STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1953

State of Minnesota,
Appellant,

vs.

Christopher Nathan Polister,
Respondent.

Filed April 19, 2011
Reversed and remanded
Toussaint, Judge

Aitkin County District Court
File No. 01-CR-10-217

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James P. Ratz, Aitkin County Attorney, Rebecca A. Trapp, Assistant County Attorney, Aitkin, Minnesota (for appellant)

Bradford S. Delapena, Bradford Delapena, Ltd., St. Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Judge

The State of Minnesota appeals the district court's dismissal of a charge of second-degree possession of a controlled substance for lack of probable cause. Because

the district court erred by concluding that the statutory definition of a "mixture" in Minn. Stat. § 152.01, subd. 9a (2008), does not apply to the facts of the present case despite the supreme court's holding in *State v. Peck*, 773 N.W.2d 768 (Minn. 2009), we reverse the district court's dismissal and remand the case for further proceedings consistent with this opinion.

FACTS

At approximately 10:32 a.m. on March 18, 2010, respondent Christopher Nathan Polister was found slumped over in his vehicle, which was parked at a gas station. Aitkin County Deputy John Novotny was dispatched to the scene, but while en route, learned that respondent had been taken to the hospital by ambulance. Later that day, Deputy Novotny learned that unidentified pills and small pieces of cotton consistent with IV drug use had been found in respondent's belongings.

Deputy Novotny took a recorded statement from respondent at the hospital, during which he observed signs that respondent was under the influence of a substance other than alcohol. During this conversation, respondent admitted to using IV drugs within the last two days and showed the deputy a fresh needle mark on his arm. Deputy Novotny indicated to respondent that he intended to apply for a search warrant for the vehicle, and respondent replied that he had "used everything up."

Respondent's vehicle was towed approximately 28 miles to a secure garage. Deputy Novotny obtained a search warrant for respondent's vehicle, and a search was conducted on March 19. During the execution of the warrant, Deputy Novotny found an uncapped 32-ounce Powerade bottle on the floor of the front passenger side of the

vehicle. The bottle was approximately halfway filled with liquid. At the bottom of the bottle—fully submerged in the liquid—was a small, unsealed jeweler's bag containing a white substance. There was also sediment in the bottle—but outside of the bag—that appeared to be similar to the contents of the jeweler's bag. Deputy Novotny believed that the jeweler's bag and its contents had been concealed inside the Powerade bottle.

Deputy Novotny transported the Powerade bottle in his squad car to the sheriff's office for field testing. He extracted some of the liquid from the bottle using a pipette and tested it with a cocaine NIK kit. Using another pipette, he took a sample of the white substance from inside the jeweler's bag. Both the liquid and the substance from the bag field-tested positive for cocaine.

The bureau of criminal apprehension (BCA) conducted further analysis of the contents of the bottle. The BCA removed the jeweler's bag from the bottle and poured its contents into the bottle. The substance tested positive for methadone and revealed the contents of the bottle to have a weight of 453 grams and a volume of 451 milliliters, although the BCA did not test how much controlled substance was in the liquid.

At respondent's request, the sample was also tested by a separate facility in Sacramento, California. In order for the second test to be completed, the BCA swirled the contents of the bottle to suspend the precipitate material and make a homogenous mixture, then removed a sample from the bottle that was sent to the California laboratory. According to testimony, the sample received was one milliliter of colorless liquid that tested positive for methadone. Using an extraction method by which the methadone was removed from the liquid, forensic toxicologists determined that the liquid in the

Powerade bottle contained 0.37 milligrams of methadone per milliliter.

The state charged respondent with second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(2) (2008). Respondent challenged probable cause for the charge, arguing that the substance in the Powerade bottle did not constitute a "mixture" within the meaning of Minn. Stat. § 152.01, subd. 9a. The district court granted respondent's motion to dismiss for lack of probable cause.

D E C I S I O N

A pretrial order dismissing a charge for lack of probable cause is appealable if the order is based on a legal determination. *State v. Ciurleo*, 471 N.W.2d 119, 121 (Minn. App. 1991); *see also* Minn. R. Crim. P. 28.04, subd. 1(1) (providing that the state may appeal as of right from any pretrial order—including a probable-cause dismissal—based on questions of law, but may not appeal a probable-cause dismissal "premised solely on a factual determination"). Under rule 28.04, subdivision 1(1), "whether the dismissal is based on a legal or a factual determination is a threshold jurisdictional question." *Ciurleo*, 471 N.W.2d at 121.

The dismissal in the present case was based upon the district court's interpretation of Minn. Stat. § 152.01, subd. 9a, defining "mixture" in the context of the controlled-substance statutes. Dismissal for lack of probable cause based on statutory interpretation is a legal determination. *State v. Williams*, 762 N.W.2d 583, 585 (Minn. App. 2009), *review denied* (Minn. May 27, 2009). The district court's dismissal of the second-degree-possession-of-a-controlled-substance charge for lack of probable cause is therefore appealable.

We will reverse a probable-cause pretrial dismissal "only if the state demonstrates clearly and unequivocally that the district court erred in its judgment and, unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001). "Dismissal of a complaint based on a question of law satisfies the critical impact requirement." *State v. Dunson*, 770 N.W.2d 546, 550 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009), *cert. denied* 130 S. Ct. 1891 (2010). The sole issue on appeal is whether the district court erred by concluding that the liquid in the Powerade bottle was not a "mixture" within the meaning of Minn. Stat. § 152.01, subd. 9a. *See State v. Linville*, 598 N.W.2d 1, 2 (Minn. App. 1999) (reviewing statutory interpretation de novo). In conducting this review, courts must view the evidence and all resulting inferences in the light most favorable to the state. *Peck*, 773 N.W.2d at 770 n.1.

The threshold issue in any statutory-interpretation analysis is whether the statute's language is ambiguous. *State v. Wiltgen*, 737 N.W.2d 561, 570-71 (Minn. 2007). "A statute is ambiguous if its language is subject to more than one reasonable interpretation." *Peck*, 773 N.W.2d at 772. If the "words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2008); *see also State v. Jesmer*, 293 Minn. 442, 443, 196 N.W.2d 924, 924 (1972) (stating that when statutory language is unambiguous, further construction is neither necessary nor permitted).

"A person is guilty of controlled substance crime in the second degree if . . . the person unlawfully possesses one or more mixtures of a total weight of 50 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine." Minn. Stat. § 152.022, subd. 2(2). "Mixture" is defined as "a preparation, compound, mixture, or substance containing a controlled substance, regardless of purity." Minn. Stat. § 152.01, subd. 9a. A "preparation" is a "substance, such as a medicine, prepared for a particular purpose"; "compound" is a "combination of two or more elements or parts"; "mixture" is "[s]omething produced by mixing"; and "substance is "[t]hat which has mass and occupies space; matter. A material of a particular kind or constitution." *Peck*, 773 N.W.2d at 772 (quoting *The American Heritage Dictionary* (4th ed. 2000) (internal quotation marks omitted)).

In *Peck*, the Minnesota Supreme Court addressed whether bong water was a "mixture" under the statute. 773 N.W.2d at 769. In reversing this court's decision, the supreme court held that, "when applied to the water containing methamphetamine stored in [a] bong, the phrase 'preparation, compound, mixture, or substance' is clear and free from all ambiguity." *Id.* at 772. The supreme court concluded: "Bong water is plainly a 'substance' because it is material of a particular kind or constitution. The bong water is a 'mixture' because it is a 'substance containing a controlled substance'—methamphetamine." *Id.*

Peck compels reversal of the probable-cause dismissal in the present case. The statutory definition of a mixture contained in Minn. Stat. § 152.01, subd. 9a, when construed according to the ordinary rules of grammar, is free from ambiguity. We therefore have neither the need nor the authority to engage in further statutory construction and must apply the plain meaning of the definition. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). The liquid in the Powerade bottle is a substance because it is a "material of a particular kind or constitution." Because the liquid contained a controlled substance—methadone—it meets the definition of "mixture." *Peck*, 773 N.W.2d at 772; *see also State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) (stating that court of appeals is bound by established supreme court precedent).

The district court distinguished *Peck*, stating that "the bong water in *Peck* was a *means* of consumption whereas in the present case the bottle was a place to conceal the drug." But a close reading of *Peck* indicates that the purpose of the bong water was not a consideration in the court's holding. *See* 773 N.W.2d at 772 (holding that bong water is a substance because "it is material of a particular kind or constitution" and the bong water is a mixture because it is a "substance containing a controlled substance"). Moreover, to the extent that purpose of the mixture is a relevant factor, there is evidence in the record that respondent intended to drink the Powerade. While it is unclear in what context this statement was made, the evidence—when viewed in the light most favorable to the state—demonstrates that the liquid in the Powerade bottle was

more than a means to conceal the methadone. We conclude that the district court erred by concluding that the liquid in the Powerade bottle was not a "mixture" within the definition articulated in Minn. Stat. § 152.01, subd. 9a. The district court's dismissal of the second-degree-possession-of-a-controlled-substance charge is therefore reversed, and the matter is remanded to the district court for further proceedings not inconsistent with this opinion.

By reversing the district court's dismissal, we do not mean to indicate that we agree with the prosecutor's decision to charge appellant with second-degree possession of a controlled substance in this case. The issue in this case is one of statutory interpretation, not whether we, or the district court, approve of the prosecutor's charging decision. The courts may intrude onto the executive branch's charging function only in very limited circumstances. *State v. Krotzer*, 548 N.W.2d 252, 254 (Minn. 1996) ("Under established separation of powers rules, absent evidence of selective or discriminatory prosecutorial intent, or an abuse of prosecutorial discretion, the judiciary is powerless to interfere with the prosecutor's charging authority."). Because the facts in this case fall well short of the standard the supreme court articulated in *Krotzer*, the propriety of the prosecutor's decision to charge respondent with second-degree possession of a controlled substance is beyond the reach of the judicial branch.

Reversed and remanded.