THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Som-23-261

DALVIN PEGUERO,

Appellant

v.

STATE OF MAINE,

Appellee

ON APPEAL from the Somerset County
Unified Criminal Docket

APPELLANT'S REPLY BRIEF

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I. This Court has allowed prior acts of a defendant to be used to show intent, not the prior acts of others.

The central focus of the State's rebuttal to objections to the use of prior acts is that this court has allowed such testimony to establish intent. Just whose intent, however, is a matter of interpretation. To the State, it does not matter who is on trial; evidence related to what it calls a "drug distribution operation" equally applies to anyone whether they were present for the past events or not.

> Based on Peguero's involvement as an accomplice to [Younary] Arias-Dejesus and others involved in this drug distribution operation, , [sic] it was permissible to offer evidence of prior instances of drug trafficking that tended to show this was an ongoing plan or scheme. As an accomplice to this scheme, demonstrating Arias-DeJesus's knowledge and intent to traffick drugs was also relevant. Evidence of prior drug sales (or attempts to facilitate them) are properly admissible to show intent to traffick drugs. *State v. Cote*, 444 A.2d 34, 36 (Me. 1982).

State's Brief ("St.Br.") p.9.

This sweeping approach to such evidence under the Rule 404(b) of the Maine Rules of Evidence ("M.R.Evid.") does not square with Maine law. This is because the Court's decision in *Cote* does not say quite what the State thinks it says. First, the court briefly addressed this issue in a matter of sentences. It noted "Cote objected to testimony by one of the undercover officers regarding

the defendant's alleged statement to the officer that he could get them one ounce of rock cocaine along with the ten pounds of marijuana." *Cote*, 444 A.2d at 36. Such evidence, the Court found, was permissible "to show the defendant's intention to sell drugs." Id. The point the State misses is that *Cote* was dealing with statements *by the defendant*, not statements or acts of others. Indeed, the cases that have cited *Cote* for the proposition cited by the State have done so when looking at the prior acts of the person on trial, not the acts of others. *See State v. Veglia*, 620 A.2d 276, 280 (Me. 1993) ("defendant's implicit admissions of prior drug dealing were relevant to defendant's intent to sell cocaine and possibly to show a common plan or general pattern in selling drugs"); *State v. Caulk*, 543 A.2d 1366, 1371 (Me. 1988) (defendant's statement he had used the stolen gun in prior criminal activity).[1] Even the Court's decisions before *Cote* support the same

[1] A review of some of the other cases post-*Cote* finds them in uniformity. *State v. Osborn*, 2023 ME 19, ¶ 18, 290 A.3d 558, 565 ("admitting the [confidential informant]'s testimony regarding the manner in which he had previously met with Osborn to obtain drugs."); *State v. Pillsbury*, 2017 ME 92, ¶ 23, 161 A.3d 690, 695 ("testimony regarding Pillsbury's prior assault of the victim as a result of his jealousy was admissible because it went to his motive and intent, and to the relationship between Pillsbury and the victim"); *State v. Pierce,* 474 A.2d 182, 186 (Me.1984) (defendant's prior threats admissible to show defendant's consciousness of guilt and identity when at issue in aggravated assault case); *State v. Valentine,* 443 A.2d 573, 578 (Me.1982) (defendant's beating of homicide victim one year before admissible to prove motive or intent).

interpretation. *State v. Carlson*, 304 A.2d 681, 683 (Me. 1973) (cited by the Court in *Cote*) (that the "defendant in the course of the burglary broke into a Coca Cola machine and a cigarette vending machine on the premises and removed money from one and cigarettes from the other" can be used to show defendant "larcenous intent"); *State v. O'Toole*, 118 Me. 314, 315, 108 A. 99 (1919) (evidence of sales made by the defendant eighteen months before the alleged offense was proper to show intent to sell liquor found in her possession).

State v. Osborn illustrates this point in the context of a drug trafficking case. In *Osborn*, the State offered evidence by a confidential informant ("CI") of prior drug sales between Osborn and the CI. 2023 ME at ¶ 18. The Court held this evidence was proper under M.R.Evid. Rule 404(b) to establish Osborn's understanding of the "cryptic" text messages used by the CI to set up the sale, as well as to show why when they met "they did not speak of drugs but where drugs were exchanged." Id. Further, it was not violative of M.R.Evid. 403 because it was used for the limited purpose of explaining how the CI knew to contact Osborn for drugs, and the probative value of that was not "cumulative of other less prejudicial evidence and in fact demonstrated the relevance of other evidence presented." Id. at ¶ 20 (citations omitted.)

The evidence offered by the State would likely come in under the State's theory if the defendant at trial was Mr. Arias de Jesus, but his case had been severed. It was Mr. Peguero was on trial and there was no evidence Mr. Peguero was present during any of the previous incidents involving Mr. Arias de Jesus. Anthony Merrow explicitly testified he had never seen Mr. Peguero before September 1, 2022. Tr. 244-45.

The State's brief highlights how the highly prejudicial effect this sort of testimony can have. Unlike the impression left by the State's brief, it did not charge Mr. Peguero as being part of "an ongoing scheme involving Arias-DeJesus and other individuals situated identically to Peguero." St.Br. at 10. He was charged, not with conspiracy, but with trafficking drugs on September 1, 2022. There is no reason to offer evidence "to demonstrate the intentions of the combination [Arias-DeJesus and other individuals situated identically to Peguero] as a whole" except to prove Mr. Peguero's "character" in a way not permitted by M.R.E. 404(b). In other words, Mr. Arias de Jesus was suspected to have sold drugs in Maine in the past, so if Mr. Peguero was with Mr. Arias de Jesus in Maine in the present, Mr. Peguero must be selling drugs too. This is the sort of prejudicial inference M.R.E. 404(b) was designed to prevent.

II. The campers were not part of the property subject to be searched under the search warrant.

The warrant did not include the campers searched on the Merrow property and therefore the evidence found there should have been suppressed. The Warrant Clause of the Fourth Amendment requires a particular description of the place to be searched to prevent "general searches." *State v. Samson*, 2007 ME 33, ¶ 12, 916 A.2d 977, 981 (*citing Maryland v. Garrison,* 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987)). "By limiting the authorization to search to the specific areas ... the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Garrison,* 480 U.S. at 84, 107 S.Ct. 1013.

The warrant could have specifically included the campers, but it did not.

A. The campers were neither vehicles nor structures.

The search warrant had the boxes checked to authorize a search of the "building," "vehicle," and "person" of Anthony Merrow. Appendix ("App.") 31. The State appears to have difficulty reconciling its belief the two free-standing, non-operative campers should have been searched with the fact the campers do not fall into one of those three categories.

> The Court noted there was apparently no dispute that the campers are not buildings, but reasoned that they are not vehicles because they were not currently capable of motion. (A[pp]. 13 at FN 2). The State respectfully contends that they must, however, be treated as one or the other; either they are a stationary semi-permanent building on the property, or a vehicle. In either event, boxes on the warrant are checked for both "building" and "vehicle," and one or the other necessarily includes these campers. (A[pp]. 31).

St.Br. 12. The State's respectful contention that this Court infer the camper's fall into one of the checked boxes ignores the fact there is a fourth possibility – the box marked "other." A box that was not checked.

A warrant must describe with particularity the property to be searched. *See State v. Lehman*, 1999 ME 124 ¶ 7, 736 A.2d 256. Properly detailed warrants are not meant to be hyper-technical to pass constitutional muster. *See State v. Wing*, 559 A.2d 783, 786 (Me. 1989) (warrant describing "motor vehicles on the premises" is descriptive enough to cover the vehicle being driven by the defendant but owned by the co-defendant). They must, however, be specific enough to prevent a search based on a "mistaken belief that [the property] falls within the authorization of the search. *State v. Sweatt*, 427 A.2d 940, 949 (Me.1981). Failure to do so requires evidence found during the execution of the warrant to be suppressed.

B. Mobile campers recently seen in another location are not appurtenant to the structure on the property.

Alternatively, the State argues the campers should be considered appurtenant to the structures already found on the property, and thus subject to the search warrant. As the Court has not explicitly used this phrase, the State cites a First Circuit case, *United States v. Fagan*, 577 F.3d 10 (1st Cir. 2009) for the proposition. A closer look at the decision in *Fagan* is warranted.

The *Fagan* court defined appurtenancy this way: "A typical dictionary definition of "appurtenant" indicates that it means "[b]elonging as a property or legal right (to); spec. in Law, constituting a property or right subsidiary to one which is more important." Oxford English Dictionary 590 (2d ed.1989)." 577 F.3d at 13. It also reviewed various structures "found to be appurtenant to described residential premises" in warrants. 577 F.3d at 13 (collecting cases including *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir.1999) (storage closets); *United States v. Principe*, 499 F.2d 1135, 1137 (1st Cir.1974) (cabinets); *United States v. Ware*, 890 F.2d 1008, 1011 (8th Cir.1989) (storage rooms and bins); *State v. Llamas-Villa*, 67 Wash.App. 448, 836 P.2d 239, 242 (1992) (lockers); *People v. Weagley*, 218 Cal.App.3d 569, 267 Cal.Rptr. 85, 87 (1990) (mailboxes); and *United States v. Asselin*, 775 F.2d 445, 446-47 (1st Cir.1985) (birdhouses)). Each of these types of structures fits within the

proffered dictionary definition: they are subsidiary parts of the structure in question but are connected thereto.

The Court's jurisprudence in this area is not in opposition to either the logic of *Fagan* or in finding the warrant defective here. Structures subsidiary to a property can be incorporated into a search by way of a warrant that specifically lists the property to be searched because they are not independent structures on their own. *See State v. Dignoti*, 682 A.2d 666, 671 (Me. 1996) (holding that the applicable warrant did not limit the scope of the search to the mobile home, the detached garage, and persons and vehicles on the premises but included the backyard area and the septic tank located there); *State v. Brochu*, 237 A.2d 418, 420, 423 (Me. 1967) (seizure of evidence found in detached garage did not exceed scope of warrant authorizing search of "the premises known as the dwelling of Armand A Brochu located at 20 Forest Street, ... said premises being owned/ occupied by Armand A. Brochu"; inclusion of clause "known as the dwelling of Armand A. Brochu" did not "limit the breadth of 'premises at 20 Forest Street' to the dwelling house proper").[2]

[2] The Court in *Brochu* found a funnel, glass jar, and cloth were not described in the warrant and therefore not subject to seizure despite being found in the detached garage. 237 A.2d at 424.

The campers at issue here were not appurtenant as contemplated by the *Fagan* court or this Court's lines of cases in this area. Rather than be akin to a cabinet, a closet, or a mailbox, there was sufficient evidence these were separate dwelling places. Special Agent Rich testified he had seen the trailer in a different town in June, 2022. Motion to Suppress Transcript ("MTS Tr.") 19. They were being occupied by people other than the person named in the warrant to be subject to the search. MTS Tr. 20. It had electricity. Trial Transcript Day 1 ("TTr D1") 54. It had a sleeping area. Id. There was a kitchenette and food in the area. Id. It had a toilet showing signs of current use. TTr D1 54-55.

The campers were independent from the dwelling that was subject to the search. Therefore, they were not appurtenances to that property and were not covered by the warrant.

CONCLUSION

For the reasons stated above and Appellant's opening brief, Mr. Peguero's conviction should be vacated and the case against him should either be dismissed or returned for a new trial.

Respectfully submitted, this 29th day of January 2024.

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CERTIFICATE OF SERVICE

As required by the Maine Appellate Rules of Procedure, I sent a native PDF version of this brief to the Clerk of this Court and the parties' counsel at the email addresses provided in the Board of Bar Overseers' Attorney Directory. I delivered 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the addresses provided by that same Directory.

CERTIFICATE OF COMPLIANCE

I hereby certify I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f)(1), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

Dated: January 29, 2024

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