IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0218

LLOYD SCOTT MAIER,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly denied Maier's petition to expunge his felony conviction when it found that the State provided a reasonable basis showing Maier does not satisfy criteria for expungement.

STATEMENT OF CASE

The State requests that this Court take judicial notice of the district court documents in the Appendix and the facts presented pursuant to Mont. R. Evid. 202(b)(6) (Court may take judicial notice of records from any Montana court) and Mont. R. Evid. 201(b)(2) (Court may take judicial notice of facts "not subject to reasonable dispute," as they are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.").

On January 31, 1991, Billings Police Department officers arrested Maier for attempted deliberate homicide. (02/24/1992 Br. in Supp. of Def. Mot. to Suppress Evid. (D.C. Cause No. DC-91-122), attached as Appendix C (App. C) at 2.) Billings Police Department detectives searched Maier's residence looking for a weapon and found a grow operation with 32 marijuana plants. (*Id.*; 4/4/1991 Field Rep. attached as Appendix A (App. A) at 1.) The State filed an Affidavit and Information in the Thirteenth Judicial District Court, Yellowstone County, charging Maier with criminal possession of dangerous drugs with intent to sell,

a felony, in violation of Mont. Code Ann. § 45-2-103(1). (03/08/1991 Aff. and Mot. for Leave to File Info and Info (D.C. Cause No. DC-91-122) attached as Appendix B (App. B).)

On February 21, 1992, Maier filed a motion to suppress and brief in support of the State's discovery of the 32 marijuana plants. (App. C.) In his motion, Maier conceded that officers had located 32 "pot plants" in his residence pursuant to the search warrants. (*Id.* at 3.) The State then filed an Amended Affidavit and Amended Information charging Maier with criminal possession of dangerous drugs, a felony, in violation of Mont. Code Ann. § 45-2-102. (D.C. Cause No. DC-91-122 Doc. 3, Ex. B (D.C. Doc. 3, Ex. B).) On that same day, Maier signed and filed an Acknowledgment of Waiver of Rights by Plea of Guilty. (D.C. Doc. 3, Ex. C.) Maier pled guilty to the amended charge in open court. (App. B at 5.)

The court sentenced Maier for criminal possession of dangerous drugs, a felony, in violation of Mont. Code Ann. § 45-9-102. (D.C. Doc. 3, Ex. A.) The district court sentenced Maier to five years to the Montana State Prison. (*Id.*)

On November 3, 2020, Montana voters passed Citizen Initiative 190 (Ballot No. 190), which created the "Montana Marijuana Regulation and Taxation Act," (MMRTA). On May 18, 2021, the governor signed House Bill 701 (HB 701) into law, which amends and implements I-190. (2021 Mt. Laws 576, 2021 Mt. Ch. 576,

2021 Mt. HB 701.) One purpose of HB 701 is to legalize and regulate nonmedical marijuana. 2021 Mt. HB 701, § 9.

Maier filed his petition for expungement on April 7, 2021, before HB 701 was passed. (D.C. Doc. 2.) The State responded in opposition on April 13, 2021. (D.C. Doc. 3.) The district court denied Maier's petition. (D.C. Doc. 6.) The legislature subsequently passed HB 701, which has several sections with retroactive January 1, 2021 effective dates, including those involving expungement and possession of marijuana plants. (2021 Mt. HB 701, § 48.) HB 701, §§ 41 and 48 were effective January 1, 2021, and supersede Ballot No. 190, §§ 8 and 36, the sections upon which Maier relied to file his petition and his appeal.

STATEMENT OF FACTS[1]

On January 31, 1991, Billings Police Department officers arrested Maier for attempted deliberate homicide after he fired a gun and put a police officer in fear for his life. (App. C at 2.) After securing a search warrant, Detective Rich Lueck and other Billings Police Department detectives entered Maier's residence looking for the "9mm handgun used in the commission of the alleged offense." (*Id.*;

[1] The State relies upon the facts in the Amended Information in DC 91-122 as well as the State's response to Maier's petition because Maier pled guilty to the charges pursuant to a plea agreement. Maier concedes "the State accurately describes the allegation made in the affidavit." (D.C. Doc. 5.)

App. B.) Officers found 32 marijuana plants growing at Maier's residence, which prompted them to obtain a second search warrant to search the residence for drugs and other items related to a marijuana grow operation. (*Id.* at 1-2; D.C. Doc. 3.) The detectives also found "explosives and other devices used to detonate." (App. A at 1.)

On April 7, 2021, Maier filed a Petition for Expungement or Redesignation with the sentencing court. (D.C. Doc. 2.) Maier cited to and relied upon the language of Ballot No. 190 to argue that his possession of 32 marijuana plants in 1991 is an act now legal under current law because his marijuana "was not viewable by normal, unaided vision from a public place." (*Id*.) The State countered that Maier's conviction was based upon his possession of 32 plants and that Ballot No. 190 limited possession to a maximum of 8 plants and 8 seedlings. (D.C. Doc. 3.) The State also pointed out that the MMRTA does not authorize an individual to maintain a grow operation involving 32 plants and that possession of more than 30 plants is a crime punishable by up to 25 years in prison and a $50,000 fine. (*Id*.)

The district court denied Maier's petition. (D.C. Doc. 6 at 2.) The district court found that the MMRTA does not authorize or decriminalize Maier's marijuana-related conviction in cause number DC-91-122, because the MMRTA does not allow possession of 32 marijuana plants. (*Id.*)

SUMMARY OF ARGUMENT

House Bill 701 (HB 701) amended and superseded Ballot No. 190, the MMRTA. Those changes impact Maier's petition and arguments. Maier seeks to expunge his 1992 conviction for felony criminal possession of dangerous drugs, in violation of Mont. Code Ann. § 45-9-102. Under HB 701, the State must provide the district court with a reasonable basis (rather than prove by clear and convincing evidence) that Maier does not satisfy the criteria to have his prior conviction expunged. Maier's conviction was for possession of 32 marijuana plants, far too many plants to be lawful under the MMRTA. In fact, possession of 32 plants is a felony crime with a sentence that exceeds the one Maier served.

The district court correctly found that the State proved by clear and convincing evidence that Maier did not meet the criteria to have his felony conviction expunged. The burden of proof to overcome the presumption that Maier was entitled to the expungement is now "a reasonable basis," so the district court's finding is still correct. This Court should affirm the district court's order denying Maier's petition to expunge his felony conviction.

ARGUMENT

I. Standard of review

We review a trial court's statutory interpretation to determine whether the interpretation is correct. *City of Missoula v. Shumway*, 2019 MT 38, ¶ 9, 394 Mont. 302, 434 P.3d 918, citing *State v. Sutton*, 2018 MT 143, ¶ 11, 391 Mont. 485, 419 P.3d 1201. "[W]hen interpreting statutes within an act, we interpret individual sections of the act in a manner that ensures coordination with the other sections of the act." *Id.*

On appeal, this Court "will not disturb factual findings unless they are clearly erroneous, and whether those facts satisfy the legal standard is reviewed de novo." *State v. Brothers*, 2013 MT 222, ¶ 9, 371 Mont. 254, 307 P.3d 306.

II. Applicable expungement law under House Bill 701 (current Montana Marijuana Regulation and Taxation Act)

The MMRTA provides a mechanism for the expungement of certain marijuana convictions. *See* 2021 Mt. HB 701, § 48. The MMRTA directs that a "person who has completed a sentence for an act that is permitted under this chapter or is punishable by a lesser sentence under this chapter than the person was awarded may petition the sentencing court to: (i) expunge the conviction[.]" 2021 Mt. HB 701, § 48.

> Once the court receives a petition to expunge a sentence already served,
>
> the court shall presume the petitioner satisfies the criteria in subsection (5) unless the county attorney provides the court with a reasonable basis on which the petitioner does not satisfy the criteria. Once the applicant satisfies the criteria in subsection (5), the court shall redesignate the conviction as a misdemeanor or civil infraction or expunge the conviction as legally invalid pursuant to this chapter.

2021 HB Mt. 701 § 48(6). A hearing on the petition must be held at the request of the petitioner. *Id.*, § 48(7). A court's expungement determination is based on the preponderance of the evidence. *In re Expungement of Misdemeanor Records of Dickey*, 2021 MT 3, ¶ 1, 402 Mont. 409, 478 P.3d 821.

The express purpose of the MMRTA is to "provide for legal possession and use of limited amounts of marijuana legal for adults 21 years of age or older[.]" 2021 Mt. HB 701, § 37(2)(a). When interpreting a statute, this Court "first examine(s) the plain language of the statute." *City of Missoula v. Pope*, 2021 MT 4, ¶ 10, 402 Mont. 416, 478 P.3d 815. "When possible, we interpret statutes to give effect to the Legislature's intent." *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. "We will also read and construe the statute as a whole to avoid an absurd result and to give effect to a statute's purpose." *Id.*

III. The district court correctly denied Maier's petition because the MMRTA does not permit Maier's acts underlying his conviction.

A. Maier possessed far more marijuana plants than permitted by the MMRTA.

Maier's possession of 32 marijuana plants in 1991 is not an act now permitted by the MMRTA. 2021 Mt. HB 701, § 41. In relevant part, the MMRTA allows a person to possess "up to two mature marijuana plants and two seedlings, or four mature marijuana plants and four seedlings for a registered [medical marijuana] cardholder[.]" *Id.*, § 41(1)(c). Further, "marijuana plants and any marijuana produced by the plants in excess of 1 ounce must be kept in a locked space in or on the grounds of one private residence and may not be visible by normal, unaided vision from a public place[.]" *Id.*, § 41(1)(c)(i). Except as specifically provided for in Title 16, chapter 12 or Title 50, chapter 46, it remains a violation of Mont. Code Ann. § 45-9-102 to possess an amount of marijuana "greater than permitted or for which a penalty is not specified under Title 16, chapter 12." *Id.*, § 70; Mont. Code Ann. § 45-9-102.

In 1992, Maier pled guilty to criminal possession of dangerous drugs for possessing more than 60 grams of marijuana. (D.C. Doc. 3, Exs. A, C.) Montana Code Annotated § 45-9-102 (1989) provided that a person commits the offense of criminal possession of dangerous drugs whether that person possessed usable marijuana or marijuana plants. Marijuana is defined as "all plant material from the

genus cannabis containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination." Mont. Code Ann. § 50-32-101(17) (1991). In 1991, it was not lawful to possess any amount of marijuana in any form, so there were no exceptions for limited possession of plants. The State charged Maier with criminal possession of dangerous drugs based upon the 32 marijuana plants growing at Maier's residence. Those plants were considered "marijuana" and evaluated in terms of either misdemeanor weight (less than 60 grams) or felony weight (more than 60 grams).

Maier's 1991 criminal act is subject to equal or greater punishment under the MMRTA. Maier was sentenced for felony possession of marijuana under Mont. Code Ann. § 45-9-102(4) (1989): A "person convicted of criminal possession of dangerous drugs not otherwise provided for in section (2) or (3) [criminal possession of an opiate] shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $50,000 or both." Pursuant to the MMRTA:

> A person convicted of production of marijuana or tetrahydrocannabinol in an amount greater than permitted or for which a penalty is not specified under Title 16, chapter 12, or Title 50, chapter 46, or manufacture without the appropriate license and endorsement pursuant to Title 16, chapter 12, or Title 50, chapter 46, shall be imprisoned in the state prison for a term of not more than 5 years and may be fined an amount not to exceed $5,000, except <u>that if the total weight is more than a pound or the number of plants is more than 30</u>, the person shall be imprisoned in the state prison for a term of not more than 25 years and may be fined an amount not to exceed $50,000. "Weight" means

> the weight of the dry plant and includes the leaves and stem structure but does not include the root structure.

2021 Mt. HB 701, § 72; currently Mont. Code Ann. § 45-9-110. Maier's possession of 32 marijuana plants is subject to more jeopardy under the MMRTA than it was under Mont. Code Ann. § 45-9-102 when all marijuana was illegal.

Maier argued to the district court that the MMRTA allows him to possess unlimited amounts of marijuana so long as it is not in public view. (D.C. Doc. 5 at 3.) HB 701 § 41(1)(c)(i) provides that

> marijuana plants and any marijuana produced by the plants in excess of 1 ounce must be kept in a locked space in or on the grounds of one private residence and may not be visible by normal, unaided vision from a public place[.]

However, this same section of the MMRTA also limits a nonmedical marijuana user to possession of 2 marijuana plants and 2 seedlings. The MMRTA contemplates that a nonmedical marijuana user will store only the amount of marijuana harvested from two mature plants, not from 32 plants. Maier is not permitted to have 32 plants, which was the basis of his conviction for possession of dangerous drugs.

B. The State provided substantial evidence showing a reasonable basis that Maier did not meet criteria for expungement.

The legislature did not provide comprehensive statutory directives for expungement under the MMRTA, but a review of misdemeanor expungement is useful in this analysis. When considering a petition for misdemeanor expungement, the "court must make its determination for an expungement on a preponderance of the evidence." Mont. Code Ann. § 46-18-1109(1). Further, "[t]he rules of evidence do not apply in an expungement hearing." Mont. Code Ann. § 46-18-1109(5)(a). The opportunity for expungement or redesignation of a conviction under 2021 Mt. HB 701, § 48 is essentially an opportunity for resentencing, and the rules of evidence likewise do not apply at a sentencing hearing.

California law provides guidance for analyzing petitions for expungement filed under the MMRTA. "Proposition 64 (Voter Information Guide, Gen. Elec. (Nov. 8, 2016)) legalizes and regulates nonmedical marijuana. *People v. Banda* (2018), 26 Cal. App. 5th 349, 354-55, 237 Cal. Rptr. 3d 63, 67. "Proposition 64 also added a provision for relief for persons with prior convictions [for enumerated offenses]. . . . to petition for recall or dismissal of their sentence." *Id.* "Both the nature of the evidence the court could consider, and the ability to rely on evidence outside the record of conviction, were raised as issues requiring determination after the passage of both Proposition 36, the Three Strikes Reform

Act of 2012, and Proposition 47, the Safe Neighborhoods and Schools Act (2014). *Id.*, 26 Cal. App. 5th at 355. The California court found that a petition for relief from certain convictions bears the hallmarks of a resentencing proceeding . . . [so] trial courts may consider hearsay if that hearsay is reliable." *Id.*, 26 Cal. App. 5th at 357.

The California Court of Appeal also held "that the court could, consistent with the Sixth Amendment, consider facts not found by the jury." *Id.*, 26 Cal. App. 5th at 356. However, the court held that the State did not meet its burden because the State relied solely upon an unreliable probation report. *Id.* The court agreed that while a court may rely upon hearsay at sentencing, it rejected the probation report as the sole source of evidence because "the report excerpt includes the officer's assertions that certain events 'reportedly' occurred. . ." and "all of the narration contained in the excerpt must have been drawn from other people's previous statements." *Id.*, 26 Cal. App. 5th at 357. The court contrasted the *Banda* probation report from a probation report considered in *People v. Sledge*, 7 Cal. App. 5th 1089, 213 Cal. Rptr. 3d 265 (2017). The *Banda* court distinguished the use of the probation report in *Sledge* because the court there "found the report, despite its hearsay nature, to be reliable because it: had been prepared by probation officers performing their official duties, relying in part on information obtained from official court records prepared by clerks performing their regular duties; was used

by both parties without objection throughout the case; and contained conclusions supported by other facts before the court." *People v. Banda* (2018), 26 Cal. App. 5th at 358-59, citing *Sledge*, 7 Cal. App. at 1097-98.

The MMRTA does not define "reasonable basis," but it is found elsewhere in Montana civil law as an affirmative defense for insurance companies. An insurance company can use the affirmative defense that the company "had a reasonable basis in law or in fact for contesting the claim or the amount of the claim, whichever is in issue." *Redies v. Attys. Liab. Prot. Soc'y*, 2007 MT 9, ¶ 1, 335 Mont. 233, 150 P.3d 930. An insurer asserting the affirmative defense of "reasonable basis" has the burden of establishing it by a preponderance of the evidence. *Id.* This Court has determined that "reasonableness is generally a question of fact; therefore, it is for the trier of fact to weigh the evidence and judge the credibility of the witnesses[.] *Id.*, ¶ 30. Here, the district court correctly determined that the State provided a reasonable basis both in the attachments to its response and the contents of Maier's conviction record. (D.C. Doc. 3, Exs. A-C and Apps. A-C.).

Here, the State relied on substantial evidence—the underlying district court record—to provide the district court with reliable information showing Maier's petition should be denied. Detective Lueck filled out the Field Report after participating in the search of Maier's house. (App. A.) That report is signed and

dated and is a first-person account of finding 32 marijuana plants in Maier's residence. *Id.* Maier's own motion to dismiss acknowledges that law enforcement found 32 marijuana plants in his house. (App. C.)

Maier's handwritten statement on the acknowledgment of rights form did not create or limit the facts upon which his conviction was based. (D.C. Doc. 3, Ex. C.) The district court was allowed to consider the charging documents attached to the State's response. (D.C. Doc. 3.) The district court was allowed to make factual findings on the basis of facts not subject to reasonable dispute, and it properly found that Maier possessed 32 marijuana plants in 1991. Based on that fact, the district court correctly found that Maier did not meet the criteria for expungement and denied his petition.

IV. If this Court determines the record should be more fully developed, the State requests the matter be remanded for a hearing on Maier's petition.

The district court is presumed to know the facts from Maier's criminal proceeding over which it presided in 1992. Mont. R. Evid. 301(a). The State provided the district court with the relevant facts from Maier's underlying criminal conviction in its response brief. (D.C. Doc. 3.) Maier did not request a hearing, so no hearing was held. However, if this Court determines that a hearing is necessary,

the State requests this matter be remanded for a district court hearing on Maier's petition.

CONCLUSION

The State respectfully requests this Court affirm the district court's denial of Maier's petition to expunge his felony conviction.

Respectfully submitted this 23rd day of September, 2021.

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By: */s/ Bree Gee*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 3,337 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Bree Gee
BREE GEE

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APPENDIX

CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-23-2021:

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