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COURT OF APPEALS OF WISCONSIN
DISTRICT III

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2016AP002475 CR

AUGUST D. GENZ,

Defendant-Appellant.

Defendant-Appellant's Reply Brief

Appeal from the circuit court for Langlade County, Judge John B. Rhoda.

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ARGUMENT

A. This Appeal is Not Moot.

The State is correct in stating the general rule that an appellate court will not consider a moot issue on appeal, along with the exceptions to that rule, which may be made “if the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts *Warren v. Link Farms, Inc.*, 123 Wis.2d 485, 487, 368 N.W.2d 688 (Ct.App.1985), *citing Ziemann v. Village of North Hudson*, 102 Wis. 2d 705, 712, 307 N.W.2d 236, 240 (1981). It is submitted that the consideration of the sole issue that Mr. Genz raises is necessary to guide the trial courts of this state, which may routinely encounter other cases in which the State improperly charges (and convicts) defendants with the same sort of conspiracy charge as in this case.

B. There Was Insufficient Evidence to Convict Mr. Genz of Conspiracy to Deliver THC.

The State is free to read and interpret the *Smith* case in any way it wishes (and does so in its brief), but in the end, the most relevant holding in that case was that, when the evidence presented was that the controlled substance was in an amount consistent with personal use, it was necessary to present evidence that the buyer then intended to “sell, deliver or give the controlled substance to a third party.” *State v. Smith*, 189 Wis. 2d 496, 498-99, 525 N.W.2d 264, 265 (1995). As argued in the opening brief, there can be no serious doubt that \$20 worth of marijuana is consistent with personal use.

In trying to distinguish this case from *Smith*, the State relies on *State v. Sample*, 215 Wis. 2d 487, 573 N.W.2d 187 (1998), but that reliance is misplaced because in *Sample* the evidence presented regarding the controlled substances was not consistent with personal use: the defendant had delivered 15 packages to an inmate at a jail, knowing that the packages contained marijuana or cocaine and that the inmate was distributing these controlled substances to other inmates. *Sample*, at ¶4.

The State's attempt to focus on the "true rationale of *Smith*" being the mutual agreement of the parties to commit the same crime (State's brief, p.15) is merely a red herring, designed to shift the focus from the most basic holding of *Smith* as it applies to this case, namely, that there really must be evidence that the defendant intended to further deliver the small amount of marijuana he thought he was getting to a third-party. There being no such evidence in this case, Mr. Genz' conviction for conspiracy to deliver THC should be vacated.

CONCLUSION

For the foregoing reasons and those set out in his opening brief, Mr. Genz respectfully requests that his conviction for Count 2 in his judgment of conviction be vacated.

RESPECTFULLY SUBMITTED this 14th day of April, 2017.

Schertz Law Office
Attorneys for the Appellant

By: 
Dennis S. Schertz

CERTIFICATION REGARDING BRIEF LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8) (b) and (c), Stats., for a brief produced using the following font:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated: April 14, 2017

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