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Drugs—QUANTITY OF POSSESSION OF A NARCOTIC NECESSARY FOR CONVICTION—*Robbs v. Commonwealth*

Most of the states make it unlawful for a person to possess¹ a narcotic drug² unless authorized under the narcotic drug statutes.³ Most jurisdictions have adopted the Uniform Narcotic Drug Act with various amendments.⁴ Yet in those states in which the UNDA is not in force, the corresponding laws are nearly identical.⁵ Generally, the statutes specify that it is unlawful to possess "any narcotic drug." This phrase is considered by most jurisdictions to specify that any amount, even the slightest trace, is sufficient for a conviction,⁶ while other states require that a "usable quantity" must be present.⁷

¹ Possession here is distinguished from use, sale, manufacture or addiction.

² 25 AM. JUR. 2d *Drugs, Narcotics and Poisons* § 2, at 285 (1966):

[A] "narcotic" is any substance which directly induces sleep, allays sensibility, and blunts the senses, and which, when taken in large quantities, produces narcotism or complete insensibility. Among substances generally classified as narcotics are opium; morphine, a principal alkaloid of opium; heroin, a derivative of morphine; cocaine; and marijuana.

³ See 9B UNIFORM LAWS ANNOTATED 409, 410 (1966) (hereinafter cited as U.L.A.). Physicians and pharmacists are governed by statutory controls. 25 AM. JUR. 2d *Drugs, Narcotics, and Poisons* § 7, at 287-89 (1966); 72 C.J.S. *Poisons* § 8, at 180-83 (1951). The states take jurisdiction under their police powers. Congress has no power to enact legislation for the sole purpose of restraining narcotics traffic, but federal statutes are permissible if specifically designed to produce revenue and not interfere with police power. 25 AM. JUR. 2d *Drugs, Narcotics, and Poisons* § 33, at 307 (1966).

⁴ See 9B U.L.A. 409, 410 (1966); 25 AM. JUR. 2d *Drugs, Narcotics, and Poisons* § 18, at 296 (1966). (The Uniform Narcotic Drug Act is hereinafter cited as UNDA).

The pertinent section is UNDA § 2:

It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized under this act. 9B U.L.A. 409, 423 (1966).

⁵ See, e.g., VA. CODE ANN. § 54-524.55 (Cum. Supp. 1970):

It shall be unlawful for any person to manufacture or produce any drug, or possess, have under his control, sell, prescribe, administer, dispense, compound or otherwise dispose of, any controlled drug except as authorized in this chapter.

In Virginia the Drug Control Act, VA. CODE ANN. §§ 54-524.1 to -524.109 (Cum. Supp. 1970), replaces the UNDA (repealed by the Va. Acts of Assembly, 1970 ch. 650, at 135).

⁶ See, e.g., *Duran v. People*, 145 Colo. 563, 360 P.2d 132 (1961); *Peachie v. State*, 203 Md. 239, 100 A.2d 1 (1953); *State v. Jefferson*, 391 S.W.2d 885 (Mo. 1965); *State v. Humphreys*, 54 N.J. 406, 255 A.2d 273 (1969).

⁷ See, e.g., *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962); *People v. Leal*, 64 Cal. 2d 504, 413 P.2d 665, 50 Cal. Rptr. 777 (1966); *Edelin v. United States*, 227 A.2d 395 (D.C. App. 1967); *Pelham v. State*, 164 Tex. Crim. 226, 298 S.W.2d 171 (1957).

The conflict concerning the amount of a narcotic drug necessary to sustain a conviction for possession was recently resolved in Virginia in *Robbs v. Commonwealth*.⁸ In *Robbs* the police entered the domicile of the defendant and found a wine bottle cap and a syringe.⁹ The syringe yielded negative results when qualitatively tested for heroin. On the bottle cap, allegedly used to cook capsules of heroin, there was a residue which responded positively.

A case of first impression in Virginia, *Robbs* held that possession of a "modicum" or small quantity of a drug is necessary for conviction under the UNDA. Although the amount possessed need not be usable, this small quantity is still to be considered in relationship to the nature of the drug.¹⁰

This decision aligns Virginia with the majority¹¹ of jurisdictions which holds that the quantity in possession is immaterial so long as it is discern-

⁸ 211 Va. 153, 176 S.E.2d 429 (1970).

⁹ The police entered with a search warrant for "Narcotics: Heroin" and found the defendant and three other females present in the one-room apartment. The wine bottle cap was in the pocket of a housecoat lying on the bed; the syringe was under the mattress. All persons denied having knowledge of either, but there was evidence of needlemarks on the defendant's arm.

¹⁰ 211 Va. 153, 154, 176 S.E.2d 429, 430 (1970), quoting the rule enunciated in *State v. Dodd*, 28 Wis. 2d 643, 647, 137 N.W.2d 465, 469 (1965).

The defendant argued that the residue was not sufficient for a conviction under the UNDA because the quantity of heroin found was too small. She said further that there was no proof that the housecoat in which the bottle cap cooker was found belonged to her and that she did not have possession.

In affirming the conviction the court held that the residue of heroin was sufficient for conviction under the UNDA. The repeal of the UNDA in Virginia and the implementation of the Drug Control Act should not cause a different result at the present date. Compare UNDA, Va. Acts of Assembly 1934, ch. 86, at 81-90 (repealed 1970) with The Drug Control Act, VA. CODE ANN. §§ 54-524.1 to -524.109 (Cum. Supp. 1970). Thus one who possesses a very small quantity of marijuana or other controlled drug is subject to prosecution under the Drug Control Act, but the crime of possession of marijuana in Virginia has now been reduced to a misdemeanor for the first offense as opposed to the designation of possession of hard drugs as a felony. See VA. CODE ANN. § 54-524.101 (Cum. Supp. 1970).

The court in *Robbs v. Commonwealth* said there was a discernible amount of heroin present, enough for the state chemist to conduct a test, and not a microscopic quantity. Whether a microscopic quantity is sufficient for conviction still remains an open question in Virginia.

The court held as well that the inference was warranted that the housecoat belonged to the defendant and that she did have possession. On the question of possession, see generally *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970); *Crisman v. Commonwealth*, 197 Va. 17, 87 S.E.2d 796 (1955).

¹¹ See Annot., 91 A.L.R.2d 810 (1963).

ible in a qualitative analysis.¹² These courts have held that the legislature intended there be a conviction for the possession of any amount of a narcotic drug.¹³

The most popular expression, and that adopted by the Virginia court, is that possession of a "modicum" of the drug is sufficient to bring the defendant within the purview of the statute.¹⁴ The majority concludes that since the statute did not provide any minimum amount, the amount is immaterial with respect to conviction.¹⁵

Most jurisdictions reason that narcotic drugs are "contraband and dangerous" and cause harm to the public as well as to the users by their unlawful use.¹⁶ Furthermore, these courts hold that it would be unreasonable to give a more liberal interpretation which would be more favorable to drug addicts or those dealing in narcotics illegally.¹⁷ One court concludes that the small quantity readily warrants the inference that the defendant possessed a larger, usable amount. This court recognizes, however, that the possession of a larger amount is the ultimate triable issue in the case.¹⁸

A minority¹⁹ of courts, however, holds that a very small quantity of a narcotic drug is not sufficient to support a conviction.²⁰ The pervasive view here is that an amount sufficient to be applied to the use thereof is required.²¹ A usable amount is most often determined to be a quantity

¹² *Accord*, *Haley v. State*, 7 Md. App. 18, 253 A.2d 424 (1969); *State v. Dodd*, 28 Wis. 2d 643, 137 N.W.2d 465 (1965).

¹³ *See, e.g.*, *Duran v. People*, 145 Colo. 563, 360 P.2d 132 (1961) (slightest amount of marijuana will constitute possession); *State v. Jefferson*, 391 S.W.2d 885 (Mo. 1965); *State v. Humphreys*, 54 N.J. 406, 255 A.2d 273 (1969).

¹⁴ *Accord*, *Mickens v. People*, 148 Colo. 237, 365 P.2d 679 (1961); *State v. Dodd*, 28 Wis. 2d 643, 137 N.W.2d 465 (1965).

The Virginia court, however, fails to elucidate its reasons for adopting such an expression.

¹⁵ *See, e.g.*, *People v. Hartfield*, 94 Ill. App. 2d 421, 237 N.E.2d 193 (1968); *State v. Young*, 427 S.W.2d 510 (Mo. 1968); *State v. Humphreys*, 54 N.J. 406, 255 A.2d 273 (1969); *State v. Dodd*, 28 Wis. 2d 643, 137 N.W.2d 465 (1965).

¹⁶ *See* *State v. Dodd*, 28 Wis. 2d 643, 647, 137 N.W.2d 465, 469 (1965).

¹⁷ *Id.*

¹⁸ *See* *Humphreys State*, 54 N.J. 406, 410, 255 A.2d 273, 276 (1969).

¹⁹ *See* *Annot.*, 91 A.L.R.2d 810 (1963).

²⁰ *Cf.* *Duran v. People*, 145 Colo. 563, 360 P.2d 132, 135 (1961) (dissenting opinion):
Unless a statute contains a mandate to the contrary, the presumption is that trifles are not within the prohibitory terms of the statute . . . *de minimus non curat lex.*

²¹ *See* *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962) (sufficient heroin for use was present); *People v. McCarthy*, 64 Cal. 2d 513, 413 P.2d 671, 50 Cal. Rptr.

which is susceptible to use in the known practice of addicts.²² The minority jurisdictions have held that where there are miniscule, unrecognizable scrapings of a drug, it is not the scientific measurement but the awareness of possession that is important.²³ Only a stringent rule would charge one

783 (1966) (minute traces of morphine on cotton swabs); *Edelin v. United States*, 227 A.2d 395 (D.C. App. 1967) (microscopic traces of heroin); *Pelham v. State*, 164 Tex. Crim. 226 298 S.W.2d 171 (1957) (unusable amount of marijuana); *People v. Pippin*, 16 App. Div. 2d 635, 227 N.Y.S.2d 164 (1962) (the state used up all of the traces of heroin powder in chemical tests); *State v. Larkins*, 3 Wash. App. 203, 473 P.2d 854 (1970) (traces of Demerol around the neck of an empty bottle).

Any amount is sufficient for a conviction for the sale of narcotics, a different offense from possession. *See, e.g., State v. Ballesteros*, 100 Ariz. 262, 413 P.2d 739 (1966); *People v. Diamond*, 10 Cal. App. 3d 798; 89 Cal. Rptr. 126 (1970); 72 C.J.S. *Poisons* § 8, at 181 (1951).

²² It is common practice for addicts to wipe their needles with a cotton swab, saving the swab until enough residue is collected for a booster shot. Therefore, cotton swabs with a residue of a narcotic on them may be usable to produce narcotic effect. *See State v. Haddock*, 101 Ariz. 240, 418 P.2d 577 (1966) (marijuana seeds cannot be used for narcotic effect); *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962) (not enough heroin on a cotton swab to be susceptible to use as a narcotic); *People v. McCarthy*, 64 Cal. 2d 513, 413 P.2d 671, 50 Cal. Rptr. 783 (1966) (where minute traces of morphine on cotton swabs were not enough for consumption or sale); *Greer v. State*, 163 Tex. Crim. 377, 292 S.W.2d 122 (1956) (possession of wet cotton with a residue of heroin not enough for unlawful possession).

²³ *See generally* *People v. Leal*, 64 Cal. 2d 504, 413 P.2d 665, 50 Cal. Rptr. 777 (1966); *People v. McCarthy*, 64 Cal. 2d 513, 413 P.2d 671, 50 Cal. Rptr. 783 (1966); *People v. Sullivan*, 234 Cal. App. 2d 562, 44 Cal. Rptr. 524 (1965) (traces of heroin on a spoon were not visible); *People v. Aguilar*, 223 Cal. App. 2d 119, 35 Cal. Rptr. 516 (1963) (crystalline encrustations on a spoon imperceptible to the human eye).

In California cases a residue alone is not enough for a conviction. Where conviction was for a small amount, the narcotics were always in a recognizable state. *See generally* *People v. Marich*, 201 Cal. App. 2d 462, 19 Cal. Rptr. 909 (1962); *People v. Anderson*, 199 Cal. App. 2d 510, 18 Cal. Rptr. 793 (1962).

Also where police saw larger amounts but could only secure small quantities upon arrest and seizure, convictions were sustained. *See People v. Biane*, 259 Cal. App. 2d 76, 66 Cal. Rptr. 124 (1968) (where police saw defendant dispose of a large bowl of heroin); *People v. Garcia*, 248 Cal. App. 2d 284, 56 Cal. Rptr. 217 (1967) (where police saw defendant inject a large amount into his arm).

The abundance of narcotics cases in California, Texas and Arizona is undoubtedly due to their location on the Mexican border. Acquisition of narcotic drugs is considerably easier in these states, so the occurrence of narcotics crimes is more frequent, and the court's experience is greater.

Query: Is the guilt of the defendant in a conviction for possession of a small quantity of a narcotic drug to be determined by the expertise of the chemist? *See People v. Melendez*, 225 Cal. App. 2d 67, 37 Cal. Rptr. 126 (1964) (where non-scientifically trained personnel could not detect the presence of marijuana residue in a pipe); *People v. Aguilar*, 223 Cal. App. 2d 119, 35 Cal. Rptr. 516 (1963); *Commonwealth v. Dasch*, — Pa. —, 269 A.2d 359 (1970) (where it would take an

with knowingly possessing that which requires microscopic analysis to identify.²⁴

In criminal justice one objective is to deter criminal acts in the future by punishing those who have committed criminal acts in the past. Possession of minute traces of narcotics poses less chance of future harm than possession of narcotic instruments.²⁵ It makes eminently more sense to punish a man for having a bottle cap cooker, bent spoon cooker or syringe than to punish him for possessing a small or microscopic amount of a narcotic drug on such instruments.²⁶ It is axiomatic that one can use the instruments in the future, but he cannot use the residue on them.

The rationale of the majority contention transforms evidence of recent possession into proof of culpable present possession.²⁷ It is irrefutable that the evil sought to be controlled is the use of drugs and their sale and transfer for ultimate use.²⁸ Accordingly, where the amount of a narcotic in present possession is large, the probability of use is high, and society demands that such possession be proscribed. Conversely, where the amount is small, the probability is low, and where the amount is microscopic, the probability of future use, transfer or sale is nil. Therefore, proscription of

expert on drugs to separate marijuana scraps mixed with other dirt and debris).

²⁴ *Pelham v. State*, 164 Tex. Crim. 226, 298 S.W.2d 171, 173 (1957).

²⁵ *People v. Leal*, 64 Cal. 2d 504, 413 P.2d 665, 670, 50 Cal. Rptr. 777, 782 (1966).

²⁶ Possession of narcotics instruments is a misdemeanor in California. See *Fraher v. Superior Court*, 272 Cal. App. 2d 155, 159, 77 Cal. Rptr. 366, 370 (1969); *People v. Leal*, 64 Cal. 2d 504, 413 P.2d 665, 670, 50 Cal. Rptr. 777, 782 (1966); WEST CAL. HEALTH & SAFETY CODE § 11555 (West 1969).

²⁷ See *People v. Sullivan*, 234 Cal. App. 2d 562, 44 Cal. Rptr. 524 (1965) (saying that if the majority position were carried further, every high addict could be charged with possession).

It is logical to recognize that possession is but mere preparation, and thus punishment for possession has been called the "penalized state of preparation." *Edelin v. United States*, 227 A.2d 395, 397 (D.C. App. 1967), quoting J. HALL, GENERAL PRINCIPALS OF CRIMINAL LAW 584-85 (2d ed. 1960).

The latest cases have held that possession of small amounts of narcotic drugs is one of a series of circumstances establishing a prima facie case of recent unlawful possession. See, e.g., *State v. Larkens*, 3 Wash. App. 203, 473 P.2d 854, 856 (1970). Similarly possession of small particles of a drug may not be sufficient to establish the defendant's guilt beyond a reasonable doubt where based on conjecture or suspicion. See *Commonwealth v. Dasch*, — Pa. —, 269 A.2d 359 (1970).

²⁸ The explicit purpose of the UNDA was to stop illegal narcotic traffic. See, e.g., *Edelin v. United States*, 227 A.2d 395 (D.C. App. 1967); *Baldwin v. Commonwealth*, 203 Va. 570, 125 S.E.2d 858 (1970); *State v. Larkins*, 3 Wash. App. 203, 473 P.2d 854 (1970); 6 M.J. *Drugs and Druggists* § 5, at 429 (Cum. Supp. 1968). See generally *State v. Reed*, 34 N.J. 554, 170 A.2d 419 (1961); Comment, *Narcotics Regulation*, 62 YALE L.J. 751 (1953).

mere possession of unusable amounts is inconsistent with this purpose of narcotics control.²⁹ A small amount of a narcotic drug in possession is merely evidence of a previously present larger amount, and such evidence should not be concluded to be proof of possession in the absence of highly convincing circumstances.³⁰

C. J. S., Jr.

²⁹ See *Edelin v. United States*, 227 A.2d 395, 397 (D.C. App. 1967).

³⁰ Such circumstances as visible needle traces, possession of narcotic instruments, and a manifest drug induced state of being, some of which were present in *Robbs*, give rise to the inference that the defendant unlawfully has possession of a narcotic drug when he has possession of traces of a drug. Hopefully the Virginia court will not strictly follow the majority rationale if less convincing circumstances than those in *Robbs* are present.