

MINUTES

STANDING COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

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

Wednesday, May 4, 2016
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Keisa Williams, Staff
Mark Field
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps
Scott Young
Judge Michael Westfall

EXCUSED

Jennifer Andrus
David Perry

1. Welcome

Judge Blanch

Judge Blanch welcomed everyone to the meeting. He introduced Keisa Williams, the new staff member of the committee.

Mr. Phelps moved to approve the minutes from the March 2016 meeting. Mr. Nelson seconded the motion and it passed unanimously.

2. Drug Offense Instructions

Committee

(a) Possession of Drug Paraphernalia

Ms. Klucznik presented proposed language to the committee. She stated that she used the statutory language.

Judge Blanch asked if “intentionally” encompassed “knowingly.” Ms. Jones stated that if something is done intentionally, it is also done knowingly. Judge Blanch asked if both “intentionally” and “knowingly” were necessary. Judge McCullagh stated that “intentionally” was sufficient. Ms. Jones read the statute to the committee. Judge McCullagh stated that a person can recklessly possess drug paraphernalia with the specific intent to use it. Judge Blanch asked if

prosecutors would prosecute a case where they must prove that a person did not intend to possess the paraphernalia but did intend to use the paraphernalia. Judge McCullagh stated that the person must use the paraphernalia for that purpose or possess paraphernalia intending to use it for that purpose.

Ms. Johnson recommended two versions: intentionally, knowingly, or recklessly used drug paraphernalia OR intentionally, knowingly, or recklessly possess paraphernalia with specific intent to use it. Judge McCullagh agreed and stated that “intent to use” must be one of the specific uses listed in the statute. He stated that if a person used drug paraphernalia to dig a trench, it would not satisfy the “intend to use” element.

Ms. Jones stated that intent applies to use and possession. Judge Blanch asked the committee if the *mens rea* should be intentionally, knowingly, and recklessly. Ms. Jones agreed that it should because intentionally encompasses knowingly and recklessly. The committee decided to apply a separate *mens rea* for possession and use.

Ms. Klucznik asked the committee if all the specific uses in the statutory language were necessary for the instruction. Mr. Field stated that each word has different nuances and stated that practitioners should choose the applicable use. Judge McCullagh agreed.

Ms. Johnson stated that the statutory definition of “drug paraphernalia” includes “any equipment, product, or material used” and the statute provides a non-exhaustive list of examples. She stated that “equipment, product, or material used” should be included in the instruction instead of listing the specific uses. She stated that an additional jury instruction could be used to define the specific uses of “drug paraphernalia.”

Ms. Jones stated that using “drug paraphernalia” would be simpler for the jury to understand and jurors could look to the defining instruction of “drug paraphernalia.” Ms. Klucznik stated that the definition of “drug paraphernalia” is not simply equipment, but the use of the equipment. Ms. Johnson stated that part 2 specifically states that the person must use the equipment. Judge Blanch stated that an apple, by itself, is not drug paraphernalia and a conviction would require the use of the apple as “drug paraphernalia.” Ms. Klucznik stated that part 4 is specific to the defendant’s use of the drug paraphernalia, not the general use of the drug paraphernalia.

Ms. Jones stated that the jury should read a simple instruction about elements, a definitional instruction for the *mens rea*, a definitional instruction for “possess,” and a definitional instruction for “drug paraphernalia.”

Ms. Johnson stated that “and the defense of _____ does not apply” should be added to the instruction. Judge McCullagh stated that it should not be included because the person must possess the paraphernalia for a specific purpose. He stated that innocent possession would not apply to some of the uses listed in the statute, such as ingest.

Judge Blanch recommended separating “inject, ingest, inhale, or introduce in human body” from the other statutory uses because the other uses do not involve the human body.

Ms. Johnson asked if *mens rea* goes to “propagate, cultivate, etc.” Judge Blanch stated that the *mens rea* should be separated to show that it applies to all of the elements, not just use. Ms. Jones recommended applying *mens rea* to the possession, use, and the list of uses. Judge McCullagh recommended adding “did so” before the listed uses.

Judge McCullagh said that “the defense of innocence possession does not apply” is not necessary because the State must prove that a person had the *mens rea* to use the drug paraphernalia. Ms. Klucznik stated that the defense was necessary because hypodermic needles, used to inject insulin, are listed as drug paraphernalia. Judge McCullagh agreed that the defense

should be included because controlled substances can be legally injected. Ms. Jones recommended using a blank line instead of naming a specific defense.

The committee proposed the following language:

CR _____. Possession of Drug Paraphernalia.

(DEFENDANT’S NAME) is charged [in Count ____] with committing Possession of Drug Paraphernalia [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, knowingly, or recklessly
 - a. Used drug paraphernalia or possessed drug paraphernalia with intent to use it, and
 - b. Did so [to [plant], [propagate], [cultivate], [grow], [harvest], [manufacture], [compound], [convert], [produce], [process], [prepare], [test], [analyze], [pack], [repack], [store], [contain], or [conceal] a controlled substance]; [OR] [to [inject], [ingest], [inhale] or otherwise introduce a controlled substance into the human body.]
- [3. 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 § 58-37a-5

Judge McCullagh moved to approve the instruction. Mr. Phelps seconded the motion and it passed unanimously.

(b) Definition of Drug Paraphernalia

Ms. Klucznik recommended removing all brackets because the instruction should include all the uses of drug paraphernalia. Ms. Jones recommended removing the numbering because practitioners should choose the applicable option. Mr. Field recommended capitalizing “OR” to differentiate between human consumption and other uses.

The committee proposed the following language:

CR ____ . Definition of “Drug Paraphernalia”.

You are instructed that “drug paraphernalia” means any equipment, product, or material used, or intended for use, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance; OR to inject, ingest, inhale, or otherwise introduce a controlled substance into the human body,

Drug paraphernalia includes but is not limited to:

[kits used, or intended for use, in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived];

[kits used, or intended for use, in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance];

[isomerization devices used, or intended for use, to increase the potency of any species of plant which is a controlled substance];

[testing equipment used, or intended for use, to identify or to analyze the strength, effectiveness, or purity of a controlled substance];

[scales and balances used, or intended for use, in weighing or measuring a controlled substance];

[diluent and adulterants, such as quinine hydrochloride, mannitol, mannited, dextrose and lactose, used, or intended for use to cut a controlled substance];

[separation gins and sifters used, or intended for use to remove twigs, seeds, or other impurities from marihuana];

[blenders, bowls, containers, spoons and mixing devices used, or intended for use to compound a controlled substance];

[capsules, balloons, envelopes, and other containers used, or intended for use to package small quantities of a controlled substance];

[containers and other objects used, or intended for use to store or conceal a controlled substance];

[hypodermic syringes, needles, and other objects used, or intended for use to parenterally inject a controlled substance into the human body, except as provided in Section 58-37a-5]; and

[objects used, or intended for use to ingest, inhale, or otherwise introduce a controlled substance into the human body, including but not limited to]:
[metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls];
[water pipes];
[carburetion tubes and devices];
[smoking and carburetion masks];
[roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand];
[miniature cocaine spoons and cocaine vials];
[chamber pipes];
[carburetor pipes];
[electric pipes];
[air-driven pipes];
[chillums];
[bongs]; and
[ice pipes or chillers].

References

Utah Code § 58-37a-3

Mr. Phelps moved to approve the instruction. Ms. Klucznik seconded the motion and it passed unanimously.

3. Adjourn

Committee

The meeting was adjourned at 1:26 p.m. The next meeting is Wednesday, June 1, 2016.