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Division III
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36034-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LESLIE PITTMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT

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A. INTRODUCTION

Leslie Pittman collects trash he finds in dumpsters and sorts through it to find food and items he can either use or sell. After scavenging through a dumpster behind an apartment building known as an area frequented by drug users, Mr. Pittman collected several items, including some papers. Unbeknownst to Mr. Pittman, one piece of paper included a small folded piece of foil with methamphetamine, and he was charged with possession of a controlled substance. Mr. Pittman did not know he possessed methamphetamine. However, the court instructed the jury the State need only prove possession and that Mr. Pittman bore the burden of proving lack of knowledge. The jury convicted Mr. Pittman of possession of a controlled substance.

In his opening brief, Mr. Pittman argues the statute criminalizing possession of a controlled substance without a mens rea element violates the presumption of innocence and due process of law because it criminalizes innocent conduct. Brief of Appellant at 2-4, 9-13. In addition, Mr. Pittman argues the unwitting possession defense impermissibly shifts the burden of proof to the defense to prove the

defendant did not knowingly possess the substance. Mr. Pittman urges this Court to reverse his conviction.¹

This Court stayed Mr. Pittman's appeal pending the Washington Supreme Court's decision in *State v. A.M.*, ___ Wn.2d ___, 448 P.3d 35 (2019). The Court has now lifted the stay and requested supplemental briefing on the applicability of *A.M.* Mr. Pittman submits this brief in response.

B. ARGUMENT

Interpreting possession of a controlled substance as a strict liability offense violates the presumption of innocence and due process of law.

1. The Washington Supreme Court left the issue of the constitutionality of RCW 69.50.4013 unresolved in *State v. A.M.*

In *A.M.*, the Washington Supreme Court granted review to consider the constitutionality of Washington's possession of a controlled substance statute, whether it has a knowledge element, and, if so, whether requiring a defendant to prove the affirmative defense of unwitting possession improperly shifts the State's burden to prove the elements of the offense beyond a reasonable doubt in violation of due process. However, the Court ultimately declined to reach these issues concerning

¹ Mr. Pittman also challenged his offender score and the imposition of legal financial obligations. Brief of Appellant at 2-5, 14-50. Those issues are not relevant to the supplemental brief.

the constitutionality of the statute. *A.M.*, 448 P.3d at 37, 41. Instead, the Court resolved the appeal on other grounds. *Id.* at 38-41 (reversing defendant's conviction based on Fifth Amendment violation).

2. The concurring justices demonstrate the strict liability scheme of RCW 69.50.4013 is unconstitutional.

In her concurrence, Justice Gordon McCloud, joined by Justice González, urged the Court to reach the “pressing issue” of “the ongoing criminalization of innocent conduct in Washington’s war on drugs” created by the absence of a knowledge requirement in the statute. *A.M.*, 448 P.3d at 42 (Gordon McCloud, J., concurring). The concurrence recognizes that “the settled interpretation of Washington’s basic drug possession statute offends due process insofar as it permits heavy criminal sanctions for completely innocent conduct” because it allows conviction for possession without knowledge of possession. *Id.* The concurring justices acknowledged that imposing strict liability for drug possession violates due process and labeled the Court’s contrary holdings “grievously wrong.” *Id.* at 42, 50-52 (criticizing *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) and *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004)). The concurrence would have held RCW 69.50.4013 unconstitutional. *Id.* at 41-53.

As the concurrence explains, *Cleppe* and *Bradshaw* show that the statute does not require proof of knowing possession, and this is reinforced by the legislature's acquiescence. *Id.* at 42, 46-48. Because this strict liability statute violates due process of law by criminalizing innocent conduct, the concurrence accurately explained the statute is unconstitutional. *Id.* at 49 ("The strict liability drug possession statute exceeds the legislature's authority and offends the Fourteenth Amendment right to due process."). The concurrence found the statute unconstitutional because the creation of a strict liability statute that criminalizes innocent conduct without public welfare rationale exceeds the legislature's authority. *Id.* at 49-52.

3. This Court should either find RCW 69.50.4013 unconstitutional because the strict liability statute criminalizes innocent conduct in violation of the presumption of innocence and due process of law or should interpret the statute to require proof of knowledge and find the court impermissibly shifted the burden of proof to Mr. Pittman to prove lack of knowledge.

RCW 69.50.4013 is unconstitutional if interpreted to require no mens rea element. Br. of Appellant at 9-13. This Court should construe the statute to have a knowledge requirement and find that the unwitting possession defense presents an unconstitutional shifting of the burden of proof. Br. of Appellant at 9-13.

The concurrence in *A.M.* rejected the defendant’s suggestion that the Court could construe the statute to require a knowledge element because it found the legislature specifically acquiesced in the Court’s interpretation of the statute as lacking any mens rea element. *Id.* at 46-48. In reaching this conclusion, the concurrence relied on the fact the legislature appeared to have omitted a mental element from the statute. *Bradshaw*, 152 Wn.2d at 534-35; *Cleppe*, 96 Wn.2d at 379-80. If the Court follows the concurrence, it should find the statute lacks an element knowledge and hold this strict liability interpretation is unconstitutional.

However, the concurrence also acknowledged that “Washington courts must . . . follow the long-standing common law practice of reading mens rea into criminal offenses” as a way to “avoid[] a confrontation with the constitution.” *Id.* at 43-44. The “failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.” *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); accord *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). The apparent absence of a mental element from a statute does not mean none is required. *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to exclude a traditional mental element, the courts will infer one. See, e.g., *Anderson*, 141 Wn.2d at 366-67

(declining to interpret unlawful possession of firearm statute as strict liability offense and instead interpreting knowledge element, despite absence of apparent mental intent element in statute).

As the *A.M.* concurrence recognized, the Court's interpretation of the drug possession statute as a strict liability offense void of a mens rea element is wrong. Failure to presume the legislature implied a mens rea element creates the potential to criminalize innocent conduct. Statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); *accord Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

Moreover, the cases interpreting Washington's statute as endorsing a strict liability offense failed to consider the arguments advanced by Mr. Pittman that the statute itself is unconstitutional or that the avoidance canon of statutory construction requires courts to read the statute as incorporating a knowledge requirement. *Bradshaw*, 152 Wn.2d at 532-40;

Cleppe, 96 Wn.2d at 377-81. Because these opinions did not consider the legal theories upon which Mr. Pittman relies, those cases do not control the issue. *In re Personal Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014); *State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017), *affirmed*, 190 Wn.2d 548, 415 P.3d 1179 (2018). This Court should follow Mr. Pittman's argument, find the statute implies a mens rea element, and hold requiring Mr. Pittman to prove the lack of knowledge constituted an impermissible burden shifting in violation of due process.

4. This Court should reverse Mr. Pittman's conviction.

The trial court instructed the jury the State need only prove that Mr. Pittman possessed the controlled substance in order to convict him of the offense. CP 99-102; RP 434-435. The court further instructed the jury Mr. Pittman had to prove the possession was unwitting. CP 103; RP 435. Thus, the court did not require the State to prove knowing possession, and the court placed the burden of proving lack of knowledge on Mr. Pittman.

Requiring a defendant to prove he did not knowingly engage in the behavior that constitutes the essence of the crime with which he is charged is contrary to the foundational principle of the presumption of innocence. Instead, the State must prove the defendant's wrongdoing was conscious. The facts on which the jury convicted Mr. Pittman here are strikingly

similar to the scenario of which Justice Gordon McCloud warned the Court in her concurrence.

A person might pick up the wrong bag at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse. . . . All this conduct is innocent; none of it is blameworthy.

A.M., 448 P.3d at 51. And yet, under current Washington law, such a person is guilty of the crime of possession of a controlled substance under a strict liability interpretation.

Here, Mr. Pittman collected trash, including some paper. RP 368-70. Unbeknownst to him, the paper contained a small foil of methamphetamine. RP 375. But because the State was not required to prove Mr. Pittman knew he possessed the methamphetamine, the jury convicted Mr. Pittman of the crime without any evidence he knowingly engaged in criminal behavior.

Mr. Pittman's conviction violates due process of law because it criminalizes innocent conduct without a permissible public welfare rationale. This Court should follow the concurring opinion in *A.M.*, find the statute unconstitutional because its strict liability scheme criminalizes innocent conduct without justification, and reverse and dismiss the conviction for possession of a controlled substance. Alternatively, if this Court reads the statute to require a mens rea element, the affirmative

defense of unwitting possession constitutes an impermissible shifting of the burden of proof in violation of due process. Therefore, this Court should reverse the conviction for possession of a controlled substance.

C. CONCLUSION

A.M. fails to resolve the issues raised by Mr. Pittman challenging the constitutionality of his possession of a controlled substance conviction. However, the concurring justices addressed the issue and found the strict liability scheme violates the presumption of innocence and due process and held the statute was unconstitutional. For the reasons in the *A.M.* concurrence, as well as the reasons in his opening brief, RCW 69.50.4013 is unconstitutional unless interpreted to require the State to prove that the possession was with knowledge. The Court should reverse Mr. Pittman's conviction for possession of a controlled substance.

DATED this 20th day of November, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a stylized flourish at the end.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36034-2-III
)	
LESLIE PITTMAN,)	
)	
APPELLANT.)	

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