See: Minutes of Commission
3/18/70, p. 11, Vol. IX, Tape #49

Minutes of Subcommittee on
Grading and Sentencing
4/5/70, p. 61, Vol. X, Tape #57

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 31.

OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS

Preliminary Draft No. 3; February 1970

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Subcommittee No. 3

ARTICLE 31.

OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS

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Section 1. Offenses involving narcotics and dangerous drugs; definitions. As used in this Article, unless the context requires otherwise:

(1) The definitions in subsections (2), (3), (4), (5), (6), (7), (11), (12), (13), (18), (19), (20) and (21) of ORS 474.010 apply to this Article.

(2) "Dangerous drugs" means:

(a) Amobarbital, secobarbital, pentobarbital, phenobarbital, acid diethylbarbituric, amphetamine, dextroamphetamine, mephentermine, methamphetamine, phenmetrazine, methylphenidate hydrochloride, glutethimide, methyprylon, meprobamate, chlordiazepoxide HCL, diazepam, oxazepam, chloral hydrate, paraldehyde, ethchlorvynol and ethinamate, any salts, derivatives or compounds of the foregoing substances, any preparations or compound containing any of the foregoing substances or their salts, derivatives or compounds or any registered trademarked or copyrighted preparation or compound registered in the United States Patent Office containing any of the foregoing substances; and

(b) All products containing the substances lysergic acid diethylamide, psilocybin, dimethyltryptamine, methyltryptamine, peyote and mescaline; and

(c) Any other drug designated by the Drug Advisory Council as a dangerous drug and included in published regulations of the State Board of Pharmacy under ORS 689.620.

(3) "Peace officer" means a sheriff, constable, marshal, municipal policeman or a member of the Oregon State Police.

(4) "Sells" means to barter, exchange, give or dispose of to another, or to offer or agree to do the same, and includes each such transaction made by any person, whether as principal, proprietor, agent, servant or employe.

(5) "Unlawfully" means in violation of any provision of ORS chapter 474 or 475.

COMMENTARY - OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS; DEFINITIONS

A. Summary

Thirteen definitions found in ORS 474.010 are incorporated by reference in subsection (1) and made applicable to this Article. They include the following terms: (2) "Physician"; (3) "Dentist"; (4) "Veterinarian"; (5) "Manufacturer"; (6) "Wholesaler"; (7) "Apothecary"; (11) "Coca leaves"; (12) "Opium"; (13) "Marihuana"; (18) "Narcotic drugs"; (19) "Federal narcotic laws"; (20) "Official writen order"; and (21) "Dispense".

"Dangerous drugs" are defined in subsection (2) by reference to specific drugs presently designated by the Drug Advisory Council as dangerous drugs. The drugs in paragraph (a) have been found to have a potential for abuse because of either their stimulant or depressant effect on the central nervous system. The drugs in paragraph (b) have been found to have a potential for abuse because of their hallucinogenic effect.

Paragraph (c) of subsection (2) incorporates the dangerous drug list promulgated by the Drug Advisory Council under authority of ORS 689.620. The current list (See Board of Pharmacy Chapter 855, Division 8, section 80-005) contains those drugs designated in paragraphs (a) and (b). Paragraph (c) is intended to include within the statutory definition of dangerous drugs any drug that may in the future be designated as dangerous by the Drug Advisory Council.

The object of defining specific drugs as "dangerous" is to avoid the problem raised by periodic challenges to the legal validity of the administrative procedure employed by the Drug Advisory Council in designating a drug as dangerous. While the problem may continue in regard to drugs designated as dangerous in the future, coverage for the 28 listed drugs can be firmly established.

Another potential problem to consider is the effect of a ruling by the Drug Advisory Council removing a drug presently designated as dangerous from the dangerous drug list. The definition of dangerous drugs in section 1 would then require amendment by the legislature to conform to the Drug Advisory Council's determination. It may reasonably be expected that the discretion of the district attorney would preclude prosecutions for dealing in a drug removed from the list between legislative sessions.

"Sells" is defined broadly in subsection (4), to cover both gratuitous and nongratuitous transactions, as well as offers or agreements to engage in the same. The language regarding the status of the person who "sells" is included to avoid a conflict with the definition of "sale" in ORS 474.010 (10).

"Unlawfully"is defined to mean in violation of ORS chapter 474 or 475 governing lawful narcotic and dangerous drug transactions. These statutes establish the procedures and conditions whereby narcotic and dangerous drugs may be legally manufactured, transported, sold and possessed.

B. Derivation

Paragraphs (a) and (b) of subsection (2) are taken from Board of Pharmacy Chapter 855, Division 8, section 80-005.

C. Relationship to Existing Law

The definitions in section 1 represent a restatement of existing law.

The major structural change is reflected by the inclusion of specifically named drugs in the definition of dangerous drugs. ORS 475.010 (1) presently defines "dangerous drug" as a drug designated by the Drug Advisory Council as a dangerous drug and included in published regulations of the State Board of Pharmacy under ORS 689.620. The subcommittee recommends that that definition be amended to conform to the definition of dangerous drug proposed in this Article.

Section 2. Criminal dealing in drugs. A person commits the crime of criminal dealing in drugs if he knowingly and unlawfully manufactures, cultivates, transports, possesses, sells, prescribes, administers, dispenses or compounds a narcotic or dangerous drug.

COMMENTARY - CRIMINAL DEALING IN DRUGS

A. Summary

Section 2, the most significant penal statute in the proposed Article on Narcotic and Dangerous Drugs, penalizes a broad range of illicit drug activity, including its manufacture, distribution, sale, possession and administration.

The mens rea requirement is that the conduct be "knowing" and "unlawful." "Unlawfully" means that the drug transaction is in violation of those Oregon statutes outside the criminal code that govern lawful drug activity, e.g., ORS chapters 474 and 475.

All the verbs are used in their ordinary dictionary sense, except "sells," which is defined in section 1, and "possesses," which is defined in the General Definitions as meaning "to have physical possession or otherwise to exercise dominion or control over property."

Section 4, Article ___, Parties to Crime, states:

> "Except as otherwise provided by the statute defining the crime, a person is not criminally liable for the conduct of another constituting a crime if:
>
> "(1) He is a victim of that crime; or
>
> "(2) The crime is so defined that his conduct is necessarily incidental thereto."

Subsection (2) is intended to apply to section 2 insofar as a buyer of narcotic or dangerous drugs may be held to be an accomplice of the seller. It is the intent of the subcommittee to exclude the buyer from accomplice liability under the statute since his conduct is "necessarily incidental" to the unlawful sale. (See Commentary, Exemptions to criminal liability for conduct of another, section 4, Article ___, Parties to Crime).

B. Derivation

ORS 474.020: Prohibits unlawful dealing in narcotic drugs.

ORS 474.990 (1) and (2): Provide a penalty for violation of ORS 474.020 of a $5,000 fine or 10 years imprisonment, or both, except in the case of the drug, marihuana, which may be punished either by 10 years and a $5,000 fine, or one year and a $5,000 fine.

ORS 475.100: States that "no person shall sell, give away, barter, distribute, buy, receive or possess a dangerous drug."

ORS 475.990 (2): Provides a penalty for violation of ORS 475.100 of either a $5,000 fine and one year imprisonment, or a $5,000 fine and 10 years imprisonment.

An examination of the penalty provisions shows that:

(1) Unlawful dealing in any defined narcotic drug other than marihuana is treated as a felony.

(2) Unlawful dealing in the drug marihuana is treated as an "indictable misdemeanor."

(3) Unlawful dealing in dangerous drugs is treated as an "indictable misdemeanor."

Adoption of section 2 as proposed would impose uniform penalty criteria for criminal dealing in both narcotic and dangerous drugs. This would be consistent with existing law, if alternative sentencing provisions are provided granting the court authority to impose misdemeanor penalties for unlawful dealing in marihuana and dangerous drugs.

Section 3. Tampering with drug records. A person commits the crime of tampering with drug records if he knowingly:

(1) Alters, defaces or removes a narcotic or dangerous drug label affixed by a manufacturer, wholesaler or apothecary, except by an apothecary for the purpose of filling prescriptions; or

(2) Affixes a false or forged label to a package or receptacle containing narcotic or dangerous drugs; or

(3) Makes or utters a false or forged prescription or false or forged official written order for narcotic or dangerous drugs; or

(4) Makes a false statement in any narcotic or dangerous drug prescription, order, report or record required by ORS chapter 474 or 475.

COMMENTARY - TAMPERING WITH DRUG RECORDS

A. Summary

Section 3 combines within a single offense a variety of fraudulent practices involving drug labels, prescriptions, orders and reports. The intent of the section is to support the integrity of the regulatory provisions governing lawful traffic in drugs. The section applies both to narcotic and dangerous drugs.

The required mens rea is that the actor's conduct be "knowing." The culpability factor of "unlawfully" is not included, since ORS chapters 474 and 475 do not provide any lawful means of engaging in the prohibited conduct.

Subsection (1) prohibits the alteration of a narcotic or dangerous drug label. The apothecary is exempted if his purpose in defacing or removing the label involves filling prescriptions.

Subsection (2) prohibits affixing a false or forged label to a receptacle containing narcotic or dangerous drugs. Subsection (3) prohibits making or uttering false or forged prescriptions or written orders for narcotic or dangerous drugs.

Subsection (4) penalizes making false statements in connection with a narcotic or dangerous drug prescription, order, report or record that is required to be issued or maintained in accordance with ORS chapters 474 and 475.

B. Derivation

The title of the offense, tampering with drug records, is new to Oregon law.

Subsection (1) is derived from ORS 474.100.

Subsection (2) is derived from ORS 474.170 (6).

Subsection (3) is derived from ORS 474.170 (5).

Subsection (4) is derived from ORS 474.170 (3) and 475.100 (3).

C. Relationship to Existing Law

ORS 474.100 (1) and (2): Prohibit the alteration, defacement or removal of a narcotic drug label. Subsection (1) of the proposed draft extends this prohibition by including dangerous drugs. The penalty provision is ORS 474.990, which provides a maximum punishment of 10 years imprisonment and a $5,000 fine.

ORS 474.170 (6): Prohibits affixing any false or forged label to a package or receptacle containing narcotic drugs. Section 3 extends this coverage to include dangerous drugs. The penalty provision is ORS 474.990.

ORS 474.170 (5): Prohibits the making or uttering of any false or forged prescription or written order. This coverage is also extended to include dangerous drugs. The penalty provision is ORS 474.990.

ORS 474.170 (3): Prohibits the making of a false statement in any prescription, order, report or record required by ORS chapter 474. The penalty provision is

ORS 474.990. ORS 474.100 (3) prohibits the making of a false statement in any prescription, order, report or record required by ORS chapter 475. The penalty provision is ORS 474.990 (3) which provides a punishment of one year imprisonment or a $500 fine.

Section 3 expands existing law by including within its prohibition tampering with labels, prescriptions, written orders, reports and records involving dangerous drugs. This is consistent with the legislative intent expressed by the 1969 amendment to ORS 475.990 (2) which, in effect, imposes a uniform penalty provision for dealing in narcotic drugs and dangerous drugs.

Section 4. Criminal use of drugs. (1) A person commits the crime of criminal use of drugs if he knowingly uses or is under the influence of a narcotic or dangerous drug, except when administered or dispensed by or under the direction of a person authorized by law to prescribe and administer narcotic drugs and dangerous drugs to human beings.

(2) In any prosecution for violation of subsection (1) of this section, it is not necessary to allege or prove what specific drug the defendant used, or was under the influence of, in order to establish a prima facie case. Evidence that the specific drug is not within the definition of narcotic drug in ORS 474.010 or the definition of dangerous drug in subsection (2) of section 1 of this Article is a defense.

COMMENTARY - CRIMINAL USE OF DRUGS

A. Summary

Section 4 prohibits the knowing use of a narcotic or dangerous drug when not administered or dispensed by a person authorized by law. The section penalizes both (1) the use of the drug, and (2) the condition of being under the influence of the drug. To penalize the actual use of the drug, the taking or administration must have occurred within the state. A person may be prosecuted for being under the influence of the drug within the state regardless of where taken or administered. The section does not penalize the mere status of being addicted to a narcotic or dangerous drug, so long as it is not taken or administered in Oregon and the person is not in Oregon under its influence.

B. Derivation

Section 4 is taken from ORS 475.625.

C. Relationship to Existing Law

ORS 475.625 (1) and (2) prohibit the use of narcotic or dangerous drugs unless legally administered or dispensed. Subsection (3) contains the prima facie evidence and defense provisions restated in subsection (2) above. The penalty provision is ORS 475.635 which provides a misdemeanor punishment and authorizes a maximum five year probation period.

Section 5. Criminal drug promotion. A person commits the crime of criminal drug promotion if he knowingly maintains or frequents a place:

(1) Resorted to by drug users for the purpose of unlawfully using narcotic or dangerous drugs; or

(2) Which is used for the unlawful keeping or sale of narcotic or dangerous drugs.

COMMENTARY - CRIMINAL DRUG PROMOTION

A. Summary

Section 5 is intended to discourage the knowing maintenance and frequenting of places characterized by unlawful drug activity. The words "maintain" and "frequent" are to be given their ordinary dictionary meaning.

B. Derivation

Section 5 is derived from ORS 474.130.

C. Relationship to Existing Law

ORS 474.130 (1): Declares that any place which is resorted to by narcotic addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. Subsection (2) prohibits keeping or maintaining such a common nuisance. Subsection (3) prohibits frequenting any place known to be such a common nuisance.

ORS 474.990 (3): Provides a misdemeanor penalty for violation of ORS 474.130.

The proposed section expands the scope of existing law by including within its prohibition dangerous drug activity.

Existing Law

ORS
474.170 (1) & (4)

Section 6. Obtaining a drug unlawfully. A person commits the crime of obtaining a drug unlawfully if he obtains or procures the administration of a narcotic or dangerous drug by:

(1) The forgery or alteration of a prescription or any official written order; or

(2) The concealment of a material fact; or

(3) The use or giving of a false name or a false address; or

(4) Falsely representing himself to be a person authorized by law to obtain narcotic or dangerous drugs; or

(5) Any other form of fraud, deceit or misrepresentation.

COMMENTARY - OBTAINING A DRUG UNLAWFULLY

A. Summary

Section 6 penalizes obtaining a narcotic or dangerous drug, or its administration, by various forms of fraud and misrepresentation. Subsection (5) is a dragnet provision intended to reach fraudulent means of obtaining drugs not otherwise specifically prohibited.

B. Derivation

The section is taken from ORS 474.170 (1) and (4).

C. Relationship to Existing Law

Section 6 restates the substance of ORS 474.170 (1) and (4). Subsection (2) of that statute states that "information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication." That provision has been deleted as unnecessary because the physician-client privilege under ORS 44.040 (1) (d) is limited to civil proceedings. (See State v. Betts, 235 Or 127, 384 P2d 198 (1963)).

Coverage is broadened to include dangerous drug transactions.

Section 7. Criminal possession of drug; prima facie evidence.

(1) Proof of unlawful manufacture, cultivation, transportation or possession of a narcotic or dangerous drug is prima facie evidence of knowledge of its character.

(2) Proof of possession of a narcotic drug not in the container in which it was originally delivered, sold or dispensed is prima facie evidence that the possession is unlawful.

(3) Proof of possession of a dangerous drug not in the container in which it was originally delivered, sold or dispensed, when a prescription is required under the provisions of ORS chapter 474 or 475, is prima facie evidence that the possession is unlawful unless the possessor also has in his possession a label prepared by the pharmacist for the drug dispensed.

COMMENTARY - CRIMINAL POSSESSION OF DRUG; PRIMA FACIE EVIDENCE

A. Summary

Section 7 creates three prima facie evidence situations that impose upon the defendant the burden of coming forward with rebuttal evidence.

Subsection (1) states that proof of unlawful manufacture, cultivation, transportation or possession of drugs is prima facie evidence that the defendant has knowledge of the character of the drug.

Subsection (2) makes it prima facie unlawful to possess a narcotic drug other than in the container in which it was originally sold or dispensed. This presumption could, of course, be rebutted by evidence tending to prove that the drug was lawfully obtained.

Subsection (3) makes it prima facie unlawful to possess a dangerous drug other than in the container in which it was originally sold or dispensed, unless the possessor also has in his possession a label prepared by the pharmacist who dispensed the drug. The defendant could also rebut this presumption by a showing of lawful possession.

B. Derivation

Subsection (1) is derived from Michigan Revised Criminal Code section 6015.

Subsection (2) is derived from ORS 474.110.

Subsection (3) is derived from ORS 475.100 (4).

C. Relationship to Existing Law

Subsection (1) is new statutory language. 11 Op. Atty Gen 689 (1924) stated that proof of possession of opium is prima facie evidence that such possession is unauthorized. The opinion recognizes the rule of evidence that proof of unlawful possession may be used as the basis for a rebuttable presumption that the possessor had knowledge of the unlawful character of the contraband.

Subsection (2) restates the crime defined in ORS 474.110 in terms of prima facie evidence. ORS 474.110 states that a narcotic drug may lawfully be possessed only in its original container. The penalty provision, ORS 474.990, makes a violation of that section punishable by 10 years imprisonment or a $5,000 fine.

The subcommittee believes that public policy can best be served by framing the circumstance of possession of a narcotic drug not in its original container in terms of prima facie evidence. Many instances of this conduct are lacking in criminal intent. The possessor should be afforded the opportunity to produce evidence tending to prove that his possession of the drug is, in fact, lawful.

Subsection (3) restates ORS 475.100 (4). A person can legally possess a dangerous drug not in its original container if he also possesses a label prepared by the issuing pharmacist. If the drug is not in its original container and the possessor does not have the required label, it is prima facie evidence that such possession is unlawful. The possessor may, of course, rebut that presumption with other evidence.

Millar v. Semler, 137 Or 610, 619, 2 P2d 233, 3 P2d 987 (1931), discusses the legal intendment of a "prima facie case":

> "The term 'prima facie case' was defined in Doherty v. Hazelwood Co., 90 Or. 475 (175 P. 849, 177 P. 432), as follows:
>
> > "'A prima facie case is that state of facts which entitles the party to have the case go to the jury; 6 Words & Phrases, [First Series] 5549. Whenever, therefore, it is determined that a plaintiff has made a prima facie case, it has passed beyond the power of the court to withdraw the case from the jury.'
>
> "In defining a prima facie case, various definitions have been collected from the cases in 49 C.J., at page 1346, among which are the following:
>
> > "' * * * that amount of evidence which would be sufficient to counterbalance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove facts inconsistent with it; that which is received or continues until the contrary is shown.'"

In re Estate of Thornberg, 186 Or 570, 577, 208 P2d 349 (1949), states that:

> "Prima facie evidence is such evidence as in judgment of law is sufficient to establish the fact, and, if not refuted, remains sufficient for the purpose."

The constitutional validity of statutory presumptions in criminal cases has been the subject of two recent United States Supreme Court decisions. Early decisions of the Court articulated a number of different standards by which the validity of statutory presumptions were to be measured. One test was whether there was a "rational connection" between the basic fact and the presumed fact. See Yee Hem v. U. S., 268 US 178 (1925). A second was whether the legislature might have made it a crime to do the thing from which the presumption authorized an inference. See Ferry v. Ramsey, 277 US 88 (1928). A third was whether it would be more convenient for the defendant or for the prosecution to adduce evidence of the presumed fact. See Morrison v. Calif., 291 US 82 (1934).

In Tot v. U. S., 319 US 463 (1943), the U. S. Supreme Court singled out one of these tests as controlling, holding that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the fact presumed." At 467.

In Leary v. U. S., ___ US ___, 89 S Ct 1532 (1969), a constitutional attack was directed at 21 USC 176a, which authorized a presumption of knowledge of foreign importation based upon the proven fact of possession of untaxed marihuana. 21 USC 176a:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

The Supreme Court, in applying the Tot test, found USC 176a to be unconstitutional, stating:

> " . . . A criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend . . .
>
> "We conclude that the 'knowledge' aspect of the 176a presumption cannot be upheld . . . . In the context of this part of the statute . . . it [must] be determined with substantial assurance that at least a majority of marijuana possessors have learned of the foreign origin of their marijuana through one or more of the ways discussed above . . .

> "We find it impossible to make such a determination. It would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marijuana . . . "

Similar statutory presumptions in 21 USC 174 and 26 USC 4704 (a) were challenged in Turner v. U. S., ___ US ___, ___ S Ct ___, 6 Cr L 3043 (1970).

Section 174 provides that possession of narcotics is sufficient evidence to establish that the drugs were illegally imported and that the possessor knew that they were illegally imported. Section 4704 (a) provides that the possession of narcotics which are not in the original stamped package is sufficient evidence of a violation under that section to convict.

Petitioner Turner was convicted of two counts involving heroin and cocaine under each section. The Supreme Court affirmed on the two counts involving heroin and reversed on the two counts involving cocaine.

The Court found that heroin is derived from the opium poppy, is not grown in the United States, that it is unlawful to import opium products for the purpose of producing heroin, and that there has been no discovery of clandestine laboratories engaged in the domestic production of heroin from opium derivatives. Based upon these findings, the Court held that there was a "rational connection" between the proven fact, possession of heroin, and the presumed fact, knowledge that the heroin had been illegally imported.

On the other hand, the Court found that cocaine is legally manufactured, distributed and packaged in the United States. It was therefore held that the presumed fact of knowledge arising from mere possession of cocaine was not constitutionally permissible.

The Leary and Turner decisions do not completely answer the question of the constitutionality of the prima facie rules of evidence proposed by section 7. Each subsection must be measured against the mandate that "there must be a rational connection between the facts proved and the fact presumed." Tot v. U. S., infra, at 467.

For an exhaustive survey of the subject, see 34 U Chi L Rev 141 (1966).

Section 8. Burden of proof on exemption from drug laws. In any prosecution for violation of this Article, or forfeiture proceeding authorized by section 9 of this Article, it shall not be necessary for the state to negative any exception, excuse, proviso or exemption contained in ORS chapter 474 or 475, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant.

COMMENTARY - BURDEN OF PROOF ON EXEMPTION FROM DRUG LAWS

The term "in any prosecution" is intended to include complaint, information, indictment and trial. The section shifts to the defendant the burden of proving a claimed exemption from the drug law under which he is being prosecuted, or the forfeiture of conveyance proceeding to which he is subject. This allocation of proof is considered both necessary and equitable since facts giving rise to an exemption are peculiarly within the knowledge of the defendant.

Section 8 is a restatement of ORS 474.180.

Section 9. Seizure and forfeiture of conveyance used in violation of this Article. (1) A district attorney or peace officer charged with the enforcement of this Article, having personal knowledge or reasonable information that narcotic or dangerous drugs are being unlawfully transported or possessed in any boat, vehicle or other conveyance, shall search the same without warrant and without an affidavit being filed. If narcotic or dangerous drugs are found in or upon such conveyance, he shall seize them, arrest any person in charge of the conveyance and as soon as possible take the arrested person and the seized drugs before any court in the county in which the seizure is made. He shall also, without delay, make and file a complaint for any crime justified by the evidence obtained.

(2) Any boat, vehicle or other conveyance used by or with the knowledge of the owner, operator or person in charge thereof for the unlawful transportation, possession or concealment of narcotic or dangerous drug shall be forfeited to the state in the same manner and with like effect as provided in ORS 471.660 and 471.665.

COMMENTARY - SEIZURE AND FORFEITURE OF CONVEYANCES USED IN VIOLATION OF THIS ARTICLE

A. Summary

Section 9 restates existing law as reflected by ORS 475.120 (1) and (2). The two cited statutes, ORS 471.660 and 471.665, cover the seizure and disposal of conveyances transporting liquor.

ORS 471.660 authorizes a peace officer to seize any conveyance used for the unlawful transportation of alcoholic liquors. It states:

> "When any [peace officer] discovers any person in the act of transporting alcoholic liquors in violation of law, in or upon any...conveyance...he shall...take possession of the vehicle or conveyance and arrest any person in charge thereof...."

ORS 471.665 provides that, upon conviction of the person arrested, the conveyance will be sold at public auction. It states further that:

> "No claim of ownership or of any right, title or interest in or to such vehicle shall be held valid unless the claimant shows to the satisfaction of the court that he is in good faith the owner of the claim and had no knowledge that the vehicle was used or to be used in violation of law...."

ORS 475.120 (1) states that:

> "Any district attorney [or peace officer], having personal knowledge or reasonable information that narcotic drugs are being unlawfully... transported...by any...conveyance, shall search the same without warrant and without any affidavit being filed...."

ORS 471.660 was first subject to constitutional attack in State v. DeFord, 120 Or 444, 451, 250 P 220 (1927), where the court, in sustaining the validity of the statute, quoted with approval Mr. Chief Justice Taft in Carroll v. U.S., 267 US 132, 45 Sup Ct 280, 285:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

The same statute was later upheld in State v. Christensen, 151 Or 529, 535, 51 P2d 835 (1935), wherein it was stated by Justice Rossman in a specially concurring opinion:

> " . . . The search of an automobile found upon the public highway may be lawful even though the searching officer possesses no search warrant. He must possess knowledge or information of facts constituting probable cause for a reasonable belief that the automobile which he is about to search contains illegal liquor . . . . "

The issue of a warrantless search is discussed by William F. Frye in chapter 20, (20.5), Oregon Criminal Law Handbook (1969). A condensed version of that material as it relates to ORS 475.120 follows:

" Reasonableness does not depend on whether the search was made by authority of a warrant. ' . . . An officer armed with a warrant may make an unreasonable search. An officer without a warrant may make a reasonable search. ' *State v. DeFord,* 120 Or 444, 452, 250 P 220 (1927). Nor is the fact that the officer had an opportunity to obtain a warrant necessarily controlling. *State v. Chinn,* 231 Or 259, 272, 373 P2d 392 (1962).

"In the absence of a search warrant, however, a reasonable search can only be made in specially defined situations. *Katz v. U.S.,* 389 US 347, 19 Led 2d 576 (1967). Such situations may be categorized as follows:

"(a) By consent. See §20.14 through §20.17 et seq.
"(b) Incident to lawful arrest. See §20.27 et seq.
"(c) In ' exceptional circumstances. '
"(d) Searches after seizure authorized by statute.

"The fourth category above, that of searches after seizure authorized by statute, fits into even more tenuous boundaries. In *State v. Ramon,* 248 Or 96, 432 P2d 507 (1967), the court sustained the search of a car seized off the street on the authority of ORS 475.120. This section provides that any district attorney or peace officer having personal knowledge or reasonable information that narcotic drugs are contained in 'any boat, vehicle or other conveyance, shall search the same without warrant and without any affidavit being filed. ' In *State v. Evans,* 143 Or 603, 610, 22 P2d 496 (1933) (Case note in §20.7), the court found authority in a similar statute (ORS 496.660) for the search and seizure of game from a hunting camp.

" Neither *Ramon* nor *Evans* dealt with the constitutionality of the respective statutes involved, but prior to *Evans* an article was published questioning the constitutionality of ORS 496.660. See *Skipworth, The Law of Search and Seizure,* 3 Or L Rev 179, 182 (1924). The court referred to this statute in *State v. Krogness,* 238 Or 135, 148, 388 P2d 120 (1964), saying, ' We leave open the question whether such a statute would be upheld if it were to be construed as permitting a search upon mere suspicion. ' See also ORS 471.660, .665 (forfeitures for certain violations of liquor code). The U.S. Supreme Court in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 US 693, 14 Led2d 170 (1965), held that the constitutional exclusionary rule also applies in forfeiture proceedings.

"In his dissent to *State v. McCoy,* 86 Or Adv Sh 217, ___ Or ___, 437 P2d 734 (1968), O'Connell, J., used the term 'searches after seizure authorized by statute' and cited *Cooper v. California,* 386 US 58, 17 Led 2d 730 (1967), as the case which recognized this as one of the exceptions to a warrantless search. He predicted, however, the eventual demise of the rule expressed in that case.

" CAVEAT: The Fourth Amendment is couched in terms of unreasonable 'searches *and* seizures,' while Art I, sec. 9 speaks of 'unreasonable search, *or* seizure.'" Id. at §20.5.

The grounds in ORS 475.120 (1) authorizing a warrantless search are "having personal knowledge or reasonable information." This may be construed to mean "probable cause to believe that a felony is being committed", i.e., the person in charge of the conveyance is unlawfully transporting or possessing narcotics. Viewed in this light, the officer could either (1) make a search incident to a lawful arrest, or (2) obtain a search warrant based upon the facts giving rise to such "probable cause."

The transportation in conveyances of narcotic and dangerous drugs presents special problems that may well justify a search after seizure authorized by statute. Research discloses no instance in which such a statute has been declared unconstitutional. In view of the legislative intent expressed by ORS 475.120, authority to conduct a warrantless search of conveyances for narcotic or dangerous drugs on the basis of "personal knowledge or reasonable information" has been retained. It should be noted that this authority has been broadened to include search for "dangerous drugs." The present statute refers only to narcotic drugs.

Section 10. Acquittal or conviction under federal law as precluding state prosecution. No person shall be prosecuted for a violation of any section in this Article if he has been acquitted or convicted under the federal narcotic laws of the same act or omission which it is alleged constitutes a violation of this Article.

COMMENTARY - ACQUITTAL OR CONVICTION UNDER FEDERAL LAW AS PRECLUDING STATE PROSECUTION

Section 10 restates ORS 474.210.

TEXTS OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK REVISED PENAL LAW

§ 220.00 Dangerous drug offenses; definitions of terms

The following definitions are applicable to this article:

1. "Narcotic drug" means any drug, article or substance declared to be "narcotic drugs" in section three thousand three hundred one of the public health law.

2. "Depressant or stimulant drug" means any drug, article or substance declared to be a "depressant or stimulant drug" in section three thousand three hundred seventy-one of the public health law.

3. "Hallucinogenic drug" means any drug, article or substance declared to be "hallucinogenic drugs" in section two hundred twenty-nine of the mental hygiene law.

4. "Dangerous drug" means any narcotic drug, depressant or stimulant drug, or hallucinogenic drug.

5. "Sell" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.

6. "Unlawfully" means in violation of article thirty-three, article thirty-three-A or article thirty-three-B of the public health law[1] or section two hundred twenty-nine of the mental hygiene law.

7. "Ounce" means an avoirdupois ounce as applied to solids and semi-solids, and a fluid ounce as applied to liquids. L.1965, c. 1030; amended L.1967, c. 791, § 30, eff. Sept. 1, 1967.

§ 220.05 Criminal possession of a dangerous drug in the fourth degree

A person is guilty of criminal possession of a dangerous drug in the fourth degree when he knowingly and unlawfully possesses a dangerous drug.

Criminal possession of a dangerous drug in the fourth degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 220.10 Criminal possession of a dangerous drug in the third degree

A person is guilty of criminal possession of a dangerous drug in the third degree when he knowingly and unlawfully possesses a dangerous drug with intent to sell the same.

Criminal possession of a dangerous drug in the third degree is a class E felony. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF NEW YORK REVISED PENAL LAW (CONT'D.)

§ 220.15 Criminal possession of a dangerous drug in the second degree

A person is guilty of criminal possession of a dangerous drug in the second degree when he knowingly and unlawfully possesses a narcotic drug:

1. With intent to sell the same; or

2. Consisting of (a) twenty-five or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one-eighth ounce or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one-quarter ounce or more, containing any cannabis, or (iii) one-half ounce or more, containing raw or prepared opium, or (iv) one-half ounce or more, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the second degree is a class D felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 220.20 Criminal possession of a dangerous drug in the first degree

A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one or more ounces, containing any cannabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the first degree is a class C felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 220.25 Criminal possession of a dangerous drug; presumption

The presence of a dangerous drug in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the drug and not being under duress, is authorized to possess it and such drug is in the same container as when he received possession thereof, or (c) when the drug is concealed upon the person of one of the occupants. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF NEW YORK REVISED PENAL LAW (CONT'D.)

§ 220.30 **Criminally selling a dangerous drug in the third degree**

A person is guilty of criminally selling a dangerous drug in the third degree when he knowingly and unlawfully sells a dangerous drug.

Criminally selling a dangerous drug in the third degree is a class D felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 220.35 **Criminally selling a dangerous drug in the second degree**

A person is guilty of criminally selling a dangerous drug in the second degree when he knowingly and unlawfully sells a narcotic drug.

Criminally selling a dangerous drug in the second degree is a class C felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 220.40 **Criminally selling a dangerous drug in the first degree**

A person is guilty of criminally selling a dangerous drug in the first degree when he knowingly and unlawfully sells a narcotic drug to a person less than twenty-one years old.

Criminally selling a dangerous drug in the first degree is a class B felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 220.45 **Criminally possessing a hypodermic instrument**

A person is guilty of criminally possessing a hypodermic instrument when he knowingly and unlawfully possesses or sells a hypodermic syringe or hypodermic needle.

Criminally possessing a hypodermic instrument is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definitions]

Sec. 6001. (1) The following definitions apply in this chapter.

(a) "Dangerous drug" means any substance characterized as a dangerous drug in section 1(a) of Act No. 204 of the Public Acts of 1943, as amended, being section 335.101(a) of the Compiled Laws of 1948.

[Criminal Sale of Narcotics in the First Degree]

Sec. 6005. (1) A person commits the crime of criminal sale of narcotics in the first degree if he knowingly and unlawfully sells any narcotic drug other than marijuana in any amount, ⅛th ounce or more of marijuana, or 50 capsules or more of one or more dangerous drugs.

(2) Criminal sale of narcotics in the first degree is a Class A felony.

[Criminal Sale of Narcotics in the Second Degree]

Sec. 6006. (1) A person commits the crime of criminal sale of narcotics in the second degree if he knowingly and unlawfully sells any marijuana, dangerous drug or LSD to a minor.

(2) Criminal sale of narcotics in the second degree is a Class B felony.

[Criminal Sale of Narcotics in the Third Degree]

Sec. 6007. (1) A person commits the crime of criminal sale of narcotics in the third degree if he knowingly and unlawfully sells any marijuana, dangerous drug or LSD.

(2) Criminal sale of narcotics in the third degree is a Class C felony.

TEXT OF MICHIGAN REVISED CRIMINAL CODE (CONT'D.)

[Criminal Possession of Narcotics in the First Degree]

Sec. 6010. (1) A person commits the crime of criminal possession of narcotics in the first degree if he knowingly and unlawfully manufactures, transports or possesses:

(a) Heroin, unless in a quantity less than 3250 milligrams and the less than 3250 milligrams are of less than 10% purity; or

(b) 3250 milligrams or more of one or more narcotic drugs other than heroin or marijuana; or

(c) 1 ounce or more of marijuana; or

(d) 50 capsules or more of one or more dangerous drugs; or

(e) 2 or more drugs in amounts not otherwise covered by this section.

(2) Criminal possession of narcotics in the first degree is a Class A felony.

[Criminal Possession of Narcotics in the Second Degree]

Sec. 6011. (1) A person commits the crime of criminal possession of narcotics in the second degree if he knowingly and unlawfully manufactures, transports or possesses any narcotic drug, dangerous drug or LSD.

(2) Criminal possession of narcotics in the second degree is a Class C felony.

[Prima Facie Evidence]

Sec. 6015. Proof of transportation or possession of any narcotic drug, dangerous drug or LSD is prima facie evidence of the transportation or possession of the substance with knowledge of its character.

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