

IN THE DISTRICT COURT OF TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT

THE STATE OF WYOMING,
Plaintiff,

vs.

DANIEL JULIAN BATES,
Defendant.

FILED
TETON COUNTY, WYOMING

JUL 26 2017

Dee Lee Smith
CLERK OF DISTRICT COURT

Criminal Action No. 2540

DECISION ON JOINT MOTION

This matter came before the Court on the Joint Motion on Wyo. Stat. § 35-7-1031 filed on June 22, 2017. Defendant, Mr. Bates, filed a brief regarding that joint motion on June 22, 2017. The State did not file a brief. A hearing was held on June 27, 2017. Richard Stout was present on behalf of the Defendant. Clark Allan, Deputy County Prosecuting Attorney, appeared on behalf of the State.

The parties asked this Court to decide whether edible goods containing Tetrahydrocannabinol (THC) can be used to reach the weight threshold of a felony charge pursuant to Wyo. Stat. § 35-7-1031. This is a question of statutory interpretation similar to the question raised in *State v. Piessens*, in which those parties asked the Laramie County District Court to certify a similar question to the Wyoming Supreme Court. The Honorable Judge Steven Sharpe denied the request to certify the question to the Supreme Court and instead found that under Wyo. Stat. § 35-7-1031 edible THC products cannot be used to reach a felony weight. While a motion for certification, motion to dismiss, or some other motion may have been a more appropriate procedure in this case, this Court will nevertheless accept the parties' invitation to interpret the statutory language at issue in their joint motion.

After reviewing the motion, Defendant's brief, and after hearing the arguments of counsel, the Court finds and concludes that edible gummy products containing THC cannot be used to reach the weight threshold of a felony charge pursuant to Wyo. Stat. § 35-7-1031.

Background

1. Mr. Bates was arrested on September 6, 2016 after a traffic stop in Jackson, Wyoming. According to the Probable Cause Affidavit, Jackson Police Department officers arrested Mr. Bates after a search of his vehicle revealed approximately one ounce of marijuana in plant form, a Schedule I controlled substance, and approximately two and a half ounces of

packaged gummy candy which later tested positive for THC, the active chemical in marijuana, and also a Schedule I controlled substance.

2. The same day, the State filed an Information charging Mr. Bates with Felony Possession of Marijuana. Count 1 of the Information charges that on September 6, 2017, Mr. Bates did knowingly or intentionally possess over three ounces of a Schedule I controlled substance (marijuana) in plant form in violation of Wyo. Stat. § 35-7-1031(c)(iii).
3. The total weight of marijuana in plant form is approximately one ounce, and the weight in gummy candy form (without packaging) is approximately two and one-half ounces. The combined weight is 3.497 ounces.
4. The State and Mr. Bates filed a joint motion asking this Court to determine whether THC-infused gummy candy can be used to reach the weight threshold for a felony charge of possession of marijuana in plant form under Wyo. Stat. § 35-7-1031(c)(iii). Both parties agree that this is a question of statutory interpretation.
5. During the hearing on this matter on June 27, 2017, both parties made arguments to the Court. Ella Kubicz, a chemist and unit supervisor at the Department of Criminal Investigations Crime Lab, testified as to her findings after testing the gummy candies.
6. The Laramie County District Court recently held in *State v. Piessens*, Case. No. 32-530, that edible THC products cannot be used to reach the weight threshold of a felony charge pursuant to Wyo. Stat. § 35-7-1031. Decision Letter, *State v. Christopher Piessens*, No. 32-530 (First Jud. Dist, Wyo, July 29, 2015).

Standard of Review

7. Statutory interpretation is a question of law. *E.g., Bohling v. State*, 2017 WY 7, ¶ 18, 308 P.3d 502, 505 (Wyo. 2017).

Legal Standards

8. In Wyoming, it is a felony to possess more than three ounces of a Schedule I, II, or III controlled substance “in plant form.” Wyo. Stat. § 35-7-1031(c)(iii). “Marihuana”¹ and “THC” are both classified as Schedule I controlled substances in Wyo. Stat. § 35-7-1014.

¹ Wyoming Statutes § 35-7-1014 and § 35-7-102(xiv) use the older spelling of the word “marihuana.” This Court will use the modern spelling, “marijuana” except when referring to the statutory definition.

“Marihuana” is defined by statute and includes any resin or derivative of the plant genus Cannabis. Wyo. Stat. § 35-7-102(xiv).

9. The Defendant in this case is charged in the Information with knowingly and intentionally possessing a controlled substance “in an amount greater than three ounces in plant form” under Wyo. Stat. § 35-7-1031(c)(iii). To reach the three ounce weight threshold, the State relies on the combination of one ounce of marijuana in a leafy plant form, and over two ounces of gummy candy that tested positive for the presence of THC, the active ingredient in marijuana.
10. The issue before the Court is whether edible products in a form not listed in Wyo. Stat. § 35-7-1031(c)(i)(A-F), but containing THC, can be used to calculate weight in a charge of unlawful possession of a controlled substance. This is an issue of statutory interpretation, and the Court must evaluate whether the language of Wyo. Stat. § 35-7-1031(c) allows the State to use THC gummy candy to meet their burden of proof.
11. The exercise of statutory interpretation begins by applying the plain meaning of the statute with the goal of determining the legislature’s intent:

In interpreting and construing statutory language, our primary purpose is to determine the legislature’s intent. Where the language is clear, we look to its ordinary and obvious meaning, are bound to the results so expressed and do not resort to rules of construction. A statute is unambiguous if its wording is such that reasonable persons are able to agree concerning its meaning with consistency and predictability.

Stutzman v. Office of Wyoming State Eng’r, 2006 WY 30, ¶ 14, 130 P.3d 470, 475 (Wyo. 2006) (citing *Merrill v. Jansma*, 2004 WY 26, ¶ 28, 86 P.3d 270, 284–85 (Wyo. 2004)).

12. Courts “will not interpret a statute in a way which renders any portion of it meaningless or in a manner producing absurd results.” *Adekale v. State*, 2015 WY 30, ¶ 13, 344 P.3d 761, 765 (Wyo. 2015).
13. Courts engaging in the process of statutory interpretation must also read statutes *in pari materia*, as a whole, allowing inconsistencies in one portion to be reconciled with other statutes on the same topic. *Id.* ¶ 15.
14. If a statute does contain ambiguity, the doctrine of lenity requires that ambiguity be resolved in favor of the defendant. *Id.* ¶ 25–27. “[W]hen a court is faced with two reasonable

interpretations of a criminal statute and legislative intent is ambiguous, the court should adopt the less punitive alternative.” *Id.* ¶25.

Discussion

15. The facts of this case are based primarily on the testimony of Ms. Ella Kubicz, who tested the items found in Mr. Bates’ possession. Ms. Kubicz testified that she analyzed 5 blister packs, each containing two gummy candies. The candies collectively weighed approximately 65 grams. Ms. Kubicz also tested an amount of plant-form marijuana that weighed approximately 33 grams. The blister packs were labeled as containing more than one hundred milligrams of THC per gummy candy. Ms. Kubicz testified that she tested each gummy and found the presence of THC. The crime lab can determine neither the concentration of THC in an edible product, nor the exact method by which THC was infused into the gummies. Ms. Kubicz explained the common method of infusing a medium with THC, which typically involves extracting THC from plant-form marijuana and then adding it to an edible product. Ms. Kubicz also testified that she did not observe any plant material in any of the gummy candies, but that the THC in the plant was likely derived from a marijuana plant. However, Ms. Kubicz noted that there are at least two known pharmaceutically-created synthetic THC products which are not derived from the marijuana plant.
16. The Defendant argued that the plain language of the statute charged requires the substance to be in plant form. Mr. Bates relied on Ms. Kubicz’s testimony that there was no plant material in the gummy bears, and therefore the State cannot rely on the weight of the gummies to reach its three ounce threshold for felony possession of a controlled substance in plant form.
17. The State argued that the structure of Wyo. Stat. § 35-7-1031(c), which prescribes different felony weights for different forms of controlled substances (i.e., liquid, plant, powder, or pill) is an inclusive list, and every controlled substance must fit into one of those categories. Further, the State argued that the language of Wyo. Stat. § 35-7-1031(c)(iii), “[a]nd has in his possession any other controlled substance classified in Schedule I, II or III in an amount greater than set forth in paragraph (c)(i),” supports their position that any Schedule I, II or III substance must fit into one of the six categories. The State charged the Defendant with possession of a controlled substance “in plant form.” According to the State, while the

gummy candies are neither liquid nor plant, the THC in the gummies was most likely derived from a marijuana plant. The State also argued that the statutory definition of "marijuana" in Wyo. Stat. § 35-7-102(xiv) includes "the resin extracted from any part of the plant." There is a high degree of probability, according to Ms. Kubicz, that the THC in the gummies was extracted as resin from a marijuana plant. Wyo. Stat. § 35-7-1031(d) allows the State to include the weight of a carrying agent (like the gummy candy) when calculating whether the total weight reaches felony level. Therefore, the State argues that it can use the weight of the gummy candy to meet its burden to prove that Mr. Bates possessed more than three ounces of marijuana in plant form.

18. As noted above, this case is analogous to *State v. Piessens*. There, the State charged the defendant with possession of more than 3 ounces of a controlled substance in plant form in the form of edible goods (chocolate bars, candies, cookies, and other edible products). The *Piessens* Court found that the weight of various THC-infused, edible products found in the Defendant's possession could not be used to prove possession of a felony amount of a controlled substance because the THC was not "in plant form."
19. While the Court understands the difficulty the State faces in prosecuting possession of controlled substances in food items, this Court also cannot find that a THC extract, which meets the definition of marijuana, also meets the definition of "in plant form" when it is present as an additive or ingredient in a gummy candy.
20. The State's proposed interpretation of the statute, while reasonable, is contrary to the plain meaning of the statute, and would render the words "in plant form" meaningless. The ordinary, unambiguous meaning of the statute as charged requires the State to prove three elements: (1) that the defendant possessed a controlled substance; (2) that the controlled substance was in an amount greater than three ounces; (3) and that the controlled substance was "in plant form." The statutes do not define what constitutes a plant or "plant form," so the Court must afford the words their common and ordinary meaning. Wyo. Stat. § 8-1-103. Merriam-Webster's Dictionary defines a plant as "any of a kingdom (Plantae) of multi-cellular eukaryotic mostly photosynthetic organisms typically lacking locomotive movement or obvious nervous or sensory organs and possessing cellulose cell walls." Ms. Kubicz testified that she observed no plant material in any of the gummy candy she tested. Because

the THC is not in plant form, the State cannot meet the third element. Nor can the Court consider the gummy candies to be the carrying agent for the THC for the same reason. While the carrying agent can be considered for the purpose of determining weight, Wyo. Stat. § 35-7-1031(d), the THC is still not “in plant form” and the State will be unable to satisfy that element of the charged offense.

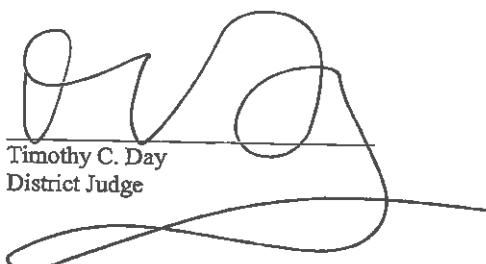
Conclusion

21. The Court cannot add language or alter a statute by choosing different words or meanings. *Adekale*, 2015 WY 30, ¶ 13. The statute says plainly and unambiguously that the controlled substance must be “in plant form,” and based on Ms. Kubicz’s uncontested testimony, the gummy candy contained no plant material.
22. The adjacent State of Colorado has authorized the sale of recreational marijuana and THC in food form since November of 2012. The Wyoming legislature has the authority to amend Wyoming’s statutes to allow for prosecution of the possession of food items containing THC. This Court does not. Again, this Court appreciates the difficulty the State faces in prosecuting possession of controlled substances in forms that Wyoming’s statutes do not contemplate, but the plain and ordinary meaning of the statutory language prevents this Court from expanding the scope of the statute where the legislature has not acted.

THE COURT THEREFORE FINDS AND CONCLUDES that edible gummy products containing Tetrahydrocannabinol (THC) cannot be used to reach the weight threshold of a felony charge pursuant to Wyo. Stat. § 35-7-1031.

DATED this 21st day of July, 2017.

CERTIFICATE OF SERVICE
This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 21st day of July 2017.
County Atty By Hand
B. Stolt
Probation & Parole VIA fax
By Def. - [Signature]



Timothy C. Day
District Judge