to treat them as "controlled substances."

The *McFadden* Court recognized this exact point under the nearly-identical federal statute, holding that the federal drug prohibitions apply to "controlled substances" and that analogs are "treated as such by operation of the Analogue Act" and are "treated as listed by operation of the Analogue Act". *McFadden*, 135 S.Ct. at 2305-2306. The federal provision "instructs courts to treat those analogues * * * as controlled substances" and thereby "extends the framework of the CSA to analogous substances". *Id.* at 2302, 2304. By operation of law, analogs are "controlled substances", and there is no contradiction. Federal law prohibits distribution of "controlled substances" and also

prohibits distribution of analogs, which are treated as “controlled substances” by operation of law. *McFadden* treats the two as interchangeable.

The *Smith-Mohammad-Mobarak* panels have also lodged various locational criticisms because the “shall be treated” requirement was put in R.C. 3719.013 instead of in R.C. Chapter 2925. They also assert that the federal statutes have a different structure.

In light of *McFadden*, however, the notion of an “ambiguity” based on “structure” does not withstand scrutiny. *McFadden* holds that the federal “shall be treated” requirement is unambiguous. The same “unambiguous” conclusion would apply here to R.C. 3719.013.

McFadden shows that the issue does not turn on the formalism of location in the Code. *McFadden* recognized that the “shall be treated” language required that it “must turn first to the statute that addresses controlled substances, the CSA.” *McFadden*, 135 S.Ct. at 2303. Thus, the controlling consideration was not “subchapters” or “parts,” but, rather, whether the other statute “addresses controlled substances”. The Court also held that the term “controlled substance” includes “those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act.” *Id.* at 2305, 2306. As confirmed by *McFadden*, the “shall be treated” requirement extends the analog concept to any statute addressing “controlled substances” – wherever it might be found – because analogs are “controlled substances” by operation of law. This makes perfect sense in *McFadden* since the federal requirement applies for purposes of *any* federal law.

The same approach leads to the rejection of the *Smith* panel’s locational contentions here. Under Ohio law, both R.C. Chapters 2925 and 3719 address controlled substances. And under R.C. 3719.013, the analog concept extends by operation of law to

any provision in the entire *Revised Code*. The analog concept therefore easily reached the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11, both of which addressed “controlled substances”.

The *Smith* panel’s locational and “structure” contrasts between federal and Ohio law are ultimately self-defeating. The General Assembly had already deviated from the “structure” of federal law by setting up the prohibition and regulation of controlled substances in at least two chapters, R.C. Chapter 2925 and R.C. Chapter 3719. By copying the federal “shall be treated” requirement into R.C. 3719.013 and by expressly indicating that this applied to any provision of the *Revised Code*, the General Assembly was signaling that the different “structuring” of Ohio law should make no difference.

It is counterintuitive to think that the General Assembly intended to deviate from federal law. If anything, the General Assembly’s copying of federal law was indicating that it wanted exactly what federal law had, i.e., a broad provision extending the “controlled substance” prohibitions to analogs.

Finally, recent cases from this Court have provided even more support for the State’s appeal here. *State v. South*, __ Ohio St.3d __, 2015-Ohio-3930, ¶ 8; *Risner v. Ohio Dept. of Natural Resources*, __ Ohio St.3d __, 2015-Ohio-3731, ¶¶ 12, 15, 16, 17, 18.

This Court recognized in *South* that, “[w]hen we construe statutes relating to the same subject matter, we consider them together to determine the General Assembly’s intent – even when the various provisions were enacted separately and make no reference to each other.” *South*, ¶ 8. “This requires us to harmonize provisions unless they irreconcilably conflict.” *Id.* “In doing so, ‘we must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute.’” *Id.* The Tenth District violated each of these

principles by insisting on the need for a “cross-reference” between R.C. 3719.013 and R.C. Chapter 2925 and by insisting that such cross-reference must be located in R.C. Chapter 2925. *South* shows there need not be any “cross-reference.” Indeed, R.C. 3719.013 itself constituted a “cross-reference” incorporating analogs into other Revised Code sections.

This Court in *Risner* also recognized several points that aid the State’s appeal. Most importantly, the *Risner* Court recognized that, in the phrase “any other section of the Revised Code,” the word “[a]ny” means “all” and that such “broad, sweeping language” must be accorded “broad sweeping application.” *Risner*, ¶ 18. The Tenth District violated these principles by not according broad, sweeping application to the language of R.C. 3719.013, which incorporated analogs into “any other provision of the Revised Code”.

Space limitations prevent a further discussion of the errors in the *Smith-Mohammad-Mobarak-Mustafa* line of cases, including the flawed list of “ambiguities” that were itemized in paragraph 7 of the *Mobarak* decision. In the end, none of these claimed “ambiguities” address the unqualified, overarching language of R.C. 3719.013 extending the analog concept to every statute in the Revised Code that addresses “controlled substances.”

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 has never addressed the State’s separation-of-powers objection to this outcome.

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, ¶¶ 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 this 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, ¶¶ 43, 48, 52. 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 “controlled substances” throughout the Revised Code as of October 17, 2011.

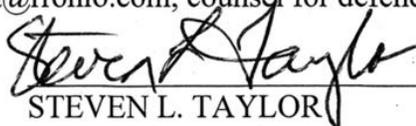
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served on February 5, 2016, by email to Dennis W. McNamara, mcnamara@rrohio.com, counsel for defendant.



STEVEN L. TAYLOR

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-465 (C.P.C. No. 13CR-0537)
Edreese Mustafa,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-466 (C.P.C. No. 13CR-0536)
Mohammad Mustafa,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

DECISION

Rendered on December 22, 2015

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

McNamara Law Office, *Dennis W. McNamara*, and *Colin E. McNamee*, for appellee.

APPEALS from the Franklin County Court of Common Pleas

HORTON, 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 defendants-appellees, Edreese Mustafa and Mohammad Mustafa

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("appellees"). Because Ohio law did not clearly define the acts alleged in the indictments as crimes at the times set forth in the indictments, we affirm.

{¶ 2} The appellees were indicted for trafficking and possessing bath salts from their business "The Smoke Shop." In a five count indictment, Mohammad Mustafa was indicted on two counts of trafficking in spice (Counts 1 and 2), one count of aggravated trafficking as a fourth-degree felony (Count 3), one count of aggravated trafficking as a first-degree felony (Count 4), and one count of aggravated possession as a first-degree felony (Count 5).

{¶ 3} Counts 1 and 2 alleged that on February 8 and 15, 2012, Mohammad Mustafa knowingly sold or offered to sell a controlled substance included in Schedule I, to wit: AM2201, which is an analog controlled substance as defined in R.C. 3719.01, commonly known as spice.

{¶ 4} Count 3 alleged that on February 15, 2012, Mohammad Mustafa did knowingly sell or offer to sell a controlled substance included in Schedule I, to wit: a-PVP, which is an analog controlled substance as defined in R.C. 3719.01, commonly known as bath salts.

{¶ 5} Count 4 alleged that on May 2, 2012, Mohammad Mustafa did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution or distribute a controlled substance included in Schedule I, to wit: a-PVP, which is an analog controlled substance as defined in R.C. 3719.01, commonly known as bath salts, in an amount equal to or exceeding 50 times the bulk amount but less than 100 times the bulk amount.

{¶ 6} Count 5 alleged that on May 2, 2012, Mohammad Mustafa did knowingly obtain, possess or use a controlled substance included in Schedule I, to wit: a-PVP which is an analog controlled substance as defined in R.C. 3719.01, commonly known as bath salts, in an amount equal to or exceeding 50 times the bulk amount but less than 100 times the bulk amount.

{¶ 7} Edreese Mustafa was indicted as a co-defendant on Counts 2, 3, 4, and 5.

{¶ 8} The appellees filed motions to dismiss contending it was not a crime at the times in question to traffic or possess AM2201 and a-PVP as controlled substance analogs. The state opposed the motions. The trial court granted the motions based on this court's earlier decision in *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303, in which this

court held that in the time period from February 8 to July 25, 2012, R.C. 2925.03 and 2925.11, statutes prohibiting the sale, distribution and possession of controlled substances, did not adequately state a positive prohibition on the sale or possession of controlled substance analogs.

{¶ 9} *Smith* was followed by *State v. Mohammad*, 10th Dist. No. 14AP-662, 2015-Ohio-1234, in which another panel of this court held that the statutory definition of controlled substance in R.C. 2925.01 did not include or expressly incorporate the definition of a controlled substance analog prior to December 2012, and therefore the trial court properly dismissed a charge relating to possession of bath salts. *Mohammad* was followed by *State v. Mobarak*, 10th Dist. No. 14AP-517, 2015-Ohio-3007, in which another panel of this court held that possession and trafficking of controlled substance analogs had not yet been criminalized as of the time of the offenses charged in the indictment.

{¶ 10} The state is appealing for the fourth time on the same issue, assigning as error the following:

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.

{¶ 11} Once again, the state reiterates that R.C. 3719.013 (effective October, 2011), required that analogs be treated as Schedule I controlled substances for purposes of any provision in the Revised Code. The state contends that this language criminalized possession and trafficking in analogs prior to December of 2012.

{¶ 12} In December of 2012, the General Assembly amended R.C. 2925.03 and 2925.11, to insert controlled substance analog language into the trafficking and possession statutes. The General Assembly also amended R.C. 3719.013 to cross-reference the offenses of trafficking and possession of controlled substance analogs.

{¶ 13} In Ohio, no conduct constitutes a criminal offense against the state unless it is defined in the Revised Code. R.C. 2901.03(A). In order for certain conduct to constitute an offense, one or more sections of the Revised Code must state a positive prohibition or

enjoin a specific duty, and the Revised Code must provide a penalty for violation of such prohibition or failure to meet such duty. R.C. 2901.03(B). At the time the appellees committed the offenses alleged in the indictment, the relevant statutes did not contain the term "controlled substance analogs." Former R.C. 2925.03 and 2925.11 did not adequately state a positive prohibition on the sale or possession of controlled substance analogs. *Smith* at ¶ 12; *Mohammad* at ¶ 8, 13; *Mobarak* at ¶ 9.

{¶ 14} This court's prior decisions in *Smith*, *Mohammad*, and *Mobarak* determine the outcome of this appeal. We are aware that the Twelfth District Court of Appeals has disagreed with our reading of the statutes. *State v. Shalash*, 12th Dist. No. CA2014-12-146, 2015-Ohio-3836. However, for all the reasons discussed in our three previous decisions, we disagree with the analysis of the *Shalash* court and continue to adhere to our precedent.

{¶ 15} The single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J. and SADLER, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-465 (C.P.C. No. 13CR-0537)
Edreese Mustafa,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-466 (C.P.C. No. 13CR-0536)
Mohammad Mustafa,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 22, 2015, having overruled appellant's sole assignment of error, 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.

HORTON, J., BROWN, P.J. & SADLER, J.

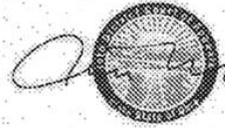
/S/ JUDGE _____

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Dec 22 2:19 PM-15AP000465

Tenth District Court of Appeals

Date: 12-22-2015
Case Title: STATE OF OHIO -VS- EDREESE MUSTAFA
Case Number: 15AP000465
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge Timothy S. Horton

Electronically signed on 2015-Dec-22 page 2 of 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-465 (C.P.C. No. 13CR-0537)
Edreese Mustafa,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-466 (C.P.C. No. 13CR-0536)
Mohammad Mustafa,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on February 2, 2016

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

McNamara Law Office, *Dennis W. McNamara*, and *Colin E. McNamee*, for appellee.

ON MOTION TO CERTIFY A CONFLICT

HORTON, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, requests that this court certify a conflict with *State v. Shalash*, 12th Dist. No. CA2014-12-146, 2015-Ohio-3836. Defendants-appellees, Edreese and Mohammad Mustafa, have not filed a response.

{¶ 2} The Ohio Constitution, Article IV, Section 3(B)(4), governs motions seeking an order to certify a conflict. It provides as follows:

Whenever judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

{¶ 3} On December 16, 2015, the Supreme Court of Ohio certified a conflict in *State v. Shalash*, 144 Ohio St.3d 1425, 2015-Ohio-5225. The question certified is "whether 'controlled substance analogs' were criminalized as of October 17, 2011, the effective date of House Bill 64." *Id.*

{¶ 4} "The conflict cases are *State v. Smith*, 10th Dist. Franklin Nos. 14AP-154 and 14AP-155, 2014-Ohio-5303, *State v. Mohammad*, 10th Dist. Franklin No. 14AP-662, 2015-Ohio-1234, and *State v. Mobarak*, 10th Dist. Franklin No. 14AP-517, 2015-Ohio-3007." *Id.*

{¶ 5} In our decision in the instant case, we noted that the Twelfth District Court of Appeals has disagreed with our reasoning in the *Smith*, *Mohammad*, and *Mobarak* cases. We adhered to our prior reasoning in deciding the instant case, and accordingly, we agree with the State of Ohio that a certifiable conflict exists.

{¶ 6} Based on the foregoing, appellant's motion to certify a conflict is granted.

Motion to certify conflict granted.

BROWN, J. and SADLER, J., concur.
