

HOUSE BILL REPORT

HB 1695

As Reported by House Committee On:
Public Safety & Emergency Preparedness

Title: An act relating to the possession of controlled substances.

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

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

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 2/10/09, 2/17/09 [DP].

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

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: Do pass. Signed by 5 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Appleton, Goodman and Kirby.

Minority Report: Do not pass. Signed by 3 members: Representatives Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Ross.

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.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- 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 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 (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 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: Available.

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

Staff Summary of Public Testimony:

(In support) This crime can be used to criminalize innocent conduct. Innocence until proven guilty is a fundamental premise of our criminal law. The current crime turns the law on its

head. The state is not relieved of its burden to prove every element of a crime just because certain cases, such as drug cases, are difficult to prove. If a stolen wallet is slipped into someone's backpack, the prosecutor has to prove the possession of the wallet was knowing. The same is not true if the item slipped into the backpack is a bag of marihuana. The state should have the same burden under this crime as they have under all others to prove the conduct was committed knowingly beyond a reasonable doubt.

The stories of a wife and girlfriend getting caught up in the drug activities of their respective husband and boyfriend are not the most typical way this crime is charged. Most often someone is pulled over for a traffic infraction and finds a reason to arrest the person and search the car. If the car contains a trace amount of drugs, for example in an empty plastic bag, the driver is charged with possession of a controlled substance. Very often the driver is driving someone else's car or allows friends to frequently drive their car. An empty bag or trace amounts of drugs are found in the car, and the driver had no idea. They get convicted even though they didn't know anything was there. These are probably not the circumstances the crime was intended to reach. The war on drugs is simply not convincing people to stop using drugs. Drug possession charges are not difficult to prove for the prosecutor. If it's a conspiracy charge or an accomplice liability issue, that's more difficult, but simple possession is not difficult to prove. There is a difference county by county in charging these offenses. King County files fewer cases in general, but in mid-sized counties empty baggie filings for possession of a controlled substance are common.

(Opposed) Our current law is better. The question is whether there is evidence to support a denial of possession of a controlled substance. Under current law, the unwitting possession instruction was adopted by the Supreme Court because some evidence should be put forward by the defendant. Once the possession itself has been proven beyond a reasonable doubt, the burden is on the defendant to present some evidence that he or she didn't know the drugs were on the person, or that he or she didn't know what they were. The change in the law proposed under the bill would make the criminal law a little less reliable and a little less predictable. You might help women and children but you might also help career criminals. Juries convict people because they believe the defendant knowingly possessed the drugs. The unwitting possession instruction is better than adding the word knowingly and shifting the mental state of the offender to the prosecution. The law works now, and if you pass this bill the law will work a little less better. It can be confusing to juries to get jury instructions that seem to be in conflict, one indicating that knowledge is not an element but the other indicating that the person is not guilty if they didn't know. It's better for the jury to get both of these instructions and not add the word knowingly to the statute. This isn't a bad bill, but our current law is better.

Persons Testifying: (In support) Representative Kagi, prime sponsor; Becki Eichner; and Charlie Commerce, Washington Defender Association.

(Opposed) Tom McBride, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: None.