In the Court of Appeals of the State of Alaska

Jonathan W. McGraw Jr., Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13566** **Order** Date of Notice: **10/29/2020**

Trial Court Case No. **1PW-18-00082CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Jonathan William McGraw Jr. was convicted of second-degree misconduct involving a controlled substance, a class B felony, and his case is currently on appeal. McGraw asked the trial court to release him on bail pending appeal, but the trial court concluded that McGraw was ineligible for bail pending appeal under AS 12.30.040(b)(3), and the court denied his request for a bail hearing. McGraw now appeals that ruling.

Under AS 12.30.040(b)(3), a person who has been convicted of a class B felony is ineligible for bail pending appeal if "the person has been convicted within the previous 10 years of a felony committed in this state or a similar offense committed in another jurisdiction." In 2011, McGraw was convicted in Alaska of fourth-degree misconduct involving a controlled substance, a felony, for possessing one ounce or more of marijuana for distribution.[1]

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[1] *See McGraw v. State*, 2015 WL 5000516 (Alaska App. Aug. 19, 2015) (unpublished).

On appeal, McGraw argues that certain conduct underlying the statute for which he was convicted has since been decriminalized or reclassified as a misdemeanor, and as a result, his prior conviction does not disqualify him from release under AS 12.30.040(b)(3). Alternatively, he argues that construing AS 12.30.040(b)(3) to disregard the purported reclassification of his prior offense would violate his right to equal protection under the law. For the reasons we explain, we reject McGraw's arguments and affirm the trial court's denial of his request for release on bail pending appeal.

McGraw first argues that a prior conviction does not qualify as a "felony committed in this state" for purposes of AS 12.30.040(b)(3) unless the elements of the prior offense are similar to the elements of the offense under current law. As support for his position, McGraw relies on cases in which we have interpreted the definition of "prior conviction" set out in AS 12.55.145(a), the statute which governs the determination of whether prior convictions should be considered for purposes of presumptive sentencing.

But the language of AS 12.55.145(a) is markedly different from the language of AS 12.30.040(b)(3). Under AS 12.55.145(a), for an offense to qualify as a "prior conviction," it must have "*elements* similar to those" of an offense under Alaska law.[2] In contrast, under AS 12.30.040(b)(3), the question simply is whether the

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[2] AS 12.55.145(a)(1)(B), AS 12.55.145(a)(2)(A), AS 12.55.145(a)(3)(B), and AS 12.55.145(a)(4)(D) (emphasis added); *see, e.g.*, *Walsh v. State*, 677 P.2d 912, 915 (Alaska App. 1984) (holding that the statute under which the defendant was convicted must be compared with the current Alaska statute in determining whether the offense is a "prior conviction" for purposes of former AS 12.55.145(a)(2)); *Lee v. State*, 673 P.2d 892, 894 (Alaska App. 1983) (holding that the definition of "prior conviction" does not focus on the

(continued...)

defendant "has been convicted within the previous 10 years of a felony committed in this state."

Here, McGraw concedes that he was convicted within the previous 10 years of a felony committed in Alaska, under former AS 11.71.040(a)(2). Accordingly, AS 12.30.040(b)(3) renders him ineligible for bail pending appeal.

McGraw also argues that if AS 12.30.040(b)(3) is not interpreted to require a "prior conviction" to have elements that are similar to the elements of an offense under current law, the statute would violate the equal protection clause contained in Article I, Section 1 of the Alaska Constitution. He contends that it would be unconstitutional to treat defendants who were convicted for the same conduct differently depending on whether the prior conduct occurred before or after the offense was decriminalized or reclassified as a misdemeanor.

It is true that AS 11.71.040(a)(2), the statute under which McGraw was convicted, was amended after his conviction to limit prosecution of marijuana-related conduct.[3] But the amendment to the statute did not decriminalize all use and distribution of marijuana. Instead, it decriminalized, *inter alia*, possessing one ounce or less of marijuana; "possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the

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[2] (...continued)
defendant's actual conduct in the prior case but rather on the similarity between the elements of the offense and current law).

[3] *Compare* former AS 11.71.040(a)(2) (2009) *with* FSSLA 2019, ch. 4, § 51 (amending AS 11.71.040(a) to incorporate AS 17.38, the statutory provisions regulating the use of marijuana); *see also* AS 17.38.020 (added by 2014 Ballot Measure No. 2, § 1, eff. Feb. 24, 2015).

marijuana produced by the plants on the premises where the plants were grown"; and "transferring one ounce or less of marijuana and up to six immature marijuana plants to a person who is 21 years of age or older without remuneration."[4]

McGraw does not argue that the conduct underlying his previous conviction would not also be punishable as a felony under current law.[5] He argues only that his previous offense should not be considered a "prior conviction" because the statute under which he was convicted does not have elements that are similar to the current Alaska statute. Because McGraw does not claim that a defendant who engaged in the same conduct today would be treated any differently than he is under the bail statute, his equal protection argument fails.

Accordingly, we AFFIRM the trial court's denial of McGraw's request for release on bail.

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[4] AS 17.38.020.

[5] Indeed, McGraw was convicted in 2011 of possessing one ounce or more of marijuana with the intent to distribute. As we noted in our opinion affirming his conviction, the evidence presented at McGraw's trial showed that the police seized 102 marijuana plants from McGraw's property and that McGraw had been paid to deliver marijuana to other people. *McGraw*, 2015 WL 5000516, at *2.

Clerk of the Appellate Courts

/s/ Carly Williams

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Carly Williams, Deputy Clerk

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