SUMMARY
October 26, 2023

2023COA98

No. 22CA0600, *People v. Bice* — Crimes — Uniform Controlled Substances Act of 2013 — Unlawful Distribution, Manufacturing, Dispensing, or Sale — Penalties for Criminal Conspiracy — Exceptions for Offense Levels Otherwise Provided by Law

A division of the court of appeals holds that when a defendant is convicted of conspiring to distribute a controlled substance under section 18-18-405(1), C.R.S. 2023, the offense level is governed by section 18-18-405(2) — not section 18-2-206(7)(a), C.R.S. 2023, which sets the offense level for conspiracy to commit a drug felony.

Rejecting an argument that the two statutes are inconsistent, the division concludes that (1) conspiring to distribute is itself a violation of section 18-18-405(1), not a conspiracy to commit such a violation; (2) section 18-2-206(7)(a), by its terms, does not apply to such an offense; (3) section 18-18-405(1) falls within section 18-2-

206(7)(a)'s exception for offense levels "otherwise provided by law"; and (4) section 18-18-405(2) controls as the more specific statute.

Because the defendant was convicted of a level 1 drug felony under section 18-18-405(1) and (2), he was correctly sentenced accordingly. Thus, the division affirms the district court's denial of the defendant's Crim. P. 35(a) motion to correct an illegal sentence.

COLORADO COURT OF APPEALS **2023COA98**

Court of Appeals No. 22CA0600
Larimer County District Court No. 18CR1868
Honorable Stephen J. Jouard, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Patrick Thomas Bice,

Defendant-Appellant.

ORDER AFFIRMED

Division VII
Opinion by JUDGE SCHOCK
Tow and Brown, JJ., concur

Announced October 26, 2023

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¶ 1 Section 18-18-405(1), C.R.S. 2023, makes it unlawful to, among other things, distribute or conspire to distribute a controlled substance. The level of that offense turns primarily on the quantity and nature of the controlled substance, with no distinction between distributing and conspiring to distribute. Under section 18-2-206(7)(a), C.R.S. 2023, however, conspiracy to commit a drug felony is generally one offense level lower than the drug felony itself.

¶ 2 In this case, we address the interplay between these statutes and conclude that when a defendant is convicted under section 18-18-405(1) for conspiring to sell or distribute a controlled substance (or to commit any of the other enumerated acts), that statute — not section 18-2-206(7)(a) — controls the classification of that offense.

¶ 3 In doing so, we affirm the district court's denial of defendant Patrick Bice's motion to correct an illegal sentence. Because Bice pleaded guilty to a level 1 drug felony under section 18-18-405, the district court correctly sentenced him based on that classification.

I. Background

¶ 4 Bice pleaded guilty to conspiring to sell or distribute more than 112 grams of methamphetamine, a level 1 drug felony under section 18-18-405(1) and (2)(a)(I)(B). He stipulated to a sentence of

twenty years in the custody of the Department of Corrections, and the district court sentenced him accordingly.[1] The mittimus reflects the conviction under section 18-18-405(1) and the level 1 drug felony classification under section 18-18-405(2)(a)(I)(B).

¶ 5 Two years later, Bice filed a pro se motion to correct an illegal sentence under Crim. P. 35(a). He argued that his offense should have been classified as a level 2 drug felony, instead of a level 1 drug felony, under section 18-2-206(7)(a). That statute provides:

> Except as otherwise provided by law, conspiracy to commit a level 1 drug felony is a level 2 drug felony; conspiracy to commit a level 2 drug felony is a level 3 drug felony; conspiracy to commit a level 3 drug felony is a level 4 drug felony; and conspiracy to commit a level 4 drug felony is a level 4 drug felony.

§ 18-2-206(7)(a).

¶ 6 The People, while maintaining that the sentence was appropriate under section 18-18-405(1), noted that the district court had previously accepted Bice's argument in another case and therefore asked the court to "correct the putatively illegal sentence."

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[1] Bice also pleaded guilty to money laundering and a violation of the Colorado Organized Crime Control Act and received concurrent sentences of ten years and twenty years, respectively, for those convictions. Neither of those sentences is at issue in this appeal.

¶ 7 The district court appointed counsel, who filed a supplemental motion reiterating that, because Bice was convicted of *conspiring* to distribute methamphetamine, his offense should have been treated as a level 2 drug felony under section 18-2-206(7)(a). The People responded, this time opposing the motion on the ground that section 18-18-405 is an exception to section 18-2-206(7)(a).

¶ 8 The district court initially granted the motion. Although the court acknowledged that section 18-18-405(1) and (2)(a)(I)(B) could be read as creating an exception to section 18-2-206(7)(a), it concluded that such a construction would render the latter a nullity "because a conspiracy to commit a [level] 1 drug felony would never be sentenced as a [level] 2 drug felony under this interpretation."

¶ 9 Six months later, the court sua sponte reversed course, vacated its prior order, and denied Bice's motion. The court explained that it had identified other level 1 drug felonies that, if charged as a conspiracy, would be reduced to level 2 drug felonies under section 18-2-206(7)(a). Thus, it concluded the two statutes could be read harmoniously and Bice's sentence was legal.

II. Analysis

¶ 10 Bice concedes that his offense is designated as a level 1 drug felony under section 18-18-405(2)(a)(I)(B). But he contends that this designation conflicts with section 18-2-206(7)(a)'s directive that "[e]xcept as otherwise provided by law, conspiracy to commit a level 1 drug felony is a level 2 drug felony." His argument goes like this: (1) selling or distributing more than 112 grams of methamphetamine is a level 1 drug felony; so (2) under section 18-2-206(7)(a), conspiring to do so must be deemed a level 2 drug felony. He further argues that this conflict must be resolved in his favor, making his sentence for a level 1 drug felony illegal.

¶ 11 We disagree. Because conspiring to distribute a controlled substance is, under the circumstances of this case, itself a level 1 drug felony, section 18-2-206(7)(a) does not apply. Thus, seeing no conflict, we conclude that when a defendant is convicted of conspiring under section 18-18-405(1)(a), the offense classifications in section 18-18-405(2) — not section 18-2-206(7)(a) — control.

A. Standard of Review and Applicable Law

¶ 12 We review the legality of a sentence de novo. *People v. Valadez*, 2016 COA 62, ¶ 9. A sentence is illegal, or "not authorized

by law," when it is "inconsistent with the sentencing scheme established by the legislature." *People v. Jenkins*, 2013 COA 76, ¶ 11. When the legality of a sentence turns on an issue of statutory interpretation, we review that issue de novo as well. *Id.* at ¶ 12.

¶ 13 In interpreting statutes, "our primary purpose is to ascertain and give effect to the legislature's intent." *McCoy v. People*, 2019 CO 44, ¶ 37. That quest begins with the language of the statute. *Cowen v. People*, 2018 CO 96, ¶ 12. And if the statutory language is clear and unambiguous, it ends there too. *Id.* We apply the statute as written and look no further. *Id.* Only if the statutory language is susceptible of more than one reasonable interpretation may we resort to additional tools to resolve the ambiguity. *Id.*

¶ 14 When interpreting more than one statute, we will "favor a construction that avoids potential conflict." *People v. Trujillo*, 2019 COA 74, ¶ 14 (citation omitted). If the statutes can be construed to avoid inconsistency, we must interpret them accordingly. *People v. Market*, 2020 COA 90, ¶ 18. Otherwise, we may look to other signals of legislative intent to determine which statute controls. *Id.*

B. No Conflict

¶ 15 Applying the plain language of the two statutes in question, we conclude they do not conflict.

¶ 16 Section 18-18-405(1)(a) defines the offense in question:

> [I]t is unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or induce, attempt to induce, *or conspire with one or more other persons,* to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or possess one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.

(Emphasis added.)

¶ 17 This statute creates a single offense that can be violated by committing any one of the enumerated acts. *People v. Valenzuela*, 216 P.3d 588, 592 (Colo. 2009). Thus, conspiring to do the prohibited acts is a direct violation of the statute — no different than the prohibited acts themselves. *Id.* at 593 ("[R]egardless of which proscribed act a defendant commits, he will have violated the statute and may be charged under section 18-18-405."); *see also People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005) ("The acts chosen

for specific inclusion are not themselves mutually exclusive but overlap in various ways and cover a continuum of conduct . . . .").

¶ 18 Section 18-18-405(2) then sets forth the offense classifications for a violation of the statute. As relevant here,

> (2) . . . any person who violates *any of the provisions of subsection (1) of this section*:
>
> (a) Commits a level 1 drug felony and is subject to the mandatory sentencing provisions in section 18-1.3-401.5(7) if:
>
> (I) The violation involves any material, compound, mixture, or preparation that weighs:
>
> . . . .
>
> (B) More than one hundred twelve grams and contains methamphetamine . . . .

§ 18-18-405(2)(a)(I)(B) (emphasis added).

¶ 19 Importantly, the statute does not classify offenses differently based on which prohibited act the defendant committed. It instead applies the same designation to *any* violation of section 18-18-405(1). *See Valenzuela*, 216 P.3d at 595 ("By including attempt and conspiracy within the offense provision, but for the extraordinary risk provision [which is not at issue here], attempt and conspiracy would be punished to the same degree as the completed actions

enumerated in the offense provision."); *Abiodun*, 111 P.3d at 466 ("[T]he defendant's sentence required by the statute is in no way dependent upon the particular enumerated act or acts he is found to have committed."). Because Bice was convicted of violating section 18-18-405(1) in a way that satisfied the criteria of section 18-18-405(2)(a) (i.e., the violation involved more than 112 grams of methamphetamine), that offense was a level 1 drug felony.

¶ 20 For three reasons, section 18-2-206(7)(a) does not require a different result. First, by its own terms, section 18-2-206(7)(a) does not apply. That statute provides that "conspiracy to commit a level 1 drug felony is a level 2 drug felony." *Id.* But Bice was not convicted of conspiracy to commit a level 1 drug felony. His offense — conspiring to sell or distribute — was itself a level 1 drug felony. *See People v. Thurman*, 948 P.2d 69, 73 (Colo. App. 1997) ("[W]hile the General Assembly generally has provided that the punishment of conspiracy shall be less severe than the punishment for the substantive offense, it has chosen to classify conspiracy to distribute controlled substances with the same severity as the actual distribution thereof."). Section 18-2-206(7) applies to the

offense of conspiracy — a distinct crime under section 18-2-201, C.R.S. 2023 — not any offense of which conspiring is an element.

¶ 21 The placement of section 18-2-206(7) in the Criminal Code reinforces this conclusion. *See People v. Hickman*, 988 P.2d 628, 645 (Colo. 1999). That provision appears in a section titled "Penalties for criminal conspiracy — when convictions barred," § 18-2-206, which falls within the part of the Criminal Code defining the offense of criminal conspiracy. *See* §§ 18-2-201 to -206, C.R.S. 2023. That placement provides further indication that the purpose of section 18-2-206(7) is to define the penalties for a conviction under the criminal conspiracy statute. *Cf. Abiodun*, 111 P.3d at 465 ("Where the general assembly proscribes conduct in different provisions of the penal code and identifies each provision with a different title, its intent to establish more than one offense is generally clear."). Bice was not convicted under that statute.

¶ 22 Second, even if section 18-2-206(7)(a) were not so limited, it contains an explicit qualification: it applies "[e]xcept as otherwise provided by law." Thus, the General Assembly expressly contemplated that classifications for conspiring to commit a drug felony (including a level 1 drug felony) would also be delineated in

other statutes. *See People in Interest of G.C.M.M.*, 2020 COA 152, ¶ 15 (noting that the same language in a different statute indicated the statute was "limited by other legislative enactments"). And in those instances, it made clear that the other statutes would control.

¶ 23 Section 18-18-405 is such an exception. It "otherwise provide[s]" that conspiring to sell or distribute more than 112 grams of methamphetamine is a level 1 drug felony, not a level 2. Indeed, because section 18-2-206(7) and the drug felony classifications in section 18-18-405(2) were enacted at the same time,[2] it is possible that the latter is exactly what the General Assembly had in mind when it carved out conspiracy penalties "otherwise provided by law." Notably, the "[e]xcept as otherwise provided" language appears only in the subsection addressing conspiracy to commit a drug felony and not in the subsection addressing conspiracies to commit a felony generally. *See* § 18-2-206(1). That is consistent with the General Assembly's awareness that it was "otherwise

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[2] Both statutes were enacted as part of an overhaul of the sentencing scheme for drug crimes, which created offense levels for "drug felonies" distinct from other felony classes. Ch. 333, sec. 67, § 18-2-206(7)(a), 2013 Colo. Sess. Laws 1942; Ch. 333, sec. 10, § 18-18-405(2)(a), 2013 Colo. Sess. Laws 1909-10.

provid[ing]" in section 18-18-405(2) that conspiring to distribute would receive the same offense level designation as distributing.

¶ 24 Third, to the extent the two statutes conflict, the more specific statute controls. *People v. Manaois*, 2021 CO 49, ¶ 63. And section 18-18-405(2) is the more specific of the two. While section 18-2-206(7)(a) defines the offense levels for conspiracies to commit drug felonies generally, section 18-18-405(2) defines the offense level for Bice's specific offense. *Cf. Manaois*, ¶ 63 (holding that, when a defendant is convicted of a sex offense, the statute governing sex offense sentences controls over general sentencing statutes); *Martinez v. People*, 2020 CO 3, ¶ 19 (holding that statute applicable to probationary sentence for the defendant's conviction controlled over general provision that applied to all probationary sentences).

¶ 25 Thus, we hold that when a defendant is convicted under section 18-18-405(1), the offense levels in section 18-18-405(2) apply — even when the defendant committed that offense by conspiring. Because Bice was properly sentenced for a level 1 drug felony, the district court correctly denied his Crim. P. 35(a) motion.

C. Nullity

¶ 26 Bice contends that this construction of section 18-18-405(2) would render section 18-2-206(7)(a) a nullity because a conspiracy to commit a level 1 drug felony would never be a level 2 drug felony. He asserts that the only offenses designated as level 1 drug felonies are ones that, like those in section 18-18-405(1), can be committed by conspiring. We reject both Bice's premise and his conclusion.

¶ 27 As a general matter, we strive to avoid statutory constructions that render statutory provisions a nullity. *Trujillo*, ¶ 27. But even assuming this principle would allow us to disregard the plain statutory language, our construction does not render section 18-2-206(7)(a) a nullity. To the contrary, that statute would apply if a defendant is convicted of conspiracy to commit a drug felony that does not itself include conspiring as a means of commission.

¶ 28 The People give us two such examples of level 1 drug felonies. First, a person may violate section 18-18-405(1)(a) by "possess[ing] one or more chemicals or supplies or equipment with intent to manufacture a controlled substance," but not by conspiring to do so. Second, a person may commit a level 1 drug felony by selling, transferring, or dispensing certain quantities of marijuana or

marijuana concentrate to a minor, but again, not by conspiring to do so. § 18-18-406(1)(a), C.R.S. 2023. There are several similar examples of level 2 and 3 drug felonies. *E.g.*, § 18-18-406(2)(a), (3)(a); § 18-18-412.5, C.R.S. 2023; § 18-18-412.7, C.R.S. 2023; § 18-18-416, C.R.S. 2023; § 18-18-422(2)(a), C.R.S. 2023.

¶ 29 A person who conspires to commit any of these offenses does not commit the offense itself. Instead, the person may be charged only under the general conspiracy statute. § 18-2-201(1). In that case, the penalty provisions of section 18-2-206(7)(a) would apply.

¶ 30 We acknowledge that section 18-18-405 puts a gaping hole in section 18-2-206(7)(a) — particularly as it relates to conspiracies to commit level 1 drug felonies. Most level 1 drug conspiracies do indeed fall under section 18-18-405(1) and thus are subject to the same offense level as the completed act. That limits the application of section 18-2-206(7)(a)'s offense level for a "conspiracy to commit a level 1 drug felony" to a handful of narrow, and arguably uncommon, circumstances.[3] But a statute is not a nullity simply

[3] The General Assembly could, of course, enact (or reclassify) new level 1 drug felonies, to which section 18-2-206(7), C.R.S. 2023, could also apply.

because it does not apply often. Because our reading of the statutes preserves a role for section 18-2-206(7)(a), it does not make that provision a nullity. Instead, it allows us to harmonize and give meaning to *both* statutes. *People v. Raider*, 2022 CO 40, ¶¶ 9, 19.

D. Absurdity

¶ 31 Bice also contends that our reading of the statute would produce an absurd result in each of the two potential applications we have identified above. We conclude otherwise.

¶ 32 When we interpret statutes, we aim to avoid constructions that would lead to illogical or absurd results. *Cowen*, ¶ 32. But that canon does not give us free rein to rewrite statutes to achieve what we think might be a more desirable result. *People v. Ramirez*, 2018 COA 129, ¶ 32; *People v. Rau*, 2022 CO 3, ¶ 34. We must therefore be "very cautious[]" in turning to this rule of construction and apply it sparingly. *Oracle Corp. v. Dep't of Revenue*, 2017 COA 152, ¶ 41, *aff'd*, 2019 CO 42. The rule "must be reserved for those instances where a literal interpretation of a statute would produce a result contrary to the expressed intent of the legislature." *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010).

¶ 33 Bice first attacks the application of section 18-2-206(7)(a) to a conspiracy to violate the final clause of section 18-18-405(1)(a) — "possess one or more chemicals or supplies or equipment with intent to manufacture a controlled substance" — a conspiracy that we note above could not be charged as a direct violation of section 18-18-405(1)(a). Posing an example of a person who delivers precursor chemicals to a methamphetamine laboratory, Bice argues such conduct could also be charged as "conspir[ing] . . . to manufacture" under the second clause of section 18-18-405(1)(a). He asserts that, in that case, identical conduct could result in different penalties depending on which route the prosecution chose.

¶ 34 But even assuming the conduct Bice describes could be charged as he suggests, there is nothing absurd about a defendant's conduct violating more than one statute.[4] *People v. Margerum*, 2018 COA 52, ¶¶ 62-63; *see also* § 18-1-408(7), C.R.S. 2023 ("If the same conduct is defined as criminal in . . . different sections of this code, the offender may be prosecuted under any one or all of the sections [subject to limitations not applicable here].").

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[4] Bice does not make, and affirmatively disclaims, any equal protection argument.

Nor is it absurd for the prosecution to exercise prosecutorial discretion in choosing between multiple charges. *See People v. Lovato*, 2014 COA 113, ¶ 46 ("When a criminal act violates more than one criminal statute, it is well established that 'the choice of charges generally represents a proper exercise of prosecutorial discretion.'") (citation omitted). It is "immaterial" that one of the statutes "characterizes the crime as of lesser degree than another, or provides a lesser penalty than another." § 18-1-408(7).

¶ 35 Bice also attacks the second potential application of section 18-2-206(7)(a) that we consider above — a conspiracy to sell or transfer marijuana to minors under section 18-18-406(1)(a). He contends that such an application would have the absurd result of punishing a conspiracy to distribute marijuana to minors less severely than other conspiracies to distribute controlled substances.

¶ 36 Initially, we note that this purported anomaly does not extend to conspiracies to distribute quantities of marijuana that otherwise qualify as level 1 drug felonies under section 18-18-406(2)(b)(III)(A). That subsection — which applies to offenses involving more than fifty pounds of marijuana or more than twenty-five pounds of marijuana concentrate — draws no distinction between conspiring

to distribute marijuana to minors and conspiring to distribute marijuana to adults. Neither does section 18-18-405(2)(a) for other controlled substances. What section 18-18-406(1)(a) does is lower the quantity threshold for a level 1 drug felony — to two and a half pounds of marijuana, or one pound of marijuana concentrate — when the sale or transfer is to a minor. Thus, stated more precisely, Bice's argument is that a conspiracy to distribute marijuana to minors *at that lower threshold amount* is punished less severely than a conspiracy to distribute controlled substances generally *at different (and comparatively higher) threshold amounts*.

¶ 37 If that is an anomaly, it is not a result of our construction of the statutes at issue. It is the result of the legislature not extending the distinct crime of sale to minors to the act of conspiring. There could be a reason for that. Maybe the general marijuana distribution statute — which *does* prohibit conspiring but sets higher quantity thresholds — is enough. § 18-18-406(2)(b)(III)(A). Maybe conspiring to distribute large quantities of non-marijuana controlled substances is deemed to be more severe than conspiring to sell or transfer comparatively smaller quantities of marijuana to a minor. *See Thurman*, 948 P.2d at 73 (noting that General Assembly

may "establish more severe penalties for acts which it determines to have greater social impact and more grave consequences"). Or maybe it was a legislative oversight. But that is not for us to decide. If the discrepancy is undesirable, it is up to the legislature to fix it. *Ramirez*, ¶ 32; *People v. Butler*, 2017 COA 117, ¶ 35.

E. Other Tools of Construction

¶ 38 Bice also urges us to look to legislative history and, ultimately, to apply the rule of lenity. But we do not look to legislative history when a statute is unambiguous. *People v. Johnson*, 2021 COA 102, ¶ 17, *aff'd on other grounds*, 2023 CO 7. And the rule of lenity is "a rule of last resort" that we turn to only when neither the language of the statute nor any other tool of construction allows us to discern the meaning of the statute. *People v. Jones*, 2020 CO 45, ¶ 70 (citation omitted). Because the two statutes at issue can be read consistently, harmoniously, and sensibly based on their plain language, "we need look no further." *McCoy*, ¶ 38.

III. Disposition

¶ 39 The order is affirmed.

JUDGE TOW and JUDGE BROWN concur.