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.	)	

REPLY OF APPELLANT

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SUMMARY OF THE ARGUMENT

The State's argument is fatally flawed. The Indiana Department of Pharmacy did not authorize anyone to possess anything. If the plain words of the statute prohibiting marijuana are applied, as the State urges, and the rule of lenity is applied to an understanding of the scope of "possession," then neither David Schalk nor officials and their helpers endeavouring to enforce drug laws possess or possessed marijuana.

David Schalk is charged with attempted possession of marijuana. It is acknowledged that he attempted to relieve of drug dealer of some of his wares and cause them to be delivered to the State of Indiana and placed in a secure police locker. State's Exhibit 3, pp. 28-30. Schalk refused to touch what was purported to be marijuana, so he did not attempt to actually possess marijuana. Moreover, and he did not authorize or intend for anyone or any entity other than the State of Indiana to treat the marijuana as a possession.

Fundamental constitutional considerations are invoked by the State's attempt to deprive a person of the right of a complete defence by abusing the powers our Indiana Constitution gives to prosecuting attorneys.

Unfounded conspiracy theories intended to make David Schalk look foolish by suggesting that he urged Lisa Edwards to go buy some marijuana from the State's witness causing her to do so on June 25, 2007 have no legitimate place in this appeal. David Schalk testified that he told Edwards the police would have to be involved in any purchase and she declined to do anything that would make her appear to be a snitch. Nobody knows why Lisa Edwards called David Schalk to say she was going to buy marijuana from the dealer in one hour. Lisa Edwards doesn't seem to know why she called Schalk. In retrospect, it became clear that she did not acquire evidence, not even a

transaction recording, on behalf of Chad Pemberton so it is quite a stretch to surmise that she set out to get some "weed" from "Pablo" on his behalf.

David Schalk does not comprehend how his doing what prosecuting attorneys and police officers do, especially when they wouldn't do it for his client, can rightly be considered a crime. This is not a country in which the police do as they please without legal authority and no one dares to cross them. David Schalk is here on appeal because he cares deeply about the principals on which our nation was founded, and is grateful for this opportunity to stand up in defence of the freedoms we all enjoy. If the Court sees things differently, Mr. Schalk urges it not brand him a criminal, and hold at least that the statute was void for vagueness as applied to him on June 25, 2007.

ARGUMENT

The Two Ways of Understanding Indiana Code § 35-48-4-11

The State holds fast to the proposition that violating the letter of the statute prohibiting the possession of marijuana[1] is always a crime. The only way to avoid criminal liability for possessing marijuana, in the State's view, would be to prevail in interposing one of the legal defence set forth in Ind. Code § 35-41-3. They are legal authority, involuntary intoxication, mental disease or defect, mistake of fact, duress, entrapment, and abandonment.

If the State is correct, then "possession" in the context of the marijuana prohibition must mean more than mere merely exerting physical control over marijuana or having the

[1] Ind. Code 35-48-4-11 states:
A person who:
(1) knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, or hashish;
(2) knowingly or intentionally grows or cultivates marijuana; or
(3) knowing that marijuana is growing on his premises, fails to destroy the marijuana plants;
commits possession of marijuana, hash oil, or hashish, a Class A misdemeanor.

intention and ability to physically control marijuana (constructive possession). If the statute is to be strictly applied according its letter, then the definition of "possession" cannot be so broad as to include law enforcement activities because that would imply that police officers and their civilian helpers routinely commit crimes when they purchase or seize marijuana for use as evidence in criminal prosecutions. In legal analysis, no less than in mathematics, a proposition that leads to an absurd result is, *ipso facto*, proven false. If the plain words of the statute are to be applied, and the police and their helpers do not have a viable defence, then it is certain that they do not "possess" the marijuana they handle.

Understanding the logic of the situation, but nevertheless urging the Court to adopt an expansive understanding of "possession," the State needed to find a legal defence for those who handle marijuana, and who collaborate, aid, and encourage them, while enforcing the prohibition. The State was unable to do so. It offered an attempt that does not even come close to accomplishing its goal, asserting that Indiana Department of Pharmacy regulation 856 IAC 2-3-7(a)(2) somehow grants police officers and their civilian helpers the defence of "legal authority" pursuant to Indiana Code § 35-41-3-1.[2] In fact, 856 IAC 2-3-7(a)(2) does nothing more than waive a registration requirement for

[2] 856 IAC 2-3-2 requires people engaging in manufacturing, distributing, or dispensing controlled substance to register with the Indiana Department of Pharmacy. 856 IAC 2-3-7(a)(2) waives the registration requirement for " any officer or employee of any State, or any political subdivision or agency thereof, who is . . . duly authorized to possess controlled substances in the course of his official duties."

any state employees who is already duly authorized to possess marijuana.[3] It does not purport to designate or even say who such duly authorized state employees might be. If there are any, they don't need permits to manufacture, distribute, or dispense controlled substances while performing their duties. Manufacturing, distributing, and dispensing controlled substances are not among the things that police officers and confidential informants are supposed be doing anyway. The regulation has nothing to do with them, and it doesn't grant them or anybody else the authority to do anything.

In the absence of the defence of legal authority, the conclusion is inevitable. There is no way to adhere to the letter of the statute prohibiting the possession of marijuana without understanding "possession" to encompass less than mere custody or control.

A Strict Reading of the Plain Words – Distinguishing Possession from Mere Custody

The following was cut and pasted from http://www.lexisnexis.com/lawschool/study/outlines/html/crim/crim26.htm:

> **"Custody" versus "Possession" –** Larceny involves the trespassory taking of personal property from the *possession* of another. ***Ownership is not the key***. A person has *possession* of property when he has ***sufficient control over it to use it in a reasonably unrestricted manner.*** Possession can be actual or constructive. It is *actual* if the person is in physical control of it; it is *constructive* if he is not in physical control of it but no one else has actual possession of it, either because the property was lost or mislaid or because another person has mere "custody" of it. All non-abandoned property is in the actual or constructive possession of some party at all times.
> A person has mere custody of property if he has physical control over it, but his right to use it is substantially restricted by the person in constructive possession of the property. A person in physical control of property has mere custody of the property in any of the following situations: He has temporary and extremely limited authorization to use the property.

[3] A law enforcement officer who possessed marijuana for his own personal use, or for the purpose of securing it in a police locker for use as evidence and eventual destruction, would not be manufacturing, distributing, or dispensing a controlled substance and would not be an appropriate person to register under 856 IAC 2-3-2 regardless of whether or not he was "duly authorized."

This is not binding authority, of course, but it is not contrary to Indiana law and might contain thoughts which could be incorporated in a decision in this case of first impression. Confidential informants and police officers do not have a right to use purchased marijuana in an unrestricted manner. The officer has "has temporary and extremely limited authorization to use the property." It makes sense to say that the State of Indiana has constructive possession of marijuana which has been taken from dealers for use as evidence and eventual destruction, even when it is being handled at locations remote from the evidence lockers at police headquarters. David Schalk attempted to cause the State of Indiana to take possession of marijuana. He did not and could not authorize Lisa Edwards or Roger Grubb to do anything other than hand it over to the police. State's Exhibit 3, pp. 28-30.

Loudermilk v. State, 523 N.E.2d 769, (Ind. App. 1988), cited in David Schalk's Brief of Appellee, seems more significance than ever now that the State has argued for strict application of the plain words of the marijuana statute, implying that it would be inappropriate to impute to the Indiana State Legislature unwritten intentions consistent with their goal of taking marijuana away from drug dealers. Here is the quote:

> 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, *supra* at 772.

This is a case of first impression. David Schalk respectfully suggests that the best way to resolve it would be to hold that the words of the statute are plain and clear, and no legislative intent beyond what is stated within the four corners of the enactment needs to be imputed; possession of marijuana in the absence of a viable defence always incurs potential criminal liability; and "possession" of marijuana encompasses less than mere control or custody of it.

It is well established in the published cases that the rule of lenity should be applied where reasonable doubt exists regarding the scope of applicability of a statute. The rule of lenity "requires that criminal statutes be strictly construed against the state." *Mast v. State*, 829 N.E.2d 932 (2005) quoting from *Ellis v. State,* 736 N.E.2d 731, 737 (Ind.2000) and *Walker v. State,* 668 N.E.2d 243, 246 (Ind. 1996). The narrowest reasonable understanding of "possession" should be adopted in this case. Such an understanding would affirm the lawfulness of official enforcement of the marijuana prohibition and

vindicate David Schalk who has for three years steadfastly believed, even when offered deferred prosecution, that he did not commit a criminal offense.

The Spirit of the Law and Imputing Legislative Intent

Imputing legislative intent not stated in the statute is a viable option, and would be preferable to saying David Schalk and the police are criminals.[4] A better understanding of the word "possession," as discussed above, would seem to make that unnecessary.

The State Misstated the Facts

David Schalk testified that his conversations with people who might help prove that the State's witness was actively dealing drugs always included the understanding that any actual purchase would have to made with prior knowledge of the police. The State's witnesses who said they discussed a possible purchase with Mr. Schalk did not deny the truth of Schalk's testimony when asked about it at trial. The State should not have written in its brief that "[d]efendant contests none of these facts" which show "he contacted Edwards to make the buy." Schalk did not ask Edwards to make the buy and still doesn't know why she called him to say she was going to buy some "weed" from Pablo in one hour. It is undisputed that shortly after Edwards' call David Schalk provided a recording device and recorded currency to Edwards' companion for the purchase of marijuana. That is the basis for the conviction. It was inappropriate for the State to write superfluous "facts" invoking images of imaginary plans and conspiracies.

This is what was said at trial:

> THE COURT: I understand that, but is it not correct that you had precipitated the discussion with her that ultimately resulted in the meeting at Arby's on the 25th at noon and the effort to make this buy?

[4] Actually, David Schalk is a *bona fide*, duly appointed, duly sworn deputy Monroe County Sheriff (not an auxiliary). He was not acting in his official capacity on June 25, 2007 so the significance, if any, of his status as a law enforcement officer is unclear. Tr. 115,116.

DAVID SCHALK: Your Honor, what I can say is that yes except if I may qualify that with, I didn't intentionally precipitate something that, for a lack of a better word, goofy, I mean whatever, she called me to say she was going to buy weed from Pablo and I didn't know what I could make out of that, but it wasn't like some plan of mine and she testifies that she doesn't even know why she called to tell me she was going to get weed from Pablo, but she reaped a windfall I guess and got lots of weed from Pablo. But I just….you know what Judge, it's like I don't know how it impinges on the elements in the case. But it just makes me look so incompetent and like such a fool that like I would want somebody to just go and buy weed from Pablo. And you know then afterwards I would go and try to find an officer, try to see if the prosecutor is at home, and all this, it's like….I jumped on this thing to try to get something for my client at the upcoming trial and tried to steer the drugs into the hands of the police and then we got a discussion about how…what Lisa might do if she would be willing to do that wouldn't involve her being known as the helper. But I just went along with this thing in trying to steer it where it might be useful to Pemberton, but I just feel kind of, I don't know, I wouldn't want people to think that I was that dumb, that I would just want somebody to use, go buy weed from Pablo. I mean that's not what it's….

Tr. pp. 135, 136. Something may have been lost in the transcription, but the point is clear. At the trial, Schalk asked Edwards: "Why did you call me up about noon on June the 25th 2007 and say we're going to buy some weed from Pablo in an hour?" The answer: "I'm not sure what my intentions were really." Here is what Leslie Pemberton said at trial after Schalk asked: "Do you have any recollection of any of that about who you know maybe I could get the city cops, but maybe the state police might do it?" Leslie Pemberton said: "I remember you saying that you were going to get a cop involved for the controlled buy." Schalk questioned Lisa Edwards as follows:

Q Were you here recently when Chad's sister, Leslie said that I told her that the police would need to be involved in a controlled buy?

A Yes, I heard her say that.

Q Did she tell you that, that is how it was suppose to be?

A Hum, I don't know if she elaborated in that or not. It's been two years ago, I don't recall. Her and I talked about it briefly.

David Schalk has been from the beginning, was at trial, and is still quite certain that he told Leslie Pemberton and Lisa Edwards that the police would be part of any drug buy that he was proposing.

The State wrote: "Defendant contests none of these facts, which clearly show that he completed several substantial steps in his effort to possess marijuana from Hyde to use at Pemberton's trial; he contacted Edwards to make the buy, met with Edwards, gave her a tape recorder, and provided the "buy" money." Schalk gave Edwards recorded currency and a digital voice recorder hoping that she would obtain useful evidence that Brandon Hyde was actively dealing drugs. It was a week before the Pemberton trial and Schalk tried to make the most of a strange situation that suddenly, and quite unexpectedly arose.

The Right to Defend Chad Pemberton Against Criminal Charges Was Violated

The State has the right to decline to expose the activities of the drug dealers with whom it collaborates. Prosecuting attorneys routinely aid, abet, encourage, advise, help obtain drug task force funds, and facilitate the purchase of marijuana for use as evidence against dealers. Not satisfied with these expansive powers, the State now asks the Indiana Court of Appeals to sanction the use of the State's prosecutory powers against defence attorneys doing what prosecutors do when they do it on behalf of defendants. The State's position in this matter is misguided.

Schalk asserted on page 12 of his Brief of Appellant:

> 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.

The State argues that defendants have not been designated as suspect classes in equal protection discrimination cases. That is probably true. It does not change the fact that defendants in criminal cases have been afforded quite a bit more than equal protection from the inception of our nation. The presumption of innocence, the right against self-incrimination, insistence on due process of law, and so forth extend much more than equal protection to those the State accuse of crimes. The rule of lenity is not about equal protection, but it requires that defendants always be extended the benefit of the doubt. The State wants to hide the nefarious activities of its dope-dealing witnesses behind a wall of secrecy, even when such secrecy facilitates frauds on the courts and perjured testimony, as was about to happen in the Pemberton trial.

David Schalk Did Not Attempt to Possess Marijuana

David Schalk refused to touch what was purported to be marijuana, so he did not attempt to actually possess marijuana. He did not attempt to constructively possess marijuana. Constructive possession involves an 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. Schalk did not authorize or intend for anyone or any entity other than the State of Indiana to treat the marijuana as its possession.

CONCLUSION

The State is wrong in wanting David Schalk to remain a convicted criminal. Its arguments are flawed and the result it seeks would be unjust. David Schalk did his best to defend his client, and remained always within the bounds of the law. Those who

disagree cannot rightly say that Schalk's perceptions and reasoning were irrational, and so, at the very least, his conviction should be reversed on grounds that the statute involved was void for vagueness as applied to him on June 25, 2007.

Respectfully submitted,

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CIRTIFICATE OF SERVICE

I hereby certify that on this Nineteenth Day of January, 2011, the forgoing was served upon the following counsel of record by pre-paid FedEx:

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