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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

v.

DEFENDANT NAME (001),

Defendant.

No. CR 201X-XXXXXX-001

MOTION TO DISMISS

(Hon. JUDGE NAME)

Defendant, DEFENDANT NAME, respectfully asks the Court to dismiss the indictment because it is insufficient as a matter of law, in accordance with Arizona Rule of Criminal Procedure 16.6 as well as the Fifth and Eighth Amendments of the U.S. Constitution and Article 2, Sections 4 and 15 of the Arizona Constitution. Specifically, the indictment is insufficient because it fails to state a crime: the statute underlying the charge, A.R.S. § 13-1819(A)(2), is unconstitutional on its face because it results in a strict liability offense with a harsh penalty, unfair stigma, and overbroad regulation of non-dangerous conduct; further, it encompasses innocent conduct and imposes an arbitrary and disproportionate punishment.

Memorandum of Points and Authorities

I. Facts

Defendant was indicted for the facilitated form of Organized Retail Theft, a class 4

felony, in violation of A.R.S. § 13-1819(A)(2). The offense does not require any mental state:

A person commits organized retail theft if the person acting alone or in conjunction with another person does any of the following:

...

2. Uses an artifice, instrument, container, device or other article to facilitate the removal of merchandise from a retail establishment without paying the purchase price.

A.R.S. § 13-1819(A)(2).

II. Law and Argument

The United States Supreme Court has explained that a criminal offense may permissibly lack a mental state only if it is a regulatory or public welfare offense. Such offenses have slight penalties, carry a stigma less than that of a felony, and regulate inherently dangerous conduct. *Staples v. United States*, 511 U.S. 600, 618-19 (1994); *United States v. X-Citement Video*, 513 U.S. 64, 71-73 (1994); *Morissette*, 342 U.S. 246, 254 (1952). This analysis has been adopted by the Arizona Court of Appeals. *State v. Slayton*, 214 Ariz. 511, 516 ¶ 20, 154 P.3d 1057, 1062 (App. 2007). By contrast, traditional common-law offenses like theft must have a mental state requirement, and even the Legislature exceeds its power by omitting that requirement. *See, e.g., X-Citement Video*, 513 U.S. at 78; *Morissette*, 342 U.S. at 275 (“Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit.”).

Under this framework, A.R.S. § 13-1819(A)(2) fails completely and is unconstitutional. A first-time offender faces up to 3.75 years of imprisonment, a fine of up to \$150,000, forfeiture, and the loss of basic civil rights. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.18 (1978) (3 years too harsh). Further, the conduct regulated includes much that is innocent because the statute allows conviction without regard to the value of the merchandise or any exception for accident, mistake, or negligence. For example, a person who accidentally left the store with unpaid-

for water on the bottom of their shopping cart, or whose child places a candy bar with their purchases, would be guilty under A.R.S § 13-1819(A)(2) as the statute is written.

Arizona courts will strike down statutes that create a mandatory presumption of guilt on an element of a crime. *State v. Seyrafi*, 201 Ariz. 147, 151 ¶ 17, 32 P.3d 430, 434 (App. 1970) (presumption in city code that the recorded owner of property controlled the property, and thus was subject to criminal penalties, violated due process by “impos[ing] strict criminal liability”); *see also Norton v. Superior Court In & For Cty. of Maricopa*, 171 Ariz. 155, 159, 829 P.2d 345, 349 (App. 1992) (severing unconstitutional portion of statute that required factfinder to presume element of crime); *State v. Shaw*, 106 Ariz. 103, 112, 471 P.2d 715, 724 (1970) (in banc) (statute that bifurcated guilty-but-insane trials into a guilt phase and an insanity phase unconstitutional because first phase presumed criminal intent). Organized Retail Theft (A)(2) assumes criminal intent without requiring the State to meet its burden of proof, and therefore is invalid and unconstitutional. *See Shaw*, 106 Ariz. at 112, 471 P.2d at 724 (“It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention.”) (quoting *Morissette*, 342 U.S. at 274).

The Court of Appeals, Division Two, decision in *State v. Veloz* does not change this analysis. 236 Ariz. 532, 342 P.3d 1272 (App. 2015). In *Veloz*, the court held that an implicit mental state requirement—the intent to deprive—must be read into A.R.S § 13-1819(A)(2). *Id.* at ¶ 10, 342 P.3d at 1276. But *Veloz* was wrongly decided because it goes against the Legislature’s clear intent to create a strict liability offense. “All rules for the interpretation of statutes have for their sole objective the discovery of legislative intent.” *City of Mesa v. Killingsworth*, 96 Ariz. 290, 295, 394 P.2d 410, 413 (1964) (in banc).

Three things indicate the Legislature’s intent to make § 13-1819(A)(2) a strict liability crime.

First, subsection (A)(1) does have a mental state requirement, meaning that the Legislature knew what it was doing when it omitted any such requirement from subsection (A)(2). *See Banks v. Arizona State Bd. of Pardons & Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035, 1039 (App. 1981). Second, the legislative history shows that the Legislature first added and then removed an intent requirement from what is now subsection (A)(2). *See Veloz*, 236 Ariz. ¶ 9 n. 4, 342 P.3d at 1276 n.4. Third, A.R.S. 12-202 dictates that “[i]f a statute defining an offense does not expressly prescribe a culpable mental state . . . no culpable mental state is required . . . and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state.” Further, the *Veloz* court erred by relying on the common law to conclude that the Legislature must have intended a mental state requirement. *See Veloz*, 236 Ariz. ¶ 10, 342 P.3d at 1276; A.R.S. § 13-103 (“All common law offenses . . . are abolished.”); *Vo v. Superior Court In & For Cty. of Maricopa*, 172 Ariz. 195, 204, 836 P.2d 408, 417 (App. 1992) (“Arizona is a ‘code state,’ and this court is legislatively precluded from creating new crimes by expanding the common law through judicial decision”).

In sum, the Legislature’s intent should be given effect, and A.R.S. § 13-1819(A)(2) should be interpreted to impose strict liability on a theft offense. But because a statute imposing strict liability and harsh penalties for a traditional theft offense is unconstitutional, the statute should be struck down. *See Seyrafi*, 106 Ariz. at 151 ¶ 17, 32 P.3d at 434.

The facilitated form of Organized Retail Theft is also unconstitutional because it criminalizes innocent conduct. As noted, a person could accidentally and unknowingly take merchandise from a retail establishment, which, under A.R.S. § 13-1819(A)(2), is a class 4 felony. Such punishment violates the Eight Amendment. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”);

see generally Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol’y 1065, 1098-99 (2014).

III. Conclusion

For these reasons, Defendant respectfully asks the Court to dismiss the indictment. It is insufficient as a matter of law because the underlying statute, A.R.S. § 13-1819(A)(2), unconstitutionally imposes strict liability on a traditional theft crime. Further, its punishment of innocent conduct violates the right against cruel and unusual punishment.

Respectfully submitted DATE.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/ * _____
*
Deputy Public Defender

Copy of the foregoing e-filed DATE to:

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