IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0696

STATE OF WEST VIRGINIA,

Respondent,

v.

WILLIAM T. WILFONG,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the August 2, 2021, Order
Circuit Court of Randolph County
Case No. 20-M-2

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ASSIGNMENT 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.*

STATEMENT OF THE CASE

On November 8, 2019, Deputy E.B. Carr responded to a report of a suspicious vehicle located at the Columbia gas station on Files Creek Road in the Beverly area of Randolph County, West Virginia. A.R. 5. Upon arriving, Dep. Carr observed a black 1998 Toyota Tacoma. A.R. 5. Dep. Carr made contact with the Petitioner, who was occupying the Tacoma. A.R. 5. Dep. Carr told the Petitioner he was parked on property posted with no trespassing signs. A.R. 5. Dep. Carr ran the Petitioner's driver's license through Randolph County E-911 communications and was informed the Petitioner's license was suspended. A.R. 5. A warrant check revealed the Petitioner had an active arrest warrant through Elkins Municipal Court for a failure to appear offense. A.R. 5.

Dep. Carr advised the Petitioner of the warrant and endeavored to place the Petitioner in hand restraints. A.R. 5. The Petitioner became noncompliant with Dep. Carr's commands. A.R. 5. The Petitioner tensed up and pulled his arm away from Dep. Carr. A.R. 5. Dep. Carr ordered the Petitioner to stop resisting. A.R. 5. Dep. Carr assisted the Petitioner into the vehicle in order to gain compliance over him. A.R. 5. Dep. Carr forcefully held the Petitioner's wrists and managed to get the Petitioner into restraints. A.R. 5.

Located behind the Petitioner in the car was a Remington Model 597 rifle. A.R. 5. Dep. Carr's search incident to his arrest of the Petitioner disclosed a 22LR magazine for a Model 597 rifle. A.R. 5. The magazine contained 10 rounds of ammunition. A.R. 5. Dep. Carr also discovered a digital scale with what he believed was marijuana residue. A.R. 5. A criminal history check of the Petitioner disclosed the Petitioner had a previous conviction for possession of a controlled

substance with a disposition date of May 28, 2019. A.R. 5. While being transported to jail by Deputy B.M. Roy, the Petitioner spontaneously uttered that "he only uses marijuana" and smokes it on a "normal" basis. A.R. 5. The Petitioner admits in his brief that he also told Dep. Roy that the last time he smoked was a week before his arrest. Pet'r Br. at 1 (citing A.R. 12).

The Petitioner was charged with, *inter alia*, a violation of West Virginia Code § 61-7-7(a)(3) which prohibits a person who is "an unlawful user of or habitually addicted to any controlled substance" from possessing a firearm. A.R. 4. The Petitioner apparently removed his case to circuit court, although what mechanism the Petitioner employed for removal is not set forth in the Petitioner's Brief . Pet'r Br. at 2. He filed a motion seeking to have the circuit court declare that West Virginia Code § 61-7-7(a)(3) unconstitutional under the void for vagueness doctrine. A.R. 6-7. The Petitioner specifically asserted in his motion that West Virginia Code § 61-7-7(a)(3) "does not give any specificity as to what constitutes the status of being an 'an unlawful user,' or how long someone is considered to be 'an unlawful user,' after said use." A.R. 7.

On October 1, 2020, the Petitioner argued his motion to the circuit court. A.R. 24. The circuit court ruled against the Petitioner:

> THE COURT: Okay. Well, the—the language from the Mill's case says that a statute—in headnote five—the basic requirements are that a statute must be couched in language such as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain as to whether he has violated the offense conduct. Um, I think that the statute 61-7-7(a)3—it is clear to me that if you're an unlawful user or habitual addict to any controlled substance, then you are not to have possession of a firearm.
>
> So that would mean that if you're—if you have an illegal controlled substance and you're smoking marijuana, or your smoking methamphetamine, or using heroin, or any other number of a variety of controlled substances, and you have a gun, then it is illegal. I think that the language is clear. And I think it's sufficient enough to advise the defendant of what it is and what conduct they should avoid in order to not run afoul of the statute.

A.R. 35. The Petitioner then entered a conditional guilty plea to being a prohibited person in possession of a firearm in violation of West Virginia Code § 61-7-7(a)(3). A.R. 13. The Petitioner reserved the right to appeal the constitutionality of West Virginia Code § 61-7-7(a)(3). A.R. 14. The circuit court accepted the Petitioner's conditional guilty plea. A.R. 18-19.

The Petitioner now appeals the circuit court's ruling that West Virginia Code § 61-7-7(a)(3) is not void for vagueness.

SUMMARY OF ARGUMENT

The Petitioner contends that West Virginia Code § 61-7-7(a)(3) is void for vagueness. The Petitioner bears the burden of proving West Virginia Code § 61-7-7(a)(3) is void as it applies to him and must do so beyond a reasonable doubt. Given that the Petitioner has failed to meet the high burden he shoulders when challenging the constitutionality of a statute, the judgment of the circuit court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

The circuit court correctly found that West Virginia Code § 61-7-7(a)(3) is not unconstitutional under the void for vagueness doctrine.

A. The Due Process requirement of notice and fair warning.

The Petitioner challenges West Virginia Code § 61-7-7(a)(3) under the void for vagueness doctrine. Pet'r Br. at 3. "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). "Due process of law is

synonymous with fundamental fairness." *State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 422, 249 S.E.2d 765, 766 (1978). "Fundamental fairness of course requires that people be given notice of what to avoid." *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J. dissenting). "Deprivation of the right to fair warning . . . can result . . . from vague statutory language[.]" *Id.* at 457. "Vague statutes violate due process because they do not allow fair warning to those who are prosecuted under them." *Comm. on Legal Ethics of the West Virginia State Bar v. Printz*, 187 W. Va. 182, 186, 416 S.E.2d 720, 724 (1992) (emphasis deleted). "As generally stated, the void-for-vagueness doctrine requires that a penal statute 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." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *accord State ex rel. Appleby v. Recht*, 213 W. Va. 503, 518, 583 S.E.2d 800, 815 (2002) (per curiam) ("The void for vagueness doctrine is an aspect of the due process requirement that statutes set forth impermissible conduct with sufficient clarity that a person of ordinary intelligence knows what conduct is prohibited and the penalty if he transgresses these limitations.").

B. *The standard of review.*

"The constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008). Thus, the circuit court's decision that West Virginia Code § 61-7-7(a)(3) is not void for vagueness, A.R. 35, is given plenary review. *See State v. Moore*, No. 18-0786, 2020 WL 533113, at *10 (W. Va. Feb. 3, 2020) (memorandum decision) ("We first address whether the following-too-closely statute is so unconstitutionally vague so as to be void. We review constitutional challenges relating to a statute de novo.").

C. West Virginia Code § 61-7-7(a)(3) is not void for vagueness.

The Petitioner bears the burden of proving a violation of the Constitution. *See, e.g., State v. Wyatt*, 198 W. Va. 530, 543, 482 S.E.2d 147, 160 (1996) ("One seeking to establish that a matter violates the Constitution of this State or the United States bears the burden of establishing the violation."). Because "a statute is presumed to be constitutional[,]" *State v. Connor*, 244 W. Va. 594, 855 S.E.2d 902, 907 (2021), "the threshold for declaring a law void for vagueness is high." *Johnson v. United States*, 576 U.S. 591, 629 (2015) (Alito, J., dissenting). Consequently, a petitioner shoulders a heavy burden in seeking to have a statute declared void for vagueness. *See, e.g., State v. White*, 58 A.3d 643, 647 (N.H. 2012) ("A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality."); *State v. Bauer*, 337 N.W.2d 209, 210 (Iowa 1983) ("In considering vagueness challenges we are guided by well known rules. The challenger carries a weighty burden and must overcome a vigorous presumption of constitutionality."). "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). In short, "the unconstitutionality of a statute must be shown beyond a reasonable doubt." *McCoy v. VanKirk*, 201 W. Va. 718, 728, 500 S.E.2d 534, 544 (1997).

"There 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." Syl. Pt. 1, in part, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970). "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." *Id.* In other words, "[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).

West Virginia Code § 61-7-7(a)(3) provides, "[e]xcept as provided in this section, no person shall possess a firearm . . . who: . . . [i]s an unlawful user of or habitually addicted to any controlled substance[.]" The Petitioner contends that the statute "does not inform the [Petitioner] of the Conduct [sic] 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." Pet'r Br. at 1. Consequently, the Petitioner contends that West Virginia Code § 61-7-7(a)(3) is constitutionally vague "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." Pet'r Br. at 5. Unfortunately for the Petitioner, one "'who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); *see also Appleby*, 213 W. Va. at 519, 583 S.E.2d at 816 (where a defendant's conduct falls within the core a criminal statute, the defendant lacks standing to raise a facial challenge to the statute). Thus, to establish his right to relief, the Petitioner must show that West Virginia Code § 61-7-7(a)(3) "is vague as applied to his particular conduct." *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016). The Petitioner cannot make this requisite showing.

The language of West Virginia Code § 61-7-7(a)(3) is similar to the language contained in 18 U.S.C. § 922(g)(3), which provides in relevant part, that "[i]t shall be unlawful for any person . .

.who is an unlawful user of or addict to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . to . . . possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(3). "'The term 'unlawful user' is not otherwise defined in the statute, but courts generally agree the law runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use.'" *United States v. Augustin*, 376 F.3d 135, 138 (3d Cir. 2004) (quoting *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003)); *see also United States v. Sanders*, 43 F. App'x 249, 256 (10th Cir. 2002) ("The government does not dispute that § 922(g)(3) may be void for vagueness in the absence of a sufficiently close temporal link between a defendant's drug use and firearm possession."). However, courts may, before striking a statute down as impermissibly vague, "consider whether the prescription is amenable to a limiting construction[.]" *Skilling v. United States*, 561 U.S. 358, 405 (2010). Thus, "[i]n evaluating 18 U.S.C. § 922(g)(3), courts have generally remedied vagueness concerns in its language through clarifying or limiting constructions." *United States v. Stupka*, 418 F. Supp. 3d 402, 413 (N.D. Iowa 2019). Courts have, therefore, defined what constitutes an unlawful user:

> Those of our sister courts of appeals that have considered 18 U.S.C. § 922(g)(3) have concluded, as do we, that one must be an unlawful user at or about the time he or she possessed the firearm and that to be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm.

Id. at 138–39. In making this determination, courts[1] have also looked to the definition of "unlawful user" as contained in 27 C.F.R. § 478.11:

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[1] *United States v. Cheeseman*, 600 F.3d 270, 280 (3d Cir. 2010) (relying on 27 C.F.R. § 478.11 to define "unlawful user of controlled substances" for the purpose of § 922(g)(3)); see also Kimberly J. Winbush, *Proscription of 18 U.S.C.A. § 922(g)(3) that Persons Who Are Unlawful Users of or Addicted to Any Controlled Substance Cannot Possess Any Firearm or Ammunition in or Affecting*

> Unlawful user of or addicted to any controlled substance. 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 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. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

The Petitioner pled guilty to the criminal complaint filed against him in magistrate court. A.R. 13. "[A] guilty plea is an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Consequently, "[a] plea of guilty to the crime as charged constitutes an admission of the facts alleged in the criminal complaint." *State v. Cook*, 344 N.W.2d 487, 488 (N.D. 1984); *see also State v. Liebnitz*, 603 N.W.2d 208, 214 (Wis. 1999) ("it is a well-established rule 'that what is admitted by a guilty . . . plea is all the material facts alleged in the charging document.'") (citation omitted); *cf.* Syl. Pt. 3, in part, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966) ("A plea of guilty is an admission of whatever is well charged in the indictment[.]"). Thus, in the Petitioner's case, the Petitioner's guilty plea admitted that he occupied a vehicle containing a rifle on November 8, 2019. A.R. 5. The Petitioner's plea of guilty admitted that also in the vehicle occupied by the Petitioner was a

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Commerce, 44 A.L.R. Fed. 3d Art. 3 § 3 (2019) (observing that while 18 U.S.C. § 922(g)(3) does not provide a definition of "unlawful user" 27 C.F.R. § 478.11 does provide such a definition).

digital scale with what Dep. Carr believed was marijuana residue. A.R. 5. The plea admitted that the Petitioner had a previous conviction for possession of a controlled substance with a disposition date of May 28, 2019. A.R. 5. The Petitioner's plea also admitted that while being transported to jail by Deputy B.M. Roy, he spontaneously uttered that "he only uses marijuana" and smokes it on a "normal" basis. A.R. 5. Marijuana was a controlled substance under state law in 2019. *Mutter v. Ross*, 240 W. Va. 336, 344, 811 S.E.2d 866, 874 (2018). Finally, the Petitioner judicially admits in his brief that he also told Dep. Roy that the last time he smoked marijuana was only a week previously. Pet'r Br. at 1 (citing A.R. 12). The Petitioner's conduct clearly places him within the core of conduct prohibited by West Virginia Code § 61-7-7(a)(3) and he cannot complain that the statute is void for vagueness. *See, e.g.*, *United States v. Cook*, 970 F.3d 866, 874 (7th Cir. 2020) (finding that § 922(g)(3) was not unconstitutionally vague as applied to a defendant possessing a firearm who "engaged in the regular, non-prescribed use of a controlled substance."); *United States v. Patterson*, 431 F.3d 832, 836 (5th Cir. 2005) (finding that the defendant's regular use of marijuana would lead an ordinary person to understand defendant was an unlawful user of drugs while possessing a firearm); *United States v. Purdy*, 264 F.3d 809, 812 (9th Cir. 2001) (holding that evidence the defendant smoked methamphetamine and marijuana contemporaneously with his possession of a firearm put him on notice he fell within the statutory definition of an unlawful drug user).

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Randolph County, West Virginia should be affirmed.

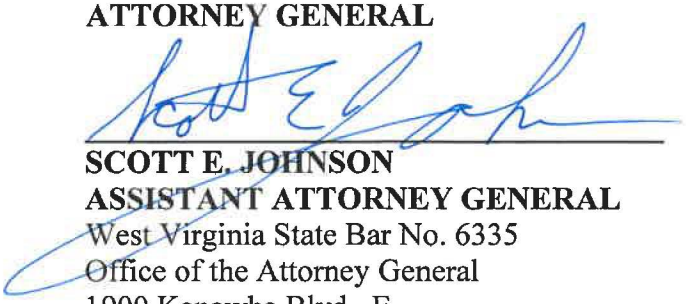
Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, January 21, 2022, and addressed as follows:

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