



GENERAL ASSEMBLY
OF NEW JERSEY
TRENTON

LEGISLATIVE OVERSIGHT COMMITTEE

COURT INVALIDATION OF THE DRUG
PARAPHERNALIA LAW -- SHOULD THE
LEGISLATURE RESPOND NOW?

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Introduction

In response to mounting public concern over an apparent increase in the incidence of the use of illicit drugs, particularly among teenagers, numerous states and communities have enacted "drug paraphernalia" measures during the past few years. These statutes and ordinances generally prohibit the advertisement and sale of items associated with the use of drugs and typically found in so-called "head shops" or other specialty stores which cater to a young clientele.

The first wave of these measures, enacted between 1975 and 1979, ran into substantial legal difficulties. Most were declared unconstitutional or were rendered difficult to enforce through judicial exclusion of certain key phrases. For the most part, these laws were struck down for lack of clear definition of the term "drug paraphernalia", for lack of specificity over the type of behavior that was actually prohibited, or for insufficient guidelines as to the appropriate conduct of law enforcement authorities in the implementation of the measures.

In 1979, the federal Drug Enforcement Administration developed a model drug paraphernalia act. The model was drafted with careful attention to the relevant court decisions and designed to withstand legal challenge. In short order, it served as the basis for numerous pieces of legislation,

including New Jersey's paraphernalia law, enacted as Chapter 133 of the Laws of 1980.

Governmental reliance on the model act has not stilled the constitutional controversies. While laws based on the model have been upheld in some jurisdictions, others have been invalidated in whole or part, including New Jersey's. A resolution of these conflicting interpretations must await a definitive ruling from the United States Supreme Court. On this point, the Supreme Court has just recently agreed to review a local drug paraphernalia ordinance. As it happens, this particular ordinance in an Illinois village is not based on the model act. Nevertheless, the eventual decision would be expected to have a substantial influence on the judicial reading of other paraphernalia laws.

The New Jersey Law

New Jersey's drug paraphernalia law was declared invalid by a Superior Court decision on March 12, 1981 (Town Tobacconist v. John J. Degnan, Superior Court, Middlesex County, Docket No. C-2198-80). The court found the definition of drug paraphernalia to be unlawfully vague. The definition is long and complex, covering 83 lines of type and attempting to be both general and specific in terms of the items which are to be considered as drug paraphernalia. At its broadest the term applies to "all

equipment, products and materials of any kind which are used or intended for use" in connection with controlled dangerous substances, including, for example, planting, harvesting, manufacturing, storing or using drugs. The definition also lists specific examples of objects that are prohibited when "used or intended for use" with drugs.

The court found fault with the key phrase "used or intended for use" which appears about a dozen times throughout the definition:

The phrase "used or intended for use", that appears a dozen times renders the definition of drug paraphernalia unlawfully vague. It is impossible for any retailer to know whose use or whose intention he must be aware of. If it is "frequent" use, he can not tell how frequent it must be, or among what groups of people. If it is the customer's intention, then, before the customer arrives, the retailer can not tell if he is unlawfully stocking drug paraphernalia. The prior act of putting the item on his shelves would become unlawful only later, after the intentions of the yet unidentified customer are revealed.

This reasoning is repeated later in the decision, in a general comment on the many decisions that have gone against drug paraphernalia laws: "Running through their opinions, almost without exception, is the same feeling that business people of common intelligence can not deal sensibly with the act's definition or its requirement that they act on the invalid basis of a view of someone else's intent. They share this Court's reluctant conclusion that the constitution not permit such vagueness and indirection in criminal laws."

The Attorney General's Office is appealing the decision. Meanwhile, the court, which expressed sympathy with the intent of the law and reluctance at having to declare it invalid, did offer the possibility "that a law barring sales of specified paraphernalia, with the purpose that the customer unlawfully use it with CDS [controlled dangerous substances], might pass constitutional muster. Such formulation might avoid focusing on the seller's evaluation of his purchaser's intent."

The "Designed for Use" Controversy

After the New Jersey law was struck down, the Assembly Legislative Oversight Committee convened a meeting on April 27, 1981, to consider whether suitable language could be drawn up to provide a formulation that would meet the court's objections to the existing law. At the committee meeting, several witnesses asserted that the New Jersey law had left itself open to successful challenge because it did not follow faithfully the precise wording of the model act. In particular, the statute was amended during its passage through the Legislature to eliminate the phrase "designed for use" from the model act's definition of drug paraphernalia. Indeed, the court's opinion noted this omission:

Objects are not used or intended for use in an unpopulated vacuum. The use or intention for use envisioned by the statute must be by someone. It is not facially clear whether "used" means

frequently used or used by someone in particular against whom enforcement may be aided and whether "intended for use" means intended by its manufacturer, its seller or its ultimate possessor for use. It is clear that it does not mean "designed for use." The model act created by D.E.A. employed the phrase, "used, intended for use, or designed for use." The omission in our act of that language may mean that it is insufficient that the original designer or maker of the item contemplated a particular use for the item.

The belief that, but for this omission, the law might have been upheld stems from several other decisions which have found the model act to be constitutional. Of particular relevance to New Jersey, for example, is the decision of the U.S. District Court in Trenton concerning a Woodbridge Township ordinance based on the model act (World Imports, Inc. v. Woodbridge Twp. 493 F. Supp. 428). On the other hand, however, a more recent decision by the Sixth Circuit U.S. Court of Appeals threw out a Parma, Ohio paraphernalia law which was based on the model act and, as part of its reasoning, held that the phrase "designed for use" was "vague and overbroad." The court quoted from a similar conclusion in the case of Indiana Chapter, NORML, Inc. v. Sendak (No. TH 75-142-C, S.D. Ind. Feb. 4, 1980):

The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a

makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with I.C. 35-48-4-8 what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Even were the "designed for use" phrase not at issue, a careful reading of the Superior Court decision indicates that other objections may be raised, ones that were not addressed by the court. For example, section 2 of the law prohibits the use or possession with intent to use drug paraphernalia in conjunction with illicit drugs. As to whether this section could survive even though the definition of drug paraphernalia is declared unconstitutionally vague was not before the court:

Section 2 may or may not be affected. The question is not before me, but it is possible that the prohibition of use or possession of drug paraphernalia with intent to use it may survive. Since the statutory definition can be read to focus on the use or intent of the very person to be charged under section 2, his conduct may be lawfully regulated. That is not the plaintiffs' problem. It will have to await decision elsewhere. (emphasis added)

Conclusion

The Oversight Committee concludes that at this juncture it would be best to await a settlement of the legal issues at hand, both at the State and the federal level, before embarking on a campaign to amend the present law. The appeal

of the decision in the New Jersey case, and the acceptance of a drug paraphernalia case by the U.S. Supreme Court, suggest that clarification of the points of controversy lies within the foreseeable future. Furthermore, in the face of the wide divergence of opinions from a variety of court jurisdictions, this committee is far from certain that anyone could construct a law that satisfies all points of view. A binding decision from either the State or federal Supreme Court will surely ease the task.

