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ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, Appellant/Plaintiff, vs. DANIEL LOUIS SANTILLANES, Appellee/Defendant.	No. 1 CA-CR 21-0389 Maricopa County Superior Court No. CR2011-108577-001

APPELLANT'S RESPONSE TO BRIEF OF AMICI CURIAE PIMA COUNTY PUBLIC DEFENDER'S OFFICE AND ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. The Court must look at the underlying facts of a possession of drug paraphernalia offense to determine whether the paraphernalia offense is eligible for expungement.

Arizona Attorneys for Criminal Justice and the Pima County Public Defender's Office (hereinafter "AACJ") argue that the court should grant petitions to expunge drug paraphernalia petitions that could relate to marijuana and/or any other drug, because six months before the voters approved Proposition 207, this Court held in *State v. Soza*, 249 Ariz. 13 (App. 2020), that possession of drug paraphernalia, pursuant to A.R.S. § 13-3415(A) is a unitary offense.[1] (AACJ Amici Brief, at 3.) This interpretation has no basis in either the plain language of A.R.S. § 36-2862 or the intent of the electorate that approved Proposition 207 in November 2020.

When analyzing statutes, this Court considers the statutory scheme as a whole and assumes that the electorate did not include provisions that are "redundant, void, inert, trivial, superfluous, or contradictory." *State v. McDermott*, 208 Ariz. 332, 334-35 (App. 2004), *quoting State v. Moerman*, 182 Ariz. 255, 260 (App. 1994). Like

[1] AACJ's hypothetical argument would not apply in Santillanes' case because he was only arrested and charged with marijuana offenses and only one count of Possession of Drug Paraphernalia. (R.O.A. 4.) Furthermore, in Santillanes' case, like many others charged before *Soza*, the charging document specified the type of drug to which the paraphernalia related. (*Id*. at 2.)

other subsections of A.R.S. § 26-2862(A) that permit only certain marijuana offenses to be expunged, § 26-2862(A)(3) specifically limits eligible paraphernalia offenses to those "relating to the cultivation, manufacture, processing or consumption of marijuana." This language does not permit the expansion of expungement to any other type of drug paraphernalia. Title 36, Chapter 28.2 narrowly defines the relevant terms in A.R.S. § 26-2862(A)(3) to marijuana offenses only. For example, an eligible consumption-related paraphernalia offense must be limited to a marijuana-only offense because "consumption" is defined in A.R.S. § 36-2850(3) as "the act of ingesting, inhaling or otherwise introducing *marijuana* into the human body." (Emphasis added.) Similarly, an eligible manufacture-related paraphernalia offense can only mean marijuana paraphernalia because "manufacture" means "to compound, blend, extract, infuse or otherwise make or prepare a *marijuana* product." A.R.S. § 36-2850(18). (Emphasis added.)

Thus, an interpretation that avoids rendering the marijuana language in Title 36, Chapter 28.2 superfluous requires the court to consider evidence of the underlying facts of the offense beyond the statutory elements of A.R.S. § 13-3415(A) to show that the paraphernalia offense is eligible for expungement. This statutory interpretation is consistent with the State's arguments in its supplemental brief in response to questions 4, 5, and 6.

Similarly unavailing is AACJ's argument that the rule of lenity requires this Court to interpret subsection (A)(3) to permit the expungement of drug paraphernalia offenses, regardless of the related drug. The rule of lenity is inapplicable when the intent of the statute is discernable. *Raney v. Lindberg*, 206 Ariz. 193, ¶ 21 (App. 2003), *quoting State v. Nihiser*, 191 Ariz. 199, 201 (App. 1997). The provisions of Proposition 207 dealt only with marijuana offenses, not any other drug.

It defies common sense that the electorate would have intended that any non-marijuana drug paraphernalia offenses would be expungement-eligible while only small amounts of marijuana would be eligible for expungement under subsections (A)(1) and (A)(2). The "findings and declaration of purpose" section of the ballot initiative informed the electorate that the initiative's purpose was to regulate the "responsible adult use of marijuana" and made no reference to any other type of drug. (2020 Arizona General Election Publicity Pamphlet at 56.[2]) Even the AACJ, in their argument to the electorate in favor of Proposition 207, wrote that the measure would allow expungement for "folks who were previously convicted of *low-level marijuana charges*." (*Id*. at 81. Emphasis added.) The Arizona Dispensaries Association similarly argued that expungement would be an option for "low-level

[2] The pamphlet is accessible at: https://azsos.gov/sites/default/files/2020_General_Election_Publicity_Pamphlet_English.pdf (last accessed June 15, 2022).

marijuana charges." (*Id*.) Neither argument made any reference to the possibility of expunging offenses relating to other drugs.

In light of the fact that voters were told that only a narrow class of marijuana charges would be eligible for expungement, this Court should disregard the AACJ's new position that the statute should be interpreted to allow non-marijuana paraphernalia convictions to be expunged without regard to the underlying conduct and circumstances of the offense. Instead, this Court should interpret A.R.S. § 36-2862(A) to require the court to consider the underlying conduct of the offense to determine whether the offense is eligible for expungement as a low-level marijuana-only offense.

II. The plain language of A.R.S. §36-2862(B)(2)(b) permits a court to hold a hearing without a specific request from the State and assumes that a court will look beyond the statutory elements to the underlying facts of the charge to determine expungement eligibility.

AACJ also argues that a court's factual determination of eligibility is limited to the statute and that it has no authority to conduct evidentiary hearings unless the prosecutor requests one. (AACJ Amicus Brief, at 7-8.) This ignores the plain language of A.R.S. § 36-2862(B)(2)(b) and Ariz. R. Crim. P. 36(C)(1), both of which provide that the court may hold a hearing when either party requests it "or the court concludes there are genuine issues of fact regarding whether the petition should be granted." The inclusion of the language "genuine issues of fact" assumes that the

court must look beyond the statutory elements of an offense to determine whether it is eligible for expungement.

Furthermore, the court's ability to set an evidentiary hearing in the absence of a specific request from either party is part of its inherent authority to "issue orders necessary for the ordinary and efficient exercise of its jurisdiction." *See Arpaio v. Baca*, 217 Ariz. 570, 577 (App. 2008). In this case, the trial court had clear and convincing evidence to disqualify Santillanes based on the presentence report and the charging document. The State additionally submitted the police report showing Santillanes possessed more than 2.5 ounces. Nevertheless, after the parties informed the superior court that a material dispute of fact existed about the amount of marijuana found in Santillanes' possession, the court had the statutory and inherent authority to hold a hearing on the matter. Indeed, where the State brought forward disputed evidence that Santillanes' offense was not eligible, the trial court had a duty to hold a hearing to permit the State to meet its burden of proof. To hold otherwise renders § 36-2862(B)(3) meaningless.

Additionally, AACJ's citation to *State v. Gomez*, 212 Ariz. 55 (2006), does not support its position that the court cannot hold an evidentiary hearing without a request from the State. In that case, the State attempted to use a prior dismissed indictment for a violent offense to disqualify the defendant from the mandatory probation provisions of Proposition 200. *Id*. at 56. The Arizona Supreme Court held

that a dismissed indictment would not qualify as a violent crime indictment under A.R.S. § 13-901.01(B) because it is akin to a reversed prior conviction. *Id*. at 58. Nothing in the case suggested, much less held, that a court could not, *sua sponte*, hold a hearing to determine a material dispute of fact regarding a defendant's eligibility for Proposition 200 sentencing.

To reach its conclusion interpreting the statutory language, the Supreme Court noted in *Gomez* that a reviewing court must "identify the reasonable interpretation [of a proposition] that is most consistent with the intent" of the ballot measure and found that interpreting the statute to mean that only a then-pending indictment was the most reasonable interpretation. *Id*. at 59.

In this case, it makes no sense to claim that a reasonable interpretation of A.R.S. § 36-2862 prohibits the court from holding a hearing without a specific request from the State when the plain language of the statute specifically provides otherwise. As the *Gomez* court noted, Arizona courts will interpret statutes "to avoid absurd results." *Id*. at 59. In this case, it would be absurd to hold that a court's factual determination is limited to the statute's provisions and/or that a court cannot hold a hearing without a specific request from the State, when the plain language of the statute provides otherwise.

AACJ's argument that a court can only look at the statute on its face or a factual basis for an offense would not work in many cases, including this one. First,

as the State previously noted, the elements of a marijuana possession offense under A.R.S. §13-3405 do not align with the weight limit for expungement under A.R.S. § 36-2862(A). (Opening Brief, at 9-10.) Likewise, the factual basis for an offense given at the change of plea rarely, if ever, contains the information necessary to determine whether the amount of marijuana meets the weight criteria in the expungement statute. In this case, Santillanes' factual basis was silent as to the weight. (R.T. 2/24/11 at 7.) Moreover, because Santillanes did not plead guilty to the other three counts in his Information, the record is silent as to the facts of those counts and the factual basis cannot give any guidance to the court as to whether Santillanes is entitled to expungement on those counts. For that reason, the court must look at the underlying facts of each individual offense to determine their respective eligibility.

Even under AACJ's assertion that the correct framework merely requires a petition to "identify the records to be expunged" and then "make a finding whether the prosecution has proven factual ineligibility," the trial court erred in this case. The trial court made no findings of fact regarding the evidence submitted by the State in response to the petition. Indeed, the trial court's order did not even correctly identify Count 1.[3] Moreover, under AACJ's proposed framework, the court erred because

[3] The trial court identified Count 1 as "A.R.S. § 13-3405(A)(1) Possession or use of marijuana." (R.O.A. 24, at 2.) Santillanes was charged with Count 1: Possession of

Santillanes was convicted in Count 1 of Facilitation to Commit Sale or Transportation of Marijuana, an offense that is not eligible "on its face" because the A.R.S. § 36-2862(A)(1) does not reference preparatory or inchoate offenses. Consequently, if this Court accepts AACJ's argument, it must reverse the trial court's decision and vacate the expungement anyway.

CONCLUSION

The most reasonable interpretation of the provisions of A.R.S. § 36-2862 require the court to review the underlying facts of the offenses that the petitioner seeks to expunge. Only low-level marijuana offenses are eligible for expungement in keeping with the expressed intent of the ballot measure as told to the voters in pre-election materials.

Submitted June 17, 2022.

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Marijuana for Sale. (R.O.A. 4 at 2.) He was convicted of Count 1 (as amended): Facilitation to Commit Sale or Transportation of Marijuana. (R.O.A. 10, at 2.)