OLR RESEARCH REPORT

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SUMMARY OF STATE V. LEWIS

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This report summarizes the Connecticut Supreme Court's decision in *State v. Lewis*, 303 Conn. 760 (2012).

SUMMARY

In this case, the defendant was stopped because he matched the description of a robbery suspect and arrested because of an outstanding warrant. He was charged with four drug offenses when a search following his arrest revealed numerous small bags of crack cocaine, empty bags, a razor blade, and cash. He was charged with narcotic possession with intent to sell, drug paraphernalia possession, and two offenses that enhance penalties for committing these acts near an elementary or secondary school.

At trial, a jury found him guilty of all four offenses. However, the Appellate Court remanded the case because the jury had not been properly instructed on the specific intent required for each of these four offenses. Additionally, regarding the enhanced penalties for acts near schools, it found that the prosecution presented insufficient evidence to establish that (1) the defendant intended to sell drugs where he was arrested and (2) the nearby school was an elementary or secondary school.

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A majority of the Supreme Court agreed with the Appellate Court that the jury was improperly instructed and the evidence was insufficient to establish that the defendant intended to sell drugs where he was arrested near a school. The court stated that while the defendant may have been equipped to sell drugs "*somewhere*," there was an "[in]adequate basis for concluding that the place the defendant intended to sell narcotics was the place of his arrest" (303 Conn. at 771). The court disagreed with the Appellate Court's conclusion that there was insufficient evidence showing the school in question was an elementary or secondary school. Relying on testimony interrupted by an objection but not stricken from the record, the court held the jury was capable of inferring that the school in question was an elementary or secondary school, an element of the two offenses that enhance penalties for drug crimes. As a result, the court ordered (1) the defendant to be retried on paraphernalia possession near a school and (2) a verdict of not guilty on intent to sell drugs near a school.

Justices Eveleigh and Vertefeuille concurred in part, but dissented on the issue of the school's status as an elementary or secondary school.

FACTS

Police officers stopped the defendant on his bicycle one block from his home and 1,050 feet from a school because he matched a suspect's description. He was placed under arrest when a warrant check showed an active warrant for him. During a search incident to the arrest, police discovered 19 bags of crack cocaine, $876 in cash distributed in different pockets, a razor blade, and additional plastic bags. The defendant was charged with four offenses:

1. possession of narcotics with intent to sell by a person who is not drug-dependant (CGS § 21a-278(b)),

2. possession of narcotics with intent to sell within 1,500 feet of a school ("school zone") (CGS § 21a-278a(b)),

3. possession of drug paraphernalia with intent to use (CGS § 21a-267(a)), and

4. possession of drug paraphernalia with intent to use in a school zone (CGS § 21a-267(c)).

PROCEEDINGS BELOW

At trial, the jury found the defendant guilty of all four offenses. However, the Appellate Court held that (1) there was insufficient evidence that the defendant intended to sell drugs at a location in a school zone; (2) there was insufficient evidence that the school in question was an elementary or secondary school, as required by statute; and (3) the jury was improperly instructed on the specific intent required for each of the four offenses (*State v. Lewis*, 113 Conn. App. 731 (2009)).

Insufficient Evidence Claims

Although testimony suggested the defendant was equipped to sell crack cocaine, the Appellate Court found there to be insufficient evidence he intended to sell it at the location where he was detained. The Appellate Court noted that to be guilty of intending to sell narcotics in a school zone, there "must be evidence of something more than just an intent to sell at some unspecified location" (113 Conn. App. at 747). Accordingly, the Appellate Court held that the jury had insufficient evidence upon which to find the defendant guilty of intending to sell narcotics in a school zone.

Additionally, the prosecution was required to prove that the defendant intended to sell narcotics or use paraphernalia within 1,500 feet of "real property comprising a public or private elementary or secondary school" (CGS §§ 21a-278a(b), 21a-267(c)). Although the prosecution established the school in question was a public school, the majority found insufficient testimony to allow jurors to infer it was an elementary or secondary school building (as opposed to, for example, a preschool or adult education school building).

The Appellate Court ordered a retrial on the charges unrelated to school zones. But, because there was insufficient evidence of the (1) defendant's intent to sell where he was arrested and (2) school's primary or secondary school status, the Appellate Court ordered the trial court to enter not guilty judgments on the school zone charges.

Improper Jury Instructions

The Appellate Court stated that the statutory language for all four offenses require not only drug or paraphernalia possession but also specific intent to sell or use them. However, it found that the trial court did not instruct the jury on this specific intent requirement.

ISSUES BEFORE THE SUPREME COURT

The Connecticut Supreme Court considered whether the Appellate Court properly concluded there was insufficient evidence of the (1) defendant's intent to sell narcotics at the place where he was arrested and (2) school's status as an elementary or secondary school.

HOLDING

Justice McLachlan wrote the majority's opinion, joined by Chief Justice Rogers and Justices Palmer, Norcott, and Zarella. The majority held that there was (1) insufficient evidence to convict the defendant of possession of narcotics with intent to sell in a school zone, but (2) sufficient evidence that the school was an elementary or secondary school. The court concluded the defendant could be retried for paraphernalia possession in a school zone and the two charges unrelated to school zones because of improper jury instructions. The majority affirmed all other aspects of the Appellate Court's decision. The dissenting opinion argued that there was insufficient evidence presented on the school's status as an elementary or secondary school.

ANALYSIS

Intent to Sell Where Arrested

In upholding the Appellate Court's finding regarding intent to sell near a school, the court noted that it is difficult to prove intent to sell in a particular location when there is evidence of neither an actual nor attempted sale and the defendant is stopped while in transit. The court held that the location in which the defendant was stopped was "merely fortuitous;" he was stopped because he matched a robbery suspect's description and happened to be bicycling through the area, just one block from his home (303 Conn. at 772; see *State v. Hedge,* 297 Conn. 621 (2010)).

The prosecution's evidence showed the defendant (1) was equipped to sell drugs, (2) could have been working as a sales team with another man in his vicinity, and (3) was in an area known for drug activity. But, the court stated that considering "the tremendous range of possible lawful reasons the defendant could have had for being near his home, the evidence presented by the state attempting to correlate the facts with its chosen conclusion appears so tenuous that it shades into pure speculation" (303 Conn. at 776). The court upheld the Appellate Court's order to find the defendant not guilty on the charge of intent to sell narcotics in a school zone.

School's Status

The court reversed the Appellate Court's determination that the prosecution presented insufficient evidence to support the jury's conclusion that the school in question was an elementary or secondary school. The court held that testimony from the board of education district supervisor, although interrupted by the defendant's objection, was sufficient to allow jurors to conclude the school was an elementary or secondary school.

The district supervisor, in responding to a question on the grades served by the school, responded "the grades are from" before being interrupted by the defendant's objection. In a discussion the jury was not present for, the trial judge held that it would be prejudicial to the defendant for the jury to learn the grade range of the school's students. Although the trial judge said it would be permissible to ask what the school's highest grade is, when the jury returned the prosecution began a different line of questioning.

The court held his partial testimony was in the evidentiary record because "the court did not state on the record that the objection was sustained, nor did the defendant seek to strike the question and partial response from the record" (303 Conn at 779-80). The court reasoned that because it is commonly understood that only elementary and secondary schools have multiple grades, the jury could reasonably infer that the school in question was an elementary or secondary school for purposes of the school zone statutes. Accordingly, the court ordered the defendant to be retried on the charge of paraphernalia possession with intent to use in a school zone.

DISSENT

Justices Eveleigh and Vertefeuille concurred with the majority in part, but dissented on the sufficiency of evidence of the school's elementary or secondary school status. The dissent argued that the partial response "the grades are from" was not properly in the evidentiary record because:

> "[t]he fact that the partial response was not stricken from the record and the jury was not instructed to disregard the partial answer does not change the fact that the court would not allow the answer to this question…it is likely that the jurors realized that the

objection was sustained, since the question was similar to the prior question to which an objection was sustained, and the prosecutor asked a new question when the jury returned" (303 Conn. at 792-93).

Because, in the dissent's opinion, the prosecutor failed to elicit testimony showing the school was an elementary or secondary school, the dissent would have affirmed the Appellate Court's finding that there was insufficient evidence to uphold either school zone-related conviction.

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