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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 57

RON HILL,

Appellant.

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20 Eagle Street  
Albany, New York  
May 19, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 57, The People of  
2 the State of New York v. Ron Hill.

3 Counsel, just give your colleagues a moment.  
4 Good afternoon, Counsel.

5 MR. FERGUSON: Good afternoon, Your Honor. It's  
6 Harold Ferguson for Appellant Ron Hill. We would request  
7 two minutes for a rebuttal in this case.

8 CHIEF JUDGE DIFIORE: You may have two minutes,  
9 sir.

10 MR. FERGUSON: Your Honor, not all synthetic  
11 cannabinoids are illegal in this state. Only those  
12 specifically enumerated in public health law 3306(g) are  
13 the ones that are illegal. Here, the complaint is  
14 jurisdictionally defective because it did not allege that  
15 my client possessed an illegal synthetic cannabinoid. All  
16 it said was that he possessed a synthetic cannabinoid, and  
17 the mere possession of a synthetic cannabinoid is not a  
18 crime in this state.

19 Only those particular ones that are contained in  
20 the public health law are the ones that are criminal.

21 JUDGE RIVERA: So Counsel, to - - - to agree with  
22 you, would that devolve to a requirement that there always  
23 be a lab test?

24 MR. FERGUSON: As it is today, the answer is yes,  
25 Your Honor, unless the legislature recognizes that there is



1 a problem. Many other states have made all synthetic  
2 cannabinoids illegal. This state has had multiple bills  
3 over the last several years, trying to do that exact thing.  
4 That they have not done, and what's happening is as Senator  
5 Ritchie points out, that it's essentially a whack-a-mole  
6 type situation.

7 Every time they make something illegal, the  
8 chemists get around to subtly changing the chemical  
9 compound to make it a legal substance. Here, only as the  
10 Illinois court did in Chatha indicated, only a person with  
11 an advanced chemistry degree would be able, through  
12 chemical testing, be able to determine whether or not a  
13 particular synthetic cannabinoid is an illegal one or a  
14 legal one, and that's what would be needed here.

15 And it's not a particularly difficult thing here  
16 because these cases are generally prosecuted on - - -  
17 started with a desk appearance ticket, so before the client  
18 or the defendant comes to court, there is a period of time  
19 where this testing could take place, and if Senator  
20 Ritchie's bill becomes law, it'll be very easy because the  
21 - - - the request is to transform it from a misdemeanor  
22 into a felony, and then to have it as an indictment, there  
23 would be a chemist who would testify that the particular  
24 thing was a synthetic cannabinoid.

25 JUDGE RIVERA: So what about an alternative?



1           Would it be possible - - - I'm not - - - I'm not speaking  
2           to - - - to this particular instrument, just as a general  
3           matter. Would it be possible that the deponent - - - let's  
4           say the officer could observe certain conduct that might  
5           provide indicia, perhaps unlawful actions that would allow  
6           for an inference of the possession of one of the illegal  
7           synthetic cannabinoids?

8                       MR. FERGUSON: There is nothing that could  
9           possibly be.

10                      JUDGE RIVERA: Okay.

11                      MR. FERGUSON: The bottom line is, you can't  
12           tell. It is a liquid sprayed on dry vegetative matter.

13                      JUDGE TROUTMAN: And is the problem that there  
14           are those that are legal as opposed to illegal at the same  
15           time?

16                      MR. FERGUSON: That is correct, Your Honor, and  
17           by charging him simply with possessing a synthetic  
18           cannabinoid, they have not made in this complaint that he  
19           possessed anything that was illegal.

20                      JUDGE SINGAS: Well, how about if they had said  
21           that he possessed an illegal synthetic cannabinoid and then  
22           referenced the public health law?

23                      MR. FERGUSON: And if they had done that, there  
24           would still have to be evidentiary facts contained in the  
25           complaint that would indicate why they made that



1 determination. It's no different than a situation  
2 involving pills, and not all pills are controlled  
3 substances.

4 JUDGE CANNATARO: Well, to get back to Judge  
5 Rivera's question, given the set of allegations that - - -  
6 that Judge Singas just proposed, couldn't there be other  
7 indicia in where the defendant is, what the defendant's  
8 engaged in, that - - - that would further suggest that this  
9 was one of the illegal cannabinoids as opposed to the  
10 hundreds of legal ones?

11 MR. FERGUSON: All of - - - all of the synthetic  
12 cannabinoids have an effect upon the cannabinoid receptors  
13 in the brain. There are those that are legal that have  
14 that effect. There are those that are illegal. Seeing  
15 someone smoking something, and we don't even have that  
16 allegation here. Seeing someone smoking that substance  
17 does not indicate that what he is smoking is illegal.

18 JUDGE WILSON: You're really saying that - - -  
19 sorry, over here - - - that there's no way the defendant  
20 even could know whether what he was smoking was legal or  
21 illegal?

22 MR. FERGUSON: That's absolutely true, Your  
23 Honor. That's part - - - that was one of the other  
24 arguments that we had. How could he knowingly possess an  
25 illegal synthetic cannabinoid when he cannot tell it? No



1 human - - - my wife is a retired chemist and pharmaceutical  
2 executive. She can't tell by her naked eye and naked nose  
3 whether something is an illegal or a legal synthetic  
4 cannabinoid. Only a chemist doing tests can make that  
5 determination, and the court in Illinois made that same  
6 determination.

7 That's what's needed, here, or the legislature  
8 needs to fix it. The legislature has had this before on  
9 multiple occasions. If you read Senator Ritchie's comments  
10 in introducing the current iteration of the bill, she  
11 recognizes exactly the problems that are involved with this  
12 particular type of controlled substance and why it needs to  
13 be made into a general form.

14 The legislature has the ability to fix it.  
15 They've chosen not to. My adversary is relying primarily  
16 on cases involving cocaine, heroin, and marijuana, and say  
17 those cases control this. The significant difference there  
18 is all forms of cocaine, all forms of heroin, and all forms  
19 of marijuana at the time Kalin came down were illegal.

20 Therefore, an officer would be able to identify  
21 those substances.

22 JUDGE GARCIA: Counsel, I'm sorry.

23 MR. FERGUSON: Yes.

24 JUDGE GARCIA: I take that point, but this was a  
25 complaint, right?



1 MR. FERGUSON: Absolutely.

2 JUDGE GARCIA: And there was a plea entered, and  
3 so we're judging this accusatory instrument by the standard  
4 of a complaint. Is there any difference in this case or in  
5 another case going to what my colleagues have been asking,  
6 where absent the lab report, judging the standard by one  
7 applied to a complaint, you could survive a jurisdictional  
8 challenge on a complaint?

9 MR. FERGUSON: No, Your Honor, and that - - -

10 JUDGE GARCIA: So it doesn't matter?

11 MR. FERGUSON: It doesn't matter, and the reason  
12 being is they have not alleged a crime in this complaint.  
13 They - - -

14 JUDGE GARCIA: But what if they did? What if  
15 they said it's one of the substances listed in the relevant  
16 statute?

17 MR. FERGUSON: Then they would have had to have  
18 identified which particular one it was and how they were -  
19 - - that the officer was how that officer was able to  
20 determine was which one of these ten. That is clearly not  
21 here in this particular case. All he says is there's a  
22 chemical odor. Your Honor, if he had potpourri in a  
23 plastic bag, that is a dry vegetative matter that has a  
24 chemical odor.

25 Based on how this is now, he could have been



1 prosecuted as possessing synthetic cannabinoid by an  
2 officer saying, dry vegetative matter, plastic bag,  
3 chemical odor. That doesn't correlate to anything in the  
4 public health law, and that as a result here, this is a  
5 defective complaint, irrespective of the fact that it is -  
6 - -

7 JUDGE RIVERA: But why isn't that all what could  
8 have gone to the jury if there wasn't a plea? All of that  
9 could be challenged. The basis - - -

10 MR. FERGUSON: It's jurisdictionally - - -

11 JUDGE RIVERA: If indeed the object - - - excuse  
12 me, the deponent had said, it's the packaging, it's the  
13 conduct, it has some odor based on my experience, I think  
14 this is a synthetic cannabinoid.

15 MR. FERGUSON: But it - - -

16 JUDGE RIVERA: Unlawful under the public health  
17 law, excuse me.

18 MR. FERGUSON: But again, Your Honor, that's not  
19 what's here. Does not allege that it was illegal - - -

20 JUDGE RIVERA: But I was asking you before, would  
21 it be possible to add something into the instrument that  
22 might be enough short of a lab report?

23 MR. FERGUSON: There is nothing that could  
24 possibly be put in besides a laboratory report because it  
25 is impossible for anyone looking at this substance,





1 touching this substance, smelling this substance to say  
2 that this particular item is one of the ten contained  
3 within the public health law.

4 Thank you, Your Honors.

5 CHIEF JUDGE DIFIORE: Thank you.

6 Counsel?

7 MR. WEISS: Good afternoon, Your Honors. May it  
8 please the Court, my name is ADA Joshua Weiss from the  
9 Bronx District Attorney's Office. It's a privilege to be  
10 here with you today. As the Appellate Term - - - as the  
11 Appellate Term correctly found, the core concerns  
12 underlying the facial sufficiency requirement were clearly  
13 met in this case.

14 Defendant was adequately furnished with the facts  
15 and attendant circumstances of his crime to prepare a  
16 defense and invoke his protection against double jeopardy.

17 JUDGE TROUTMAN: So how was it clear that the one  
18 he had was illegal based on the instrument?

19 MR. WEISS: Your Honor, it's important to note  
20 here that the officer did not rest his conclusions solely  
21 on the category that defendant possessed synthetic  
22 cannabinoids. Rather, he specified that the substance the  
23 defendant possessed was K2. K2 is widely - - - is widely  
24 associated with unlawful synthetic cannabis. It is a - - -  
25 it is a common name and it is a street name for the drug,



1 and the public health law expressly provides that an  
2 officer is permitted to rely on the common name to - - - to  
3 identify the drug.

4 JUDGE TROUTMAN: So the common name without a  
5 descriptor as to its identity? Just the name? All he has  
6 to do is assert K2, and that satisfies the requirements?

7 MR. WEISS: Well, no, Your Honor. That's not the  
8 only allegation, here. It - - - it - - - it also - - - it  
9 also includes the officer's physical description of the  
10 substance. He described it as a - - - as a shredded, dry,  
11 like - - - a shredded, dry plant - - - plant substance, and  
12 also that it had a chemical order. Further - - -

13 JUDGE TROUTMAN: And to distinguish it from those  
14 that are legal, how does that do that?

15 MR. WEISS: Well, Your Honor, at this point,  
16 there was no - - - there was no requirement at this  
17 juncture for - - - at the pleading stage - - - for the  
18 people to - - - to - - - to conclusively foreclose all  
19 possibility that the substance the defendant possessed was  
20 not unlawful.

21 JUDGE TROUTMAN: So you just cast a net and you  
22 figure out if it was illegal later?

23 MR. WEISS: Well, no, Your Honor, but - - - but -  
24 - - but properly training our focus on the core concerns of  
25 facial sufficiency. Is - - - is the complaint sufficient



1 to provide the defendant notice? These - - - these charges  
2 satisfy that standard. This court has - - - this court has  
3 upheld complaints on allegations with less specificity.  
4 Further - - - furthermore - - -

5 JUDGE SINGAS: Counsel, your - - - the  
6 sufficiency though goes to a charged crime, and I think  
7 what we're trying to get to is where in this factual  
8 recitation is there a charged crime if there is no  
9 reference to anything that's illegal, and your point about  
10 K2, K2's not in the schedule, so where on this complaint,  
11 on the face of it, in the four corners, is there a charged  
12 crime?

13 MR. WEISS: Well, Your Honor, we believe that the  
14 officer's use of the common name K2 to allude to the subset  
15 - - - the subset category of - - - of - - - of illegal  
16 synthetic cannabis is - - - is enough to charge a crime, so  
17 if I may - - - if I may illustrate this point, another  
18 example would be crack cocaine.

19 A substance identified as crack cocaine can still  
20 serve as the res for a - - - for a criminal possession  
21 charge even though that term appears nowhere in the public  
22 health law.

23 JUDGE SINGAS: Yeah, but again, as counsel  
24 mentioned, at that time, all of cocaine was illegal, so a  
25 police officer saying you possess cocaine is enough to



1 sustain an attack on the sufficiency of the complaint. The  
2 same thing with heroin, but when you say synthetic  
3 cannabinoids, we don't know, because some are illegal and  
4 others are legal.

5 MR. WEISS: That - - - that is - - - that is  
6 true, Your Honor, and that's why the - - - the analysis,  
7 particularly under the reasonable cause standard, turns on  
8 the reasonableness of the conclusion the officer draws in  
9 light of the facts he's offering in support of it. So - -  
10 -

11 JUDGE WILSON: But how could - - - how could the  
12 officer know? I mean, if what Mr. Ferguson says is true,  
13 the officer has to have a little chem lab with him.

14 MR. WEISS: I'm sorry, Your Honor? I - - - I  
15 couldn't hear you.

16 JUDGE WILSON: The officer would need to have a  
17 chemistry lab with him to be able to know if it's one of  
18 the 20 or one of the other 380.

19 MR. WEISS: That - - - that's - - - that's  
20 exactly right, Your Honor, and these - - - these are  
21 trained - - - these are trained members of law enforcement  
22 who are relying on their experience in the field to - - -  
23 to draw certain conclusions. It - - - it certainly can't  
24 be expected that police officers are going to possess the  
25 scientific - - - the acumen of a - - - a chemist or - - -



1 or a science, so the officer is simply relying on  
2 observable facts, training, and experience to offer - - -

3 JUDGE RIVERA: But Counsel, if - - - if what the  
4 officers - - - I'm sorry, I'm on the screen. If what the  
5 officers relying on are the exact same characteristics of  
6 what is not illegal or what's lawful, avoiding the double  
7 negative, then how can that be enough, even with - - - with  
8 the low standard that applies?

9 MR. WEISS: Well, Your Honor, again - - - again,  
10 under the less demanding reasonable cause standard, it  
11 turns on reasonableness. It - - - it - - - it's no  
12 different than an officer who mistakes baking soda for  
13 cocaine or an unmarked pill for an opiate. It's - - - it's  
14 - - - at the facial sufficiency - - -

15 JUDGE TROUTMAN: But the difference is those  
16 substances are illegal. They're - - - cocaine is all  
17 illegal, and if - - - within the descriptors and training  
18 and experience and what they saw, they can allege that  
19 which is sufficient for a complaint without a lab. The  
20 problem here is you have that which is legal and illegal.

21 JUDGE GARCIA: We'll put it another way, Counsel,  
22 is if the officer had a reasonable basis for believing it  
23 was cocaine, even if it's baking soda, they have a reason -  
24 - - reasonable cause to believe it's an illegal substance.  
25 Here, there is - - - this - - - there's no basis for saying



1 what they believe it to be is illegal, right? It's  
2 different. It's not, like, oh, they mistook cocaine for  
3 baking soda. They just don't have enough of a basis for  
4 saying the substance itself is illegal.

5 MR. WEISS: Well, we - - - we would maintain that  
6 these - - - these allegations are sufficient to support - -  
7 - to support the conclusion. In addition to the fact that  
8 - - - the complaint also notes that the defendant discarded  
9 the bag at the site - - - at the site of the officer, so  
10 for pleading purposes, that fact would at least bolster the  
11 inference that - - -

12 JUDGE WILSON: Well, but that is - - - but that  
13 goes back to my earlier question, that that assumes the  
14 defendant has an idea of whether he's smoking something  
15 illegal or legal, which I'm not sure - - - all he wants to  
16 do is to get high, presumably. He doesn't really care if  
17 it's one of the illegal ones or legal. He doesn't even  
18 know which it is. All he knows is that it works, so the  
19 fact that he discards it because he thinks he might be  
20 prosecuted doesn't really bear on whether it's one of the  
21 legal or one of the illegal.

22 MR. WEISS: Again - - - again, Your Honor, I - -  
23 - I readily acknowledge that this complaint does not negate  
24 - - - does not negate the possibility that the substance  
25 was unlawful, and furthermore - - -



1 JUDGE WILSON: Well, it's not the question of  
2 whether it negates it. It's whether it - - - whether the  
3 office had any basis, you know, for cocaine, it comes maybe  
4 it's packaged a certain way typically, or you can taste it,  
5 and it tastes different from baking soda. There are things  
6 that an officer can do, based on training and experience,  
7 to distinguish cocaine from baking soda.

8 But what we have heard, and what I don't think  
9 you've disputed, is that there's any way an officer in the  
10 field can distinguish between one of the illegal ones and  
11 one of the legal ones.

12 MR. WEISS: No, Your Honor, I - - - the - - - the  
13 officer could not conclusively identify the controlled  
14 substance and - - -

15 JUDGE WILSON: Not even conclusively. Not - - -

16 MR. WEISS: - - - and we - - - and we agree that  
17 chemical testing would be required for the - - -

18 JUDGE WILSON: - - - not conclusively. Can even  
19 make any, you know, a probabilistic judgment that it is - -  
20 - it is more likely legal than illegal.

21 MR. WEISS: Well, Your Honor, I - - - I - - -  
22 again, I would - - - I just - - - I would note that the - -  
23 - the reasonable cause standard for facial sufficiency is  
24 equivalent to the reasonable cause standard for making an  
25 arrest, so to countenance the heightened pleading standard



1 that my - - - my opponent is requesting would render the  
 2 statutes unenforceable. There would be - - - there - - -  
 3 there would simply be no way to make a street arrest for  
 4 this offense, and it would be denying these statutes the  
 5 intent - - - the - - - the effect intended by the  
 6 legislature if we were subjected to - - -

7 JUDGE RIVERA: Yes, but that - - - that - - -  
 8 that goes to your adversary's argument that there is not a  
 9 - - - let me put it this way, a judicial cure for this  
 10 problem. This has to be resolved by the legislature  
 11 because some of this is lawful and some of it is not, and  
 12 as it stands, again, you've not said otherwise.

13 The - - - the defendant's position is there's no  
 14 way to distinguish it absent a chemical test, and so that's  
 15 the problem, and one that - - - his argument is the  
 16 judiciary cannot step in and resolve that. That requires  
 17 legislative action.

18 MR. WEISS: Your - - - Your Honor, I - - - I - -  
 19 - again, I would just note that the only aspect of the  
 20 defense that the defendant would not be able to prepare at  
 21 the pleading stage would be to challenge the - - - the  
 22 soundness or the methodology or the fundament - - - the  
 23 underlying integrity of the scientific testing, but he  
 24 would be able to pursue all other elements of - - - of his  
 25 defense. It's only - - - it's only that one component that





1 would still be outstanding.

2 He could move to suppress. He could - - - this  
3 was - - - this was a - - - this was a case that pre-dated -  
4 - - that pre-dated the discovery reform, so he could have  
5 made discovery demands of us, so again, it's - - - it's - -  
6 - it's important that we - - - that we - - - that the  
7 inquiry be cabined to the underlying concerns with facial  
8 sufficiency.

9 Does this provide him notice of the charges to  
10 prepare a defense and is it sufficiently specific so that  
11 he could invoke his protection against double jeopardy to  
12 avoid re-prosecution?

13 JUDGE WILSON: I'm not sure that the concerns are  
14 limited to that. I mean, if hypothetically, it turned out  
15 that ninety percent of the stuff being smoked was in the  
16 legal category and ten percent was in the illegal, and  
17 officers couldn't discriminate based on what they see, and  
18 they just start arresting people, you're going to have  
19 ninety percent of the people improperly arrested, which is  
20 a concern beyond anything that - - - that has to do with  
21 what they might be able to prove at a trial.

22 There are consequences to arrest. I mean, you  
23 ought to arrest people for things that are illegal and you  
24 don't want to arrest them for things that aren't, and some  
25 of this isn't.



1 MR. WEISS: Right, certainly. Again, I - - - I  
2 would just - - - I would just refer back to the officer's  
3 use of K2 to - - - which is a - - - which is a commonly  
4 accepted term for unlawful synthetic cannabis just as - - -  
5 just as crack cocaine is - - - is widely associated with -  
6 - - with regular cocaine, and there are - - - and there  
7 are, in the definition of cocaine, there - - - there - - -  
8 for example, a substance that's arrived from decocainized  
9 coco plant would - - - is - - - is exempted from the  
10 definition of controlled substance.

11 So - - - and so a police officer could still  
12 reasonably believe that the white powdery substance he  
13 observes in a defendant's possession is still cocaine even  
14 if that's subsequently proven to be a mistake.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MR. WEISS: Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Counsel, your - - - you're  
18 welcome.

19 Counsel, your rebuttal?

20 MR. FERGUSON: Your Honor, to seize upon what  
21 Judge Singas had pointed out, the public health law not  
22 only denotes each of the synthetic cannabinoids that are  
23 illegal, it also provides a series of trade names to it.  
24 Notably absent, as Your Honor recognized, is K2. K2 is  
25 simply a street name. There are hundreds of street names



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for synthetic cannabinoids.

None of them correlate to anything that's contained in the public health law, and as to Judge Rivera, as you indicated, yes, there is a fix, here. The fix here is within the legislature, and Your Honor, Judge Garcia, as you wrote in People v. Hardy, even in a complaint, you still have to allege every element of the crime.

Here, there is no allegation that what my client possessed was an illegal synthetic cannabinoid. As a result, they have not alleged that my client committed a crime, and as the last attorney who gets to speak before your summer recess, I want to wish all of you a wonderful and relaxing summer recess and I hope to see you in the near future.

Thank you, Your Honors. Have a great summer.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of Ron Hill v. The People of the State of New York, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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