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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2020AP1157-CR

STATE OF WISCONSIN,
Plaintiff -Respondent,

v.

TERRY L. HIBBARD,
Defendant-Appellant-Petitioner.

RESPONSE OPPOSING A PETITION FOR REVIEW

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INTRODUCTION

Terry L. Hibbard seeks reversal of the court of appeals' opinion in *State v. Terry L. Hibbard*, 2020AP1157-CR (Wis. Ct. App. Sept. 21, 2022) (recommended for publication). (Pet-App. 3–18.) The State opposes Hibbard's petition because the court of appeals' decision applied the appropriate standard of review, statutes, and caselaw to determine that the evidence was sufficient to sustain Hibbard's conviction. Further, the court of appeals correctly concluded that the statutes provided clear, sufficient notice that Hibbard's conduct was prohibited.

The Court of Appeals' Decision

This is a *Len Bias* case that concerns Hibbard's involvement in his daughter's death from an overdose. The court of appeals affirmed Hibbard's conviction of first-degree reckless homicide as party to a crime (PTAC). (Pet-App. 4.) Hibbard had argued that the evidence was insufficient to prove that he aided and abetted the seller's delivery of the drugs to his daughter. In the alternative, Hibbard argued that if the evidence was sufficient, that Wis. Stat. § 940.02(2)(a) was unconstitutionally vague as applied to aiders and abettors like him.

Recognizing that the court views the evidence most favorably to the State (Pet-App. 7, 9), the court of appeals first concluded that the evidence was indeed sufficient to sustain Hibbard's conviction (Pet-App. 9, 17). In rejecting Hibbard's argument to the contrary, the court found that, "In picking up [his daughter]—who could not drive—and driving her to meet [the seller], Hibbard assisted both [the seller's] delivery of heroin and his daughter's acquisition of it." (Pet-App. 11.) That Hibbard "may have wanted to obtain some of the drugs for his own use, does not change the fact that his conduct assisted [the seller] in delivering the drugs to [his daughter]." (Pet-App. 11.)

The court also rejected Hibbard’s alternative argument. (Pet-App. 16.) It determined that the *Len Bias* and PTAC statutes—Wis. Stat. §§ 940.02(2)(a) and 939.05(2)(b)—“sufficiently define what is prohibited and provide objective standards for enforcement.” (Pet-App. 15.) The statutes “clearly identify three actions—manufacture, distribution, and delivery—that are prohibited with respect to controlled substances, and further specify that the term ‘delivery’ includes an attempt, actual or constructive, to transfer the controlled substance from one person to another.” (Pet-App. 15.) As applied to Hibbard, these statutes informed him that “because he knew [the seller] intended to sell heroin to [his daughter], anything he did to facilitate that sale with the intent that the sale occur could subject him to liability for a homicide resulting from a person’s use of the drugs that were sold.” (Pet-App. 17.)

Hibbard now seeks this Court’s review of that decision, which this Court should deny.

ARGUMENT OPPOSING PETITION FOR REVIEW

The State opposes Hibbard’s petition on the following grounds:

- Contrary to Hibbard’s assertion, this case does not meet the criteria for review. The court of appeals did not “charte[r] new territory,” nor did it misinterpret statutes. (Pet. 5.) Rather, the court of appeals answered the narrow issues before it, rejecting Hibbard’s interpretation of statutes and caselaw. (Pet-App. 12 (“We are not convinced that the legal authorities upon which Hibbard relies compel a contrary conclusion.”).)
- Hibbard acknowledges that the State proved that he aided and abetted his daughter, but he argues that a “thornier question” is whether he aided and

abetted the *seller*. (Pet. 11.) It isn't. As the court of appeals determined, Hibbard's description of his involvement in the drug transaction is a "fundamentally incorrect premise." (Pet-App. 11.) Here, Hibbard aided the *seller's* delivery of the heroin by driving his daughter to the delivery location. Had it not been for Hibbard driving his daughter to a place where Hibbard knew the seller would deliver the heroin, the seller would have been unable to make the delivery.

- Nor was Hibbard just "in the buying side" of the transaction. (Pet. 11.) As the court of appeals found, "Hibbard's description of his role is not accurate." (Pet-App. 16.) Rather, Hibbard "encouraged his daughter to obtain the drugs and drove her to the location where she met the seller so that she could do so." (Pet-App. 16.) Again, Hibbard aided and abetted *the seller*, who could not have committed the crime without Hibbard's assistance.
- Next, while Hibbard argues that there is "explicit statutory distinction between" buyer and seller (Pet. 11), he is simply wrong. The statutes in Chapter 961 do not use the terms "buyers" and "sellers." Wis. Stat. § 961.001(1r), (2). Nor do the statutes in Chapter 961 use the terms "users" and "dealers." (Pet. 4, 11, 13–15, 21–22.) Also, there is no legislative history that Chapter 961 treats persons like Hibbard—who knowingly transport another person to a location where the delivery of a controlled substance is to occur—as someone who does *not* violate Wis. Stat. § 940.02.
- Neither the circuit court nor the court of appeals applied a "but-for analysis when assessing party-to-a-crime liability for drug crimes." (Pet. 11.)

Both courts correctly concluded that Hibbard was an active participant of the crime. (Pet-App. 11.)

- The court of appeals' decision will not produce "sweeping homicide prosecutions." (Pet. 11.) The court of appeals provided what was already evident: Wisconsin's statutes and caselaw define and give notice to exactly what is prohibited, putting aiders and abettors like Hibbard on notice.
- The court of appeals was not "silent" on the distinction between the two sides of the drug deal. (Pet. 16.) Again, the court found "Hibbard's description of his role is not accurate" (Pet-App. 16), and it determined that there was sufficient evidence to sustain the conviction that Hibbard aided and abetted the seller.
- *State v. Smith*, 189 Wis. 2d 496, 525 N.W.2d 264 (1995) is inapposite. (Pet. 14–17.) The court of appeals correctly found Hibbard's reliance on *Smith* was misplaced, and that *Smith* was "of no import," noting that the defendant in *Smith* was not even charged with aiding and abetting. (Pet-App. 12.) Further, the court of appeals found that "Hibbard's repeated characterization of his actions as 'buyer-side conduct' is inaccurate." (Pet-App. 11.)
- *State v. Hecht*, 116 Wis. 2d 605, 342 N.W.2d 721 (1984) also does not support Hibbard's argument that he cannot be liable as an aider and abettor. (Pet. 14–17.) The *Hecht* court determined, "This court has also held that aider and abettor liability extends to the natural and probable consequence of the intended acts, as well as any other crime which, under the circumstances, was a natural

and probable consequence of the intended crime.” *Hecht*, 116 Wis. 2d at 624. *Hecht*’s language does not suggest that liability as an aider and abettor attaches *only* when used to punish a buyer for a seller’s wrongdoing.

- Hibbard’s continued characterization of his role in this drug transaction as “one-sided” and “buyer’s side” does not make it so. (Pet. 17.) The court of appeals expressly rejected this repeated inaccurate characterization—twice. (Pet-App. 11, 16.)
- The court of appeals made no “implicit” decision “that those on each side of a drug transaction are liable for the other side’s crimes.” (Pet. 17.) The court’s decision was narrow: “The State introduced sufficient evidence that Hibbard aided and abetted [the seller’s] delivery of a fatal amount of heroin to Hibbard’s daughter by driving her to meet [the seller] so that the delivery could take place.” (Pet-App. 17.)
- The State hates to beat a dead horse, but again, the issue in this case was not “whether a person who assists a *buyer* in effectuating a deal is a party to the dealer’s crime” or whether the person is “liable for the *buyer*’s crime.” (Pet. 18 (emphasis added).) That is an inaccurate description of Hibbard’s involvement in this case and what the court of appeals determined. (Pet-App. 11, 16.) This “issue[]” does not need to be “resolved” or “clarified.” (Pet. 18.)
- Regarding the issue of notice (Pet. 21), Hibbard was not “someone solely on the receiving end of a drug deal.” (Pet. 21.) He was an active participant who had notice that his conduct was prohibited.

The *Len Bias* statute provides that “[w]hoever causes the death of another human being” by “delivery, in violation of s. 961.41, of a controlled substance included in schedule I or II under ch. 961 . . . if another human being uses the controlled substance . . . and dies as a result of that use” is guilty of a Class C felony. Wis. Stat. § 940.02(2)(a). And the PTAC statute, Wis. Stat. § 939.05(2), provides that a “person is concerned in the commission of the crime if the person . . . intentionally aids and abets the commission of it.” The statutes define exactly what is prohibited, and they put aiders and abettors like Hibbard on notice.

- Finally, regarding enforcement standards, the court of appeals decision did not affirm Hibbard’s conviction based on his “buyer-side involvement.” (Pet. 22.) The court of appeals affirmed his conviction because there was sufficient evidence that Hibbard aided and abetted the *seller* in the delivery of the controlled substance, which led to his daughter’s death.
- “[F]actfinder[s]” and potential defendants know where to “draw the line” (Pet. 22), by the plain language of the *Len Bias* and PTAC statutes, which, as the court of appeals concluded, “clearly identify” what is prohibited. (Pet-App. 15.) “Hibbard does not identify any language in [section] 940.02(2)(a) that the average person would be unable to decipher, and we conclude that a person wanting to follow the law is given sufficient guidance in the text of the statute as to the conduct it proscribes.” (Pet-App. 15.)

CONCLUSION

This Court should deny and dismiss Hibbard's petition for review.

Dated this 28th day of October 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,587 words.

Dated this 28th day of October 2022.



SARA LYNN SHAEFFER
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**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §§ (RULES) 809.19(12) and
809.62(4)(b) (2019-20)**

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 28th day of October 2022.



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