STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2024AP0554-CR; 2024AP0556-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER J. SYRRAKOS AND KRISTYN A. SHATTUCK,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF DISMISSAL ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM J. DOMINA, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Under both Wisconsin law and federal law, any part of the Cannabis sativa L. plant with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent is defined as hemp. Any part of the same plant with a THC concentration above 0.3 percent is defined as marijuana. In 2021, Wisconsin issued licenses to hemp growers and to hemp processors. Christopher R. Syrrakos had a State-issued hemp processor license which authorized him to "store, handle, and convert hemp into a marketable form under Wisconsin law." He operated a retail store where he legally processed hemp and legally sold hemp products, i.e., products with a THC concentration of "not more than 0.3 percent." But according to the criminal complaint, he also illegally possessed, manufactured, and delivered products with a THC concentration far above .3 percent, some as high as 40 percent. This was not hemp, but marijuana—a controlled substance under current federal and Wisconsin law.

The State charged Syrrakos with eleven crimes, for manufacturing or delivering THC, possession of THC with intent to deliver, possession of THC, and maintaining a drug house. It charged Syrrakos's partner, Kristyn A. Shattuck—who did not have a grower license or a processor license—with maintaining a drug house. Syrrakos and Shattuck moved to dismiss the charges, asserting that since Syrrakos had a license to process hemp, the State could only charge him for possessing, manufacturing, or delivering marijuana if the case was referred to the District Attorney by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). The circuit court denied the defendants' motion. But a different judge granted their motion for reconsideration, concluding that Wis. Stat. § 961.32(3)(c) bars prosecution unless DATCP refers the case to the district

attorney. The court concluded that since the cases were not referred by DATCP, the court lacked competency over them.

On appeal, the issues are not whether a hemp processor could legally process and sell hemp, whether marijuana should be legalized, or whether the possession or sale of marijuana should be criminally prosecuted. The issues concern only whether under Wisconsin law, Syrrakos's hemp processing license insulated him from being prosecuted for possessing, manufacturing, and delivering marijuana—not hemp—unless the case was referred to the prosecutor by DATCP. Because the statutes requiring a referral by DATCP applied only to negligent violations of Wis. Stat. § 94.55 by hemp producers (growers), not to intentional violations of the controlled substances law by any person, including a hemp processor, the circuit court erred when it dismissed the charges against Syrrakos. And since Shattuck did not have even a hemp processor license, the circuit court erred when it dismissed the charge against her. Accordingly, this Court should reverse.

ISSUES PRESENTED

1. Do Wisconsin's hemp laws prohibit the State from prosecuting a person with a license to process hemp—but not a license to produce (grow) it—for possessing, manufacturing, or delivering marijuana unless the case is referred to the district attorney by DATCP?

The circuit court answered "yes" so it dismissed the charges against Syrrakos.

This Court should reverse.

2. Do Wisconsin's hemp laws prohibit the State from prosecuting a person with a license to process hemp for maintaining a drug house unless the case is referred to the district attorney by DATCP?

The circuit court answered "yes" so it dismissed the charge against Syrrakos for maintaining a drug house.

This Court should reverse.

3. Do Wisconsin's hemp laws prohibit the State from prosecuting a person who had no hemp license for maintaining a drug house unless the case is referred to the district attorney by DATCP?

The circuit court answered "yes" so it dismissed the charge against Shattuck for maintaining a drug house.

This Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument will be necessary, as the issues presented should be fully developed in the parties' briefs. The State does request publication. While regulation of Wisconsin's hemp program was transferred to the United States Department of Agriculture (USDA) on January 1, 2022, there are numerous pending prosecutions in Wisconsin relating to possessing, manufacturing, and delivering marijuana by defendants with a hemp processing license, and no binding case law explains whether that license bars those prosecutions without a referral by DATCP. A published decision would provide necessary guidance to parties and courts.

STATEMENT OF THE CASE

In 2020 and 2021, Syrrakos operated Superstar Buds, a retail store in the Village of Menomonee Falls that sold products containing THC. (R. 2:7; A-App. 11.)[1] Syrrakos had a state-issued hemp processor license that authorized him to

[1] Citations to the appellate record in this brief are to the record in case number 2024AP2554-CR.

"store, handle, and convert hemp into a marketable form." (R. 43:3.); Wis. Admin Code ATCP § 22.03(3). Hemp is defined in Wisconsin law as the Cannabis sativa L. plant with a THC concentration of no more than 0.3 percent. Wis. Stat. § 94.55(1). The same plant with more than .3 percent THC is marijuana.

In November 2020, two parents went into Superstar Buds, and an employee gave them a sample bag of gummies that contained THC. (R. 2:7; A-App. 11.) The couple's two children ate the gummies and were hospitalized. (R. 2:7; A-App. 11.)[2] In January 2021, police conducted an undercover buy of products from Superstar Buds. (R. 2:7; A-App. 11.) Packages of gummies were tested and determined to have a THC concentration below 0.3 percent. (R. 2:8; A-App. 12.) But a vape cartridge police purchased had a certificate of analysis indicting a THC concentration of 29.53 percent, nearly 100 times the .3 percent limit. (R. 2:8; A-App. 12.) On February 3, 2021, police purchased more gummies and vape cartridges from Superstar Buds. (R. 2:8; A-App. 12.) A gummy was tested and found to have a THC concentration below 0.3 percent. (R. 2:8; A-App. 12.) But a vape cartridge was found to have a THC concentration of 33.44 percent, more than 111 times the limit of .3 percent. (R. 2:8; A-App. 12.)

On February 11, 2021, police searched garbage that was left at the curb by the residence where Syrrakos and Shattuck lived and found parts of cigarettes that tested positive for THC, and a baggie containing a substance that smelled like marijuana. (R. 2:8; A-App. 12.) The material was tested and was found to have a THC concentration of 0.43 percent. (R. 2:8–9; A-App. 12–13.) On the same day, police conducted another undercover buy at Superstar Buds. (R. 2:9; A-App. 13.) THC oil that police purchased was tested and found to

[2] The gummies were alleged to contain 500 mg of THC. (R. 2:7; A-App. 11.) No charges relating to the gummies were filed.

have a THC concentration of 0.50 percent. (R. 2:9; A-App. 12.) A vape cartridge was found to have a THC concentration of 40.32 percent, more than 134 times the .3 percent limit. (R. 2:9; A-App. 12.) And a package of THC "moonrocks" had a THC concentration of 7.11 percent, more than 23 times the .3 percent limit. (R. 2:9; A-App. 12.)

In March 2021, police bought products from Superstar Buds on two occasions. (R. 2:9–10; A-App. 12–13.) Two vape cartridges were tested. One was found to have a THC concentration of 0.62 percent, and the other had a THC concentration of 1.22 percent. (R. 2:9–10; A-App. 12–13.) Two packages of "moonrocks" were found to have a THC concentration of 2.93 percent and 2.01 percent, more than six times the .3 percent limit. (R. 2:9–10; A-App. 12–13.)

On March 25, 2021, police recovered items allegedly used for processing THC from the garbage outside Superstar Buds and the residence where Syrrakos and Shattuck lived. (R. 2:10; A-App. 13.) On March 30, 2021, police executed search warrants at Superstar Buds and the residence where Syrrakos and Shattuck lived and found numerous items containing THC and other items used in processing and selling THC. (R. 2:10–12; A-App. 13–15.)

The State charged Syrrakos with eleven crimes. (R. 2:1–6; 10:1–6; A-App. 4–10.) It charged five counts of manufacturing or delivering THC relating to the undercover buys on January 20, 2021, February 4, February 11, March 10, and March 23, 2021. (R. 2:1–3; 10:1–3; A-App. 4–6.) And it charged six counts relating to the March 30, 2021 search warrants: two counts of possession of THC, two counts of possession of THC with intent to deliver, and two counts of maintaining a drug trafficking place, one each for Superstar Buds and the residence where he and Shattuck lived. (R. 2:4–6; 10:4–6; A-App. 7–9.) The State charged Shattuck with maintaining a drug trafficking place for the residence where she and Syrrakos lived. (R. 2:6; 10:6; A-App. 9.)

Syrrakos and Shattuck moved to dismiss the charges against them, alleging that the circuit court lacked subject matter jurisdiction because the State charged them without the cases being referred to the district attorney by DATCP. (R. 27; 28; A-App. 25;27.) The circuit court, the Honorable Jennifer R. Dorow, presiding, denied the motion after a hearing. (R. 35; 37; A-App. 40.) The court noted that the motion concerned only the first eight counts, all of them against Syrrakos, relating to products with a THC concentration above 0.3 percent that the police purchased from Superstar Buds. (R. 35:2–3; A-App. 41–42.) The court therefore denied the motion as it related to the other charges against Syrrakos and the charge against Shattuck. (R. 35:3; A-App. 42.) The court also denied the motion as it related to the eight charges against Syrrakos. The court noted that Syrrakos was not charged with violating Wis. Stat. § 94.55, Wisconsin's hemp law. (R. 35:7; A-App. 46.) The court rejected the defense argument that Syrrakos could not be prosecuted under Chapter 961 for crimes involving marijuana—a controlled substance with a THC concentration above 0.3 percent. (R. 35:13–17, 20–23; A-App. 52–56; 69–62.) The court noted that Wis. Stat. § 94.55 concerns only hemp, and that Syrrakos was charged with crimes including possession of THC, manufacturing or delivering THC, and maintaining a drug trafficking place, but not with violating Wis. Stat. § 94.55. (R. 35:13–17; A-App. 52–56.) The court concluded that nothing in Wis. Stat. § 94.55 or Chapter 961 says that a person with a hemp processing license cannot be charged for violations under Chapter 961. (R. 35:16–17; A-App. 55–56.) And the court concluded that the statutes do not provide a shield for a hemp processor who deals marijuana. (R. 35:21–22; A-App. 60–61.) Accordingly, the court denied the motion to dismiss. (R. 35:22–23; A-App. 60–61.)

Syrrakos and Shattuck moved for reconsideration (R. 40; 41; A-App. 68), and the circuit court, the Honorable

William J, Domina, presiding, granted the motion (R. 77; A-App. 138), after a hearing (R. 76; A-App. 82). The court concluded that while Syrrakos and Shattuck asserted that the court lacked subject matter jurisdiction over the charges against them, the issue was really whether the court had competency to decide the cases. (R. 77:10 n.4; A-App. 147.) The court concluded that the "negligent violation rules contained in Section 94.55(2g), Wis. Stats, apply fully to all forms of production regulated by the licenses which the administration agency is authorized to issue." (R. 77:10; A-App. 147.) The court noted that the licenses DATCP issues to hemp producers under Wis. Stat. § 94.55(2)(am) authorize the processing of hemp, so "the fact that the defendant Syrrakos operated as [a] hemp 'processor' does not block the negligent violation provisions of the same statute." (R. 77:10; A-App. 147.)

The court concluded that the charges against Syrrakos are prohibited by Wis. Stat. § 961.32(3)(c), which provides that "A person who violates s. 94.55 or a rule promulgated under s. 94.55 may not be prosecuted under s. 94.55 or this chapter unless the person is referred to the district attorney for the county in which the violation occurred . . . by [DATCP]." (R. 77:10; A-App. 147.) The court concluded that it lacked competency over the charges against Syrrakos and that Judge Dorow's decision denying the motion to dismiss was therefore "a manifest error." (R. 77:11; A-App. 148.) The court concluded that the charges relating to maintaining a drug house must also be dismissed because "the relevant questions regarding potential liability relate both to products held for sale or maintained as stock to hold for sale and to the processing of such products, regardless of material location." (R. 77:11; A-App. 148.) The court recognized that Shattuck did not have a license to process or grow hemp but it concluded that the charge against her must be dismissed because "both co-defendants are entitled, in the interest of justice, to the

Court's reconsideration and analysis." (R. 77:11; A-App. 148.) The court therefore dismissed all the charges against both Syrrakos and Shattuck. (R. 77:11; A-App. 148.)

The State now appeals. (R. 79.)

STANDARDS OF REVIEW

An appellate court determines de novo whether the trial court has competency over a criminal charge. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 6, 370 Wis. 2d 595, 882 N.W.2d 738.

The issues in this case require the interpretation and application of Wis. Stat. § 94.55 and Wis. Stat. § 961.32. The proper interpretation and application of statutory language are questions of law that an appellate court reviews independently. *State v. Lickes*, 2021 WI 60, ¶ 14, 397 Wis. 2d 586, 960 N.W.2d 855.

ARGUMENT

The circuit court erred in dismissing the charges against Syrrakos and Shattuck because it had competency to adjudicate the cases against them.

The circuit court concluded that it lacked competency over the charges against Syrrakos because they allegedly violated Wis. Stat. § 94.55, so the State could only charge them criminally if the case was referred to the District Attorney by DATCP. (R. 77:11; A-App. 148.) The court's conclusion was premised on Syrrakos being a licensed hemp producer. However, as the State will explain, Syrrakos, who had a license to process hemp, was not authorized to grow (produce) hemp. Even if he had been authorized to produce hemp, he was not authorized to intentionally possess, manufacture, and deliver marijuana or to maintain a drug house. And Shattuck had no license to grow *or* process hemp, and also obviously was not authorized to maintain a drug

house. In addition, the State did not charge either Syrrakos or Shattuck with violating Wis. Stat. § 94.55. The State instead charged Syrrakos with intentionally possessing and manufacturing or delivering THC, and it charged both Syrrakos and Shattuck with maintaining a drug trafficking place. The circuit court had competency to adjudicate those charges, and erred when it dismissed them.

A. The State properly charged Syrrakos with crimes involving the possession of THC; the substances were marijuana, not hemp, and the State did not charge him with violating the hemp law, Wis. Stat. § 94.55.

1. Overview of Wisconsin's Hemp Regulations

The 2014 federal Farm Bill authorized state departments of agriculture and institutions of higher education to produce hemp. *See* Establishment of a Domestic Hemp Program, 86 Fed. Reg. 11 at 5596 (Jan. 19, 2021) (to be codified at 7 C.F.R. pt. 990). In 2017, Wisconsin established a pilot program for the growing and processing of industrial hemp and the sale of hemp products. Wis. Stat. § 94.55 (2017–18.) Just like under federal law, hemp was defined as the plant Cannabis sativa L. with a delta-9 THC concentration of not more than 0.3 percent. Wis. Stat. § 94.55(1) (2017–18.) The same plant with a THC concentration above 0.3 percent is not hemp. It is marijuana—a controlled substance. Wis. Stat. § 961.14(4)(t). In the 2018 Farm Bill, the federal government removed hemp from its list of controlled substances. *See* Establishment of a Domestic Hemp Program, 86 Fed. Reg. 11 at 5666 (Jan. 19, 2021) (to be codified at 7 C.F.R. pt. 990). However, Cannabis sativa L. with a THC concentration above 0.3 percent remained a controlled substance. *Id.* In 2019, Wisconsin made its hemp program permanent. 2019 Wis. Act 68; Wis Stat. § 94.55(1) (2019–20).

In 2019, USDA issued an interim final rule "specifying the rules and regulations to produce hemp." Establishment of a Domestic Hemp Program, 84 Fed. Reg. 211 at 58522 (Oct. 31, 2019) (to be codified at 7 C.F.R. pt. 990). The interim final rule addressed a problem that hemp growers had reported—accidentally producing a crop that had a THC concentration above the legal limit of 0.3 percent, known as a "hot crop" or "hot hemp." *Id.* at 58526. The interim final rule provided that a hemp grower negligently violated the hemp law only by producing hemp with THC concentration above 0.5 percent. *Id.* In 2021, USDA issued a final rule which provided that a grower negligently violated the hemp law if he or she produced a crop with a THC concentration above one percent THC. Establishment of a Domestic Hemp Program, 86 Fed. Reg. 11 at 5605 (Jan. 19, 2021) (to be codified at 7 C.F.R. pt. 990). The final rule also provided for remediation of plants that exceed 0.3 percent THC. *Id.* at 5642. The one percent threshold and the remediation provisions explicitly apply only to hemp producers, not to hemp processors: "The [interim final rule] and this final rule do not cover hemp or its products beyond production." *Id.* at 5649. Specifically, "This final rule does not cover" the "processing" of hemp or "the licensing of processors." *Id.*

In response to USDA's interim final rule, the Wisconsin legislature amended Wis. Stat. § 94.55 to provide that "if hemp producers are required to hold a license to produce hemp under federal law," no person may produce hemp without a license from DATCP. The Legislature provided that DATCP "shall issue licenses to hemp producers" which "may authorize the planting, growing, cultivating, harvesting, producing, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of hemp." Wis. Stat. § 94.55(2)(am) (2019–20.)

Like USDA's final rule, the Legislature also provided for "negligent violations" which applied to hemp producers.

Wis. Stat. § 94.55(2g)(a). Under the amended law, a person licensed to produce hemp who negligently violates the hemp law by growing a crop with a THC concentration above 0.3 percent is required to comply with a DATCP plan to correct the violation. Wis. Stat. § 94.55(2g)(b). The Legislature provided that a hemp producer who violates Wis. Stat. § 94.55 "may not be prosecuted" under Wis. Stat. § 94.55 or Chapter 961. Wis. Stat. § 961.32(3)(cm). The Legislature also provided that a person authorized to plant, grow, cultivate, harvest, produce, process, transport, sell, transfer, import, export, process, transport, or possess for processing cannabis generally may not be prosecuted for doing any of those things with cannabis that has a THC concentration up to one percent. Wis. Stat. § 961.32(3)(b).

The Legislature authorized DATCP "to issue licenses to hemp producers if hemp producers are required to hold a license to produce hemp under federal law." Wis. Stat. § 94.55(2)(am) (2019–20). The Legislature provided that "Licenses from the department may authorize the planting, growing, cultivating, harvesting, producing, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of hemp." Wis. Stat. § 94.55(2)(am) (2019–20.)

In response to the USDA final rule and Wisconsin's amended hemp law, DATCP issued Emergency Rule 2039 which interpreted Wis. Stat. § 94.55 and converted Wisconsin's pilot hemp program to a permanent hemp program. DATCP EmR2039.[3] Under the emergency rule, DATCP was authorized to issue two types of licenses to a

[3] DATCP's emergency rule is available at: https://docs.legis.wisconsin.gov/code/register/2020/779a1/register/emr/emr2039_rule_text/emr2039_rule_text

person who wishes to participate in the hemp program: a "grower license" and a "processor license." Wis. Admin Code ATCP § 22.02(9), (17). A grower license authorized a person to "plant, possess, cultivate, grow, and harvest hemp under Wisconsin law," and to "store, handle, and convert into a marketable form under Wisconsin law the hemp cultivated, grown, and harvested under this grower license." Wis. Admin Code ATCP § 22.03(1)(a). A processor license authorized a person only to store, handle, and convert hemp into a marketable form under Wisconsin law. Wis. Admin Code ATCP § 22.03(3). DATCP also issued Emergency Rule 2111, which recognized that the USDA final rule "gives licensed growers the option to remediate, resample, and retest non-compliant hemp." DATCP EmR2111.

On September 2, 2021, DATCP announced that Wisconsin's hemp program would transfer to USDA on January 1, 2022. As of that date, hemp growers are required to obtain a federal license. But hemp processors are not required to have a DATCP license or a federal license. Wisconsin hemp Program Transitioning to USDA in 2022. (https://datcp.wi.gov/Pages/News_Media/20210902HempTransitionToUSDA.aspx).

2. Wisconsin Stat. §§ 94.55 and 961.32 do not prohibit charging a person with crimes involving possession, manufacturing, and delivering marijuana under Chapter 961.32 simply because he is licensed to process hemp.

The circuit court concluded that the State could not prosecute Syrrakos for possessing and manufacturing or delivering marijuana unless the case was referred to it by DATCP. (R. 77:11; A-App. 148.) The court relied on Wis. Stat. § 961.32(3)(c), which provides in relevant part that "A person who violates s. 94.55 or a rule promulgated under s. 94.55 may

not be prosecuted under s. 94.55 or this chapter unless the person is referred to the district attorney for the county in which the violation occurred or to the department of justice" by DATCP. (R. 77:9; A-App. 146.) The circuit court further relied on Wis. Stat. § 94.55(2g), titled "Negligent violations," which concerns violations of Wis. Stat. § 94.55(2g). (R. 77:10; A-App. 147.) That statute provides in relevant part:

> (a) This subsection applies only to hemp producers, and only if the department determines that the hemp producer has negligently violated this section or rules promulgated under this section, including by negligently doing any of the following:
>
> 1. Failing to provide a legal description of land on which the producer produces hemp.
>
> 2. If required under federal law, failing to obtain a license or other required authorization from the department or from the U.S. department of agriculture.
>
> 3. Producing Cannabis sativa L. with a delta-9-tetrahydrocannabinol concentration of more than 0.3 percent on a dry weight basis or the maximum concentration allowed by law up to 1 percent.

The circuit court concluded that since Syrrakos had a hemp processor license, he was a hemp producer for purposes of Wis. Stat. § 94.55(2g). (R. 77:10; A-App. 147.) And it seemed to conclude that the State alleged that Syrrakos negligently violated Wis. Stat. § 94.55. (R. 77:10–11; A-App. 147–48.) The court concluded that the State could therefore charge Syrrakos under Wis. Stat. § 94.55 or Chapter 961 only if DATCP referred the case to the district attorney. (R. 77:11; A-App. 148.) The court concluded that since DATCP did not refer Syrrakos's case to the district attorney, the court did not have competency over the charges brought against him. (R. 77:11; A-App. 148.)

The circuit court was incorrect for two reasons. First, Syrrakos was not a licensed hemp producer. He had a license to process hemp, not to produce (grow) it. The provision for

negligent violations of the hemp law, Wis. Stat. § 94.55(2g), therefore did not apply. Second, the State did not charge Syrrakos with violating Wis. Stat. § 94.55 or even allege that he violated Wis. Stat. § 94.55. The State charged him with violating several statutes in a completely different chapter of the Wisconsin Statutes, chapter 961, by intentionally possessing and manufacturing or delivering THC, not for negligently producing hemp.

a. Wisconsin Stat. § 94.55(2m) applies to a person licensed to produce (grow) hemp, not to a person licensed only to process hemp.

The first words of Wis. Stat. § 94.55(2g) are "This subsection applies only to hemp producers." "Producers" is not defined in the statute. "When interpreting the language of a statute, the words are given their 'common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.'" *State v. Schmidt*, 2021 WI 65, ¶ 50, 397 Wis. 2d 758, 960 N.W.2d 888 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110). "Producer," means "One that produces, brings forth, or generates." *Webster's Third New International Dictionary* 1810 (1986). A "hemp producer" is therefore a person who brings forth hemp. In other words, one who grows hemp (Cannabis sativa L. with a THC concentration of not more than 0.3 percent), not one who only processes hemp that has been produced or sells marijuana.

That "producers" in Wis. Stat. § 94.55 means growers, not processors, is evident from USDA's interim final rule and final rule implementing the 2018 Farm Bill, which was the impetus for the Wisconsin Legislature to amend Wis. Stat. § 94.55. The interim final rule provided that a person commits a negligent violation of the hemp law only by producing hemp

with a THC concentration above 0.5 percent. Establishment of a Domestic Hemp Program, 84 Fed. Reg. 211 at 58526 (Oct. 31, 2019) (to be codified at 7 C.F.R. pt. 990). The final rule provided that a grower negligently violated the hemp law if he or she produced a crop with a THC concentration above one percent THC. Establishment of a Domestic Hemp Program, 86 Fed. Reg. 11 at 5845 (Jan. 19, 2021) (to be codified at 7 C.F.R. pt. 990). The final rule explicitly provided that "The [interim final rule] and this final rule do not cover hemp or its products beyond production." *Id.* at 5649. It further provided specifically that "This final rule does not cover" the "processing" of hemp or "the licensing of processors." *Id.*

Before USDA issued its interim final rule and final rule, Wis. Stat. § 94.55(3) authorized DATCP to "Issue licenses that authorize the planting, growing, cultivating, harvesting, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of industrial hemp. Wis. Stat. § 94.55 (2017–18.) After the USDA issued its interim final rule and final rule making it clear that hemp producers are hemp growers, not hemp processors, the Wisconsin Legislature repealed Wis. Stat. § 94.55(3) and created Wis. Stat. 94.55(2)(am), which authorized DATCP to issue licenses to hemp producers if they are required by federal law to hold a license to produce hemp. Wis. Stat. § 94.55(2)(am) (2019–20.) The new statute added "producing" to the list of things covered by DATCP licenses, providing that licenses from DATCP "may authorize the planting, growing, cultivating, harvesting, producing, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of hemp." Wis. Stat. § 94.55 (2019–20.) Hemp producers under Wis. Stat. § 94.55(2)(am) are plainly hemp growers, not hemp processors, because only hemp growers are required to be licensed under federal law.

After the Legislature amended Wis. Stat. § 94.55 to add "producers," DATCP repealed and recreated ATCP 22 relating to hemp. The new rule still differentiated between a grower license and a processor license. It provided that a licensed hemp grower may "plant, possess, cultivate, grow, and harvest hemp", and may "store, handle, and covert into a marketable form" the hemp "cultivated, grown, and harvested" under the license. ATCP 22.03(1). And it provided that a licensed hemp processor may only "store, handle, and convert hemp into a marketable form." ATCP 22.03(3). Analysis by DATCP made it clear that the USDA final rule and ATCP 22 "gives growers the greatest opportunity to produce hemp," and "gives growers the option to remediate, resample, and retest non-compliant hemp." ATCP 22 Analysis Prepared by the Department of Agriculture, Trade and Consumer Protection. As DATCP recognized, USDA's final rule applies to hemp producers (growers), not to hemp processors.

The circuit court concluded that since DATCP is authorized to issue licenses to hemp producers that may authorize the processing of hemp, "the fact that the defendant Syrrakos operated [] as [a] hemp 'processor' does not block the negligent violation provisions of the same statute." (R. 77:10.)

However, while Wis. Stat. § 94.55(2)(am) provides that DATCP shall issue licenses to hemp producers that "may authorize the planting, growing, cultivating, harvesting, producing, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of hemp," only a hemp grower license authorizes all those actions. ATCP 22.03(1). A hemp processor license authorizes a person only to "store, handle and convert hemp into a marketable form under Wisconsin law" (process hemp). ATCP 22.03(3).

Syrrakos was not a licensed hemp grower. He was issued a hemp processor license. (R. 43:3.) He was not

authorized to "plant, possess, cultivate, grow, and harvest under Wisconsin law" (produce hemp). ATCP 22.03(1). Just like under federal law, the provisions for negligent violations under Wis. Stat. § 94.55 (2g) apply to hemp producers (growers), not to hemp processors.

The enumerated negligent violations under Wis. Stat. § 94.55(2g)(a) which apply only to hemp producers, confirm that hemp producers are hemp growers, not hemp processors. A person can negligently violate Wis. Stat. § 94.55(2g) or DATCP rules in three ways, by

> 1. Failing to provide a legal description of land on which the producer produces hemp;
>
> 2. If required by federal law, failing to obtain a license [to produce hemp]; or
>
> 3. Producing Cannabis sativa L. with a [THC concentration above 0.3 percent (THC rather than hemp).]

All these violations apply to hemp growers, not hemp processors. First, a hemp grower is required to provide a legal description of the land on which his hemp crop would be grown. A person processing hemp in his home or store is not required to provide a legal description of his home or store. Second, while federal law requires hemp growers to obtain a producer (grower) license, federal law does not require a license to process hemp. Federal law does not address hemp processing at all. And third, a person who only processes hemp or THC does not produce the Cannabis sativa L. plant.

The list of consequences for negligently violating Wis. Stat. § 94.55 or DATCP rules under the statute also can only reasonably apply to hemp growers and not to hemp processors. A person who negligently violates Wis. Stat. § 94.55 or DATCP rules is required to "comply with a plan established by [DATCP] to correct the negligent violation." Wis. Stat. § 94.55(2g)(b). The plan must include "A reasonable date by which the hemp producer is required to correct the

negligent violation," and "A requirement that the hemp producer periodically report to the department on the compliance of the hemp producer with the department's plan for a period of not less than the following 2 years." Wis. Stat. § 94.55(2g)(b)1. and 2.

Logically, these requirements of a DATCP plan and compliance with that plan apply to hemp growers, not to hemp processors. DATCP could reasonably establish a plan for a hemp grower who produces a crop with too high a THC concentration to be hemp. But what plan could DATCP establish to correct a hemp processor's sale of a product that has a THC concentration higher than that which makes it hemp? Since Syrrakos had only a license to process hemp, not a license to grow it as required under federal law, none of these enumerated negligent violations which apply only to hemp producers apply to him.

b. The State did not charge Syrrakos with violating Wis. Stat. § 94.55, so prosecution without a referral from DATCP is not prohibited by Wis. Stat. § 961.32

The circuit court rejected what it termed "the State's view that once a substance no longer is definable as 'hemp,' it graduates automatically to criminal regulation under ch. 961, Wis. Stats." (R. 77:10; A-App. 147.) The court said that "the legislature intended that [a] governmental agency chosen by the legislature act as a clearinghouse for individuals operating under license under Section 94.55, Wis. Stats." The court concluded that the Legislature therefore enacted a statute that "prohibits unambiguously any prosecution, whether civil or criminal until and unless a referral is made by the designated governmental agency." (R. 77:10; A-App. 147.)

However, the statute the court relied on, Wis. Stat. § 961.32(3)(c), does not apply to the charges against Syrrakos. The statute provides in relevant part that "[a] person who violates. S. 94.55 or a rule promulgated under s. 94.55 may not be prosecuted under s. 94.55 or this chapter unless the person is referred to the district attorney for the county in which the violation occurred" by DATCP. Wis. Stat. § 961.32(3)(c). Here, the State did not charge Syrrakos for violating the hemp law, Wis. Stat. § 94.55, by producing a "hot" crop of Cannabis sativa L., either negligently, Wis. Stat § 94.55(2g) or with a mental state greater than negligence. Wis. Stat. § 94.55(2m). The State charged Syrrakos with intentionally violating statutes in Chapter 961 by possessing, manufacturing, and delivering marijuana in products containing up to 134 times the .3 percent THC limit that would make the product hemp.

The provisions in Wis. Stat. § 961.32 explaining when a person who produces a "hot" crop but who does not otherwise violate the hemp law cannot be prosecuted also do not apply to Syrrakos's crimes. These provisions reflect USDA's final rule relating to the growing of a "hot" crop of hemp. Wisconsin Stat. § 961.32(3)(b) provides that a person who is not otherwise violating Wis. Stat. § 94.55 or a DATCP rule promulgated thereunder may not be prosecuted for a number of acts involving cannabis with a THC concentration above the 0.3 percent THC level that would make it hemp, but under the one percent THC level that would make it a controlled substance under federal law. The statute provides that a person cannot be prosecuted for "planting, growing, cultivating, harvesting, producing, processing, or transporting" cannabis with a THC concentration below one percent, Wis. Stat. § 961.32(3)(b)1. A person cannot be prosecuted for possessing cannabis with a THC concentration below one percent if the possessor reconditions or processes the cannabis to a THC concentration below 0.3 percent,

Wis. Stat. § 961.32(3)(b)4. And a person cannot be prosecuted for "[t]emporarily possessing cannabis during the normal course of processing hemp if the processor reconditions or processes the cannabis to" a THC concentration of 0.3 percent within a reasonable time. Wis. Stat. § 961.32(3)(b)4m. None of these provisions apply to the charges against Syrrakos because the State alleged that he possessed cannabis with a THC concentration above one percent, and he did not process if to a THC concentration of .3 percent or less within a reasonable time. He instead possessed, manufactured or deliver, and sold the cannabis with a THC concentration above one percent.

The Legislature did not provide that a person with a mere license to process hemp, but not to grow (produce) it, cannot be prosecuted for possessing, manufacturing, or delivering cannabis with a THC concentration above one percent without a referral from DATCP. Such a provision would fly in the face of federal law under which cannabis with a THC concentration above one percent is a controlled substance. It would mean that a person with a license to process hemp, which is not required under federal law, would somehow be exempted from prosecution for intentionally selling a product that is not hemp, but is a controlled substance under federal law. And it would mean that a person with a hemp processing license could sell any quantity of marijuana—bales or truckloads of it—and could only be prosecuted if DATCP—an agency that was only tasked with administering a hemp program—refers the case to the district attorney. There is no indication that the Legislature intended this result. Therefore, even if the statute were ambiguous, this Court should interpret it to allow for prosecution of a person with a license to process hemp for possessing, manufacturing, or delivering marijuana without a referral from DATCP.

Since Syrrakos was not a licensed hemp producer, the negligent violations provision under Wis. Stat. § 94.55(2g) did not apply to him, and Wis. Stat. § 961.32(3)(c), which bars prosecution under Chapter 961 for "a person who violates s. 94.55," did not bar his prosecution for crimes involving THC possession, manufacturing, and delivery under Chapter 961 without a referral from DATCP.

B. Nothing in Wis. Stat. § 94.55 or Wis. Stat. § 961.32 prohibits charging a person, whether a licensed hemp processor or not, for maintaining a drug trafficking place.

In addition to the charges relating to possessing, manufacturing, and delivering THC, the State charged Syrrakos with two counts of maintaining a drug trafficking place, one each for Superstar Buds and the residence he shared with Shattuck. (R. 2:4–6; A-App. 7–9.) And it charged Shattuck for maintaining a drug trafficking place for the residence. (R. 2:6; A-App. 9.) The circuit court dismissed all the charges for maintaining a drug trafficking place. The court concluded that "the relevant questions regarding potential liability relate both to products held for sale or maintained as stock to hold for sale and the processing of such products, regardless of material location." (R. 77:11; A-App. 148.) The court concluded that both Syrrakos and Shattuck are therefore "entitled, in the interests of justice, to the Court's reconsideration and analysis." (R. 77:11; A-App. 148.)

The court's conclusion is incorrect. A person maintains a drug trafficking place when he knowingly keeps or maintains a or dwelling "which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for manufacturing, keeping or delivering them in violation of this chapter." Wis. Stat. § 961.42(1). The State charged Syrrakos with maintaining Superstar Buds as a drug trafficking place. The State alleged that he manufactured and delivered

products with a THC concentration above the 0.3 percent that would make it hemp, and above the one percent that would allow for prosecution under Wis. Stat. § 961.32. The State alleged that he sold products with a THC concentration as high as 40 percent (two orders of magnitude higher than the legal limit). (R. 2:9; A-App. 12.) He was not maintaining a store that only processed and sold legal hemp products. He maintained a store used for manufacturing, keeping, or delivering controlled substances. And his license to process hemp, but not to grow it, did not provide a shield to prosecution without a referral by DATCP.

The State also charged Syrrakos and Shattuck for maintaining their residence as a drug trafficking place. (R. 2:5–6; A-App. 8–9.) Police searched the residence pursuant to a search warrant and found various products containing THC, along with packaging materials. (R. 2:10; A-App. 13.) The criminal complaint alleged that Syrrakos and Shattuck used their residence for possessing and processing controlled substances. (R. 2:5–6, 10–13; A-App. 8–9; 13–16.) The circuit court concluded that since Syrrakos had a hemp processor license, he could only be prosecuted for possessing and processing controlled substances in his home if DATCP referred the case to the district attorney. (R. 77:11; A-App. 148.) As explained above, the court was incorrect since the law requiring such a referral applies only to hemp producers (growers) not to hemp processors. And even if the statute requiring a referral did apply to a person with a hemp processor license, it would not prohibit prosecution of Shattuck without a referral from DATCP because Syrrakos sold marijuana with a THC content far above one percent, beyond the 0.3 to one percent range governed by the regulations he attempts to rely on. And Shattuck did not have a license to process hemp, much less to produce (grow) it. The circuit court therefore erred when it dismissed the charges

against Syrrakos and Shattuck for maintaining a drug trafficking place.

C. Because the charges against Syrrakos and Shattuck were not prohibited by statute, the circuit court had competency to adjudicate them.

A "circuit court's determination of competency refers to its 'ability to exercise the subject matter jurisdiction vested in it' by Article VII, Section 8 of the Wisconsin Constitution." *Booth*, 370 Wis. 2d 595, ¶ 20 (citing *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶ 16, 348 Wis. 2d 282, 832 N.W.2d 121) (quoting *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 9, 273 Wis. 2d 76, 681 N.W.2d 190). That ability "may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction in individual cases." *Mikrut*, 273 Wis. 2d 76, ¶ 9. "[A] failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court." *Booth*, 370 Wis. 2d 595, ¶ 20 (citation omitted).

The circuit court concluded that it lacked competency over the charges against Syrrakos and Shattuck. (R. 77:10–11; A-App. 147–48.) However, as explained above, the charges complied with statutory mandates. The circuit court therefore had competency to adjudicate the cases against Syrrakos and Shattuck, and it erred when it dismissed them.

CONCLUSION

This Court should reverse the order dismissing the charges against Syrrakos and Shattuck.

Dated this 7th day of August 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6567 words.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of August 2024.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General