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IN THE
COURT OF APPEALS OF INDIANA

Courtney L. Reece,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 22, 2021

Court of Appeals Case No. 21A-CR-864

Appeal from the Marion Superior Court

The Honorable Jennifer P. Harrison, Judge

Trial Court Cause No. 49D20-2101-F4-254

Brown, Judge.

[1] Courtney L. Reece appeals the denial of his motion to dismiss the charge of unlawful possession of a firearm by a serious violent felon. He raises two issues which we consolidate and restate as whether Ind. Code § 35-47-4-5, as applied to him, is unconstitutional. We affirm.

Facts and Procedural History

[2] On August 10, 2005, Reece was convicted of conspiracy to commit burglary as a class B felony. On January 4, 2021, the State charged Reece with Count I, unlawful possession of a firearm by a serious violent felon as a level 4 felony, and Count II, possession of marijuana as a class B misdemeanor. With respect to Count I, the State alleged that "[o]n or about January 2, 2021, Courtney Reece having previously been convicted of a serious violent felony, to-wit: Conspiracy to Commit Burglary, a Class B Felony, in Marion Superior Court Criminal Division Two under cause number 49G02-0505-FB-075604, did knowingly possess a firearm, to-wit: a handgun." Appellant's Appendix Volume II at 17.

[3] On April 16, 2021, Reece filed a motion to dismiss and argued that Count I was defective pursuant to Ind. Code § 35-34-1-4(a)(1) because Ind. Code § 35-47-4-5 was void for vagueness as it "fails to provide adequate notice that Indiana attempts and conspiracies . . . can serve as predicate serious violent felonies"

and must be dismissed under Ind. Code § 35-34-1-4(a)(5).[1] *Id.* at 26. On April 28, 2021, the court held a hearing and denied Reece's motion to dismiss.

Discussion

[4] The issue is whether Ind. Code § 35-47-4-5, as applied to Reece, is unconstitutional. Before addressing the parties' arguments, we take note of the relevant statutes. At the time Reece was convicted of conspiracy to commit burglary as a class B felony in 2005, Ind. Code § 35-47-4-5 provided that "[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony," that "'serious violent felon' means a person who has been convicted of . . . (1) committing a serious violent felony . . . or (2) attempting to commit or *conspiring to commit* a serious violent felony," and that "serious violent felony" included "burglary as a Class A felony or Class B felony." (Emphasis added).[2]

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[1] Ind. Code § 35-34-1-4(a) provides that "[t]he court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds . . . (1) The indictment or information, or any count thereof, is defective under section 6 of this chapter. . . . (5) The facts stated do not constitute an offense." Ind. Code § 35-34-1-6 provides in part that an indictment or information is defective when: "(1) it does not substantially conform to the requirements of section 2(a) of this chapter; (2) the allegations demonstrate that the court does not have jurisdiction of the offense charged; or (3) the statute defining the offense charged is unconstitutional or otherwise invalid."

[2] Subsequently amended by Pub. L. No. 151-2006, § 21 (eff. July 1, 2006); Pub. L. No. 126-2012, § 58 (eff. July 1, 2012); Pub. L. No. 158-2013, § 590 (eff. July 1, 2014); Pub. L. No. 214-2013, § 40 (eff. July 1, 2014); Pub. L. No. 168-2014, § 88 (eff. July 1, 2014); Pub. L. No. 25-2016, § 26 (eff. July 1, 2016); Pub. L. No. 65-2016, § 39 (eff. July 1, 2016); Pub. L. No. 252-2017, § 19 (eff. July 1, 2017); Pub. L. No. 198-2018, § 9 (eff. July 1, 2018); and Pub. L. No. 142-2020, § 74 (eff. July 1, 2020).

[5] In 2020, the legislature adopted Pub. L. No. 142-2020, which became effective July 1, 2020. Pub. L. No. 142-2020, § 2, added Ind. Code § 1-1-2-4, which provides:

> (a) As used in this section, "reference to a conviction for an Indiana criminal offense" means both a specific reference to a conviction for a criminal offense in Indiana (with or without an Indiana Code citation reference) and a general reference to a conviction for a class or type of criminal offense, such as:
>
> (1) a felony;
>
> (2) a misdemeanor;
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> (3) a sex offense;
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> (4) a violent crime;
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> (5) a crime of domestic violence;
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> (6) a crime of dishonesty;
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> (7) fraud;
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> (8) a crime resulting in a specified injury or committed against a specified victim; or
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> (9) a crime under IC 35-42 or IC 9-30-5 or under any other statute describing one (1) or more criminal offenses.
>
> (b) Except as provided in subsection (c), *a reference to a conviction for an Indiana criminal offense appearing within the Indiana Code also includes a conviction for any of the following*:
>
> (1) An attempt to commit the offense, unless the offense is murder (IC 35-42-1-1).
>
> (2) *A conspiracy to commit the offense.*

> (3) A substantially similar offense committed in another jurisdiction, including an attempt or conspiracy to commit the offense, even if the reference to the conviction for the Indiana criminal offense specifically refers to an "Indiana conviction" or a conviction "in Indiana" or under "Indiana law" or "laws of this state".
>
> (c) A reference to a conviction for an Indiana criminal offense appearing within the Indiana Code does not include an offense described in subsection (b)(1) through (b)(3) if:
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> (1) the reference expressly excludes an offense described in subsection (b)(1) through (b)(3); or
>
> (2) with respect to an offense described in subsection (b)(3), the reference imposes an additional qualifier on the offense committed in another jurisdiction.
>
> (d) If there is a conflict between a provision in this section and another provision of the Indiana Code, this section controls.

(Emphases added).

[6] Pub. L. No. 142-2020, § 74, amended Ind. Code § 35-47-4-5 and deleted the reference to "attempting to commit or conspiring to commit a serious violent felony" such that Ind. Code § 35-47-4-5 now provides, and provided at the time that Reece allegedly possessed a firearm on January 2, 2001, that "'serious violent felon' means a person who has been convicted of committing a serious violent felony," and "'serious violent felony' means . . . burglary (IC 35-43-2-1) as a . . . Class A felony or Class B felony, for a crime committed before July 1, 2014 . . . ."

[7] Reece argues that, just as the statute in *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002), failed to give individuals fair warning and lacked the sufficient definiteness due process requires, Ind. Code § 35-47-4-5 is similarly deficient. He also asserts that the charging information contained no reference to Ind. Code § 1-1-2-4(b). The State cites *Tiplick v. State*, 43 N.E.3d 1259 (Ind. 2015). In reply, Reece contends that *Tiplick* is distinguishable on the issue of vagueness and supports his position on the issue of a deficient charging information.

[8] The constitutionality of statutes is reviewed de novo. *Conley v. State*, 972 N.E.2d 864, 877 (Ind. 2012), *reh'g denied*. "Such review is 'highly restrained' and 'very deferential,' beginning 'with [a] presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional.'" *Id.* (quoting *State v. Moss-Dwyer*, 686 N.E.2d 109, 111-112 (Ind. 1997)).

[9] "'Due process principles advise that a penal statute is void for vagueness if it does not clearly define its prohibitions,'" and one such source of vagueness is if the statute lacks "'notice enabling ordinary people to understand the conduct that it prohibits.'" *State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017) (quoting *Tiplick*, 43 N.E.3d at 1262 (quoting *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007))). A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it adequately to inform them of the proscribed conduct. *State v. Lombardo*, 738 N.E.2d 653, 656 (Ind. 2000) (citing *State v. Downey*, 476 N.E.2d 121, 122 (Ind. 1985), *reh'g denied*). The statute "need only inform the individual of the generally proscribed conduct, [and]

need not list with itemized exactitude each item of conduct prohibited." *Id.* (quoting *Downey*, 476 N.E.2d at 122). Further, criminal statutes may be void for vagueness "for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement." *Gaines v. State*, 973 N.E.2d 1239, 1243 (Ind. Ct. App. 2012) (citing *Brown*, 868 N.E.2d at 467). Finally, "it is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Lombardo*, 738 N.E.2d at 656 (quoting *Davis v. State*, 476 N.E.2d 127, 130 (Ind. Ct. App. 1985) (quoting *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L.Ed.2d 706 (1975)), *reh'g denied*, *trans. denied*).

[10] To the extent resolution of this issue requires that we interpret Ind. Code §§ 35-47-4-5 and 1-1-2-4, we interpret statutes "with a primary goal in mind: 'to fulfill the legislature's intent.'" *Jackson v. State*, 105 N.E.3d 1081, 1087 (Ind. 2018) (quoting *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016)), *reh'g denied*. If a statute is unambiguous, we must give the statute its clear and plain meaning. *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002). A statute is unambiguous if it is not susceptible to more than one interpretation. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). If a statute is susceptible to multiple interpretations, we must try to ascertain the legislature's intent and interpret the statute so as to effectuate that intent. *Bolin*, 764 N.E.2d at 204. We presume the legislature intended logical application of the language used in the statute, so as to avoid unjust or absurd results. *Id.* A statute should be examined as a whole, avoiding excessive reliance upon a strict literal meaning or the selective

reading of individual words. *Mayes v. Second Injury Fund*, 888 N.E.2d 773, 776 (Ind. 2008).

[11] In *Healthscript*, the State charged Healthscript, Inc. ("Healthscript") with Medicaid Fraud for allegedly overcharging Medicaid for products it provided to its customers. 770 N.E.2d at 812. The trial court denied Healthscript's motion to dismiss. *Id.* On appeal, the Indiana Supreme Court reversed, finding that the statute under which Healthscript was charged was too vague to meet the requirements of due process. *Id.* Specifically, the Court found that the penal statute at issue, Ind. Code § 35-43-5-7.1(a)(1), cross-referenced Ind. Code Article 12-15, which the Court described as "an entire article of the Indiana Code, covering 50 pages of the 1993 Code and comprising 280 sections organized in 37 chapters." *Id.* at 816. The Court held that "[t]he effect of the statute . . . is to say that a provider is prohibited from filing a Medicaid claim 'in violation of' nothing more specific than this vast expanse of the Indiana Code," which the Court held did not constitute "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* (quoting *United States v. Bass*, 404 U.S.336, 348, 92 S. Ct. 515 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340 (1931))). The Court stated that to understand what conduct Ind. Code § 35-43-5-7.1(a)(1) prohibits "requires following a cross-reference to Ind. Code § 12-15, then through the 50 pages and 280 sections of that article, and then to the language of an agency regulation in the Indiana Administrative Code." *Id.* The Court concluded that "[t]his lacks the 'sufficient definiteness' that due process requires

for penal statutes" and that the general reference to Ind. Code Article 12-15 in Ind. Code § 35-43-5-7.1(a)(1) was too vague in defining the conduct sought to be proscribed to meet the requirements of due process. *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855 (1983)).

[12] In *Tiplick v. State*, the State charged Christopher Tiplick with possessing, selling, and dealing in the chemical compound designated XLR11 and dealing and conspiracy to commit dealing in look-alike substances. 43 N.E.3d at 1260-1261. He sought dismissal of all counts, on the grounds that: (1) the charging information failed to reference the Indiana Board of Pharmacy's Emergency Rule 12-493(E), which criminalized XLR11; (2) the applicable statutory schemes were impermissibly vague under both the United States and Indiana Constitutions; and (3) the legislature impermissibly delegated the authority to criminalize XLR11 to the Pharmacy Board under the Indiana Constitution. *Id.* at 1261. The trial court denied Tiplick's motion. *Id.*

[13] On appeal, the Indiana Supreme Court explained that regulation of synthetic cannabinoids, also known as spice, is a particularly challenging pursuit, as minor variants in chemical structure can place the substances beyond the reach of criminal statutes without diminishing their psychotropic effects. *Id.* The Court observed that the legislature made two significant revisions to the criminal code in 2012 in an attempt to match pace with the evolving chemistry with respect to synthetic cannabinoids. *Id.* First, Ind. Code § 35-31.5-2-321 ("Section 321") re-defined the term "synthetic drug" to include a broad range of compounds and chemical analogs, including "any compound determined to be

a synthetic drug by rule adopted under IC 25-26-13-4.1." *Id.* Second, the legislature added Ind. Code § 25-26-13-4.1 ("Section 4.1"), which empowered the Indiana Board of Pharmacy to adopt emergency rules declaring additional compounds to be a "synthetic drug," which would become effective thirty days after publication in the Indiana Register and would remain in effect until June of the following year. *Id.*

[14] Pursuant to its authority under Section 4.1, the Pharmacy Board filed Emergency Rule 12-493(E) with the Indiana Register (the "Emergency Rule"), classifying thirteen additional compounds as "synthetics," including "XLR11 [(1-(5-fluoropentyl)indol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone]."[3] *Id.*

[15] The Court distinguished *Healthscript* and held:

> [T]he State has provided a much more confined universe of investigation. "Synthetic drug" is defined in Section 321, it names the Section 4.1 emergency rules as the only additional source for prohibited substances, and Section 4.1(c) describes where to look for those published rules, based on the procedures contained in Indiana Code section 4-22-2-37.1 (2012). This is not a "maze," but rather a chain with three links—three discrete statutes which give clear guidance as to how to find everything falling within the definition of "synthetic drug" under Section 321. Such a statutory scheme is not unduly vague.

[3] Bracketed text appears in the *Tiplick* opinion.

Id. at 1264.

[16] With respect to Tiplick's argument that the charging information was required to reference the Emergency Rule rather than just the criminal statute, because without it, there was nothing to indicate with specificity the criminality of XLR11, the Court held:

> On this technical point, we find Tiplick to be correct. In *State v. Jennings*, the defendant was charged with possession of a "dangerous drug," (namely, marijuana) under Indiana Code section 16-6-8-2(j), which included "any substance which the state board of pharmacy, after reasonable notice and hearing, shall by promulgated rule determine has qualities similar to that of any dangerous drug." 262 Ind. 443, 444-45, 317 N.E.2d 446, 447-48 (1974) (Givan, J., dissenting). The possession occurred on August 3, 1973, during a narrow gap between effective statutes where marijuana was only defined as a "dangerous drug" pursuant to such a Pharmacy Board rule. *Id.* at 445, 317 N.E.2d at 447-48. We upheld the dismissal of the information, finding:
>
> > There being no statutory offense alleged, it was incumbent on the State to allege that the appellee violated the promulgated rule of the Board of Pharmacy . . . Yet, nowhere in the record before us does the Board of Pharmacy rule appear. The affidavit was clearly defective in that it alleged no criminal offense.
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> *Id.* at 444, 317 N.E.2d at 447. The same circumstances—almost to the letter—have occurred here: Tiplick was charged under Indiana statutes with dealing, conspiracy to commit dealing, and possession of synthetic drugs. Yet, the only synthetic drug listed in the information or the probable cause affidavit is XLR11. XLR11 was only illegal at that time pursuant to the Emergency Rule, and neither the charging information nor the probable

> cause affidavit reference that Rule. We thus find the charging information inadequate under *Jennings*.
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> The State urges us to disavow *Jennings*, arguing that subsequent Indiana precedent has imposed a lesser standard on the allegations in the charging information: "An information that enables an accused, the court and the jury to determine the crime for which conviction is sought satisfies due process." State's Br. at 13 (quoting *Dickenson v. State*, 835 N.E.2d 542, 550 (Ind. Ct. App. 2005)[, *trans. denied*,] and *Lampitok v. State*, 817 N.E.2d 630, 636 (Ind. Ct. App. 2004)[, *reh'g denied*, *trans. denied*]). We have no quarrel with the standard used in *Dickenson* and *Lampitok* for determining the adequacy of an information in general, and we agree with the State that fairness does not mandate dismissal under these circumstances, as Tiplick is at this point fully informed that the underlying statutory basis for the charges is the Emergency Rule, even if the information was not completely explicit in that regard. However, we believe we remain duty-bound to follow *Jennings* under the highly specific factual circumstances presented, given the extreme parity of the two cases.

Id. at 1270. The Court held it was obligated to dismiss the counts alleging dealing, conspiracy to commit dealing, and possession of synthetic drugs. *Id.* It noted:

> We wish to emphasize, however, that as we found no constitutional or statutory infirmity to the charges, the State remains free to re-file an amended information with proper reference to the Emergency Rule. *See* Ind. Code § 35-34-1-13(b) (2014) ("In any case where an order sustaining a motion to dismiss would otherwise constitute a bar to further prosecution of the crime charged, unless the defendant objects to dismissal, the granting of the motion does not bar a subsequent trial of the defendant on the offense charged."); *Joyner v. State*, 678 N.E.2d

> 386, 394 (Ind. 1997) ("[T]he dismissal of a charge will not bar the renewal of proceedings unless the substantial rights of the accused have been prejudiced.")[, *reh'g denied*].

Id. at 1270 n.13.

[17] Unlike in *Healthscript*, in which the Court found that to understand the prohibited conduct one would have to review an entire article of the Code as well as "the language of an agency regulation in the Indiana Administrative Code," 770 N.E.2d at 816, and *Tiplick*, which involved the definition of a drug in the context of the evolving chemistry of synthetic cannabinoids and the application of an emergency rule adopted by the Indiana Board of Pharmacy, 43 N.E.3d 1261-1270, the present case requires an examination of only Ind. Code § 35-47-4-5 and Ind. Code § 1-1-2-4, which is found at the beginning of the Indiana Code under the broadly applicable Ind. Code Chapter 1-1-2, which is titled "Laws Governing the State." Further, that Ind. Code § 35-47-4-5 does not specifically reference Ind. Code § 1-1-2-4 does not render the statute vague as applied. The Indiana Supreme Court has observed that "[t]he legislature knows how to apply a statutory definition broadly" and "[e]xamples abound of the legislature's applying a definition *throughout the entire code*, *see id.* § 1-1-4-5(a), as well as throughout a title, article, or chapter." *Rainbow Realty Grp., Inc. v. Carter*, 131 N.E.3d 168, 174 (Ind. 2019) (emphasis added). *See also S.B. v. Seymour Cmty. Sch.*, 97 N.E.3d 288, 294 (Ind. Ct. App. 2018) (observing that "person" was not specially defined within the Indiana Civil Protection Order Act, holding that, "[a]ccordingly, we look to Indiana Code Chapter 1-1-4,

which provides generally applicable statutory definitions," and noting that, "[h]ad the General Assembly sought a different definition special to the Act, it would have provided for that definition within the Act itself"), *reh'g denied*, *trans. denied*. Under these circumstances, we cannot say that Ind. Code § 35-47-4-5 is void for vagueness as applied to Reece.

[18] For the foregoing reasons, we affirm the trial court's denial of Reece's motion to dismiss.

[19] Affirmed.

May, J., and Pyle, J., concur.