Attorney Grievance Commission of Maryland v. Morgan Joseph Hallmon, Misc. Docket (Subtitle BV) No. 13, September Term, 1995.

[Attorney Did Not Evaluate Layperson's Preparation Of Presentation For Special Exception And, At Hearing, Looked To Layperson For Presentation. Held: Attorney Assisted Unlicensed Person In The Unauthorized Practice Of Law.]

In Re: Timothy F.
No. 67, September Term, 1995

[CRIMINAL LAW - SUFFICIENCY OF THE EVIDENCE - THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE PETITIONER POSSESSED A NON-CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE IT AS A CONTROLLED DANGEROUS SUBSTANCE]

IN THE COURT OF APPEALS OF MARYLAND

No. 67

September Term, 1995

IN RE: TIMOTHY F.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

Dissenting Opinion by Raker, J.

Filed:

Raker, J., dissenting

I dissent because I disagree with the majority's conclusion that the evidence was insufficient as a matter of law to support the judgment of the trial court that Petitioner violated Maryland Code (1957, 1992 Repl. Vol., 1995 Cum. Supp.) Article 27, § 286B(c). I would affirm the trial court.

The majority does not contest the sufficiency of the evidence to prove Petitioner's intent to distribute the substance. The majority finds, however, that the evidence was insufficient as a matter of law to prove that Timothy F. possessed the requisite intent to *misrepresent* the noncontrolled dangerous substance as a controlled dangerous substance.

Contrary to the majority's conclusion, I believe the State presented sufficient evidence to establish Petitioner's intent to misrepresent the substance as crack cocaine. Based upon a report that Timothy F. might be in possession of drugs, the assistant principal at the Centreville Middle School called him into the office and ordered him to empty his pockets. The principal found a brown prescription bottle containing two pieces and three crumbs of a white substance. The State presented expert testimony that the appearance of the substance was substantially identical to crack, and that the substance was packaged in the manner typically used to distribute crack. Furthermore, the State presented evidence that Petitioner had knowledge of the appearance and

packaging of crack because he had participated in a mandatory drug education program. Although Petitioner contends that the packaging and quantity of the substance "go, at most, to the issue of intent to distribute; it has no bearing on whether he intended criminally to mischaracterize what he intended to distribute," maj. op. at 7, the appearance and packaging of the noncontrolled substance are clearly probative of intent to misrepresent it as a controlled dangerous substance. *See* Md. Code (1957, 1992 Repl. Vol., 1995 Cum. Supp.) Art. 27, § 286B(d).[1] It appears that the holding of the majority is based on two factors: the inference drawn from the evidence of the prior distributions, and the age of the juveniles.

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[1] The statute provides, in pertinent part, that:

> (d) For the purpose of determining whether this section has been violated, the court or other authority shall include in its consideration the following:
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> > (1) Whether the noncontrolled substance was packaged in a manner normally used for the illegal distribution of controlled substances;
> >
> > (2) Whether the distribution or attempted distribution included an exchange of or demand for money or other property as consideration, and whether the amount of the consideration was substantially greater than the reasonable value of the noncontrolled substance;
> >
> > (3) Whether the physical appearance of the noncontrolled substance is substantially identical to that of a controlled dangerous substance.

Md. Code (1957, 1992 Repl. Vol., 1995 Cum. Supp.) Art. 27, § 286B(d).

The majority adopts the theory that Timothy F. was "a child merely pretending to be a criminal," maj. op. at 16, although the defense presented no evidence to support this contention. The only evidence presented suggesting that Timothy F. did not intend to misrepresent the substance as real crack when he distributed it to another student, Giovanni W., was that Giovanni W. told the school authorities when questioned that he knew the substance was not real crack cocaine. Giovanni W.'s statements, however, were inconsistent. *See* maj. op. at 15, n.3. He first told the school personnel that he knew the substance was fake, but later told the police that he did not know the nature of the substance. Nonetheless, the majority concludes that "the non-fraudulent nature of the prior distributions of the milk chips negate, rather than support, any inference of criminal intent." Maj. op. at 13.[2] I find no evidence in this record to support the majority's conclusion that when Timothy F. distributed the substance to

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[2] The majority finds the cases of *Felkner v. State*, 218 Md. 300, 311, 146 A.2d 424, 431 (1958) and *Sample v. State,* 33 Md. App. 398, 405, 365 A. 2d 773, 778 (1976) "relevant and helpful on the question of intent." Maj. op. at 14. In *Felkner*, the defendant was charged with breaking with intent to feloniously commit larceny. The Court found that on the record, defendant could not be found to have had an intent to steal goods more valuable than those he actually stole. In *Sample*, the Court of Special Appeals reached the same conclusion. In those cases, both Courts focused on the defendant's intent in the past, *i.e.,* the defendant's intent at the time of the breaking. Both Courts found that what was actually stolen was the best evidence of the defendant's intent. In contrast, in this case, we must determine Petitioner's intent to perform an act in the future. The *Sample* and *Felkner* rationale is simply inapposite.

Giovanni, he told him anything, one way or the other, of the nature of the substance.

The issue of whether Timothy F. possessed the requisite intent to fraudulently mischaracterize the substance as a controlled substance is a question of fact to be determined by the trial court. On review, we do not make an independent assessment of whether the evidence establishes guilt beyond a reasonable doubt, but instead we must consider:

> whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see also State v. Albrecht,* 336 Md. 475, 479, 649 A.2d 336, 337-38 (1994).

The majority makes much of the age of Petitioner, and refers to the common law defense of infancy, or *doli incapax*. It is unclear, however, how the defense of infancy has any bearing on the issues in this case. There was no suggestion before the trial court, or before this Court, that Timothy F. lacked the *capacity* to form the criminal intent or that because of his age, he was incapable of distinguishing right from wrong. This is simply a red herring.

The Court of Special Appeals, in an unreported opinion, affirmed the conviction and held that the evidence was sufficient

to establish that Timothy F. intended to distribute a noncontrolled substance as a controlled substance. I agree with that opinion. The intermediate appellate court found:

> There was evidence, as we have indicated, that appellant actually distributed the substance. There was evidence, largely uncontradicted, that it was packaged for distribution in the same manner as it would be packaged by illegal dealers and distributed in narcotic drug trafficking. There was no evidence that appellant was doing it "for fun."
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> The only evidence before the trial court from the State's witnesses was that the substance was packaged in a manner indicative of distribution. In fact, appellant had both received from and distributed the substance to another co-respondent. Appellant's counsel's argument was not evidence. It is an attempt to explain the evidence but it cannot contradict the evidence before the trial court.
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> If there were evidence, as opposed to argument, that appellant was just having fun, perhaps such an inference could have been made. But, as we have said, there was no such evidence presented. Even if appellant had so testified, that would not be the only inference the fact finder could have made from the totality of the evidence presented below.
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> The evidence, as opposed to argument, before the trial judge, a rational fact finder, was adequate to convince and could have convinced him beyond a reasonable doubt that appellant committed the offense, *i.e.*, the delinquent act with which he was charged, when we consider the legal standards for our appellate review.

As I indicated, I also find that the evidence was sufficient for the fact finder to conclude beyond a reasonable doubt that Petitioner possessed the requisite intent.

Although the defense argued in closing that the students were merely engaged in a "game," in the absence of any evidence to support this theory, we should not reverse the trial court's