Maine Supreme Judicial Court
Sitting as the Law Court

Docket No. Pen-24-303

State of Maine,

Appellee,

v.

John D. Schlosser,

Appellant.

On Appeal from the
Unified Criminal Docket, Penobscot County

Appellant's Brief

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other Authorities

Statement of the Case

John D. Schlosser was found guilty of aggravated trafficking in scheduled drugs (17-A M.R.S. § 1105-A(1)(M), Class A) (Count 1) and unlawful trafficking in scheduled drugs (17-A M.R.S. § 1103(1-A)(A), Class B) (Count 2) after a jury trial. (A. 16.) He was also found guilty of violating conditions of release (15 M.R.S. § 1092(1)(A), Class E) (Count 3) by the trial judge, having waived his right to a jury trial on that charge, and the Court granted the State's count for criminal forfeiture (15 M.R.S. § 5826) (Count 4). (A. 16, 18.) On Count 1, the trial court sentenced Schlosser to 7 years' incarceration, with all but 4 years suspended, and 3 years of probation. (A. 16.) On Counts 2 and 3, the trial court sentenced Schlosser to 4 years' incarceration and 30 days incarceration, respectively, to run concurrent with Count 1. (A. 16-17.)

Before trial, Schlosser moved to suppress evidence arising from a warrantless search and seizure of Schlosser's person on May 27, 2023. (A. 39.) That day, around 9:00 a.m., Officer Nathaniel Alvarado of the Bangor Police Department was on duty in a marked cruiser. (A. 19.) Officer Alvarado was driving on 3rd Street, between Cedar Street and Union Street. (A. 19.) As Officer Alvarado neared Union Street, he approached the back of several businesses facing Union Street (A. 19.)

An area behind one of those buildings contained a driveway leading to loading bays and two dumpsters. (A. 19.)

The driveway is a large, open area with a loading dock at the corner of the building. (Supp. Tr. at 26:6-27:23, State's Ex. 1 at 1:03.) A narrower portion of the driveway leads further back to two dumpsters. (Supp. Tr. at 26:6-27:23, State's Ex. 1 at 1:03.) Ofc. Alvarado testified about two no trespassing signs in the area—one to the left on yellow barricade postings in front of an area where there is electrical equipment, and another on a corner of a brick building adjacent to a loading bay, behind which the narrower portion of the driveway leads to two dumpsters. (Supp. Tr. at 26:6-27:23, State's Ex. 1 at 1:03.)[1] Officer Alvarado has encountered people doing or selling drugs in the secluded, far-back area near the dumpsters, and the business owner has complained about drug activity in that area, too. (Supp. Tr. 18:21-20:7.)

Officer Alvarado saw Schlosser in the driveway, pulled in, and confronted Schlosser. (A. 19.) Whereas the complaints of drug activity involved the far-back, secluded area, Schlosser was standing in the middle of the parking lot close to 3rd Street. (Supp. Tr. 33:11-36:1; State's Ex. 1 at 1:03.) Officer Alvarado testified that

[1] A third sign consistent in appearance with the two no trespassing signs is visible on the corner of the building near 3rd Street as Officer Alvarado pulls into the driveway; however, no testimony was offered at the hearing about this sign.

he recognized Schlosser as someone who had been observed in the vicinity of drug houses. (A. 19.) The video shows that Schlosser was folding an item of clothing as Officer Alvarado pulled into the parking lot, and that he began walking toward 3rd Street with his hand in the vicinity of his pocket. (State's Ex. 1 at 1:00-1:12.) Officer Alvarado said, "come here," and Schlosser immediately turned to his right to meet Officer Alvarado by the driver's side door of Officer Alvarado's cruiser. (State's Ex. 1 at 1:00-1:12.) After learning that Schlosser was on bail conditions requiring that he submit to searches based upon articulable suspicion for illegal drugs, Officer Alvarado searched Schlosser's person. (A. 19-20.) That search yielded cocaine and fentanyl. (A. 19.)

The trial court denied the motion to suppress in a written order dated January 23, 2024. (A. 19-20.) In short, the order concluded that Alvarado had reasonable suspicion to stop Schlosser for his unauthorized presence in the parking lot, and reasonable suspicion that he possessed drugs because Schlosser was trespassing in an area frequented by drug users, engaged in furtive behavior in that area, and had been observed previously in areas frequented by drug users. (A. 20.) Schlosser moved for reconsideration and for additional findings of fact as to the specific evidence supporting the conclusion that Schlosser was trespassing, and

descriptions of Schlosser's conduct that the trial court considered constitute furtive behavior. (A. 119.) The trial court denied the motion. (A. 119.)

Sometime in March 2024, the State filed a witness list including Special Agent (S/A) Vafiades. (A. 60.) Trial counsel also represented to the trial court, without dispute from the State, that he did not know what S/A Vafiades was supposed to testify about until sometime in April. (Trial Tr. 20:19-21:10, A. 30.) Trial counsel requested an expert witness report for S/A Vafiades on April 22, 2024, and the State refused because, in the State's view, S/A Vafiades' testimony about market drug prices would be lay testimony rather than expert opinions. (Trial Tr. 10:12-17:11, 24:4-26:5.)

Schlosser moved in limine on May 14, 2024 to exclude S/A Vafiades' testimony, because that testimony qualifies as expert testimony under M.R. Evid. 701, and the State had failed to designate him as an expert. (A. 55-60.) In the motion, Schlosser observed that he had requested in November 2023 "names of all expert witnesses who might be called at trial" and additional information, and that the State did not provide any responsive materials or an objection. (A. 60.) The motion continued to explain that trial counsel and the prosecutor corresponded about S/A Vafiades' testimony, and that the State's objection to producing a report was seemingly not final until after jury selection:

> The State did not name this witness on any discovery materials until it included his name on its first witness list in late March 2024. About one month later the undersigned counsel requested discovery materials pertinent to S/A Vafiades, at which point the AAG stated he would be calling him as a lay opinion witness. The AAG then suggested he would try to elicit the desired testimony from an actual witness at trial and seemingly did not make his objection to an expert witness report final until after jury selection.

(A. 60-61.) Jury selection was on May 10, 2024—four days before Schlosser moved in limine to exclude S/A Vafiades' testimony.

The trial court agreed with Schlosser that S/A Vafiades was an expert witness and appeared ready to exclude his testimony. (Trial Tr. at 19:16-24, A. 29.) The attorney for the State, however, argued that the defense failed to file a motion to compel, and that the rules do not require an expert report unless there is a motion to compel. (Trial Tr. at 19:25-21:22, A. 29-31.) The trial court, although stating it appeared to be "sharp practice" by the State, ultimately concluded there was no discovery violation. (Trial Tr. 21:23-26:3, A. 31-36.) Schlosser was offered a continuance (Trial Tr. 25:7-12), and the trial moved forward.

The jury ultimately found Schlosser guilty, and the trial court held a sentencing hearing on June 25, 2024. (Sent. Tr. 1:11.) When discussing the second step of the *Hewey* analysis, the trial court observed, "[t]here are aggravating factors, however. I am satisfied that there -- the evidence is that Mr. Schlosser's cell phone was very active during the time he had interaction with the police

officer." (Sent. Tr. 17:22-25.) Earlier, in the State's sentencing argument, the prosecutor pointed out that "business was apparently booming" for Schlosser and stated that Schlosser's phone "would not stop ringing with various and sundry names or code names[.]" (Sent. Tr. at 3:22-4:6; *see also* Trial Tr. at 66:5-23.)

Schlosser timely appealed and applied for leave to appeal his sentence. (A. 14.) The sentencing review panel granted Schlosser's application on October 28, 2024. *See* SRP-24-304.

Questions Presented

1. Whether the trial court erred by denying Schlosser's motion to suppress, which challenged the search and seizure of Schlosser's person.

2. Whether the trial court erred by finding that the State had not committed a discovery violation, when it disclosed an expert witness long after the dispositional conference and shortly before trial.

3. Whether the trial court erred by failing to instruct the jury that unlawful possession of scheduled drugs was a lesser included offense of aggravated trafficking in scheduled drugs.

4. Whether the trial court erred in its sentencing analysis, when it considered the quantity of drugs at step one of the *Hewey* analysis, and then considered that Schlosser's phone was "very active" during the arrest as an aggravating factor at step two of the *Hewey* analysis.

Argument

I. The trial court should have granted Schlosser's motion to suppress.

The trial court erred by denying Schlosser's motion to suppress Officer Alvarado's seizure and the search of Schlosser's person. This Court "appl[ies] two standards of review to the denial of a motion to suppress; we review the factual findings for clear error and the legal issues de novo." *State v. Akers*, 2021 ME 43, ¶ 23, 259 A.3d 127. When a recording of the police interaction is admitted at the suppression hearing, the Court "may, [in its] … appellate capacity, listen to and view the recordings in their entirety as [it] review[s] the court's findings and conclusions." *State v. Athayde*, 2022 ME 41, ¶ 29, 277 A.3d 387. Because Schlosser moved for further findings of fact, this Court may not infer that the trial court found all the necessary facts supported by the record to support a denial of the motion to suppress. *Cf. State v. Sasso*, 2016 ME 95, ¶ 19, 143 A.3d 124.

A. Officer Alvarado lacked reasonable suspicion that Schlosser possessed illegal drugs when searching his person.

Before the police conduct a search, they must obtain a warrant, unless the search "falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382 (2014). No exception to the warrant requirement arguably applied, but for the fact that Schlosser was subject to a bail condition requiring that he submit to searches upon articulable suspicion for illegal drugs.

(Supp. Tr. 21:20-24.) *United States v. Gates*, 709 F.3d 58, 64 (1st Cir. 2013) (upholding a search conducted pursuant to bail conditions). The question, therefore, is whether Officer Alvarado had reasonable suspicion that Schlosser had drugs on his person when searching him.

"The reasonable suspicion standard requires less than probable cause that a crime was being committed, but more than speculation or an unsubstantiated hunch." *State v. Caron,* 534 A.2d 978, 979 (Me. 1987) (citation omitted). "Whether an officer's suspicion is objectively reasonable is a pure question of law[,]" which this Court therefore reviews de novo. *State v. Lovell*, 2022 ME 49, ¶ 18, 281 A.3d 651.

The trial court's findings supporting its conclusion that Officer Alvarado had reasonable suspicion that Schlosser possessed illegal drugs were: Schlosser's unauthorized presence in the driveway, that the area is "frequented by drug users," that Schlosser had previously been observed in areas frequented by drug users, and Schlosser's "furtive behavior" in that area. Because Schlosser requested additional findings of fact as to how his behavior was furtive and to the determination that he was trespassing, this Court is constrained to reviewing the "explicit findings" on those two issues. *Ehret v. Ehret*, 2016 ME 43, ¶ 12, 135 A.3d 101.

Applying this standard of review, the Court should disregard the trial court's reliance on Schlosser's "furtive" behavior. "Furtive" is an adjective that, when unaccompanied by a description of specific conduct, carries no factual or legal significance. For example, in *Meridian Med. Sys., LLC v. Epix Therapeutics, Inc.*, 2021 ME 24, 250 A.3d 122, this Court considered what to make of a civil complaint's allegations that the defendants "corrupted" other individuals. *Id.* ¶ 4. Disregarding that allegation, the Court pointed out that "[w]hile the word 'corrupt' may own literary value, it adds no substance to a legal cause of action." *Id.* (internal footnote omitted). Just as saying that "the defendants 'corrupted' the co-managers of MMS" did not provide fair notice of what the defendants did in *Meridian Med. Sys.*, *id.*, saying that Schlosser engaged in "furtive" behavior here does not tell us what specific actions the trial court found were indicative of drug possession.

This is no surprise, because there was no "furtive" conduct. The Massachusetts Supreme Judicial Court has noted that "[f]urtive is defined as 'done by stealth' or 'secret.'" *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 39, 138 N.E.3d 1012, 1018 (2020) (citing Webster's Third New International Dictionary 924 (1963)). The video shows that Schlosser was folding an item of clothing as Officer Alvarado pulled into the parking lot, began walking, and had his hand in the

vicinity of his pocket. Although Officer Alvarado claimed that Schlosser was trying to conceal something in his pocket, the video disproves that testimony. And Schlosser was walking diagonally towards Union Street, bringing him closer to Officer Alvarado's cruiser which was pulling into the driveway. And when Officer Alvarado said, "come here," Schlosser immediately changed his trajectory to meet Alvarado by the driver's side door of Alvarado's cruiser. This is inconsistent with the argument that Schlosser engaged in "furtive" behavior suggestive of stealth or secrecy. *Cf. State v. Griffin*, 459 A.2d 1086, 1090 (Me. 1983) (reasonable suspicion where a suspect reacted in a manner suggesting that he was trying to avoid being seen).[2] And finally, even if the record suggested that Schlosser was trying to walk away from the cruiser (which it does not), Schlosser was free to ignore the officer and "go on his way" unless and until he was lawfully detained. *Florida v. Royer*, 460 U.S. 491, 498 (1983).

The trial court's analysis about Schlosser trespassing in an area frequented by drug users was also flawed. To start, there was no evidence that Schlosser's

[2] *Griffin* is distinguishable because the subject was attempting to avoid being seen. *Griffin* is also of limited value because it is premised on the outdated notion that, "[i]n rural Maine, where there is no history of institutionalized fear of the police on the part of the civilian population, furtive behavior or actions suggesting that the subject does not want to be seen by the police at a particular time or place may furnish a rational foundational basis for an officer's reasonable suspicion that the subject is involved in unlawful conduct." *Griffin*, 459 A.2d at 1090. Citizens may wish to avoid contact with law enforcement for any number of lawful reasons unrelated to criminal wrongdoing.

presence was in fact trespassing. There were two "no trespassing" signs posted in the parking lot identified in the testimony: (1) one to the left on yellow barricade postings in front of an area where there is electrical equipment, and (2) another on a corner of a brick building adjacent to a loading bay, behind which a narrower portion of the driveway leads to two dumpsters.[3] No signage provided that the area in which Schlosser was standing was posted as "no trespassing." So especially when considering that the trial court denied Schlosser's motion for additional findings, the trial court's conclusion that Schlosser was "trespassing" is unsustainable.

Not only was there inadequate evidence that Schlosser was trespassing, the evidence also showed that Schlosser was not in the area in which Officer Alvarado had seen prior drug activity. Officer Alvarado testified that the prior drug trafficking activity he saw was in a secluded area by the dumpsters. (Supp. Tr. 18:21-20:7.) This makes sense—the people he encountered were likely trying to avoid detecting by hiding in an area that is difficult to see from 3rd Street. In contrast, Schlosser was standing by himself in an open area of the parking lot, close to 3rd Street and far from the dumpsters, and not attempting to be secretive or

[3] A third sign is briefly visible on the video at the corner of the building, adjacent to yellow post barriers encapsulating some pipes, as Officer Alvarado pulls into the parking lot. No testimony was offered, however, about this sign.

otherwise hide his presence. (Supp. Tr. 33:11-36:1; State's Ex. 1.) Moreover, Officer Alvarado testified that he could not identify whether Schlosser was coming from the dumpster area, or a separate walking path. (Supp. Tr. 35:6-17.) So contrary to the trial court's analysis, Schlosser was not in an area frequented by drug users.

The legal significance of prior complaints of drug activity by the dumpsters is limited. "It is well-settled that a person's mere presence in a high crime area does not justify an investigatory stop." *State v. Dean*, 645 A.2d 634, 636 (Me. 1994) (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979) and 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.3(c) at 457-58 (2d ed. 1987)). That principle applies with special force here because, as explained above, Schlosser was not even at the location at which Officer Alvarado had seen prior drug activity.

The final piece of the trial court's discussion was that, at some point, Schlosser had been seen with others believed to be involved with drug activity. Knowledge that someone is associated with drug dealers is "not terribly compelling evidence" that the person is, himself, involved in drug trafficking. *United States v. Williams*, 705 F. Supp. 3d 1054, 1064-65 (N.D. Cal. 2023). In short, that Schlosser "hung out near drug dealers did not mean that he was a drug dealer." *Id.* And it did

not support the more specific suspicion needed here: that Schlosser in fact possessed drugs when Officer Alvarado seized him

At bottom, Officer Alvarado may have entertained a legitimate hunch that something was off when seeing Schlosser in the back parking lot. And nothing prevented him from approaching Schlosser to investigate further. But Officer Alvarado lacked reasonable suspicion to seize Schlosser, or to conduct a bail search. The trial court should have granted Schlosser's motion to suppress.

B. Officer Alvarado lacked reasonable suspicion to seize Schlosser for criminal trespass, or any other crime.

To support a seizure, "a police officer must have an objectively reasonable, articulable suspicion that either criminal conduct, a civil violation, or a threat to public safety has occurred, is occurring, or is about to occur." *State v. Sylvain*, 2003 ME 5, ¶ 11, 814 A.2d 984 (internal footnote omitted).

There was no dispute in the trial court that Officer Alvarado seized Schlosser upon pulling into the parking lot and directing Schlosser to come to him, and the trial court found as much. (A. 19-20.) As explained in Part I.A above, the evidence at the suppression hearing did not establish that Alvarado had reasonable suspicion that Schlosser was committing a crime—either drug possession or criminal trespass. Especially so as to the latter, considering that the trial court

denied Schlosser's motion for further findings on Schlosser's alleged trespass. (A. 119.)

II. The trial court erred by finding that there was no discovery violation by the State when, shortly before trial, it disclosed an expert witness for the first time.

"Imposing disclosure obligations on the State serves to 'enhanc[e] the quality of the pretrial preparation of both the prosecution and defense and diminish[] the element of unfair surprise at trial, *all to the end of making the result of criminal trials depend on the merits of the case* rather than on the demerits of lawyer performance on one side or the other.'" *State v. Green*, 2024 ME 44, ¶ 12, 315 A.3d 755 (quoting *State v. Poulin*, 2016 ME 110, ¶ 29, 144 A.3d 574). The Maine Rules of Unified Criminal Procedure requires that the State, as part of its automatic discovery obligations, provide the defense with the names of all witnesses it intends to call. M.R.U. Crim. P. 16(a)(2)(H) (requiring the names of all witnesses as automatic discovery). The State has an ongoing duty to supplement. M.R.U. Crim. P. 16(b)(5).

Ensuring adequate notice and orderly administration of the Court's docket, a defendant must serve on the prosecutor any motions related to discovery 7 days before the dispositional conference, and then submit to the Court no later than the next court date after the dispositional conference if the matter remains unresolved.

M.R.U. Crim. P. 12(b)(3)(A). At the dispositional conference, both the defendant and the State are expected to be "prepared to engage in meaningful discussions regarding *all aspects of the case*[.]" M.R.U. Crim. P. 18(b). This implicitly requires that, by the date of the dispositional conference, the State will have reviewed the case with enough care to have identified its witnesses, including experts.

The trial court should have concluded that the State violated the discovery rules by its late disclosure of S/A Vafiades, and thus excluded him as a witness. *Green* is instructive. There, the appellant argued that a trial court should have excluded the testimony of a drug recognition expert (DRE), because the State did not provide a curriculum vitae for the DRE or the scientific studies supporting the DRE's conclusions. *Green*, 2024 ME 44, ¶ 13. But unlike here, the State in *Green* provided the DRE's expert report as part of automatic discovery. *Id.* Green therefore had notice that an expert was involved at the outset of the case—before bail hearings, dispositional conferences, plea negotiations, trial preparation, and other proceedings. And not only did the defendant in *Green* know that an expert was involved, he also knew the subject matter of that expert's testimony.

In contrast to prosecution in *Green*, the State here added S/A Vafiades to its witness list in the critical weeks leading up to docket call and jury selection and trial, when trial attorneys are often consumed with balancing the many tasks of trial

preparation. As trial counsel indicated below, he did not learn what S/A Vafiades was supposed to testify about until sometime in April, and the State's decision to not provide an expert report did not become final until jury selection. (A. 60-61.) Whereas "the State provided Green with the DRE's report as part of automatic discovery, putting Green on notice that there was an expert involved in the case[,]" *Green*, 2024 ME 44, ¶ 13, the State here did not mention Vafiades until shortly before trial, and did not reveal the subject matter of Vafiades' testimony until even later. While trial counsel has the option of seeking to compel a report, M.R.U. Crim. P. 16(d)(4), that tool presupposes timely notice that an expert is involved. See *Green*, 2024 ME 44, ¶ 13. Ultimately, the State chose to wait until the last minute to designate S/A Vafiades, and it should not have been permitted to benefit from what the trial court itself described as "sharp practice" of pointing the finger at the defense for not filing a motion to compel preparation of a report. (Tr. 21:23-25.) This is especially so where trial counsel was not aware of the subject matter of S/A Vafiades' testimony until April, and given the timeline of discussions set out in trial counsel's motion in limine. The State's unnecessary delay in naming S/A Vafiades as a witness was a discovery violation, regardless of whether the State had been directed to file a report, and S/A Vafiades should have been excluded.

This discovery violation prejudiced Schlosser's defense. S/A Vafiades' testimony was substantively prejudicial to the defense because, if believed, the testimony undermined the economics of Schlosser's defense that the drugs he possessed were for personal use only. (Trial Tr. 168:13-174:3.) Indeed, the State's closing argument focused almost entirely on the implausibility of Schlosser's testimony in view of S/A Vafiades' testimony about the drug market in Bangor, Maine. (Trial Tr. 274:24-283:2.) And granting the defense the option of a continuance, as the trial court offered to do, was hardly a fair remedy. Schlosser had a right to a speedy trial and was in custody, and the case had been pending for about 12 months. *See generally Barker v. Wingo*, 407 U.S. 514 (1972)*; Winchester v. State*, 2023 ME 23, 291 A.3d 707. Requiring that Schlosser give up his trial date and await another jury selection and trial list because the State chose to wait until the home stretch of the case to decide that it needed an expert would be fundamentally unfair, and undermine Schlosser's speedy trial rights.

III. The trial court erred by failing to instruct the jury that possession of scheduled drugs was a lesser included offense of trafficking in scheduled drugs.

When a defendant requests that the jury be instructed on a lesser included offense, as here, "a jury *must* consider a lesser included offense if either the State or the defendant requests it and there is a 'rational basis for finding the defendant

guilty of that lesser included offense.'" *State v. Thornton*, 2015 ME 15, ¶ 10, 111 A.3d 31 (quoting 17-A M.R.S. § 13-A). To assess whether a defendant is entitled to a lesser included offense instruction, a court must resolve three issues: (1) is the lesser included offense, as legally defined, necessarily committed when the principal offense, as legally defined, is committed; (2) whether the lesser included offense carries lesser penalty than the principal offense; and (3) whether the lesser included offense instructions were required under the facts of the case. *State v. Gantnier*, 2012 ME 123, ¶ 9, 55 A.3d 404. "In undertaking this review," the Law Court "review[s] the court's legal conclusions de novo." *Id.*

There is no question that the second and third elements of this test are met. Unlawful possession of scheduled drugs is a Class C crime, while aggravated trafficking in scheduled drugs is a Class A crime. 17-A M.R.S. § 1105-A; 17-A M.R.S. § 1107(1)(B). And the State's entire theory was premised on Officer Alvarado finding drugs when searching Schlosser's person. The question thus turns on whether unlawful possession of scheduled drugs, as legally defined, is necessarily committed when unlawful trafficking, as legally defined, is committed. 17-A M.R.S. § 13-A(2)(A).

The first element is also met. "A lesser-included offense is one that has no elements different from or in addition to the elements of the charged offense,

making it 'impossible to commit the greater [offense] without having committed the lesser.'" *Gantnier*, 2012 ME 123, ¶ 10 (quoting *State v. Rembert,* 658 A.2d 656, 657 (Me. 1995)). "The indicted offense will include a lesser offense whenever the State has alleged within its indictment . . . a particular, *defined* manner of committing the crime which *necessarily* includes acts that must necessarily also be engaged in to constitute the commission of a lesser offense, as that offense is *defined.*" *Id.*

Here, the indictment charged Schlosser with aggravated trafficking in scheduled drugs, 17-A M.R.S. § 1105-A(1)(M), and alleged in relevant part that Schlosser "did intentionally or knowingly traffick in what he knew or believed to be a scheduled drug, which was in fact fentanyl powder, a schedule W drug." (A. 37.) The indictment did not define "traffick," and the trial court instructed the jury that trafficking means "to possess with the intent to sell, barter, trade, exchange or otherwise furnish for consideration." (Trial Tr. 309:7-11, A. 80.) So, although one can "traffick" by four statutorily defined means, 17-A M.R.S. § 1101(17), possession plus intent was the only one of those means submitted to the jury. This categorically limited the offense for which Schlosser was tried to require that the jury find Schlosser committed acts constituting the crime of unlawful possession of scheduled drugs. 17-A M.R.S. § 1107(1)(B) (defining unlawful possession of

schedule W drugs). And as a result, unlawful possession of scheduled drugs was a lesser included offense of aggravated unlawful trafficking in scheduled drugs, and needed to be submitted to the jury under 17-A M.R.S. § 13-A.[4]

The trial court's reliance on *State v. Hardy*, 651 A.2d 322, 325 (Me. 1994) was misplaced. That case held that "[u]nlawful possession of scheduled drugs pursuant to 17-A M.R.S.A. § 1107 is not a lesser included offense of unlawful trafficking in scheduled drugs pursuant to 17-A M.R.S.A. § 1103, because one need not 'possess' [drugs] in order to 'traffick' in [drugs]." *Id. See also State v. Osborn*, 2023 ME 19, ¶ 14 n.7, 290 A.3d 558 (stating the same, in dicta). And that may have been true on *Hardy*'s facts. But as explained above, the *only* definition of "traffick" given to the jury required possession. So unlike the framework outlined in *Hardy*, Schlosser had to possess drugs in order to traffick in drugs.

IV. Even if not granted a new trial, Schlosser is entitled to resentencing.

Even if Schlosser is not entitled to a new trial for the reasons stated above, he is at least entitled to resentencing because the trial court erred in its sentencing

[4] This Court has considered jury instructions before in assessing whether a principal offense includes the elements of a lesser included offense. *State v. Lowden*, 2014 ME 29, ¶ 24, 87 A.3d 694. And while *Gantnier* refers to the elements of the principal offense as alleged in the indictment, there is no logical reason for treating an offense limited by a definition in a jury instruction any differently than an offense limited by a definition in an indictment for purposes of 17-A M.R.S. § 13-A. Either way, a jury's finding that a defendant committed principal offense necessarily means that the defendant committed the proposed lesser offense.

analysis. When applying the three-step analysis set out in 17-A M.R.S. § 1602(1), the trial court considered that Schlosser's cell phone was "very active" during his interaction with Officer Alvarado as an aggravating factor on step two. Doing so misapplied Section 1602 by "double-counting" the breadth of Schlosser's drug trafficking activity, and improperly relied on speculative inferences about the nature of the phone activity.

A. The trial court impermissibly counted the scope of Schlosser's drug trafficking activity at step one and step two of the *Hewey* analysis.

A court sentencing someone for a Class A, B, or C crime must follow the three-step analysis set out in 17-A M.R.S. § 1602, codifying this Court's decision in *State v. Hewey*, 622 A.2d 1151, 1154-55 (Me. 1993). In step one, the court "determine[s] a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the individual." 17-A M.R.S. § 1602(1)(A). Then, at step two, the court "determine[s] the maximum term of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to the case." 17-A M.R.S § 1602(1)(B). "Relevant sentencing factors include, but are not limited to, the character of the individual, the individual's criminal history, the effect of the offense on the victim and the protection of the public interest." *Id.* And finally, at

step three, the court "determine[s] what portion, if any, of the maximum term of imprisonment under paragraph B should be suspended and, if a suspension order is to be entered, determine the appropriate period of probation or administrative release to accompany that suspension." 17-A M.R.S. § 1602(1)(C).

This Court "review[s] the sentencing court's 'determination of the basic sentence de novo for misapplication of legal principles and its determination of the maximum sentence for abuse of discretion.'" *State v. Plummer*, 2020 ME 143, ¶ 10, 243 A.3d 1184 (quoting *State v. Sweeney*, 2019 ME 164, ¶ 17, 221 A.3d 130). A double-counting claim relates to multiple steps of the analysis, and this Court "therefore review[s] a double-counting claim de novo." *Id.* ¶ 11. The "critical point" of a double-counting claim is that a trial court cannot consider the same sentencing factor at both step one and step two. *Id.* ¶ 13. To be sure, "the same *fact* can generate multiple *factors*," but a trial court may only consider the same facts on multiple steps if it "does so for different purposes." *Id.*

The trial court double-counted that Schlosser was trafficking drugs. At the first step, the trial court discussed the "very serious" nature of aggravated trafficking in scheduled drugs, the quantity of drugs found on his person, how they were also packaged, and set the basic term in the "seven-to-eight-year range." (Sent. Tr. 16:23-17:16.) Then, the trial court found as an aggravating factor that

Schlosser's phone was "very active" during the arrest—apparently assuming that anyone contacting Schlosser *must* be a drug buyer. (Sent. Tr. 17:22-25.) By splitting the quantity of drugs into step one and the perceived number of potential buyers into step two, the trial court impermissibly double-counted the scope of Schlosser's drug trafficking activity.

B. That Schlosser's phone was "very active" during the arrest was an unreliable indicator of the scope of his drug trafficking activity.

Due process requires that a sentencing court base the sentence on "reliable factual information." *State v. Wright*, 588 A.2d 1200, 1201 (Me. 1991) (quoting *State v. Dumont*, 507 A.2d 164, 167 (Me. 1986)). Here, it was unduly speculative for the trial court to assume that all the cell phone activity that occurred when Mr. Schlosser was apprehended must have been trafficking-related, or that the phone activity showed the scope of the trafficking business. Indeed, no testimony was offered about the nature of the calls, beyond Officer Alvarado's subjective perception that the names were strange. (Trial Tr. 65:5-23.) Thus, the idea that all the phone activity related to drug trafficking was based only on assumptions about what types of names are usually associated with drug dealers or drug users. Because the trial court's inference that the phone activity was somehow indicative of the scope of Schlosser's drug trafficking was factually unreliable, using that inference as an aggravating factor violated Schlosser's due process rights.

Conclusion

For the reasons stated above, Schlosser requests that the Court vacate his conviction, and remand for entry of an order granting his motion to suppress and a new trial. Or, if this Court does not order a new trial, Schlosser requests that the Court remand for resentencing.

Respectfully submitted,

Dated: November 5, 2024

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Certificate of Service

I hereby certify that on the date stated below I caused an electronic copy of this document to be served on the following counsel via email. In addition, upon acceptance of this brief by the Court, two paper copies of this brief will be served on the following counsel.

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