No. 16-115405-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

RONALD JOSEPH AROWCAVAGE
Defendant-Appellant

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF GEARY COUNTY, KANSAS
HONORABLE RYAN ROSAUER, DISTRICT JUDGE
DISTRICT COURT CASE NO. 15-CR-254

Paul D. Cramm, #19543
7450 West 130th Street, Suite #305
Overland Park, KS 66213
(913) 322-3265: Telephone
(913) 322-4371: Facsimile
paul@crammlawfirm.com
ATTORNEY FOR APPELLANT

ORAL ARGUMENT 15 MINUTES

TABLE OF CONTENTS

No. 16-115405-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

RONALD JOSEPH AROWCAVAGE
Defendant-Appellant

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF GEARY COUNTY, KANSAS
HONORABLE RYAN ROSAUER, DISTRICT JUDGE
DISTRICT COURT CASE NO. 15-CR-254

NATURE OF THE CASE

On April 6, 2015, Junction City Police Officer Nicholas Blake stopped Mr. Arowcavage traveling westbound on I-70 in Geary County for speeding 6 miles per hour above the posted speed limit. After retrieving Mr. Arowcavage's driver's license and rental paperwork, Officer Blake submitted the information to dispatch for a criminal history check. While dispatch conducted the background check, Blake walked his K-9 partner around the exterior of the vehicle. Blake reported that his K-9 demonstrated alert and indication behavior on the exterior of the vehicle.

During a subsequent search of the vehicle, law enforcement discovered $266,268.00 in U.S. currency. Officers arrested Arowcavage and escorted him to the police station. After counting the currency at the police station, law enforcement recovered a trace amount of dry residue from the automated currency counter that tested positive for THC. Other than the trace

amount of residue recovered from the currency counter, law enforcement found no narcotics and no drug paraphernalia during exhaustive search of the vehicle and its contents.

Subsequent investigation indicated that Mr. Arowcavage is a resident of California and had flown to Philadelphia on April 2, 2015. Travel records indicate that Mr. Arowcavage rented the vehicle at the Philadelphia International Airport and had a hotel reservation in New Jersey for April 2 - 4. Additionally, Mr. Arowcavage had a hotel reservation in Denver, Colorado for April 4 - 5. Investigation of Mr. Arowcavage's travel records and telephone records indicate no reservations at any hotel within the state of Kansas and no contacts with any persons within the state of Kansas.

The state of Kansas charged Mr. Arowcavage with a single count of Criminal Transportation of Drug Proceeds in violation of K.S.A. 21-5716(b). In the alternative, the state of Kansas charged Mr. Arowcavage with a single count of Criminal Transfer of Drug Proceeds in violation of K.S.A. 21-5716(c). In addition to the foregoing alternative charge, the State of Kansas charged Mr. Arowcavage with a single misdemeanor count of Possession of Marijuana in violation of K.S.A. 21-5706(b)(3) and/or (b)(7).

Following bench trial before the Honorable Ryan Rosauer, the court found Mr. Arowcavage guilty of Criminal Transportation of Drug Proceeds in violation of K.S.A. 21-5716(b). The court found Mr. Arowcavage *not guilty* of the alternative charge of Criminal Transfer of Drug Proceeds in violation of K.S.A. 21-5716(c). The court also found Mr. Arowcavage *not guilty* of Possession of Marijuana in violation of K.S.A. 21-5706(b)(3) and/or (b)(7).

Mr. Arowcavage appeals his conviction on the basis of insufficient evidence to support said conviction.

STATEMENT OF ISSUE TO BE DECIDED ON APPEAL

Did the State of Kansas present sufficient evidence to sustain Mr. Arowcavage's conviction for Criminal Transportation of Drug Proceeds in violation of K.S.A. 21-5716(b)?

PRESERVATION OF ISSUE

"There is no requirement that a criminal defendant challenge the sufficiency of evidence before the trial court in order to preserve the question for appeal." *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008). However, Mr. Arowcavage did file a Motion for Judgment of Acquittal at the close of the State's evidence which the district court denied. (Volume 6, pages 1-13)

STANDARD OF REVIEW

In reviewing the denial of a motion for judgment of acquittal, the appellate court examines the sufficiency of the evidence in support of the conviction. *State v. Cavaness*, 278 Kan. 469, 479, 101 P.3d 717 (2004); *State v. Wiggett*, 273 Kan. 438, 443, 44 P.3d 381 (2002). When examining the sufficiency of the evidence in a criminal case, the standard of review is whether, after reviewing all the evidence in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Frye*, 294 Kan. 364, 374–75, 277 P.3d 1091 (2012). If the appellate court is not so convinced, a reversal is justified.

STATEMENT OF FACTS

On April 6, 2015, Junction City Police Officer Nicholas Blake stopped Mr. Arowcavage traveling westbound on I-70 in Geary County for speeding 6 miles per hour above the posted speed limit. (Volume 4, page 15, lines 12-25) After retrieving Mr. Arowcavage's driver's license and rental paperwork, Officer Blake submitted the information to dispatch for a criminal history check. (Volume 4, page 19, lines 14-20) While dispatch conducted the background check, Blake walked his K-9 partner around the exterior of the vehicle. (Volume 4, page 20, lines 8-20) Blake reported that his K-9 demonstrated alert and indication behavior on the exterior of the vehicle. (Volume 4, page 20, lines 21-24)

During a subsequent search of the vehicle, law enforcement discovered $266,268.00 in U.S. currency. (Volume 4, page 22, lines 14-20) Officers recovered $680.00 from Mr. Arowcavage's pocket, $32.00 from the console of the vehicle, $15,801.00 from a duffel bag in the back seat of the vehicle and $249,755.00 from a suitcase in the rear cargo area of the vehicle. (Volume 4, page 99, lines 5-8) Officers arrested Arowcavage and escorted him to the police station. (Volume 4, page 39, lines 5-7)

The $249,755.00 recovered from the suitcase was packaged in 5 vacuum sealed plastic bags. (Volume 4, page 24, lines 17-20) The $249,755.00 recovered from the suitcase was the only currency packaged in vacuum sealed bags. (Volume 4, page 81, lines 5-13) The remaining currency recovered from Mr. Arowcavage's pocket ($680.00), recovered from the console of the vehicle ($32.00) and recovered from the duffel bag ($15,801.00) was not packaged in vacuum sealed bags. (Volume 4, page 81, lines 14-17) During post arrest interview, Mr. Arowcavage told police that the $15,801.00 recovered from the duffel bag belonged to him and constituted his life savings. (Volume 4, page 39, lines 11-16)

After counting all of the currency at the police station, law enforcement recovered a trace amount of dry residue from the automated currency counter that tested positive for THC. (Volume 4, page 72, lines 14-17) Other than the trace amount of residue recovered from the currency counter, law enforcement found no narcotics and no drug paraphernalia during exhaustive search of the vehicle and its contents.

Subsequent investigation indicated that Mr. Arowcavage is a resident of California. (Volume 4, page 122, lines 14-17) Travel records indicate that Mr. Arowcavage rented the vehicle at the Philadelphia International Airport and had a hotel reservation in New Jersey for April 2 - 4. (Volume 4, page 104, lines 15-25, page 105, lines 1-9) Additionally, Mr. Arowcavage had a hotel reservation in Denver, Colorado for April 4 - 5. (Volume 4 page 105 lines 19-25, page 106 lines 1-21) The State of Kansas presented no evidence to indicate that Mr. Arowcavage had reservations at any hotel within the state of Kansas and presented no evidence to establish that Mr. Arowcavage made contact with any persons within the state of Kansas.

Subsequent investigation involved execution of a search warrant at Mr. Arowcavage's residence in the state of California. (Volume 4, page 122, lines 14-17) Officers discovered marijuana (volume 4, page 123, lines 19-20) and equipment ostensibly used to grow marijuana at the residence. (Volume 4, page 124, lines 2-13) Officers located, but did not seize, ½ pound of marijuana recovered from a bedroom of the residence. (Volume 4, page 145, lines 22-25, page 145, lines 1-5) When asked why officers did not seize this marijuana, the lead agent testified: "Because, um, it is lawful for people to possess marijuana on occasion, for their personal use, since they were claiming it was for their use, whether I believe that or not." (Volume 4, page 146, lines 11-14) When asked about documentation authorizing use of marijuana under California's 'Medical Marijuana' laws, the agent confirmed: "The only documentation I saw

was a doctor – one or two doctors' notes related to Mr. Arowcavage." (Volume 4, page 147, lines 24-25) The agent elaborated:

> "Well, *the California law allows personal use for medical purposes*. Um, so the defendants had allowed - - or said they were allowed medical marijuana. It doesn't have to be in writing. It can be oral. So I felt it was reasonable to leave behind, considering the circumstances. And our policy allows us - - *we walk away from much bigger, um amounts of marijuana than a half pound between two persons*." (Volume 4, page 153, lines 20-25, page 154, lines 1-5)

The only charge filed against Mr. Arowcavage in the State of California arising from execution of the search warrant at his residence was related to discovery of a .22 caliber rifle found in one of the bedrooms. (Volume 4, page 148 lines 2-6) No charges were filed against Mr. Arowcavage arising from the marijuana or the equipment ostensibly used to grow marijuana. (Volume 4, page 148, lines 7-9)

The state of Kansas charged Mr. Arowcavage with a single count of Criminal Transportation of Drug Proceeds in violation of K.S.A. 215716(b). (Volume I, page 16) In the alternative, the state of Kansas charged Mr. Arowcavage with a single count of Criminal Transfer of Drug Proceeds in violation of K.S.A. 21-5716(c). (Volume I, page 16) In addition to the foregoing alternative charge, the State of Kansas also charged Mr. Arowcavage with a single misdemeanor count of Possession of Marijuana in violation of K.S.A. 21-5706(b)(3) and/or (b)(7). (Volume I, page 16)

Following bench trial before the Honorable Ryan Rosauer, the Court found Mr. Arowcavage guilty of Count I - Criminal Transportation of Drug Proceeds in violation of K.S.A. 215716(b). (Volume 4, page 212, lines 19-22) The Court found Mr. Arowcavage *not guilty* of the alternative charge of Criminal Transfer of Drug Proceeds in violation of K.S.A. 21-5716(c) and also found Mr. Arowcavage *not guilty* of Possession of Marijuana in violation of K.S.A. 21-5706(b)(3) and/or (b)(7). (Volume 4, page 212, lines 23-25, page 213, lines 1-4)

ARGUMENTS AND AUTHORITIES

I. K.S.A. 21-5716(b).

K.S.A. 21-5716(b) provides:

> "It shall be unlawful for any person to distribute, invest, conceal, transport or maintain an interest in or otherwise make available anything of value which that person knows is intended to be used for the purpose of committing or furthering the commission of any crime in K.S.A. 2014 Supp. 21-5701 through 21-5717, and amendments thereto, *or any substantially similar offense from another jurisdiction*." (Emphasis added)

The statute provides alternate means by which the state may prove the offense, to wit: an offer of proof of "the commission of any crime in K.S.A. 2014 Supp. 21-5701 through 21-5717, and amendments thereto" *or* an offer of proof of the commission of "any substantially similar offense from another jurisdiction."

By contrast to the foregoing statutory language, the state's complaint herein alleges:

> "that on or about the 6th day of April, 2015, in Geary County, Kansas, the defendant unlawfully, feloniously and intentionally distributed, invested, concealed, transported or maintained an interest in or otherwise make (sic) available anything of value which that person knows is intended to be used for the purpose of committing or furthering the commission of any crime in K.S.A. 2014 supp. 21-5701 - 21-5717, and the amount was at least $250,000.00 but less than $500,000.00, in violation of K.S.A. 2014 Supp. 21-5716(b): Criminal Transportation of Drug Proceeds, a drug severity level 2, nonperson felony.

Notably absent from the state's complaint is the statutory language "*or any substantially similar offense from another jurisdiction.*" By omitting this language from the complaint and alleging only that the defendant transported currency "intended to be used for the purpose of committing or furthering the commission of any crime in K.S.A. 2014 supp. 21-5701 - 21-5717" the state has affirmatively waived any offer of proof that the currency was intended to be used for the purpose of committing or furthering the commission of "*any substantially similar offense from another jurisdiction*."

In order for the currency at issue to be "used for the purpose of furthering the commission of any crime in K.S.A. 2014 Supp. 21-5701 through 21-5717, and amendments thereto," the state was required to present proof beyond reasonable doubt of a drug crime *in the state of Kansas*, as K.S.A. 21-5701 through 21-5717 have no jurisdictional force or effect on conduct occurring *outside* the geographic boundaries of the state of Kansas.

The state presented no evidence whatsoever to suggest that Mr. Arowcavage intended to commit a drug crime in the state of Kansas with the currency in his possession. The state presented no evidence whatsoever to suggest that Mr. Arowcavage intended to deliver the currency to anyone within the state of Kansas, or that Mr. Arowcavage intended to exchange the currency with anyone in the state of Kansas for any controlled substance in violation of K.S.A. 21-5701 through 21-5717. The state presented no evidence whatsoever to suggest that Mr. Arowcavage had any contact with anyone in the state of Kansas (but for the subject traffic stop) or that he even intended to stop within the state of Kansas for any purposes other than - perhaps - to purchase fuel.

Because the state alleged only that Mr. Arowcavage transported money "intended to be used for the purpose of committing or furthering the commission of any crime in K.S.A. 2014 supp. 21-5701 - 21-5717" and presented no evidence to prove up any such unlawful transaction, the state has failed to meet its burden as to Count I as pled in the state's complaint.

A. 'Substantially Similar Offense from Another Jurisdiction.'

Assuming arguendo that the state *had* properly pled the 'substantially similar offense from another jurisdiction' language in its complaint, inclusion of said language would not support conviction on the evidence presented. Incorporation of the 'substantially similar offense from another jurisdiction' language imposes two separate and distinct jurisdictional elements

upon the prosecution. In addition to proving that the defendant 'transported' the currency in Geary County, Kansas, the state must also prove that the currency was intended to facilitate commission of a '*substantially similar offense from another jurisdiction*.' That would require that the State prove an intended drug offense in another jurisdiction with laws 'substantially similar' to K.S.A. 21-5701 through K.S.A. 21-5717. In other words, the state would need to prove the existence of an intended drug crime in another jurisdiction with drug laws 'substantially similar' to the laws of Kansas.

Here, the state presented evidence to establish that Mr. Arowcavage is a resident of the state of California. (Volume 4, page 122, lines 14-17) Additionally, the state presented evidence to establish that Mr. Arowcavage stayed in the state of New Jersey April 2-4. (Volume 4, page 104, lines 15-25, page 105, lines 1-9) Finally, the state established that Mr. Arowcavage had reservations to stay at a hotel in Denver, Colorado April 4-5. (Volume 4 page 105 lines 19-25, page 106 lines 1-21) The State of Kansas presented no evidence to indicate that Mr. Arowcavage had reservations at any hotel within the state of Kansas and presented no evidence to establish that Mr. Arowcavage made contact with any persons within the state of Kansas.

Unlike the laws of the state of Kansas, the state of California now permits possession, use, cultivation and sale of marijuana for medicinal purposes. See: California Proposition 215 and Senate Bill 420. Unlike the laws of the state of Kansas, the state of New Jersey has also legalized marijuana for medicinal purposes. See: N.J. Stat. Ann. §§ 24-61-1-10. Unlike the laws of the state of Kansas, the state of Colorado permits possession, use, cultivation and sale of marijuana for medicinal and recreational purposes. See: Colorado Amendment 20 and Amendment 64.

As of January 1, 2015, 23 states and the District of Columbia have enacted legislation legalizing possession and use of marijuana for medicinal purposes. Four of those states: Oregon, Washington, Alaska, *Colorado* and the District of Columbia have legalized marijuana for recreational use. Additionally, 20 states have enacted 'de-criminalization' legislation wherein possession of marijuana for personal use constitutes an 'ordinance violation' as opposed to a criminal offense. To the extent the currency in Mr. Arpwcavage's possession constitutes proceeds of a *completed* marijuana transaction occurring in New Jersey, said transaction would not have occurred in a jurisdiction with laws 'substantially similar' to K.S.A. 21-5701 through 21-5717. Similarly, to the extent Mr. Arowcavage intended to use the currency to *complete* a marijuana transaction in Colorado or California (or any one of the 23 states which have legalized marijuana for either medicinal or recreation) said transaction would not occur in a jurisdiction with laws 'substantially similar' to K.S.A. 21-5701 through 21-5717. Thus, any hypothetical marijuana transaction or transactions that could reasonably be inferred from the evidence presented at trial would not constitute a 'substantially similar offense from another jurisdiction' and would not support conviction for violation of K.S.A. 21-5716(b).

Counsel concedes that this defense would not apply to a fact pattern involving (for example) MDMA, methamphetamine or heroin, as no states have legalized these substances for medicinal or recreational use. Thus, all other states currently have laws 'substantially similar' to the laws of the state of Kansas in this regard. Similarly, the operative arguments would not apply to a fact pattern involving discovery of currency in conjunction with discovery of drugs and indicia of distribution such as scales and baggies. Such additional evidence would support finding a contemporaneous course of unlawful transactions. However, none of these differentiating factors are present in the case at bar.

B. Federal Law Does Not Satisfy the 'Substantially Similar Offense From Another Jurisdiction' Language of K.S.A. 21-5716.

During closing argument, the district court inquired of counsel if federal law could constitute the 'substantially similar offense from another jurisdiction' language set forth in K.S.A. 21-5716(b) and (c). Based on the rules of statutory construction, federal law cannot satisfy this element.

Interpretation of a statute is a question of law over which Courts of Appeal have unlimited review. *State v. Jefferson*, 287 Kan. 28, 33, 194 P.3d 557 (2008). "When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. We need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent." *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271–72, 202 P.3d 7 (2009). "[T]he court cannot delete vital provisions or supply vital omissions in a statute. No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct.' (Citation omitted.)" *Kenyon v. Kansas Power & Light Co.*, 254 Kan. 287, 292–93, 864 P.2d 1161 (1993). Moreover, "criminal statutes must be strictly construed in favor of the accused. Any reasonable doubt as to the meaning of the statute is decided in favor of the accused. This rule of strict construction is nevertheless subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent." *State v. Gracey*, 288 Kan. 252, 257-258, 200 P.3d 1275 (2009).

Subsection (d) of K.S.A. 21-5716 addresses financial transactions involving proceeds of unlawful drug transactions and provides:

> "It shall be unlawful for any person to conduct a financial transaction involving proceeds derived from commission of any crime in K.S.A. 2012 Supp. 21-5701 through 21-5717, and amendments thereto, or any substantially similar offense from another jurisdiction, when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds known to be derived from commission of any crime in K.S.A. 2012 Supp. 21-5701 through 21-5717, and amendments thereto, or any substantially similar offense from another jurisdiction, *or to avoid a transaction reporting requirement under state or federal law*." (Emphasis added)

The legislature specifically incorporated avoidance of reporting requirements under 'federal law' as a means of violating subsection (d) of K.S.A. 21-5716, but specifically omitted 'federal law' as an alternative jurisdiction in the 'substantially similar offense' language which appears in subsection (b) & (c). Had the legislature intended 'federal law' as an alternative jurisdiction where a 'substantially similar offense' may be committed, the legislature would have simply written: 'or any substantially similar offense from another jurisdiction *under state or federal law*.' By including the language 'federal law'' *only* in subsection (d) of K.S.A. 21-5716 and by not including said language in subsections (b) or (c) of K.S.A. 21-5716, the legislature specifically omitted 'federal law' as means of satisfying the 'substantially similar offense from another jurisdiction' alternative element of the statute.

Further support for this correct interpretation of K.S.A. 21-5716(b) and (c) is found in the language of K.S.A. 65-4142 which was *repealed* in 2009 and replaced with K.S.A. 21-5716. Now *repealed* K.S.A. 65-4142(b) provided:

> It is unlawful for any person knowingly or intentionally to give, sell, transfer, trade, invest, conceal, transport or maintain an interest in or otherwise make available anything of value which that person knows is intended to be used for the purpose of committing or furthering the commission of *any violation of the uniform controlled substances act* and amendments thereto.

Similarly, now *repealed* K.S.A. 65-4142(c) provided:

> It is unlawful for any person knowingly or intentionally to direct, plan, organize, initiate, finance, manage, supervise or facilitate the transportation or transfer of proceeds known to be derived from *any violation of the uniform controlled substances act* and amendments thereto.

Because K.S.A. 65-4142 made specific reference to the Uniform Controlled Substances Act and made no reference to Kansas law, K.S.A. 65-4142 specifically applied to currency derived from or intended to facilitate any transaction in any state or jurisdiction that had adopted the Uniform Controlled Substances Act. By deleting all references to the Uniform Controlled Substances Act the legislature clearly intended that a violation of K.S.A. 21-5716 require proof of a concomitant violation of K.S.A. 21-5701 through 21-5717 or violation of a 'substantially similar offense from another jurisdiction.'

C. Amount at Issue.

Assuming arguendo, this Court were to uphold Mr. Arowcavage's conviction for violation of K.S.A. 21-5716(b), the evidence presented at trial would only support a conviction for a Severity Level 3 drug offense, not a Severity Level 2 drug offense. Subsection (e) of K.S.A. 21-5716 provides in pertinent part: "Violation of this section is a … (3) drug severity level 3 felony if the value of the proceeds is at least $100,000 but less than $250,000; (4) drug severity level 2 felony if the value of the proceeds is at least $250,000 but less than $500,000."

Law enforcement recovered a total of $266,268.00 in U.S. currency. (Volume 4, page 22, lines 14-20) Officers found $680.00 in Mr. Arowcavage's pocket, $32.00 in the center console of the vehicle, $15,801.00 in a duffel bag in the back seat of the vehicle and $249,755.00 in a suitcase in the rear cargo area of the vehicle. (Volume 4, page 99, lines 5-8) The $249,755.00 recovered from the suitcase was packaged in 5 vacuum sealed plastic bags. (Volume 4, page 24, lines 17-20) The $249,755.00 recovered from the suitcase was the *only* currency packaged in

vacuum sealed bags. (Volume 4, page 81, lines 5-13) The remaining currency recovered from Mr. Arowcavage's pocket ($680.00), the center console of the vehicle ($32.00) and the duffel bag ($15,801.00) was not packaged in vacuum sealed bags. (Volume 4, page 81, lines 14-17) During post arrest interview, Mr. Arowcavage told police that the $15,801.00 recovered from the duffel bag belonged to him and constituted his life savings. (Volume 4, page 39, lines 11-16)

After counting the currency at the police station, law enforcement recovered a trace amount of dry residue from the automated currency counter that tested positive for THC. (Volume 4, page 72, lines 14-17) During trial, the State of Kansas argued that the trace amount of dry reside recovered from the currency counter constituted circumstantial proof of the illicit nature of the transactions or transactions resulting in said currency. However, law enforcement unpackaged the vacuum sealed currency and counted it along with the currency recovered from Mr. Arowcavage's pocket, duffel bag and the console of the vehicle before discovering the trace amount of residue in the currency counter. (Volume 4, page 82, lines 6-18) Therefore, the state was unable to present evidence that the trace amount of residue recovered from the currency counter came exclusively from the vacuum sealed currency or also from the currency on Mr. Arowcavage's person and in the duffel bag. To the extent the residue came exclusively from the vacuum sealed currency, said 'circumstance' would only support an inference as to $249,755.00.

It is well settled that drug residue is commonly found on United States currency. See: *United States v. $10,700.00 in U.S. Currency*, 258 F.3d 215, 230 (3d Cir.2001) (noting that "several of our sister circuits recently have called into question the evidentiary significance of a positive reaction to currency in determining whether there is probable cause to forfeit the money in light of studies indicating that a large percentage of United States currency is contaminated with sufficient traces of drug residue to cause a canine to 'alert' to it"); *United States v.*

Buchanan, 213 F.3d 302, 311 (6th Cir.2000) ("Prior cases support the proposition that because a high percentage of currency in circulation is tainted with a scent or residue of narcotics, evidence of a positive indication by a drug-sniffing dog may have minimal evidentiary value."); *United States v. $5,000 in U.S. Currency*, 40 F.3d 846, 849 (6th Cir.1994) (finding "the evidentiary value of the narcotics dog's alert to be minimal" in light of evidence regarding narcotics contamination of currency); *United States v. U.S. Currency*, $30,060.00, 39 F.3d 1039, 1043 (9th Cir.1994) (finding that in light of currency contamination, "the continued reliance of courts and law enforcement officers on [a dog alert] to separate 'legitimate' currency from 'drug-connected' currency is logically indefensible." See also: *Journal of Analytical Toxicology* (Volume 28, Number 6, September 2004, pp. 439-442) "Cannabis (Marijuana) Contamination of United States and Foreign Paper Currency" by Eric S. Lavins, Bethany D. Lavins, and Amanda J. Jenkins. ("It is well known that United States paper currency in general circulation is contaminated with trace amounts of illicit substances such as cocaine, heroin, and marijuana.")

Of note, the district court correctly found Mr. Arowcavage 'not guilty' of Count III of the State's complaint alleging misdemeanor possession of marijuana in violation of K.S.A. 21-5706(b)(3) and/or (b)(7). This charge was based solely on the trace amount of residue collected from the currency counter as law enforcement found no other drugs or drug paraphernalia during exhaustive search of Mr. Arowcavage's rental vehicle. The court found that the State had failed to present sufficient evidence to support the conclusion that Mr. Arowcavage was even 'aware of the presence' of the trace amount of residue or that he intended to 'exert control' over the reside - separate from its being commingled with the currency. Because the district court found this trace amount of residue to be insufficient to support a charge of possession of said residue, it is unreasonable to find that the same residue supports the necessary inference regarding the source

or intended use of the currency for conviction of K.S.A. 21-5716(b). Absent evidence of the specific transaction or transactions resulting in this currency including, but not limited to: 1) the nature of the substance involved in the transaction; and 2) proof of the jurisdiction wherein the alleged transaction occurred, mere presence of drug residue on currency does not prove 'beyond reasonable doubt' that the currency constitutes proceeds of a drug transaction.

Counsel for the State of Kansas also argued that the fact that the currency was vacuum sealed provided circumstantial proof of the illicit nature of the underlying transaction or transactions giving rise to the currency. During trial, Counsel for the State of Kansas inquired of the arresting officer: "did the fact that the US currency was in vacuum-sealed bags, did that have any significance to you?" To which the arresting officer replied: "It did. (Volume 4, page 87, lines 2-5) The officer elaborated: "In the cases that I've dealt with involving currency, vacuum sealed, that's a huge factor to me, as to why criminals do that, and that is to defeat the drug dog, um, and to conceal the odor that may be on the currency itself." (Volume 4, page 87, lines 10-14)

Once again, because the currency found in Mr. Arowcavage's pocket, the center console of the vehicle and the duffel bag was ***not*** packaged in vacuum sealed bags, any inference arising from the use of vacuum packaging applies only to the $249,755.00 recovered from the suitcase, which would support conviction for a Severity Level 3 drug offense pursuant to K.S.A. 21-5716(e)(3).

"Convictions based upon circumstantial evidence ... can present a special challenge to the appellate court [because] 'the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.'" *State v. Williams*, 229 Kan. 646, 648–49, 630 P.2d 694 (1981) (quoting 1 Wharton's Criminal Evidence § 91, pp. 150–51 [13th ed.1972]). Courts of appeal "will not uphold a conviction ... that was obtained by nothing more than piling

inference upon inference ... or where the evidence raises no more than a mere suspicion of guilt." *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013)(health care fraud convictions reversed). Here, the state raised no more than a 'mere suspicion' of Mr. Arowcavage's guilt and the district court imposed a conviction that is premised entirely upon piling inference upon inference.

CONCLUSION

During argument, the district court inquired rhetorically of counsel whether or not a Kansas resident traveling to the state of Colorado with any given amount of US currency intending to use that currency to purchase marijuana at a now lawful Colorado dispensary would be guilty of violating K.S.A. 21-5716(b). The court proposed that the person would be 'transporting a thing of value' (currency) which that person 'knows is intended to be used' for the purpose of completing a transaction which *would* be in violation of Kansas law. The court inquired:

> "If I were to apply your definition, at this stage of the proceedings, would it not be, then, legally impossible for the State to charge count one, for example, where the person collects money from his buddies and is going to Colorado to buy marijuana? … I'm going to buy marijuana in Colorado, and you can't charge me with any kind of crime, where I'm in possession of money that's going to be used to purchase that marijuana because it's completely legal in Colorado? … You know, aside from the argument that the state might say, well, you were going to bring the marijuana back into Kansas… (Volume 4, page 187, lines 6-25)

The district court decided erroneously that the foregoing hypothetical fact pattern would be a violation of K.S.A. 21-5716(b):

> "So long as the state is able to show that a crime as the Kansas statutes defines it, is going to occur no matter where, whether it be in California or Russia, okay? That - - that because of the transport through Kansas, that the State will have met its burden so long as it would be a crime under Kansas Statutes, okay? And that's – that's in sum, the ruling of the Court." (Vol, 4 page 193, lines1-9)

Although the district court ruled incorrectly, the foregoing rhetorical question constitutes the very essence of Mr. Arowcavage's defense herein. According to the district court's ruling, anyone traveling through the State of Kansas with currency that the person intends to use to purchase marijuana at a now lawful Colorado dispensary would be guilty of Criminal Transportation of drug Proceeds: transporting a thing of value (currency) that the person knows is intended to be used for the purpose of committing and act that *would* be a violation of Kansas law *if* committed in Kansas. Clearly, such an interpretation yields an absurd result. One cannot be convicted of a crime for traveling to a jurisdiction with currency in one's possession to engage in activities that are lawful in the destination jurisdiction.

Applying the district court's ruling to K.S.A. 21-5716(c) yields an equally absurd result: a Colorado resident who maintains full-time employment in the now lawful marijuana industry would be subject to felony criminal prosecution for traveling into the State of Kansas - not with marijuana - but with the currency (paycheck) in that person's possession which would constitute 'proceeds' from transactions that *would* be violations of Kansas law *if* committed in Kansas.

The only way to avoid the foregoing absurd result is to interpret K.S.A. 21-5716 as requiring proof that the alleged underlying transaction either occurs in the State of Kansas so as to constitute a violation of Kansas law, or occurs in a jurisdiction with 'substantially similar offenses' to those set forth in K.S.A. 21-5701 through 21-5717. If the alleged underlying transaction occurs in a jurisdiction that does <u>*not*</u> have 'substantially similar offenses' to those set forth in K.S.A. 21-5701 through 21-5717, then <u>*no*</u> violation of K.S.A. 21-5716 has occurred.

Counsel for the State of Kansas conceded during argument on defendant's Motion for Judgment of Acquittal that the State could not satisfy this necessary jurisdictional element of the offense: "Well Judge, that's almost impossible to prove on certain cases, because we don't know

where the people come from, period, okay?" (Volume 4, page 176, lines 24-25, page 177, line 1). Counsel for the State continued:

> "Can we show where it came from? No. What they are trying to do is add the additional element of, we have to point out which state it's going to. That's almost impossible, okay? What that refers to, Judge, specifically, is not jurisdiction, but not all states have the exact same criminal statutes." (Id. at 6-12)

As set forth in *State v. Gracey* supra, "criminal statutes must be strictly construed in favor of the accused. Any reasonable doubt as to the meaning of the statute is decided in favor of the accused. This rule of strict construction is nevertheless subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent." Mr. Arowcavage's conviction is the result of interpretation of K.S.A. 21-5716 strictly in favor of the state. Moreover, the conviction is based upon an interpretation of K.S.A. 21-5716 that is neither reasonable nor sensible and yields absurd results.

Respectfully submitted,

BY /s/ *Paul D. Cramm*

Paul D. Cramm #19543
PAUL D. CRAMM, CHARTERED
7450 W. 130th Street, Suite 305
Overland Park, KS 66213
Telephone: (913) 322-3265
Facsimile: (913) 322-4371
paul@crammlawfirm.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on this 25th day of May, 2016 a copy of the above and foregoing was filed with the clerk of court utilizing the Kansas Courts Electronic Filing System with a copy delivered electronically to:

Assistant District Attorney Tony Cruz
Geary County District Attorney's Office
801 N. Washington Street Suite A
Junction City, KS 66441

Attorney General Derek Schmidt
Kansas Judicial Center, 2nd Floor
301 S.W. 10th Avenue
Topeka, KS 66612-1597

BY /s/ *Paul D. Cramm*
Paul D. Cramm
ATTORNEY FOR APPELLANT