North Carolina Central Law Review

Volume 2 | Issue 2 Article 6

10-1-1970

# Marijuana - Federal Regulation and the Fifth Amendment

Mable A. Minor

## Marijuana—Federal Regulation and the Fifth Amendment

With the ever increasing problem of the importation of marijuana into the United States, one may be concerned about his constitutional right against self incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States of America. Does the code[1] which requires that marijuana imported into the United States be presented for inspection by governmental authorities violate the Fifth Amendment privilege against self incrimination? This question is particularly apropos to those persons who import marijuana without a written order form[2] and without paying the transfer tax.[3] The aspect of having a written order form in conjunction with paying the transfer tax and with selling marijuana will be considered in this paper.

In *Leary v. United States*,[4] Leary has been charged with and convicted of the transportation of marijuana as a transferee without having secured and furnished the written order form from the Secretary of the Treasury as required by statute.[5] Leary, his daughter, and others were on an automobile trip from New York to Mexico. After an apparent denial of entry into Mexico, they drove back across the International Bridge into Texas where a Customs official through a search discovered some marijuana in the car and on the person of Leary's daughter. Leary contended that his conviction must be reversed on the basis of the holdings in *Marchetti v. United States*,[6] *Grosso v. United States*,[7] and *Haynes v. United States*.[8] In *Marchetti* the United States Supreme Court held that one who claims his Fifth Amendment privilege against self incrimination has a complete defense to a federal prosecution for failure to register as a gambler by paying the occupational tax.[9] The court sustained the Fifth Amendment privilege as a defense against an indictment for failure to pay excise and occupational taxes incurred by gambling activity in *Grosso*. The court sustained a similar defense in *Haynes* in a prosecution for failure to register as a possessor and for possession of an unregistered,

[1] 21 U.S.C. § 176a (1964).
[2] 26 U.S.C. § 4705a (1964).
[3] 26 U.S.C. § 4744a (1964).
[4] 392 F.2d 220 (1968), cert. granted 295 U.S. 6 (1969).
[5] 26 U.S.C. §§ 4741a, 4742, 4744a.
[6] 390 U.S. 39 (1968).
[7] 390 U.S. 62 (1968).
[8] 390 U.S. 85 (1968).
[9] 26 U.S.C. § 4411 (1964).

untaxed, sawed-off shotgun. *Marchetti, Grosso,* and *Haynes* indicate that when a statute "unfairly" and inconsistently with accepted standards of "official morality," is designed to coerce those involved in criminal activity to bear part of the government's burden of proving their crime, the statute will be held unenforceable.[10] Certiorari was granted in *Leary* to consider (1) whether petitioner's conviction for failing to comply with the transfer tax provisions of the Marijuana Tax Act[11] violated his Fifth Amendment privilege against self incrimination and (2) whether petitioner was denied due process by the application of the part of 21 U.S.C. § 176a which provides in relevant part:

> . . . Whenever on trial for a violation of this subsection, the defendant is shown to have or 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 United States Supreme Court held in favor of the petitioner on both issues and reversed the judgment of the Court of Appeals.

Failure to register and to pay the transfer tax for marijuana is punishable both by a prison sentence and by a penalty tax of one hundred dollars per ounce of marijuana.[12] A prison sentence is also prescribed for failure to pay the occupational tax, for supplying marijuana except pursuant to an order form, for obtaining marijuana without paying the tax, and for transporting or concealing untaxed marijuana. Furthermore, the statute provides that mere possession places the burden on the defendant to prove that he has duly registered and that he has complied with the order form requirements. One interesting point is that there are various federal rules for the occupational and transactional taxes and for the registration requirements under the federal narcotics tax for narcotics, but according to Internal Revenue Code of 1954, § 4731, marijuana is not included in the definition for narcotics. This makes it imperative to have separate taxation statutes for narcotics and for marijuana.[13]

In *Sanchez v. United States*,[14] Sanchez pleaded guilty to violation of 21 U.S.C. § 176a which rules it unlawful to bring marijuana into the

[10] Powell and Jones, *Self Incrimination and Fair Play—Marchetti Grosso, and Haynes Examined,* 18 Am. U.L. Rev. 114 (1968).
[11] 26 U.S.C. § 4744a (1964).
[12] Int. Rev. Code of 1954 §§ 4741-4742.
[13] *The Marijuana Tax and the Privilege against Self Incrimination,* 117 U. of Penn. L. Rev. 432 (1969).
[14] 400 F.2d 92 (1968).

United States without having it invoiced. However, in a post conviction motion to vacate the sentence, the petitioner contended that in light of the recent Supreme Court decisions of *Marchetti*, of *Grosso*, and of *Haynes* that the Federal Marijuana Registration Statutes are unconstitutional. The District Court denied relief on the basis of *Leary*. The Court of Appeals held that Federal Marijuana Registration Statutes requiring that transfers of marijuana be accompanied by written order forms issued by the Secretary of the Treasury in payment of the transfer tax were not unconstitutional on the theory that they violated the Fifth Amendment privilege against self incrimination. Likewise, in *United States of America v. Garrison, Wertheim, et al.*[15] in which the defendants were charged with knowing that the marijuana they possessed was imported in violation of the statute requiring payment of an occupational tax by every importer, the defendants were not entitled to dismissal on the ground that their assertion of privilege against self incrimination provided a complete defense, where they were not licensed or legally qualified to deal in marijuana and they would not have been permitted to pay the tax. Therefore, their motion for dismissal of the indictment was denied.

The presumption in the statute[16] that whenever on trial for a violation of the section, 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, requires that the court instruct the jury that proof of possession alone is sufficient to authorize conviction. Therefore, a defendant can be convicted under this section without any proof that the marijuana was illegally imported or that he knew it was illegally imported.[17] This presumption was the basis for Adams' motion to dismiss the indictment in *United States v. Adams*.[18] The defendant moved to dismiss the indictment on the ground that the "presumption" or "statutory inferences" authorized violate both the right to due process and the privilege against self incrimination. The District Court invalidated the statutory inference, but held that the invalidation did not lead to dismissal of the indictment charging a substantive offense and

[15] 308 F. Supp. 419 (1969).
[16] 21 U.S.C. § 176a (1964).
[17] ———, *Constitutional Law—Statutory Presumption of Knowledge of Illegal Importation of Marijuana Held Violation of Due Process*, 44 N.Y.U.L. Rev. 623 (1969).
[18] 293 F. Supp. 776 (1968).

conspiracy to import marijuana illegally and receive and conceal it knowing that it has been imported illegally.

Another provision of the statute dealing with written order forms requires that one sell narcotics and marijuana pursuant to a written order form.[19] Minor was convicted for selling narcotic drugs without a written order form in violation of the statute in *United States v. Minor*.[20] The Court of Appeals held that compliance with the statute providing that no sale of narcotic drugs may be made except to one who furnishes an appropriate written order form does not contravene the constitutional privilege against self incrimination with respect to the seller of narcotics, who is not required to register or in any way to incriminate himself. This holding was affirmed on the theory that compliance with the statute[21] would not have required Minor to risk incriminating himself since it is "the purchaser of narcotics and not the seller [who] is under compulsion to apply for and to obtain the requisite form." Therefore, the seller can comply with the statute simply by requiring his prospective purchasers to produce a valid written order form. *United States v. Morales*,[22] *United States v. Oliveros*,[23] *United States v. Buie*,[24] and *United States v. Mastrianni*[25] involved convictions for the sale of narcotics or for the sale of marijuana without the written order form. Each of these convictions was affirmed following the reasoning in *United States v. Minor* that compliance with the statute would not contravene the seller's constitutional privilege against self incrimination.

Since this paper is dealing with the privilege against self incrimination as related to obtaining written order forms and paying the transport tax for importing marijuana, exclusively, the cases with decisions contrary to the foregoing decisions were decided in relationship to another statute and to a different issue. For example, in *Miller v. United States*,[26] the issue is whether the inaction at the trial court level to assert one's right against self incrimination waives one's right to assert it later. The court held that Miller did not waive his constitutional privilege against self incrimination and the judgment of conviction was reversed. *United States*

[19] 26 U.S.C. § 4705a (1964).
[20] 398 F.2d 511 (1968).
[21] 26 U.S.C. § 4705a (1964).
[22] 406 F.2d 1135 (1969).
[23] 398 F.2d 349 (1968).
[24] 407 F.2d 905 (1969).
[25] 420 F.2d 283 (1969).
[26] 412 F.2d 1008 (1969).

*v. Rowell*[27] involves the same technicality and the judgment of conviction was set aside. However, the judgment of reversal has been vacated and the case is remanded to the United States Court of Appeals for further consideration in light of *United States v. Buie, supra.* On the other hand, the majority seem to hold that the presentation of marijuana to governmental authorities for inspection when it is being imported into the United States does not violate one's privilege against self incrimination even without the required written order form and without payment of the transfer tax.

MABLE A. MINOR

## The Affiliations Between Pennsylvania's Abortion Laws and Dying Declarations

ATTEMPTING TO PROCURE AN ABORTION

> Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug or substance, or unlawfully uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both.[1]

*Commonwealth v. Sierakowski* and *Commonwealth v. Williard*[2] particularly noted the aforementioned Pennsylvania statute's dissemination of the acts which constitute an attempt to procure an abortion; a factual stipulation contained within the language of this statute is that "the mere attempt per se is the veritable crime—the actual abortion is not the crime." The Pennsylvania Superior Court, in deciding both of these cases, adjudicated it unnecessary that an actual abortion occur or that the woman actually be pregnant. Simply stated, the area of the crime lies within the attempt to procure an abortion.

[27] 415 F.2d 300 (1969).

[1] Penn. Penal Code, P.L. 872, 18 P.S. § 4718 (June 1939). *See* 39 Temp. L.Q. 33 (1965).

[2] Com. v. Sierakowski, 154 Pa. Super. 321, 35 A.2d 790 (1943); Com. v. Williard, 179 Pa. Super. 368, 116 A.2d 751 (1955). Com. v. Adams (Pa. 1961), 11 Bucks Co. L. Rep. 233 (1962).