IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	
-vs.-	)	**No. S-2015-771**
	)	
CARL EDWARD PRINCE a/k/a CARL EDWARD HARPER,	)	
	)	
Appellee.	)	

ACCELERATED DOCKET OPINION

LEWIS, JUDGE:

Appellee, Carl Edward Prince a/k/a Carl Edward Harper, was charged by Information in the District Court of Garvin County, Case No. CF-2013-19, with Count 1: Possession of Marijuana with Intent to Distribute within 2000 Feet of a School (63 O.S.Supp.2012, § 2-401(F)); Count 2: Maintaining Place for Keeping/Selling Controlled Substance (63 O.S.2011, § 2-404(A)(6)); and Count 3: Unlawful Use of a Police Radio while in Commission of a Felony (21 O.S. 2011, § 1214), all after former conviction of two or more drug related felonies. At the August 4, 2015, preliminary hearing, the Magistrate, the Honorable Trisha Misak, Special Judge, sustained Prince's demurrer to Count 2.

The applicable statute under which Count 2 was brought states:

> A. It shall be unlawful for any person:
>
> . . . .
>
> 6. To *keep or maintain* any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled dangerous substances in violation of this act for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this act.

63 O.S.2011, § 2-404(A)(6) (emphasis added). In sustaining that demurrer, the

Magistrate found, "[T]here is not sufficient cause to believe the Defendant guilty of Count 2 of the complaint pursuant to *Meeks v. State*, 1994 OK CR 20, ¶ 7, 872 P.2d 936, 939, requiring proof of more than an isolated incident of activity." (O.R. 11.)

The State appealed the Magistrate's decision under the authority of 22 O.S.2011, § 1089.1. On August 25, 2015, the Honorable George W. Butner, District Judge, heard that appeal. Judge Butner affirmed the Magistrate's ruling on concluding that the evidence presented by the State failed to adequately prove Prince had "kept or maintained" marijuana within the meaning of the statute. (O.R. 113.) The State now appeals to this Court. That appeal was automatically assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2016).

Oral argument was held on April 14, 2016, and the Court duly considered Appellant's propositions of error raised on appeal:

> Proposition 1
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> The preliminary hearing magistrate erred in the demurrer because the "*habitualness-requirement*" for a conviction—which the magistrate read into the elements—is a fact question for the jury and guidance for deliberation.
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> Proposition 2
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> Even if the "*habitualness-requirement*" is viewed as an element of the offense, the State adduced sufficient evidence at preliminary hearing to carry the question to a jury.

After hearing oral argument and thoroughly considering Appellant's propositions of error and the entire record before us on appeal, the Court affirms.

The language of Section 2-404(A)(6), under which Prince was charged, has been construed by this Court as requiring "more than a single, isolated

activity." *Howard v. State*, 1991 OK CR 76, ¶ 9, 815 P.2d 679, 683. Instead it requires "evidence that the location in question is somehow being used for the purpose of facilitating drug usage or sales" and that such use is at least "a substantial purpose" of the location maintained. *Id.* In a subsequent decision, the Court elaborated further on the offense described in this statute:

> [T]he activity giving rise to the charge must be more than a single, isolated activity. Rather, the term implies an element of *some degree of habitualness.*
>
> . . . .
>
> . . . [T]he mere possession of limited quantities of a controlled substance by the person keeping or maintaining the residence, structure, or vehicle for that person's personal use within that residence or structure is insufficient to support a conviction under this section.

Meeks v. State, 1994 OK CR 20, ¶ 7, 872 P.2d 936, 939 (emphasis added).[1] We therefore reject Appellant's contention in Proposition 1 that the habitualness issue was not a matter required to be shown to establish probable cause for an offense under Section 2-404(A)(6).

In state appeals brought under the procedures established at 22 O.S. 2011, §§ 1089.1 - 1089.7, and Section VI of this Court's *Rules*, this Court reviews the factual findings of the magistrate and reviewing judge for an abuse of discretion[2] and reviews their legal interpretation of statutes de novo.[3] This

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[1] In construing the statute, the Court looked to decisions from early state history that construed statutes prohibiting the keeping of a bawdy house. *Meeks*, ¶ 7, 872 P.2d at 939 *citing Jones v. State*, 10 Okl.Cr. 79, 133 P. 1134, 1135 (1913); *Nelson v. Territory*, 5 Okl. 512, 49 P. 920 (1897).

[2] *See State v. Swicegood*, 1990 OK CR 48, ¶ 7, 795 P.2d 527, 529 (where the State failed to meet its burden to show the alleged crime was committed, causing the magistrate to sustain the defendant's demurrer, "[a]bsent an abuse of the discretion in reaching that decision, the magistrate's ruling will remain undisturbed"); *accord State v. Vincent*, 2016 OK CR 7, ¶ 5, ___ P.3d ___, 87 OBJ 733, 734 (Okl.Cr. March 23, 2016).

requires that "we consider the evidence in the light most favorable to the district court's ruling [and] accept those of the district court's factual determinations supported by evidence." *State v. Zungali, et al.*, 2015 OK CR 8, ¶ 4,348 P.3d 704, 705. In other words, "this Court defers to the trial court's findings of fact unless they are not supported by competent evidence and are therefore clearly erroneous." *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92.

In Appellant's matter, there was certainly evidence that Prince possessed marijuana in his apartment. There was additionally evidence from which reasonable persons could conclude that Prince was intending to sale or distribute the marijuana. Lacking at preliminary hearing, however, was direct proof of when Prince came into possession of the marijuana and whether his possession and intent was an isolated incident. Therefore, whether the State presented that quantum of evidence sufficient to establish probable cause on the habitualness issue must necessarily remain a judgment within the purview of the Magistrate.[4] Providing appropriate deference to the Magistrate's judgment on that issue, and being unable to find it is clearly erroneous based on the evidence presented, we find no abuse of discretion. We therefore find Appellant's Proposition 2 lacks merit.

DECISION

The Magistrate's order of August 4, 2105, sustaining Appellee's demurrer to the preliminary hearing evidence on Count 2 of the State's Information

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[3] *In re J.L.M.*, 2005 OK 15, ¶ 4, 109 P.3d 336, 338 (where the issue on appeal is one of statutory construction, "the standard of review is *de novo*," and appellate court had "plenary, independent and non-deferential authority to determine whether the trial court erred in its legal ruling").

[4] In arguing against the demurrer at preliminary hearing, the State's attorney claimed he need not show habitualness at preliminary hearing but only when before the jury, and he seemed to admit that he had not presented proof of the habitualness requirement over which the Magistrate had concern. (Tr. 50-53.)

against Carl Edward Prince a/k/a Carl Edward Harper, in Garvin County District Court, Case No. CF-2013-19, and the reviewing judge's decision of August 25, 2105, upholding the Magistrate's order, are hereby **AFFIRMED**. Pursuant to Rule 3.15 of this Court's *Rules*, **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARVIN COUNTY
THE HONORABLE TRISHA MISAK, SPECIAL JUDGE, AS MAGISTRATE
THE HONORABLE GEORGE W. BUTNER, DISTRICT JUDGE, ON REVIEW

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OPINION BY: LEWIS, J.
Smith, P.J.: Concurs
Lumpkin, V.P.J.: Concurs
Johnson, J.: Concurs
Hudson, J.: Dissents

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HUDSON, J., DISSENTING

The lower courts abused their discretion in sustaining the defendant's demurrer to the Count 2 charge alleging Maintaining a Place for Keeping or Selling a Controlled Dangerous Substance. The lower courts' decision, like the majority opinion in this case, is based on a misapplication of 63 O.S.2011, § 2-404(A)(6) driven by our decisions in *Howard v. State*, 1991 OK CR 76, 815 P.2d 679 and *Meeks v. State*, 1994 OK CR 20, 872 P.2d 936. I dissent to this Court's unwillingness to revisit its unnecessarily restrictive interpretation of 63 O.S.2011, § 2-404(A)(6) which resulted in the demurrer and would reverse the lower courts' rulings. *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117 (we review *de novo* a magistrate's legal conclusions drawn from the facts).

We have interpreted § 2-404(A)(6) to require proof "that the activity giving rise to the charge must be more than a single, isolated activity." Rather, we have held that "keep[ing] or maintain[ing]" for § 2-404(A)(6) purposes implies an element of some degree of habitualness. *Meeks v. State*, 1994 OK CR 20, ¶ 7, 872 P.2d 936, 939. This limiting construction—which is part of the current uniform jury instruction for this charge—originated to prevent convictions under § 2-404(A)(6) due solely to the presence of drugs inside a residence, car or some other place. In *Howard v. State*, 1991 OK CR 76, 815 P.2d 679, this Court held that evidence of simple possession of drugs inside a motel room was insufficient to support a second charge of Maintaining a Place where Controlled Dangerous Substances are Kept. In that case, police discovered a small package of white powder on a bedside table in a motel room

along with a syringe, a piece of damp cotton and a broken cigarette. The package and the cotton both tested positive for methamphetamine. *Id.*, 1991 OK CR 76, ¶ 5, 815 P.2d at 682.

Howard correctly held that "the legislature intended to do more by the enactment of Section 2-404(A)(6) than provide additional punishment or enhanced punishment for cases of simple possession." *Id.*, 1991 OK CR 76, ¶ 8, 815 P.2d at 683. We noted that "[c]onviction under this section is warranted when there is evidence that the location in question is somehow being used for the purpose of facilitating drug usage or sales." *Id.* Towards that end, this Court articulated two essential elements for conviction under § 2-404(A)(6): 1) that a substantial purpose—but not necessarily the sole purpose—of the maintaining of a place identified by the statute is for the keeping, selling or using of controlled dangerous substances; and 2) the activity giving rise to the charge must be more than a single, isolated activity. *Id.*, 1991 OK CR 76, ¶ 9, 815 P.2d at 683. However, we emphasized that this second element "may be established through either direct or circumstantial evidence *of the intent to continue illicit activities at the place in question.*" *Id.* (emphasis added). We also recognized that these requirements "be applied to the facts and circumstances of each case individually rather than as hard and rigid rules." *Id.*

In *Meeks v. State*, 1994 OK CR 20, 872 P.2d 936, this Court applied the rules adopted in *Howard* to find sufficient evidence to support a conviction under 2-404(A)(6) for maintaining a dwelling house to facilitate the sale of

drugs to others and also for use by its inhabitants. *Id.*, 1994 OK CR 20, ¶¶ 2-5, 872 P.2d at 937-38. In *Meeks*, the State presented, *inter alia*, evidence of two drug sales by the defendant occurring on the same day to the same person at the defendant's residence. Additionally, a second person present at the defendant's house made a living as a drug dealer and the defendant himself had only sporadic employment. Even though there was no evidence that the defendant kept or maintained the house primarily to sell drugs, we emphasized *Howard*'s holding that this need not be the primary purposes for maintaining a dwelling. Rather, it need only be a *substantial* purpose. *Id.*

We nonetheless granted relief in *Meeks* because the written instruction defining the § 2-404(A)(6) offense for the jury allowed the defendant to be convicted simply because he consumed drugs in his home. *Meeks*, 1994 OK CR 20, ¶¶ 6-7, 872 P.2d at 938-39. This Court prescribed language in *Meeks* for use in all future cases to define for juries the § 2-404(A)(6) offense. *Meeks*, 1994 OK CR 20, ¶ 7, 872 P.2d at 939. Notably, this language from *Meeks* was adopted nearly verbatim by the uniform instruction committee in Instruction No. 6-12, OUJI-CR(2d) (Supp. 2000). The uniform instruction emphasizes that a conviction for maintaining a place where controlled dangerous substances are kept "requires that the activity giving rise to the charge must be more than a single, isolated activity. Rather, the term implies an element of some degree of habitualness." *Id.* The instruction goes on to state that "mere possession of limited quantities of a controlled substance by the person keeping or maintaining the residence, structure, or vehicle for that person's personal use

within that residence or structure is insufficient to support a conviction under this section." *Id.*

Missing from this instruction is language from *Howard* emphasizing that a conviction under this section may be proven "through either direct or circumstantial evidence of the intent to continue illicit activities at the place in question." *Howard*, 1991 OK CR 76, ¶ 9, 815 P.2d at 683. We chose instead to replace it with language directing that evidence of "some degree of habitualness" was required for a conviction under § 2-404(A)(6). Perhaps unsurprisingly, the published cases where we have affirmed convictions under § 2-404(A)(6) have involved evidence of drug sales occurring over a period of days or even weeks at a dwelling house, *see Ott v. State*, 1998 OK CR 51, ¶ 11, 967 P.2d 472, 476, or proof of multiple drug sales occurring on the same day in the same dwelling house. *See Meeks*, 1994 OK CR 20, ¶¶ 3-5, 872 P.2d at 938.

In my view, the plain language of § 2-404(A)(6) unquestionably covers the facts in the present case. Nonetheless, the interpretive gloss we have developed and applied over the years for this section has stifled the ability of prosecutors to charge on similar facts under § 2-404(A)(6). The State's evidence at preliminary hearing shows that half a pound of marijuana was recovered in Appellant's living room in close proximity to an operating police scanner tuned to the Pauls Valley Police Department along with a handwritten note of the radio frequencies used by the local police department. The marijuana itself

was contained in a large plastic bag concealed inside a Crown Royal bag. Additionally, a digital scale and a box of sandwich baggies were found nearby.

The lower courts' demurrer of Count 2 turned on the lack of proof at preliminary hearing of sales, delivery, or other habitual drug activity. Evidence of the operating police scanner tuned to the local police department, however, provides probable cause to show that a substantial purpose of the defendant's residence was to keep, protect and defend the illegal drugs found inside. Section 2-404(A)(6) prescribes the keeping or maintaining of any dwelling house or other place for the purpose of keeping *or* selling controlled dangerous substances. This statutory language is broad and suggests that the Legislature intended to cover situations where a defendant keeps or maintains a dwelling house to keep illegal drugs so long as the evidence demonstrates an intent to continue his or her illicit purposes in the future. The operating police scanner in this case, along with the additional evidence of drug distribution presented in relation to the sandwich bags and digital scale, demonstrate the defendant's intent to continue his illicit drug activities at his residence even though there was no evidence of repeated drug sales. Thus, there was more than sufficient evidence under the plain language of § 2-404(A)(6) to enter a bindover order on Count 2.

In my view, this Court's interpretation and application of § 2-404(A)(6) has hamstrung the intended application of this statute. I believe the language from *Meeks* emphasizing the need for prosecutors to show some degree of habitualness is made with too broad a brush and has erroneously foreclosed

prosecutors from proceeding with this charge in a case like the present one. Nothing about § 2-404(A)(6)'s language suggests the Legislature intended for a defendant to effectively receive "one free pass" before becoming eligible for prosecution under this statute. *Howard* cited with approval language from a Georgia case interpreting a similar provision which stated "there is no inflexible rule that evidence found only on a single occasion cannot be sufficient to show a crime of a continuing nature." *Howard*, 1991 OK CR 76, ¶ 7, 815 P.2d at 683 (quoting *Barnes v. State*, 339 S.E.2d 229, 234 (Ga. 1986)). This language supports a charge under § 2-404(A)(6) in the present case; yet, the Court's emphasis on the need for prosecutors to show habitualness under this section forecloses that possibility. Here, the majority was not moved to revisit this issue and for that reason I dissent. This may therefore be a case where legislative intervention is necessary to right the course.