

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

AHMAD MOBARAK,

Defendant-Appellee.

Case No.

16-1168

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

Court of Appeals
Case No. 16AP-162

MEMORANDUM OF PLAINTIFF-APPELLANT STATE OF OHIO
SUPPORTING JURISDICTION

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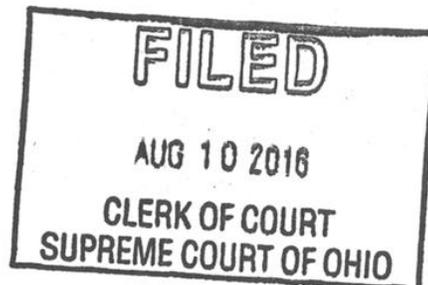


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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

The present discretionary appeal should be considered a companion to three other Franklin County cases. In *State v. Mohammad* (Sup.Ct. No. 15-774), *State v. Mobarak* (Sup.Ct. No. 15-1259), and *State v. Mustafa* (Sup.Ct. No. 16-179), this Court has accepted review over the State's discretionary appeals therein and ordered those cases to 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 agreed that a conflict exists. See, also, *State v. Mustafa* (Sup.Ct. No. 16-201) (accepting certified-conflict review).

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 this "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. 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, beginning with *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303, 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 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, *R.C. 2925.03* and *R.C. 2925.11*, fell within the “Revised Code.” R.C. 1.01 (“Revised Code” is all permanent statutes). 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. No further “cross-reference” was needed anywhere else.

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 analogs operate in exactly the same fashion as the State contends here.

The Tenth District in its other *Mobarak* decision 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. *State v. Mobarak*, 10th Dist. No. 14AP-517, 2015-Ohio-3007, ¶ 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 the Tenth District, the *McFadden* Court *was* directly asked to 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 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 “controlled substance” statutes and thereby extends those statutes to reach analogs. This is how *McFadden* concluded that the knowledge requirement for distributing “controlled substances” applied to analogs.

The need for discretionary review is increased here because the panel below repeated the errors committed in the earlier Tenth District decisions and added to them. It is particularly unfortunate that the Tenth District criticized the Twelfth District’s *Shalash* decision as lacking sufficient analysis when, in fact, *Shalash* is far more faithful to the actual statutory text of R.C. 3719.013 than any of the Tenth District decisions.

Most erroneous below was the panel's attempt to justify *Smith* as a constitutional-avoidance decision, with the panel claiming *Smith* needed to interpret the statute the way it did to avoid alleged "vagueness" concerns. *Smith* never mentioned any such concerns as a basis for its decision, and the panel below was factually and legally incorrect in selectively relying on materials filed in the trial court in *Smith*. See Part C, *infra*.

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, (not December 26th as wrongly stated by the panel below), 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, even so, the Tenth District's flawed analysis still warrants review for several reasons.

Most importantly, 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.

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).

Space limitations prevent a full discussion of the Tenth District's errors. A full discussion of these errors can be found in the briefs supporting the State in *Shalash*.

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

STATEMENT OF FACTS

The grand jury indicted defendant Ahmad Mobarak on counts of aggravated trafficking in drugs and aggravated possession of drugs, both offenses occurring on August 15, 2012. The indictment alleged that the controlled substance involved in the drug offenses was "a controlled substance included in Schedule I, to wit: MDPPP, which is a controlled substance analog as defined in section 3719.01 * * *, commonly known as Bath Salts * * *." Both counts were second-degree felonies, alleging that the amounts equaled or exceeded five times bulk but were less than 50 times bulk.

The defense filed a motion to dismiss the indictment, contending that the counts failed to charge an offense because it had not yet been made a crime to traffic or possess controlled substance analogs at the time. The State filed a memo opposing, contending that, at the time of the offenses, R.C. 3719.013 provided that analogs shall be treated as Schedule I controlled substances and therefore fell within the reach of the trafficking and possession statutes.

The court eventually issued its decision and entry on March 3, 2016, granting the motion to dismiss and following the Tenth District's 2014 decision in *State v. Smith*.

The State timely appealed, and the Tenth District affirmed.

ARGUMENT

Proposition of Law: 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 Twelfth District’s decision in *Shalash* adequately debunks the Tenth District’s illogic in the *Smith* line of cases, it is still helpful here to reiterate some of the Tenth District’s errors, beginning with its misapplication of “strict construction.”

A.

Claiming “ambiguity,” *Smith* concluded that the statutes were not “clear” and therefore the charges were properly dismissed. The panel below repeatedly invoked this “strict construction” logic.

But the mere existence of real or possible “ambiguity” does not mean that the defendant prevails. “[T]his Court has never held that the rule of lenity automatically permits a defendant to win.” *Muscarello v. United States*, 524 U.S. 125, 139 (1998). Even when the statutory language is “ambiguous,” which is not conceded here, the statutory text still must be *fully* analyzed to try to construe it.

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).

Ohio follows the federal precedents in this area. 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”. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 40 (quoting another case). “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.” *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). “[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). “[S]trict 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.” *In re Clemons*, 168 Ohio St. 83, 87-88 (1958).

The Tenth District has not exhausted all of the textual clues in the statutory scheme and has not applied all pertinent canons of statutory construction. The Tenth District has never reached the proper point where it could apply the rule of lenity.

B.

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”. It still failed to do so in the decision below, which twice misstated the statute. Decision, ¶¶ 12, 18 (purporting to quote non-existent “any purposes” language).

The State has 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 has 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. The mere “arguable” application of a canon does not trigger the rule of lenity. *Lockhart v. United States*, 136 S.Ct. 958, 968 (2016).

In addition, *Smith* failed to recognize that 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 *Smith*’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 to H.B. 64 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 Tenth District's repeated emphasis on a lack of cross-references in Chapter 2925 also violates 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 has 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 in construing statutes in pari materia. *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956).

Smith also 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 by 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 Tenth District panels have also asserted that the federal statutes have a
different structure. But, in light of *McFadden*, 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 applies here.

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. The Court 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. Thus, the “shall be treated” requirement extends the analog concept to
any statute addressing “controlled substances” – wherever it might be found – because
analogues are treated as “controlled substances” by operation of law.

The same approach leads to the rejection of *Smith*’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*. Analogs therefore easily reach the trafficking and possession
statutes in R.C. 2925.03 and 2925.11, since both address “controlled substances”.

Smith’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.

Recent cases from this Court have provided even more support for the State’s appeal here. *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, ¶ 8; *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, ¶¶ 12, 15, 16, 17, 18.

C.

Without prior notice to the State in the present case, the panel below went outside the appellate record to review materials submitted in the trial court in the *Smith* case. The panel asserted that those materials “made clear” that Columbus police had disagreed with the Franklin County Sheriff’s Office as to whether analogs were prohibited before December 20, 2012. The panel contended that the disagreement “was not disputed by the State” and that such “diametrically opposite conclusions” and “two diametrically differing interpretations by competent law enforcement agencies” somehow would have created a “serious question” as to “vagueness.” Decision, ¶¶ 15-16.

All of this is dubious and flawed. *Smith* itself had not mentioned or relied on any

such “vagueness” concern. Moreover, the trial-court materials from *Smith* were not part of the appellate record in this case and were not raised by the State or the defense (which did not even bother to file an appellate brief below). Bringing up trial-court materials from another case outside the appellate record without notice amounts to error.

Even taking this outside-appellate-record information into account, the panel below was incorrect in every respect. The State *did* dispute the existence of the supposed law-enforcement disagreement in *Smith*, contending that the single Columbus detective merely “didn’t want to take the time to prosecute an F5” and that such decision could not be controlling or even relevant for the court’s analysis. (*Smith* 2-19-14 Tr. 18)

In addition, the State’s appellate briefing in *Smith* disputed and refuted any reliance on the supposed disagreement. The trial-court materials from *Smith* merely showed that the Columbus detective misunderstood what the lab report had indicated. The lab report had only indicated that, effective December 20, 2012, AM 2201 was now listed in Schedule I in R.C. 3719.41, which was true. The lab report was not claiming that the substance was lawful to possess and sell before then. Moreover, the lab report was not issued until August 28, 2013, and it was in September 2013 when the detective misunderstood the lab report and closed the cursory CPD investigation. These matters occurring internally in the Columbus Police department could not have entered into defendant Smith’s calculations in 2012. Indeed, the Columbus detective in an earlier report had indicated that Smith himself acknowledged that he had *already* been charged by the Sheriff’s Office for bath salts and synthetic marijuana, and, in fact, Smith *had been indicted* in August and October 2012, thereby providing a far-more-authoritative indication of statutory meaning than a single CPD detective’s cursory misunderstanding

of a lab report several months later, which explains why *Smith* avoided this matter.

This “vagueness” theory is also legally dubious. Vagueness doctrine does not allow the person to merely throw his hands up in frustration at the complexities of the law, and the statutory scheme was not “complex” in this regard anyway. A person wishing to comply with the law would have found R.C. 3719.01 and its definition of “controlled substance analog.” Such a person would then perform a related search for any other statute referring to such analogs and thereby found R.C. 3719.013, which incorporated analogs into all “controlled substance” provisions in the “Revised Code.”

The enactment of R.C. 3719.013 in 2011 gave sufficient notice of its applicability. “It is an ancient maxim that all are conclusively presumed to know the law.” *State v. Pinkney*, 36 Ohio St.3d 190, 198 (1988). And “[i]t is well-settled that the mistake-of-law defense is not recognized in Ohio.” *Id.* at 198.

Nor is a statute “vague” merely because it might require some judicial construction of statutory terms or meaning. “Occasional doubt or confusion about the applicability of a statute does not render the statute vague on its face.” *State v. Anderson*, 57 Ohio St.3d 168, 173 n. 2 (1991). The void-for-vagueness doctrine assumes that citizens can consult attorneys and other sources to understand the meaning of a law. *Anderson*, 57 Ohio St.3d at 175; *Rose v. Locke*, 423 U.S. 48, 50 (1975) (“Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.”). The comprehensibility of statutory language is assessed from the perspective of a person desiring to obey and understand the law. *Id.* at 50 (“Anyone who cared to do so * * *”); *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). Even when courts disagree on the

meaning and scope of a particular statute, plausible arguments over the construction of a statute do not render the statute vague. *Chapman*, 500 U.S. at 467; *Rose*, 423 U.S. at 50. The void-for-vagueness doctrine “permits a statute’s certainty to be ascertained by application of commonly accepted tools of judicial construction * * *.” *Perez v. Cleveland*, 78 Ohio St.3d 376, 378-79 (1997).

Also, as the United States Supreme Court stated in *McFadden* in relation to the federal analog provision, the constitutional-avoidance canon is inapplicable “in the interpretation of an unambiguous statute such as this one.” *McFadden*, 135 S.Ct. at 2307. “[I]gnorance of the law is typically no defense to criminal prosecution,” and “[a] defendant need not know of the existence of the Analogue Act to know that he was dealing with ‘a controlled substance.’” *Id.* at 2305.

The panel below erred in every respect in attempting to rely on this “vagueness” theory, especially without giving prior notice of reliance on matters outside the record.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by email on August 10, 2016, to Joseph Landusky, joelandusky@aol.com, 901 South High Street, Columbus, Ohio 43206-2534, counsel for defendant.


STEVEN L. TAYLOR

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 16AP-162
v.	:	(C.P.C. No. 13CR-532)
	:	
Ahmad Mobarak,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 28, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Stephen L. Taylor*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals a decision of the Franklin County Court of Common Pleas in which the trial court dismissed criminal charges against defendant-appellee, Ahmad Mobarak, on the grounds that the conduct underlying the charges was not criminal at the time Mobarak engaged in it. Because we have previously addressed this precise legal issue, and because the law is clear on the subject, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 1, 2013, Ahmad Mobarak was indicted for one count of aggravated trafficking in drugs and one count of aggravated possession of drugs for activity that allegedly occurred on August 15, 2012. Specifically, the indictment referenced a compound called MDPPP, allegedly a "[c]ontrolled substance analog" as defined in R.C. 3719.01. The State did not allege in the indictment that MDPPP was a controlled substance at the time but that it was analogous to a controlled substance.

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{¶ 3} Mobarak pled "not guilty" on February 8, 2013. (Feb. 8, 2013 Plea Form.) On May 11, 2014, Mobarak filed a motion to dismiss based in part on the argument that on August 15, 2012, it was not a criminal offense under Ohio law to possess or sell a "controlled substance analog." (May 11, 2014 Mot. to Dismiss at 1.) The trial court granted the motion in an entry filed on March 3, 2016.

{¶ 4} The State now timely appeals.

II. ASSIGNMENT OF ERROR

{¶ 5} The State assigns a single error for review:

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

III. DISCUSSION

{¶ 6} Currently, the statutes that Mobarak was accused of violating prohibit the sale and possession of controlled substance analogs. R.C. 2925.03(A) prohibits the following:

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance or a controlled substance analog;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

(Emphasis added). R.C. 2925.11(A) similarly provides:

(A) No person shall knowingly obtain, possess, or use a controlled substance *or a controlled substance analog*.

(Emphasis added). Current R.C. 2925.01(A) of R.C. Title 29 now adopts the definition of "controlled substance analog" that is and was previously defined in R.C. 3719.01(HH):

{¶ 7} As used in this chapter:

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(A) "Administer," "controlled substance," "*controlled substance analog*," "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.

(Emphasis added.) R.C. 2925.01(A).

{¶ 8} However, the bill that added "controlled substance analog" phrasing to the three above-referenced sections of R.C. Title 29 was not enacted until December 26, 2012, after August 15, 2012 when Mobarak was alleged to have committed the offenses at issue. 2012 Am.Sub.H.B. No. 334.¹ In the preamble of the legislation, one of the stated purposes was "to *create* the offenses of trafficking in and possession of controlled substance analogs." (Emphasis added) *Id.*; see also, e.g., *GMC v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869, ¶ 32; *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.*, 98 Ohio St.3d 214, 2002-Ohio-7213, ¶ 1, 94; *Ritchey Produce Co. v. State Dept. of Admin. Servs.*, 85 Ohio St.3d 194, 260 (1999) (all considering stated legislative purpose in the preamble of an enactment). Although the term, "[c]ontrolled substance analog" was defined in R.C. Title 37, before December 26, 2012 nothing in the criminal title made it a crime to possess or sell controlled substance analogs.

{¶ 9} As the law existed in August 2012 (when Mobarak's illegal conduct was alleged to have occurred), R.C. Title 37 regulated the licensing and use of controlled substances. Within that title, R.C. 3719.01 set out over 40 definitions. Several of these were plainly inapplicable to R.C. Title 29, for example, "[c]ategory III license" and "[h]ospital." R.C. 3719.01(J) and (FF). Also included in those definitions was a definition of "[c]ontrolled substance analog." R.C. 3719.01(HH). The pre-December 2012 definition in R.C. 3719.01 of that term was (in general paraphrase) a substance substantially similar to a Schedule I or II substance which has or is intended to have a substantially similar or greater effect than a Schedule I or II substance. R.C. 3719.01(HH).

{¶ 10} However, the pre-December 2012 version of R.C. Title 29 had explicitly adopted only 17 of the more than 40 definitions in R.C. 3719.01:

¹ Reported at 2011 Ohio HB 334.

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(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.

R.C. 2925.01(A) (pre December 2012). Notably absent from this list was the term, "controlled substance analog." Despite the fact that the health, safety, morals title (Title 37) of the Ohio Revised Code contained a definition of "controlled substance analog" in August 2012, the criminal title (Title 29) of the Ohio Revised Code did not contain, adopt or even reference a definition of "controlled substance analog," and it did not prohibit the possession or sale of a "controlled substance analog." *See, e.g.*, R.C. 2925.01 through 2925.58 (2012). The maxim of *expressio unius est exclusio alterius*,² and the rule of lenity, as set forth in R.C. 2901.04(A), are to be applied in this circumstance.

The "rule of lenity" is a principle of statutory construction codified in R.C. 2901.04(A), which provides, in relevant part that: "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." Application of the rule of lenity prevents a court from interpreting a criminal statute so as to increase the penalty it imposes on an offender where the intended scope of the statute is ambiguous. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 38, citing *Moskal v. United States*, 498 U.S. 103, 107-08 (1990). Under the rule, ambiguity in criminal statutes "is construed strictly so as to apply the statute only to conduct that is clearly proscribed." *Id.* at ¶ 38, citing *United States v. Lanier*, 520 U.S. 259, 266 (1997).

State v. Goins, 10th Dist. No. 14AP-747, 2015-Ohio-3121, ¶ 46. Prior to December 2012, it was not a crime to possess or sell controlled substance analogs in Ohio, and therefore, we are constrained to find that Mobarak could not be charged with a crime that was defined as such after he allegedly committed the acts in question. *See State v. Mustafa*, 10th Dist. No. 15AP-465, 2015-Ohio-5370; *State v. Mobarak*, No. 14AP-517, 2015-Ohio-3007; *State*

² This legal maxim or principle of interpretation is that when particularized items are expressed, those that are not expressed are inferred to be excluded.

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v. Mohammad, 10th Dist. No. 14AP-662, 2015-Ohio-1234; *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303.

{¶ 11} Contrary to this law, the State argues that the statutes prior to December 2012 were not ambiguous and did clearly prohibit the possession or sale of controlled substance analogs. The State primarily relies upon R.C. 3719.013 to support this argument since, even prior to December 2012, that statute provided that a controlled substance analog was to be treated, "for purposes of any provision of the Revised Code as a controlled substance in schedule I." R.C. 3719.013. Prior to December 2012, there did exist in the Ohio Revised Code an offense of possessing or selling a Schedule I controlled substance. Thus, the State argues that the language of R.C. 3719.013 supports its indictment against Mobarak for the offenses of possessing or selling a controlled substance analog prior to the enactment of versions of R.C. 2925.03(A) and R.C. 2925.11(A) containing the positive prohibition on possessing or selling "controlled substance analog[s]." (State Brief at 4-13.)

{¶ 12} This argument contravenes R.C. 2901.04, which requires strict reading of R.C. Title 29 in whatever iteration existed at the time of and subsequent to its codification. Before December 2012, R.C. Title 29 did not define Schedule I drugs for which criminal prosecution was permitted to include those drugs also listed in R.C. 3719.013. As it existed prior to December 2012, R.C. 2925.01(A) adopted the definition of "schedule I," as set forth "in section 3719.01 of the Revised Code," not as set forth in R.C. 3719.013. R.C. 2925.01(A) (2012). At that time, R.C. 3719.01(BB) defined "[s]chedule I" as, "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(BB) (2012). None of these statutes (R.C. 3719.41, 3719.43, or 3719.44), as they existed in August 2012, included controlled substance analogs within Schedule I, and none of these statutes as they existed in August 2012, referenced a modification to the definition of Schedule I set forth in R.C. 3719.013. R.C. 3719.41 (2012); R.C. 3719.43 (2012); R.C. 3719.44 (2012); *see also* R.C. 2925.01 through 2925.58 (2012). A required, strict reading of the plain language of the statutes prevents us from inferring otherwise. Further, even if R.C. 3719.013's inclusion of the words "any purpose" were to be understood to be an attempted modification of the criminal title prior to December of 2012, it at best would be ambiguous.

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{¶ 13} Despite this, the State contends that the law prior to 2012 was unambiguous in prohibiting the possession and sale of controlled substance analogs and, therefore, not in need of interpretation or construction. We reiterate our previous holding in *Mobarak* that a number of ambiguities led to the conclusion that the law prior to 2012 did not clearly prohibit the possession or sale of controlled substance analogs. In *Mobarak*³ we reasoned:

We noted the following ambiguities existed in the criminal statutes: (1) by failing to incorporate the definition of "controlled substance analog" in R.C. 3719.01(HH) into R.C. 2925.01, while specifically incorporating other definitions of terms from R.C. Chapter 3719, the General Assembly excluded that definition from applying in the context of the criminal drug offense statutes; (2) R.C. 3719.01 expressly limits the definitions contained therein, including the definition of "controlled substance analog" under R.C. 3719.01(HH), to "[a]s used in this chapter"—i.e., Chapter 3719 of the Revised Code; (3) the preamble to H.B. No. 64 indicated that one of its purposes was "to define a 'controlled substance analog' for purposes of the Controlled Substances Law," suggesting that the definition created in the legislation was limited to that portion of the Revised Code and did not extend to the criminal drug offense statutes. H.B. No. 64; (4) R.C. Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement, and there were no cross-references or any other indicators in R.C. Chapter 2925 to provide notice that the treatment of controlled substance analogs under R.C. Chapter 3719 also applied to R.C. 2925; (5) R.C. 3719.01(HH)(2)(a) states that "controlled substance analog" does not include "[a] controlled substance," which seemingly contradicts R.C. 3719.013; and (6) unlike the federal Controlled Substance Analogue Enforcement Act of 1986, in which all of the relevant provisions were placed into the same portion of federal law that contained the prohibitions on possession and sale of controlled substances, H.B. No. 64 placed the controlled substance analog provisions in R.C. Chapter 3719, separate from the prohibitions and penalties set forth in R.C. Chapter 2925, and failed to incorporate any explicit cross-references in R.C. Chapter 2925 to the controlled substance analog provisions. Applying the rule of lenity, which requires the court to construe ambiguity in criminal statutes strictly so as to apply only to conduct that

³ Not the same defendant as in this case.

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is clearly proscribed, we concluded in *Smith* that, during the period from February through July 2012 when the defendant was alleged to have possessed and sold A-PVP, R.C. 2925.03 and 2925.11 did not adequately state a positive prohibition and provide a penalty for violation of such prohibition on the sale or possession of controlled substance analogs. Therefore, we found the acts defendant was alleged to have committed in *Smith* were not clearly defined as criminal offenses under the law as it existed at the time.

Mobarak at ¶ 7.

{¶ 14} In short, the Revised Code edition that existed prior to December 2012, though it did define "controlled substance analog," did not make it a crime to possess or sell controlled substance analogs. Though our reasoning stands on its own based on the law as it existed prior to December 2012, one clear confirmation of the reliability of our reasoning is that, when the legislature drafted House Bill No. 334 (which was ultimately enacted on December 26, 2012) it explained that the bill's purpose was "to *create* the offenses of trafficking in and possession of controlled substance analogs." (Emphasis added.) 2012 Am.Sub.H.B. No. 334.

{¶ 15} The State notes that the Twelfth District Court of Appeals has now decided *State v. Shalash*, 12th Dist. No. CA2014-12-146, 2015-Ohio-3836, which diverted from the holdings of *Smith* and its progeny. In considering the State's arguments we also consider that, in addition to factors already discussed, in *Smith*, there was a potential vagueness problem. That is, in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), the United States Supreme Court explained that one requirement for the constitutionality of a penal statute is that it must define an offense with sufficient definiteness to enable ordinary people to understand what conduct is prohibited. *See also Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

{¶ 16} In *Smith*, the Franklin County Sheriff's Office had conducted the investigation that led to the charges against the defendant. Yet, the defendant's motions to dismiss made clear (and the fact was not disputed by the State), that the Columbus Police Department had also investigated the same conduct of the defendant and had reached a different conclusion, that the materials sold by the defendant's stores were not illegal prior to December 2012. Thus, prior to the legislature's enactment "to *create* the offenses of trafficking in and possession of controlled substance analogs" in December

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2012, the Franklin County Sheriff's Office and the Columbus Police Department had reached diametrically opposite conclusions on whether it was criminal to sell what was not clearly defined under R.C. Title 29 as "controlled substance analogs" until December 2012. (Emphasis added.) 2012 Am.Sub.H.B. No. 334. Moreover, the Ohio Legislature, by acting to "create the offense" rather than "clarify" or "modify" the offense in 2012, also expressed the view that prior to December 2012, it was not a criminal offense to possess or sell controlled substance analogs. 2012 Am.Sub.H.B. No. 334. Had we decided *Smith* differently and somehow held that the definitions in R.C. Title 37 created criminal liability, there would have been serious question as to how "ordinary people" could have understood what conduct was prohibited, especially when two law enforcement agencies for the same general geographical area in the State of Ohio reached different interpretations in applying the same statutes in whether or not to charge an individual with a crime. *Kolender* at 357. The evidence that there existed two diametrically differing interpretations by competent law enforcement agencies in overlapping political subdivisions strengthened our conclusion that it was not a crime until after the enactment of 2012 Am.Sub.H.B. No. 334.

{¶ 17} Additionally, the Twelfth District Court of Appeals simply held without explanation that the law prior to 2012 unambiguously made it a crime to possess and sell controlled substance analogs and that, therefore, no construction or interpretation was needed. *Shalash* at ¶ 23-28. With due respect, this analysis put the proverbial cart before the horse. More analysis was needed, at the very least to explain how under R.C. 2901.04 it conducted a strict construction analysis of the laws applied to charge *Shalash* with a crime and how it liberally construed the laws in favor of *Shalash* as the accused.

{¶ 18} The Twelfth District Court of Appeals in *Shalash* also did not explore or reason why the numerous ambiguities we have noted in our prior decisions comparing the "before" and "after" statutory schemes are in error. *Id.* For example, although the *Shalash* court quoted R.C. 3719.013 as purporting to define controlled substance analogs as Schedule I substances for the purposes of "any provision of the Revised Code," the court in that district did not discuss how this language could be squared with how "Schedule I" as defined at that time referenced only R.C. 3719.01, 3719.41, 3719.43, and 3719.44 (as all defining the contents of "Schedule I") but did not mention R.C. 3719.013. Nor did the

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court in *Shalash* address the fact that R.C. 3719.013, which purported to place controlled substance analogs on Schedule I, potentially conflicted with R.C. 3719.01(HH)(2)(a), which plainly provided that "[c]ontrolled substance analog" does not include "[a] controlled substance." The court in *Shalash* also did not discuss the ambiguity between R.C. 3719.013's any purposes language and the fact that "R.C. 3719.01 expressly limits the definitions contained therein, including the definition of 'controlled substance analog' under R.C. 3719.01(HH), to '[a]s used in this chapter'—i.e., Chapter 3719 of the Revised Code." See *Mobarak* at ¶ 7. Finally, the *Shalash* court did not discuss how it could already be a crime to possess or traffic in controlled substance analogs when the legislature (long before *Smith* first drew attention to the clarity issues of the statutory scheme then in existence) thereafter acted to "create the offenses of trafficking in and possession of controlled substance analogs." (Emphasis added.) 2012 Am.Sub.H.B. No. 334.

{¶ 19} When a statute instructs us on how the legislature requires certain laws to be interpreted, we must follow such interpretive laws. We cannot choose our own method of statutory construction of whether a statute prescribes criminal offenses or penalties when there exists R.C. 2901.04. Because that section speaks to statutory construction of criminal offenses and penalties, we cannot unilaterally declare a statute to be unambiguous without first undertaking analysis by which we strictly construe sections of the law defining offenses or penalties against the State and liberally construe them in favor of the accused. R.C. 2901.04(A). Where there exists ambiguity in the definition of a criminal offense, we must construe its application in favor of the accused and against the State. *Id.* We have previously done so in cases such as *Smith* and *Mobarak*, and we continue to follow this charge by finding that the crimes with which this Mobarak have been charged did not exist at the time he was alleged to have committed them.

{¶ 20} The State finally notes that the United States Supreme Court recently decided a case discussing federal statute, 21 U.S.C. 813, which provides that controlled substance analogs are to be treated "for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813; *McFadden v. United States*, __ U.S. __, 135 S.Ct. 2298 (2015). This, argues the State, shows that R.C. 3719.013's language was sufficient to make possession and sale of controlled substance analogs criminal in Ohio also. However, R.C. 3719.013 is not a part of R.C. Title 29, nor did R.C. Title 29 reference it. In

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fact, the definition of "Schedule I" adopted by R.C. Title 29 prior to December 2012 expressly included a number of different statutes which together explained the content of the drug schedules (R.C. 3719.01, 3719.41, 3719.43, and 3719.44) but did not include R.C. 3719.013.

{¶ 21} By contrast, even in 2011, when the defendant in *McFadden* was under investigation, 8 U.S.C. 813 was in the same title and chapter as the positive prohibition on drug possession and sale. *Compare* 21 U.S.C. 813 *with* 21 U.S.C. 841. Moreover, section 841, which contains the prohibition on possession and sale, specifically mentions controlled substance analogs, and it did so in 2011 as well. 21 U.S.C. 841(b)(7). Despite the existence of similar language in R.C. 3719.013 and 21 U.S.C. 813, the Ohio Revised Code and the United States Code differ. The Ohio Revised Code (as it existed before December 2012) presented a number of ambiguities concerning controlled substance analogs and their inclusion in the criminal code that were not and are not present in federal law. Even if the United States Code was unambiguous in its prohibition of controlled substance analogs in 2011, the Ohio Revised Code was not. Moreover, we have previously explained why *McFadden*, which was not a direct challenge to the clarity of the federal scheme, but rather, concerned a question about scienter, is distinguishable.

[T]he United States Supreme Court in *McFadden* was not asked to directly interpret the 'shall be treated' language in the Controlled Substance Analogue Enforcement Act of 1986. The issue before the United States Supreme Court concerned the knowledge necessary for conviction under the Controlled Substances Act ("CSA") when the controlled substance at issue is an analog. The United States Supreme Court merely assumed that the analog was included as a controlled substance for purposes of interpreting the mens rea requirement in the CSA. Therefore, we do not find that *McFadden* demands a different result in the present case.

Mobarak at ¶ 10.

{¶ 22} The State's sole assignment of error is overruled.

IV. CONCLUSION

{¶ 23} Based on our precedent and the reasoning expressed herein, we again hold that prior to December 26, 2012 it was not a criminal act to possess or sell controlled

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substance analogs in Ohio. The State's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, J., concurs.

LUPER SCHUSTER, J., concurs in judgment only.

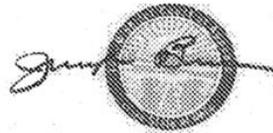
LUPER SCHUSTER, J., concurring in judgment only.

{¶ 24} I concur in judgment only because while I agree with the majority that the trial court decision should be affirmed, I would do so based solely on the precedent of this court in *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303.

Tenth District Court of Appeals

Date: 06-29-2016
Case Title: STATE OF OHIO -VS- AHMAD MOBARAK
Case Number: 16AP000162
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge Jennifer Brunner

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