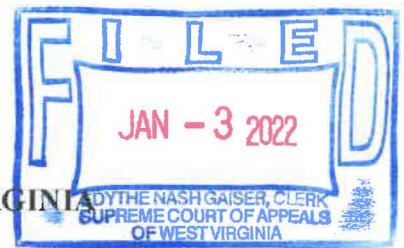


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0696

FROM THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA
20th Judicial Circuit

State of West Virginia
Plaintiff Below, Respondent

FILE COPY

vs.

William T. Wilfong,
Defendant below, Petitioner

PETITIONERS BRIEF

MORRIS C. DAVIS, Counsel for Petitioner
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I. ASSIGNMENTS OF ERROR

1. The Trial Court did err when it ruled that W. Va. Code §61-7-7(a)(3) was constitutional. *P.A. Vol. 1 9.*

II. STATEMENT OF THE CASE

Petitioner entered a conditional guilty to one misdemeanor count of W. Va. Code §61-7-7(a)(3). *P.A. Vol. 1 9.* Pursuant to his conditional plea agreement, he now appeals the constitutionality of W. Va. Code §61-7-7(a)(3). Specifically, he appeals said statute because it does not adequately inform the Defendant of the Conduct which it purports to prevent on its face. It does not inform an individual as to what constitutes the status of being an “unlawful user,” or how long someone is considered an “unlawful user,” after said use.

The matter arose when the Defendant was stopped along the road in the Flies Creek Area of Randolph County, West Virginia. *P.A. Vol. 1 5.* The Defendant was sitting in a vehicle when he was approached by members of the Randolph County Sheriff’s Department. *Id.* After some investigation the officer determined that the Defendant did not have a valid drivers license and had an outstanding arrest warrant from the City of Elkins Municipal Court. *Id.* The Defendant’s vehicle was searched incident to arrest and said search produced a Winchester Model 597 firearm and a magazine for said firearm loaded with 10 .22 Long Rifle Rounds. *Id.* The search also resulted in the seizure of a scale with what was believed to be marijuana residue on the upper side. *Id.* The Petitioner was then arrested, and on his way to the Tygart’s Valley Regional Jail made the statement that “he uses Marijuana on a normal basis (sic) and the last time that he smoked it was last week.” *P.A. Vol. 1 12.* The Defendant was thereafter charged with a violation of W. Va. Code §61-7-7(a)(3) by way of criminal complaint. *P.A. Vol. 1 4.* W. Va. Code §61-7-7(a)(3) provides in pertinent part that an individual who is “an unlawful user of or habitually addicted to any controlled

substance,” is prohibited from owning a firearm. (Citations Omitted) After institution of the criminal proceedings, The Defendant removed the matter to the Randolph County Circuit Court and filed a motion to have W. Va. Code §61-7-7(a)(3) declared unconstitutional because it does not give an individual notice that their conduct is prohibited by statute nor does it provide an adequate standard for adjudication. *P.A. Vol. 1* 6. Said motion was denied, and the Defendant later entered into a conditional plea for the purposes of appealing said denial. *P.A. Vol. 1* 9, 13.

III. SUMMARY OF ARGUMENT

The plain language of W. Va. Code §61-7-7(a)(3) does not provide an individual notice that their conduct is prohibited by statute nor does it provide an adequate standard for adjudication. Specifically, the statute does not provide what constitutes the status of being an unlawful user or how long one remains an unlawful user after unlawful use of a controlled substance.

IV. STANDARD OF REVIEW

The standard of review in this matter has been articulated by this Court as follows:

On the more narrow issue of the circuit court's interpretation and application of W. Va. Code § 61-7-7, we apply a de novo standard of review: "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. pt. 1, *Chrystal R.M v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Accord Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review.").

Rohrbaugh v. State, 216 W. Va. 298, 302, 607 S.E.2d 404, 408 (2004).

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is matter of first impression for the Court. The Court has recently explored other subsections of W. Va. Code §61-7-7. *See State v. Ward*, 245 W. Va. 157(2021); *State v.*

Mills 243 W.Va. 328 (2021). However, Counsel for the Petitioner is unable to find any interpretation of W. Va. Code §61-7-7(a)(3) specifically. He therefore requests a Rule 20 argument and a signed opinion declaring W. Va. Code §61-7-7(a)(3) unconstitutional without further legislative enactment.

VI. ARGUMENT

THE COURT DID ERR WHEN IT RULED THAT W. VA. CODE §61-7-7(A)(3) WAS NOT UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT PROVIDE AN INDIVIDUAL NOTICE THAT THEIR CONDUCT IS PROHIBITED BY STATUTE NOR DOES IT PROVIDE AN ADEQUATE STANDARD FOR ADJUDICATION BECAUSE OF THE LACK OF GUIDANCE AS TO THE TEMPORAL ASPECT OF THE CRIME.

“Claims of unconstitutional vagueness in criminal statutes are grounded in the constitutional due process clauses, U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, Sec. 10.” *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998).

Criminal Statutes must place an individual on notice that their conduct is prohibited by law. The Supreme Court of the United States has recognized that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties " *Connally v. Gen. Const. Co.*, 269 U.S. 385,391 (1926). The Connally Court further explained that a "statute which either forbids or requires the doing of an act in terms so vague that men [or women] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* In explaining the void for vagueness doctrine this Court has previously explained, “[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. Pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

This Court has also previously recognized that:

“[t]here is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.”

Syl. pt. 1, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970).
Syl. Pt. 2, *State v. Blair*, 190 W. Va. at 426, 438 S.E.2d at 606.

However, this Court has a duty to give “full force and effect,” ,without interpretation, to statutes that clearly, unambiguously state legislative intent. *Sybl. Pt. 1 State v. Epperly*, 135 W. Va. 877(1951). The Court does not interpret statutes that are free from ambiguity. See *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) , *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Further, the Court must employ every reasonable construction of a statue to sustain the constitutionality of that statue. *syl. Pt. 3, Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967) .In determining if the statue contains ambiguity this court must look first to the statute's language; If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995).

However, when the Court examines the plain text of W. Va. Code 61-7-7(a)(3) the it is clear that it is unclear; the statue is ambiguous. In examining the issue of ambiguity, the Court has defined the term as such: “Ambiguity is a term connoting doubtfulness, doubleness of

meaning of indistinctness or uncertainty of an expression used in a written instrument.” *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 397–98, 582 S.E.2d 841, 844–45 (2003).

The issue with the language of W. Va. Code 61-7-7(a)(3) is the uncertainty as to temporal aspect of the crime. Specifically, there is no explicit guidance as to the temporal aspect of the crime; therefore it is impossible for the Court to interpret this aspect of the statute. This complete lack of guidance introduces a great deal of uncertainty, and therefore, ambiguity to the application of the statute. W. Va. Code §61-7-7(a)(3) provides that those who are “unlawful users” of controlled substances are prohibited from possessing firearms. The statute does not define what it takes to be deemed an “unlawful user,”; however, the real problem is how long one remains an unlawful user after the use of a controlled substance. The Statute is completely silent to this point; therefore, the statute is ambiguous because no one can be certain, in the absence of non-existent guidance from the statute, how long one remains an “unlawful user,” after the use of a controlled substance.

Under *Flinn* this ambiguity creates a problem for the potential Criminal Defendant and the trier of fact. 158 W. Va. 111, 208 S.E.2d 538 (1974). As to the Criminal Defendant, one is left with more questions than answers after a review of W. Va. Code §61-7-7(a)(3). Does one forfeit their Second Amendment rights because like Petitioner, they used marijuana the week before? What about the month or year before? No answer to this question can be found in the plain language of the statute. Therefore, rendering it impossible for a “person of ordinary intelligence,” to have “fair notice that his contemplated conduct is prohibited by statute.” Syl. Pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974)

This lack of guidance also causes problems for determining “adequate standards for adjudication.” *Id.* How is a jury supposed to determine how long a person remains a prohibited


“unlawful user,” when no guidance for such is provided on the face of the statute or within West Virginia Common Law? In the absence of such guidance, a jury is simply left to guess, and under the West Virginia and United States constitutions, this is impermissible because statutes must provide “adequate standards for adjudication,” *Id.* Therefore, this Court should deem W. Va. Code §61-7-7(a)(3) unconstitutionally vague.

VII. Conclusion

W. Va. Code §61-7-7(a)(3) is unconstitutionally vague because it does not provide any guidance, to the criminal defendant or finder of fact, as to how long one remains an unlawful user after the unlawful use of a controlled substance.

VIII. PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, your petitioner respectfully prays that that this petition for appeal be granted.



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William Wilfong,
Petitioner,
By Counsel

CERTIFICATE OF SERVICE

I, Morris C. Davis, Counsel for the Petitioner, hereby certify that I have duly served a true copy of the foregoing: Petitioner's Brief and Appendix to the State of West Virginia via electronic mail and first class U.S. Mail, as well as, the Court, by depositing a true copy of the same in the US Mail, overnight service, postage pre-paid, addressed as follows:

*Scott E. Johnson.
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Given under my hand this 31st day of December 2021



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