IN THE
INDIANA COURT OF APPEALS

CASE NO. 53A01-1005-CR-00210

DAVID E. SCHALK,	)	
	)	Appeal from the Monroe Circuit Court
Appellant,	)	Division 5
	)	
v.	)	Trial Court Cause Number 53C05 0804 FD 402
	)	
STATE OF INDIANA,	)	The Honorable Michael A. Robbins, Special
	)	Judge for the Monroe Circuit Court, Presiding
	)	
Appellee.	)	

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. Whether David Schalk committed the misdemeanor of Attempted Possession of Marijuana when he attempted to remove marijuana from the possession of a the State's key witness in an upcoming trial and cause it to be placed in the custody of the police and a trial court for use as evidence that the witness, while doing favors for the police, continued to deal drugs right up to the time of trial?

A. Whether prosecutors, police officers, and confidential informants routinely violate the letter of the marijuana prohibition during the course of investigations and prosecutions in the absence any legally cognizable defenses.

B. Whether it would have been better for David Schalk to have arrested the State's witness.

C. Whether David Schalk should have stood by and allowed perjury and fraud to be perpetrated at his client's trial, possibly resulting in grave injustice.

D. Whether David Schalk was selectively and vindictively prosecuted.

E. In light of the undisputed fact that Schalk did not want to possess marijuana, but only wanted for it to be delivered to the police through an intermediary, whether he can be guilty of attempted possession of marijuana any more than a prosecutor or police detective who, without wanting exclusive control or personal use, tries to divert marijuana from the underground marketplace into the possession of the police.

F. Whether the prosecution and conviction of David Schalk violated the state and federal constitutional guarantees of equal protection and the right of defendants in criminal cases to defend themselves.

G. Whether it is significant that David Schalk was a sworn law enforcement officer, a full-fledged albeit unpaid Monroe County Deputy Sheriff on June 25, 2007.

H. Whether, at the very least, the rule of lenity requires reversal of Schalk's conviction on grounds that the marijuana prohibition, as it might have pertained to him on June 25, 2007, was void for vagueness.

STATEMENT OF THE CASE

Concise narrative accounts of the following are contained in the Appellant's Appendix, Volume 2, in the Affidavit of David Schalk on page 212; in the excerpt from the hearing on the motion to dismiss beginning on page 259, and in the excerpt from the trial transcript beginning on page 277.

On June 25, 2007, David Schalk received an unexpected phone call from Lisa Edwards. She announced that in one hour, she would purchase marijuana from Brandon Hyde. Hyde was scheduled to testify against Schalk's client, Chad Pemberton, in one week. He was expected to say that he purchased a small amount of methamphetamine from Pemberton near a public housing project. He was also expected to deny that, in addition to working as an informant for the police, he continued to deal drugs right up to the time of trial.

David Schalk wanted to prove that Brandon Hyde was actively dealing drugs. He was surprised to hear from Edwards because she had indicated during prior conversations that she did not want to get involved with the police or be known to anyone as a snitch. Schalk asked Edwards to meet him and get a digital voice recorder to document the purchase. She agreed, but indicated during the meeting, which also included her companion Roger Grubb and his nephew John Grubb, that she did not want to be known

as a snitch. After arriving at the meeting place, it occurred to Schalk that he had some cash which could be used as marked money. He also thought that he or his client should bear the cost of any marijuana that ended up in police custody. Schalk wrote down the serial numbers of two hundred dollars in currency and gave it and the voice recorder to Roger Grubb. That evening, Schalk retrieved the voice recorder but it had been turned off prior to any transaction. Schalk refused to touch a folded newspaper which supposedly contained purchased marijuana. He did his best to persuade Roger Grubb and Lisa Edwards to deliver the package to the police for use as evidence at the Pemberton trial which was scheduled to start in one week.

Edwards testified at Schalk's trial that the folded newspaper did not actually contain marijuana. Tr. p. 84. She testified that she and Roger Grubb bought only fifty dollars worth and smoked it. Tr. p. 88. Edwards and Grubb were planning to buy marijuana for their own consumption when Edwards called Schalk. She did not seem to know why she told Schalk she planned to buy marijuana from Brandon Hyde on June 25, 2007. Tr. p. 95-98.

This case started with baseless conspiracy theories. Appellant's App. p. 277-283. Edwards and Grubb were not doing anything in conjunction with Schalk when they made plans to get marijuana from Brandon Hyde. They were just going after some marijuana to smoke. Schalk wrote down the serial numbers of some currency and gave it to Grubb in an attempt to cause him to divert some marijuana from Brandon Hyde's enterprise to the police to show that Hyde was an active drug dealer. Providing money intending that it be used for such a purchase is the factual basis for Schalk's conviction.

STATEMENT OF THE FACTS

Again, the facts of the case are conveniently set forth in narrative form in the Appellant's Appendix, Volume 2, in the Affidavit of David Schalk on page 212; in the excerpt from the hearing on the motion to dismiss beginning on page 259, and in the excerpt from the trial transcript beginning on page 277. They are essentially uncontroverted. David Schalk's providing cash for the purchase of marijuana was never in dispute, and that is the basis of his conviction for attempted possession of marijuana. The issues presented pertain to the legality - or lack thereof - of Schalk's actions.

Around Noon on June 25, 2007, Lisa Edwards called David Schalk to say she was going to buy marijuana from Brandon Hyde in one hour. David Schalk met with Edwards to give her a digital voice recorder around 1:00 p.m. Schalk gave the recording device and two hundred dollars in recorded currency to Edwards' companion Roger Grubb at around 1:00 p.m. At 1:30 p.m., Edwards left a voice message for Schalk saying, "Everything is confirmed." Schalk tried to call James Kennedy, the Monroe County Sheriff, shortly thereafter but was unable to contact him. He began trying to contact Deputy Sheriff Jerry Reed through police dispatch, but Reed was preoccupied with emergencies and did not call him. He called the number of Chris Gaal, the Monroe County Prosecuting Attorney, but got no answer. He eventually got through to Chief Deputy Prosecuting Attorney Robert Miller to arrange for delivery of marijuana to a police officer, but Miller was no help, suggesting that they should destroy the marijuana. Schalk then met with Edwards and Grubb. He told them that he had spoken with Miller. He tried to persuade them to meet with Deputy Reed if he could set it up.

The next morning, Schalk tried to contact Detective Haverstock at the Bloomington Police Department and found out that he had retired. He left a message to Assistant Chief Diekoff and then filed a petition to take custody of evidence with the Monroe Circuit Court.

There was no recording of a drug transaction on voice recorder. At trial, Lisa Edwards testified that there was no marijuana in the package Roger Grubb showed David Schalk.

Detective Cody Forston of the Bloomington Police Department admitted that one reason he did not follow up on David Schalk's offer to introduce him to a confidential informant who would purchase drugs from Brandon Hyde was that helping Schalk would be a conflict of interest since he was opposing Schalk in the upcoming Pemberton trial. Exhibit "1," pp31,32. Detective William Jeffers admitted that he had asked Brandon Hyde to target Chad Pemberton so he would have leverage to persuade Pemberton to testify against a man named Carlton White. Pemberton's case in chief would have involved showing that the State's key witness had easy access to drugs, and a great deal to lose and great deal to gain depending on how happy he made the police who asked him to make a case against Chad Pemberton.

SUMMARY OF THE ARGUMENT

David Schalk was on the same legal footing as the prosecuting attorneys, other police officers, and confidential informants planning and executing controlled buys. The legal underpinnings of that footing are not contained in Indiana's statutes, nor are they explained in the reported cases.

Perhaps removing illegal drugs from commerce and putting them in police custody for use as evidence in trials and eventual destruction is not the evil the Indiana State Legislature intended to prohibit. Perhaps "possession" does not legally include activities involved in taking illegal drugs from dealers for the purpose of getting them logged into police storage lockers for use as evidence and eventual destruction. Even police chiefs and sheriffs might be said not to possess drugs they hold which are destined for destruction since they don't have dominion or control over them for any personal purpose.

The Court of Appeals need not answer these questions in this appeal. Acknowledging the murkiness of a state of affairs that the Indiana State Legislature might someday address, it can hold that the marijuana prohibition is void for vagueness as applied to David Schalk under the circumstances of June 25, 2007. If Schalk broke the law, then prosecutors, police officers, and confidential informants routinely break the law during the planning and execution of controlled buys, and the prosecution of David Schalk was selective and vindictive. That scandalous scenario is unthinkable, and could not possibly be a picture of public life in Indiana.

ARGUMENT

Precedent would support a holding by this Court that confidential informants and police officers do not have constructive or actual possession of illegal drugs during law enforcement and judicial actions. For example:

> Conviction on a possession of a narcotics offense may rest upon proof of actual or constructive possession. Actual possession is shown where there is an intent and capability to maintain dominion and control over the narcotics. Wilburn v. State (1982), Ind., 442 N.E.2d 1098. Williams v. State (1969), 253 Ind. 316, 253 N.E.2d 242 cited by Loudermilk also discusses the meaning of the word "possession":

> The terms control and possession are not precisely synonymous although they do have common elements in their meanings. Webster's International Dictionary gives the legal definition of possession as "one who has physical control of the thing and holds it for himself." All the definitions contained in recognized law dictionaries indicate that the element of custody and control is involved in the term possession. State v. Virdure, (Mo. 1963), 371 S.W.2d 196. Possession of a thing means having it under one's control or under one's dominion. United States v. Malfi, (3 Cir 1959), 264 F.2d 147. A person who is in possession of a chattel is one who has physical control with the intent to exercise such control on his own behalf. New England Box Co. v. C & R Const. Co., (1943), 313 Mass. 696, 49 N.E.2d 121, 150 A.L.R. 152. Possession involves a present or, in case of constructive possession, a past ability to control the thing possessed plus an intent to exclude others from such control. State ex rel. Edie v. Shain, (1941), 348 Mo. 119, 152 S.W.2d 174. For additional definitions of the word possession see, 72 C.J.S., p. 233; also see "Possession" (control, care or custody), 33 Words and Phrases, p. 80; and "Custody" (charge, control or possession) 10A Words and Phrases, p. 500.

Williams, supra at 321, 253 N.E.2d at 245-46.

Loudermilk v. State, 523 N.E.2d 769. 771,2 (Ind. App. 1988). Adhering to the principle that control is not possession without "intent to exercise such control on [one's] own behalf" and "an intent to exclude others from such control" would release prosecuting attorneys, police officers, and confidential informants from potential liability while they make plans to obtain illegal drugs and other contraband and, if the plans work out, take control of contraband for use as evidence and eventual destruction. David Schalk declined to so much as touch a packet that purportedly contained marijuana purchased from Brandon Hyde on June 25, 2007. It is undisputed that his efforts were directed solely toward causing any purchased marijuana to be handed over to the police. Exhibit. 2, p.27,28. Since Schalk did not attempt to cause himself, Edwards, Grubb, or the police to possess marijuana, but intended only for some of them to guide it through a legal

process culminating in its destruction after the Pemberton trial, Schalk's conviction should be reversed.

Another approach would be to hold that the Indiana State Legislature did not intend to prohibit Hoosiers from taking prohibited drugs away from dealers so the drugs could be kept in police custody, used as evidence in court, and destroyed. In this case, the police were not interested in exposing Brandon Hyde's drug dealing. The State Legislature grants citizens and police officers equal arrest powers whenever a felony or observed, ongoing misdemeanor breach of the peace has been committed. Ind. Code § 35-33-1-4. It is not logical to suppose that the Legislature meant to give the police a monopoly on sting operations. If the Indiana State Legislature ever establishes guidelines for controlled buys, it would be wise to establish ways in which citizens, or at least officers of the court acting in the course of their duties, can obtain evidence proving the existence of ongoing criminal enterprises.

To say that Appellant's only recourse, if he wanted convincing proof that the State's witness was actively dealing drugs while doing favors for the police, was to follow Ind. Code § 35-33-1-4 and forcibly take the witness into custody while he was in possession of a felonious amount of drugs, would promote violence and put feeble, infirm, and elderly defense lawyers at a disadvantage while giving an advantage to drug-dealing witnesses who are skilled in the martial arts.

This case has implications beyond a personal attack on a defense lawyer by representatives of the State. The constitutional right of people accused of crimes to defend themselves is under attack. Chad Pemberton is not a party to this appeal, but David Schalk has standing to assert his right to defend his clients as part of the guarantees

of the Sixth Amendment to the Constitution of the United States of America and Article 1, § 13 of the Constitution of Indiana. Ind. Const. Art. 1, § 13, USCS Const. Amend. 6.

Article 1, Section 13 of the Constitution of Indiana and the Sixth Amendment of the Constitution of the United States of America guarantee the right to defend oneself and to have counsel of one's choice. This case is sending a clear and chilling message to counsel all across Indiana that the State can crush you if you try to get your client a fair trial.

Ind. Code § 35-48-4-11(1), as it is being applied in this case, violates the Sixth Amendment and Article 1, Section 13 of the Indiana Constitution by attempting to establish a rule whereby criminal defense attorneys may not probe very deeply into the nefarious activities of State's witnesses without being disqualified as counsel and prosecuted like common criminals. The State's efforts are also ripe for challenge here as an attempt to impose prior restraint of two related constitutionally protected core values of our society – the rights defend against criminal charges and the right to be represented the attorney of ones choice.

This case is not being prosecuted to further any purpose intended by the Indiana State legislature, but rather to retaliate against David Schalk for defending Chad Pemberton and to discourage him and other defense counsel from adequately defending their clients in the future. Where a defendant is denied his rights under the due process and due course of law clauses of state Constitution, all procedural rules that would prevent their consideration or leave them to the discretion of the trial court must yield to the fundamental principles of due process and due course of law, and all proceedings in the

case thereafter are void. Const. art. 1, §§ 12, 13. *State v. Lindsey*, 106 N.E.2d 230 (Ind. 1952). Ind. Const. Art. 1, § 12, Ind. Const. Art. 1, § 13.

Prosecuting attorneys advise and encourage the police regarding sting operations against drug dealers. It is assumed that they do so legally. David Schalk was the prosecuting attorneys counterpart in the Pemberton case. Defendants and their attorney's deserve equal protection under the law with representatives of the State.

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. Art. 1, § 23.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

USCS Const. Amend. 14, § 1.

Article 1, Section 23 of the Indiana Constitution was intended to minimize the risk of misuse of legislative power to the benefit of some citizens. Statutes granting unequal privileges or immunities will not violate Section 23 if the disparate treatment is reasonably related to inherent characteristics which distinguish the unequally treated classes, and if the preferential treatment is uniformly and equally available to all persons similarly situated. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

David Schalk is before this Court to vindicate himself and help preserve the rights of defendants in criminal cases and the right of their lawyers to defend them. He could have avoided judgment of conviction and much expenditure of time and effort by admitting

wrongdoing but instead he remained true to himself and core principles of our constitutional republic which he holds dear. Schalk is reminded of his oath as an attorney and his oath as a deputy sheriff, swearing to always uphold and defend the constitution.

Schalk is a man of at least average intelligence. He is confident that the law did not prohibit him from doing what he did on June 25, 2007, in preparation for the scheduled Pemberton trial. If the Court finds flaws in his analysis, he asks the Court to extend to him the benefit of the doubt by applying the principle of lenity and declaring that, as applied to him under the circumstances of June 25, 2007, the prohibition against attempting to possess marijuana was void for vagueness.

> A challenge to the validity of a statute must overcome a presumption that the statute is constitutional. *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000). The party challenging the statute has the burden of proving otherwise. Brady v. State, 575 N.E.2d 981, 984 (Ind. 1991).
>
> Due process principles advise that a penal statute is void for vagueness if it does not clearly define its prohibitions. Klein v. State, 698 N.E.2d 296, 299 (Ind. 1998) (citing Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). A criminal statute may be invalidated for vagueness for either of two independent reasons: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement. City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67, 79-80 (1999); Healthscript, Inc. v. State, 770 N.E.2d 810, 815-16 (Ind. 2002). A related consideration is the requirement that a penal statute give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden so that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Healthscript, Inc., 770 N.E.2d at 816 (quoting United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989, 946 (1954)). In State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985), this Court emphasized that "there must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines." Accordingly, the statutory language must "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding." Rhinehardt v. State, 477 N.E.2d 89, 93 (Ind. 1985).
>
> But a statute "is not void for vagueness if individuals of ordinary intelligence could comprehend it to the extent that it would fairly inform them of the generally proscribed conduct." Klein, 698 N.E.2d at 299; *accord*

> Lombardo, 738 N.E.2d at 656. And the statute does not have to list specifically all items of prohibited conduct; rather, it must inform the individual of the conduct generally proscribed. Lombardo, 738 N.E.2d at 656. The examination of a vagueness challenge is performed in light of the facts and circumstances of each individual case. *Id*.

Brown v. State, 868 N.E.2d 464, 467 (Ind. 2007)

CONCLUSION

David Schalk respectfully submits that his conviction should be reversed on grounds that that his actions on June 25, 2007 did not constitute a criminal offense. If there is doubt about that, then the statute as it pertained to Schalk on that date was void on grounds that it was unconstitutionally vague.

Respectfully submitted,

David E. Schalk
Attorney Number 15551-53

CERTIFICATE OF SERVICE

I hereby certify that on this Eighth Day of November, 2010, the forgoing was served upon the following counsel of record by pre-paid FedEx:

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Attached: Judgment
Notice of Appeal

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