Maine Supreme Judicial Court
Sitting as the Law Court

Docket No. Cum-24-421

State of Maine,

Appellee,

v.

Townsend Thorndike,

Appellant.

On Appeal from the
Unified Criminal Docket, Cumberland County

Reply Brief

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

Argument

I. Different applications of one hearsay except is not an emergency jeopardizing public peace, health, or safety of the State of Maine.

The preamble to the 2024 amendment to 16 M.R.S. § 358[1] does not state facts constituting an emergency as required by the Maine Constitution, because an alleged disagreement between trial judges about a statute's application does not threaten the public peace, health, or safety of the State of Maine. Me. Const., Art. IV, pt. 3, § 16.

The State primarily urges reliance on the preamble's "implicit determination" that inconsistent application of 16 M.R.S. § 358 amounts to "more than just a routine disagreement among judges[,]" because not applying section 358 to pending cases harms crime victims. (Red Br. at 22-25.) But there is no such "implicit determination" in the preamble. An emergency preamble must express

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[1] The amendment was enacted as part of P.L. 2024, ch. 646 (emergency, effective Apr. 22, 2024). It provides, in relevant part:

> **16 MRSA §358, sub-§5** is enacted to read:
>
> 5. Applicability. Notwithstanding Title 1, section 302, this section applies to:
>
> A. Cases pending on June 16, 2023; and
>
> B. Cases initiated after June 16, 2023, regardless of the date on which conduct described in the forensic interview allegedly occurred.

P.L. 2024, ch. 646, § D-1.

"the facts constituting the emergency[.]" Me. Const., art. IV, pt. 3, § 16. A preamble needn't recite every fact constituting the emergency but must still express the "ultimate fact" with "sufficient definiteness" to enable judicial review. *Morris v. Goss*, 83 A.2d 556, 563 (Me. 1951). Nothing in the preamble hints to the implicit determination the State cites. Rather, the preamble says that "trial courts across the State have reached disparate decisions regarding whether the [1 M.R.S. § 302] affects whether [16 M.R.S. § 358] applied to pending proceedings[,]" and that "citizens of the State rely on the Legislature to enact statutes that will be interpreted consistently[.]" P.L. 2024, ch. 646. The preamble's stated concern is not one interpretation over another, as the State would have it, but the existence of different interpretations in the first place. *Id.*

Neither the preamble's invocation of words like "uncertainties" and "confusion," nor its reference to disparate decisions, establish the existence of an emergency. (Red Br. 21-22.) Facts stated in a preamble are, ordinarily, treated as true. *Maine Milk Comm'n v. Cumberland Farms N., Inc.,* 205 A.2d 146, 153 (1964), *appeal dismissed*, 380 U.S. 521 (1965) (absent contrary evidence, statements in a preamble are deemed true and a court will not substitute its judgment for that of Legislature). But unlike deciding whether the milk industry employed unfair tactics, *Maine Milk Comm'n*, 205 A.2d at 153, or whether state budgetary

circumstances required more revenue, *Verrill v. Sec'y of State*, 1997 ME 82, ¶ 7, 693 A.2d 336, evaluating the state of the law is a uniquely judicial task. And the judiciary is well-positioned to review, with heightened scrutiny, if judicial officers are in fact confused or uncertain about whether section 358 applied to pending proceedings.

No confusion existed. Counsel is unaware of any case holding that section 358 as originally enacted applied to pending proceedings despite *State v. Beeler*, 2022 ME 47, ¶ 1, n.1, 281 A.3d 637, and 1 M.R.S. § 302, and none have been cited. There is at least one case where a trial court and counsel overlooked 1 M.R.S. § 302, *see State v. Engroff*, Ken-24-125,[2] but that's a different issue. And in any event, this Court's precedents already establish that section 358 as originally enacted did not apply to pending proceedings, because section 358 did not cite 1 M.R.S. § 302 or explicitly state an intent to apply to pending proceedings. *Beeler*, 2022 ME 47, ¶ 1, n.1. Any trial courts holding otherwise did so in plain error, probably from missing 1 M.R.S. § 302 and *Beeler*. This Court needn't defer to the preamble's

[2] *Compare* Blue Br. at 43-46, *State v. Engroff*, Docket No. Ken-24-125, *with* An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine: Hearing on L.D. 2290 Before the J. Standing Comm. On Judiciary, 131st Legis. (2024) (testimony of Shannon Flaherty), available at https://legislature.maine.gov/bills/display_ps.asp?snum=131&paper=HP1478PID=1456#.

legal conclusion that there was something confusing or uncertain about section 358's application to pending proceedings.

II. The amendment to 16 M.R.S. § 358 encroaches on individual disputes involving a closed class of people.

The State contends, because the amendment "broadly affects all cases involving a recorded forensic interview concerning sexual abuse of a child or a disabled adult[,]" (Red Br. at 36), it does not violate the separation of powers doctrine or the prohibition on special legislation. Me. Const. art. III, § 2; Me. Const. art. IV, pt. 3, § 13.

The premise is wrong: the amendment does not broadly affect all cases involving a forensic interview; it affects only a narrow class of cases that were already pending when section 358 took effect. By its original terms, section 358 already applied to all newly filed cases. Thus, the amendment making section 358 retroactive affects only those identifiable defendants who had pending cases when section 358 went into effect. Nobody new will ever enter the class. The amendment, then, was not a generally applicable law as the State claims, but a special law targeting a closed class of cases that the Legislature wished to influence. *See*, *e.g.*, *People v. Canister*, 110 P.3d 380, 384 (Colo. 2005) ("a class that is drawn so that it will never have any members other than those targeted by the legislation is

illusory, and the legislation creating such a class is unconstitutional special legislation"); *see also Sierra Club v. DOT*, 202 P.3d 1226, 1251 (Haw. 2009) (same).

This framework is not "strikingly similar" to *MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, 40 A.3d 975. The statute at issue in *MacImage* regulated fees charged for bulk-copying digital information at registries of deeds, and was intended to "address a newly developing issue that broadly affects the counties in the state and all entities who have requested—*and will request*—bulk digital information from the counties." *Id.* ¶ 37 (emphasis added). Worded differently, the statute applied not only to those entities who had already requested bulk digital information, but also other entities who will later request bulk, digital information. The amendment to section 358, in contrast, applies only to discrete disputes.

Finally, these problems worsen when considering separation of powers concerns. Largely bypassed in the State's brief, the facts as to Thorndike's case are troubling. The trial court granted the motion to continue, without opposition from Thorndike, because it was stated that not allowing the State to play the forensic interview at trial "will severely impact the Victim's emotional state in preparing for this trial and the State must take time to prepare the family for this change in course." (A. 70.) No other ground was cited. Meanwhile, the family and the Maine

Prosecutor's Association jointly worked to change the law so that the State could use section 358 against Thorndike and others. The legislative committee even asked about the status of Thorndike's specific case and expressed a desire to change the law to "help out" the alleged victims. An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine: Hearing on L.D. 2290 Before the J. Standing Comm. On Judiciary, 131st Legis. (2024) (oral testimony of Christina L[redacted] at 3:00:25-3:01:30);[3] *id.* (oral testimony of Senator Carney at 2:32:40-2:33:14) (committee member asking, "I would like to know are there cases are there cases that were pending that are now in process that are being affected because this language isn't in there and if so, *how can we get this to be in effect immediately so we can help those people out*" (emphasis added)). Likewise, prosecutors from other districts urged the Legislature to change the law, presumably to thwart pending appeals and prevent retrials.[4] This was an unfair,

[3] Available at https://legislature.maine.gov/audio/#438?event=91420&startDate=2024-04-10T13:00:00-04:00.

[4] An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine: Hearing on L.D. 2290 Before the J. Standing Comm. On Judiciary, 131st Legis. (2024) (testimony of Shannon Flaherty) (expressing concern that, absent an amendment, a defendant who was convicted after a trial at which a forensic interview was played might be entitled to a new trial); An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine: Hearing on L.D. 2290

legislative interference with ongoing judicial proceedings, violating the separation of powers doctrine and constituting unlawful special legislation targeting a closed and politically disfavored class of people.

III. The trial court was not alternatively required to admit the interview under Rule 803(5), and doing so would have been an abuse of discretion on this record.

The State argues that any error in admitting the forensic interview was harmless because the forensic interview would have been admissible as a recorded recollection. M.R. Evid. 803(5). This Court reviews decisions to admit or exclude evidence for abuse of discretion, *State v. Tieman*, 2019 ME 60, ¶ 12, 207 A.3d 618, and applies the clear error standard to the trial court's preliminary findings of fact, *State v. Paquin*, 2020 ME 53, ¶ 22, 230 A.3d 17. *See also* M.R. Evid. 104(a).

This standard of review presents two problems for the State. First, the trial court made no findings concerning admissibility under Rule 803(5), so there is nothing for this Court to review. We do not know if the trial court would have found that the State established Rule 803(5)'s preliminary requirements. Guessing (as we must) about what the trial court might have done would also violate Thorndike's due process rights, because there was no reasonable opportunity or

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Before the J. Standing Comm. On Judiciary, 131st Legis. (2024) (testimony of Chelsea Lynds) (same).

incentive for Thorndike to challenge whether a proper foundation was laid under Rule 803(5). The Court should thus decline the State's invitation to conduct appellate review of hypothetical factual findings that the trial court never made on an issue that was never raised.

Second, the record did not compel the trial court to admit the forensic interview under Rule 803(5). Rule 803(5)(A) requires that the proffered evidence "relate[] to a matter the witness once knew about but cannot recall well enough at trial to testify fully and accurately[.]". The alleged victim testified, "I remember pretty good of what happened to me." (6/25/2024 Tr. at 86:16-87:7.) *Cf. State v. Adams*, 2019 ME 132, ¶ 14, 214 A.3d 496 (admitting evidence of a forensic interview under Rule 803(5) where the alleged victim "could not remember where the abuse had occurred and did not have a clear or specific memory of the other aspects of that abuse"). The testimony cited in the State's brief, in contrast, focuses more on the alleged victim's limited memory of what she said to the forensic interviewer. The State is, therefore, incorrect in suggesting that the alleged victim's memory of the occurrences with Thorndike was so bad that she could not "testify fully and accurately," as Rule 803(5) requires. If anything, the trial court would have committed an abuse of discretion by admitting the forensic interview under Rule 803(5).

Respectfully submitted,

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I certify that I caused an electronic copy of this document to be served on the following counsel via email on the date below.

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