

MINUTES

**SUPREME COURT’S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, November 4, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Mark Field
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendon McCullagh
Jesse Nix
Nathan Phelps
Judge Michael Westfall
Scott Young

EXCUSED

Jennifer Andrus
Professor Carissa Byrne Hessick
Steve Nelson
David Perry

1. Welcome

Judge Blanch

Judge Blanch welcomed everyone to the meeting. Ms. Adams-Perlac stated that the minutes from the October meeting were not ready to be approved. She stated that the minutes would be ready by the December meeting.

2. Drug Offense Instructions

Committee

Judge Blanch asked for the discussion on the following definitions.

(a) Possession of an altered or forged prescription

Ms. Johnson asked if the exclusion of “written order” from the statute was intentional. The committee discussed the meaning of “written order,” concluded that an order could be written by a doctor to a nurse, and included it in the instruction.

Judge McCullagh asked if the committee should include the element of non-innocent possession. Ms. Jones stated that non-innocent possession would be element 5. Ms. Klucznik asked how a forged prescription could be innocently possessed. She

asked if a person had to know a prescription was forged. Ms. Jones and Judge McCullagh stated that the person must know that it was altered or forged AND possess it. Ms. Johnson and Judge McCullaugh agreed that the defense should apply.

Ms. Jones asked if knowingly and intentionally applied just to possession, or to knowledge of the forged prescription and knowledge that it was for a controlled substance. She stated that based on State v. Bird, *mens rea* applies to every element of the offense. The committee agreed that knowingly and intentionally applied to both possession and knowledge of the forgery. Judge Blanch asked if ignorance of whether a substance is a controlled substance is a valid defense. Ms. Klucznik and Ms. Jones stated that it was not. Ms. Jones said that this defense would fall under ignorance of fact. Judge Blanch stated that the defense may argue, based on Bird, that knowledge of a controlled substance is an element. However, he stated that he would not be inclined to let the defense make this argument.

Ms. Jones asked if *mens rea* could include reckless (“reckless to whether it was altered or forged”). Judge McCullagh stated that the person must knowingly and intentionally possess an altered prescription. Judge Blanch suggested placing them both on the same line to avoid applying *mens rea* to knowledge of the controlled substance. Judge McCullagh suggested separating each element to ensure that jurors understand.

Ms. Johnson asked if *mens rea* for possession of the forged prescription included reckless. Ms. Jones stated that it would be hard to argue recklessness. She stated that it would be an argument of mistake of law because drugs are defined as controlled substances. Judge Blanch stated that recklessness would mean that person did not know it was forged, but should have known it was forged. Ms. Johnson suggested only using “knowingly” regarding knowledge that a prescription was forged. Judge McCullagh agreed and stated that although the legislature used “intentionally and knowingly,” they should have only used “knowingly” for knowledge that a prescription was forged. He noted that “intentionally” was neither grammatically correct nor logical. He suggested, “knowing it was altered or forged.”

The committee proposed this language:

(DEFENDANT’S NAME) is charged [in Count ____] with committing Possession of an Altered or Forged [Prescription] [Written Order [on or about (DATE)]]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME)
2. intentionally and knowingly possessed an altered or forged [prescription] [written order];
3. knowing the altered or forged [prescription] [written order] is for a controlled substance [; and]
- [4. The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced

that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 58-37-8(2)(a)(iii)

Ms. Johnson moved to approve the instruction. Judge McCullagh seconded the motion and it passed unanimously.

(b) Possession of Marijuana – Second Degree Felony

Judge Blanch asked if possession of 100 pounds is a question of fact. He stated that if a defendant can convince a jury that they did not know they had 100 pounds, the prosecution could not prove that element. Judge McCullagh suggested using a special verdict form for the 100 pounds. He stated that the jury would first decide possession and then use a special verdict form to decide if the amount is 100 pounds. Ms. Johnson stated that the jury still must find that it was 100 pounds.

Ms. Klucznik stated that the defense would want 100 pounds to be an element of possession. Judge McCullagh and Ms. Johnson stated that it is not an element to prove possession, but rather an element for sentencing. Ms. Jones asked if the jury must still find possession of 100 pounds beyond a reasonable doubt. Judge McCullagh and Ms. Johnson answered yes. Ms. Johnson said that 100 pounds is not an element of possession, but a sentencing determination. Ms. Klucznik agreed.

Ms. Jones stated that the *mens rea* language should be applied to the 100 pounds. Judge Blanch stated that if a person was charged with possession of over 100 pounds and the person believed that they possessed less than 100 pounds, a jury could acquit. Ms. Johnson asked how this differed from a defendant who claims that he thought the age of consent was 16. Judge Blanch stated that her example is an exception because there is a statute that explicitly excludes this defense.

Ms. Johnson reiterated that 100 pounds is not an element because the statute addresses penalties. Ms. Klucznik agreed. Ms. Jones stated that she could see the court making the distinction between *mens rea* element of possession and sentencing element of the amount. Ms. Klucznik agreed.

Judge Blanch stated that this is similar to DUI and domestic violence statutes. He explained that the defendant's knowledge of prior crimes is not an element of the crime, but rather a sentencing element used for enhancement.

Ms. Adams-Perlac stated that she would prepare a special verdict form for the committee to discuss at the next meeting.

(c) Possession of Marijuana – Class B Misdemeanor

Ms. Klucznik stated that this instruction is unnecessary because the possession of controlled substance covers this instruction. The committee agreed.

(d) Firearm Enhancement

Ms. Johnson suggested beginning the instruction with defendant's name as the committee has done for other instructions. Ms. Jones asked if this instruction should be a special verdict form. The committee agreed that it should be a special verdict form.

Mr. Phelps asked if a person must know that they possess the firearm. Ms. Johnson asked what the difference was between "during the commission" and "in furtherance of." Judge McCullagh stated that "in furtherance" is passive, while "during the commission" is an active act. Ms. Jones stated that a *mens rea* element is necessary for "in furtherance of." Ms. Klucznik stated that the *mens rea* is implicit because the person used it. She stated that the *mens rea* for possession is more difficult. Ms. Jones stated that if the statute does not contain a *mens rea*, but is implicit, it has to be recklessly, knowingly, or intentional. Ms. Klucznik stated that because this is a sentencing enhancement, not an element of the crime, *mens rea* does not need to be included. Ms. Jones disagreed and stated that it should be included because "in furtherance of" suggests the jury must determine a mental state

Ms. Johnson stated that the *mens rea* depends on what the defendant is doing. If an element does not have to do with a defendant's mental state, it should not be included. Ms. Johnson stated that the *mens rea* should be included to address "used, carried, or possessed." Judge Blanch stated that her distinction made sense.

The committee struggled with the question of whether a *mens rea* element is required for instructions that are sentencing enhancements. Judge Blanch suggested temporarily including the *mens rea* language and stated that he will ask his clerk to research this issue for the committee. He stated that the committee would discuss it at the next meeting.

3. Adjourn

Committee

The meeting was adjourned at 1:15 p.m. The next meeting is Wednesday, December 2, 2015.