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To meet a sufficient standard of evidence for conviction in a drug prosecution case, there must be some evidence beyond the lay testimony of a user of the substance that the substance is a dangerous drug.

Anthony Burwell (Burwell) was convicted of criminal distribution of dangerous drugs when he allegedly sold Jennifer Jones (Jones) marijuana as payment for babysitting services. While in custody, Jones compiled a list of “people to narc on” that included a vague description of a man who lived next door to a close friend of hers. Officers concluded her statement referred to Burwell, who officers also discovered had a medical marijuana card. Based on Jones’ statement and the medical marijuana card information, the officers charged Burwell with criminal distribution of dangerous drugs. Officers did not search Burwell’s residence or attempt to buy marijuana from him.

At trial, Jones testified that Burwell gave her a bag that had a substance in it that was “green with orange hairs.” Jones stated that she smoked the substance over the next day and knew the substance was marijuana because she had smoked marijuana before. The jury convicted Burwell on that evidence alone.

The only issue the Montana Supreme Court considered was the sufficiency of evidence to support a conviction. The Court noted that while physical evidence of the substance is preferred for lab testing, it is not required to support a conviction. For example, convictions have been upheld when an experienced officer who is trained in identifying dangerous drugs provides testimony as to what the substance was. Furthermore, circumstantial evidence can also provide enough for conviction in some instances. For example, the Court upheld convictions of distributors of LSD based on evidence regarding the users’ demeanor. In that case, the drug users
testified as to how they felt, and witnesses testified to their actions. Additionally, an expert
witness who also saw some of the users’ symptoms made a medical opinion that the pills were
LSD or a similar hallucinogenic.

In this case no expert trained in identifying illegal substances ever saw the substance.
Furthermore, no witness testified to Jones’ actions after smoking the substance. In fact, Jones’
only testimony was that she smoked it. The Court held that the lack of any reliable identifying
information—whether through expert substance verification or personal demeanor traits—failed
the evidentiary sufficiency standard because it did not allow a rational trier of fact to conclude
beyond a reasonable doubt that the substance was a dangerous drug.

Montana law enforcement personnel and prosecutors should be aware that in
prosecutions for criminal distribution of dangerous drugs, there must be some amount of reliable
evidence identifying the drug. This can be in the form of expert drug identification or
circumstantial evidence, including the drug user’s demeanor. But a vague description from a lay
witness will not meet this standard.

Honorable Loren Tucker, Montana Fifth Judicial District Court

For Appellant: Wade Zolynski, Chief Appellate Defender; Jacob Q. Johnson, Assistant Appellate
Defender; Helena, MT.

For Appellee: Timothy C. Fox, Montana Attorney General and Jonathan M. Krauss, Assistant
Attorney General from Helena, Montana | Jed Fitch, Beaverhead Country Attorney from Dillon,
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