

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0338

CITY OF GREAT FALLS,

Plaintiff and Appellee,

v.

KENTON STEVEN MONROE,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

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INTRODUCTION

At issue is the application of statutory factors which guide the trier of fact's determination of whether an object is drug paraphernalia. Kenton Monroe asserted in his opening brief that the trial court did not properly consider and weigh evidence pertaining to statutory factors, and the evidence before the court did not support an inference that Monroe intended to use the syringe to inject drugs. In response, the City argues, without citation to authority, that the statutes should be construed liberally, and under such a construction, the court's findings that the syringe was drug paraphernalia and Monroe intended to use it were supported by sufficient evidence. The City's arguments are unpersuasive, for the following reasons.

ARGUMENT

First, the City attacks an argument that Monroe did not raise. Mont. Code Ann. § 45-10-101 defines "drug paraphernalia." Mont. Code Ann. § 45-10-102 sets out fourteen factors that the trier of fact should consider in determining whether an object is drug paraphernalia. Subsection (1) directs the court to consider a statement by an owner or by one in control of the object concerning its use. The Municipal Court considered the statutory definition and based its finding in part on a statement made by Mr. Monroe to Sgt. Bragg. Contrary to the City's argument, Mr. Monroe does not assert that the court considered and

applied only Mont. Code Ann. § 45-10-101 and didn't consider the factors in Mont. Code Ann. § 45-10-102. Brief of Appellee, at 10-11. Monroe likewise does not contend that the trial court ruled that a syringe is drug paraphernalia in all cases. Brief of Appellee, at 11.

Second, the City fails to respond to Monroe's assertion that the court erred when it failed to consider and weigh evidence pertaining to three other factors set out in Mont. Code Ann. § 45-10-102(3), (4) and (5). These factors direct the trier of fact to consider "the proximity of the object in time and space to a direct violation" of Title 45, Chap. 10, part 1; "the proximity of the object to dangerous drugs;" and "the existence of any residue of dangerous drugs on the object[.]" Sgt. Bragg admitted he did not observe any dangerous drugs or drug residue at any time during the interaction with Mr. Monroe that resulted in the criminal charge. Opening Brief of Appellant, at 10-12.

In the face of this undisputed evidence, the City argues only that these factors "were not applicable to the evidence presented[.]" Brief of Appellee, at 12. The City's failure to offer any argument on this point is telling. The absence of illegal drugs or drug residue on an object goes to the core of the issue of whether the object is drug paraphernalia. The absence of drugs or residue wholly undermined Sgt. Bragg's opinion and the court's finding that the syringe was

drug paraphernalia. Sgt. Bragg explained how syringes are used to ingest drugs. Narcotics are melted, and pills are crushed, and the drug is then mixed with water and the solution is injected with a syringe. The uncontroverted evidence that Bragg did not see any drug residue on or in the syringe, did not observe or find any drugs, and did not observe anything that could be used to melt drugs, or any packaging, pill bottles, baggies or balloons directly contradicts the finding that the capped syringe was drug paraphernalia.¹

Third, the City urges this Court to consider a factor on which the Municipal Court did not rely: “the existence and scope of legitimate uses for the object in the community. Mont. Code Ann. § 45-10-102(13).” Brief of Appellee, at 12. This Court should apply the law to the facts and evidence admitted at trial, and on which the trial court relied. The Court should reject the City’s invitation to uphold the trial court’s ruling based on other factors that court did not consider.

Monroe asserted that the Municipal Court placed undue emphasis on Sgt. Bragg’s question to Monroe: “any reason you have this?” and Monroe’s

¹ The City’s extensive reliance on Off. Larson’s trial testimony is misplaced. Cf., Brief of Appellee, at 3, 5, 9, 12. The Municipal Court relied on Sgt. Bragg’s testimony. The District Court observed that the trial court judge “did not actually rely on Officer Larson’s opinion testimony. *See* Hr’g R. at 7:00:50 – 7:08:37.” Order on Appeal, p. 12; attached to the Opening Brief of Appellant as Appendix A.

response: a shrug of the shoulders and “no.” Opening Brief of Appellant, at 11-12. The trier of fact should consider a statement by one in control of the object concerning its use. Here, however, Bragg re-interpreted Monroe’s response from “no reason” to “no *medical* reason.” Then, as there was no medical reason, the only use for the syringe could be an illegal purpose. The Municipal Court inferred from Monroe’s response an illegal purpose that was not supported by the evidence concerning that response.

Even if one assumes for the sake of argument that the capped syringe was drug paraphernalia, proof that the syringe was in Mr. Monroe’s possession is not enough to convict. The City also had to prove that Monroe intended to use the syringe to ingest drugs, in order to obtain a conviction. Mont. Code Ann. § 45-10-103. Monroe cited decisions in which the Court held that an inference of intent was proper, based on the evidence. Here, however, the trial court made inferences that were not supported by the facts.

Proof of possession is not sufficient to permit an inference of intent. See Opening Brief of Appellant, at 13-14, citing *Brooks v. United States*, 130 A.3d 952, 958 (D.C. App. 2016) and *Sluder v. State*, 997 N.E.2d 1178 (Ind.App. 2013). The City argues these cases are distinguishable because neither case involved evidence that the defendant was under the influence of a narcotic at the

time he was found in possession of drug paraphernalia. Brief of Appellee, at 17. While this may be correct, it also is beside the point. The cases are persuasive authority on the point for which they are offered: possession alone of a syringe does not create a presumption of intent.

The Municipal Court referred to Monroe's response to Sgt. Bragg in its findings as to the element of intent, but after objection by counsel, the court stated that even if the response is taken out, Monroe had the syringe and he acted as if he was under the influence of a narcotic. Trial 53:38-54:12.² Even though the trial court excluded Monroe's response from consideration, the City argues that the evidence regarding the question and response supports the finding that the evidence was sufficient. Brief of Appellee, at 14. The City's argument should be rejected for two reasons. The trial court did not base its ruling on the evidence, and had it done so on the element of intent, it would constitute impermissible burden-shifting. See, Opening Brief of Appellant, at 12-13.

² The District Court observed that the trial court judge found that "[e]ven taking out that he didn't say anything when given the opportunity, he had the syringe and was acting as if he was under the influence." Order on Appeal, p. 10, ¶ 15; attached to the Opening Brief of Appellant as Appendix A.

The other factor on which the Municipal Court based its decision on the element of intent was Mr. Monroe's behavior. Based on Sgt. Bragg's opinion that Mr. Monroe appeared to be under the influence of drugs, the court inferred that Monroe intended to use the capped syringe to inject drugs at some future time.

Something affected Monroe's behavior that night. Mr. Monroe told Sgt. Bragg that he was having a panic attack. The Municipal Court disregarded this as the cause of his apparent behavior, because Monroe was assessed by medical personnel at the scene and they did not transport Monroe to the hospital. Monroe asserted that the court erred in doing so. There was no factual or legal basis on to reject the possibility that Monroe's behavior was caused by something other than illegal drug use, simply because he did not require hospitalization. Opening Brief of Appellant, at 14-15. The City now offers a new justification for this ruling: the court's determination was one of credibility, which ought not be disturbed on appeal. Brief of Appellee, at 15. This new argument is not supported by the record.

The inference that Monroe was under the influence of drugs is undermined by the fact that the City did not offer any evidence at trial to that end from the medical personnel who assessed Monroe's condition that night.

The Municipal Court relied on an inference to find intent, and the City supports that inference here: Mr. Monroe appeared to be on drugs that night so he must have intended to use the syringe to get high at some future time. The City offered no evidence at trial, and it does not point to any evidence in this appeal, that connects Monroe's behavior with the syringe. No drugs or residue were found, so if Mr. Monroe was under the influence, as Bragg opined, there was no basis to conclude that he had used a syringe. The inference of intent was not supported by the facts and evidence.

Lastly, the City concedes there was no evidence that Monroe possessed dangerous drugs or that drug residue was found on or in the syringe. Brief of Appellee, at 16-17. The City goes on to argue that such evidence is not necessary for a conviction for possession of drug paraphernalia. It attempts to distinguish *City of Missoula v. Shumway*, 2019 MT 38, 394 Mont. 302, 434 P.3d 918 and *State v. Arthun*, 274 Mont. 82, 906 P.2d 216 (1995), in which intent to use drug paraphernalia was based on admissions by the possessor, the presence of drugs and the presence of drug residue on the object. Without citation to authority, the City argues for a liberal construction of the drug paraphernalia statutes. In fact, the City's argument would appear to permit a conviction based on possession alone, which is contrary to the statutes.

The Court should reject the City's argument. The guiding principle to apply is well-established. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 363–64 (1970).

CONCLUSION

For the reasons set out in the Opening Brief and in this Reply Brief, Mr. Monroe asks this Court to reverse the judgment and conviction of the Municipal Court and order that the charge of possession of drug paraphernalia be dismissed.

Respectfully submitted this 1st day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,778, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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