OPINION ON REHEARING

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IN THE COURT OF APPEALS OF INDIANA

Travis Armes, Eric Settles, and Debra Pennington,
Appellants-Defendants,

v.

State of Indiana,
Appellee-Plaintiff

September 12, 2022

Court of Appeals Case No. 21A-CR-2384

Appeal from the Marion Superior Court

The Honorable James K. Snyder, Magistrate

Trial Court Cause Nos. 49D28-2101-F2-3158, -3159, -3149

Crone, Judge.

[1] The State has filed a petition for rehearing of our opinion in *Armes v. State*, 191 N.E.3d 942 (Ind. Ct. App. 2022), in which we reversed the trial court's denial of Travis Armes', Eric Settles', and Debra Pennington's (collectively Defendants) motions to dismiss the charging informations against them, which alleged that

they had committed various crimes involving MDMB-4en-PINACA (MDMB), a Schedule I controlled substance. We grant rehearing and affirm our original opinion in all respects.

[2] In our opinion, we concluded that LSA Document No. 20-516(E) (the Emergency Rule), which declared MDMB a Schedule I controlled substance, is unconstitutionally vague under the United States Constitution. Under federal constitutional principles of due process, a criminal statute is void for vagueness if it "fail[s] to provide notice enabling ordinary people to understand the conduct that it prohibits." *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007).

[3] Schedule I controlled substances include those substances listed in Indiana Code Section 35-48-2-4, the synthetic drugs listed in Section 35-31.5-2-321, and "[a]ny compound determined to be a synthetic drug by rule adopted under IC 25-26-13-4.1." Ind. Code § 35-31.5-2-321(13). Pursuant to the authority granted in Section 25-26-13-4.1, the Indiana Board of Pharmacy adopted the Emergency Rule, which added three substances to Schedule I:

> (1) MDMB-4en-PINACA.
>
> (2) 4F-MDMB-BICA; 4-fluoro MDMB-BICA, 4F-MDMB-BUTICA; Methyl 2-[[1-(4-fluorobutyl)indole-3-carbonyl]amino]-3,3- dimethyl-butanoate.
>
> (3) Isotonitazene. Synonyms: N,N-diethyl-2-(2-(4 isopropoxybenzyl)-5-nitro-1 *H*- benzimidazol-1-yl)ethan-1-amine.

Ind. Reg. LSA Doc. No. 20-516(E) § 1 (filed Oct. 6, 2020), http://iac.iga.in.gov/iac/20201014-IR-856200516ERA.xml.html [https://perma.cc/63UF-GQQV].

[4] Based on our supreme court's decision in *Tiplick v. State*, 43 N.E.3d 1259 (Ind. 2015), we concluded that the Emergency Rule was unconstitutionally vague. In *Tiplick*, the defendant was charged with possessing, selling, and dealing in a Schedule I controlled substance designated XLR11, which was identified in Emergency Rule #12-493(E) as "XLR11 [(1-(5-fluoropentyl)indol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone]." *Id.* at 1261 (quoting Ind. Reg. LSA Doc. No. 12-493(E), http://www.in.gov/legislative/iac/20120822-IR-856120493ERA.xml.html) [https://perma.cc/HXX8-3GZ7]. The *Tiplick* court concluded that Emergency Rule #12-493(E) was not unconstitutionally vague, reasoning as follows:

> [I]t may be that a person with ordinary experience and knowledge does not know what [(1–(5–fluoropentyl)indol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone] is made of, but that is not the test; rather, it is whether a person of ordinary intelligence would understand his conduct was proscribed. Here, *an ordinary Hoosier, armed with this chemical formula for XLR11, could determine through appropriate testing whether he was attempting to sell any products containing it*. That is what we demand of our penal statutes.

Id. at 1263 (emphasis added); (original emphases omitted).

[5] In our opinion, we compared the Emergency Rule to the one considered in *Tiplick* and concluded,

> Unlike the rule in *Tiplick*, the Emergency Rule does not explicitly identify the listed substances as synthetic drugs. An even greater problem is that the Emergency Rule does not provide the chemical composition of MDMB. Thus, there is no official designation of what constitutes MDMB. In *Tiplick*, the court concluded that the rule provided fair notice to a person of ordinary intelligence because "an ordinary Hoosier, *armed with this chemical formula for XLR11*, could determine through appropriate testing whether he was attempting to sell any products containing it." [43 N.E.3d] at 1263. The Emergency Rule does not provide adequate information for a person of ordinary intelligence to determine whether he or she is dealing a substance that contains MDMB.

Armes, 191 N.E.3d at 951 (emphasis added).

[6] The State argues that the "commonly accepted scientific name for a controlled substance places a citizen of ordinary intelligence on notice as to what substances are controlled and what conduct is illegal[,]" and that *Tiplick* does not "require the chemical composition to be listed to give sufficient notice." State's Pet. for Reh'g at 4-5. We disagree.

[7] The regulation of synthetic drugs is a "particularly challenging pursuit" involving the rapid introduction of new substances. *Tiplick*, 43 N.E.3d at 1261. MDMB is one of many such new chemical compounds, and it is not as simple to identify as the State asserts. Although the State refers to MDMB as a synthetic cannabinoid and the Board initially declared MDMB a Schedule I controlled substance pursuant to its authority to declare synthetic drugs Schedule I controlled substances, *see* Ind. Code §§ 35-31.5-2-321(13) and 25-26-

13-4.1, MDMB is currently listed as an opiate. *See* Ind. Code § 35-48-2-4(b). This divergence reflects confusion as to what MDMB is.

[8] We note that other than Indiana, only Hawaii, South Dakota, and Virginia have criminalized MDMB. While the relevant statutes categorize MDMB as a cannabinoid or synthetic cannabinoid and provide a chemical composition for the substance, the statutes do not provide the same chemical composition. Hawaii lists the substance as "Methyl 3,3-dimethyl-2-(1-(pent-4-en-1-yl)-1H-indazole-3-carboxamido)butanoate (MDMB-4en-PINACA)." Haw. Rev. Stat. § 329-14(g)(31). South Dakota lists it as "methyl (S)-3,3-dimethyl-2-[(1-(pent-4-enlindazole-3-carbonyl)amino]butanoate (MDMB-4en-PINACA)." S.D. Codified Laws § 34-20B-14(47)(k). And Virginia lists it as "Methyl 2-[1-(pent-4-enyl)-1H-indazole-3-carboxamindo]-3,3-dimethylbutanoate (other name: MDMB-4en-PINACA)." Va. Code § 54.1-3446(6)(b).[1] As for our Emergency Rule, it is unclear to us how a person of ordinary intelligence would be able to determine whether a material contained whatever it is the State considers MDMB to be, which begs the question as to how the State will prove that a material contains MDMB. In contrast, the emergency rule approved of in *Tiplick* specifically identified XLR11 by providing its chemical composition,

[1] The State directs us to https://www.caymanchem.com/product/26097/mdmb-4en-pinaca [https://perma.cc/7PPE-F5CU], which provides a "formal name" for MDMB as follows: "3-methyl-N-[[1-(4-penten-1-yl)-1H-indazol-3-yl]carbonyl]-L-valine, methyl ester."

thereby enabling a person of ordinary intelligence to determine whether a material contained it.

[9] The State and the public must deal with the brisk influx of newly created synthetic substances, some of which are not controlled substances. MDMB is a relative newcomer and was declared a Schedule I controlled substance pursuant to an *emergency rule*. The chemical composition provides an official designation of precisely what chemical compound the State has declared to be a Schedule I controlled substance. The Emergency Rule provided the chemical composition of two of the controlled substances but did not provide the chemical composition of MDMB, and without it, a person of ordinary intelligence would not be able to determine through appropriate testing whether a material contained it.

[10] Finally, we address the State's one-paragraph argument that all the crimes charged require Defendants to have acted knowingly or intentionally and that the inclusion of the proper scienter element defeats a vagueness challenge to a criminal statute. State's Pet. on Reh'g. at 7-8 (citing *Tiplick*, 43 N.E.3d at 1264-65). After the *Tiplick* court concluded that Section 35-31.5-2-321 and the emergency rule at issue there were not unconstitutionally vague, the court turned to the defendant's vagueness challenge to the "Look-Alike Statutes," which prohibit conduct related to substances "represented to be a controlled substance" and "counterfeit substances." 43 N.E.3d at 1264. In concluding that the Look-Alike Statutes were not void for vagueness, the *Tiplick* court observed, "[W]here the punishment imposed is only for an act knowingly done with the

purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Id*. at 1264-65 (quoting *Screws v. United States*, 325 U.S. 91, 102 (1945)); *see also Bemis v. State*, 652 N.E.2d 89, 92 (Ind. Ct. App. 1995) ("In Indiana, … knowledge of the nature of the substance sold or possessed is an element of dealing in a controlled substance and possession of a controlled substance."). We are unpersuaded that that principle is applicable here because the crimes target a specific newly created chemical compound, but that chemical compound is not clearly identified. In other words, a defendant may know that he possesses a substance, but because the Emergency Rule is unconstitutionally vague, he does not (and cannot) know that the substance is illegal to possess.

[11] We hereby affirm our original opinion in all respects.

Vaidik, J., and Altice, J., concur.