STATE OF MAINE
PENOBSCOT, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: PEN-24-303

STATE OF MAINE,
Appellee

v.

JOHN SCHLOSSER,
Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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PROCEDURAL HISTORY

On August 30, 2023, the Penobscot County Grand Jury returned an indictment charging John Schlosser (Schlosser) with one count of Aggravated Trafficking of Scheduled Drugs, Class A,[1] one count of Unlawful Trafficking of Scheduled Drugs, Class B,[2] one count of Violation of Condition of Release, and one Criminal Forfeiture. (*State of Maine v. John Schlosser,* PENCD-CR-2023-01531, Appendix 37-38). On August 14, 2023, Schlosser filed a Motion to Suppress, which was followed by an Amended Motion to Suppress on September 21, 2023. (A. 39, 42). On January 16, 2024, a hearing was held on the Motion to Suppress, which was denied in a written order dated January 23, 2024. (*Roberts, J.*). (A. 19). Schlosser filed a Motion to Reconsider that ruling on January 26, 2024, which was denied on March 1, 2024. (*Roberts, J.*). (A. 9). A jury was selected on May 10, 2024 (A. 10). On May 14, 2024, Schlosser moved to exclude the testimony of Special Agent Vafiades for an alleged discovery

[1] 17-A M.R.S. §§ 1105-A(1)(M) (2017).

[2] 17-A M.R.S. §§ 1103(1-A)(A) (2001).

violation. (A. 55). The trial court found there was no discovery violation and offered Schlosser both a continuance and an order for the discovery requested. (Trial Tr. 25). Schlosser declined the trial court's offer. (Trial Tr. 38). Trial commenced on May 20, 2024, with Counts Three and Four to be decided by the Court. (A. 10). The jury returned a verdict of guilty as Counts One and Two on May 21, 2024. (A. 11). The trial court then found the Defendant guilty of Count Three and found Count Four true on the same day. (A. 11).

A sentencing hearing was held on June 25, 2024, and Schlosser was sentenced to 7 years, all but 4 years suspended, with 4 years probation and a $400 fine on Count One, 4 years and a $400 fine concurrent on Count Two, and 30 days concurrent on Count Three. (A. 13-14). Notice of appeal was timely filed on June 27, 2024. (A. 14).

STATEMENT OF FACTS

On May 27, 2023, Officer Nathaniel Alvarado of the Bangor Police Department was on patrol in a marked cruiser. (Trl. Tr. 59). At about 9:00 am, while approaching the back of several businesses facing Union Street, he saw Schlosser in a walled rear driveway area behind those businesses. (Trl. Tr. 59, 62). The area was clearly marked with no trespassing signs. (Trl. Tr. 60). Ofc. Alvarado was also aware that the businesses and other local residents had complained of illegal drug activities happening in that driveway, particularly

near dumpsters in the back corner. *Id*. Ofc. Alvarado had also removed people using drugs from that space. (Trl. Tr. 61). Schlosser immediately began walking away from Ofc. Alvarado's vehicle and appeared to be concealing something. (Trl. Tr. 63). Ofc. Alvarado also recognized Schlosser as someone he had regularly observed in the vicinity of drug houses. (Motion to Suppress Tr. 16 (hereinafter "MTS Tr.")). Ofc. Alvarado called to Schlosser to get him to come back. (Trl. Tr. 64). Schlosser was on bail conditions allowing search for drugs upon reasonable articulable suspicion. (Trl. Tr. 65). Ofc. Alvarado searched Schlosser pursuant to those bail conditions revealing several bags totaling 42 grams of fentanyl powder, more than 6 grams of cocaine, and $1,194 in cash. (Trl. Tr. 67-71, 80-81, 144-146). Many of the drugs appeared packaged in a manner consistent with resale. Schlosser also had a scale and spare unused baggies like those used for packaging the other drugs. *Id.* He also had a cell phone that rang constantly throughout the interaction with Ofc. Alvarado, with the officer observing various strange-sounding street and car names on the screen. (Trl. Tr. 66).

STATEMENT OF THE ISSUES

I. Whether the trial court erred in denying Schlosser's motion to suppress.

II. Whether the trial court erred in finding that the State had not committed a discovery violation.

III. Whether the trial court erred in refusing to instruct the jury that possession of scheduled drugs was a lesser included offense of aggravated trafficking in scheduled drugs.

IV. Whether the trial court erred at sentencing by separately considering the quantity of drugs in step one and the level of activity from Schlosser's phone during step two.

SUMMARY OF ARGUMENT

1. There was as reasonable articulable suspicion that Schlosser was trespassing behind the businesses where he was encountered. Secondarily, Ofc. Alvarado had a reasonable suspicion that Schlosser was involved in drug activity, justifying a search pursuant to his bail conditions.

2. Automatic discovery rules do not require the creation of an expert report that does not exist. No motion was made, or order granted, requiring the creation of one, thus, there was no discovery violation.

3. This Court has stated unambiguously that unlawful possession of a controlled substance is not a lesser included offense of unlawful trafficking of

scheduled drugs as legally defined. The type of proof at trial does not alter the manner it is alleged in the indictment.

4. The trial court did not double-count a sentencing factor by considering the quantity of drugs separately from unusual phone activity that could indicate a high volume of distinct customers. The information regarding the phone activity was reliable as it emerged from the trial process.

ARGUMENT

I. The trial court properly denied the motion to suppress.

When reviewing the denial of a motion to suppress, the trial court's factual findings are reviewed for clear error, and the legal conclusions are reviewed de novo. *State v. Nunez*, 2016 ME 185, ¶ 18, 153 A.3d 84.

A. There was reasonable suspicion of trespass.

Criminal trespass is committed when a person enters any place from which they may be lawfully excluded that is posted in various prescribed ways (such as by signs indicating access is prohibited) or in a manner reasonably likely to come to the attention of intruders. 17-A M.R.S. § 402(C) (2001).

Ofc. Alvarado testified that Schlosser was inside a partially-walled area behind businesses that contained dumpsters and had two different posted "no trespassing" signs. (MTS Tr. 9-10, 16). Business owners had made previous complaints and advised Ofc. Alvarado they did not want anyone trespassing in

this area. (MTS Tr. 11). Ofc. Alvarado recognized Schlosser and could tell from his appearance that he did not appear to be a staff member. (MTS Tr. 15). When Ofc. Alvarado first observed Schlosser, he was walking outward from within the proscribed area, coming from the area of the dumpsters and toward the road where Ofc. Alvarado was driving. (MTS Tr. 28).

An officer may initiate a stop if they have an objectively reasonable, articulable suspicion that criminal conduct has occurred, is occurring, or is about to occur. *State v. Sylvain*, 2003 ME 5, ¶ 11, 814 A.2d 984. The motion court found that, "the area behind the businesses contains a driveway leading to loading bays and dumpsters," and, "the drive is clearly marked with no trespassing signs." (A. 19). The motion court further found that Ofc. Alvarado observed Schlosser within the lower end of the driveway. *Id.* Based on all these facts, the officer has reasonable, articulable suspicion that Schlosser was engaged in conduct that would constitute a criminal trespass.

B. There was reasonable suspicion of drug activity.

It is agreed that Schlosser was on bail conditions requiring that he submit to search upon articulable suspicion for evidence of use or possession of illegal drugs. (Blue Br. 14). There are also several relevant findings that the motion court made which are not being disputed, including: 1) that these businesses, as well as local residents, had complained of illicit drug activities in the area of

the drive, 2) that Ofc. Alvarado had himself found individuals using drugs in the area, 3) that the businesses had posted the drive (as no trespassing) and requested police to monitor the area for further drug activities, 4) that Ofc. Alvarado recognized Schlosser as someone he had regularly observed in the vicinity of drug houses, and 5) that Schlosser initially reacted to Ofc. Alvarado's arrival by turning and walking away from him without meeting his gaze. (A. 19). Schlosser challenges the finding that he made furtive movements and, presumably, the motion court's finding that the Defendant appeared to be attempting to conceal something in his pocket when the police came in view. (A. 19-20).

Ofc. Alvarado testified that it appeared Schlosser started fumbling with something after seeing his cruiser. (MTS Tr. 15). After the second time Ofc. Alvarado asked him to stop, Ofc. Alvarado saw what he believed to be Schlosser trying to shove something in his pocket. *Id.* Shortly after Ofc. Alvarado's front facing cruiser camera captures Schlosser for the first time, he can be seen appearing to reach for a left pocket behind the partial cover of a jacket he folds (whether in the jacket itself or in his pants), and again appears to fidget at the same left pocket momentarily as he obeys Ofc. Alvarado's command to come to him, within a span of about 20 seconds. (State's Exhibit 2, Nathaniel Alvarado M500 Camera 0 at global timestamp 09:18:24, 09:18:35, and 09:18:42). This

fidgeting with the pocket could also be consistent with adjusting the zipper. Given that Ofc. Alvarado was viewing this happen in real-time over such a short time span, without the benefit of reviewing the video later, it was reasonable for him to interpret these actions as he did.[3] The Court's finding that Schlosser appeared to be attempting to conceal something in his pocket is likewise not clearly erroneous.

Schlosser also incorrectly asserts that he was not in the area of drug activity. Notwithstanding the testimony that Schlosser was emerging from the direction of the dumpsters, Ofc. Alvarado testified that the area of complaints encompassed the entire rear drive/parking lot area, up to and including the path around from the walled in area. (MTS Tr. 10-12). He also testified that there were two sets of dumpsters; two to the left, and one to the right. (MTS Tr. 10). It is also abundantly clear from the video that Schlosser is in closer proximity (at the time he was stopped) to another dumpster on the right of the frame in the foreground, while the other two (to the left) are in the background. (State's Exhibit 2, Nathaniel Alvarado M500 Camera 0 at global timestamp 09:18:34).

[3] Nor did Ofc. Alvarado misinterpret the significance of these movements. The large bag of drugs and the scale disguised as cigarettes were both removed from Schlosser's left pants pocket. (State's Exhibit 2, Nathaniel Alvarado V300 9:17:41 AM Camera 0 at global timestamp 09:26:11).

When judging whether an articulable suspicion is objectively reasonable, the Court must consider the totality of the circumstances. *State v. Brown*, 1997 ME 90, ¶ 5, 694 A.2d 453. Notwithstanding Schlosser's attempt to attack the 'furtiveness' of his movement and the location information in isolation, when all these factors are considered in the totality of the circumstances, including that Schlosser was already trespassing, the officer's familiarity with reported drug activity in the area, and knowledge of Schlosser's association with known drug houses, it was reasonable for Ofc. Alvarado to suspect that Schlosser could be using or in possession of drugs.

II. The State committed no discovery violation in its disclosure of Special Agent Vafiades as a witness.

The Court reviews whether a discovery violation occurred de novo. *State v. Reed-Hansen,* 2019 ME 58, ¶ 12 n.3, 207 A.3d 191.

Schlosser agrees the State provided the name of Maine Drug Enforcement Agency Special Agent Vafiades (S/A Vafidaes) on its first witness list in March 2024. (A. 60). The content of the anticipated testimony had been communicated to Schlosser. (Trl. Tr. 11). Given the nature of that testimony and his lack of direct involvement with the case, he did not have a narrative report. (Trl. Tr. 14). Schlosser did ask for an expert report, however, Schlosser

understood the State declined to provide one because this was not expert testimony. (Trl. Tr. 19).

The automatic discovery rules only require the production of any report or statements of experts *made in connection with the particular case*, including, for example, test results. M.R.U. Crim. P. 16(a)(2)(G), emphasis added. It is undisputed in the record that no such report existed.

While the State maintains the trial court erred by ruling this testimony to be expert in nature, assuming arguendo that it was, the discovery rules provide a different mechanism for requesting the creation of a report by an expert. The Court may order, upon motion, the creation of a report by an expert witness. M.R.U. Crim. P. 16(d)(4). Schlosser maintained that S/A Vafiades was an expert witness, asked for an expert report, and was told the State objected, well prior to trial. (Trl. Tr. 19-20). Despite that, Schlosser never filed a motion to compel the creation of an expert report as provided by M.R.U. Crim. P. 16(d)(4). (Trl. Tr. 20).

The State has no obligation to provide a report that does not exist under automatic discovery rules, and, absent an agreement or order pursuant to M.R.U. Crim. P. 16(d)(4), no obligation to create one. If Schlosser truly wanted such a report, instead of attempting to use the discovery rules to exclude evidence that he believed to be inculpatory, the Court offered to order the

creation of one anyway, and to continue the trial for Schlosser to prepare with the benefit of that report. (Trl. Tr. 25). Schlosser declined. (Trl. Tr. 38). As such, there was no discovery violation for the trial court to find.

III. Unlawful Possession of Scheduled Drugs is not a lesser included offense of Aggravated Trafficking.

The first issue the court must resolve when determining whether a defendant is entitled to a lesser included offense is whether the lesser included offense, *as legally defined*, is necessarily committed when the principal offense, *as legally defined*, is committed. *State v. Gantnier,* 2012 ME 123, ¶ 9, 55 A.3d 404, emphasis added. This can be circumscribed some if the State alleges within the indictment a particular, defined manner of committing the crime which necessarily includes acts that constitute the commission of a lesser offense, as that offense is defined. *Id*., citing *State v. Luce,* 394 A.2d 770, 773-74 (Me. 1978). However, in this case, the indictment alleged Aggravated Trafficking generally, and does not define any particular manner or definition of trafficking, leaving only the legal definition of trafficking. (A. 37).

As legally defined, this Court has stated, unambiguously, that unlawful possession of scheduled drugs is not a lesser included offense of unlawful trafficking in scheduled drugs because one need not possess the drugs in order to traffick them. *State v. Osborn*, 2023 ME 19, ¶ 14 n.7, 290 A.3d 558; *State v.*

Hardy, 651 A.2d 322, 325 (Me. 1994). Even if the trial court only provided one trafficking definition in the jury instructions[4], that does not alter how the offense is legally defined, or how it is defined in the indictment.

IV. The Court did not err in its sentencing analysis.

A sentencing court must follow a three-step analysis, also known as the *Hewey* analysis, when imposing a sentence upon a felony. 17-A M.R.S.A. § 1602 (2019). When reviewing a sentence, the Court reviews the basic sentence de novo for misapplication of principle, and reviews the maximum and final sentences determined in steps two and three for an abuse of discretion. *State v. Hansen,* 2020 ME 43, ¶ 27, 228 A.3d 1082. However, the Court reviews a claim of double-counting claim de novo. *State v. Plummer,* 2020 ME 143, ¶11, 243 A.3d 1184.

A. The trial court did not double-count a factor.

The trial court is generally afforded "significant leeway" in determining which factors are considered and the weight a factor is assigned. *State v. Watson*, 2024 ME 24, ¶22, 319 A.3d 430. Schlosser recognizes that the same 'fact' can generate multiple 'factors.' *State v. Plummer,* 2020 ME 143, ¶14 243 A.3d 1184. However, here, Schlosser is conflating two different facts. The Court considered two distinct facts entirely: the sheer quantity of drugs seized, and

[4] No explanation for this appears in the record.

also the remarkable level of activity and different callers on Schlosser's phone as he's walking around with those drugs. (Sent. Tr. 3-4, 16-17). Restated more succinctly, the court considered the amount of drugs, and the amount of apparent customers, separately. No one disputes that having a large amount of drugs is a significant factor to consider. However, when trafficking a large amount of drugs, it does not necessarily follow that one is supplying a large amount of distinct customers. A reasonable inference that one is supplying many different individuals is a separate and distinct fact and factor that can rationally be considered an aggravating factor.

B. The challenged information was factually reliable and emerged from the trial process.

A sentencing court is afforded wide discretion in determining what sources and types of information it considers when imposing a sentence. *State v. Wright,* 588 A.2d 1200, 1201 (Me. 1991). The sentence must be based on reliable factual information. *Id.* Information obtained through the trial process is factually reliable because it is derived from sworn testimony by witnesses subject to cross-examination and observation by the court.[5] *State v. Dumont*, 507 A.2d 164, 166 (Me. 1986).

[5] The sentencing court is not limited to facts found at trial, but here, all of the facts considered were before the jury. *State v. Rosario*, 2022 ME 46, ¶38, 280 A.3d 199.

Ofc. Alvarado testified at trial that Schlosser had a phone that, "kept ringing over and over and over and over." (Trl. Tr. 66). He also testified that he observed the phone (while ringing) to show multiple different strange sounding names, that sounded more like street or car names. *Id.* This also continued unabated when he later handled the phone a second time, at which point it displayed further different names. (Trl. Tr. 82). Schlosser had an opportunity to cross examine Ofc. Alvarado on this subject, and did. (Trl. Tr. 100). This can properly be considered in the broader context that Schlosser also had two bulk bags of drugs, as well as nine individually portioned out 'ticket' bags of drugs, an additional as-yet unused ticket bags, a scale, and a roll of $1,194 on-hand, which had some of the ticket bags folded into it.[6] (Trial State's Exhibit 1; Trl. Tr. 71-75, 81, 198).

In determining appropriate factors for sentencing, the trial court is entitled to draw reasonable inferences from the facts in evidence. From these facts, one can reasonably infer that the never-ending stream of incoming phone calls from different individuals represented a steady stream of potential customers for these pre-portioned bags of drugs (or those yet to be portioned out). The breadth and briskness of Schlosser's business was appropriate to

[6] Ticket bags are small ticket-sized Ziploc-style bags frequently used to repackage portions of drugs for resale. (Trl. Tr. 70, 74-75).

consider as an aggravating factor particular to the defendant. The wording of the trial court, in the context of the argument made, reflects that was the significance of the phone activity it referred to. (Sent. Tr. 17).

CONCLUSION

For the foregoing reasons, the State respectfully asks that the conviction and sentence be affirmed.

Respectfully submitted,

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Dated: December 18, 2024

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CERTIFICATE OF SERVICE

I, Jason Horn, Assistant Attorney General, certify that I have sent a native PDF and mailed two copies of the foregoing "BRIEF OF APPELLEE" to Schlosser's attorney of record, Tyler Smith, Esq.

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