STATE OF MICHIGAN
IN THE NINTH CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

CIRCUIT COURT NO. 2012-0235-AR
DISTRICT COURT NO. 2011-1138-FY
HON. GARY C. GIGUERE, JR.

DONALD HAUGEN,
Defendant-Appellee,

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OPINION AND ORDER REVERSING THE DISTRICT COURT'S ORDER DISMISSING THE CASE AND REMANDING FOR ENTRY OF AN ORDER BINDING THE CASE OVER FOR TRIAL

At a session of said Court
held in the City and County of Kalamazoo
on the 26th day of July, 2012.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 19, 2008, a fire ignited at Appellee's property at 10135 West O Avenue in Texas Township. Fire personnel responded to the scene and found a pole barn located on the property on fire. Texas Township Fire Marshall James Williams observed several small explosions taking place inside the pole barn. After speaking with Appellee, Marshall Williams discovered that the contents of the barn contained gasoline, diesel, methyl ketones, and other substances Appellee could not recall. This information, along with Marshall Williams' observations, resulted in his decision to let the fire consume itself without attempting to apply water.

On or about August 21, Mark Ducharme of the Michigan Department of Environmental Quality (MDEQ), Detective Bill Ford, and Fred Sellers of MDEQ made personal contact with Appellee to inquire

about the fire and gather information about what chemicals were present on his property. When Appellee denied them access to his property, the investigators sought and obtained a search warrant to do so.

Between August 21 and August 26, 2008, Marinus Polderman was hired by Appellee to conduct excavation work. Upon Appellee's request, Mr. Polderman dug a hole as deep as he could with a ramp going down into the hole.

On August 26, 2008, Marshall Williams, State Trooper Scott Leroy, Ducharme, Ford, and Sellers executed a search warrant at Appellee's property. The search uncovered 55-gallon drums stacked in the barn, another fifty to sixty drums that were covered under a piece of plastic alongside a path on the property, and the excavation pit dug by Mr. Polderman, which contained thirty to forty drums. At that time, other state and federal agencies along with private contractors were contacted to undertake the process of taking samples of the contents in the drums and stabilizing and cleaning up the area. These samples revealed the presence of various hazardous substances including carbon tetrachloride, arsenic, silver, mercury, barium, cadmium, and chromium.

Subsequently, on July 8, 2011, a two-count criminal action was initiated against Appellee. Count 1 alleged Appellee knowingly released six hazardous substances, while Count 2 alleged he knowingly released four other hazardous substances, both in violation of MCL 324.20139.

A preliminary examination was held on November 30, 2011, during which the criminal action was amended to strike certain hazardous substances, leaving arsenic, mercury, and carbon tetrachloride. After testimony concluded, the District Judge requested additional time to review the evidence presented, exhibits, and the relevant statutes. On April 11, 2012, the examination continued with Appellant's motion to bind Appellee over for trial. The District Court denied the motion, and dismissed the charges against Appellee, giving rise to this appeal.

Briefs were timely filed and oral argument was held on July 16, 2012, before this Court.

STANDARD OF REVIEW

A district court's decision to bind over a defendant is reviewed for an abuse of discretion. *People v Hamblin,* 224 Mich App 87, 91 (1997). An abuse of discretion occurs when a court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269 (2003).

A magistrate's responsibility when presiding over a preliminary examination is described in MCL 766.13, which states:

> If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial. MCL 766.13; see also MCR 6.110(E).

Over the years, appellate decisions have given considerable gloss to the dual requirements that there be evidence that a felony was committed and "probable cause" to believe that the defendant committed that felony. See, e.g., *People v Doss,* 406 Mich 90, 100-101 (1979). Our Supreme Court has stated that:

> "[i]t is the contrast of probable cause and proof beyond a reasonable doubt that inevitably makes for examinatorial differences between the preliminary hearing and the trial. Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Proof beyond a reasonable doubt, on the other hand, connotes evidence strong enough to create an abiding conviction of guilt to a moral certainty. The gap between these two concepts is broad. A magistrate may become satisfied about probable cause on much less than he would need to be convinced. Since he does not sit to pass on guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations. By the same token, a showing of probable cause may stop considerably short of proof beyond a reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause." *People v* Justice, 454 Mich 334, 344 (1997).

Thus, it is clear that the magistrate is *not* required to find that the evidence at the time of the preliminary examination proves the defendant's guilt beyond a reasonable doubt in order to bind the defendant over for trial on the charge. *People v Hudson*, 241 Mich App 268, 278 (2000).

Despite this rather low level of proof, the magistrate must always find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred" in order to bind over a defendant. *People v Selwa,* 214 Mich App 451, 457 (1995). If the evidence conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact and bind defendant over for trial. *People v Hill,* 433 Mich 464, 469 (1989). In other words, the magistrate may not weigh the evidence to determine the likelihood of conviction, but must restrict his or her attention to whether there is evidence regarding each of the elements of the offense. *People v Coons,* 158 Mich App 735, 738 (1987). The evidence that factors into the magistrate's decision may be direct or circumstantial, *People v Terry,* 224 Mich App 447, 451 (1997), and it meets the "probable cause" standard when, "by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods,* 200 Mich App 283, 288 (1993). When reviewing this decision, a circuit court considers the whole record of the preliminary examination. *People v Abraham*, 234 Mich App 640, 656 (1999).

DISCUSSION

Appellee was charged with knowingly releasing hazardous substances contrary to the Natural Resources and Environmental Protection Act, 1994 PA 451, in violation of MCL 324.20139, which specifically prohibits a person who:

> (a) Knowingly releases or causes a release contrary to applicable federal, state, or local requirements or contrary to any permit or license held by that person, if that person knew or should have known that the release could cause personal injury or property damage. MCL 324.20139.

The statute defines "release" as including but not limited to "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance." MCL 324.20101(1)(ll).

Here, the latter half of that definition is at issue, as Appellant claims Appellee knowingly abandoned or discarded the barrels or closed receptacles containing the hazardous substances. The statute, however, does not define "abandon" or "discard", leaving those terms open for judicial interpretation. The primary goal of judicial interpretation of statutes is to give effect to the Legislature's intent. *Putkamer v Transamerica Ins Corp of America,* 454 Mich 626, 631 (1997). Clear and unambiguous statutory language may not be the subject of judicial construction. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135 (1996). Instead, statutory language is to be accorded its ordinary and generally accepted meaning. *Id.* at 135-136. If a term is not defined in the statute, a court may consult a dictionary to aid its understanding. *People v Denio*, 454 Mich 691, 699 (1997). As such, the parties here provided, and the District Court considered, standard definitions for those terms: for example, to abandon meaning to "give up completely", and to discard meaning "to cast aside, dispose of, or get rid of." Prelim Tr, vol II, 17; see also Def's Br in Opp'n to Bind Over 11.

The elements of the crime charged, then, are that Appellee knowingly gave up, cast aside, disposed of, or got rid of the barrels or closed receptacles containing a hazardous substance. In considering these elements, the District Court first found a lack of evidence of abandonment or discharge. It stated:

> Here we go. So, if these items, and the testimony was that arsenic, mercury and carbon tetrachloride are hazardous substances, and they're contained within the barrels, the closed receptacles. Were these barrels abandoned or discarded when the barrels were placed in this pit? And I just can't find any way that that would constitute abandonment or discard. I don't think it's abandonment. It might be storage. It might be something else. But I don't find it falls within the definition of abandonment or discard. I don't think it falls within – there's no testimony it was done knowingly to abandon or discard. Prelim Tr, vol II, 29.

This finding, however, falls outside the range of reasonable and principled outcomes. Evidence presented at the preliminary examination established that directly after a fire ignited in a barn full of barrels containing different chemicals and flammable liquid, Appellee was questioned by DEQ investigators who informed him of the nature of and reasons for the investigation. Prelim Tr, vol I, 14, 22-23, 199. Immediately after that, Appellee contacted an excavator, telling him he needed a hole dug as deep as possible, quickly, and without regard to whether it is level. Prelim Tr, vol I, 93. A few days later, investigators found the excavated hole a quarter mile away from Appellee's home which contained barrels on their sides, with chemicals leaking from them, and laying in the dirt without a barrier between them. Prelim Tr, vol I, 47, 77, 225. These drums were in various stages of disrepair, with rust or corrosion visible and their labels worn off. Prelim Tr, vol I, 78. Smoke or gas emanated from them. Prelim Tr, vol I, 56. Given the haste, timing, and lack of care with which Appellee wanted the hole dug, and the physical state of the barrels, the testimony, pursuant to the lesser probable cause standard, was sufficient enough to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that Appellee was giving up, getting rid of, or disposing of the barrels. Even when considering Appellee's argument, and the District Court's contention, that this evidence showed that the hole was for storage purposes, it is beyond the function of the district court to discharge an accused when the evidence is conflicting or raises a reasonable doubt. *Hill, supra* at 469. Rather, these questions are for the trier of fact. *Id.*

Additionally, and perhaps even more indicative of error, the District Court improperly delved into the issue of Appellee's intent. As supported by our Court of Appeals, error is evident in the District Court's finding that there was "no testimony it was done knowingly to abandon or discard", because:

> There would rarely be a conviction if a criminal's intent had to be confessed or proven directly by a witness. Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from

> which it logically and reasonably follows. *People v Johnson*, 54 Mich App 303, 304 (1974).

As such, intent is a question of fact to be inferred from the circumstances by the trier of fact. *People v Wirth,* 87 Mich App 41, 46 (1978). It is likewise a factual issue for the jury whether a particular act was fairly within the intended scope of the common criminal enterprise. *Id.* at 47.

Next, the District Court found the presence of a hazardous substance was not established, stating:

> The composi – or the – there's no testimony that I could rely on to establish that the concentration of arsenic, mercury or carbon tetrachloride falls within the definition of a hazardous substance under the statute. I just don't think the case has been proven. Prelim Tr, vol II, 29-30.

This, too, however, falls outside the range of reasonable and principled outcomes. When asked what hazardous substances were found on Appellee's property, Mr. Ducharme unequivocally listed, among others, carbon-tetrachloride, mercury, and arsenic. Prelim Tr, vol I, 244. In further support, no testimony was presented to refute this. Thus, contrary to what the District Court found, testimony was presented – from a DEQ employee, nonetheless – establishing that the three substances charged are hazardous substances. While it appears the District Court believed the substances were not at the correct levels to be hazardous, this is unsupported. Instead, as was explained, for each hazardous substance, there exist certain risk-based clean-up levels. Prelim Tr, vol I, 244. These levels simply represent different risk exposure scenarios which then dictate what clean-up is necessitated. Prelim Tr, vol I, 244-245. This, though, is not to diminish the uncontroverted testimony that the three charged substances are hazardous substances. Yet, even considering the District Court's assertion, Mr. Ducharme specifically testified that the concentrations of mercury and carbon-tetrachloride found on Appellee's property were in excess of permissible levels for unrestricted residential use. Prelim Tr, vol I, 244-246. Moreover, even if testimony was presented that the three charged substances were not at levels high enough to be designated as hazardous substances, this, again, would simply raise a reasonable doubt only resolvable by a jury. See *Hill, supra* at 469 (1989).

CONCLUSION

For the reasons just discussed, the evidence presented at the preliminary examination either directly or inferentially supported each element of the crime charged and Appellant's motion to bind over was improperly denied. The District Court's determination was either erroneously based on the resolution of issues for a jury or was contrary to testimony.

Therefore, the District Court's order dismissing the charges is reversed, and the case is remanded for entry of an order not inconsistent with this opinion.

IT IS SO ORDERED.

July 26, 2012

Hon. Gary C. Gigueré, Jr.
Circuit Judge