UIC Law Review

Volume 9 | Issue 1 Article 15

Fall 1975

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Frank Wesolowski Jr., Pretrial Preparation of Minor Drug Cases, 9 J. Marshall J. Prac. & Proc. 235 (1975)

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PRETRIAL PREPARATION OF MINOR DRUG CASES

by FRANK WESOLOWSKI, JR.*

As a direct result of the *McCabe* case,[1] the Illinois legislature has re-defined narcotic substances and relocated the criminal penalties attendant thereto in the chapter regulating food and drugs. Two acts have accomplished this purpose: the Cannabis Control Act[2] and the Controlled Substances Act.[3]

During the pre-*McCabe* era, Illinois law proscribed possession and sale of narcotic drugs under the Narcotic Drugs section of the Criminal Code. By definition, narcotics were opium and its derivatives, and cannabis sativa L.[4] Possession of narcotics, as previously defined, was an indictable misdemeanor carrying a possible fine of $5,000, and a penitentiary sentence of no less than two, and no more than ten, years. The sale of a narcotic drug carried a minimum sentence of ten years without probation, and a maximum sentence of life. Prior to the effective date of the Cannabis Control Act and the Controlled Substances Act, the person who was accused of selling or possessing a narcotic, without regard for quantity or quality, was facing possible punishment which far exceeded the gravity of the offense. Illinois' revision of the laws adopted the sound philosophy of letting the punishment fit the crime. Unfortunately many states have not followed the Illinois pattern of reclassification, and some states still retain harsh and archaic penalty systems.

Given this background, the discussion that follows will deal primarily with the pretrial preparation of minor drug cases. While the pretrial preparation or investigative procedures described herein would apply to all criminal cases, they seem particularly applicable to the small drug cases. Among the topics of discussion will be client profiles, client interviews, and visits to the police station. Included will be a brief highlight of factors to be considered in formulating your trial strategy.

Experience has shown that the most common violation filed before the court involves searches of the person and his vehicle

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1. People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971).
2. ILL. REV. STAT. ch. 56½, §§ 701-719 (1973).
3. ILL. REV. STAT. ch. 56½, §§ 1100-1603 (1973).
4. The present definition of cannabis is very broad and includes virtually all of the plant and derivatives thereof. ILL. REV. STAT. ch. 56½, § 703(a) (1973).

incident to a traffic stop or an ordinance arrest, where the damning evidence is the product of the ensuing search. Cases of this type are being filed in increasing numbers by police, due in part to the fact that increasing numbers of young citizens are driving around in cars with a little "grass" in their pockets. In many cases these youngsters have a somewhat defiant attitude about the state of the law not progressing as far as their mental attitude toward the use of marihuana or hash. Many of the people accused of the illegal possession of controlled substances or cannabis display an immature attitude that they wear publicly. While this characteristic is not universal, a great number of them seem to fit a mold of nonconformity. Many clients will lack reliability, punctuality, and the financial resources to retain private counsel. This type of client often proves uninviting to the private bar, which will not endure such idiosyncracies or "sweat out" their fees. If counsel is still willing to handle this type of case, after being apprised of the individual often encountered, he may proceed to the interview stage.

The interview should be used to acquaint yourself with the facts, to impart preliminary advice, and, perhaps more importantly, to familiarize yourself with the charges. It is important that you do not make any firm commitments, until you see the actual charges. If your client is incarcerated, he will have a copy of the charge that you can examine and use during your interview. If he does not have it, the jailers have one, and they will generally allow defense attorneys to use it. After examining the charges and acquainting yourself with the facts, a proper conclusion to the interview would be to advise your client not to discuss the case with anyone, in or out of jail. He should be reminded that police use informants in jail, and will also go to the extreme of examining out-going mail in attempts to secure damaging evidence.

After conducting a preliminary interview, the defense attorney should seek to study the details of the arrest, including any police communications attendant thereto. These communications can be used to corroborate a defendant, to impeach a policeman's testimony, or to support a motion to suppress.

Radio communications can be particularly useful in those cases where there has been a drug bust pursuant to a purported arrest for a traffic violation. For example, it is accepted routine that while pursuing any vehicle, police transmit information to determine if the vehicle or license number indicate an irregularity. After the stop is made, they transmit the license number to check the registration of the vehicle. Because of highly sophisticated communications and computer storage equipment, they

receive an answer in a matter of ten to fifteen seconds. Any additional conversation would be extraneous, and probably unusual. These unusual conversations should be the focus of your attention. You should listen for an indication to other squads in the vicinity that assistance may be needed. Typical of such communications are "stopping a van with five white subjects," when the policeman is on patrol in a black community, or "am stopping suspect vehicle with five black subjects in it," when the policeman is on patrol in an all-white neighborhood. Armed with this type of information, it can be argued that these communications are indicative of the fact that the officer was acting on mere suspicion, and that the arrest was a subterfuge. It is evident that this type of information can provide substantial support for suppressing evidence seized pursuant to the putative traffic arrest.

It cannot be over-emphasized how a careful examination of the circumstances of an arrest may prove useful in supporting your motion to suppress. Again, the traffic arrest cases prove illustrative, since the searches that police make after traffic arrests generate the largest percentage of marihuana and controlled substances possession-type cases.

Despite the trend in Illinois against the suppression of evidence uncovered during a search after a traffic arrest, the motion to suppress still has continued vitality in this area. Many judges will suppress evidence obtained pursuant to a "traffic arrest" if it appears that there may not have been a traffic violation.[5] Evidence may also be suppressed if it can be shown that, from the instant the police left their squad car, their actions were more consistent with making an arrest for possession of marihuana or controlled substances than with a traffic arrest. Some of the ways that you could generate evidence to support this contention are through your client's testifying that the police immediately started searching the occupants, that the request for a driver's license was secondary to the search, or that the entire scene in no way resembled a traffic arrest. Although this procedure should prove useful, a better way to elicit the same evidence would be to cross-examine the arresting officer. In felony cases, after indictment, the police report you receive on discovery will be very helpful in assisting your preparation for cross-examination. Although these same police reports are not discoverable before trial as a matter of right in misdemeanor cases, you do have a right to have these reports

5. For cases illustrating the problems of automobile searches after traffic arrests, *see generally* People v. Jordan, 11 Ill. App. 3d 482, 297 N.E.2d 273 (1973); People v. Francis, 4 Ill. App. 3d 65, 280 N.E.2d 49 (1972); People v. Harr, 93 Ill. App. 2d 146, 235 N.E.2d 1 (1968).

produced for purposes of cross-examination during the trial, after the witness has testified.[6]

After acquainting yourself with the details of the arrest, a visit to the police station will often be of great assistance to your pretrial preparation. Assuming the detective on the case is an honest, sincere law enforcement official, he will generally be co-operative and you will learn the strength of the prosecution's case. Although some police departments have a policy of keeping police reports from defense lawyers, the arresting or investigating officer might be willing to discuss the facts of the arrest with you. Unfortunately, if you encounter the type of arresting officer often characterized as the "nark," you will more than likely encounter resistance. He will clearly demonstrate a lack of respect for you. Most of them will fit one of two patterns: they will either try to convince you that your client is not deserving of any representation, or they will decline to say anything. In either event, it is suggested that you endeavor to engage them in conversation for as long as you possibly can. A useful suggestion is that you oblige them to make a clearly outrageous statement, as they are wont to do, full of vulgar and profane language. When the case goes to trial, you can then cross-examine him about your visit to the police station. You then have the right to compel him to repeat his most outlandish statement on the witness stand, before the judge and jury, complete with the typical colorful language of a "nark."

Finally, during a visit to the police station, you might avail yourself of a conversation with the communications officer. Communications officers are generally very co-operative. They may permit you to listen to the tapes of any pertinent radio communications and, in some departments, they might allow you to make your own recording of the playback.

It is at this point that you should reevaluate your client's initial statement in the light of your preparation. You may find that an additional conference is indicated. If not, your defense strategy should be further formulated.

There are a number of factors which should enter into your trial strategy, and there are a number of pitfalls to be avoided. Early and complete preparation is a key factor in the successful defense of minor drug cases. If you are representing a client in the more populated areas of the state, the defense attorney has one distinct advantage, which is that the prosecuting attorney has had little or no time available for preparation of your case. The prosecutors in the busier courts consider it an ideal situa-

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6. People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960), *cert. denied*, 364 U.S. 874 (1960).

tion if they can devote a half-hour to each case they must handle. Their preparation time is accordingly devoted to those cases they evaluate as most serious on that particular court date. Thus, the defense can retain this edge through early and complete preparation. The defense lawyer who enters a case, answers ready for hearing at the earliest opportunity, presents his motion to suppress, and presents a written memorandum of law directly on point to the issues raised in the motion to suppress enhances his chances of success. In so doing, he retains the advantage that is his initially because the prosecutor cannot prepare every case as fully as he did.

The possibility of surprise testimony is an important factor to be considered in formulating your defense strategy. Indeed, a major characteristic of minor drug cases is the frequency with which defense counsel is surprised by the prosecutor's evidence. If surprise testimony can be anticipated during preparation, unfortunate consequences can be avoided.

The most frequently encountered surprise is testimony of the arresting officer that, as he approached the vehicle he just stopped for speeding, he discerned the distinct odor of burning marihuana.[7] Another element interjected at the hearing to suppress evidence that can have a very surprising effect on a defense attorney is the testimony of the policeman that he observed the defendant's vehicle and knew that the driver was underage and in violation of curfew.[8] The curfew ploy often gives justification for the officer's arrest and search, and can have a devastating effect upon your motion to suppress. A third type of surprise evidence arises when the arresting officer testifies that he observed a "furtive move" by one of the occupants in defendant's vehicle, seconds before the arrest.[9] The "furtive move" testimony will have the effect of raising mere suspicion to the level of probable cause, thereby justifying an exhaustive search during a routine traffic stop.

The reluctant client who, in the face of overwhelming evidence, demands a trial can have a significant impact on your trial strategy. Faced with the unfortunate possibility of a guilty verdict, you should seek to construct a defense attuned to mitigation of punishment. A typical illustration would be the person

7. Eight to ten years ago, officers would often testify that they went to special training schools, where they were taught to distinguish the distinctive aroma of burning marihuana, thus establishing themselves as lay experts. This is rarely done now, as judges are aware that smoking marihuana leaves a tell-tale odor.

8. The curfew ploy is a difficult one to combat, because the legislative policy of the State of Illinois is that youngsters should be home after the designated hour, and law enforcement officers are sworn to enforce that policy.

9. *See* Annot., 45 A.L.R.3d 581 (1972).

who is rushed to a hospital in a police ambulance for an overdose when, in the process, the police discover a quantity of pills or powders. Very legitimately, the medical personnel in the emergency room need to know what type of substance was ingested, and a police search for additional drugs can hardly be considered unreasonable. If your client was fortunate enough to live through the experience, and to ingest all of the substances he had, you can always assert the defense that it is not a crime to be addicted to the use of a controlled substance.[10] However, it is more common for your client to have a few pills left. Confronted with this possibility, you should not hesitate to argue that the controlled substance was a compound that is readily available by prescription. If it happens to be a fact, you should show that the accused or one of his friends pilfered the drugs from a family medicine chest, or other like depository of drugs. Because this is a frequent occurrence where the party charged has been consuming every pill from vitamins to birth control pills, it is generally quite persuasive in mitigation.

It is also useful to assume the mitigation mode when your client has been arrested with a marihuana plant clearly in his possession. For example, if your client was in possession of marihuana plants with a combined weight of sixty-five grams, you can mitigate possible punishment by having the plant reweighed before trial. Since the moisture content of the evidence will dissipate while the case is pending, in those cases where the weights are very close to the plateau between misdemeanor and felony, re-weighing can result in reduced sentencing.

A final consideration which will have significant bearing upon your trial strategy is the choice between a bench or jury trial. The axiom, that if your defense is factual you should try your case before a jury, and if your defense is based on the law, then you should waive a jury, is not entirely applicable to the defense of drug cases. The choice of a jury requires additional considerations and caution. If the case involves heroin, it is advised that unless you are sure of a sound, factual defense, you should avoid a jury. A jury starts out with considerable mental reservation and prejudice against heroin. Although the prejudice reduces in degrees when the case involves marihuana and some of the controlled substances, this factor should not be overlooked. In this regard it should be noted that if your client is charged with selling or dispensing drugs, cautionary instructions regarding accomplice testimony or drug addict testimony will often fall on deaf ears. If you should decide to forego a jury

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10. People v. Davis, 27 Ill. 2d 57, 188 N.E.2d 225 (1963).

trial, a consideration which should not be overlooked is that the trial record will be more difficult to protect, and less complete. As in all cases, you have to weigh all factors, including your personal opinion of the propensities of the judge assigned to the case.

Even with the best of preparation, it would be unrealistic to ignore the fact that many cases are going to result in conviction. Regardless of your philosophy about victimless crimes or the use of marihuana or controlled substances, the present status of the law is clear: possession of a prohibited substance is a crime. As in all other criminal cases, you will generally find that a guilty plea is the best vehicle to minimize the consequences or punishment. In addition to preparing mitigating evidence, you have open several avenues when dealing with marihuana users, and more particularly, first offenders.

As to first offenders Illinois law provides for supervision without entry of a judgment or a record of a criminal conviction, if the supervisory period is successfully completed.[11] The Illinois provisions are quite reasonable. Frequently, if the accused possesses a quantity of a substance that is slightly over the maximum amount covered by these provisions, it is not too difficult to negotiate a plea for an amendment to the charge, reducing the quantity of controlled substance or cannabis possessed to conform to the requirements of these sections. The legislative declarations of both acts are undoubtedly the most concise expression available to defense counsel for argument in mitigation.

An alternative avenue is to refer your client to a community drug rehabilitation center or other similar facility as soon as possible, especially if your client uses marihuana or controlled substances. Since many professionals in the mental health area believe that they cannot help someone ordered to psychiatric or psychological counseling, and since mental health practitioners will often write helpful reports only when they believe the patient came to them voluntarily, it is suggested that referral be made prior to adjudication.

My presentation has emphasized pretrial preparation. If your pretrial preparation is flawless, or nearly so, your efforts will be rewarded with successful trial results. It is hoped that this exposition will not in any way discourage members of the private bar from handling minor drug cases. Many people accused of these minor offenses are truly innocent. Thus, it is abundantly clear that the defense bar should not avoid the

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11. ILL. REV. STAT. ch. 56½, §§ 710, 1410 (1973).

challenge that these cases present. Too often, those of us charged with a duty to preserve individual rights tend to allow the enthusiasm exerted in performing that duty to diminish in direct proportion to the seriousness of the charge. It is hoped that the remarks made herein will encourage and aid the private bar in meeting the challenge inherent to minor drug cases.