IN THE MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

STATE OF MAINE, Plaintiff/Appellee, vs. RICHARD TONINI, Defendant/Appellant	Appeal from Judgment and Commitment of Hancock County Unified Criminal Docket Case No. HANCD-CR-2018-1171 Law Court Docket No. HAN-19-245 APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF THE FACTS

Defendant Richard Tonini was pulled over for a traffic infraction (Tr I[1], 35). During the stop, State Trooper Travis Chapman observed a clear plastic bag in the back seat he believed to be marijuana (Tr I, 36). Chapman asked Tonini "what was up with the marijuana" (Tr I, 36). Tonini responded that he was allowed to possess up to eight pounds (Tr I, 36). Chapman asked Tonini if he had any weapons on him and Tonini told him he had a gun on his hip and another gun in the back seat in a holster (Tr I, 37). During the search of the vehicle, Chapman also found a small "sandwich baggie" of marijuana (Tr I, 39). Trooper Chapman also found a large amount of cash in a tool bag in the back of the car (Tr I, 40). Tonini told Chapman there was approximately $5,000 and it belonged to his boss (Tr I, 40). Tonini stated that he was a property manager (Tr I, 40).

Chapman did not observe any signs that Tonini was or had recently been using marijuana (Tr I, 47). Tonini did not appear

[1] The transcripts will be referred to as follows:
Tr I – Jury Trial Transcript, April 12, 2019

intoxicated (Tr I, 47). Chapman did not smell smoke or observe any pipes or other smoking paraphernalia (Tr I, 47).

Chapman collected the bags he believed to be marijuana and weighed them on a scale in the back seat of his cruiser (Tr I, 48). Chapman never opened the bags and the substances were never chemically tested (Tr I, 49).

Chapman issued Tonini a summons for furnishing scheduled drugs. Tonini was ultimately charged with furnishing scheduled drugs and with being a prohibited person in possession of a firearm (Class D) in violation of 15 M.R.S.A. § 393(1)(G) (Complaint, Appendix p. 10).

Following the close of the State's proofs, the defense moved for a judgment of acquittal on both counts (Tr I, 52). The court denied the motion with respect to both counts, but indicated it would take the motion as to count 2 under advisement to be reconsidered after the close of all proofs (Tr I, 54-55).

The defense presented the testimony of Lori Callnan who corroborated Tonini's statement that the cash belonged to his boss and that he was a property manager (Tr I, 60). Tonini was advised

by the court of his right to testify and he elected not to testify (Tr I, 77).

The court heard oral argument on the record in chambers on the defense's renewed motion for a judgment of acquittal (Tr I, 65-68). The court stated it had "real questions" regarding whether defendant's status as an "unlawful user" could be rationally inferred from the evidence presented (Tr I, 68). The Court took the motion under advisement and sent the case to the jury to "see what they come back with" (Tr I, 69). The Court invited the parties to brief the issue stating "It's an interesting question. I just don't know the answer" (Tr I, 70). The jury returned a verdict of not guilty as to count 1 (Furnishing) and guilty as to count 2 (Prohibited person in possession of a firearm) (Tr I, 106). The defense renewed its motion for a judgment of acquittal and the court took it under advisement (Tr I, 108).

The defense filed a brief in support of its motion for a judgment of acquittal and a motion to dismiss arguing that the infraction was de minimis under 17-A M.R.S.A. § 12. Appendix p 11). The State responded to both motions in its "Response to Defendant's Post-Verdict Motions." Appendix p. 18. In a written decision, the trial

court denied both motions stating "[a]lthough the verdict presents anomalous features, the court finds no basis for disrupting the jury's decision." Appendix P. 21.

Defendant was sentenced on June 12, 2019 to pay a fine of $350. Judgment and Commitment, Appendix, p. 7. This appeal followed.

STATEMENT OF ISSUES PRESENTED

I. In Maine, where adult use and possession of marijuana is legal, does a state statute prohibiting a person from possessing a firearm merely because they are a marijuana user violate the constitutional right to keep and bear arms?

II. To convict the Defendant of being a prohibited person, the jury was required to find beyond a reasonable doubt that he was an unlawful user of a controlled substance. There was no direct or circumstantial evidence presented at trial that defendant was a marijuana user. Was the evidence insufficient to allow a rational juror to find guilt beyond a reasonable doubt?

III. Due process requires that a criminal statute give fair notice of the standard of conduct to which a person will be held accountable. It is a crime in Maine for an "unlawful user of a controlled substance" to possess a firearm. As applied to this case, does that criminal statute violate due process because it is unconstitutionally vague?

IV. Under Maine's de minimis infraction statute, the trial court must consider the full range of factors articulated by this Court in *State v. Kargar*. Here the trial court failed to conduct any analysis or consider *any* of the relevant factors. Did the trial court abuse its discretion as a matter of law by refusing to consider all the required factors?

LAW AND ARGUMENT

I. In Maine, where adult use and possession of marijuana is legal, a state statute prohibiting a person from possessing a firearm merely because they are a marijuana user violates the constitutional right to keep and bear arms.

Standard of Review:

The constitutionality of a Maine statute is reviewed de novo. *State v. Nisbet*, 2018 ME 113, ¶ 16, 191 A.3d 359. Where, as here, the issue was not raised below, the Court applies the obvious error standard. See *State v. Greenleaf*, 2004 ME 149, ¶ 34, 863 A.2d 877. This Court has stated, "For an error or defect to be obvious for…, there must be (1) an error, (2) that is plain, and (3) that affects substantial rights." *State v. Pabon,* 2011 ME 100, ¶ 29, 28 A.3d 1147. The Court further stated, "If these conditions are met, we will exercise our discretion to notice an unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *Id.* Here, the error seriously affects the fairness of judicial proceedings because defendant's constitutional right to bear arms was infringed by the

conviction. This Court should exercise its discretion and decide this constitutional question de novo.

Law and Argument

The Second Amendment to the United States Constitution states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend II. Likewise, Article 1, Section 16 of the Maine Constitution states, "Every citizen has a right to keep and bear arms and this right shall never be questioned." Me. Const. art. I, § 16.

In 2016 Maine voters approved a referendum legalizing adult use and possession of marijuana. Personal adult use of marijuana is now governed by Title 28-B, Section 1501 of the Maine Revised Statutes. 28-B M.R.S.A § 1501 authorizes (within certain limitations) the recreational use of marijuana by persons 21 years of age or older. Section 1502 allows home cultivation of a limited number of marijuana plants. The legislature recently adopted P.L. 2019, ch. 491 which implements a legal framework for the recreational marijuana industry in Maine. Essentially, the State

(like many other states) has moved toward regulating marijuana more like alcohol and tobacco and less like a scheduled drug.

Even though marijuana use is legal under Maine law, marijuana is still considered a "controlled substance" under federal law. 21 U.S.C. § 812. Title 15, Section 393(1)(G) of the Maine revised statutes makes it a crime in Maine to possess a firearm if a person is "an unlawful user of or is addicted to any controlled substance and as a result is prohibited from possession of a firearm under 18 United States Code, Section 922(g)(3)."

In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the United States Supreme Court recognized the Second Amendment right to keep and bear arms as a fundamental individual right. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), the Supreme Court held that the fundamental constitutional right to bear arms applies to the states through the due process clause of the 14th Amendment. "Like most rights, the right secured by the Second Amendment is not unlimited." *Heller* at 626. However, when the State seeks to regulate an activity that is considered a fundamental right, that regulation is subject to strict scrutiny review. See *Butler v. Supreme Judicial Court*, 611 A.2d 987, 992 n.9 (Me. 1992)

("Where a classification involves a suspect class or impinges on a fundamental right, the strict scrutiny test is applied: the classification must be narrowly tailored to promote a compelling state interest."). Under strict scrutiny, the State bears the heavy burden of showing that it has a compelling interest in the regulation and that it has chosen the least restrictive means.

Heller explicitly states "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . ." *Heller* at 626. However, the statute at issue in this case is sufficiently distinguishable from a firearm prohibition for convicted felons to warrant this Court's scrutiny. Section 393(1)(G), as applied to this defendant and those similarly situated, absolutely bans the possession of firearms by those who use marijuana—a substance the people of Maine have made legal for adult recreational use. If the Second Amendment right to bear arms is to be given due regard as a fundamental individual right, any legislation infringing that right must be subject to strict judicial scrutiny.

Post-legalization, Maine's interest in preventing marijuana users from possessing firearms cannot be said to be compelling.

The State's interest in preventing all felons from possessing firearms is compelling because the underlying conduct for which the person has been found guilty is objectionable to the State. As this Court has stated, "One who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable[2] for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person." *State v. Brown*, 571 A.2d 816, 821 (Me. 1990).

Here, the underlying conduct—the medicinal or recreational use of marijuana—is not objectionable to the State and does not rise to the level a public safety concern that would justify a total ban on firearms for the affected class of persons. To the contrary, a majority of voters has acted to legalize such use and the Legislature has taken steps to develop a regulatory framework for a marijuana industry in Maine. Under current law pertaining to the use and possession of marijuana, the State of Maine has no compelling

[2] The Court in *Brown* appears to be applying a "rational basis" test rather than strict scrutiny. However, as discussed infra, *Brown* was decided before the United States Supreme Court announced in *Heller* that the right to bear arms was a fundamental individual right.

interest in preventing marijuana users from exercising their Second Amendment rights.

Looking at the firearms prohibition under § 393 more broadly, it prohibits firearm possession by felons, those adjudicated mentally ill, those dishonorably discharged from the military, and aliens in the country illegally. Although the Court is not being asked to determine the constitutionality of a firearms prohibition regarding these categories, the State's compelling interest in those situations is more apparent. Like felons, those found not criminally responsible by reason of insanity demonstrate a public safety concern because their mental illness has caused or allowed them to act in a manner that would ordinarily be considered criminal. Dishonorable discharge from the military demonstrates a lack of regard for authority that justifies prohibition. Preventing illegal aliens from possessing firearms serves a national security concern. By contrast, a complete firearm prohibition based on the use of marijuana serves no compelling State interest.

Even if the Court finds that the State has a compelling interest, § 393(1)(G) is still unconstitutional because it is not narrowly tailored to serve that interest. Assuming that the State's

interest arises from a concern for public safety (i.e. we don't want people using firearms while under the influence of drugs) § 393(1)(G) is both overinclusive and underinclusive. It is overinclusive because it is a total prohibition on firearms for anyone who uses marijuana. As demonstrated by the circumstances of this case, a person can run afoul of this law while exhibiting no signs of intoxication and with no evidence of recent use. Section 393(1)(G) is underinclusive because it fails to address use of other intoxicants—namely alcohol—that pose serious risk to the public when combined with firearms. Further, the public safety concerns the State may advance are already addressed by laws against hunting while intoxicated, 12 M.R.S.A. § 10701, possession of a firearm in a licensed retail liquor establishment, 17-A M.R.S.A. § 1057, and reckless conduct 17-A M.R.S.A. § 211.

The State may argue that this Court in *Brown* applied rational basis review to § 393(1) and found that section constitutional. However, *Brown* addressed the prohibition against felons found in subsection (1)(A-1) and said nothing about the prohibition against drug users. Further, *Brown* was decided pre-*Heller*. This Court should revisit its use of rational basis as the test for laws regulating

the use and possession of firearms. Because of the fundamental individual right involved, strict scrutiny is the proper test.

As applied to marijuana users, § 393(1)(G) violates both the state and federal constitutional right to keep and bear arms. Accordingly, defendant asks that this Court vacate his conviction and sentence.

II. To convict the Defendant of being a prohibited person, the jury was required to find beyond a reasonable doubt that he was an unlawful user of a controlled substance. There was no direct or circumstantial evidence presented at trial that defendant was a marijuana user. Therefore, the evidence was insufficient to allow a rational juror to find guilt beyond a reasonable doubt.

Standard of Review:

"When a criminal defendant challenges the sufficiency of the evidence, [this Court] view[s] the evidence in the light most favorable to the State and review[s] any applicable statute de novo to determine whether the fact-finder could have found beyond a reasonable doubt every element of the offense charged." *State v. Murphy*, 2016 ME 5, ¶ 5, 130 A.3d 401.

Law and Argument

At issue in this case is the definition of the term "unlawful user of or [] addicted[3] to a controlled substance." Under 15 M.R.S.A § 393(1)(G),

> A person may not own, possess or have under that person's control a firearm . . . if that person . . . [i]s an unlawful user of or is addicted to any controlled substance and as a result is prohibited from possession of a firearm under 18 United States Code, Section 922(g)(3).

Maine statutes do not provide any guidance regarding the definition of who is considered an unlawful user of a controlled substance. Likewise, there is no statutory guidance in federal law. However, the Federal Bureau of Alcohol Tobacco and Firearms has promulgated a regulation defining "unlawful user of or is addicted to any controlled substance." 27 C.F.R. § 478.11. That regulation states in relevant part:

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the

[3] The State did not argue that defendant was "addicted to" marijuana and no evidence was presented that could rationally support that theory.

> unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year.

The regulatory definition appears not to treat the "or" separating "unlawful user of or addicted to" as strictly disjunctive. Rather, the definition is informed by the common sense understanding of the dangers of drug addicts in possession of firearms. The regulation discusses a "pattern of use" and use that "has occurred recently enough to indicate that the individual is actively engaged in such conduct." "A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance" is the type of person the Legislature has determined should not possess firearms.

The evidence at trial, viewed in the light most favorable to the prosecution, supported the conclusion that defendant was in possession of approximately 5-and-a-half ounces of marijuana when he was pulled over. However, there was no direct evidence that defendant was using marijuana at the time, nor was there evidence of recent use. The officer testified that he did not smell marijuana smoke and that defendant did not appear intoxicated. The officer did not find any smoking paraphernalia is the vehicle.

The court instructed that marijuana was a controlled substance, but did not define the term "unlawful user." Neither defense counsel nor the prosecutor objected to these instructions. However, this Court has stated,

> it is insufficient merely to give the jury general and abstract propositions of law, which may be correct in themselves but, without further explanation as to their application to the particular facts of the case, leave the jury to speculate as to how they should be applied in determining guilt or innocence in the factual scenario presented by the evidence. [*State v. Bahre*, 456 A.2d 860, 866 (Me. 1983).]

Accordingly, the jury was required to speculate not only whether defendant's possession of marijuana implied he was a user,

but also how the term "unlawful user" should be applied to the evidence.

Therefore, the evidence was insufficient to sustain a conviction and defendant's conviction and sentence should be vacated.

III. Due process requires that a criminal statute give fair notice of the standard of conduct to which a person will be held accountable. It is a crime in Maine for an "unlawful user of a controlled substance" to possess a firearm. As applied to this case, that criminal statute violates due process because it is unconstitutionally vague.

Standard of Review:

The constitutionality of a Maine statute is reviewed de novo. *Nisbet*, 2018 ME 113, ¶ 16, 191 A.3d 359. Where, as here, the issue was not raised below, the Court applies the obvious error standard. See *Greenleaf*, 2004 ME 149, ¶ 34, 863 A.2d 877.

Law and Argument

"The due process clauses of the United States and Maine Constitutions "require that criminal defendants be given fair notice of the standard of conduct to which they can be held accountable."

Nisbet, 2018 ME 113, ¶ 17, 191 A.3d 359. "In order to find a statute void for vagueness, [the Court] must find that the statute fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Id.* (internal quotation marks omitted).

As discussed above, there is no statutory definition for the term "unlawful user[4]" in Maine law or federal statutes. For the same reasons a jury would be forced to speculate as to its meaning, ordinary people would find it difficult to "understand what conduct is prohibited." When does this firearm's prohibition attach? If a person uses marijuana once, do they become a prohibited person? Or does the prohibition apply only to regular or compulsive marijuana users?

Contrast subsection (1)(G) with the other subsections in the prohibited person statute. Subsection (1)(A-1) prohibits firearm

[4] There was no evidence presented that defendant was "addicted to" a controlled substance and the State never advanced that theory. Accordingly, defendant takes no position regarding the constitutionality of a statute that prohibits someone who is "addicted to" marijuana from possessing a firearm.

possess based on criminal conviction. Subection (1)(C) applies to persons who have been involuntarily committed or found not criminally responsible by reason of insanity. Subsection (1)(I) applies to those who have been dishonorably discharged from the armed forces. Each of these subsections describe a particular judicial determination that triggers prohibition. Subsection (1)(G) is unique because it does not require a definite triggering judicial event.

A vague criminal statute violates due process because it fails to give citizens effective notice of prohibited conduct. Under each of the other subsections of § 393, a person is put on actual notice that they have become a prohibited person because of specific court action. Section 393(1)(G) not only does not provide a person with that type of actual notice, its language is vague to the extent it would "encourage arbitrary and discriminatory enforcement."

Accordingly, as applied to the facts of this case, 15 M.R.S.A § 393(1)(G) is unconstitutionally vague and defendant's conviction should be vacated.

IV. Under Maine's de minimis infraction statute, the trial court must consider the full range of factors articulated by this Court in *State v. Kargar*. Here, the trial court failed to conduct any analysis or consider *any* of the relevant factors. The trial court abused its discretion by refusing to consider all the factors.

Standard of Review:

A trial court's ruling a motion to dismiss a de minimis infraction is reviewed for abuse of discretion. *State v. Kargar*, 679 A.2d 81, 83 (Me. 1996).

The defense filed a post-trial motion to dismiss based on 17-A M.R.S.A. § 12 arguing that the defendant's infraction was de minimis. The trial court denied the motion.

17-A M.R.S.A. § 12 states:

> 1. The court may dismiss a prosecution if, upon notice to or motion of the prosecutor and opportunity to be heard, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:
>
> A. Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the crime; or
>
> B. Did not actually cause or threaten the harm sought to be prevented by the law defining the

crime or did so only to an extent too trivial to warrant the condemnation of conviction; or

C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.

In *Kargar*, 679 A.2d at 84, this Court articulated the following factors to consider regarding whether an offense is a de minimis infraction:

> [T]he background, experience and character of the defendant which may indicate whether he knew or ought to have known of the illegality; the knowledge of the defendant of the consequences to be incurred upon violation of the statute; the circumstances concerning the offense; the resulting harm or evil, if any, caused or threatened by the infraction; the probable impact of the violation upon the community; the seriousness of the infraction in terms of punishment, bearing in mind that punishment can be suspended; mitigating circumstances as to the offender; possible improper motives of the complainant or prosecutor; and any other data which may reveal the nature and degree of the culpability in the offense committed by the defendant. [*Id.* at 84.]

Defendant was found guilty of being a prohibited person in possession of a firearm under 15 M.R.S.A § 393(1)(G). Under 15 M.R.S.A § 393(1)(G),

> A person may not own, possess or have under that person's control a firearm . . . if that person . . . [i]s an unlawful user of or is addicted to any controlled

> substance and as a result is prohibited from possession of a firearm under 18 United States Code, Section 922(g)(3).

Of all the ways a person could violate this law, defendant's violation was "too trivial to warrant the condemnation of conviction." Defendant's statement that he believed he was entitled to possess up to 8 pounds of marijuana indicates he was or has been a medical marijuana patient. See 22 M.R.S.A. § 2324-A(1)(1)("a qualifying patient may [] possess up to 8 pounds of harvested marijuana"). If he had been allowed to make an offer a proof with regard to this motion, defendant would have stated that he uses marijuana for a non-intoxicating purpose – namely the manufacture of an ointment to treat peripheral neuropathy.

Although knowledge of the law is presumed, this particular statute is arguably vague (See Issue III). It is counterintuitive that medicinal use of a drug that has been decriminalized by the people of Maine should result in the loss of 2nd Amendment rights.

Condemnation of defendant's conduct cannot "reasonably be regarded as envisaged by the Legislature in defining the crime." No harm was caused or threatened on this occasion. The Trooper who pulled defendant over did not observe any signs that defendant was

currently using or that he had recently used. Defendant was cooperative with law enforcement and immediately informed the Trooper of the presence of the firearms in the vehicle.

In *Kargar*, this Court held that it was error as a matter of law for a trial court to deny a de minimis motion "without considering the full range of relevant factors." *Kargar*, 679 A.2d at 84. Here, in denying the motion, the trial court only stated "The court has reviewed the parties' submissions as well as its own trial notes. Although the verdict presents anomalous features, the court finds no basis for disrupting the jury's decision." The court did not hold a hearing on the de minimis motion and did otherwise state its reason for denying the motion on the record.

Therefore, the trial court's order denying the motion should be reversed and remanded with instruction to enter an order granting the motion to dismiss as de minimis.

Respectfully submitted this 26th of September, 2019

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