1984

State of Utah v. Timmy Hill : Respondent's Brief In Support of Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19275
TIMMY HILL,	:	
Defendant-Appellant.	:	

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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APPEAL FROM A JUDGMENT RENDERED IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, THE HONORABLE JOHN F. WAHLQUIST, JUDGE, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Timmy Hill, was charged with theft by deception, a second degree felony, in violation of Utah Code Ann. § 76-6-405 (1978).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of theft by deception on April 28, 1983 in the Second Judicial District Court for Weber County, Utah, the Honorable John F. Wahlquist presiding. On May 31, 1983, the trial court sentenced appellant to an indeterminate term of not less than one year nor more than fifteen years. On July 19, 1983, the trial court ordered appellant's release from the Utah State Prison pending disposition of this appeal.

DISPOSITION IN THE UTAH SUPREME COURT

On April 26, 1984, this Court reversed appellant's conviction, holding that he should have been charged with a violation of Utah Code Ann. § 58-37b-4 (Supp. 1983) (see State

v. Hill, Utah, ___ P.2d ___, slip op. no. 19275, attached as Appendix A).

RELIEF SOUGHT

Respondent seeks an order granting a rehearing or, alternatively, a modification of this Court's opinion in State v. Hill, if a full rehearing is not deemed necessary.

STATEMENT OF FACTS

Respondent incorporates by reference the statement of facts set forth in its brief on appeal, filed November 25, 1983.

INTRODUCTION

The standard established by this Court for determining whether a petition for rehearing is proper was expressed in Brown v. Pickard, denying reh'g, 4 Utah 294, 11 P. 512 (1886):

> To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing.

11 P. at 512 (citation omitted). In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), the Court stated:

> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. . . . [A] rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

129 P. at 624. The argument portion of this brief will show that, based on these standards, respondent's petition for rehearing is properly before this Court.

ARGUMENT

POINT I

THIS COURT INCORRECTLY CONCLUDED THAT APPELLANT SHOULD HAVE BEEN CHARGED UNDER UTAH CODE ANN. § 58-37b-4 (Supp. 1983); RATHER, APPELLANT SHOULD HAVE BEEN CHARGED UNDER § 58-37-8(1)(a)(iv).

The majority opinion in State v. Hill, Utah, __ P.2d___, slip op. no. 19275 (decided April 26, 1984)(see Appendix A), concluded that because appellant's conduct was specifically covered by Utah Code Ann. § 58-37b-4 (Supp. 1983), the section within Utah's Imitation Controlled Substances Act found to be controlling in this case, appellant's conviction of theft by deception under Utah Code Ann. § 76-6-405 (1978) should be reversed. In short,

the majority held that appellant should have been charged under § 58-37b-4. This conclusion misconstrues the Imitation Controlled Substances Act and ignores the provision within Utah's Controlled Substances Act which clearly applies to appellant's conduct.

As noted in Chief Justice Hall's dissenting opinion in Hill:

> [T]he clear intention of the [Imitation Controlled Substances] Act, [which is patterned closely after the Model Imitation Controlled Substances Act drafted by the Drug Enforcement Administration (DEA), United States Department of Justice], is to deal with manufacturers, distributors and users of drugs that are not claimed to be the real thing but that look like the real thing and have a like effect. Certainly, baking soda does not fit that category, nor is there any indication that the DEA intended to reach persons who were selling non-drug substances, such as baking soda, representing them as controlled substances, such as cocaine. Similarly, there is no indication that the Utah Legislature intended the Imitation Controlled Substances Act to apply other than to the conduct discussed by the DEA.

Slip op. at p.4, C.J. Hall, dissenting; see also Prefatory Note to the Model Act (attached as Appendix B). Given this, the majority's conclusion that appellant's sale of baking soda in lieu of cocaine violated § 58-37b-4, is incorrect. Rather, appellant's conduct is covered by Utah Code Ann. § 58-37-8(1)(a)(iv) (Supp. 1983), which reads:

> (a) Except as authorized by this act, it shall be unlawful for any person knowingly and intentionally:
> . . .

> (iv) To agree, consent, offer, or arrange to distribute or dispense a controlled substance for value or to negotiate to have a controlled substance distributed or dispensed for value and distribute, dispense, or negotiate the distribution or dispensing of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated.

That section clearly applies to the situation present in this case, a "turkey buy" situation, where a controlled substance is offered for sale but at the time of the sale a substitute substance or "material in lieu of the specific controlled substance so offered" is delivered. See State v. Hicken, Utah, 659 P.2d 1038, 1039-1040 (1983). Therefore, appellant should have been charged with violating § 58-37-8(1)(a)(iv), not § 58-37b-4.

Based upon the foregoing, this Court should grant respondent's petition for rehearing or, alternatively, modify its opinion, without a full rehearing, to indicate that appellant should have been charged under § 58-37-8(1)(a)(iv). Such a modification would satisfy the legitimate concerns about the majority's misapplication of the Imitation Controlled Substances Act expressed in the dissenting opinions of both Chief Justice Hall and Justice Oaks. Furthermore, this would make clear the intended distinction between conduct that violates § 58-37-8(1)(a)(iv) and that which violates § 58-37b-4. Without that clarification, the majority opinion in Hill creates an unintended and unnecessary overlap of those

two sections, the violations of which carry different penalties, thus perpetuating the confusion which recently has plagued the enforcement of this state's drug laws.

CONCLUSION

Utah's Controlled Substances Act and its Imitation Controlled Substances Act should be interpreted and applied in a manner consistent with the intent of the Legislature. When construing statutes, the fundamental question which transcends all others is what was the intent of the Legislature. Johnson v. Tax Commission, 17 Utah 2d 337, 339, 411 P.2d 831, 832 (1966). Insuring proper effect to that intent is a primary consideration. Millett v. Clark Clinic Corp., Utah, 609 P.2d 934, 936 (1980). When the majority in Hill held that appellant's conduct was covered by § 58-37b-4, it seemingly ignored the clear intent of the Imitation Controlled Substances Act and failed to consider the confusion its decision creates with respect to at least one provision within the Controlled Substances Act. Accordingly, this Court should grant rehearing so that it may hear argument on the question of which statute properly applies in this case--§ 58-37b-4 or § 58-37-8(1)(a)(iv). Alternatively, the Court should modify its opinion in Hill as specified in respondent's argument above, if it decides that a full rehearing is unnecessary.

RESPECTFULLY submitted this 16th day of May, 1984.

DAVID L. WILKINSON
Attorney General

Dave B. Thompson

DAVE B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to John T. Caine and Bernard L. Allen, Richards Caine & Richards, Attorneys for Appellant, 2568 Washington Boulevard, Ogden, Utah 84401, this 16th day of May, 1984.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Respondent,

v.

Timmy Hill,
Defendant and Appellant.

No. 19275
F I L E D
April 26, 1984

Geoffrey J. Butler, Clerk

HOWE, Justice:

Defendant Timmy Hill received $2,100 in cash from an undercover agent in exchange for one ounce of baking soda wrapped in newspaper that the defendant claimed was "good" cocaine. He now appeals from a jury conviction of theft by deception, a second degree felony in violation of U.C.A., 1953, § 76-6-405.

Defendant contends that he was improperly charged under § 76-6-405 of our criminal code, which provides in pertinent part:

> (1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

Instead, he claims he should have been charged under U.C.A., 1953, § 58-37b-4, contained in the Imitation Controlled Substances Act that specifically proscribes the conduct with which he was charged. That section provides:

> Manufacture, distribution or possession of substance unlawful--Penalty. It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance. Any person who violates this section shall be guilty of a class B misdemeanor and upon conviction may be imprisoned for a term not exceeding six months, fined not more than $299, or both. [Emphasis added.]

Section 58-37b-2(4) of the same act defines:

> (4) "Imitation controlled substance" means a substance that is not a controlled substance, which by overall dosage unit substantially resembles a specific controlled substance in appearance (such as color, shape, size, and markings), or by representations made, would cause a reasonable person to believe that the substance is a controlled substance.

We adhere to the principle that when an individual's conduct can be construed to be a violation of two overlapping statutes, the more specific statute governs. See Helmuth v. Morris, Utah, 598 P.2d 333 (1979). See also State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969), where we held that two statutes which interdicted the same conduct but imposed different penalties entitled the violator to the lesser punishment.

In this case, the foregoing principle is buttressed by U.C.A., 1953, § 58-37-19, which provides in relevant part:

> [W]henever the requirements prescribed, the offenses defined or the penalties imposed relating to substances controlled by this act shall be or appear to be in conflict with Title 58, Chapter 17 or any other laws of this state, the provisions of this act shall be controlling.

In State v. Hicken, Utah, 659 P.2d 1038 (1983), we affirmed the dismissal of an information charging the defendant with aiding and abetting the distribution of a controlled substance for value because a specific provision of the controlled substance act, § 58-37-8(1)(a)(iv), which prohibits the arranging of a sale of controlled substances, directly covered the defendant's conduct and thus exclusively governed the offense. We cited Helmuth v. Morris, Utah, supra, as controlling.

The Imitation Controlled Substances Act, Chapter 37b, Title 58, was enacted in 1982, years after enactment of the Utah Controlled Substances Act, Chapter 37, Title 58. Nonetheless, § 58-37-19 of the Controlled Substances Act is applicable to Chapter 37b offenses since the two acts are integrally connected. For example, in its definition section, the Imitation Controlled Substances Act cites to the Controlled Substances Act for definition. The more recent act also provides an exemption for persons registered under the Controlled Substances Act. Consequently, where specific conduct is proscribed by the Imitation Controlled Substances Act, its provisions should control as mandated by § 58-37-19.

Section 58-37b-4 proscribes defendant's conduct. Unquestionably the defendant made representations that would have caused a reasonable person to believe that the baking soda was cocaine. The fact suggested by the State that ingested baking soda would not produce effects similar to cocaine is unavailing. The baking soda sufficiently resembled cocaine so that combined with defendant's representations that it was "good" cocaine, it was an imitation controlled substance. (See U.C.A. § 58-37b-3 for considerations involved in determining whether a substance is an imitation controlled substance where appearance alone may be insufficient to establish that fact.)

By exchanging the baking soda for money, the defendant committed the distribution of an imitation controlled substance. The definition of "distribute" under § 58-37b-2 of the Imitation Controlled Substances Act is:

> Distribute means the actual, constructive, or attempted sale, transfer, delivery, or dispensing to another of an imitation controlled substance.

Were it not for the inclusion of "sale" in the definition of distribute, the State's argument that the defendant committed theft by deception of the $2,100 might be more persuasive. However, as the statutes are written, exchanging baking soda for money is distribution of an imitation controlled substance in violation of § 58-37b-4. That provision covered defendant's conduct, and he should have been charged with its violation.

Judgment reversed.

WE CONCUR:

I. Daniel Stewart, Justice

Christine M. Durham, Justice

HALL, Chief Justice: (Dissenting)

I do not share the view of the Court that the deception engaged in by the defendant in violation of U.C.A., 1953, § 76-6-405[1] also constituted a violation of the Utah Imitation Controlled Substances Act.[2]

1. That theft by deception is a legitimate charge, see, e.g., Pritchard v. State, Alaska App., 673 P.2d 291 (1983); Commonwealth v. Jones, Pa. Super., 393 A.2d 737 (1978).
2. U.C.A., 1953, § 58-37b-1, et seq.

The defendant unequivocally represented the baking soda as being "good" cocaine. He made no representation whatsoever that the baking soda was an "imitation controlled substance" as defined by statute.[3] Indeed, baking soda has none of the properties of cocaine and only resembles it in general appearance.

Utah's Imitation Controlled Substances Act is patterned closely after the Model Imitation Controlled Substances Act drafted by the Drug Enforcement Administration (DEA), United States Department of Justice.[4] The Prefatory Note to the Model Act[5] states the reasons it was felt necessary to draft legislation dealing with look-alike drugs. In sum, the clear thrust of the Act is to reach dealers who sell tablets, capsules, powders and liquids that "closely resemble or even duplicate the appearance of well-known, brand name controlled substances, but which contain only non-controlled over-the-counter drugs such as caffeine, ephedrine, phenylpropanolamine, acetaminophen, or some combination of these substances."[6] These look-alikes are being advertised and widely circulated, particularly among the school age population as "the 'safe' legal way to get high."[7] This contributes to the growing drug problems in our schools by fostering acceptability of drug ingestion, which, in turn, often leads to experimentation with controlled drugs or to tragic accidents when the real thing is ingested by mistake.

Thus, the clear intention of the Act is to deal with manufacturers, distributors and users of drugs that are not claimed to be the real thing but that look like the real thing and have a like effect. Certainly, baking soda does not fit that category, nor is there any indication that the DEA intended to reach persons who were selling non-drug substances, such as baking soda, representing them as controlled substances, such as cocaine. Similarly, there is no indication that the Utah Legislature intended the Imitation Controlled Substances Act to apply other than to the conduct discussed by the DEA.

I view the Imitation Controlled Substances Act as not having any application to defendant's conduct, and I would therefore affirm his conviction of theft by deception.

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3. U.C.A., 1953, § 58-37b-2(4).
4. A number of other states have adopted some form of the Model Act. See, e.g., Alaska Stat. § 11.73.010, et seq. (Supp. 1983); Ariz. Rev. Stat. Ann. § 13-3451-1 (Supp. 1983); Colo. Rev. Stat. § 18-5-601 (Supp. 1983). However, to date no court has interpreted the progeny of the Model Act and only one court has mentioned it in passing. McCrary v. State, Ala. Cr. App., 429 So. 2d 1121 (1982).
5. October, 1981, p.2a.
6. Id.
7. Id.

Oaks, Justice, concurs in the dissenting opinion of Chief Justice Hall.

OAKS, Justice: (Dissenting)

Representing baking soda as cocaine, defendant sold an ounce to an undercover agent for $2,100. The majority now reverses his conviction of the second degree felony of theft by deception, U.C.A., 1953, § 76-6-405, on the basis that he should have been charged with a violation of the Imitation Controlled Substances Act, § 58-37b-4, a Class B misdemeanor. The apparent holding that a Criminal Code conviction will be reversed when the defendant could have been charged under any of the statutes regulating drugs is a principle that can work untold mischief in the administration of the criminal law. That principle should not be adopted without the clearest direction from the Legislature or the prior decisions of this Court. Neither the statute nor the case relied on by the majority dictates that principle, and I dissent from the Court's establishing it in this case.

Section 20 of the Utah Controlled Substances Act of 1971, codified at § 58-37-19, quoted by the majority, makes the provisions of that Act "controlling" in case of any conflicts with tit. 58, ch. 17 (the licensing of pharmacists and the sale of drugs and medicines) "or any other laws of this state . . . ." Even if that section would cause the Controlled Substances Act to prevail over conflicts with the later-enacted Criminal Code of 1973, section 20 cannot reasonably be read to supersede the effect of a Criminal Code provision that covers the same crime treated in the Imitation Controlled Substances Act of 1982, §§ 58-37b-1 to -8, an entirely different enactment. The majority applies the 1971 provision to the 1982 Act on the basis that "the two acts are integrally connected," but it does not explain what that means or why it dictates this result. In contrast, I suggest that a rule that conduct made felonious by the Criminal Code shall no longer be punishable under that Code is sufficiently radical that it should only be inferred from a clear legislative direction. There is no such direction as to the Imitation Controlled Substances Act relied on by the majority.

Helmuth v. Morris, Utah, 598 P.2d 333 (1979), provides no support for the reversal of defendant's conviction or for the general rule espoused by the majority. That case only concerned the lawfulness of the sentence imposed on the petitioner for the felony of uttering a forged prescription under the Controlled Substances Act. Id. at 335. Petitioner attacked the legality of that sentence by habeas corpus, con-

tending that he was "entitled to the lesser punishment" prescribed in the Criminal Code for the misdemeanor of forgery. Id. The Court rejected that contention because (1) the two offenses were "of an entirely different nature" (a ground that applies just as well to the theft and distribution offenses involved in this case), and (2) the Controlled Substances Act "takes precedence" over the Criminal Code in this circumstance because it "applie[d] more specifically" to petitioner's offense. Id.

Helmuth's holding that the petitioner was not entitled to the lesser sentence under the Criminal Code obviously falls far short of dictating that the present defendant's conviction under the Criminal Code should be reversed because he might have been charged with a lesser offense under the Imitation Controlled Substances Act. Helmuth surely does not establish what the majority refers to as "the principle that when an individual's conduct can be construed to be a violation of two overlapping statutes, the more specific statute governs" (p.2).

I would affirm defendant's conviction for theft by deception.

APPENDIX B

MODEL IMITATION CONTROLLED SUBSTANCES ACT

Drafted by the

Drug Enforcement Administration

of the

United States Department of Justice

October, 1981

With

Prefatory Note and Comment

Prefatory Note

The wholesale vending of look-alike drugs has become a major, nationwide drug abuse problem. Look-alikes are tablets and capsules which are manufactured and imprinted to closely resemble or even duplicate the appearance of well-known, brand name controlled substances, but which contain only non-controlled over-the-counter drugs such as caffeine, ephedrine, phenylpropanolamine, acetaminophen, or some combination of these substances. Look-alikes are advertised as being body stimulants, alternative energy sources, or nighttime analgesics - the "safe," legal way to get high.

The number of look-alike wholesalers and distributors has grown from just a handful at the end of 1979 to more than 110 in June of 1981. The primary targets of this multi-million-dollar industry are college, high school, and even junior high school students. These youthful customers are being bombarded by advertising which extols these products as being "the most powerful stimulants available without a prescription." Most of the ads offer jars of 1,000 dosage units and suggest that purchasers can make high profits from resales. In the past several months, there has been a plethora of advertisements in the underground drug press, in music magazines, and even in the legitimate press as well as a flood of flyers and business cards on college campuses and in schoolyards across the country. Some wholesalers have expended tens of thousands of dollars on advertising, money they consider to be well-spent.

The recent proliferation of look-alikes has caused deep consternation among law enforcement authorities across the nation. Time, effort, and taxpayers' money have been expended and arrests have been made only to discover that the so-called drugs were actually noncontrolled substances. In some cities, so many cases have been dismissed that police departments are no longer buying pills or making dangerous drugs cases at all. Parents and community leaders have written to express their feelings of outrage and indignation at the way in which these substances are freely advertised and sold.

Look-alikes are touted as being completely safe and legal and consumers are advised to take several in order to get the full effect. Of course, the danger to a child who has been ingesting five or six caffeine pills and attempts the same thing with real amphetamines one day is obvious. More

insidious is the growing climate of acceptance of these substances among students as their sale and use become widespread. Of immediate concern, however, are recent reports of hospital emergencies and even overdose deaths caused solely by ingestion of look-alikes.

The DEA, for the reasons cited above, considers the manufacture, distribution and use of look-alikes to have a substantial and detrimental effect on the general welfare of American society, particularly on our youth. It is a problem which must be dealt with at all levels of Government. Efforts against the look-alike problem, however, must take into consideration the facts that the look-alike ingredients have a legitimate medical use, they are found in many of the more common over-the-counter products and when used as directed, they are generally not harmful. DEA has no jurisdiction over look-alike products under the Controlled Substances Act since only noncontrolled substances are involved. However, DEA does have a responsibility to combat drug abuse and considers the look-alike problem one facet of drug abuse. The distribution and sale of look-alikes, much as drug paraphernalia, encourages and contributes to the profiteering from drug abuse. Thus DEA has undertaken an initiative, similar to that used in the paraphernalia problem, against look-alikes. At the heart of this initiative is the Model Imitation Controlled Substances Act which is targeted to eliminate these undesirable enterprises through the application of regulations and civil and criminal penalties. A number of states have already enacted look-alike legislation. DEA applauds this action and encourages other states to do the same. The DEA Model Act will serve as a guide for states that wish to take legislative action against look-alike manufacturers and distributors.

Section 1. Definitions

a. The term "controlled substance" means a substance as defined in (insert appropriate citation for definition of "controlled substance" in State Controlled Substances Act).

b. The term "distribute" means the actual, constructive, or attempted transfer, delivery, or dispensing to another of an imitation controlled substance.

c. The term "manufacture" means the production, preparation, compounding, processing, encapsulating, packaging, or repackaging, labeling or relabeling, of an imitation controlled substance.

d. The term "imitation controlled substance" means a substance that is not a controlled substance, which by dosage unit appearance (including color, shape, size and markings), or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. In those rare cases when the appearance of the dosage unit is not reasonably sufficient to establish that the substance is an "imitation controlled substance" (for example in the case of powder or liquid), the court or authority concerned should consider, in addition to all other logically relevant factors, the following factors as related to "representations made" in determining whether the substance is an "imitation controlled substance":

(1) Statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect.

(2) Statements made to the recipient that the substance may be resold for inordinate profit.

(3) Whether the substance is packaged in a manner normally used for illicit controlled substances.

(4) Evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities.

(5) Prior convictions, if any, of an owner, or anyone in control of the object, under state or Federal law related to controlled substances or fraud.

(6) The proximity of the substances to controlled substances.

Section 2. Offenses

a. Manufacture or distribution - It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance. Any person who violates this section shall be guilty of a crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

b. Distribution to a minor - Any person 18 years of age or over who violates Section 2a by distributing an imitation controlled substance to a person under 18 years of age is guilty of an aggravated crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

c. Possession - It is unlawful for any person to use, or to possess with intent to use, an imitation controlled substance. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

d. Advertisement - It is unlawful for any person to place any newspaper, magazine, handbill or other publication, or to post or distribute in any public place, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

e. Immunity - No civil or criminal liability shall be imposed by virtue of this Act on any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.

Section 3. Forfeiture :

(Insert designation of state civil forfeiture section) is amended to provide for the civil forfeiture of imitation controlled substances by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all imitation controlled substances as defined by (list appropriate citation for this Act in the state's statutes).

Section 4. Severability

If any provision of this Act or the application of the Act to any person or circumstance is held invalid, the invalidity does not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

COMMENT

The Model Imitation Controlled Substances Act incorporates by reference certain definitions in the applicable State Controlled Substances Act, but does not attempt to incorporate or amend the definition of "counterfeit substance" in the State Controlled Substances Act. DEA believes it would unnecessarily confuse the issues to attempt to amend the definition of "counterfeit substance" in the State Controlled Substances Act. Therefore, the Model Act uses a new term of "imitation controlled substance" as the key to the Model Act.

DEA believes that many of the existing and draft State Acts which have sought to reach the look-alike problem have placed too much emphasis on the representations made by the seller of the substances. Hence, the DEA Model Act seeks to place emphasis on the "look-alike" nature of most of the substances involved to sustain the burden of proving a violation. The portion of the DEA Model Act which deals with "representations made" by the seller is not really intended to reach look-alikes in tablet or capsule form, but rather, is intended to reach those cases where powder or liquid is represented to be controlled substances. Most cases related to powder will involve alleged cocaine or heroin and most cases related to liquid will involve alleged PCP or other hallucinogenic drugs.

The sections of the Model Act which deal with penalties, advertisement, forfeiture, and severability are framed from the pattern used in the Model Drug Paraphernalia Act, drafted by DEA in August 1979. As of October 1981, the Model Paraphernalia Act has been enacted by 23 states and many localities, and has been upheld at the state level by every Federal District Court and Appeals Court that has considered it. As in the Model Paraphernalia Act, the Model Imitation Controlled Substances Act leaves to each state the specific penalty to be inserted as a sanction for each of the criminal offenses proscribed by the Act.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	PETITION FOR REHEARING
-v-	:	Case No. 19275
TIMMY HILL,	:	
Defendant-Appellant.	:	

Respondent petitions this Honorable Court for rehearing in the above entitled case pursuant to Rule 76(e), Utah Rules of Civil Procedure, because the Court has misapplied Utah Code Ann. § 58-37b-4 (Supp. 1983) to the facts of the case.

Respectfully submitted this 16th day of May, 1984

DAVID L. WILKINSON
Attorney General

Dave B. Thompson

DAVE B. THOMPSON
Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Petition for Rehearing, postage prepaid, to John T. Caine and Bernard L. Allen, Richards Caine & Richards, Attorneys for Appellant, 2568 Washington Boulevard, Ogden, Utah 84401, this 17th day of May, 1984.

Kathleen Kitchenberg

APPENDIX A

MODEL IMITATION CONTROLLED SUBSTANCES ACT

Drafted by the

Drug Enforcement Administration

of the

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October, 1981

With

Prefatory Note and Comment

MODEL IMITATION CONTROLLED SUBSTANCES ACT

Prefatory Note

The wholesale vending of look-alike drugs has become a major, nationwide drug abuse problem. Look-alikes are tablets and capsules which are manufactured and imprinted to closely resemble or even duplicate the appearance of well-known, brand name controlled substances, but which contain only non-controlled over-the-counter drugs such as caffeine, ephedrine, phenylpropanolamine, acetaminophen, or some combination of these substances. Look-alikes are advertised as being body stimulants, alternative energy sources, or nighttime analgesics - the "safe," legal way to get high.

The number of look-alike wholesalers and distributors has grown from just a handful at the end of 1979 to more than 110 in June of 1981. The primary targets of this multi-million-dollar industry are college, high school, and even junior high school students. These youthful customers are being bombarded by advertising which extols these products as being "the most powerful stimulants available without a prescription." Most of the ads offer jars of 1,000 dosage units and suggest that purchasers can make high profits from resales. In the past several months, there has been a plethora of advertisements in the underground drug press, in music magazines, and even in the legitimate press as well as a flood of flyers and business cards on college campuses and in schoolyards across the country. Some wholesalers have expended tens of thousands of dollars on advertising, money they consider to be well-spent.

The recent proliferation of look-alikes has caused deep consternation among law enforcement authorities across the nation. Time, effort, and taxpayers' money have been expended and arrests have been made only to discover that the so-called drugs were actually noncontrolled substances. In some cities, so many cases have been dismissed that police departments are no longer buying pills or making dangerous drugs cases at all. Parents and community leaders have written to express their feelings of outrage and indignation at the way in which these substances are freely advertised and sold.

Look-alikes are touted as being completely safe and legal and consumers are advised to take several in order to get the full effect. Of course, the danger to a child who has been ingesting five or six caffeine pills and attempts the same thing with real amphetamines one day is obvious. More

insidious is the growing climate of acceptance of these substances among students as their sale and use become widespread. Of immediate concern, however, are recent reports of hospital emergencies and even overdose deaths caused solely by ingestion of look-alikes.

The DEA, for the reasons cited above, considers the manufacture, distribution and use of look-alikes to have a substantial and detrimental effect on the general welfare of American society, particularly on our youth. It is a problem which must be dealt with at all levels of Government. Efforts against the look-alike problem, however, must take into consideration the facts that the look-alike ingredients have a legitimate medical use, they are found in many of the more common over-the-counter products and when used as directed, they are generally not harmful. DEA has no jurisdiction over look-alike products under the Controlled Substances Act since only noncontrolled substances are involved. However, DEA does have a responsibility to combat drug abuse and considers the look-alike problem one facet of drug abuse. The distribution and sale of look-alikes, much as drug paraphernalia, encourages and contributes to the profiteering from drug abuse. Thus DEA has undertaken an initiative, similar to that used in the paraphernalia problem, against look-alikes. At the heart of this initiative is the Model Imitation Controlled Substances Act which is targeted to eliminate these undesirable enterprises through the application of regulations and civil and criminal penalties. A number of states have already enacted look-alike legislation. DEA applauds this action and encourages other states to do the same. The DEA Model Act will serve as a guide for states that wish to take legislative action against look-alike manufacturers and distributors.

Section 1. Definitions

a. The term "controlled substance" means a substance as defined in (insert appropriate citation for definition of "controlled substance" in State Controlled Substances Act).

b. The term "distribute" means the actual, constructive, or attempted transfer, delivery, or dispensing to another of an imitation controlled substance.

c. The term "manufacture" means the production, preparation, compounding, processing, encapsulating, packaging, or repackaging, labeling or relabeling, of an imitation controlled substance.

d. The term "imitation controlled substance" means a substance that is not a controlled substance, which by dosage unit appearance (including color, shape, size and markings), or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. In those rare cases when the appearance of the dosage unit is not reasonably sufficient to establish that the substance is an "imitation controlled substance" (for example in the case of powder or liquid), the court or authority concerned should consider, in addition to all other logically relevant factors, the following factors as related to "representations made" in determining whether the substance is an "imitation controlled substance":

(1) Statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect.

(2) Statements made to the recipient that the substance may be resold for inordinate profit.

(3) Whether the substance is packaged in a manner normally used for illicit controlled substances.

(4) Evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities.

(5) Prior convictions, if any, of an owner, or anyone in control of the object, under state or Federal law related to controlled substances or fraud.

(6) The proximity of the substances to controlled substances.

Section 2. Offenses

a. Manufacture or distribution - It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance. Any person who violates this section shall be guilty of a crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

b. Distribution to a minor - Any person 18 years of age or over who violates Section 2a by distributing an imitation controlled substance to a person under 18 years of age is guilty of an aggravated crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

c. Possession - It is unlawful for any person to use, or to possess with intent to use, an imitation controlled substance. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

d. Advertisement - It is unlawful for any person to place any newspaper, magazine, handbill or other publication, or to post or distribute in any public place, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than _____, fined not more than _____, or both.

e. Immunity - No civil or criminal liability shall be imposed by virtue of this Act on any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.

Section 3. Forfeiture

(Insert designation of state civil forfeiture section) is amended to provide for the civil forfeiture of imitation controlled substances by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all imitation controlled substances as defined by (list appropriate citation for this Act in the state's statutes).

Section 4. Severability

If any provision of this Act or the application of the Act to any person or circumstance is held invalid, the invalidity does not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

COMMENT

The Model Imitation Controlled Substances Act incorporates by reference certain definitions in the applicable State Controlled Substances Act, but does not attempt to incorporate or amend the definition of "counterfeit substance" in the State Controlled Substances Act. DEA believes it would unnecessarily confuse the issues to attempt to amend the definition of "counterfeit substance" in the State Controlled Substances Act. Therefore, the Model Act uses a new term of "imitation controlled substance" as the key to the Model Act.

DEA believes that many of the existing and draft State Acts which have sought to reach the look-alike problem have placed too much emphasis on the representations made by the seller of the substances. Hence, the DEA Model Act seeks to place emphasis on the "look-alike" nature of most of the substances involved to sustain the burden of proving a violation. The portion of the DEA Model Act which deals with "representations made" by the seller is not really intended to reach look-alikes in tablet or capsule form, but rather, is intended to reach those cases where powder or liquid is represented to be controlled substances. Most cases related to powder will involve alleged cocaine or heroin and most cases related to liquid will involve alleged PCP or other hallucinogenic drugs.

The sections of the Model Act which deal with penalties, advertisement, forfeiture, and severability are framed from the pattern used in the Model Drug Paraphernalia Act, drafted by DEA in August 1979. As of October 1981, the Model Paraphernalia Act has been enacted by 23 states and many localities, and has been upheld at the state level by every Federal District Court and Appeals Court that has considered it. As in the Model Paraphernalia Act, the Model Imitation Controlled Substances Act leaves to each state the specific penalty to be inserted as a sanction for each of the criminal offenses proscribed by the Act.