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Criminal Intent and Knowledge as Requirements in Dangerous Drug Cases

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NOTES

CRIMINAL INTENT AND KNOWLEDGE AS REQUIREMENTS IN DANGEROUS DRUG CASES

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INTRODUCTION

Montana's 1969 Dangerous Drug Act[1] made the possession of certain drugs a crime unless the person in possession was excepted from the act. On its face the act does not require anything more for conviction than that state show possession of the prohibited substance. The applicable section of the act reads:

> **A person commits the offense of criminal possession of dangerous drugs if he possesses any dangerous drug as defined in this act and does not come within the exceptions[2]. . . .**

What this section and the act as a whole fails to do is to address itself to the question of whether or not criminal intent and knowledge of the character of a drug[3] are necessary requirements for a conviction of criminal possession of dangerous drugs.[4] Because of the legislature's failure to set out these requirements, the Supreme Court of Montana has heard several cases dealing with these questions in the last four years. The purpose of this note is to explore these cases to determine the answers to two questions: 1. Is criminal intent required to establish possession of dangerous drugs?; and, 2. If criminal intent is required, can it be inferred from possession alone or must knowledge be shown independently?

EARLY LAW

Possession of dangerous drugs did not pose the problems of criminal intent and knowledge at common law that many courts now face. The common law did not recognize possession of dangerous drugs as a crime

[1]REVISED CODES OF MONTANA, §§ 54-129—54-138 (1947) (hereinafter cited as R.C.M. 1947).

[2]R.C.M. 1947, § 54-133.

[3]As used in this note knowledge will, unless otherwise indicated, connote knowledge of the nature of the character of the drug possessed. This type of knowledge is not to be confused with knowledge of the fact that something is possessed. For example, one could have knowledge that he possesses something and yet be totally unaware of what he possesses. This second type of knowledge, knowledge of the character of the thing possessed, is the type of knowledge referred to in this note.

[4]Although this note is primarily concerned with criminal intent and knowledge in regard to possession crimes, the problem is virtually the same for cases dealing with the sale of dangerous drugs. The sale section of the drug act failed to require criminal intent or knowledge in cases dealing with the sale of dangerous drugs. Thus, on its face, the section could provide punishment for someone who unknowingly and without criminal intent sells a dangerous drug just as the possession section could result in the punishment of one who unknowingly and without criminal intent possesses the drug.

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mainly because there were no dangerous drugs. It is only within the last one hundred years that drug possession has been recognized as an evil which the state should prohibit.[5]

Montana's first drug control laws were enacted in 1895.[6] The statutes limited the sale of opium but did not make the possession of the drug a crime. In 1921 the legislature enacted the first statute making the possession of certain drugs a crime.[7] This statute, like its successor today, failed to mention criminal intent or knowledge as a prerequisite to showing criminal possession. The statute did state that possession or control was "presumptive evidence of a violation of this act,"[8] but did not address itself to the other issues. In a case arising six years after the passage of the 1921 statute, the Montana supreme court hinted that lack of knowledge may be a legitimate defense to a possession charge.[9] This statement however, was dictum. Not until *State v. Hood*[10] did the court really face head-on the issues of criminal intent and knowledge.

In *Hood* police officers entered a room occupied by the appellant and found a dictionary on which was printed "the property of Samuel C. Hood."[11] The officers found cocaine inside the dictionary and Hood was convicted of possession in district court. On appeal, Hood contended that criminal intent had not been shown because the state had failed to show the appellant had knowing possession of the narcotic substance.[12] The supreme court agreed and reversed the lower court decision on the grounds that there had been no showing that the appellant had knowing possession of the cocaine. As the court pointed out:

> If the book had belonged to the defendant, it may have been loaned by him to the owner or occupant of the house, and it is just as reasonable to suppose that some one other than (the) defendant concealed cocaine in its binding. It does not appear that he had any knowledge of the fact that it contained cocaine; . . . Here there was no evidence connecting defendant with the conscious possession of cocaine hydrochloride, and in consequence the court erred submitting the case to the jury and in denying defendant's motion for a directed verdict.[13]

Thus, according to *Hood,* a criminal intent was required to show possession and that intent could not be inferred from possession alone but rather through knowledge of the nature of the thing possessed. In other words, it was not enough for the state to show that Hood knew he possessed a dictionary. Rather, the state had to show that Hood knowingly possessed a dictionary containing cocaine.

[5]State ex rel. Glantz v. District Court, 154 Mont. 132, 461 P.2d 193, 198 (1969).
[6]MONTANA CODE ANNOTATED, § 654 (1895).
[7]REVISED CODES OF MONTANA, § 3200 (1921).
[8]*Id.*
[9]State ex rel. Kuhr v. District Court, 82 Mont. 515, 268 P. 501, 503 (1928).
[10]89 Mont. 432, 298 P. 354 (1931).
[11]*Id.* at 355.
[12]*Id.*
[13]*Id.*

Montana's legislature replaced the 1921 statute with the Uniform Narcotic Drug Act[14] in 1937.[15] The relevant portion of the act provided: "It shall be unlawful for any person to manufacture, possess, . . . any narcotic drug, except as authorized in this act."[16] Once again there was no specific requirement of criminal intent or knowledge in the statute. No Montana cases concerning these issues arose while the Uniform Act was in effect in Montana.

In other jurisdictions the questions of intent and knowledge in possession cases sparked some controversy. The majority of states held that a criminal intent in the form of knowledge of the character of the drug must be shown to prove criminal possession.[17] Four states held knowledge is not a prerequisite of criminal possession because no criminal intent is required with possession crimes.[18] Among the states not adopting the Uniform Act, the decisions were split.[19]

The reasoning behind the minority position is simple: if the legislature wanted a criminal intent to be required the statute would have so provided. As *State v. Henker*[20] pointed out:

> Had the legislature intended to retain guilty knowledge or intent as an element of possession, it would have spelled it out. . . . The omission of the words 'with intent' evidences a desire to make mere possession or control a crime.[21]

Massachusetts has followed a slightly different type of rationale.[22] The court there has relied on strict reasoning derived from a prohibition case holding "the burden is placed upon the actor of ascertaining at his

[14]R.C.M. 1947, §§ 54-101—54-128.

[15]Forty-seven states, the District of Columbia and Puerto Rico adopted the Uniform Narcotic Drug Act. Only California, Mississippi and Pennsylvania did not adopt the act.

[16]R.C.M. 1947, § 54-102.

[17]Parks v. State, 46 Ala. App. 722, 248 So.2d 761 (1971); Carroll v. State, 90 Ariz. 411, 368 P.2d 649 (1962); Mickens v. People, 148 Colo. 237, 365 P.2d 679 (1961); People v. Pigrenet, 26 Ill.2d 224, 186 N.E.2d 306 (1962); State v. Williams, 250 La. 64, 193 So.2d 787 (1967); State v. Burns, 457 S.W.2d 721 (Mo. 1970); State v. Faircloth, 181 Neb. 333, 148 N.W.2d 187 (1967); Wallace v. State, 77 Nev. 123, 359 P.2d 219 (1961); State v. Gonzales, 78 N.M. 591, 435 P.2d 210 (1967); People v. Pippen, 16 App. Div.2d 635, 227 N.Y.S.2d 164 (1962); State v. Dempsy, 22 Ohio St. 2d 219, 259 N.E.2d 745 (1970); Gonzales v. State, 157 Tex. Crim. 8, 246 S.W.2d 199 (1951); Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970).

[18]Broic v. State, 79 So.2d 775 (Fla. 1955); Jenkins v. State, 215 Md. 70, 137 A.2d 115 (1957); Commonwealth v. Lee, 331 Mass. 166, 117 N.E.2d 830 (1954); State v. Boggs, 57 Wash.2d 484, 358 P.2d 649 (1961).

[19]California ,after initially holding knowledge not to be an element of possession in *People v. Randolph,* 133 C.A. 192, 23 P.2d 777 (1933) has since reversed itself and joined the majority. People v. Cirilli, 265 C.A.2d 607, 71 Cal. Rptr. 604 (1968). Pennsylvania has held knowledge not to be an element of possession. Commonwealth v. Yaple, 217 Pa. Sup. 232, 273 A.2d 346 (1970). Mississippi has not considered the problem.

[20]50 Wash.2d 809, 314 P.2d 645 (1957).

[21]*Id.* at 647. Although the court said knowledge wasn't required, the court approved a jury instruction requiring knowledge and actively sought out evidence of this knowledge before affirming the jury verdict.

[22]Commonwealth v. Lee, *supra* note 18.

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peril whether his deed is within the prohibition of my criminal statute."[23] Implicit in both minority positions is the consideration that it will be extremely difficult for the state to prove a criminal intent or knowledge for possession crimes. If possession alone is a crime, the state will have little difficulty in convicting violators. Once criminal intent or knowledge is added to the possession requirement, however, the state's burden is much greater. Thus, underlying the minority position is the consideration that ease of prosecution dictates that bare possession be sufficient to obtain a conviction without further proof.

The majority position is based upon the understandable concern that a perfectly innocent person might physically possess a dangerous drug while having no real knowledge of what the drug was or what he actually possessed.[24] In *Hood*[25] for instance, Hood or anyone else could have bought the dictionary in which cocaine was found, had no knowledge of what the dictionary contained, and yet still be sent to prison in a minority jurisdiction. Only with the retention of intent or knowledge is the innocent possessor spared such a fate.[26]

THE DRUG ACT CASES

Montana replaced the Uniform Narcotic Drug Act with the Montana Dangerous Drug Act in 1969.[27] The case of *State ex rel. Glantz v. District Court*[28] put the act to a constitutional test shortly after its adoption. Since the act had failed to require criminal intent or knowledge for estabishing possession, the relators charged that the section was unconstitutionally vague. In denying this constitutional challenge, the court referred back to *Hood*[29] to show that criminal intent and knowledge were required to show possession. The court pointed out that the state did not have to go to the extent of showing a specific intent to obtain a conviction. The court stressed, however, that "this does not mean to imply that the state is relieved of showing that the defendant knew the prohibited substance was in his possession."[30] But how is the defendant's knowledge of the prohibited substance to be shown? Can it be inferred from possession alone or should it be shown independently? *Glantz* indicated that the knowledge should be shown independently:

> Such knowledge can be proved by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that he knew of the existence of the prohibited substance[31]. . . .

[23]Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910).
[24]State v. Burns, *supra* note 17.
[25]State v. Hood, *supra* note 10.
[26]State v. Dempsy, *supra* note 17.
[27]R.C.M. 1947, §§ 54-129—54-138.
[28]State ex rel. Glantz v. District Court, *supra* note 5.
[29]State v. Hood, *supra* note 10.
[30]State ex rel. Glantz v. District Court, *supra* note 5 at 198.
[31]*Id.*

By requiring knowledge to be proved from acts, declarations, or conduct of the accused, the court implicitly rejected the notion that knowledge could be inferred from possession alone. Thus, *Glantz* indicated that criminal intent was required to show possession of dangerous drugs and that this intent was not to be inferred from possession alone.

The Montana supreme court took a new and inconsistent course from *Glantz* when it decided *State v. Trowbridge*[32] two years later. In *Trowbridge,* possession of marijuana had been estabished through the appellant's possession of a baggage claim tag that belonged to a bag containing marijuana. The appellant had received the tag when she checked the suitcase in for an airplane flight. On appeal, the appellant contended that knowledge of the contents of the bag had not been shown. In affirming the lower court's conviction, the court cited a Colorado case, *Petty v. People,*[33] which stated: "If possession is established, knowledge of the character of the drug and the fact that it is possessed can be inferred therefrom."[34] By so reasoning the supreme court changed it's position in *Glantz.* Although the state must show criminal intent as well as knowledge, *Trowbridge* says this knowledge can be inferred from possession alone. The court then went on, however, to find evidence that the defendant did have some sort of knowledge independent of possession. The fact that Trowbridge travelled under an assumed name and was able to describe the suitcase with particularity supported inferences of knowledge independent of possession.[35] Thus, while the court in *Trowbridge* stated that knowledge can be inferred from possession alone, the court looked for and found independent evidence of knowledge.

The whole issue of knowledge and the inference of knowledge from possession finally came to a head in *State v. Anderson.*[36] Although Anderson had been convicted for sale of dangerous drugs rather than possession, the issues were identical to those faced in the possession cases previously discussed.[37] The defendant claimed that he had no knowledge of the nature of the diet pills he sold and as such he did not have the requisite criminal intent to commit a crime. He further argued that a jury instruction implying knowledge from possession alone was a clear misstatement of the law. The instruction read:

> [I]f you believe that the Defendant sold dextro (d) amphetamine capsules which he knew were in his possession and under his physical control, the law implies knowledge by the Defendant of facts necessary to make the sale criminal.[38]

[32]157 Mont. 527, 487 P.2d 530 (1971).
[33]167 Colo. 240, 447 P.2d 217 (1968).
[34]*Id.* at 220.
[35]State v. Trowbridge, *supra* note 32 at 532.
[36]159 Mont. 344, 498 P.2d 295 (1972).
[37]*See* material *supra* note 4.
[38]State v. Anderson, *supra* note 36 at 297.

Simply stated, the law implied knowledge and a criminal intent from the mere fact of possession alone prior to the sale. The supreme court rejected the language used in the instruction. With Justice John C. Harrison dissenting, the court reversed and remanded the case for a new trial. The reasoning of the majority was summarized in three basic points, all based on *Glantz*[39]. These points were:

> (1) [K]nowledge is an essential element of the criminal act, (2) knowledge can be proved by direct evidence, or (3) by evidence of acts, declarations, or conduct of the accused from which an inference of this knowledge may be drawn. The law does not imply knowledge from the fact of possession alone.[40]

The majority thus explicitly rejected the notion that knowledge could be inferred from bare possession—the rationale found in *Trowbridge*.[41] Nowhere in the majority opinion, however, does the court note, overrule, or even attempt to distinguish *Trowbridge*. Justice Harrison, in dissent, remained consistent with *Trowbridge* and argued that since possession had been established knowledge could be inferred.[42] Thus, Montana lawyers are left with two inconsistent positions with no real indication of which is correct.

As long as *Trowbridge* is still good law, it poses danger to innocent possessors just as the minority position under the Uniform Narcotic Drug Act.[43] Under the minority position, no criminal intent is required; mere possession is enough to obtain a conviction. According to *Trowbridge,* a criminal intent is required through a showing of knowledge, but this knowledge can be inferred from possession. If this is true, the innocent buyer of a dictionary with cocaine in its binding could be convicted under either the Uniform Narcotic Drug Act minority position or the *Trowbridge* rationale. For all practical purposes then, the two positions are identical and equally distasteful.

CONCLUSION

The purpose of this note was to find the answer to two question: 1. Is criminal intent required to show possession of dangerous drugs?; and, 2. If criminal intent is required, can it be inferred from possession alone or must knowledge be shown independently? There is no question that criminal intent is required to show possession in Montana.[44] When dealing with the second question the Montana supreme court has been less clear than with the first. While one case indicated that knowledge can be inferred from possession alone, several others have indicated

[39]State ex rel. Glantz v. District Court, *supra* note 5.

[40]State v. Anderson, *supra* note 36 at 299.

[41]State v. Trowbridge, *supra* note 32.

[42]Interestingly enough, Justice John Harrison also wrote the majority opinion in *State v. Trowbridge.*

[43]Minority cases are listed at *supra* note 18.

[44]R.C.M. 1947, § 94-117 should also be noted.

that knowledge must be shown independently. Until the supreme court clarifies the question, either position may be correct. Due to the possible injustice that could result when knowledge is inferred from possession, the better view should require the state to show knowledge independently of possession.