
**Public Safety & Emergency Preparedness
Committee**

HB 1695

Brief Description: Modifying provisions relating to the possession of controlled substances.

Sponsors: Representatives Kagi, Roberts, Dickerson, Goodman, Upthegrove, Darneille and Kenney.

Brief Summary of Bill

- Modifies the elements of the felony crime of possession of a controlled substance by providing that a person must possess the drug knowingly.
- Modifies the elements of the misdemeanor crime of possessing 40 grams or less of marihuana by providing that a person must possess the drug knowingly.

Hearing Date: 2/10/09

Staff: Lara Zarowsky (786-7123)

Background:

The commission of a crime generally requires the co-existence of two essential components: a culpable act, and a culpable mental state.

- A culpable "act" may be an affirmative action, failure to act by one with a legal duty to do so, or certain usage of words such as threats, perjury, and conspiracy.
- A culpable mental state may include, for example, intent, knowledge, recklessness, and criminal negligence.

Strict liability crimes prohibit certain conduct without regard to whether the conduct was engaged in knowingly or intentionally. Such crimes are an exception to the general rule that criminal liability requires some showing of intent by the actor. Washington courts have held that

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the Legislature has authority to enact strict liability crimes despite the fact that they are "strongly disfavored."

Uniform Controlled Substances Act

At least 48 states and the District of Columbia have enacted controlled substances legislation based on the model Uniform Controlled Substances Act. Washington enacted the Uniform Controlled Substances Act in 1971. The vast majority of states require, either by statute or judicial decision, that a controlled substance be possessed *knowingly* in order for such possession to qualify as criminal conduct. Two states, Washington and North Dakota, serve as exceptions by classifying possession as a strict liability offense.

Possession of a Controlled Substance

It is a Class C felony for any person to possess a controlled substance unless it was obtained through a valid prescription. It is a misdemeanor for any person to possess 40 grams or less of marihuana.

To support a guilty finding in a prosecution for possession of a controlled substance, the government must prove beyond a reasonable doubt that: (1) the substance in question is a controlled substance; and (2) the defendant possessed the substance.

A "controlled substance" is any substance included in statute in Schedules I, II, III, IV, and V.

Washington courts have determined that the possession element of the crime may be proved through either "actual" or "constructive" possession.

- **Actual** possession may be established if the controlled substance is in the actual physical custody of the defendant.
- **Constructive possession** may be established when the person charged has dominion and control over either: (1) the drugs; or (2) the premises upon which the drugs were found. The concept of "dominion and control" has not been clearly defined by the courts. Whether a defendant had dominion and control over the drugs or the premises upon which the drugs were found is generally determined by the court through an examination of various factors considering the totality of the circumstances in a particular case.

Strict Liability

Possession of a controlled substance is a strict liability offense, meaning that the mental state of the defendant is not an element of the crime. The defendant may be found guilty if the prosecution proves the defendant had actual or constructive possession of a substance qualifying as a controlled substance. The defendant's mental state need not be established in order for the defendant to be convicted.

Affirmative Defense - Unwitting Possession

Unwitting possession is an affirmative defense to the charge of possession of a controlled substance. A defendant has the burden to assert the defense and has the burden to prove the defense by a preponderance of the evidence. The defendant may establish the defense by making one of two alternate showings: (1) that the defendant did not know he or she was in possession of the controlled substance; or (2) that the defendant did not know the substance he or she

possessed was a controlled substance. A successful showing of unwitting possession excuses the defendant's behavior, notwithstanding the fact that the defendant violated the letter of the statute.

Judicial Interpretation

In 1981 the Washington State Supreme Court settled a conflict between the courts of appeal by declining to impute a knowledge element into the crime of possession of a controlled substance. The court explicitly based its decision on the Legislature's omission of the words "knowingly" and "intentionally" from the statute, indicating that if the Legislature had intended guilty knowledge to be an element of the crime of simple possession, it would have included that requirement in the act.

In all subsequent challenges to the statute, the State Supreme Court has continued to uphold its decision based on apparent legislative intent. In a 2004 decision, the court noted that the Legislature has amended the controlled substances statute seven times since the court's initial interpretation of the statute in 1981, and has not added a knowledge element to the crime.

Summary of Bill:

The crimes of felony possession of a controlled substance and misdemeanor possession of 40 grams or less of marijuana are modified to require proof that the possession occurred knowingly.

Appropriation: None.

Fiscal Note: Requested on February 5, 2009.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.