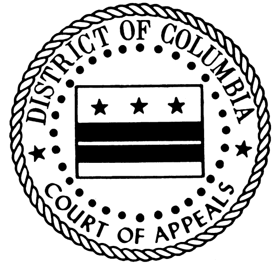

Clerk of the Court
Received 02/07/2024 04:59 PM
Filed 02/07/2024 04:59 PM

Appeal No. 23-CF-331

DISTRICT OF COLUMBIA COURT OF APPEALS

GREGORY PHILLIP WOODS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

SAMIA FAM
SHILPA S. SATOSKAR
* FLEMING TERRELL

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, NW
Washington, DC 20004
Telephone: (202) 628-1200

*Counsel for Oral Argument

DISCLOSURE STATEMENT

Gregory Woods was represented pretrial by Jonathan Armstrong and Aubrey Dillon of the Public Defender Service for the District of Columbia (PDS), and briefly by Stephanie Johnson, Esq. He was represented at trial by Aubrey Dillon, and is represented on appeal by Samia Fam, Shilpa S. Satoskar, and Fleming Terrell, also of PDS. The government was represented at trial by Assistant United States Attorneys Richard Kelley and Katie Yaske.

TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT 1

ISSUE PRESENTED..1

STATEMENT OF THE CASE AND JURISDICTION...1

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE TAMPERING BECAUSE IT SHOWED ONLY THAT MR. WOODS STOMPED ON THE BAGGIE OF WHITE SUBSTANCE BUT NOT THAT HE CHANGED THE SUBSTANCE IN ANY WAY. 11

A. The prosecution's evidence was not sufficient to show Mr. Woods "altered" the baggie or its contents because it did not show he diminished their evidentiary value as required under D.C. Code § 22-723. 14

B. The prosecution's evidence was not sufficient to show Mr. Woods "altered" the baggie or its contents because it did not show he changed them in any way. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

A.F. v. State, 850 So. 2d 667 (Fla. Dist. Ct. App. 2003) 19

Alfaro v. United States, 859 A.2d 149 (D.C. 2004)...11

In re Am. H., 299 A.3d 584 (D.C. 2023) 14, 15

* *Anderson v. State*, 123 P.3d 1110 (Alaska Ct. App. 2005)..............................20, 21

Belay v. District of Columbia, 860 A.2d 365 (D.C. 2004) 21

Facebook, Inc. v. Wint, 199 A.3d 625 (D.C. 2019) 15

Harris v. State, 991 A.2d 1135 (Del. 2010)..19

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 16

Lopez-Ramirez v. United States, 171 A.3d 169 (D.C. 2017).................................14

Mobley v. United States, 101 A.3d 406 (D.C. 2014) 18

People v. Comage, 946 N.E.2d 313 (Ill. 2011)..20

Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751 (D.C. 1983) (en banc) 15

* *Rivas v. United States*, 783 A.3d 125 (D.C. 2001) (en banc).....................11, 12, 23

* *Stahmann v. State*, 548 S.W.3d 46 (Tex. App. 2018) 22, 23

Stahmann v. State, 602 S.W.3d 573 (Tex. Crim. App. 2020)................................22

Vernon v. State, 841 S.W.2d 407 (Tex. Crim. App. 1992) (en banc).....................22

Statutes

District of Columbia Theft and White Collar Crimes Act of 1982, Title V, § 502(a), 29 D.C. Reg. 3976 (1982) (codified at D.C. Code § 22-722)...18

D.C. Code § 7-2502.01(a) 1

D.C. Code § 11-721(a)(1) 2

D.C. Code § 22-723(a) .... *passim*

D.C. Code § 22-3307 17

D.C. Code § 22-4502 1

D.C. Code § 22-4503(a) 1

D.C. Code § 22-4504 1

D.C. Code § 25-1001(a)(2) 1

D.C. Code § 48-902.06(1)(D) 21

D.C. Code § 48-904.01(a)(1) 6

D.C. Code § 48-1103(a) 1

D.C. Code § 50-1401.01(d) 2

Other Authorities

58 Am. Jur. 2d *Obstructing Justice* § 36 18

Extension of Comments on Bill No. 4-133: The District of Columbia Theft and White Collar Crimes Act of 1982 (July 20, 1982) (submitted by David A. Clarke) 17, 18

Council of the District of Columbia, Comm. on the Judiciary, *Rep. on Bill No. 4-133* (Jun. 1, 1982) 16, 17

* Cases chiefly relied upon are denoted with an asterisk

ISSUE PRESENTED

Gregory Wood was convicted of tampering with physical evidence, D.C. Code § 22-723, a felony, for stomping on a plastic baggie of suspected cocaine that fell from his waistband during a search incident to arrest. Arresting officers immediately retrieved the unchanged baggie of suspected cocaine from the ground. Was evidence of the stomp sufficient to prove Mr. Woods "alter[ed]" physical evidence within the meaning of the tampering statute?

STATEMENT OF THE CASE AND JURISDICTION

Gregory Woods was indicted for unlawful distribution of cocaine while armed, D.C. Code §§ 48-904.01(a)(1), 22-4502; unlawful possession with intent to distribute (PWID) cocaine while armed, D.C. Code §§ 48-904.01(a)(1), 22-4502; PWID synthetic cannabinoid while armed, D.C. Code §§ 48-904.01(a)(1), 22-4502; three counts of possession of a firearm during a crime of violence or dangerous offense (PFCV) predicated on the drug distribution offenses, D.C. Code § 22-4504(b); unlawful possession of a firearm by a felon, D.C. Code § 22-4503(a)(1); unlawful possession of a firearm by one previously convicted of an intrafamily offense, D.C. Code § 22-4503(a)(6); carrying a pistol without a license, D.C. Code § 22-4504(a)(2); possession of an unregistered firearm, D.C. Code § 7-2502.01(a); unlawful possession of ammunition, D.C. Code § 7-2506.01(a)(3); tampering with physical evidence, D.C. Code § 22-723; unlawful possession of drug paraphernalia, D.C. Code § 48-1103(a); possession of an open container of alcohol in a vehicle (POCA), D.C. Code § 25-1001(a)(2); and driving without a

permit, D.C. Code § 50-1401.01(d). R.18.[1] The government later elected to dismiss the PFCV, POCA and no-permit charges, and to proceed on an attempt theory for the drug distribution and possession charges (2/1/23 at 176-77).

A jury trial commenced before the Honorable Jason Park on February 1, 2023. At the close of the government's case, the defense moved for judgment of acquittal (MJOA) on all counts (2/8/23 at 176-77). The trial court granted the motion as to the PWID-synthetic cannabinoid and possession of drug paraphernalia charges (2/8/23 at 186-88). The defense unsuccessfully renewed its MJOA on the remaining charges after the close of all evidence (2/10/23 at 16-18). On February 10, 2023, the jury returned its verdict acquitting Mr. Woods of all but the tampering charge, and one count of attempted unlawful possession of a controlled substance as a lesser-included offense of the attempted PWID cocaine charge. R.106; 2/10/23 at 19-21.

On March 30, 2023, the court imposed a sentence of time served, plus a $50 Victims of Violent Crime Compensation Act (VVCA) payment on the misdemeanor attempted possession charge and a $100 VVCA payment on the felony tampering charge. R.111. Mr. Woods filed a timely notice of appeal on April 19, 2023. R.112. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

[1] All citations to "R.*" refer to the number assigned to a particular trial court filing by the Appeals Coordinator in amassing the record on appeal.

STATEMENT OF FACTS

Mr. Woods was arrested and charged with various drug distribution and weapons offenses after he was identified by an undercover officer as the person who sold him “crack” from a parked car during a police “buy bust operation” on December 4, 2019. The jury ultimately discredited the undercover officer’s identification, acquitting Mr. Woods of all charges for the drugs, firearm and ammunition police found inside the car where he had been sitting. R.106. Mr. Woods was convicted of the two remaining charges: attempted simple possession of a controlled substance, a misdemeanor, for the 1.2 grams of white, rock-like substance contained within a plastic baggie that fell from his waistband as police were searching him; and tampering with physical evidence, a felony, for stomping on that baggie before police moved him back and recovered the baggie of white, rock-like substance from the ground. *Id*. Mr. Woods argues on appeal that the evidence of stomping was insufficient to prove he “alter[ed]” physical evidence as required for conviction under the tampering statute. D.C. Code § 22-723.

The Buy Bust Operation

Metropolitan Police Department (MPD) Detective Ryan Tran testified that he served on the arrest team for a “buy bust operation” carried out on the evening of December 4, 2019, in the parking lot of a Valero gas station at 1801 West Virginia Avenue, NE (2/7/23 at 37, 40). Tran explained that a buy bust operation involves an undercover team purchasing drugs from a street dealer, then radioing a “lookout” description of the dealer to a uniformed arrest team waiting just out of

sight (2/7/23 at 32-36). The arrest team typically waits for word that the undercover buyer and their team have cleared the area, then moves in to find and arrest the suspected dealer (2/7/23 at 36).

On this occasion, Detective Raymond Hawkins acted as the undercover buyer (2/7/23 at 94-96). Hawkins testified that he approached a parked car with "several people around" it and asked the person in the driver's seat, "Hey who got some smoke" (2/8/23 at 15-17). According to Hawkins, the person replied, "You talking about crack?" (2/8/23 at 17). Hawkins testified that he affirmed, then got into the car, gave the person a pre-recorded $20 bill, and received a loose piece of white, rock-like substance in exchange (2/8/23 at 17-21, 59-60).[2] Hawkins said he then returned to the unmarked car where his partner was waiting, radioed to the arrest team that he had completed the buy, and drove away (2/8/23 at 23-24). He gave the arrest team a description of the car in which he made the buy, but no description of the dealer's appearance (2/8/23 at 73-74).

Detective Tran testified that he and three other arrest team members were waiting in an unmarked police car parked half a block away, out of sight and out of view of the Valero parking lot, when they received radio confirmation that "the buy was good" and they could move in to make an arrest (2/7/23 at 38-44). Upon pulling into the Valero parking lot, Tran said, he saw a vehicle matching the undercover team's lookout for "a Ford Freestyle" (2/7/23 at 45-46, 98-100). Tran

[2] MPD Investigator Ryan Bernier, testifying as a narcotics expert, told the jury that "Crack Cocaine" is a "rock like substance," "[a]lmost like chunks of soap or plastic," that "typically has a white or maybe just a yellowish t[i]nt to it" (2/8/23 at 125).

parked, approached on foot and opened the Ford driver's door to find Mr. Woods seated alone in the driver's seat, smoking a cigarette (2/7/23 at 48-50, 100). Tran testified that another arrest team member removed Mr. Woods and together they handcuffed Mr. Woods and held him near the rear of the vehicle so that Detective Hawkins could do a show-up identification (2/7/23 at 50-51, 100). Hawkins radioed back a "positive" identification of Mr. Woods as the person who had sold him the white rock (2/8/23 at 25). Tran then placed Mr. Woods under arrest (2/7/23 at 51-52), and other officers searched the vehicle, recovering a scale and a green substance, some packaged in individual white papers, which they suspected to be synthetic cannabinoid, from a cooler bag in the back seat (2/7/23 at 190-92). Officers also found a loaded firearm in the front center console (2/7/23 at 79-84).

Hawkins's identification of Mr. Woods as the dealer fell apart at trial.[3] The jury accordingly acquitted Mr. Woods of all charges related to drug distribution

[3] Hawkins admitted he was not wearing his prescription bifocals when he identified Mr. Woods from inside his car on the other side of West Virginia Avenue, NE—across the Valero gas pumps and parking lot, plus three lanes of street traffic (2/8/23 at 31-32, 77-80, 84, 92-94). He told the jury Mr. Woods was facing him "directly," "[n]ot at an angle" (2/8/23 at 81-82), but bodyworn camera footage from the arrest team showed Mr. Woods was facing away from West Virginia Avenue, NE when Hawkins made his "positive ID" from across that street (2/7/23 at 101-107; 2/8/23 at 82-86). Hawkins testified that Mr. Woods "looked the exact same way" the dealer had inside the Ford, where "the big thing" that stood out about him was his "short haircut" (2/8/23 at 67, 81-82), but bodyworn camera footage showed that during the showup, Mr. Woods was wearing a hat and a raised hood that obscured his hair (2/8/23 at 86-87). When faced with the prospect of being asked for an in-court identification at a pretrial hearing two days before his court testimony, Hawkins had asked the prosecutor to show him a photograph of Mr. Woods before the hearing got started (2/8/23 at 94-95). The physical evidence

and to the drugs, gun and ammunition found inside the car (R.106). Mr. Woods's possession and tampering convictions, and this appeal, stem from what happened next, when he was searched incident to arrest.

The Alleged Tampering

Tran testified that once he received Hawkins's identification over the radio, he told Mr. Woods he was under arrest and began to search him (2/7/23 at 51-52). Tran stated that he first found a clear plastic bag containing paper "twists with some green plant inside" in the pocket of Mr. Woods's hoodie (2/7/23 at 52, 55).[4] Tran also recovered $72 in cash from Mr. Woods's "front person" (2/7/23 at 55-56,

---

called Hawkins's unreliable identification even further into doubt. The pre-recorded $20 bill he used to buy the white rock was not on Mr. Woods's person or inside the Ford when the arrest team searched them at the scene (2/7/23 at 68, 174). Although police searched Mr. Woods's cell phone and took DNA swabs and a fingerprint from the firearm (2/7/23 at 126-131), the government introduced no text messages or cell phone photos linking Mr. Woods to drug dealing, nor any DNA or fingerprints linking him to the firearm. To the contrary, defense fingerprint expert Dr. Heidi Eldridge testified that she compared the latent print to exemplars taken from Mr. Woods and concluded that it could not have been made by him (2/9/23 at 23-26).

All of this was consistent with the defense theory that Mr. Woods was not the dealer Hawkins had encountered, but another customer who just happened to be taking a moment to charge his cell phone and smoke a cigarette in the car after the dealer stepped away (2/9/23 at 106).

[4] The trial court entered a judgment of acquittal on the charge of PWID-synthetic cannabinoid for these packets, finding that the government had not presented sufficient evidence that Mr. Woods believed the packets contained synthetic cannabinoid, as opposed to real marijuana, or that he intended to distribute them for remuneration (2/8/23 at 185-86). *See* D.C. Code § 48-904.01(a)(1) (legalizing possession of up to two ounces of marijuana and transfer of up to one ounce of marijuana without remuneration).

67-68). While he was checking the front waistband of Mr. Woods's pants, Tran testified, he "saw a white product or object [that] came out from that location and fell to the ground" (2/7/23 at 72). Tran described the object as "a clear plastic bag and inside that was a white rock like substance" in "[m]ultiple pieces" (2/7/23 at 72). Tran testified that he "basically tried to reach for it, at which point [Mr. Woods] stepped on it. Myself and a few other [o]fficers removed [Mr. Woods] away from the object, at which point I recovered it" (2/7/23 at 72). Specifically, Tran testified, "[w]e recovered . . . . the clear plastic bag containing the multiple small pieces of white rock like substance" (2/7/23 at 75).

The incident was captured by Officer James Love's bodyworn camera (2/7/23 at 72-74, 78).[5] The video shows a blurry white object fall out of Mr. Woods's waistband and exit the frame toward the ground. Mr. Woods takes a step forward as Detective Tran bends toward the ground, then police wrestle Mr. Woods backward. His feet are not visible in the frame.[6] After reviewing this footage, Tran testified that Mr. Woods "stomped on" the object before Tran "pushed [him] off by grabbing his leg away from the product" "[b]ecause his foot was actually on the product" (2/7/23 at 74-75).

Detective Love also testified about the incident. He said he watched as "Mr. Wood's waistband was pulled forward and a clear plastic bag with a white rock

---

[5] Love had attained the rank of Detective by the time of trial (2/7/23 at 144).

[6] A copy of the footage, introduced at trial as Government's Exhibit 19 (2/7/23 at 74), is included in the Appendix at Tab A. The relevant portion begins at timestamp 00:29:28. Undersigned counsel will move to supplement the record on appeal with this exhibit.

substance fell to the ground" (2/7/23 at 159). "When it hit the ground," Love continued, "Mr. Woods took his right leg and kind of moved it forward. Put it on the ground either on top of or near the clear plastic and then dragged his foot back" (2/7/23 at 159). After watching his bodyworn camera footage, Love characterized it as showing "Officers Tran and Banks kind of try to remove or pull the waistband out of [Mr.] Woods and then a clear plastic with the white rock falls to the ground and Mr. Woods is taken back and then I pick it up off the ground" (2/7/23 at 160). Love added that it "looks like to me [Mr. Woods] tries to step on it and kind of smear it or scrap [sic] it on the ground" (2/7/23 at 160-61). Love did not recall Mr. Woods appearing unsteady on his feet before that moment (2/7/23 at 161).

Love testified that it was he who recovered "the clear plastic containing the white rock" from the ground, then processed it back at the station (2/7/23 at 163-65), where he found that it weighed 1.2 grams (2/7/23 at 165). A photograph of an evidence bag containing the recovered plastic baggie with its white contents still inside was admitted into evidence as Government's Exhibit 8 (2/7/23 at 75-76, 163-64).[7]

Neither Love, Tran, nor any other witness testified that the plastic bag appeared changed in any way after Mr. Woods stepped on it. Nor did any witness testify that any of the white substance the baggie contained was spilled, crushed, or otherwise changed in any way when Mr. Woods stepped on it.

[7] Undersigned counsel will move to supplement the record on appeal with the photograph, a copy of which is included in the Appendix at Tab B.

After the close of evidence, the trial court instructed jurors to convict Mr. Woods of tampering with physical evidence if they found beyond a reasonable doubt that he "knew that a trial was likely to be instituted," that he "altered an object," and that he "intended to alter that object to reduce its value as evidence or its availability for use as evidence at the trial" (2/9/23 at 78). The prosecutor argued in closing that Mr. Woods knew or had reason to know a trial was likely to be instituted because he was under arrest, that he "altered an object" "by reaching out with his right foot, stepping on the suspected narcotics and pulling back," and that taking that step was a voluntary reaction to the baggie falling from his waistband that reflected an intent "to alter the object to reduce its value as evidence" (2/9/23 at 95-96). The prosecutor did not explain how this stepping action altered the baggie or its contents. Nevertheless, the jury returned a conviction on the felony tampering charge, in addition to attempted simple possession of cocaine (R.106).

SUMMARY OF ARGUMENT

Section 22-723(a) of D.C. Code provides:

> A person commits the offense of tampering with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.

Here, even assuming the evidence was sufficient to show that Mr. Woods stepped on the baggie of suspected cocaine with the intent to reduce its integrity or availability as evidence at an anticipated trial, the prosecution failed to present any

evidence that he completed the *actus reus* of "alter[ing]" the baggie or its contents. Even if jurors could permissibly have speculated that some of the white substance was crushed inside the bag—and they could not—such a superficial change is not an "alter[ation]" within the meaning of the tampering statute because it has no conceivable impact on the object's evidentiary value or availability. In fact, there was no testimony or other evidence from which to infer that the baggie or the white rock-like substance it contained were changed or "altered" under any definition of that term. Because the government failed to present sufficient evidence of an essential element of the offense, Mr. Woods's tampering conviction must be vacated.

ARGUMENT

In addition to proof that a defendant knew or had reason to believe an official proceeding was in the offing and intended to diminish an object's evidentiary value for that proceeding, the felony tampering statute requires proof that the defendant committed one of five acts: "alter[ed], destroy[ed], mutilate[d], conceal[ed], or remove[d]" the object in question. D.C. Code § 22-723. Here, the government argued and the jury was instructed on only one of these *actus rei*: "alter[ed]" (2/9/23 at 78, 95-96). Mr. Woods's conviction therefore cannot stand if the prosecution failed to present sufficient evidence that he altered the baggie of white substance within the meaning of the tampering statute.

Here, the evidence was insufficient to prove Mr. Woods "altered" the baggie or the white substance it contained because it showed nothing more than that Mr.

Woods stepped or stomped on them. This is insufficient, first, because a review of the full text and legislative history of Section 22-723 establishes that in order to constitute "altering" physical evidence, the charged act must have diminished the object's evidentiary value. Any change that Mr. Woods's stomping could conceivably have wrought on the baggie or its contents had no diminishing effect on their evidentiary value. The prosecution's evidence was also insufficient because it failed to show that the baggie or its contents were changed in *any* way by Mr. Woods's stomping action, under even the broadest interpretation of the term "alter." As such, this Court need not even engage in the statutory construction exercise to conclude that the government failed to present sufficient evidence of the essential element of "altering" physical evidence. Under either interpretation of the term, Mr. Woods's felony tampering conviction must be vacated.

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE TAMPERING BECAUSE IT SHOWED ONLY THAT MR. WOODS STOMPED ON THE BAGGIE OF WHITE SUBSTANCE BUT NOT THAT HE CHANGED THE SUBSTANCE IN ANY WAY.

"In assessing a claim of evidentiary insufficiency, [this Court] must view the record in the light most favorable to the government, giving full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (internal quotation marks and citation omitted). This Court's review is not "toothless," however. *Rivas v. United States*, 783 A.3d 125, 134 (D.C. 2001) (en banc). It must "take seriously" its obligation to ensure the government is held to its

burden to prove each element of the charged offense beyond a reasonable doubt. *Id*.

That exacting standard "requires the factfinder 'to reach a subjective state of near certitude of the guilt of the accused.'" *Id*. at 133 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). The prosecution's evidence is insufficient to clear that high bar if, despite its relevance, the evidence requires the factfinder "'to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation'" in order to convict. *Id*. at 134 (quoting *Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987)). In this case, the record is not sufficient to permit the factfinder to reach the necessary state of near certitude, without speculation, that Mr. Woods altered the plastic baggie or its contents in any way by stepping on them. The prosecution did not present any direct testimony, or evidence from which it was possible to infer, that the baggie or substance it contained was changed when Mr. Woods stepped on it. To the contrary, both officers who testified about its discovery and recovery from the ground described it with the same terms both before and after Mr. Woods stepped on it. Detective Tran testified that he found a baggie in Mr. Woods's waistband containing "[m]ultiple pieces" of a "white rock like substance" (2/7/23 at 72), and likewise described the baggie he recovered from the ground after Mr. Woods stepped on it as "containing the multiple small pieces of white rock like substance" (2/7/23 at 75). Detective Love, too, did not vary his description: He testified that he watched "a clear plastic bag with a white rock substance" or "a clear plastic with the white rock" fall from Mr. Woods's waistband (2/7/23 at 159, 160) and that he recovered "the clear plastic

containing the white rock" from the ground after the allegedly felonious step (2/7/23 at 161, 162, 165).

Neither Tran, Love, nor any other witness testified that the baggie appeared to be damaged or that any of the white substance appeared to have been spilled or crumbled when it was recovered from the ground. The prosecution opted not to introduce the baggie itself into evidence for jurors to inspect, and the blurry footage of a white object falling from Mr. Woods's waistband and photograph of what police recovered—a baggie containing a low-resolution white clump about the size of a marker cap—did not show any detail to support a conclusion that, contrary to the officers' descriptions, the baggie or its contents was changed in any way. *See* App. Tabs A, B. Even if it had been possible to draw such a conclusion, the government's evidence provided no way to determine that any speculative damage resulted from Mr. Woods's footfall rather than the impact from the baggie's fall to the pavement that preceded it.

Detective Love's testimony that Mr. Woods "dragged his foot back" after stepping "on top of or near" the baggie (2/7/23 at 159), and his characterization of his bodyworn camera footage as "look[ing] like" Mr. Woods "tries to . . . smear" or "scrap [sic]" the baggie "on the ground" (2/7/23 at 160-61) did not supply evidence of any change to the baggie or its contents. If anything, Love's formulation suggested that Mr. Woods tried and *failed* to "smear" or "scrap[e]" the baggie on the ground. The prosecutor did not ask Love to clarify, or elicit any testimony from him or Tran about what, if any, impact the scraping motion had on the baggie or the substance inside. It would thus be doubly speculative for jurors to

conclude that Mr. Woods succeeded in scraping the baggie on the ground, and that such scraping physically changed the baggie or its contents in any way.

A. The prosecution's evidence was not sufficient to show Mr. Woods "altered" the baggie or its contents because it did not show he diminished their evidentiary value as required under D.C. Code § 22-723.

Even if it were possible to conclude on this record that Mr. Woods's foot crushed some or all of the white substance inside the baggie—and it is not—causing such a superficial change did not constitute "alter[ing]" physical evidence within the meaning of D.C.'s tampering statute because it had no impact on the evidentiary value of the baggie or its contents.

"'Statutory interpretation is a holistic endeavor.'" *In re Am. H.*, 299 A.3d 584, 587 (D.C. 2023) (quoting *Tippett v. Daly*, 10 A.3d 1123, 1127 (D.C. 2010) (en banc)). "'In determining the correct reading of statutory language, [this Court] consider[s] statutory context and structure, evident legislative purpose, and the potential consequences of adopting a given interpretation.'" *Id*. at 587 (quoting *In re G.D.L.*, 223 A.3d 100, 104 (D.C. 2020)). Ultimately, the "judicial task is to discern, and give effect to, the legislature's intent." *Lopez-Ramirez v. United States*, 171 A.3d 169, 172 (D.C. 2017) (internal quotation marks and citation omitted).

Even when a statutory term is "generally understood" to have a broad meaning, this Court has urged caution "'not [to] read statutory words in isolation'" because "'the language of surrounding and related paragraphs may be instrumental to understanding them.'" *In re Am. H.*, 299 A.3d at 587 (quoting *Tippett*, 10 A.3d

at 1127). Further, notwithstanding a term's "superficial clarity, a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) (en banc) (internal quotation marks and citation omitted). This Court will therefore "'consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme,'" *In re Am. H.*, 299 A.3d at 587 (quoting *Tippett*, 10 A.3d at 1127), and it will "'look to the legislative history to ensure that [its] interpretation is consistent with legislative intent.'" *Facebook, Inc. v. Wint*, 199 A.3d 625, 628 (D.C. 2019) (quoting *Thomas v. Buckley*, 176 A.3d 1277, 1281 (D.C. 2017)) (internal quotation marks omitted in *Facebook*).[8]

Here, when read in the context of the tampering statute as a whole and its purpose and legislative history, it is clear that the legislature did not use the term "alters" in the expansive sense of making any change, however insignificant, to the physical properties of a piece of evidence. Instead, consistent with the statute's purpose of preventing the actual destruction of evidence, the legislature used the term "alters" to denote making a *significant* change, one capable of diminishing the

[8] This approach to statutory interpretation has lead this Court, for example, to interpret the term "good cause," which "in isolation . . . is generally understood to leave broad discretion to the decision-maker," to instead confer "quite narrow" discretion to override an incapacitated person's choice of guardian in the context of a statutory scheme that directs courts to foster such persons' autonomy and restricts them from appointing the court's own preferred guardian outside circumstances where the person has expressed no preference or "good cause dictates" their preference be overridden. *In re Am. H.*, 299 A.3d at 587-88 (noting "the term 'dictates' indicates the need for a compelling basis") (citation omitted).

object's evidentiary value at an anticipated proceeding. First, the statute's text defines the offense as "*tampering* with physical evidence," a verb that connotes not just changing evidence, but reducing its value. D.C. Code § 22-723(a) (emphasis added); *see also* "tamper," *Merriam-Webster.com* (last accessed Feb. 5, 2024) ("1 a: to interfere so as to weaken or change for the worse"). Second, this connotation is reinforced by the *mens rea* element, which requires an intent to make not just any superficial change to an object, but a change that would "impair [the object's] integrity or its availability for use" as evidence at an official proceeding. This reveals that the statute is aimed at preventing the diminishment in evidentiary value of physical objects that might be used in a trial or other official proceeding. Third, consistent with this focus on diminished evidentiary value, the statute lists alongside "alters" four other *actus rei*, all of which *significantly* change the object ("destroys," "mutilates") or otherwise render it unusable as evidence ("conceals" "removes"). "Alters" should be read consistently with the "company it keeps" in this statutory list to refer to a significant change. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). And what makes a change significant in the context of a statute aimed at preventing the diminution in value of evidence is that it actually impairs an object's evidentiary value.

The tampering statute's legislative history supports this narrow interpretation of "alter." The offense was added to the D.C. Code in 1982 in order to fill a gap in the law for "preventing the *destruction* of evidence." Council of the District of Columbia, Comm. on the Judiciary, *Rep. on Bill No. 4-133* at 25 (Jun. 1, 1982) (emphasis added). As the Judiciary Committee explained in its report on the

proposed legislation, while an existing statute already "prohibit[ed] destroying or defacing public records," that statute was "primarily aimed at protecting court records rather than preventing the destruction of evidence." *Id*.[9] Further, as the Committee Chair noted in his Extended Comments on the bill, "[t]he only other statute in the current law that could possibly be used to prosecute a person who *destroys evidence*" was the one penalizing those who act as accessories after the fact, and it was not clear that "a person who committed a crime and then destroyed evidence relating to the offense could be prosecuted as both a principle and an accessory after the fact to the same crime." *Extension of Comments on Bill No. 4-133: The District of Columbia Theft and White Collar Crimes Act of 1982* at 103 (July 20, 1982) (submitted by David A. Clarke) (emphasis added).

This history demonstrates that when the Council defined the elements of the new tampering offense, it had in mind acts significant enough to effect the actual destruction of evidence, in whole or in part. Its choice to make tampering a felony punishable by up to three years in prison reinforces the conclusion that the statute is aimed at conduct with significant consequences. This conclusion is further supported by what the Council, like many state legislatures, chose *not* to include in the tampering statute: liability for unsuccessful attempts to carry out an intent to "impair [an object's] integrity or its availability for use" as evidence. D.C. Code

---

[9] That statute remains on the books as D.C. Code 22-3307, imposing misdemeanor penalties on one who "maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys, abstracts, or conceals the whole or any part of any record authorized by law to be made, or pertaining to any court or public office in the District, or any paper duly filed in such court or office . . . ."

§ 22-723(a). *See* 58 Am. Jur. 2d *Obstructing Justice* § 36 ("The offense [of tampering] does not apply to an attempted act of concealment, alteration, or destruction. Rather, it applies when the defendant suppresses the evidence by actual completed concealment, alteration, or destruction.") (footnote omitted).

The Council knew well how to impose such liability where it wanted. The same title of the Act that created the new tampering offense also restated and expanded the offense of obstruction of justice. Unlike the tampering provision, the obstruction provision expressly included liability not only for one who carries out any of five enumerated acts, but also for one who merely "endeavors" to carry out three of those acts. District of Columbia Theft and White Collar Crimes Act of 1982, Title V, § 502(a), D.C. Law 4-164, 29 D.C. Reg. 3976 (1982) (codified at D.C. Code § 22-722). The Council was aware that this "endeavor" language had already been interpreted to mean "an effort to do or accomplish the results forbidden by the statute," in order to "prohibit[] attempts," even when unsuccessful, to do the selected obstructive acts. *Extension of Comments on Bill No. 4-133* at 99. It intentionally chose to use this language incorporating attempt in defining several of the acts penalized under the obstruction statute. *Id*. at 98-99, 101 (repeating for each of the three acts subject to the term "endeavor" that it is not necessary that the effort "actually be successful"). In contrast, the Council opted not to use such language incorporating attempt in the tampering section, thus declining to extend the tampering offense to unsuccessful attempts. The acts penalized under D.C. Code Section 22-723(a) must therefore be completed in order to constitute tampering. *See generally Mobley v. United States*, 101 A.3d 406, 425

(D.C. 2014) (evidence sufficient for *attempted* tampering conviction where "jurors could infer that [defendant] took a substantial step in completing the crime of tampering by going to the spot where [accomplice] tossed a gun and searching for it [unsuccessfully], with the intent to prevent it from being used by law enforcement officials in the prosecution of" accomplice).

Interpreting "alters" to include making superficial changes that fail to effectuate the actor's intent to impair an object's evidentiary integrity or availability would frustrate the Council's clear intent that liability should not attach for failed attempts at tampering. Consider a suspect who places a plastic baggie of narcotics in their mouth as police close in, intending to swallow it to prevent its use as evidence of drug possession. If police retrieve the baggie before it can be swallowed, the prosecution could still argue that the suspect "altered" the object within the most expansive reading of the term by wetting its exterior with their saliva. Yet the statute's text, purpose and legislative history all indicate that this is not the kind of act the Council intended to penalize as felony tampering with physical evidence because the unsuccessful attempt to get rid of the evidence would have had no impact on the baggie's evidentiary value or availability for use in an official proceeding.[10]

---

[10] Other state courts have declined to uphold convictions under the "conceal" and "destroy" provisions of similar tampering statues for trying and failing to swallow contraband in the presence of police. *See Harris v. State*, 991 A.2d 1135, 1142-43 (Del. 2010) (reversing tampering conviction for "destroying" marijuana by putting it in mouth in presence of police, who promptly retrieved it, and observing "[p]rosecutors and the courts should avoid leveraging misdemeanor drug possession prosecutions with additional, felony tampering penalties"); *A.F. v.*

Neither does the statute's text or history convey an intent to penalize as a felony acts such as the one here, which on an overly generous interpretation of the prosecution's evidence could at best be construed as an impulsive, if not entirely reflexive effort to avoid an arrest for misdemeanor drug possession that had zero impact on the government's ability to use the recovered evidence at trial. At a minimum, adopting an expansive definition of "alters" to encompass such acts would risk generating harsh and unjust results without adequate indication that this is what the Council intended.

At least one other state appellate court, interpreting the same term in a similarly worded tampering statute, has accordingly declined to "give a broad interpretation to the word[] . . . 'alter,'" out of concern that it would "lead[] to results that are inexplicably harsh and probably not within the legislature's intent." *Anderson v. State*, 123 P.3d 1110, 1118 (Alaska Ct. App. 2005) (interpreting Alaska Statute 11.56.610(a)(1), which applies to one who "alters," "suppresses," "conceals," or "removes physical evidence with intent to impair its verity or availability in an official proceeding or criminal investigation"), *abrogated on other grounds by Young v. State*, 374 P.3d 395 (Alaska 2016). This Court should

---

State, 850 So. 2d 667, 668 (Fla. Dist. Ct. App. 2003) (evidence of unsuccessful attempt to swallow bag of marijuana before spitting it out insufficient to prove tampering by destroying or concealing evidence). More broadly, courts across the country "have repeatedly rejected the proposition that temporarily removing contraband from the sight of police officers during a pursuit or arrest is sufficient, by itself, to constitute concealment for purposes of obstructing justice or tampering with evidence statutes." *People v. Comage*, 946 N.E.2d 313, 316 (Ill. 2011) (collecting cases).

do the same. *See*, *e.g. Belay v. District of Columbia*, 860 A.2d 365, 367 (D.C. 2004) ("It is well-established that criminal statutes should be strictly construed and that ambiguities should be resolved in favor of the defendant (*i.e.*, the Rule of Lenity).") (citations omitted).

In *Anderson*, the defendant was charged with tampering after he tossed both a handgun used in a shooting and, separately, the handgun's magazine and ammunition, from his car as police gave chase. 123 P.3d at 1117-18. In addition to holding that the acts of tossing did not constitute tampering under a "'removal' theory," the appellate court rejected the government's argument that Anderson's "removal of the magazine from the handgun constituted an act of 'alteration' for purposes of the evidence tampering statute." *Id*. at 1118. To the contrary, the court held, "[t]o constitute an 'alteration', the defendant's conduct must disguise or alter *the evidentiary value* of the article." *Id*. (emphasis added). Because removing the magazine from the handgun did not disguise or alter the handgun's or the magazine's evidentiary value, that act did not constitute "alteration" within the meaning of the tampering statute. *Id*.

Likewise here, crushing or crumbling the white substance contained within the plastic baggie would have done nothing to disguise or alter its evidentiary value. Crushed cocaine can be photographed, weighed, tested for narcotics, and introduced into evidence at trial just the same as cocaine in rock form, and D.C. law draws no distinction between the two, *see* D.C. Code § 48-902.06(1)(D) (listing "cocaine" and "any compound, mixture or preparation that contains" cocaine as Schedule II controlled substance). Even if the prosecution's evidence

were sufficient to prove Mr. Woods's stomping action crushed some of the substance inside the baggie—and it was not—that evidence would still be insufficient to prove he "alter[ed]" the baggie or its contents within the meaning of the tampering statute.

B. The prosecution's evidence was not sufficient to show Mr. Woods "altered" the baggie or its contents because it did not show he changed them in any way.

This Court need not reach the statutory interpretation question in this case, however, because the government's evidence was also insufficient to prove that Mr. Woods's stomping action "altered" the baggie or its contents under the broadest definition of that term.

Stahmann v. State, 548 S.W.3d 46 (Tex. App. 2018), *aff'd*, 602 S.W.3d 573 (Tex. Crim. App. 2020), illustrates the point. *Stahmann* considered a sufficiency challenge to a conviction for "alter[ing]" physical evidence under Texas's tampering statute, which has been interpreted to apply to simply, "'chang[ing]; mak[ing] different; modify[ing]'" physical evidence. *Id*. at 54 (quoting *Williams v. State*, 270 S.W.3d 140, 146 (Tex. Crim. App. 2008)).[11] Stahmann was charged

---

[11] This interpretation is not based upon statutory construction, but upon ordinary usage, consistent with state precedent that "[w]ords not specially defined by the Legislature are to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance," *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992) (en banc). *See Stahmann v. State*, 602 S.W.3d 573, 578 (Tex. Crim. App. 2020) ("The word 'alter' must be interpreted according to its common usage because it is not statutorily defined."). As explained above, such an broad and unexamined reading of the term is not consistent with D.C. Code Section 22-723(a)'s statutory purpose as illuminated by its text, context and legislative history.

with violating the statute for throwing a pill bottle over a fence while fleeing police. *Id*. at 54. It had rained earlier that day, and when police recovered the bottle, some of the text on its label was smudged. *Id*. Thus, there was evidence of an action by the defendant and a plausible theory of how that action, combined with the wet weather, could have caused the smudging. Nonetheless, the appellate court held this was not sufficient evidence that Stahmann "altered" the bottle, even under Texas's expansive definition of that term. *Id*. at 54-55. It explained:

> There was no evidence indicating what the bottle looked like prior to the time Stahmann threw it over the fence, and although the evidence established that it had been raining earlier in the day, there was nothing showing that the area where the pill bottle was recovered was wet or that Stahmann's throw could have otherwise caused the smudges. For the jury to conclude from the evidence that Stahmann altered the bottle would therefore be an unreasonable inference, amounting to no more than mere speculation.

Id. The state's high Court of Criminal Appeals agreed, holding that the prosecution's evidence was insufficient to prove tampering under an 'alteration" theory because "the mere act of throwing the pill bottle did not change the bottle itself." *Stahmann*, 602 S.W.3d at 579-80.

Likewise here, the mere act of stomping on a baggie of white substance did not change the baggie or the substance itself. Mere speculation that stomping could in theory have damaged the baggie, spilled its contents, or crushed or crumbled the substance inside the baggie cannot sustain a criminal conviction for tampering with physical evidence without some evidentiary basis to conclude that it actually did cause such impacts. *Rivas*, 783 A.2d at 134. Here, not only is there no record support for such an inference, the prosecution's own evidence was to the contrary.

Both testifying officers described the baggie and its contents in virtually identical terms both before and after the charged stomping. *Compare* 2/7/23 at 72 (Tran: object that fell from waistband was "a clear plastic bag and inside that was a white rock like substance in "[m]ultiple pieces") *with* 2/7/23 at 75 (Tran: "[w]e recovered . . . . the clear plastic bag containing the multiple small pieces of white rock like substance" after stomp); *compare also* 2/7/23 at 159 (Love: "Mr. Wood's waistband was pulled forward and a clear plastic bag with a white rock substance fell to the ground") *with* 2/7/23 at 164-65 (Love: describing recovery of "the clear plastic containing the white rock" after stomp). Neither officer testified, and none of the prosecution's other evidence so much as hinted, that the baggie was torn or that any of the white substance it contained was spilled, crushed, crumbled or otherwise changed in any way between the time it fell from Mr. Woods's waistband and the time police picked it up from the ground. There is also no way to discern whether any conceivable change to the baggie or its contents would have resulted from Mr. Woods's stomping action or from earlier the impact of falling to the ground when police pulled on his waistband. On this record, it would be purely speculative to conclude that anything Mr. Woods did "altered" the baggie or the white rock substance even if that term were interpreted to mean simply, "changed." The prosecution therefore failed to meet its burden of proving an essential element of the offense of tampering with physical evidence.

CONCLUSION

Because the prosecution's evidence was insufficient to prove that Mr. Woods altered physical evidence within the meaning of D.C. Code 22-723, or

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

Fleming Terrell
Signature

23-CF-331
Case Number(s)

Fleming Terrell
Name

02/07/2024
Date

fterrell@pdsdc.org
Email Address

within any definition of that term, Mr. Woods's felony conviction for tampering with physical evidence must be vacated.

Respectfully submitted,

s/Fleming Terrell

Samia Fam, Bar No. 394 445
Shilpa S. Satoskar, Bar No. 457 263
*Fleming Terrell, Bar No. 998 774

PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

*Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, this 7th day of February, 2024.

.

s/Fleming Terrell
Fleming Terrell