

2008

Utah v. Setoki : Brief of Appellee

Utah Court of Appeals

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Case No. 20080930-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,

vs.

Don Jacob Setoki,
Defendant/ Appellant.

Brief of Appellee

Appeal from convictions for unlawful possession of
methamphetamine and unlawful possession of drug paraphernalia, in
the Third Judicial District Court of Utah, Salt Lake County, the
Honorable Paul G. Maughan presiding.

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Oral Argument Not Requested

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Case No. 20080930-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,

vs.

Don Jacob Setoki,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for unlawful possession of methamphetamine, a third degree felony, and unlawful possession of drug paraphernalia, a class B misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUE

Defendant moved to dismiss the case, claiming that the evidence was insufficient for “lack of any kind of physical corroborating evidence.” Now, on appeal, he claims the evidence was insufficient to show his constructive possession of drugs and paraphernalia. Did the trial court plainly err for not *sua sponte* dismissing the State’s case for insufficiency of the evidence to show constructive possession?

Standard of Review. To establish plain error, defendant must show (1) that an error occurred; (2) that the error should have been obvious to the trial court; and (3) that the error was prejudicial. *See State v. Casey*, 2003 UT 55, ¶ 41, 82 P.3d 1106.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are included in **Addendum A**:

Utah Code Ann. § 58-37-2 (West Supp. 2007);
Utah Code Ann. § 58-37-8 (West Supp. 2007); and
Utah Code Ann. § 58-37a-5 (West 2004).

STATEMENT OF THE CASE

The State filed an information charging defendant with possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2007), and possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (West 2004). R7-9. The court conducted a jury trial. At the close of the State's evidence, defense counsel moved to dismiss. R150:89. Counsel asserted, "[I]t would be my motion that the lack of any kind of physical corroborating evidence presents the lack . . . of a prima facie case." R150:89-90. Counsel elaborated, "There hasn't been retesting of the substance, there hasn't been fingerprinting, there hasn't been a recording of the statements that are alleged to have been made[,], and there was no contact with the registered owners." R150:90. "For those reasons," counsel "ask[ed] for a directed

verdict of not guilty.” *Id.* The trial court denied the motion, finding there was “prima facie evidence of the crimes alleged.” *Id.*

A jury found defendant guilty on both counts. R83. On October 9, 2008, the trial court entered judgment, sentencing defendant to an indeterminate term not to exceed five years on the felony count and to an unspecified jail term¹ on the misdemeanor count, suspending both terms, and placing defendant on probation for 24 months. R139-40. Defendant timely appealed. R148.

STATEMENT OF FACTS

The crime

On May 5, 2007, Officer Christopher Dowland of the West Valley Police Department stopped defendant for speeding. R150:36-37. When Officer Dowland approached defendant’s car to speak to him, defendant, the only occupant in the vehicle, opened his car door. R150:38. Defendant said that he did not have his

¹ The sentencing minutes state that the court imposed a prison term of up to five years on defendant’s conviction for drug possession. R139. That term was suspended. *Id.* As to the conviction for paraphernalia possession, the minutes state only the following: “SENTENCE JAIL SUSPENDED NOTE – The court orders the deft receive credit for time served on count 2.” R140. No transcript of the sentencing hearing is included in the record on appeal. Adult Probation and Parole recommended in its presentence investigation report that defendant “[s]erve 69 days in the Salt Lake County Jail with credit for 69 days served.” PSI at 2.

driver's license with him, so Officer Dowland began taking down defendant's information to run a driver's license check. *Id.*

As Officer Dowland was gathering the information, he saw defendant reach over to the door handle of the car. R150:38-39. Inside the handle were cigarettes and a small plastic baggie with a substance that appeared to be methamphetamine. *Id.* As defendant "reached down for the package of cigarettes he also grabbed the bagg[ie], [and] put[] it in between his legs." R150:39.

Upon seeing the baggie, Officer Dowland returned to his police car and called for backup. *Id.* When backup arrived, Officer Dowland arrested defendant, telling him he was in custody for possession of a controlled substance. *Id.* When Officer Dowland asked defendant to exit his car, defendant "grabbed onto the bagg[ie] and placed it in between the center console and the driver's seat." R150:39-40. After seating defendant in the police car, Officer Dowland retrieved the baggie. R150:40. He also found a glass pipe "used for ingesting illegal narcotics." R150:41-42.

Officer Dowland then advised defendant of his *Miranda* rights. R150:42. Defendant agreed to talk to him. *Id.* Officer Dowland asked defendant how long he had been smoking methamphetamine. *Id.* Defendant said that he had "only been smoking it for a few days." *Id.* The officer then asked where defendant had purchased the methamphetamine. *Id.* Defendant said "he had purchased it from a

friend.” *Id.* Defendant told the officer “he had purchased it for personal use.” R150:43.

Justin Bechaver, a forensic scientist at the Utah State Crime Laboratory, analyzed the substance in the baggie and determined that the substance was methamphetamine. *See* R150:57, 62; *see also* R150:41 (stipulation on chain of custody).

The defense

Defendant’s father testified on defendant’s behalf. *See* R150:80. He said that he owned the car where the drugs were found and that he had lent it to his son on the day of the incident. R150:80-81. He said that his car needed a new starter and sunshade and that two weeks before the incident he had visited an auto yard looking for used parts. R150:82-83. He said that while removing a sunshade kit, a sunglasses case fell down and he thought that he “could do with a second pair of sunglasses,” so he took it. R150:83.

When he got home, he opened the case. R150:84. Inside he found a small plastic pipe and a small packet of “some white substance.” *Id.* He had not “seen these things before.” *Id.* Suspecting the white substance was “something that [he had] seen people sniff on TV,” he wanted “to keep it away from the reach of anybody” until he could dispose of it. *Id.* So he “wrapped it up again in that sunglass package and left it in the middle console of the car.” R150:85.

Rebuttal

Officer Dowland testified that when he stopped defendant's car, the methamphetamine and the glass pipe were not situated together in one place, but were in two different locations within the car. R150:91. Moreover, Officer Dowland did not "find a sunglass case or anything like that." *Id.*

SUMMARY OF ARGUMENT

Defendant claims that the trial court erred in denying his motion to dismiss the charges at trial. According to defendant, the court should have dismissed the charges because the evidence did not establish that he constructively possessed either the drugs or paraphernalia found in the car he was driving when he was stopped for speeding.

Defendant did not raise this claim below. Thus, his claim succeeds on appeal only if he can show plain error, i.e., that an error occurred, that the error should have been obvious to the trial court, and that the error was prejudicial. Because defendant cannot show either error or obvious error, defendant's claim fails.

First, defendant's drug conviction was based on actual possession, not constructive possession. And the evidence was sufficient to establish that defendant actually possessed the drugs, where the police officer saw defendant handling the drugs and defendant admitted to the officer that he had purchased the drugs from a

friend for his own use. Thus, the trial court did not err, let alone obviously err, in not dismissing defendant's drug charge.

Second, even if defendant's drug paraphernalia charge was based on constructive possession, the evidence was sufficient to support that charge. Specifically, defendant's occupancy of the car, the connection between defendant and the drugs found in the car, defendant's admission that he had purchased the drugs for his own use, and the pipe's location in the car with the drugs all supported a finding that defendant constructively possessed the pipe. Thus, the trial court also did not err, let alone obviously err, in not dismissing defendant's paraphernalia charge.

ARGUMENT

THE TRIAL COURT DID NOT ERR OR PLAINLY ERR FOR NOT DISMISSING AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF; THE STATE PRESENTED SUFFICIENT EVIDENCE TO SHOW ACTUAL POSSESSION OF DRUGS AND CONSTRUCTIVE POSSESSION OF DRUG PARAPHERNALIA

Defense counsel moved to dismiss both charges at the close of the State's case, claiming that the State had not presented sufficient evidence sufficient to support them because it had presented no physical evidence corroborating Officer Dowland's testimony. R150:89-90 (motion to dismiss and ruling on motion—attached as **Addendum B**). Specifically, counsel noted that “[t]here hasn't been retesting of the substance, there hasn't been fingerprinting, there hasn't been a recording of the statements that are alleged to have been made and there was no contact with the registered owner.” R150:90 (attached as part of **Addendum B**—motion to dismiss and ruling on motion). The trial court denied the motion. *Id.*

On appeal, defendant again claims that the evidence was insufficient to support the charges. Br. Appellant at 1-2. But defendant no longer claims a lack of physical evidence corroborating Officer Dowland's testimony. *See id.* at 7-13. Rather, defendant now claims that “there was insufficient evidence to establish that [defendant] had constructive possession of drugs or drug paraphernalia.” Br. Appellant at 7 (boldface and capitalization omitted).

Preservation and plain error. To preserve an issue for appeal, a defendant's objection "must be sufficiently raised to a level of consciousness before the trial court." *State v. Dean*, 2004 UT 63, ¶ 13, 95 P.3d 276. (quotations and citation omitted). This means that a defendant "must enter an objection on the record that is both timely and specific." *State v. Rangel*, 866 P.2d 607, 611 (Utah App.1993). "The objection must 'be specific enough to give the trial court notice of the very error' of which [the party] complains." *State v. Bryant*, 965 P.2d 539, 546 (Utah App.1998) (quoting *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 460 (Utah App.1996) (quotation and citation omitted). This preservation rule "applies to every claim, including constitutional questions." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. And, if a defendant does not preserve his claim below, this Court may review his claim only for plain error. *Id.* at ¶ 11.

Defendant brought a motion to dismiss below. The motion, however, rested on his claim that the State had not met its burden to prove the offense beyond a reasonable doubt because it had not presented any physical evidence corroborating Officer Dowland's testimony concerning defendant's guilt. Thus, defendant claims for the first time on appeal that the State had not proved constructive possession. Because defendant did not raise this specific claim below, defendant can only obtain review of his claim by demonstrating plain error. *Id.* In other words, defendant

must show (1) that error occurred, (2) that it should have been obvious, and (3) that it was harmful. *See Casey*, 2003 UT 55, ¶ 41.

Defendant cannot prevail on his plain error claim. First, he cannot show error.² Second, even if he could show error, he could not show that it was obvious.

Standard of review. “[I]f upon reviewing the evidence and all inferences that can be reasonably drawn from it, the court concludes that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt, [the court] will uphold the denial of a motion to dismiss.” *State v. Hamilton*, 2003 UT 22, ¶ 41, 70 P.3d 111 (internal quotation marks and citation omitted). “When evaluating whether the State produced sufficient believable evidence to withstand a challenge at the close of the State’s case in chief, [the reviewing court] appl[ies] the same standard used when reviewing a jury verdict.” *Id.* The court looks at the evidence and all inferences which may reasonably be drawn from it in a light most favorable to the State and will dismiss

²Defendant argued that he had preserved his claim, *see* Br. Appellant at 2, but argued plain error in the alternative, *see id.* at 9. The State treats defendant’s claim as unpreserved and addresses it under the plain error doctrine. Defendant could not prevail, however, even if his claim were preserved, because he has not shown any error, let alone obvious error.

“for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.” *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94 (citation omitted).

When an insufficiency claim is brought under the plain error doctrine, a defendant must show not only “that the evidence was insufficient to support [his] conviction,” but “that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *Holgate*, 2000 UT 74, ¶ 17.

Elements of the offenses. To prove possession of a controlled substance, the State must establish that defendant “knowingly and intentionally . . . possess[ed] or use[d] . . . a controlled substance.” Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2007). To prove possession of drug paraphernalia, the State must show that defendant knowingly and intentionally “use[d], or [] possess[ed] with intent to use, drug paraphernalia.” Utah Code Ann. § 58-37a-5 (West 2004); *State v. Layman*, 1999 UT 79, ¶ 13, 985 P.2d 911.

Possession. “‘Possession,’” for purposes of Utah’s drug and drug paraphernalia laws, “means the joint or individual ownership, control, occupancy, holding, retaining, belonging [or] maintaining . . . of controlled substances.” See Utah Code Ann. § 58-37-2(1)(ii) (West Supp. 2007). Where the defendant is found in

actual possession of drugs or paraphernalia, the State may prove possession by showing that the defendant “individually possessed, used, or controlled” the drugs or paraphernalia. *See id.*

However, where the defendant is not in actual physical possession of the drugs or paraphernalia, but the contraband is found under circumstances suggesting his possession, the State must show that the defendant constructively possessed the contraband. 1999 UT 79, ¶ 13. To establish constructive possession, the State must show “a sufficient nexus between the accused and the drugs [or paraphernalia] to permit an inference that the accused had both the power and the intent to exercise dominion or control over the drugs [or paraphernalia].” *Layman*, 1999 UT 79, ¶ 13; *see also* Utah Code Ann. § 58-37-2(1)(ii). “[T]he existence of a sufficient nexus to prove constructive possession is a highly fact-sensitive determination.” *Id.* at 14. And, while no list of factors is always relevant, several of the following factors may be useful in determining whether a sufficient nexus exists: (1) “ownership and/or occupancy of the . . . vehicle where the drugs were found,” (2) “presence of a defendant at the time the drugs were found,” (3) a “defendant’s proximity to the drugs,” (4) a defendant’s “previous drug use,” (5) “incriminating statements or behavior,” and (6) “presence of drugs in a specific areas where the defendant had control.” *State v. Workman*, 2005 UT 66, ¶ 32, 122 P.3d 639 (citing *State v. Anderson*, 668 P.2d 1258, 1264 (Utah 1983)). Furtive movements may also

support a finding of constructive possession. *See United States v. Bowen*, 437 F.3d 1009, 1016 (10th Cir. 2006). Testimony that a defendant may have placed something in the spot where the police later found an item can support a finding that the defendant possessed the item. *See United States v. Flenoid*, 718 F.2d 867, 868 (8th Cir. 1983). Even where a relevant factor does not by itself establish a sufficient nexus between a defendant and contraband, the cumulative effect of multiple factors can. *See Workman*, 2005 UT 66, ¶ 35.

A. Defendant actually possessed methamphetamine.

As stated, actual “possession” or “use” means “the joint or individual ownership, control, . . . [or] holding” of such substances. *See Utah Code Ann. § 58-37-2* (West Supp. 2007). Here, the evidence sufficed to show that defendant actually controlled the methamphetamine upon which his drug charge was based. Officer Dowland testified that he saw the baggie containing the methamphetamine in the door handle and that he saw defendant “grab[] the bagg[ie], [and] put[] it in between his legs. R150:39. When the officer asked defendant to exit the car, he saw defendant “grab[] onto the bagg[ie] and place[] it in between the center console and the driver’s seat.” R150:39-40. Thus, the officer saw defendant actually possessing the controlled substance. In addition, defendant told the officer that “he had purchased [the methamphetamine] from a friend.” R150:42. The officer’s testimony on the matter was also evidence of actual possession. The testimony demonstrated

that defendant owned the methamphetamine. Given this evidence that defendant actually possessed the methamphetamine, the trial court did not err, let alone obviously err, in denying defendant's motion to dismiss for lack of constructive possession.

B. Defendant constructively possessed the glass methamphetamine pipe.

Moreover, the nexus between defendant and the drug paraphernalia was sufficient "to permit an inference that [defendant] had both the power and the intent to exercise dominion and control" over that item. *Layman*, 1999 UT 79, ¶ 13.

As stated, "the existence of a sufficient nexus to prove constructive possession is a highly fact-sensitive determination." *Layman*, 1999 UT 79, ¶ 14. Relevant factors may include (1) "ownership and/or occupancy of the . . . vehicle where the drugs were found," (2) "presence of a defendant at the time the drugs were found," (3) a "defendant's proximity to the drugs," (4) a defendant's "previous drug use," (5) "incriminating statements or behavior," and (6) "presence of drugs in a specific areas where the defendant had control." *Workman*, 2005 UT 66, ¶ 32 (citing *Anderson*, 668 P.2d at 1264).

Here, the evidence established a sufficient nexus. Defendant was present and was the only occupant of the vehicle where the methamphetamine and the glass pipe were found. R150:38. Thus, at the time, he was in sole control of the car and

the areas within the car. Moreover, defendant admitted that he actually possessed the methamphetamine, that he had been using methamphetamine for several days, and that he had purchased the methamphetamine for his own use. *See* R150:42-43. And Officer Dowland testified that the pipe could be used to smoke narcotics. R150:42. Under these circumstances, the evidence also sufficed to permit an inference that defendant had both the power and intent to exercise control over the paraphernalia.

Finally, even if the evidence was insufficient to show constructive possession of the pipe, that insufficiency was not obvious. As stated, the pipe was found with drugs in a car in which defendant was the sole occupant, defendant admitted he intended to use the drugs for his own use, and the pipe was a means by which to use those drugs. Under these circumstances, any insufficiency in the evidence to establish constructive possession of the pipe would not have been obvious.

In sum, defendant has not established that the trial court erred or plainly erred in denying his motion to dismiss the charges in this case. Thus, defendant's plain error claim fails.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted June 2, 2009.

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CERTIFICATE OF SERVICE

I certify that on June 2, 2009, two copies of the foregoing brief were

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Addenda

Addendum A



UT ST § 58-37a-5
U.C.A. 1953 § 58-37a-5

Page 1

WEST'S UTAH CODE ANNOTATED
TITLE 58. OCCUPATIONS AND PROFESSIONS
CHAPTER 37A. UTAH DRUG PARAPHERNALIA ACT
§ 58-37a-5. Unlawful acts

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. [FN1] Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

Laws 1981, c. 76, § 5.

[FN1] Laws 1981, c. 76, that enacted this chapter.

<General Materials (GM) - References, Annotations, or Tables>

CROSS REFERENCES

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.

Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.

Fines upon conviction of misdemeanor or felony, see § 76-3-301.

Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.



WEST'S UTAH CODE ANNOTATED
TITLE 58. OCCUPATIONS AND PROFESSIONS
CHAPTER 37. UTAH CONTROLLED SUBSTANCES ACT
§ 58-37-2. Definitions

(1) As used in this chapter:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(i) a practitioner or, in his presence, by his authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them.

(c) "Consumption" means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.

(d) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

(e) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(f)(i) "Controlled substance" means a drug or substance included in Schedules I, II, III, IV, or V of Section 58-37-4, and also includes a drug or substance included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513 [FN1], or any controlled substance analog.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, Alcoholic Beverage Control Act, regarding tobacco or food;

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(g)(i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in Subsection (1)(f); or

(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this Subsection (1).

(ii) "Controlled substance analog" does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 366, to the extent the conduct with respect to the substance is permitted by the exemption;

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance;

(E) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug

is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(h) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, or for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under Title 58, Chapters 37, 37a, 37b, 37c, or 37d.

(i) "Counterfeit substance" means:

(i) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(ii) any substance that is represented to be a controlled substance.

(j) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(k) "Department" means the Department of Commerce.

(l) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine;
or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(m) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(n) "Dispenser" means a pharmacist who dispenses a controlled substance.

(o) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(p) "Distributor" means a person who distributes controlled substances.

(q) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(r) "Drug" means:

(i) articles recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them;

(ii) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(iii) articles, other than food, intended to affect the structure or function of man or other animals; and

(iv) articles intended for use as a component of any articles specified in Subsection (1)(r)(i), (ii), or (iii); but does not include devices or their components, parts, or accessories.

(s) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to his dependency.

(t) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(u) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(v) "Indian" means a member of an Indian tribe.

(w) "Indian religion" means any religion:

(i) the origin and interpretation of which is from within a traditional Indian culture or community; and

(ii) which is practiced by Indians.

(x) "Indian tribe" means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village, which is legally recognized as eligible for and is consistent with the special programs, services, and entitlements provided by the United States to Indians because of their status as Indians.

(y) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(z) "Manufacturer" includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(aa) "Marijuana" means all species of the genus *cannabis* and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant *cannabis sativa* or any other species of the genus *cannabis* which are chemically in-

distinguishable and pharmacologically active are also included.

(bb) "Money" means officially issued coin and currency of the United States or any foreign country.

(cc) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) opium, coca leaves, and opiates;

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (1)(cc)(i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(dd) "Negotiable instrument" means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(ee) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(ff) "Opium poppy" means the plant of the species *papaver somniferum* L., except the seeds of the plant.

(gg) "Person" means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(hh) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(ii) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that

the person had the ability and the intent to exercise dominion and control over it.

(jj) "Practitioner" means a physician, dentist, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(kk) "Prescribe" means to issue a prescription orally or in writing.

(ll) "Prescription" means an order issued by a licensed practitioner, in the course of that practitioner's professional practice, for a controlled substance, other drug, or device which it dispenses or administers for use by a patient or an animal. The order may be issued by word of mouth, written document, telephone, facsimile transmission, computer, or other electronic means of communication as defined by rule.

(mm) "Production" means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(nn) "Securities" means any stocks, bonds, notes, or other evidences of debt or of property.

(oo) "State" means the state of Utah.

(pp) "Ultimate user" means any person who lawfully possesses a controlled substance for his own use, for the use of a member of his household, or for administration to an animal owned by him or a member of his household.

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply.

Laws 1971, c. 145, § 2; Laws 1977, c. 29, § 3; Laws 1979, c. 12, § 1; Laws 1981, c. 75, § 1; Laws 1982, c. 12, § 1; Laws 1987, c. 190, § 1; Laws 1989, c. 50, § 1; Laws 1989, c. 186, § 1; Laws 1989, c. 225, § 60; Laws 1991, c. 198, § 1;
Laws 1992, c. 121, § 1; Laws 1994, c. 132, § 2; Laws 1996, c. 170, § 53, eff.
July 1, 1996; Laws 1996, c. 294, § 1, eff. April 29, 1996; Laws 1997, c. 64, § 2,
eff. May 5, 1997; Laws 2003, c. 131, § 40, eff. May 5, 2003; Laws 2004, c. 241, §
1, eff. May 3, 2004; Laws 2005, c. 283, § 2, eff. May 2, 2005; Laws 2006, c. 8, §
2, eff. May 1, 2006.

[FN1] 21 U.S.C.A. § 812.

<General Materials (GM) - References, Annotations, or Tables>

CROSS REFERENCES

Dangerous weapons, possession by certain persons, see § 76-10-503.



UT ST § 58-37-8
U.C.A. 1953 § 58-37-8

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WEST'S UTAH CODE ANNOTATED
TITLE 58. OCCUPATIONS AND PROFESSIONS
CHAPTER 37. UTAH CONTROLLED SUBSTANCES ACT
§ 58-37-8. Prohibited acts--Penalties

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute;
or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B--Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in his body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA) is guilty of a third degree felony; or

(iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(3) Prohibited acts C--Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in or on the grounds of a library;

(ix) within any area that is within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iv), (vi), and (vii);

(x) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b)(i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. (ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as de-

fined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (10) as soon as practicable, but not later than ten days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (10) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(11) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

Laws 1971, c. 145, § 8; Laws 1972, c. 22, § 1; Laws 1977, c. 29, § 6; Laws 1979, c. 12, § 5; Laws 1985, c. 146, § 1; Laws 1986, c. 196, § 1; Laws 1987, c. 92, § 100; Laws 1987, c. 190, § 3; Laws 1988, c. 95, § 1; Laws 1989, c. 50, § 2; Laws 1989, c. 56, § 1; Laws 1989, c. 178, § 1; Laws 1989, c. 187, § 2; Laws 1989, c. 201, § 1; Laws 1990, c. 161, § 1; Laws 1990, c. 163, §§ 2, 3; Laws 1991, c. 80, § 1; Laws 1991, c. 198, § 4; Laws 1991, c. 268, § 7; Laws 1995, c. 284, § 1, eff. May 1, 1995; Laws 1996, c. 1, § 8, eff. Jan. 31, 1996; Laws 1997, c. 64, § 6, eff. May 5, 1997; Laws 1998, c. 139, § 1, eff. May 4, 1998; Laws 1999, c. 12, § 1, eff. May 3, 1999; Laws 1999, c. 303, § 1, eff. May 3, 1999; Laws 2003, c. 10, § 1, eff. May 5, 2003; Laws 2003, c. 33, § 6, eff. May 5, 2003; Laws 2004, c. 36, § 1, eff. March 15, 2004; Laws 2005, c. 30, § 1, eff. May 2, 2005; Laws 2006, c. 8, § 4, eff. May 1, 2006; Laws 2006, c. 30, § 1, eff. May 1, 2006; Laws 2007, c. 374, § 1, eff. April 30, 2007.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Composite section by the Office of Legislative Research and General Counsel of Laws 2006, c. 8, § 4 and Laws 2006, c. 30, § 1.

CROSS REFERENCES

Arrest of school employee, notice required, see § 53-10-211.

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.

Addendum B

1 anyone until after the trial.

2 THE WITNESS: Okay, sir.

3 THE COURT: Do you have anything else?

4 MS. GARLAND: Your Honor, may we have a brief
5 recess to confer with Mr. Setoki about whether or not we plan
6 to have him testify?

7 THE COURT: We'll take a brief recess and we ask
8 you not to discuss the case, form an opinion or let others
9 discuss it with you.

10 Please rise for the jury.

11 (Whereupon the jury left the courtroom)

12 THE COURT: Ms. Garland, I don't know how many days
13 you've had to prepare for this plus the noon hour. Why is
14 this a surprise now?

15 MS. GARLAND: It's not a surprise Your Honor. I
16 just wanted to take one last few minutes and be sure. But
17 you're right, we've had months and months. It's just I
18 wanted to see how the evidence came out before we made that
19 decision.

20 THE COURT: Okay. Do you want to make your motion?

21 MS. GARLAND: Thank you Your Honor. This is for,
22 as you know, it's a Motion for Directed Verdict for the
23 purpose of preserving the record Your Honor. I realize that
24 the standard is very low; however, it would be my motion that
25 the lack of any kind of physical corroborating evidence

1 presents the lack - well, if there is actually a lack of a
2 prima facie case on the State's part. There hasn't been
3 retesting of the substance, there hasn't been fingerprinting,
4 there hasn't been a recording of the statements that are
5 alleged to have been made and there was no contact with the
6 registered owner and for those reasons, Judge, I would ask
7 for a directed verdict of not guilty.

8 THE COURT: Does the State want to respond at all?

9 MS. GOMEZ: No, Your Honor.

10 THE COURT: The motion is denied. There is prima
11 facie evidence of the crimes alleged, enough to go to the
12 jury at this point. Okay. Five minutes.

13 MS. ROBERTS: I think so.

14 THE COURT: Court is in recess.

15 (Whereupon a recess was taken)

16 THE COURT: We're back on the record in State vs.
17 Setoki, parties are present and the jury has returned. Ms.
18 Garland?

19 MS. GARLAND: Thank you, Your Honor. We plan to
20 rest at this point.

21 THE COURT: Okay. Any rebuttal?

22 MS. GOMEZ: Yes Your Honor. We'd like to call
23 Officer Dowland just briefly.

24 THE COURT: Okay, would you come up and retake the
25 stand.