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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2020AP001157 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY L. HIBBARD,

Defendant-Appellant.

Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief
Entered in the Ozaukee County Circuit Court,
the Honorable Paul V. Malloy, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. Introduction.

The relevant facts are undisputed and the parties frame the issues the same way.

First, the Court must determine whether the evidence was sufficient to prove Hibbard aided and abetted Poe in delivering a fatal dose of heroin to Tara. But unlike a typical sufficiency case, this one isn't about the State's proof; it's about the governing statutes. Do the Len Bias¹ and PTAC² statutes bar what Hibbard indisputably did? Or was his role in the drug deal between Poe and Tara outside the scope of those statutes' proscriptions?

Second, if the Court holds that Hibbard ran afoul of the Len Bias law by aiding and abetting Poe, then it must also decide whether the Len Bias law is void for vagueness as applied to aiders and abettors. This question requires the Court to determine how expansive aiding-and-abetting liability is under the Len Bias law, how clear its parameters are, and what enforcement standards the statutes provide.

The State's analysis of these issues falls short on multiple levels. To start, there isn't much of it: most of the State's brief recites undisputed facts and delves into simple legal standards that no one contests. What analysis it does provide is riddled with red herrings,

¹ See Wis. Stat. § 940.02(2)(a).

² See Wis. Stat. § 939.05(2)(b).

misstatements, contradictions, and general confusion. Only by carefully separating the wheat from the chaff do its core arguments emerge. They are as follows.

The State wholly rejects Hibbard's claim that his conduct remained on the buyer-side of the drug deal between Tara and Poe. It avers that Poe could not have sold heroin to Tara had Hibbard not driven Tara to Poe's location. From that premise, the State concludes that Hibbard "helped *Poe*," and thus aided and abetted his fatal drug delivery to Tara. *See* State's Br. 20.

On the void-for-vagueness issue, the State makes a conclusory argument that the Len Bias law gives adequate notice, asserting that it's obvious, given the statutory text, that Hibbard committed the "intentional constructive delivery of heroin." *See* State's Br. 24-25. The State then contends, in an even more conclusory manner, that the Len Bias law includes adequate enforcement mechanisms, as the jury was able "to apply the law objectively to Hibbard's conduct ... without ... having to 'create or apply their own standards.'" *See* State's Br. 26.

The State does not fully confront, let alone overcome, the buyer-seller divide in the statutes and case law governing PTAC liability for drug crimes. It does not *at all* confront, let alone overcome, the constitutional defect produced by its preferred reading of the Len Bias and PTAC statutes. Thus, nothing in the State's brief effectively counters the analysis set forth in Hibbard's brief. The Court should reject its ill-

conceived arguments and vacate Hibbard's unlawful conviction.

II. Hibbard did not aid and abet Poe's delivery of heroin to Tara.

Since a drug delivery requires both a recipient and a deliverer,³ it seems at first glance that helping one party to the transaction necessarily helps the other, and thus that aiding and abetting one party necessarily aids and abets the other. This first-glance analysis is the State's final position. It notes that Hibbard gave Tara a ride to Poe's location to make their drug deal possible, and from this fact it concludes that Hibbard aided and abetted Poe—not just Tara. The governing statutes and case law, as well as the significant implications of this Court's decision (regardless of how it rules) require a deeper analysis. And a deeper analysis demonstrates that Hibbard did nothing to implicate himself in Poe's crime.

³ Hibbard's briefs use the words "buyer," "user," and "recipient" mostly interchangeably. It does the same with the words "seller," "dealer," and "deliverer." The State criticizes Hibbard's use of these terms on the grounds that Chapter 961 doesn't use them. (It doesn't mention why this discrepancy matters, and it doesn't clarify what phrases it would prefer.)

For its part, Chapter 961 uses lengthy phrases like "[p]ersons who habitually or professionally engage in commercial trafficking in controlled substances and prescription drugs" and "persons addicted to or dependent on controlled substances." *See* Wis. Stat. § 961.001(1r), (2). The case law, presumably to enhance readability, replaces those phrases with the simple words Hibbard uses.

The State's key error, made throughout its brief in a variety of contexts, is persistently begging the question. Instead of interrogating whether Hibbard *assisted* Poe (as opposed to just Tara), the State accepts as a premise that he did so, then reaches the preordained conclusion that he *aided and abetted* Poe based on that assistance. *See generally* State's Br. 17-22. The only concrete discussion of *why* the State believes Hibbard assisted Poe comes in its periodic regurgitation of the same but-for logic the postconviction court employed. State's Br. 20-21. But, perplexingly, the State also seems to disclaim that logic, asserting: "The postconviction court was correct. It did not apply a 'but-for causation' test" State's Br. 21. In this way, its analysis remains hazy—even as its conclusion is crystal clear.

Setting aside the State's analytical errors, the best support for its position comes from the broad definition of aiding and abetting set forth in case law (and mirrored in the pertinent jury instruction). As the Wisconsin Supreme Court has explained, the general rule is that the State must establish two elements to prove aiding and abetting: "(1) that the defendant undertook some conduct ... that as a matter of objective fact aided another person in the execution of a crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance." *State v. Rundle*, 176 Wis. 2d 985, 990, 500 N.W.2d 916 (1993). This definition seems to apply to Hibbard, as he drove Tara to Poe so Poe could sell Tara heroin, after which Poe sold Tara heroin. *See id.* But it also seems to apply to Tara: she set up the

drug deal and brought money so Poe could sell her heroin, after which Poe sold her heroin. *See id.*

While Tara and Hibbard took different steps to make Poe's crime possible, they were indisputably collaborators in a successful scheme to procure heroin from Poe—and thus to aid Poe's "execution of a crime." *See id.* If Hibbard aided and abetted Poe, so did Tara.

Perhaps that's how the State hopes this Court will read the Len Bias and PTAC statutes: to encompass all manner of recipient-side conduct, since you can't have a drug delivery without a recipient. But there are problems with that approach, even beyond its basic unfairness: neither the broader statutory scheme nor the governing cases permit it.

The crimes users and dealers commit by engaging in a deal, whether it leads to an overdose death or not, are distinct. They carry disparate penalties. And the legislature has made clear that the disparity is intentional: it considers dealers a far greater threat to "the health and general welfare of the people" than users, whom it aims to rehabilitate. See Wis. Stat. § 961.001(1m), (2)-(3). The following provisions within Chapter 961's declaration of intent make its dual aims explicit:

- (1r) Persons who illicitly traffic commercially in controlled substances constitute a substantial menace The possibility of lengthy terms of imprisonment must exist as a deterrent to ... such persons....

- (2) Persons who ... engage in commercial trafficking in controlled substances ... should ... [get] substantial terms of imprisonment ... [while] persons addicted to or dependent on controlled substances should ... be sentenced in a manner most likely to produce rehabilitation.

§ 961.001(1r)-(2).

This distinction in the statutory response to drug use and drug dealing—the line between buyer- and seller-side crimes and penalties—matters here. While the Len Bias law is not part of Chapter 961, it expressly incorporates multiple provisions from that chapter. For example, it explicitly references the “delivery, in violation of s. 961.41, of a controlled substance.” *See* Wis. Stat. § 940.02(2)(a). In doing so, it incorporates Wis. Stat. § 961.01(6), which defines “delivery” as “the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog.” Similarly, the Len Bias law clarifies that it applies to deliveries of “a controlled substance in schedule I or II under ch. 961.” *Id.* Since Wis. Stat. §§ 961.14 and 961.16 set forth the drugs in schedules I and II, it incorporates those provisions too.

In short, the Len Bias law integrates aspects of Chapter 961, making a drug delivery under Wis. Stat. § 961.41 a prerequisite to its violation. Accordingly, the statutes and cases governing § 961.41 drug

deliveries (including *Smith*,⁴ *Hecht*,⁵ and the statement of legislative intent at § 961.001) apply with equal force in the Len Bias context.

Recall, then, *Smith*'s holding that the parties to a personal-use drug transaction under § 961.41 are not co-conspirators. In Hibbard's case, before trial, the State said it could proceed under either PTAC theory, but it now concedes "there was no evidence of conspiracy." See State's Br. 18. It is unclear if it means to concede that Hibbard *couldn't* conspire with Poe, due to *Smith*, or that he *didn't* conspire with Poe, since the two never communicated or coordinated with one another. In any case, the State deems *Smith*'s limit on conspiracy liability irrelevant; Hibbard engaged in seller-side conduct, it says, so it doesn't matter if a buyer-seller conspiracy is possible.

Therein lies the crux of the dispute in this case. When Hibbard drove Tara to Poe, whom was he assisting? The State offers no genuine analysis to support its repeated assertions that by giving Tara a ride to buy drugs he intended to share, Hibbard engaged in seller-side conduct. Case law, meanwhile, undermines that view.

Unlike the defendant in *Hecht*, Hibbard was not involved with both parties to the drug deal; he did not cooperate or interact with Poe or any of Poe's associates in the run-up to the deal, but he did,

⁴ *State v. Smith*, 189 Wis. 2d 496, 525 N.W.2d 264 (1995).

⁵ *State v. Hecht*, 116 Wis. 2d 605, 342 N.W.2d 721 (1984).

obviously, cooperate and interact with Tara. Also unlike the defendant in *Hecht*, Hibbard engaged in classic drug-seeking behaviors—nothing that indicated any current or future participation in commercial drug trafficking. In short, Hibbard was a habitual heroin user, and he helped make Tara’s heroin purchase possible so he could get some heroin himself. If Hibbard’s conduct aided and abetted Poe, then every drug buyer, and every aider and abettor of a drug buyer, is also an aider and abettor of their seller. That’s not how § 961.41 works, and it’s not a result that *Smith* allows.

A more deliberate analysis of the governing authorities shows why Hibbard remained on the buyer-side of the drug deal in question. Consider these five basic lessons from the statutes and case law:

1. A drug delivery under § 961.41 involves a deliverer (often involved in commercial drug trafficking) and a recipient (often procuring drugs for personal use).
2. Lawmakers established disparate crimes and penalties for these groups (harsher for those who sell drugs for profit, more lenient for those who buy drugs to feed their addictions).
3. Appellate courts have rejected efforts to blur the statutory distinction between the two groups, as that would violate the legislature’s unambiguous intent to treat them differently. For that reason, a person

acting solely as a buyer is not a party to their seller's crimes (or vice versa).⁶

4. A Len Bias violation includes a drug delivery under § 961.41. The statutes and case law that guide the interpretation and application of § 961.41 thus guide the interpretation and application of the Len Bias law.
5. Just as a buyer and seller aren't parties to each other's crimes when they engage in a standard drug deal, they aren't parties to each other's crimes when the drug deal results in an overdose death.⁷

These principles clarify the legal significance of Hibbard's conduct. He engaged in purely drug-seeking behavior. He helped a fellow drug-seeker, his daughter Tara, obtain drugs for the two of them to use. He did not communicate or interact with Poe, or anyone associated with Poe, except through Tara. After Poe delivered heroin to Tara, Hibbard accepted some of the heroin she'd purchased and used it all right away. In short, while Hibbard did not hand over any money, he was firmly on the buying side of the drug deal between Tara and Poe.

⁶ This is not to say a person is always one or the other; a person can, as in *Hecht*, be both. But it takes engagement with both sides of a deal to implicate a person in both sides' crimes.

⁷ The same caveat noted above, *supra* n.6, applies here.

Holding that Hibbard was Poe's aider and abettor would dissolve the statutory distinction between buyer and seller—a distinction at the foundation of the Len Bias law given its incorporation of § 961.41 and other provisions from Chapter 961. The State offers no cogent justification for taking that dramatic step. Neither statute nor case law—nor the rule of lenity, which the State opts to ignore—permit it.

Because the State did not provide sufficient evidence that Hibbard aided and abetted Poe, rather than Tara, Hibbard's conviction should be vacated and a judgment of acquittal entered. *See State v. Miller*, 2009 WI 111, ¶44, 320 Wis. 2d 724, 772 N.W.2d 188.

III. If Hibbard aided and abetted Poe, then the Len Bias law is void for vagueness as applied to aiders and abettors.

The State has almost nothing to say on the void-for-vagueness question. It makes clear that it sees no constitutional problem with the Len Bias law, even as applied to aiders and abettors, but its reasoning remains largely elusive.

As Hibbard's opening brief details, due process requires that statutes provide fair notice of their proscriptions and objective standards for their enforcement. *See State v. Smith*, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997). In this context, "fair notice" means sufficient warning, to those who want to obey the law, that their "conduct comes near the proscribed area." *Id.* A statute's enforcement

standards, meanwhile, are insufficient if “basic policy matters” are left “to policemen, judges, and juries for resolution on an ad hoc and subjective basis.” *Id.*

The State asserts that “the statutes and caselaw define exactly what is prohibited, putting aiders and abettors like Hibbard on notice.” State’s Br. 25. This is the sort of logical misstep that pervades the State’s brief: it explains why the statute gives fair notice by asserting that the statute gives fair notice. But this void in its analysis is followed by another error—a return to its claim that Hibbard was not on the receiving end of the drug deal at all. Any ambiguity in the statute’s reach, it implies, is constrained to those who remain on the receiving end, while Hibbard aided and abetted the delivery.

The reality is that a drug-seeker aiding a fellow drug-seeker in their co-pursuit of drugs would not consider himself a drug dealer—or expect to be held liable for dealing drugs. No matter how many times a layperson might read the governing statutes, he’d still reasonably expect Len Bias liability to cover only those involved with the manufacture, distribution, or delivery of fatal doses of drugs. This is what the case law means by a notice problem: a drug seeker trying to steer clear of a Len Bias violation wouldn’t know if he’d succeeded, since the statute doesn’t communicate the true scope of its proscriptions. The State has no answer to this dilemma. It looks the other way.

Finally, the State offers almost no argument on the Len Bias law’s enforcement standards. It

wholly ignores the line-drawing and policy delegation issues raised by its interpretation of the statutes. This is puzzling, considering it twice references the formulation of the aiding-and-abetting test that makes these problems most acute: the State says a person can aid and abet a crime by acting in furtherance of another person's conduct, while knowing the other person is committing a crime and acquiescing in its commission. *See State's Br. 16, 20* (discussing *Roehl v. State*, 77 Wis. 2d 398, 407, 253 N.W.2d 210 (1977)). This knowing-acquiescent-aid standard underscores the money-lending and bus-driving hypotheticals raised in Hibbard's opening brief. *See Appellant's Br. 24*. How far down the line of actors who enable a fatal drug purchase will this knowing-acquiescent-aid liability stretch? Does an employer who knows a particular employee spends part of her paycheck on drugs—and, by doing nothing to stop her, acquiesces in that conduct—aid and abet the dealer who delivers that employee a fatal dose of drugs? The State doesn't provide an answer, or even suggest one. The statutes don't provide an answer either, if the Court adopts the State's preferred interpretation. Instead, fact-finders are left to resolve these ambiguities on "an ad hoc and subjective basis," violating due process. *Smith*, 215 Wis. 2d at 84.

While the State barely engages with Hibbard's void-for-vagueness claim, due process demands careful attention both to the notice the statute gives and the enforcement standards it prescribes. For the reasons set forth here and in Hibbard's opening brief, both aspects of the Len Bias and PTAC statutes fall

short. The statutes do not reasonably convey to laypeople what conduct does and doesn't violate the Len Bias law, and they do not reasonably convey to fact-finders how to assess the conduct at issue. The Len Bias law is thus void for vagueness as applied to aiders and abettors.

CONCLUSION

For the reasons set forth, Hibbard asks this Court to reverse the order denying postconviction relief and remand the case with instructions to vacate the judgment of conviction and enter a judgment of acquittal (based on insufficient evidence) or an order of dismissal (because the Len Bias statute is void for vagueness as applied to aiders and abettors).

Dated this 16th day of February, 2022.

Respectfully submitted,

Electronically signed by
Megan Sanders-Drazen

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2807 words.

Dated this 16th day of February, 2022.

Signed:

Electronically signed by
Megan Sanders-Drazen

MEGAN SANDERS-DRAZEN
Assistant State Public Defender