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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2024AP0554-CR; 2024AP0556-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER J. SYRRAKOS
AND KRISTYN A. SHATTUCK,

Defendants-Respondents.

ON APPEAL FROM AN ORDER OF DISMISSAL
ENTERED IN THE WAUKESHA COUNTY CIRCUIT
COURT, THE HONORABLE WILLIAM J. DOMINA,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

The circuit court had competency to adjudicate the charges against Syrrakos and Shattuck.

A. The State did not need a referral from DATCP to charge Syrrakos and Shattuck criminally because their conduct did not violate Wis. Stat. § 94.55.

The State charged Christopher J. Syrrakos with eleven counts for delivering tetrahydrocannabinols (THC), possession of THC, possession of THC with intent to deliver, and maintaining a drug trafficking place. It charged Krystin A. Shattuck with maintaining a drug trafficking place. The circuit court dismissed all the charges because it concluded that Syrrakos's license to process hemp meant that any prosecution for violating the hemp law, Wis. Stat. § 94.55, required a referral from the Department of Agriculture, Trade, and Consumer Protection (DATCP) under Wis. Stat. § 961.32(3)(c), and without a referral, the court lacked competency over the charges.

In its opening brief, the State explained that the circuit court erred in dismissing the charges. Wisconsin law authorizes licensees to grow and process hemp, which is the *Cannabis sativa L.* plant with a THC concentration of no more than 0.3 percent. It does not require a referral from DATCP to criminally charge a person who possesses and distributes cannabis with a THC concentration more than 1 percent, which is not hemp but a controlled substance under Wis. Stat. § 961.41(3g)(e) (2019–20), or who maintains a drug trafficking place in violation of Wis. Stat. § 961.42(1).

Wisconsin Stat. § 961.32(3)(c) reads: “A person who violates s. 94.55 or a rule promulgated under s. 94.55 may not be prosecuted under s. 94.55 or this chapter unless the person is referred . . . by [DATCP].” That statute does not apply to

Syrrakos's possession and distribution of vape cartridges and "moonrocks" for two reasons. First, the potential violations of Wis. Stat. § 94.55 in Wis. Stat. § 94.55(2g)(a) and (2m) and the consequences for those violations in Wis. Stat. § 94.55(2g)(b) and (c) and (2m) apply only to hemp producers (growers) not processors. Second, the State did not charge Syrrakos or Shattuck with violating Wis. Stat. § 94.55 by producing "hot"¹ hemp either negligently, Wis. Stat. § 94.55(2g), or with a mental state greater than negligence, Wis. Stat. § 94.55(2m). The State charged Syrrakos with intentionally violating statutes in Chapter 961 by possessing, manufacturing, and delivering THC (a controlled substance). And it charged Syrrakos and Shattuck with maintaining a drug trafficking place.

Syrrakos and Shattuck do not defend the circuit court's conclusion that a referral from DATCP is required to criminally prosecute them because Syrrakos violated Wis. Stat. § 94.55. They instead argue that a referral from DATCP is required because Syrrakos violated regulations² promulgated under Wis. Stat. § 94.55 "by having product in excess of the prescribed amount." (Resp. Br. 23–24.)

¹ To address the problem of hemp growers accidentally producing a "hot crop" or "hot hemp" with a THC concentration above the legal limit of 0.3 percent, USDA's final rule provides that a grower negligently violates the hemp law only if he or she produces a crop with a THC concentration above one percent. Establishment of a Domestic Hemp Program, 84 Fed. Reg. 211 at 58522, 58560 (Oct. 31, 2019) (to be codified at 7 C.F.R. pt. 990).

² Wisconsin Stat. § 94.55(2)(b) requires DATCP to "promulgate rules regulating" activities under Wisconsin's hemp law. The State will therefore refer to "rules," not "regulations."

However, the rules in Wis. Admin. Code ATCP ch. 22³ that Syrrakos and Shattuck claim Syrrakos violated apply only to hemp growers, not processors. Syrrakos and Shattuck have therefore not shown that Wis. Stat. § 961.32(3)(c) required a referral from DATCP before they could be criminally charged under Chapter 961.

B. The State did not need a referral from DATCP to charge Syrrakos and Shattuck criminally because they did not violate a rule promulgated under Wis. Stat. § 94.55.

Syrrakos and Shattuck argue that a referral from DATCP was required to criminally charge them for possessing and delivering THC and maintaining a drug trafficking place because they violated rules promulgated under Wis. Stat. § 94.55. They argue that ATCP section 22.15 required Syrrakos to comply with all laws, and he violated Wis. Stat. § 961.32(3)(b)4. by “possessing and distributing product that exceeds .3%.” (Resp. Br. 22.) They claim that Syrrakos was required to destroy or remediate the “product” and give notice to DATCP, and he was subject to enforcement actions and penalties sanctions under ATCP section 22.16. (Resp. Br. 22) (footnotes omitted). They argue that “[t]he question for the Department of Agriculture would then be whether the violation was negligent or willful.” (Resp. Br. 22.) Syrrakos and Shattuck are wrong on all counts.

ATCP section 22.15 requires that “licensees” comply with “all applicable federal, state, and local laws.” Syrrakos and Shattuck seem to argue that since Syrrakos was a licensee, all the rules in ATCP chapter 22 apply to them.

³ Wisconsin Admin. Code ATCP ch. 22 is available at https://docs.legis.wisconsin.gov/code/register/2021/785a1/register/emr/emr2111_rule_text/emr2111_rule_text

(Resp. Br. 22.) However, “[w]hen an administrative agency promulgates regulations pursuant to a power delegated by the legislature,” a court “construe[s] those regulations ‘together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.’” *DOR v. Menasha Corp.*, 2008 WI 88, ¶ 45, 311 Wis. 2d 579, 754 N.W.2d 95. The rules in ATCP chapter 22 that Syrrakos and Shattuck rely on, viewed together with Wis. Stat. § 94.55, only apply to a person licensed to grow hemp, not process it.

1. Syrrakos did not violate Wis. Stat. § 961.32(3)(b)4.

Syrrakos and Shattuck argue that Syrrakos violated Wis. Stat. § 961.32(3)(b)4. by having “product above the legal limit.” (Resp. Br. 22.) But that statute does not prohibit a person from possessing hemp, “hot” hemp, or even THC. It says only that a person who is not otherwise violating Wis. Stat. § 94.55 or its rules may not be prosecuted for possessing cannabis with a delta-9 THC concentration no more than 1 percent (“hot” hemp) if he reconditions or processes the cannabis to no more than 0.3 percent THC (hemp) with approval of DATCP.

Syrrakos’s possession of vape cartridges and “moonrocks” with a THC concentration above 1 percent (as high as 40 percent) did not implicate Wis. Stat. § 961.32(3)(b)4. Rather, it violated Wis. Stat. § 961.41(3g)(e) (2019–20), which prohibited the possession of THC, a controlled substance under Wis. Stat. § 961.41(3g)(e) (2019–20). Syrrakos and Shattuck point to no statute or rule shielding Syrrakos from prosecution for violating that statute (or the statutes prohibiting distributing THC or maintaining a drug trafficking place) simply because he is licensed to process hemp.

2. Syrrakos did not violate ATCP section 22.10 or ATCP section 22.12.

Syrrakos and Shattuck argue that since Syrrakos had a hemp processor's license, ATCP sections 22.10(3) and (6) and ATCP section 22.12 required him to destroy or remediate any product that failed a test. (Resp. Br. 22.) And since he violated those rules, he cannot be criminally prosecuted for possessing THC without a referral by DATCP. (Resp. Br. 22.)

However, the testing and remediation rules in ATCP chapter 22 all apply to hemp growers, not hemp processors. ATCP section 22.10(1) requires that "All plant samples shall be tested for THC levels." Sampling of plants is governed by ATCP section 22.09, which requires that "[e]ach lot shall be sampled by the department to verify THC level compliance." A "[l]ot" is "a contiguous area in a field, greenhouse, facility, or growing structure containing the same variety or strain of hemp throughout the area." ATCP § 22.02(18).

ATCP section 22.10(6) governs remediation of hemp shown in an "initial test" to have a THC concentration above 0.3 percent. The rule says that a licensee may request to remediate "the entire lot," and if DATCP approves, may remediate "the entire lot."

Taken together, these rules provide that each lot of hemp that a grower produces must be sampled for THC level, and if testing reveals that the sample has a THC concentration above the limit for hemp, the entire lot of hemp may be remediated. ATCP section 22.11 makes it clear that these rules apply to growers, not processors, stating that DATCP "shall invoice the licensed grower" for sampling, testing, remediation, and retesting. There is no parallel provision for processors.

DATCP's analysis confirms that these testing and remediation rules apply to hemp growers, not processors. USDA's Final Rule "gives licensed growers the option to

remediate, resample, and retest non-complaint hemp.” ATCP chapter 22 at 3. DATCP’s emergency rule “incorporates parts of the Final Rule to give growers the greatest opportunity to produce hemp.” *Id.* It “gives licensed growers the option to remediate, resample, and retest non-compliant hemp.” *Id.* The rule allows growers to destroy the cannabis plant’s flower material, or “to shred or grind the entire lot into a homogeneous biomass,” after “their hemp has been tested and is found to be non-compliant by the Department.” *Id.* Remediation gives “growers a greater chance of having a compliant and marketable crop.” *Id.* DATCP said nothing about hemp processors testing or remediating non-complaint hemp, much less THC.

ATCP section 22.12 governs the destruction of hemp “by the licensee’s own determination and independent of a requirement set by the department.” ATCP § 22.12(1). A licensee who intends to destroy hemp voluntarily must inform DATCP, and then may plow or disk it under, cut it down and mix it into compost, mow it down with a brush mower or brush hog, or burn the hemp. ATCP § 22.12(2). The licensee must submit a report to DATCP that includes information including the GPS coordinates for “each growing location,” the variety of hemp subject to destruction at each lot, and the “[t]otal acreage subject to destruction.” ATCP §§ 22.12(4)(c) and (e). Again, this rule can apply only to licensed hemp growers, not processors, who cannot grow hemp, does not have a lot, or acreage, and cannot destroy hemp in the manner described in the rule.

3. The enforcement action and penalties under ATCP section 22.16 do not apply to Syrrakos.

Syrrakos and Shattuck argue that as a licensed hemp processor, Syrrakos was subject to enforcement action and penalties under ATCP section 22.16 for violations of ATCP

chapter 22. (Resp. Br. 22.) But since Syrrakos’s possession and distribution of THC is not regulated by any rule in ATCP chapter 22, the enforcement and penalty provisions in ATCP section 22.16 do not apply. And the enforcement provisions and penalties Syrrakos and Shattuck point to apply only hemp producers (growers), not processors.

ATCP section 22.16(2) authorizes DATCP or a district attorney or the United States Department of Justice at DATCP’s request to ask a court to seize and destroy hemp “produced in violation of s. 94.55, Stat. and [ATCP Chapter 22.]” Syrrakos and Shattuck do not dispute that producing hemp means growing hemp, not processing it. Syrrakos’s vape fluid and “moonrocks” which have a delta-9 THC concentration above 1 percent are not “hemp produced in violation of” Wis. Stat. § 94.55 or ATCP chapter 22. They are THC—a controlled substance.

ATCP section 22.16(3) requires a licensee who negligently violates Wis. Stat. § 94.55 or ATCP chapter 22, “as defined by s. 94.55(2g), Stats.” to “comply with a corrective action plan approved by [DATCP].” Wisconsin Stat. § 94.55(2g) explicitly “applies only to hemp producers” (growers), not processors, so ATCP section 22.16(3) also applies only to hemp growers, not processors.

ATCP section 22.16(4) provides that “A licensee who violates this chapter with a culpable mental state greater than negligence shall be reported to the U.S. attorney general and the department of justice as provided in s. 94.55(2m), Stats.” Wisconsin Stat. § 94.55(2m) applies only to hemp producers (growers) not processors, so ATCP section 22.16(4) also applies only to hemp growers. And referral for federal prosecution makes sense for hemp growers, not processors, since USDA’s hemp program’s final rule does “not cover hemp or its products beyond production.” Establishment of a Domestic Hemp Program, 86 Fed. Reg. 11 at 5649 (Jan. 19, 2021) (to be codified at 7 C.F.R. pt. 990). It explicitly “does not

cover” the “processing” of hemp or “the licensing of processors.” *Id.*

Finally, ATCP sections 22.16(5)(a), (b), and (c) provides that DATCP shall consider three factors in determining whether to refer a person for prosecution for a violation of Wis. Stat. § 94.55 or its rules: (1) “[w]hether voluntary compliance can be achieved”; (2) if not, whether progressive enforcement can achieve permanent compliance; and (3) for willful or dangerous violation referral, for prosecution. Since Syrrakos did not violate Wis. Stat. § 94.55 or a rule promulgated under Wis. Stat. § 94.55, none of these three factors apply. Referral by DATCP is not required when a person licensed to process hemp instead possesses and distributes THC.

C. The State’s “counter arguments” are correct.

Syrrakos and Shattuck claim that the State’s “counter arguments” are wrong in three respects. First, they argue that the State is wrong in arguing that a person with a license to process hemp cannot negligently violate Wis. Stat. § 94.55 or its rules because Wis. Stat. § 94.55(2g) says the negligent violation provisions apply only to hemp producers, and the provisions themselves can only be violated by a producer (grower). (Resp. Br. 23.) They claim that the referral provision in Wis. Stat. § 961.32(3)(c) is at issue, not the negligent violation provision. (Resp. Br. 24.)

But just like the negligent violation provision, Wis. Stat. § 961.32(3)(c) does not apply to hemp processors, only to growers. It provides that “[a] person who violates s. 94.55 or a rule promulgated under s. 94.55 may not be prosecuted under s. 94.55 or this chapter unless the person is referred to the district attorney for the county in which the violation occurred” by DATCP. Wis. Stat. § 961.32(3)(c). Here, the State did not allege that Syrrakos or Shattuck violated

the hemp law, Wis. Stat. § 94.55, by producing “hot” hemp either negligently, Wis. Stat § 94.55(2g) or with a mental state greater than negligence, Wis. Stat. § 94.55(2m), or that they violated a rule in ATCP chapter 22. As explained above, their conduct did not violate Wis. Stat. § 94.55 or any rule promulgated under that statute. Syrrakos possessed and delivered cannabis with a THC concentration above 1 percent, which is a controlled substance under Wisconsin and federal law. And Syrrakos and Shattuck maintained a drug trafficking place. The referral provision in Wis. Stat. § 961.32(3)(c) does not apply.

Second, Syrrakos and Shattuck argue that the State is wrong in arguing that “any hemp above the threshold is automatically illegal marijuana.” (Resp. Br. 25.) But that is just a fact. Wisconsin Stat. § 94.55(1) defines hemp as “the plant *Cannabis sativa* L.” with a delta-9-THC concentration of not more than 0.3 percent. Cannabis with a delta-9 THC concentration above 0.3 percent is THC, not hemp. Wis. Stat. § 961.14(4)(t). There are circumstances in Wis. Stat. § 961.32(3)(b) under which a person who possesses “hot” hemp cannot be criminally prosecuted. But under Wisconsin and federal law, cannabis with a THC concentration above 1 percent is an illegal controlled substance.

Syrrakos and Shattuck assert that regardless of the delta-9 THC concentration of cannabis a person possesses or distributes, the person can only be prosecuted if DATCP tests the cannabis and refers the person for criminal prosecution. (Resp. Br. 26–27.) But when DATCP administered the hemp program (before the program transitioned to USDA on January 1, 2022), it was tasked only with requiring that “plant samples” in hemp growers’ lots be tested. ATCP §§ 22.09(1); 22.10(1). Nothing in Wis. Stat. § 94.55 or ATCP chapter 22 required the testing of cannabis that is processed and sold in retail stores.

Finally, Syrrakos and Shattuck assert that the State is wrong in arguing that charges for maintaining their home as a drug trafficking place “aren’t covered” by the referral provision in Wis. Stat. § 961.32(3)(c). (Resp. Br. 27.) They claim that the referral provision “is not geographically limited to Syrrakos’s business.” (Resp. Br. 27.) They seem to misread the State’s brief as arguing that the referral provision in Wis. Stat. § 961.32(3)(c) does not apply to Syrrakos and Shattuck’s home because it is their home, rather than Syrrakos’s business. (Resp. Br. 27.) But as the State explained, the referral provision did not apply because it “applies only to hemp producers (growers) not to hemp processors,” and to violations of the hemp law, not maintaining a drug trafficking place. (State’s Br. 27.)

Syrrakos and Shattuck claim the State was wrong in arguing that the charge against Shattuck for maintaining a drug trafficking should not have been dismissed because she did not have a license to even process hemp. (Resp. Br. 27.) They seem to argue that even though Shattuck did not have a license to process or grow hemp, the referral provision applies to her because it applies to “[a] person.” (Resp. Br. 27.)

But Wis. Stat. § 961.32(3)(c) applies only to a person who violates Wis. Stat. § 94.55 or its rules. A person who is not licensed to process or grow hemp who maintains a drug trafficking place violates Wis. Stat. § 961.42, not the hemp law. A referral by DATCP is not required for criminal prosecution.

D. The circuit court had competency over the charge in this case.

Syrrakos and Shattuck acknowledge that their “whole” argument is that Syrrakos violated a rule in ATCP chapter 22, so they cannot be charged criminally with possession and distribution of THC and maintaining a drug trafficking place without referral by DATCP. (Resp. Br. 22.) Since they have

not pointed to any rule in ATCP chapter 22 that Syrrakos violated by possessing and distributing THC, or that they both violated by maintaining a drug trafficking place, their argument fails. No referral was necessary, and the circuit court had competency over the criminal charges.

CONCLUSION

This Court should reverse the order dismissing the charges against Syrrakos and Shattuck.

Dated this 25th day of February 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2987 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th day of February 2025.

Electronically signed by:

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