

I N S I D E T H E M I N D S

Defense Strategies for Drug Crimes

*Leading Lawyers on Interpreting Today's Drug
Cases, Developing a Thorough Defense, and
Protecting a Client's Rights*



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Drugs Bunny:¹ When Does the Personal Use Defense Lose Its Bounce?

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¹ Defined, *inter alia*, as a supplier of drugs or a dealer by the *Urban Dictionary*. *Drugs Bunny*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=drugs+bunny> (last visited August 26, 2014).

Introduction

Bud and Herb are driving on the New Jersey Turnpike back home to Maryland after a snowboarding vacation in Stowe, Vermont. A state trooper stops them for a speeding infraction. When the trooper approaches the vehicle, he smells a strong odor of raw marijuana, using his canine-like olfactory skills he attained in the police academy. After a brief conversation, the trooper cajoles Bud, the driver and registered owner of the vehicle, to sign a Consent to Search form. The subsequent search yields a pound of Sour Diesel packaged in a vacuum sealed plastic bag inside a knapsack in the trunk. The trooper also finds a digital scale, a grinder, two glass pipes, and \$1,200 in cash in the knapsack. No other contraband is found in the vehicle or on the occupants. Bud and Herb are placed under arrest and each charged with third degree possession with intent to distribute marijuana and fourth degree possession of marijuana, in violation of the applicable statutes in the New Jersey Criminal Code.² What are their defenses and what factors are crucial in determining whether the prosecutor can prove intent to distribute beyond a reasonable doubt?

Expert Testimony

Since no actual distribution occurred in a possession with intent to distribute case, the prosecution will often utilize expert testimony to explain possible indicators of an intent to distribute. “Admission of expert testimony on drug possession and distribution techniques is permissible when reasonably required to assist jurors in understanding subjects that are beyond the ken of an average layperson.”³ Most frequently, the expert will be a police detective who has extensive experience dealing with the drug trade.⁴ The expert must be properly qualified and can opine that certain quantities and packaging of drugs are indicative of an intent to distribute to assist the jury in understanding the evidence. However, in New Jersey and many other jurisdictions, the expert cannot give an opinion as to the guilt or innocence of the defendant and should only provide an opinion in a hypothetical scenario.⁵ In addition, an officer who is testifying as a lay witness about a suspected

² See N.J. STAT. ANN. §§ 2C:35-5b(11), 2C:35-10a(3).

³ *State v. Nesbitt*, 888A.2d 472, 473-74 (N.J. 2006).

⁴ See *State v. Odom*, 560 A.2d 1198, 1200 (N.J. 1989) (a detective with over sixteen years on the job who made approximately 4,000 narcotics arrests qualified as an expert with specialized knowledge as to possession of drugs with intent to distribute).

⁵ See *id.* at 1205-06.

drug deal cannot state an opinion regarding the ultimate issue in the case—i.e., that the defendant did in fact intend to sell illegal drugs.⁶

Defense counsel can call an expert to counter the prosecution's claim that the drugs were possessed with the intent to distribute. A defense expert should also have specialized training and experience with narcotics and drug users. A defense expert will usually be a retired narcotics detective, a private investigator, or even a substance abuse counselor. For example, the defense expert can explain how a heavy drug user may consume a large quantity of drugs in a relatively short period of time or how certain drug paraphernalia found in the vicinity of the drugs is indicative of personal use. In addition, a defendant's prior convictions for drug possession (and not distribution) can be used to support the argument that the drugs seized in the case in question were possessed solely for personal consumption. This is one of the few times where a prior record is potentially a positive factor.

In the case of Bud and Herb, the prosecution may call an expert witness to testify about the quantity of the marijuana, as well as the significance of discovering a digital scale and cash in close proximity to the drugs. Meanwhile, a defense expert can be helpful in explaining the amounts of marijuana a heavy smoker can consume through personal use as well as the significance of finding paraphernalia, such as a grinder or a pipe, in close proximity to the drugs. An expert's testimony, whether for the prosecution or the defense, can have a substantial impact on the jury and would be crucial in a case such as the aforementioned. A prosecution expert may opine that not even Cheech and Chong would possess a pound of marijuana for personal use. Meanwhile, a defense expert can rebut that opinion and explain the benefits of a heavy user purchasing larger amounts to save on cost, otherwise known as the "Costco defense" (and you do not even have to be a member). In the fact pattern set forth above, all experts would likely conclude that a pound of marijuana is a hefty amount. However, the experts may differ in opinion as to whether such an amount can be for personal use or only for distribution...

Quantity

In some situations, the quantity of drugs alone will suffice in proving an intent to distribute. The weight of the drugs is a key factor not only in

⁶ See *State v. McLean*, 16 A.3d 332 (N.J. 2011).

determining the degree of the crime, but also in determining whether the drugs are possessed for personal use or distribution, or a combination of the two (after all, many businessmen like to sample their goods).

In New Jersey, as in many other jurisdictions, actual distribution and possession with intent to distribute are lumped together in the same statute. The level of the distribution offense is determined by the weight of the drugs. There are four degrees of distribution for marijuana:

1. Fourth degree involves less than one ounce;⁷
2. Third degree deals with one ounce or more but less than five pounds;⁸
3. Second degree involves five pounds or more but less than twenty-five pounds;⁹ and
4. First degree is twenty-five pounds or more.¹⁰

The most commonly charged of the four offenses is the third degree offense. The third degree offense presents a wide range in terms of whether the marijuana being possessed can arguably be for personal use only.

For instance, a regular marijuana user who smokes daily can easily consume more than an ounce in a month. It is not uncommon for such a user to purchase several ounces at a time. However, there is a limit to how much can be considered for personal use, and some drugs, such as marijuana, go stale over time. Practically all experts in drug usage will agree that several pounds of marijuana or several ounces of cocaine, for example, can only be possessed with intent to distribute. However, there may be some circumstances where some of the drugs are possessed for personal use and the rest possessed with the intent to distribute. Under such a factual scenario, it is possible that the amount possessed for personal use can affect the degree of crime for the possession with intent to distribute depending on the exact amount of drugs involved and the weight cutoff for the various degrees.¹¹ If someone is arrested in New Jersey with five pounds of marijuana and plans to take

⁷ N.J. STAT. ANN. § 2C:35-5b(12).

⁸ *Id.* § 2C:35-5b(11).

⁹ *Id.* § 2C:35-5b(10)(b).

¹⁰ *Id.* § 2C:35-5b(10)(a).

¹¹ See *State v. Lefkowitz*, 762 A.2d 323 (N.J. Super. Ct. App. Div. 2000) (a jury verdict upheld in which the jury found intent to distribute but only for less than half an ounce of cocaine, thereby lowering the crime from a second degree to a third degree charge).

several ounces for personal use and then sell the rest, the amount possessed with intent to distribute is arguably in the third degree range and not the second degree range.

In the case of Bud and Herb, a pound of marijuana was found in their vehicle. This is a large amount, even if being shared by two individuals. The cash and scale can be used as further evidence of distribution. To rebut the strong evidence of intent to distribute, the attorneys for Bud and Herb should consider hiring an expert or having their clients testify about their extensive marijuana habits and how they prefer to stock up with large amounts to save money (the “Costco defense”). Putting clients on the stand is risky but sometimes necessary. Hopefully, the case for Bud and Herb will not go up in smoke if they testify.

On a rare occasion, it may be wise to have the defendant(s) testify before the grand jury about his or her extensive drug use and how the drugs seized were for personal use. If the grand jury accepts the testimony as truthful, then such a strategy decision can result in an indictment for possession and a no bill on the possession with intent to distribute. However, such a decision must be made cautiously on a case-by-case basis. For example, if there is a potential defense to all charges, including the possession only charge, in a constructive possession case in which the client has not made any prior admissions to the police, then the testimony before the grand jury will guarantee that your client will not be acquitted on all of the charges because of the admission to the possession. Nonetheless, it may be prudent to testify anyway in that situation if the client’s primary goal is to avoid a distribution conviction. A lengthy meeting with the client to review the pros and cons of testifying before the grand jury is necessary under those circumstances. If the client decides to testify, he or she must then be adequately prepped for the grand jury proceedings.

Packaging and Accessories

In addition to the issue of quantity, experts can testify about the manner of packaging of the drugs. “For example, in the case of an individual caught in possession of a kilogram of cocaine broken down into hundreds of individual packages, a prosecution drug expert could offer an opinion that the quantity and purity of the drugs and manner of packaging is inconsistent with personal

use. If scales or other drug paraphernalia indicative of distribution were found in the individual's possession, an expert would be allowed to testify as to the common and ordinary use of those instruments by drug traffickers."¹²

The marijuana found in Bud's car was packaged in one bag and not broken down into smaller amounts of equal or even differing weights.¹³ Had the marijuana been packaged in sixteen bags containing one ounce each, then the prosecution would argue that it is packaged for distribution. However, the fact that it was found in one bag does not necessarily mean it is only for personal use. All facts and circumstances of the case must be considered, including other items located in the vicinity of the illegal drugs.

The trooper also discovered a digital scale, which is a prosecution favorite. However, most of my clients who are regular drug users claim to utilize a digital scale when purchasing their drugs to ensure they are not being ripped off by unregulated dealers. After all, they cannot sue for the shortage or file a complaint with the local police department. The digital scale is their only means to keep dealers honest.

Money was also recovered from the defendants. The prosecutor will likely assert that \$1,200 is a large sum of cash that is indicative of drug dealing.¹⁴ Defense counsel should respond that it is not illegal to possess cash nor is it unusual for someone to bring a lot of cash on a vacation trip. Therefore, there is a lack of proof that the money seized from Bud and Herb was drug money.

The police also found two glass pipes (also known as bowls) and a grinder. A grinder is used to break up the marijuana into small pieces so that it burns better in a bowl or a joint. The pipes/bowls are used to smoke the marijuana. Thus, these items are clearly indicative of personal use and should be stressed by defense counsel, through cross-examination of police witnesses and direct testimony from defense witnesses, to undermine the prosecution's claim that the marijuana was not possessed for personal use.

¹² *State v. Summers*, 823 A.2d 15, 24-25 (N.J. 2003) (Albin, J., dissenting).

¹³ *See id.* at 20 (expert testified that crack cocaine packaged in fifty small baggies was indicative of distribution).

¹⁴ However, it is improper for a prosecutor to present evidence of a defendant's lack of employment to suggest the money must be drug money or that the defendant had a motive to sell the drugs. *See State v. Mathis*, 221 A.2d 529 (N.J. 1966); *State v. Terrell*, 819 A.2d 497 (N.J. Super. Ct. App. Div. 2003).

Finally, it is important to note any lack of evidence of intent to distribute. For instance, the trooper did not discover small plastic baggies or other packaging materials often used to distribute drugs. Since the burden of proof rests solely on the prosecution team, any lack of evidence potentially acts as a crucial part of the defense and should be emphasized both in plea negotiations and, if those fail, in trial.

I once had a client who was charged with serious drug offenses in New Jersey after local police stumbled upon nineteen small marijuana plants he was growing in a closet in his house. His charges included maintaining a drug manufacturing facility and possession of marijuana with intent to distribute. In reality, this young man was far from being a drug dealer. He worked a full-time job and another part-time job and happened to enjoy smoking marijuana in his spare time. To save money, he bought a “Grow DVD” from *High Times* magazine and attempted to grow his own marijuana for personal consumption. The police uncovered zero evidence indicating an intent to distribute other than the plants, many of which would have died within weeks. In fact, all other evidence seized by the police suggested they merely arrested another pothead and not a dealer. They seized a grinder, several pipes and bongs, and even a gas mask that was attached to a bong. Ultimately, the case got assigned to a reasonable and practical prosecutor who agreed to plead the case out to a simple possession of marijuana with a short period of probation after considering my arguments why there was no evidence of an intent to distribute or to maintain a drug manufacturing facility. This horticultural experiment could have resulted in many years in state prison if cooler heads had not prevailed.

Sharing

A stoner couple walks into a bank and hands the cashier a bag of marijuana, stating they would like to open a joint account. Is that legal? In all seriousness, some jurisdictions permit the defense of sharing to combat an allegation of distribution or intent to distribute. In New Jersey, intent to distribute “cannot be established on the basis of the sharing of drugs between or among joint possessors.”¹⁵ “[A]s a matter of law, two or more defendants

¹⁵ *State v. Lopez*, 819 A.2d 486, 492-93 (N.J. Super. Ct. App. Div. 2003); *see also State v. Morrison*, 902 A.2d 860, 866 (N.J. 2006) (The New Jersey Supreme Court upholds the legal principle that “a person cannot distribute a controlled dangerous substance to a person with whom he shares joint possession.”).

cannot intend to distribute to each other drugs they jointly possess.”¹⁶ Thus, if two or more individuals pool their money to purchase a large amount of drugs to share amongst each other for personal consumption, then they are not guilty of possession with intent to distribute.

If the prosecution seeks to claim that Bud and Herb jointly possessed the large amount of marijuana with the intent to distribute it, the defense can counter that proposition by arguing that the defendants jointly possessed the marijuana with the sole purpose of sharing it with each other. Perhaps Bud and Herb met a good, reliable supplier in Vermont with a high-quality product and they decided to pool their money and purchase a large amount that would last many (many) months. As long as they did not plan to sell it or share it with others, then their possession of the Sour Diesel is simply that.

Territorial Jurisdiction

What if Bud and/or Herb did in fact intend to sell or distribute the marijuana, but only upon their return to Maryland? Does that constitute possession with intent to distribute in New Jersey to violate New Jersey’s drug distribution laws? Simply put, yes. The intent to distribute is what matters and not where the distribution is intended to take place.¹⁷ An opposing interpretation of the law “would render the respective penal statute wholly ineffectual and result in dispositions contrary to public policy.”¹⁸ Therefore, it is the mens rea that controls, and territorial jurisdiction would be established in New Jersey for the case of Bud and Herb.

Conclusion

Possession with intent to distribute cases are not always simple. Attorneys representing a defendant charged with possession of illegal drugs with intent to distribute must examine the facts of the case carefully to determine if there is a defense of possession for personal use only. There are many factors and strategies to consider and evaluate in building a defense against the intent to distribute charge. If you represent clients accused of drug crimes, be mindful of the ever-evolving drug trade and make sure to learn about drug packaging and accessories as well as applicable street names for

¹⁶ *Id.* at 865.

¹⁷ *See State v. Meltzer*, 570 A.2d 1042, 1044-45 (N.J. Super. Ct. Law Div. 1989).

¹⁸ *Id.*

drugs and quantities. When equipped with this knowledge, you will be able to pull out the weeds from the prosecution's case, mount a strong defense that is not just a smokescreen, and end the case on a high note, blazing the trail to your client's freedom.

Key Takeaways

- A prosecution expert in an intent to distribute case must be properly qualified. He or she can opine whether certain quantities and packaging of drugs are indicative of an intent to distribute to assist the jury in understanding the evidence. However, in many jurisdictions, the expert—or an officer witness—cannot give an opinion as to the guilt or innocence of the defendant and should only provide an opinion in a hypothetical scenario.
- Consider calling an expert to counter the prosecution's claim that the drugs found in your client's possession were possessed with the intent to distribute. A defense expert should have specialized training and experience with narcotics and drug users. He or she can explain how a heavy drug user may consume a large quantity of drugs in a relatively short period of time or how certain drug paraphernalia found in the vicinity of the drugs is indicative of personal use.
- Note that in some jurisdictions, intent to distribute cannot be established on the basis of the sharing of drugs between or among joint possessors. Also, the intent to distribute is what matters and not where the distribution is intended to take place.
- Consider having your client testify before a grand jury and/or at trial about his or her drug use to establish that the drugs were possessed for personal use only.
- There are many factors to consider and evaluate in building a defense against the intent to distribute charge. The positive facts must be stressed and the negative ones must be neutralized.

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Dedication: *This chapter is dedicated to my partner, Jason E. Foy Esq. Jason is an exceptional attorney and passionate advocate on behalf of his clients. I am fortunate to work with him and honored to call him my partner.*



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