

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. Yor-24-68

State of Maine
Appellee

v.

Calixte Fleury
Defendant/Appellant

On appeal from guilty verdicts in the Biddeford Unified Criminal Court

BRIEF FOR APPELLANT

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PROCEDURAL HISTORY

The appellant, Calixte Fleury, was indicted on April 6, 2021, on the following charges:

- Count 1: Unlawful Trafficking of Scheduled Drugs pursuant to Title 17-A M.R.S. § 1103(1-A)(A) [R. 15-16].
- Count 2: Criminal Forfeiture pursuant to 15 M.R.S. § 5826. [R. 15-16].

A Superseding Indictment was issued on November 7, 2023, charging Mr. Fleury with:

- Count 1: Aggravated Unlawful Trafficking of Scheduled Drugs pursuant to Title 17-A M.R.S. § 1105-A(1)(M) [R. 17-19].
- Count 2: Unlawful Trafficking of Scheduled Drugs pursuant to Title 17-A M.R.S. § 1103(1-A)(A) [R. 17-19].
- Count 3: Unlawful Possession of Scheduled Drugs pursuant to Title 17-A M.R.S. § 1107-A(1)(B)(8) [R. 17-19].
- Count 4: Criminal OUI pursuant to 29-A M.R.S. § 2411(1-A)(A). [R. 17-19].
- Count 5: Criminal Forfeiture pursuant to 15 M.R.S. § 5826. [R. 17-19].

Mr. Fleury's trial was held on December 13, 2023. [R. 7]. He was found guilty on Counts 1-4. [R. 7]. On January 19, 2024, he was sentenced as follows:

- Count 1: A term of seven years to the Department of Corrections, all but four years suspended, and four years' probation. [R. 8].
- Count 2: A term of three years to the Department of Corrections to be served concurrent to the sentence on Count 1. [R. 9].
- Count 3: A term of three years to the Department of Corrections to be served concurrent to the sentence on Count 1 [R. 9].
- Count 4: A term of thirty days to the York County Jail to be served concurrent to the sentence on Count 1. [R. 10-11]

Mr. Fleury filed a notice of appeal of his convictions and sentence on February 13, 2024. [R. 10]. Mr. Fleury's requested for discretionary appeal was denied on April 23, 2024. His direct appeal was subsequently docketed in this Court.

STATEMENT OF FACTS

On September 18, 2020, the defendant, Calixte Fleury, was driving south on I-95 about two miles past the toll booth headed toward Kittery when he passed the car of Kevin Cullen at a high rate of speed. [Tr. 38]. Without warning, Mr. Fleury's car went off the road, down an embankment, and slammed into a tree. [Id.]. Mr. Cullen called 9-1-1, [Tr. 38], and Maine State Trooper Thomas Pappas

responded to the crash scene. [Tr. 45]. Mr. Fleury was seated in the driver's seat of his vehicle with the door open when Trooper Pappas walked up. [Tr. 49-50]. Mr. Fleury told Trooper Pappas that his car had hit a sidewalk, which caused the crash. [Tr. 50]. Trooper Pappas testified that there were no sidewalks on I-95. [Tr. 50]. Trooper Pappas could smell the odor of alcohol coming from Mr. Fleury's breath, [Tr. 50], and saw a bag of blue tablets in the driver's side door pocket. [Tr. 50]. Trooper Pappas believed that the tablets were 30 milligram Oxycodone tablets. [Tr. 50]. It was later determined that the 53.5 tablets totaling six grams were a mix of fentanyl and tramadol. [Tr. 69, 113].

Mr. Fleury was taken for an Intoxilyzer test, but the machine was malfunctioning, and the test could not be performed. [Tr. 51]. Mr. Fleury consented to a blood test and an individual was called to perform that test. [Tr. 52]. Mr. Fleury's blood test eventually came back as a .09. [Tr. 70]. While waiting for the blood test, Mr. Fleury asked to use the bathroom. [Tr. 53]. Trooper Pappas conducted a search of Mr. Fleury before he went to the bathroom and found a bag in Mr. Fleury's groin area that contained brown powder that was later determined to be 18.0421 grams of fentanyl. [Tr. 53, 113]. Trooper Pappas subsequently found \$908.00 on Mr. Fleury. [Tr. 78].

Mr. Fleury's trial occurred on December 13, 2023, over three years from the date of his arrest. [R. 7]. In the interim period 17-A M.R.S. § 1101, the Maine

statute that defines “trafficking” was amended. *See* 17-A M.R.S. § 1101, as amended by PL 2015, c. 346, § 1.

ISSUE FOR REVIEW

- I. Whether the definition of “trafficking” pursuant to 17-A M.R.S. § 1101(17) that was in effect at the time of Mr. Fleury’s arrest was unconstitutional as applied to him in light of the statutory amendment enacted while his case was pending?

ARGUMENT

- I. THE DEFINITION OF “TRAFFICKING” PURSUANT TO 17-A M.R.S. § 1101(17) THAT WAS IN EFFECT AT THE TIME OF MR. FLEURY’S ARREST WAS UNCONSTITUTIONAL AS APPLIED TO HIM IN LIGHT OF THE STATUTORY AMENDMENT ENACTED WHILE HIS CASE WAS PENDING.**

This Court reviews a statutory challenge de novo. *State v. Letalien*, 2009 ME 130, ¶ 15, 985 A. 2d 4, 12 (Me. 2009) (“We review de novo a challenge to the validity of a statute as a matter of law.”); *State v. Bjorkaryd-Bradbury*, 2002 ME 44, ¶ 9, 792 A.2d 1082, 1084 (Me. 2002) (noting, “[statutory construction is a question of law, and we review the trial court's construction of a statute de novo”). The Court must also “strictly construe criminal statutes.” *State v. McLaughlin*, 2002 ME 55, ¶5, 794 A.2d 69, 72 (Me. 2002) (internal citations omitted). Because the alleged constitutional violation was not raised below, even though it is of

constitutional dimension, this Court reviews it only for “obvious error affecting substantial rights.” *State v. Crocker*, 435 A.2d 58, 62 (Me. 1981) (citing M.R. Crim. P. 52(b)). “[T]o vacate a conviction based on the obvious error standard of review, there must be (1) an error, (2) that is plain, ... (3) that affects substantial rights ... [and] (4) the error [must] seriously affect[] the fairness and integrity or public reputation of judicial proceedings.” *State v. Tripp*, 2024 ME 12, ¶ 21, 314 A.3d 101, 112.

In reviewing challenges to the constitutionality of a statute, it is the challenger that has the burden of “establishing its infirmity.” *State v. Haskell*, 2001 ME 154, ¶ 3, 784 A.2d 4, 7 (Me. 2001). This Court “assume [s] that the Legislature acted in accord with constitutional requirements if the statute can reasonably be read in such a way, notwithstanding other possible unconstitutional interpretations of the same statute.” *Haskell*, 2001 ME at ¶ 4 (internal citations omitted). “Further, all reasonable doubts must be resolved in favor of the constitutionality of the statute.” *Bouchard v. Dep't of Pub. Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92, 96.

The Maine Constitution's concept of due process is identical to that contained in the United States Constitution, *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 24 n.9 (Me. 1981), and as the United States Supreme Court has held, “absent a countervailing state interest of overriding significance,” a generally valid statute or rule “may be held constitutionally invalid as applied

when it operates to deprive an individual of a protected right.” *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

“To state a substantive due process claim, a plaintiff must allege facts showing that the government has engaged in conduct that ‘shocks the conscience and violates the decencies of civilized conduct.’” *Doe v. Bd. of Osteopathic Licensure*, 2020 ME 134, ¶ 20, 242 A.3d 182, 189 (quoting *LeGrand v. York Cnty. Judge of Prob.*, 2017 ME 167, ¶ 38, 168 A.3d 783. Because the constitutional violation here is clear from the record, this Court can address whether the statute is unconstitutional as applied. *In re Guardianship of Chamberlain*, 2015 ME 76, 118 A.3d 229, 234.

At the time Mr. Fleury was arrested in 2020, the statute that was in effect defined “trafficking” as:

- A. To make, create, manufacture;
- B. To grow or cultivate, except for marijuana;
- C. To sell, barter, trade, exchange or otherwise furnish for consideration;
- D. To possess with the intent to do any act mentioned in paragraph C;
- E. To possess 2 grams or more of heroin or 90 or more individual bags, folds, packages, envelopes or containers of any kind containing heroin; or
- F. To possess 2 grams or more of fentanyl powder or 90 or more individual bags, folds, packages, envelopes or containers of any kind containing fentanyl powder.

17-A M.R.S. § 1101(17), eff. Sept. 19, 2019. However, while Mr. Fleury’s case was pending, the Maine Legislature amended the statute to delete subsections E &

F. *See* 17-A M.R.S. § 1101(17), as amended by PL 2015, c. 346, § 1, eff. Oct. 18, 2021. Thus, prior to 2021, Maine had a trafficking statute that criminalized possession of two grams or more of fentanyl with no evidence whatsoever that would demonstrate “trafficking” as it is commonly defined. *See* Black's Law Dictionary (11th ed. 2019) (defining drug trafficking as “The act of illegally producing, importing, selling, or supplying significant amounts of a controlled substance”).

As of May 2021, as many as thirty-nine states required evidence that a person intended to sell or distribute drugs before they can be convicted of trafficking. Testimony Before Joint Standing Committee on Criminal Justice and Public Safety, Maine 130th Legislature, May 14, 2021, Testimony of Rachel Talbot Ross on LD 1675, An Act to Amend Certain Provisions of Maine Drug Laws. Recognizing this deep injustice, in the time period between Mr. Fleury’s arrest and his trial, the Maine Legislature Amended the definition of “Trafficking” in 17-A M.R.S. § 1101 to eliminate the possibility that a defendant could be convicted of drug possession without any indication that they were manufacturing, selling, trading, or exchanging drugs. *See* 17-A M.R.S. § 1101(17) (2024). Although generally, “actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby,” 1 M.R.S. § 302, the statute as applied to Mr. Fleury was unconstitutional.

Mr. Fleury has been caught in a situation where the Legislature clearly intended not to punish a person for trafficking who is in possession of drugs absent evidence of the sale or distribution of those drugs, but 1 M.R.S. § 302 is barring him from taking advantage of its ameliorative effects. A more just and constitutional result would be application of the amended statute which would still allow the State the benefit of the permissible inference that a person in possession of a certain quantity of drugs is unlawfully trafficking, but the inference could be overcome by showing, as in this case, a lack of evidence of the selling, manufacturing, or distributing. *See* 17-A M.R.S. § 1103(3) (“Proof that the person intentionally or knowingly possesses any scheduled drug that is in fact of a quantity, state or concentration as provided in this subsection, gives rise to a permissible inference under the Maine Rules of Evidence, Rule 303 that the person is unlawfully trafficking in scheduled drugs.”). *See also United States v. Mohamed*, 920 F.3d 94, 103-104 (1st Cir. 2019) (“The permissible inference does not negate the distributive intent of the [trafficking statute]”) (*citing State v. Peakes*, 440 A.2d 350, 354 (Me. 1982)).

Here, the evidence of trafficking, as it is commonly known, is scant. Although Trooper Pappas concluded that money is an indicia of trafficking drugs (Mr. Fleury had \$908 in his possession) Trooper Pappas gave no testimony as to how money is used in drug trafficking, no testimony about denominations of

money used in trafficking, and in no way tied the money found on Mr. Fleury to drug trafficking as it is commonly defined. [Tr. 77-78]. Trooper Pappas admitted that he never witnessed Mr. Fleury selling or dealing drugs, had no witnesses that observed Mr. Fleury selling drugs, nor any video evidence thereof. [Tr. 70]. Trooper Pappas further testified that he did not find in Mr. Fleury's car any evidence commonly used in the selling of drugs such as a scale, baggies of any type, or small amounts of drugs in baggies prepared for sale. [Tr. 72-74]. Absent evidence of trafficking other than the amount of fentanyl possessed, prosecution of Mr. Fleury for unlawful trafficking was constitutionally invalid as applied to him. *Boddie*, 401 U.S. at 379.

CONCLUSION

For the reasons set forth herein, this Court should reverse Mr. Fleury's drug related convictions.

Date: June 28, 2024

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CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Calixte Fleury, hereby certify that on this date I made service of two copies of the foregoing brief and one copy of the Appendix, by email and mail, to the following counsel:

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