



10-1976

Casenote: Drugs: Recent Decisions

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Recommended Citation

Meyers, Peter H. (1976) "Casenote: Drugs: Recent Decisions," *University of Baltimore Law Forum*: Vol. 7: No. 1, Article 9.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol7/iss1/9>

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tiorari to determine Thompson's right to a jury trial or whether the charges should have been returned for trial in the District Court, the Court of Appeals held that the District Court rule, relied on by the lower court, which prevents a defendant from praying a jury trial on petty offenses, no longer applies when a case gets to the Circuit Court.

Rule 741 of the Maryland Rules of Procedure is applicable in Circuit Court, where all defendants, without exception as to petty offenses, are entitled to a trial by jury. The Court further stated that if the General Assembly wants to qualify

the rule it may do so, but until then the *Thompson* case applies.

In *Howard v. State*, 32 Md. App. 75, A2d 568 (1976), the defendant was charged with disturbing the peace, assault, and obstructing a police officer. The defendant was to be tried in District Court, which had concurrent jurisdiction with the Circuit Court. However, the defendant prayed a jury trial under the provisions of the Cts. & Jud. Proc. Art. §4-302 (d)(2). The issue was whether the demand for a jury trial on the latter two offenses also deprived the District Court of its original exclusive jurisdiction

over the petty offense, i.e., disturbing the peace.

Under the *Thompson* ruling, the Court of Special Appeals decided that the trial court in *Howard* erred by severing the petty charges from the other two charges for which a jury trial was prayed. The court stated that the Circuit Court properly acquired jurisdiction over all the offenses with which the defendant was charged and that the defendant was entitled to a jury trial on all charges, including the petty charges when joined originally with charges falling under C.J. §4-302.

Drugs: Recent Decisions

by Peter H. Meyers

(Reprinted, with permission, from *The Leaflet*, A publication of the National Organization for the Reform of Marijuana Laws)

U.S. SUPREME COURT LIMITS ENTRAPMENT DEFENSE

How much help can police agents give in the commission of a crime and still be able to prosecute successfully afterwards? That question recently split the U.S. Supreme Court three ways in a case that has narrowly defined the limits of entrapment and other related defenses.

The case, *Hampton v. United States*, 44 U.S.L.W. 4542 (April 27, 1976), involved an undercover DEA agent who had supplied Hampton with heroin and then arranged for him to sell it to other DEA agents. After Hampton made two sales, he was arrested and convicted for distributing heroin.

A five-Justice majority of the Supreme Court, in affirming Hampton's conviction, limits the defense of entrapment to

situations where government agents "implant" the criminal design in the mind of an innocent person. Entrapment cannot be claimed when government agents encourage or act in concert with an individual who was "predisposed" to commit an offense, as Hampton's attorney had conceded he was.

However, entrapment is not the only defense which can be raised when police participate in the commission of a crime. Two justices who voted to affirm Hampton's conviction—Powell and Blackmun—indicated in a separate opinion that they would bar the prosecution of a "predisposed" defendant when "police overinvolvement in the crime [reached] a demonstrable level of outrageousness," based upon due process principles or the Court's supervisory powers. The three dissenting justices—Brennan, Stewart, and Marshall—agreed that outrageous police involvement would bar prosecution, forming a slender five-justice majority for this principle. The dissenters would have gone further, and reversed Hampton's conviction in this case because of the police involvement, stating that in their view:

"The Government's role has passed the point of toleration . . . The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary."

The other three justices who voted to affirm Hampton's conviction—Rehnquist, White, and Chief Justice Burger—indicated in a separate opinion

that they did not recognize any defense beyond entrapment, and would not bar the prosecution of a "predisposed" defendant no matter how outrageous the government's involvement was in the commission of a crime. Justice Stevens did not participate.

This decision is binding only on the federal courts, and not the states. A number of state courts have adopted more liberal tests for entrapment.

U.S. SUPREME COURT REJECTS "FREE EXERCISE OF RELIGION" MARIJUANA DEFENSE

The U.S. Supreme Court has rejected for the second time the defense of members of a large communal group claiming a right under the Free Exercise of Religion clause of the First Amendment to cultivate marijuana for use in religious practices. In 1971, four members of the group, including its spiritual leader, Stephen Gaskin, were arrested and convicted for cultivating marijuana. All four admitted growing marijuana, but argued that marijuana was an integral part of the religious practices at "the farm" a self-sufficient spiritual community of about 800 individuals located in Summertown, Tennessee.

After these convictions were affirmed by the Tennessee Supreme Court, the U.S. Supreme Court summarily dismissed an appeal "for want of a substantial federal question" in 1973, *Gaskin v. Tennessee*, 414 U.S. 886. The four indi-

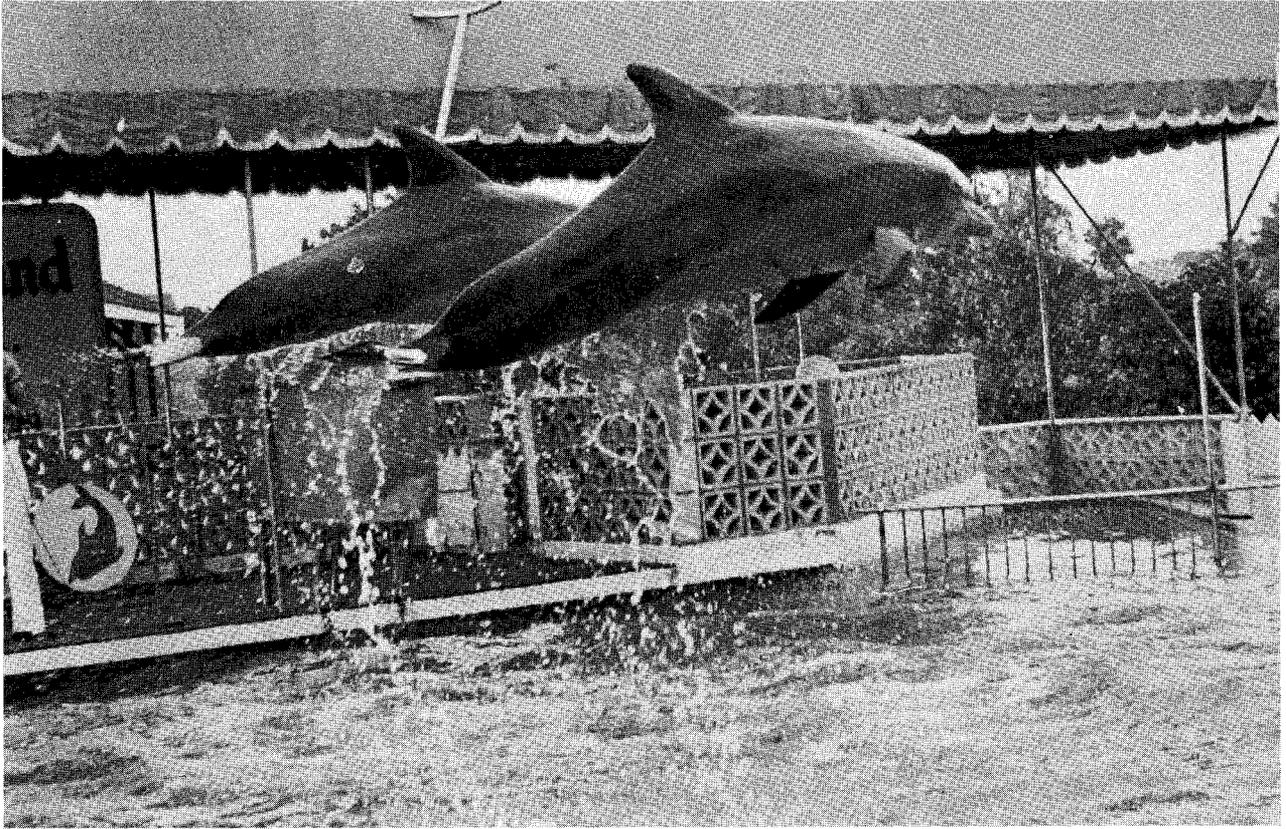


photo by June Chaplin

viduals then entered the Tennessee State Penitentiary and instituted post-conviction proceedings, raising issues similar to those raised in the original appeal—primarily the free exercise of religion, but also cruel and unusual punishment and other issues (but not the right of privacy).

After their petition was denied by the Tennessee Supreme Court, and after all four had been released from prison, a second appeal was filed with the U.S. Supreme Court. On March 29, 1976, the U.S. Supreme Court summarily dismissed this second appeal, as it had the first appeal, “for want of a substantial federal question.” *Gaskin v. Tennessee*, 44 U.S.L.W. 3545.

These summary dismissals, issued without full briefing and oral argument and without an opinion explaining the Court’s reasoning, are nonetheless decisions on the merits of the case, and are binding on the lower courts.

However, because the Court did not issue an opinion explaining its reasoning, the meaning and scope of the decision is unknowable—Is it limited to the

particular facts of this case, involving manufacture of large amounts of marijuana for use in religious practices at “the farm”? Or did the Court intend to foreclose any defense based upon the religious use of marijuana by any person under any circumstance? This uncertainty will only be resolved by future cases.

CALIFORNIA SUPREME COURT LIMITS CAR DRUG SEARCHES

The Supreme Court of California has held that when a small amount of marijuana is found in the passenger compartment of a car, the police cannot constitutionally search the trunk of the car unless there are “specific articulable facts” giving rise to a reasonable belief that additional contraband may be contained in the trunk.

Highway patrolmen had stopped a car for reckless driving, and saw some marijuana seeds and a pipe containing residue in the car. They promptly opened the trunk and found several pounds of marijuana. The California

Supreme Court ordered that the marijuana be suppressed, holding that when the amount of marijuana and the other facts of the case are “indicative only of personal use,” there is probable cause to search only the interior of the car. Probable cause to search the trunk, the court said, requires “specific articulable facts” indicating that drug trafficking may be involved or that additional contraband may be contained in the trunk. *Wimberly v. Superior Court*, 19 Cr.L.Rep 2006 (March 19, 1976).

The California Supreme Court’s decision, based on the search and seizure provisions of the state as well as federal Constitution, is part of what Justice Brennan has described as an “emerging trend” among state supreme courts of basing their decisions on state constitutional provisions. *United States v. Miller*, 44 U.S.L.W. at 4533 (April 21, 1976). Justice Brennan, the senior justice of the U.S. Supreme Court, has in a number of recent dissenting opinions actively encouraged state judges to base their decisions on state constitutional grounds, because these decisions would not be

reviewable by the U.S. Supreme Court and the state courts could provide greater protection for individual rights and liberties under state constitutions than the "Burger Court" is providing under the Federal Constitution. See, *Baxter v. Palmigiano*, 44 U.S.L.W. at 4497 (April 20, 1976); *Miller, supra*, 44 U.S.L.W. at 4533-34 and fn. 4. See generally, "Analysis" at 18 Cr.L.Rep. 2507-08.

UPDATE ON RIGHT OF PRIVACY CASES

Alaska—Last year the Supreme Court of Alaska ruled unanimously in *Ravin v. State*, 537 P.2d 494 (1975), that the constitutional right of privacy protects the possession of marijuana for personal use in the home. Relying on the *Ravin* decision, the Superior Court for the Third Judicial District of Alaska has ordered the state police to return an 8-ounce bag of marijuana seized from a defendant's apartment. State police had entered the apartment with a search warrant for stolen goods, and seeing the 8-ounce bag of marijuana, seized it. The Superior Court, concluding that the marijuana was "possessed by defendant for personal use," ordered that it be returned to him. *State v. McGahan*, Cr. Case No. 76-15045, order issued April 22, 1976. Before the marijuana was returned, DEA agents obtained a federal search warrant and took the marijuana from the state police lockers. Legal action has been instituted in federal court to compel the DEA to return the marijuana.

In another case, the Supreme Court of Alaska has refused to extend *Ravin* to protect a defendant who possessed over two pounds of marijuana and delivered it to an undercover agent in a public parking lot. *Belgarde v. State*, File No. 2447, Op. No. 1206 (Nov. 28, 1975).

Florida—The Circuit Court for Dade County, Florida, has "reluctantly" rejected a constitutional challenge to the state's marijuana possession law, stating that it was obligated to follow a 1969 Florida Supreme Court decision which had upheld the law. The Circuit Court's

opinion urged the Florida Supreme Court to reconsider its 1969 decision on the basis of current knowledge about marijuana, and also "strongly recommended" that the Florida legislature decriminalize private possession and use. Lawrence Berrin, NORML's Florida State Coordinator, argued the case. NORML is assisting in the preparation of an appeal. *State v. Gilbert*, Case No. 75-8916 (April 30, 1976).

Tennessee—A lawsuit focusing on the right of privacy was filed by NORML and others in the U.S. District Court for Western Tennessee. Bruce S. Kramer of Memphis, an ACLU attorney, is handling the suit. *Tenn. Affiliate of NORML v. Levi*, No. C-76-187, filed May 3, 1976.

District of Columbia—The federal three-judge court which is hearing NORML's privacy suit in the District of Columbia has ordered that the local D.C. defendants, but not the federal defendants, be dismissed from the suit for lack of jurisdiction. *NORML v. Cullinane*, Civ. Act. No. 1897-73, issued May 5, 1976.

Arizona—The Superior Court for Yavapai County, Arizona, has rejected a constitutional challenge to the state's marijuana possession law. Charles A. Shaw of Prescott is bringing the challenge, along with Woody Higgins, NORML's Arizona State Coordinator. An appeal has been filed. *State v. Murphy*, Crim. Act. No. 7893, April 30, 1976.

IN BRIEF DEA

- The U.S. District Court for Eastern Michigan has held that airport search techniques which may constitutionally be used to prevent airplane hijackings cannot constitutionally be used by the U.S. Drug Enforcement Administration (DEA) to prevent drug smuggling. As serious as the county's drug problem is, the court said, it does not threaten the fabric of society to the degree that air piracy does. The Court held that the DEA cannot make airport drug searches

based solely on a person's "suspicious" activities in the airport and the fact that he fits the "drug courier" profile which the DEA has prepared. Independent evidence of drug activity, or consent to the search, is required. *United States v. Van Lewis*, 18 Cr.L.Rep. 2549 (1976).

- The U.S. Court of Appeals for the Fifth Circuit has upheld a \$500 contempt-of-court fine against former DEA Administrator John R. Bartels and agent Michael Bannon. The contempt fine had been imposed by the U.S. District Court after the DEA refused to obey a court order to return to a drug store its stock of controlled substances which the DEA had seized. In upholding the fine, the Fifth Circuit stated: "We are thus confronted with the odd spectacle of persons charged with the enforcement of the law refusing, themselves, to obey a specific court order." *Norman Bridge Drug Co. v. Bannon*, 19 Cr.L.Rep. 2066 (1976).

- The New York Court of Appeals has declared invalid a consent form signed by a cocaine dealer authorizing DEA agents to search his apartment because "the apparent consent was induced by overbearing official conduct and was not a free exercise of will." The Court criticized the coercive atmosphere surrounding the consent, and the failure of the DEA agents to get a search warrant even after the individual had been arrested and handcuffed in his apartment, with 9 federal agents present. *People v. Gonzales*, 19 Cr.L. Rep 2081 (1976).

- The U.S. Court of Appeals for the Fifth Circuit has held that the failure of a trial judge to give a cautionary instruction to the jury to carefully scrutinize a well-paid DEA informer's uncorroborated testimony against the defendant, was plain error requiring reversal of the conviction even though defendant's counsel had not requested this instruction. *United States v. Garcia*, 18 Cr.L.Rep. 2565 (1976).

SEARCH AND SEIZURE

- The U.S. District Court for Northern Illinois has held that a junior high school

principal and other school officials who subjected a student to a fruitless strip-search for drugs are not immune from liability in a civil suit brought by the student under 42 U.S.C. Sec. 1983. *Picha v. Wielgos*, 18 Cr.L.Rep. 2537 (1976).

- The D.C. Superior Court has held that a search warrant for marijuana plants on an apartment patio did not justify a subsequent search inside of the apartment. The Court suppressed additional marijuana and LSD which were found in the apartment. *United States v. O'Leary*, 18 Cr.L.Rep. 2344 (1975).

- The New Mexico Court of Appeals has held that police officers manning a general roadblock, doing routine license and registration checks, exceeded their authority in searching the trunk of a car for contraband. The court reversed the defendant's conviction and ordered the marijuana found in the trunk to be suppressed. *State v. Bloom*, 19 Cr.L.Rep. 2060 (1976).

- The Maryland Court of Special Appeals has held that the removal of hash oil-filled balloons from a semi-conscious hospital patient's excrement was not a "search" covered by the Fourth Amendment. The contents of the patient's bedpan, the court said, was "abandoned property." *Venner v. State*, 19 Cr.L.Rep 2105 (1976).

DRIVING WHILE INTOXICATED

- The Florida Supreme Court has held that when a drunk driver is involved in an automobile accident, the jury can award punitive damages in a negligence suit based solely upon the act of driving while intoxicated, without any proof of carelessness or abnormal driving. *Ingram v. Pettit*, 44 L.W. 2478 (1976).

- The Minnesota Supreme Court has held that a defendant convicted of a hit-and-run automobile accident was entitled to make a defense of "involuntary intoxication" based upon his ingestion of valium pursuant to a doctor's prescription. The Court indicated that defendant must prove that he did not know, or have reason to know, that the prescribed

drug was likely to have an intoxicating effect, and that the result of the intoxication was temporary insanity. *State v. Altimus*, 18 Cr.L.Rep. 2416 (1976).

MILITARY

- The U.S. Court of Military Appeals has held that a soldier who laid the groundwork for a heroin importation scheme while stationed in Saigon, but who did not make the first "overt act" to complete the conspiracy until after he returned to the United States, was improperly court-martialed because the conspiracy was not "service-connected." *United States v. Black*, 19 Cr.L.Rep. 2030 (1976).

- The U.S. Court of Military Appeals has held that evidence which is obtained by police in a foreign country in accordance with that country's law is admissible in a U.S. court-martial. The court's decision added that foreign searches must satisfy Fourth Amendment standards whenever American officials are present at the scene of the search or "provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives" of the search. *United States v. Jordon*, 19 Cr.L.Rep. 2025 (1976).

OTHER CASES

- In England, where marijuana is defined by law as "the flowering or fruiting tops of any plant of the genus cannabis," two persons charged with possession of small amounts of marijuana have been acquitted following arguments by their attorneys that the law did not prohibit possession of cannabis leaves, and that the prosecution had failed to prove that the marijuana involved was from the flowering tops, rather than the leaves of the plant. *R. v. Duffie*, Mold Crown Court, Wales (Jan. 29, 1976); *R. v. Berriedale-Johnson*, Kingston Crown Court, Thames (Feb. 3, 1976). This "flowering tops defense" cannot be raised in the United States because the definitions of marijuana, or cannabis, contained in all state laws and in the Federal Controlled Substances Act include cannabis leaves.

- The Texas Court of Criminal Appeals has struck down a condition of probation imposed by the trial judge upon a marijuana defendant, requiring him to submit "his person, place of residence and vehicle to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer." The court indicated that while trial judges have wide discretion in setting the terms of probation, a probationer cannot be forced to surrender his entire Fourth Amendment rights. This condition of probation went far beyond the legitimate needs of the probationary process. *Tamez v. State*, 19 Cr.L.Rep. 2026 (1976).

- The U.S. Court of Appeals for the First Circuit has held that a resident alien whose state marijuana conviction has been expunged by the state court is still subject to automatic deportation from the United States. *Kolios v. Imm. & Nat. Serv.*, 19 Cr.L.Rep 2111 (1976).

- The Illinois Supreme Court has upheld the constitutionality of a classification scheme for marijuana and other drugs which is based upon the total weight of the substance with which the drugs may be mixed, rather than the weight of the illegal drugs themselves. *People v. Mayberry*, 19 Cr.L.Rep 2018 (1976).

- The U.S. Court of Appeals for the Fifth Circuit has held that a defendant cannot be convicted of a criminal attempt under 21 U.S.C. Sec. 846 for selling a substance he believed to be heroin to an undercover agent, when the substance was in reality an uncontrolled substance. *United States v. Oviedo*, 18 Cr.L.Rep 2411 (1976).

- The Michigan Supreme Court has rejected the "usable amount" test for possession of heroin, holding that: "where there is an amount of narcotic visible to the naked eye, regardless of how much it is, there is a sufficient amount to permit prosecution. We leave open the question of whether it is possible to sustain a conviction if the amount involved is not visible." *People v. Harrington*, 18 Cr.L.Rep. 2437 (1976).