

STATE OF RHODE ISLAND

NEWPORT, SC.

SUPERIOR COURT

(FILED: April 20, 2021)

STATE OF RHODE ISLAND

:  
:  
:  
:  
:

v.

C.A. No. N1-2019-0090A

CARY PACHECO

DECISION

CARNES, J. Before this Court for decision is Defendant Cary Pacheco’s Motion to Dismiss Count I of the pending indictment charging Pacheco with delivery of a controlled substance in violation of G.L. 1956 § 11-23-7(b). Specifically, Pacheco challenges the constitutionality of § 11-23-7(b) and maintains that it is constitutionally vague. Jurisdiction is pursuant to Rule 12(b)(2) of the Superior Court Rules of Criminal Procedure.

I

**Facts and Travel**

On September 10, 2018, Newport Police responded to a reported overdose at the McKinney Shelter located at 15 Meeting Street. Def.’s Mem. Supp. Mot. to Dismiss (Def.’s Mem.) at 2. Upon arrival, police observed Andrew Paiva unconscious and alone in his room. *Id.* Officers were met by the Newport Fire Department who were treating Paiva. State’s Mem. Obj. Mot. to Dismiss (State’s Mem.) at 1. Paiva was given two doses of Narcan and was later transported to Newport Hospital. Def.’s Mem. 2. Paiva was later pronounced dead around 12:10 a.m. on September 11, 2018. *Id.*; State’s Mem. 1. At the scene, officers discovered and seized two open blue glassine bags, three unused blue glassine bags, an uncapped syringe, and a RIPTA bus pass. Def.’s Mem. 2. The

baggies were submitted for testing to the Rhode Island Department of Health. State's Mem. 1. The test subsequently revealed the presence of Fentanyl. *Id.* An autopsy later revealed that the sole cause of Paiva's death was Fentanyl Intoxication. *Id.*; Def.'s Mem. 4.

On the night of the incident, police spoke with shelter employee William Brown, who stated that he last saw Paiva between 9:00 and 9:30 that evening. Def.'s Mem. 2. Brown had seen Paiva asking around for change for a one-hundred-dollar bill. *Id.* Detectives also spoke with Jeremy Boyle, Paiva's roommate at the shelter, who told police that he returned to the room around 11:00 to 11:15 p.m. and found Paiva laying on his bed with obvious overdose symptoms. State's Mem. 2. Boyle attempted to administer Narcan to Paiva but was unsuccessful. *Id.* Boyle did not know where Paiva had gotten the drugs. *Id.* The next day, detectives spoke with Paiva's sister and mother. Paiva's mother stated that she had given him the one-hundred-dollar bill for food. *Id.* Both stated that Paiva had been suffering from an opioid addiction for some time, but they did not know where he bought the heroin from. *Id.*

On September 19, 2018, detectives spoke with Keith Gillette. State's Mem. 2; Def.'s Mem. 3. Gillette was the last person to be seen with Paiva before the incident on September 10, 2018. *Id.* Gillette said that the two of them had been hanging out at the shelter most of the day and early that evening decided to get pizza at North End Pizza in Portsmouth. State's Mem. 2. Gillette also said Paiva was trying to get change for his one-hundred-dollar bill prior to leaving the shelter, but Gillette did not state the reason why. *Id.* Thereafter, the two of them took the RIPTA 60 bus to Portsmouth. Def.'s Mem. 3. Gillette said at no point did Paiva buy heroin and, after getting pizza, the two went their separate ways. *Id.*; State's Mem. 2.

On October 15, 2018, Gillette contacted the Newport Police Department stating that he had not been completely honest in his prior interview, and he now wanted to tell the truth about that

night. *Id.* Gillette told the Newport Police that Paiva had asked him to get heroin for him that day. State's Mem. 3; Def.'s Mem. 3. Gillette stated that Paiva looked "dope sick" and he felt bad for him, so he contacted Pacheco, who he had previously purchased heroin from. State's Mem. 3. Gillette and Paiva then pooled their money together and agreed to meet Pacheco at Clements Marketplace in Portsmouth around 7:30 p.m. to purchase heroin. *Id.*; Def.'s Mem. 3. The two then took the bus to Portsmouth where they had pizza at North End Pizza. State's Mem. 3; Def.'s Mem. 3. From there the two went to CVS to purchase syringes.<sup>1</sup> *Id.*

Gillette and Paiva then walked across the street to Clements Marketplace to wait for Pacheco. State's Mem. 3; Def.'s Mem. 4. It was raining, so the two waited inside. *Id.* When Pacheco arrived, Gillette walked out to Pacheco's car and sat in the rear seat where he gave Pacheco \$70. *Id.* In exchange, Gillette received twelve blue wax baggies containing what he thought to be heroin from Pacheco. *Id.* Gillette and Paiva then returned to the shelter where Gillette then used four of the bags immediately. State's Mem. 4; Def.'s Mem. 4. Gillette noticed that the heroin was strong, so he warned Paiva not to use too much. State's Mem. 4. A short time later, Gillette observed Paiva sweating profusely and advised him to get some of the shelter's Narcan in case he overdosed. *Id.* Gillette then left, with the intention of returning to check on Paiva, but did not return to the shelter. *Id.* Gillette later found out that Paiva had died from an overdose. *Id.*; Def.'s Mem. 4.

Gillette stated that he changed his mind and decided to come forward, and possibly face charges, after a conversation he had with Pacheco. State's Mem. 4. Gillette and Pacheco ran into each other at a Stop and Shop in Fall River, Massachusetts where Gillette warned Pacheco that

---

<sup>1</sup> This was confirmed by security footage received from CVS located at 10 Turnpike Avenue where Gillette is seen at the pharmacy counter purchasing syringes. State's Mem. 3.

someone had died from the drugs Pacheco had sold him. *Id.* To that, Pacheco replied, “People die off my shit all the time, I don’t give a fuck[.]” *Id.* This angered Gillette, causing him to come forward and disclose the entire story. *Id.*

Police learned that on the date of the incident Pacheco had been on an electronic monitoring ankle bracelet. *Id.* They contacted the Massachusetts Probation Office to obtain Pacheco’s exact location on September 10, 2018 between 7:00 p.m. and 8:00 p.m. *Id.* During this time, the GPS shows Pacheco traveling to Portsmouth. *Id.* The GPS puts Pacheco in the parking lot of Clements Marketplace specifically at 7:30 p.m. *Id.* Pacheco was later arrested on November 29, 2018 after selling narcotics to an undercover officer of the Newport Police Department. *Id.* Pacheco was subsequently indicted and arraigned on this five-count indictment on March 14, 2019. *Id.* Pacheco filed this motion to dismiss the indictment challenging the constitutionality of §11-23-7(b) on November 15, 2019.

## II

### Standard of Review

The void-for-vagueness doctrine has been developed by the United States Supreme Court and adopted by our Supreme Court. The doctrine “mandates that due process considerations under the Fifth and Fourteenth Amendments to the United States Constitution fairly require that ‘a criminal statute be declared void when it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” *State v. Fonseca*, 670 A.2d 1237, 1238 (R.I. 1996) (quoting *State v. Alegria*, 449 A.2d 131, 133 (R.I. 1982)). “‘Thus, the state may not hold an individual ‘criminally responsible for conduct which he could not reasonably understand to be proscribed.’” *Id.* (quoting *Alegria*, 449 A.2d at 133). “‘Therefore, the state has an

obligation to frame its criminal statutes so as to inform adequately the persons to whom it is addressed of the type of conduct that is prohibited.” *Alegria*, 449 A.2d at 133.

When determining the constitutionality of a statute, “[i]t is well settled that [the] court will presume a legislative enactment of the General Assembly to be constitutional and valid and will so construe the enactment whenever such a construction is reasonably possible.” *Fonseca*, 670 A.2d at 1240 (citing *Kass v. Retirement Board of the Employees’ Retirement System*, 567 A.2d 358, 360 (R.I. 1989)). “The burden of overcoming the presumptive constitutionality of a statute rests on the challenging party and must be proven beyond a reasonable doubt.” *Id.* (citing *Seibert v. Clark*, 619 A.2d 1108, 1113 (R.I. 1993); *State v. Capone*, 115 R.I. 426, 432-33, 347 A.2d 615, 619 (1975)). “If more than one construction is possible, we will opt for that which will avoid unconstitutionality.” *Id.* (citing *Kass*, 567 A.2d at 360).

### III

#### Analysis

##### A

#### Vagueness of § 11-23-7(b)

It is well settled in this state that “‘vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.’” *Fonseca*, 670 A.2d at 1240 (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). “Relying on those facts, so long as a statute is constitutionally specific in regard to a particular defendant, this Court will not consider a defendant’s facial-vagueness challenge.” *State v. Sahady*, 694 A.2d 707, 708 (R.I. 1997) (citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982)). “Vagueness challenges . . . rest principally on lack of notice.” *Id.* (citing *Alegria*, 449 A.2d at 133; *State v. Authelet*, 120 R.I. 42, 45, 385 A.2d 642, 644 (1978)). “Absent

some other constitutional concern, if the facts show that a defendant is given sufficient notice that his conduct is at risk we see no reason to speculate whether the statute notifies a hypothetical defendant.” *Id.* (citing *Village of Hoffman Estates*, 455 U.S. at 500).

Section 11-23-7(b) states the following:

“(b) A person is guilty of a controlled substance delivery resulting in death when, as a result of an unlawful delivery of a controlled substance to another person who subsequently delivers such controlled substance to an adult, death results to that adult because of the ingestion orally or the injection or inhalation of the controlled substance.” Section 11-23-7(b).

Pacheco argues that the vagueness problem lies in the phrase “an unlawful delivery of a controlled substance.” *Id.* More specifically, Pacheco takes issue with the words “unlawful delivery.” “The standard employed to gauge whether a particular statutory term reasonably informs an individual of the criminality of his conduct is whether the disputed verbiage provides adequate warning to a person of ordinary intelligence that his conduct is illegal by common understanding and practice.” *Fonseca*, 670 A.2d at 1239 (quoting *Authalet*, 120 R.I. at 45, 385 A.2d at 644). Pacheco contends that the statute fails to provide notice as to exactly what would be considered “unlawful delivery” under the statute.

In *Sahady*, the Court upheld the constitutionality of a statute providing that it was unlawful to carry a firearm when intoxicated or under the influence of intoxicating liquor or narcotic drugs. Like this case, the defendant in *Sahady* challenged the constitutionality of that statute contending that the phrases “when intoxicated” and “under the influence” failed to adequately warn what conduct would be considered illegal under the statute. The Court reasoned that “the term ‘intoxication’ has long been defined by this court in the criminal context.” *Sahady*, 694 A.2d at 709. The Court was satisfied that the definition of intoxication found in *State v. Amaral*, 109 R.I.

379, 285 A.2d 783 (1972) “embodie[d] [the] common understanding and practice and [was] sufficiently precise to allow the general public to gauge its conduct.” *Sahady*, 694 A.2d at 709.<sup>2</sup>

Similarly, what is required to find a defendant guilty of delivering a controlled substance has long been defined by our Supreme Court. *See State v. Rodriguez*, 742 A.2d 728, 732 (R.I. 1999) (“[t]o find a defendant guilty of delivering a controlled substance the state must prove beyond a reasonable doubt: (1) that there was an unlawful delivery of a controlled substance and (2) that defendant was the one who made the unlawful delivery”) (citing *State v. Padula*, 551 A.2d 687, 690 (R.I. 1988)) (referencing G.L. 1956 § 21-28-4.01 when stating what is necessary to convict a defendant of delivery of a controlled substance). Under the Rhode Island Uniform Controlled Substances Act, § 21-28-4.01(a)(1) makes it unlawful for “any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance.” “Delivery” or “deliver” is defined in § 21-28-1.02 as “the actual, constructive, or attempted transfer of a controlled substance or imitation controlled substance, whether or not there exists an agency relationship.” Section 21-28-2.08 provides a schedule of drugs and substances, including heroin, defined as controlled substances in § 21-28-1.02. Therefore, it is this Court’s understanding that the sale of heroin (or any other controlled substance listed in § 21-28-2.08) to another individual would constitute an unlawful delivery of a controlled substance under Rhode Island law. Further,

---

<sup>2</sup> The definition adopted by the Court in *Sahady* for use in criminal cases is as follows:

“Intoxication comprehends a situation where, by reason of drinking intoxicants an individual does not have the normal use of his physical or mental faculties, thus rendering him incapable of acting in a manner in which an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would act under like conditions.” *Sahady*, 694 A.2d at 709 (quoting *Amaral*, 109 R.I. at 385-86, 285 A.2d at 787).

it is this Court's opinion that this common understanding of unlawful delivery was the intended conduct to be encompassed by § 11-23-7.<sup>3</sup>

This Court is not convinced that Pacheco was not put on notice of the kind of conduct that would be considered unlawful under § 11-23-7(b). Considering the facts at hand and viewing the statute regarding this particular defendant, it is common understanding and practice in this state that the sale of heroin constitutes an unlawful delivery under our laws. A person of ordinary intelligence would be put on notice by the term "unlawful delivery," contained in § 11-23-7(b), that the conduct of selling heroin to another is illegal under the statute. It is this Court's opinion that because of this, Pacheco was put on notice that his conduct of selling heroin to Gillette was at risk of being unlawful under § 11-23-7(b). Therefore, § 11-23-7(b) is not unconstitutionally vague as Pacheco contends.<sup>4</sup>

## B

### *Mens Rea*

Pacheco also takes issue with the fact that § 11-23-7(b) does not contain a *mens rea*. "The existence of a mens rea is the rule rather than the exception under our jurisprudence[.]" *State v. Griffith*, 660 A.2d 704, 706 (R.I. 1995). "[A] principle 'so deeply rooted in American law' that its absence in a statute does not mean the Legislature declined to require a specific mental state but that it rather 'merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.'" *Id.* (quoting *State v. Tobin*, 602 A.2d 528, 534 (R.I. 1992)). It is

---

<sup>3</sup> This is made further apparent by the language in § 11-23-7(a), "result of an unlawful delivery of a controlled substance in exchange for anything of value . . . ."

<sup>4</sup> Pacheco brings up in his argument numerous hypotheticals in which this statute could charge a pharmacist and others working in the medical profession. As stated previously, there is "no reason to speculate whether the statute notifies a hypothetical defendant." *Sahady*, 694 A.2d at 708. Therefore, this Court will not engage in hypothetical scenarios that do not pertain to this particular defendant.



common practice in Rhode Island for the court to communicate the required *mens rea* of a statute in its jury instructions.

In *Griffith*, the Court held that a first-degree child molestation statute that lacked a requisite *mens rea* carried an implied intent requirement. *Id.* The Court reasoned that a criminal charge “which carries a minimum twenty-year sentence, is not a strict liability offense.” *Id.* The judgment of conviction appealed from was ultimately vacated because the trial justice failed to give instructions to the jury regarding the required *mens rea*. “[T]he court is required to instruct the jury on all elements of a criminal charge.” *Id.*

Following the reasoning in *Griffith*, this Court finds that the criminal charge in § 11-23-7(b), which carries a possible life sentence, is not a strict liability offense. It is clear, just as with the sexual assault statute, that intent is required in an unlawful delivery criminal charge. The issue of the lack of *mens rea* found in § 11-23-7(b) can be solved with jury instructions and is therefore a premature argument and not grounds to dismiss Count 1 of the indictment against Pacheco.

## C

### Severity of Punishment

Pacheco’s final argument is that § 11-23-7(b) imposes a punishment that is unconstitutionally disproportionate to the offense because violation of the statute can be punishable by up to life in prison. A “defendant can challenge only the statute as applied to him [and] the sentence he received not the statute on its face, as it might at some future date be applied to others[.]” *State v. Sharbuno*, 120 R.I. 714, 719, 390 A.2d 915, 919 (1978). This is “because, except in first amendment cases, one to whom a statute may be constitutionally applied lacks standing to challenge that statute on the ground that it may conceivably be applied

unconstitutionally to others in hypothetical situations not before the court.” *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). Pacheco only has standing to challenge his own sentence; he may not bring a general challenge to the statute as it may be applied to him in the future. Pacheco has not yet received a sentence; therefore, this argument is premature, and the Court will not address this argument in this Decision.

#### **IV**

#### **Conclusion**

For the foregoing reasons, Pacheco’s motion to dismiss is hereby denied. Counsel shall prepare an appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

---

**TITLE OF CASE:** State of Rhode Island v. Cary Pacheco

**CASE NO:** N1-2019-0090A

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** April 20, 2021

**JUSTICE/MAGISTRATE:** Carnes, J.

**ATTORNEYS:**

**For Plaintiff:** Roger R. Demers, Esq.

**For Defendant:** Amanda Valentino, Esq.