SJC-13275

COMMONWEALTH vs. ANGEL O. PEREZ NARVAEZ.

Hampshire. September 7, 2022. - November 22, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Practice, Criminal, Dismissal. Probable Cause. Statute, Construction. Words, "Noxious or filthy substance."

Complaint received and sworn to in the Northampton Division of the District Court Department on February 10, 2020.

A motion to dismiss was heard by Maureen E. Walsh, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Andrew C. Covington, Assistant District Attorney (Thomas H. Townsend, Assistant District Attorney, also present) for the Commonwealth.
Rachel T. Rose for the defendant.

CYPHER, J. The defendant, Angel O. Perez Narvaez, was charged with vandalizing with a "noxious or filthy substance" in

violation of G. L. c. 266, § 103 (§ 103).[1] This case requires us to determine whether urine constitutes a noxious or filthy substance within the parameters of the statute. Because we conclude that it does not, we affirm the dismissal of the criminal complaint brought against the defendant for violation of § 103.

1. Background. We summarize the facts set forth in the criminal complaint. See Commonwealth v. Ilya I., 470 Mass. 625, 626 (2015) ("Our review of [a] judge's order of dismissal is confined to the four corners of the application for complaint . . ."). See also Commonwealth v. Richardson, 479 Mass. 344, 352 (2018). On February 10, 2020, at approximately 2:30 A.M., the defendant was stopped and arrested for operating a motor vehicle while under the influence of intoxicating liquor. While the defendant was handcuffed, the officer attempted to read him the Miranda rights, but the defendant became increasingly angry and uncooperative. The defendant began to scream at the officer, "I hope your mother dies of cancer"; "I hope you die[,] pig"; and "You should [have] been killed in Afghanistan." After the officer transported the defendant to the State police barracks

[1] The defendant also was charged with operation of a motor vehicle while under the influence of intoxicating liquor, second offense, in violation of G. L. c. 90, § 24 (1) (a) (1); and a marked lanes violation, pursuant to G. L. c. 89, § 4A. Neither of these two charges, however, is the subject of this appeal.

to complete the booking process, the defendant became even more hostile and uncooperative. When the officer again tried to read the defendant the Miranda rights, the defendant refused to cooperate, and screamed, "I am not blowing." The defendant eventually was placed in a jail cell and was told he must cooperate with the booking process before he could be released on bail. The defendant instead refused to be fingerprinted and repeatedly yelled, "Just take me to the judge[;] he will dismiss this right away."

At approximately 7 A.M. later that morning, another officer performed a cell check on the defendant and observed that the defendant had "made a complete mess of [his] cell." The defendant had urinated on the floor both inside and outside of the cell. Based on the location of the toilet in the cell, the officer stated that "it [was] apparent that [the defendant] purposely urinated through the cell bars on to the floor outside the cell." The urine had "seeped into the cracks between the floor tiles, potentially causing permanent damage to the sub floor beneath." Because urine, like other bodily fluids, can carry potentially dangerous bacteria and viruses, police hired a cleanup company specializing in cleaning hazardous fluids and spills to clean the defendant's cell.

As a result of his urinating inside and outside of the jail cell, the defendant was charged with vandalizing with a "noxious

or filthy substance" in violation of § 103. A judge of the District Court allowed the defendant's motion to dismiss the complaint for lack of probable cause. The judge determined that urine was not a noxious or filthy substance under § 103 and that the facts serving as the basis for the criminal complaint did not demonstrate sufficiently that the defendant intentionally injured, defaced, or defiled the jail cell. The Commonwealth sought review in the Appeals Court, which reversed the dismissal in an unpublished decision. See Commonwealth v. Perez Narvaez, 100 Mass. App. Ct. 1122 (2022). We granted the defendant's application for further appellate review.

2. Discussion. The defendant filed a motion to dismiss the complaint, arguing that, because urine is not a noxious and filthy substance within the meaning of the statute, there was no probable cause to arrest him. Probable cause exists only where the facts and circumstances warrant a person of reasonable caution to believe that an offense has been committed. See Commonwealth v. Coggeshall, 473 Mass. 665, 667 (2016). See also Mass. R. Crim. P. 3 (g) (2), as appearing in 442 Mass. 1502 (2004). "[An] application for the complaint must establish probable cause as to each element of the [charged] offense." Coggeshall, supra. Probable cause is, however, "a decidedly low standard." See Commonwealth v. Hanright, 466 Mass. 303, 311 (2013).

We review a judge's determination of probable cause de novo. See Commonwealth v. Long, 454 Mass. 542, 555 (2009), S.C., 476 Mass. 526 (2017). Here, whether probable cause existed to issue a criminal complaint under § 103 depends on whether the Legislature intended to include urine as a "noxious or filthy substance."

"In interpreting the meaning of a statute, we look first to the plain statutory language." Cavanagh v. Cavanagh, 490 Mass. 398, 405 (2022), citing Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013). See Desrosiers v. Governor, 486 Mass. 369, 376 (2020), cert. denied, 142 S. Ct. 83 (2021) ("In interpreting a statute, we follow the plain language when it is unambiguous and when its application would not lead to an absurd result, or contravene the Legislature's clear intent" [quotations and citation omitted]). The words of the statute generally are the main source from which we ascertain legislative purpose. See Commonwealth v. Kelly, 470 Mass. 682, 688 (2015). "Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent . . . and the courts enforce the statute according to its plain wording . . . so long as its application would not lead to an absurd result" (citation omitted). Cavanaugh, supra. However, "[w]here there is doubt or ambiguity about the meaning of a statutory provision, the court may turn to extrinsic sources to

determine legislative purpose and intent." Id., citing Malloy v. Department of Correction, 487 Mass. 482, 496 (2021).

Section 103 provides:

> "Whoever wilfully, intentionally and without right throws into, against or upon a . . . building . . . or puts or places therein or thereon oil of vitriol, coal tar or other noxious or filthy substance, with intent unlawfully to injure, deface or defile such . . . building . . . shall be punished by imprisonment in the [S]tate prison for not more than five years or in jail for not more than two and one half years or by a fine of not more than [$300]" (emphasis added).

The term "other noxious or filthy substance" is not defined in the statute. See G. L. c. 266, § 103. Therefore, we first consider the plain and ordinary meaning of the phrase. See Commonwealth v. Keefner, 461 Mass. 507, 511 (2012). See also G. L. c. 4, § 6, Third ("Words and phrases shall be construed according to the common and approved usage of the language . . ."). "Noxious" is defined as "[h]armful to [one's] health," or "injurious." See Black's Law Dictionary 1283 (11th ed. 2019). See also American Heritage Dictionary of the English Language 1207 (5th ed. 2016) ("noxious" defined as "[h]armful to living things"). The term "filthy" is defined as "[c]overed or smeared with filth" and "disgustingly dirty." See id. at 659. The Commonwealth contends that where urine so obviously is "disgustingly dirty," our inquiry into the meaning of the term

"other noxious or filthy substance" ought to end there.[2] We disagree.

Ordinarily, we do not turn to extrinsic sources of legislative intent where a statute seemingly is clear and unambiguous on its face. See Cianci v. MacGrath, 481 Mass. 174, 178 (2019). In McCarthy v. Commissioner of Revenue, 391 Mass. 630, 633 (1984), however, where the term "any person" was so general, yet undefined by G. L. c. 64E, § 15, this court found it necessary to go beyond the plain and ordinary meaning of the language of the statute, to reach its legislative history, to afford properly the statutory term its intended meaning. In the context of G. L. c. 64E, § 15, the term "any person" was an "equivocal word," one with "no fixed and rigid signification," having "different meanings dependent upon contemporary

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[2] The Commonwealth cites three out-of-State cases to support its argument that urine constitutes a noxious or filthy substance. See People v. Aponte, 45 Misc. 3d 29, 30 (N.Y. App. Div. 2014). See also State v. Narmore, 107 Haw. 94 (Ct. App. 2005); State in the Interest of J.J., 125 So. 3d 1248, 1250-1251 (La. App. 2013). However, in two of those cases, the defendant seemingly did not even challenge whether urine was a noxious substance for the purposes of the relevant charged offense. See Aponte, supra. See also Narmore, supra. Moreover, in State in the Interest of J.J., supra, while urine was described as a "noxious substance," the defendant was charged with battery by way of intentionally administering "a poison or other noxious liquid or substance to another." The offense charged was vastly different from the charge against the defendant here, as a charge of simple battery does not possess the same history behind its enactment as does G. L. c. 266, § 103 (§ 103), the latter being enacted in response to the antitemperance violence, as discussed infra.

conditions, the connection in which it [was] used, and the result intended to be accomplished." Id., quoting Commonwealth v. Welosky, 276 Mass. 398, 404 (1931), cert. denied, 284 U.S. 684 (1932). Because the term was so general, yet undefined, only through inquiry into the statute's legislative history could this court properly determine what group of people were included in the term "any person," and were thus subject to the special fuel tax of G. L. c. 64E, § 15. See id. at 633-634. Our holding in McCarthy demonstrates that in some circumstances, even though a statutory term may seem clear and unambiguous on its face, proper statutory analysis nonetheless may require us to go beyond the plain and ordinary meaning to afford the language its intended effect. See id. at 633.

Here, as in McCarthy, the term "other noxious or filthy substance" may seem clear and unambiguous on its face, but it too, like the term "any person," is a general, yet undefined statutory term, the intended meaning of which cannot be fully discerned without going beyond the plain and ordinary meaning of the language of § 103. See id. What is "noxious," "filthy," "harmful to one's health," or "disgustingly dirty" is equivocal and extremely fact dependent, having no "fixed and rigid signification." It is a term that may have "different meanings dependent upon contemporary conditions, the connection in which it is used, and the result intended to be accomplished." See

id. at 633. Therefore, the term "other noxious or filthy substance" lends itself to ambiguity, an ambiguity that only is furthered by the oddity of the specific substances that precede the statutory term, oil of vitriol and coal tar.[3]

Thus, "[w]here [as here] there is [still] doubt or ambiguity about the meaning of a statutory provision, the court [must] turn to extrinsic sources to determine legislative purpose and intent." Cavanagh, 490 Mass. at 405, citing Malloy, 487 Mass. at 496. See Anderson v. National Union Fire Ins. Co. of Pittsburgh PA, 476 Mass. 377, 382 (2017), citing Kain v. Department of Envtl. Protection, 474 Mass. 278, 286 (2016) (court looks beyond plain and ordinary meaning of statutory language where such language is sufficiently ambiguous to support multiple, rational interpretations). Among those

[3] Where what is "harmful to one's health" or "disgustingly dirty" may be the subject of many interpretations, we also are cognizant of the need to construe narrowly the term "noxious or filthy substance" so as to avoid any constitutional problems. See O'Brien v. Borowski, 461 Mass. 415, 420-421 (2012) (we often have sought to construe narrowly statutory language to avoid constitutional problems). See also Oracle USA, Inc. v. Commissioner of Revenue, 487 Mass. 518, 525 (2021) ("When statutory language is susceptible of multiple interpretations, a court . . . should adopt a construction that avoids potential constitutional infirmity"). Were we to adopt the Commonwealth's argument, we risk interpreting the statute in a manner that would render it potentially constitutionally vague. See Commonwealth v. St. Louis, 473 Mass. 350, 355 (2015) ("A criminal statute must not be so vague that it opens itself up to arbitrary enforcement and prosecution," because of "its lack of reasonably clear guidelines" [citation omitted]).

extrinsic sources of legislative intent are "the historical and legal environment in which the statute was enacted to [help] discern the objectives which the Legislature expected the law to achieve." International Org. of Masters, Mates & Pilots, Atl. & Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth., 392 Mass. 811, 815 (1984), citing Chouinard, petitioner, 358 Mass. 780, 782 (1971).

Section 103 was enacted in 1851. See St. 1851, c. 129, § 3. During this time, the temperance movement was sweeping the country in the decades preceding the Civil War. See Langill, Levi Hubbell and the Wisconsin Judiciary: A Dilemma in Legal Ethics and Non-partisan Judicial Elections, 81 Marq. L. Rev. 985, 990 (1998) (Langill). "The Temperance Movement in the United States was born out of growing public dismay over what was perceived to be alcohol's corrosive effect on societal morality." See Hawkins, Great Beer, Good Intentions, Bad Law: The Unconstitutionality of New York's Farm Brewery License, 56 B.C. L. Rev. 313, 324 (2015). This moral movement "sought and eventually obtained a prohibition on the sale of alcohol." See Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335, 1364 (2006). The mission of the temperance movement was to demonstrate that "[t]he saloon [was] the sum of all villainies" (citation omitted). Id. "It [was] the crime of

crimes" (citation omitted). Id. This movement, while having its roots in morality, was met with great resistance across the country. See Langill, supra. The resistance came in the form of riots and outrage. Id. The antitemperance movement was comprised of agitators of violence, threatening to seek revenge on any who supported abstinence from the consumption of alcohol. See W. Thomas, Enemies of the Constitution Discovered, or, an Inquiry into the Origin and Tendency of Popular Violence 128 n.* (1835) (antitemperance movement led by "agitators of . . . violence").

Massachusetts too fell victim to this violence, as those opposed to the temperance movement made their opposition well known, often in a "loud and boisterous" manner. See generally Commonwealth v. Porter, 1 Gray 476, 476 (1854) (three defendants indicted for willfully disturbing and interrupting assembly of people "in a loud and boisterous manner," in attempt to interfere with lawful meeting in which subject of temperance was to be discussed). In June 1847, four years before § 103 was enacted, four bottles of coal tar were thrown through the windows of two "prominent temperance men." See Another Outrage, Liberator, June 18, 1847, at 3. The next night more coal tar was thrown through the windows of a local deacon, doing "great injury to the furniture . . . [and] paintings" located within the building. See Outrage, The Liberator, June 18, 1847, at 3.

"The weapon of choice" so to speak, in carrying out these acts of violence and vandalism, often was coal tar or oil of vitriol. See New England Farmer, Sept. 22, 1855, at 3 ("On Monday evening, several bottles of coal tar were thrown into the sitting-room of Marshal Kingman, of Watertown. The motive of the assault, probably, was the fact of Mr. Kingman being in favor of the enforcement of the liquor law"). See also New England Farmer, Aug. 13, 1853, at 3 ("scoundrel threw six bottles of oil of vitriol" into parlor windows of man who served as member of temperance vigilance committee); House Attacked with Coal Tar, Boston Evening Transcript, Sept. 18, 1855, at 2 ("Some dastardly scoundrels called at the residence of Mr. Marshall Kingman, on Walnut Hill, Watertown, last evening, and on the door being opened by a lad, several bottles of coal tar were hurled into the sitting room, badly damaging the carpet and furniture, but fortunately not injuring any of the occupants. This assault is supposed to have been made in revenge for Mr. Kingman's active efforts towards the enforcement of the liquor law"). Both substances seemingly were popular not simply for the destruction that they caused in the building into which they were thrown, but also for their potential to injure those inside. See New England Farmer, supra; House Attacked with Coal Tar, Boston Evening Transcript, supra.

In light of this historical context, the Legislature was forced to take a significant measure to combat the antitemperance violence that began to grow in the decades preceding the Civil War, by enacting § 103 in 1851. To read this statute without such cause in mind would disregard "the mischief or imperfection to be remedied and the main object to be accomplished" by the statute, and would run afoul of the Legislature's intent. See DiFiore v. American Airlines, Inc., 454 Mass. 486, 490 (2009), citing Industrial Fin. Corp. v. State Tax Comm'n, 367 Mass. 360, 364 (1975) (intent of Legislature also derived from "cause of [statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated"). See also Casseus v. Eastern Bus Co., 478 Mass. 786, 795 (2018) ("Our primary goal in interpreting a statute is to effectuate the intent of the Legislature . . ." [citation omitted]).

But the historical analysis still does not, by itself, as the plain language of the statute does not, define what the Legislature intended the term "other noxious or filthy substance" to encompass. We must turn to our canons of statutory interpretation to determine the full meaning behind "other noxious or filthy substance," as intended by the Legislature. Cf. Commonwealth v. Krasner, 358 Mass. 727, 730,

S.C., 360 Mass. 848 (1971) ("no occasion to resort to canons" of statutory interpretation where plain language and legislative history were conclusive in court's interpretation of burglary statute).

One such canon, ejusdem generis, is Latin for "of the same kind or class." People for the Ethical Treatment of Animals, Inc. v. Department of Agric. Resources, 477 Mass. 280, 287 (2017). Under this doctrine, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (citation omitted). Banushi v. Dorfman, 438 Mass. 242, 244 (2002). The doctrine is most appropriate where "a series of several terms is listed that concludes with the disputed language." Id., citing Perlera v. Vining Disposal Serv., Inc., 47 Mass. App. Ct. 491, 496 n.8 (1999). Here, the statute lists two specific terms, oil of vitriol and coal tar, followed by more general language, "or other noxious or filthy substance," i.e., the disputed language. Thus, ejusdem generis applies. Cf. Carey v. Commissioner of Correction, 479 Mass. 367, 370 n.6 (2018) (ejusdem generis inapplicable where listed items in statute began with general term followed by nonexclusive examples, rather than specific terms followed by disputed general term).

In Commonwealth v. Escobar, 479 Mass. 225, 228-229 (2018), this court used the doctrine of ejusdem generis to discern the Legislature's intent behind the term "anything of value" to determine whether a defendant committed identity fraud within the context of G. L. c. 266, § 37E (b) (§ 37E [b]). The defendant argued that evasion from criminal prosecution was not "anything of value" within the meaning of § 37E (b) and that, thus, the Commonwealth failed to establish an essential element of the charged offense. See id. at 227-228. This court agreed because where the general term "anything of value" was preceded by the specific terms "money, credit, goods, [or] services," the term "anything of value" in § 37E (b) necessarily must have been intended to be limited only to "that which can be exchanged for a financial payment." Id. at 229. The phrase "anything of value" necessarily was added "to encompass any other items that do not appear but are similar to those items that do appear." See id.

Here, coal tar is "tar obtained by distillation of bituminous coal and [is] used [especially] as an industrial fuel, in making dyes, and in the topical treatment of skin disorders." See Merriam-Webster's Collegiate Dictionary 237 (11th ed. 2020). Oil of vitriol is concentrated sulfuric acid. See id. at 862. Both are listed on the Massachusetts Oil and Hazardous Material List. See 310 Code Mass. Regs. § 40.1600

(2014). Urine is neither listed on the Massachusetts Oil and Hazardous Material List nor similar substantially in form to either of these two substances. See id.

Applying the doctrine of ejusdem generis to § 103, the general term "should itself be controlled and defined by reference to the enumerated categories of [substances] which are recited just before it." See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001). Thus, we must construe the term "other noxious or filthy substance" to encompass only those substances substantially similar to the specifically listed items, coal tar and oil of vitriol, both of which were used as items to throw at buildings as part of the antitemperance violence in the decades leading up to the Civil War.[4] See id. at 114 (specific statutory terms "seamen" and "railroad employees," which immediately preceded more general statutory term "any other class of workers engaged in . . . commerce," necessarily demonstrated congressional intent to limit and define by reference what classes of workers were to be included within

[4] In coming to this conclusion, we note the particularly harsh penalty that accompanies a violation of § 103. The statute permits imprisonment for up to five years in State prison, making the crime a felony. See G. L. c. 266, § 103. See also G. L. c. 274, § 1 ("A crime punishable by . . . imprisonment in the state prison is a felony"). Where violation of the statute constitutes a felony with a substantial potential prison sentence, we believe that our holding more closely effectuates the Legislature's intent behind the statute's enactment.

residual clause of 9 U.S.C. § 1). See also Escobar, 479 Mass. at 229. Compare Banushi, 438 Mass. at 244 (pursuant to doctrine of ejusdem generis, where specific terms of statute described places of public or commercial use, more general term "building" also must refer to "places of public or commercial use, places of assembly or places of work"), with Desrosiers, 486 Mass. at 378 (where plain language of statutory term "other natural causes" was clear and unambiguous, no need to resort to doctrine of ejusdem generis, as Governor's power to declare state of emergency necessarily extended to COVID-19 pandemic where COVID-19 was said to be caused naturally, likely originating from some type of animal).

Any other view "would . . . strip the more specific terms of any meaning whatsoever," and would rid them of their limiting effect. See Escobar, 479 Mass. at 229, citing Santos v. Bettencourt, 40 Mass. App. Ct. 90, 93 (1996). Construing the term "other noxious or filthy substance" to include urine "fails to give independent effect to the statute's enumeration of the specific categories of [substances] which precedes it." See Circuit City Stores, Inc., 532 U.S. at 114. Put differently, there would have been no need for the Legislature to have used the terms oil of vitriol or coal tar if those terms simply were going to be "subsumed within the meaning" of the more general term "other noxious or filthy substance." See id.

Accordingly, we hold that under the statutory canon of interpretation of ejusdem generis, the more specific statutory terms of "coal tar" and "oil of vitriol" necessarily were intended to limit the more general term "other noxious or filthy substance."[5,6] See id. See also Banushi, 438 Mass. at 244. Thus, where we hold that urine is not a noxious or filthy substance within the context of § 103, the criminal complaint against the defendant undoubtedly lacks probable cause. See Coggeshall, 473 Mass. at 667 ("application for the complaint must establish probable cause as to each element of the [charged] offense").

3. Conclusion. For the foregoing reasons, we affirm the motion judge's order allowing the defendant's motion to dismiss the criminal complaint.

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[5] Where we hold that urine is not a noxious or filthy substance under § 103, we need not address whether probable cause existed on the defendant's intent to injure, deface, or defile his jail cell, as would be required by the statute. See G. L. c. 266, § 103 ("Whoever wilfully, intentionally and without right throws into, against or upon a . . . building . . . or puts or places therein or thereon oil of vitriol, coal tar or other noxious or filthy substance, with intent unlawfully to injure, deface or defile such . . . building . . . shall be punished by imprisonment in the [S]tate prison for not more than five years or in jail for not more than two and one half years or by a fine of not more than [$300]" [emphasis added]).

[6] We also note, however, that our holding is a narrow one. We do not speculate whether different substances, in the same or similar circumstances, may come within the purview of what the statute seeks to criminalize.

So ordered.