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Constitutionality of Conviction under Narcotics Possession Statute

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because a more favorable judicial attitude is encountered, alternative pleading of a count in *quantum meruit*—on the basis of an implied-in-fact promise to pay—to a count for specific performance, is desirable.

CONSTITUTIONALITY OF CONVICTION UNDER NARCOTICS POSSESSION STATUTE

Defendant was convicted of the felony of possession of a narcotic without a prescription,[1] and was sentenced to serve a maximum term of twenty years. Defendant claimed that, on the same facts, the prosecutor could have charged the defendant with the gross misdemeanor of illegal use of narcotic drugs.[2] Defendant argued that this vests discretion in the prosecutor to charge either a felony or a gross misdemeanor, and that this discretion is violative of the equal protection clauses of the Washington[3] and United States[4] constitutions. On appeal, the Washington Supreme Court affirmed the conviction. *Held:* The gross misdemeanor of illegal use of a narcotic, and the felony of illegal possession of a narcotic, require different elements of proof and the prosecutor may, at his discretion, charge either or both crimes on the same set of facts without violating defendant's constitutional right to equal protection. *State v. Reid,* 66 Wash. Dec. 2d 231, 401 P.2d 988 (1965).

The guarantee of equal protection is aimed at preventing government from making unreasonable discriminations between individuals

[1] WASH. REV. CODE § 69.33.230 (1959) (based on the UNIFORM NARCOTIC DRUG ACT § 2). The illegal possession statute specifies that it shall be unlawful to possess any narcotic drug without authorization. Intent to possess is not a required element of proof. State v. Henker, 50 Wn. 2d 809, 312 P.2d 645 (1957). Thus, the prosecution need show only possession, and the presumption arises that this possession was unlawful. The burden is then shifted to the defendant to prove his inclusion within one of the statutory exceptions. State v. Boggs, 57 Wn. 2d 484, 486, 358 P.2d 124, 126 (1961).

The predecessor of the present possession statute required proof of intent to unlawfully sell, furnish, or dispose of narcotic drugs. See Wash. Sess. Laws 1923, ch. 47, § 3, at 134.

[2] WASH. REV. CODE § 69.32.080 (1959). The illegal use statute specifies that it shall be unlawful to use any narcotic drug except as prescribed, and that "unlawful possession ... shall be prima facie evidence of an intent to illegally use such drugs." It is not clear whether intent to unlawfully use is required. The provision that unlawful possession should be evidence of intent suggests that it is required, but the *definition* of the crime does not require such proof. The "prima facie" language was not part of the former statute. See Wash. Sess. Laws 1923, ch. 47, § 4, at 138.

The present statute says that a "habitual user" shall be guilty of a gross misdemeanor, and defines habitual user as "any person addicted to the use of narcotics ... obtaining such narcotics unlawfully...." Prior to the decision in the principal case, this statute had never been construed by the Washington Supreme Court.

[3] WASH. CONST. art. 1, § 12.

[4] U.S. CONST. amend. XIV.

or classes.[5] It is a violation of this protection when the "law lays an unequal hand on those who have committed intrinsically the same quality of offense. . . ."[6] The Washington court has held that, in order to violate equal protection, there must be a "pretty clear indication that the legislature . . . intended to vest in prosecuting officials the discretion to charge as for either a gross misdemeanor or a felony."[7] When there are two statutes requiring different elements of proof, however, the state's decision to proceed under either or both is acceptable.[8]

In the principal case, the court said that the elements of proof required for conviction differed under each statute. Conviction of the gross misdemeanor requires proof of actual illegal use of a narcotic, whereas such proof is not required for conviction of the felony of illegal possession. The court reasoned that, because the elements of the two crimes are different, there is a legislative standard for determining which offenders could be charged with a felony.

Assuming arguendo that the two statutes are otherwise constitutional, the court's rejection of defendant's equal protection argument seems correct. As the court pointed out, the two statutes require different elements of proof. Proof of the felony will not prove the misdemeanor,[9] and proof of illegal use—the misdemeanor—will not necessarily show illegal possession.[10] It appears that the gross misdemeanor would be more difficult to prove than the felony,[11] but this should make no difference as to constitutionality.[12]

[5] Truax v. Corrigan, 257 U.S. 312, 332 (1921).

[6] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Note, however, the difficulty in defining the term "same offense," as evidenced by the law of double jeopardy. See, *e.g.*, Martinis v. Supreme Court, 15 N.Y.2d 240, 206 N.E.2d 165, 258 N.Y.S.2d 65 (1965), 79 HARV. L. REV. 433 (1965), 41 WASH. L. REV. 140 (1966).

[7] *In re* Olsen v. Delmore, 48 Wn. 2d 545, 548, 295 P.2d 324, 326 (1956).

[8] United States v. Garnes, 258 F.2d 530 (2d Cir. 1958); State v. Reed, 34 N.J. 554, 170 A.2d 419 (1961). *Cf.* Berra v. United States, 351 U.S. 131 (1956); 1 BISHOP, A TREATISE ON CRIMINAL LAW § 815(3) (9th ed. 1923).

[9] Proof of the illegal possession would, at most, be prima facie evidence of intent to commit the misdemeanor. WASH. REV. CODE § 69.32.080 (1959). The prosecution would also have to establish actual use.

[10] The court adopted the language of the New Jersey Supreme Court in State v. Reed, 34 N.J. 554, 170 A.2d 419 (1961), in noting "that the containment of a consumed narcotic within a person's blood or respiratory system is not constructive possession." 66 Wash. Dec. 2d at 234, 401 P.2d at 991.

[11] The misdemeanor requires proof of use, probably requiring introduction of scientific evidence, and possibly proof of intent. The felony, as already pointed out, requires only proof of possession, and then the burden shifts to the defendant. The legislative history suggests that the reason why the felony is easier to prove is because intent to sell unlawfully or dispose of the possessed narcotic is difficult to establish. This element of the crime was dropped by the legislature when it enacted the present statute in 1951, perhaps to make control over narcotics transactions more effective by making it easier to gain a conviction. See note 1, *supra*.

[12] The legislative power to define crime and prescribe punishment is recognized in

Because the elements of the two crimes differ, the prosecutor does not make the determination as to charge solely on his own discretion. The decision as to the statute under which he will proceed is governed by his conclusions as to his capacity to meet the different requirements of proof.[13] This would not seem to fall within the arbitrary discretion prohibited by the Washington court in *In re Olsen v. Delmore.*[14] In that case, *one* statute vested in the prosecutor the power to proceed for either a gross misdemeanor or a felony. This vests "unguided and untrammeled" discretion in violation of constitutional principles.[15]

Where more than one crime has been defined by the legislature, wide discretion is usually given the prosecutor as to the charge under which he will proceed.[16] This approach is dictated by practical requirements. It would be almost impossible for the courts to repeatedly review the myriad factors involved in a prosecutor's determination of appropriate charges.[17] In questionable cases, the presumption is that the prosecutor does his job correctly.[18]

In the principal case, the court pointed out the purpose of the illegal possession statute: "Illegal possession is potentially more dangerous to society than illegal use, because the possessor may dispense the drugs to others. . . ."[19] Thus, the court suggested that the statute was aimed at the individual who held for dispensation. In affirming defendant's conviction, the court presumed that the prosecutor proceeded on the felony in light of this policy. In essence, the court said that the legislature had provided the necessary guidance for the prosecutor, *i.e.*, by specifying a harsher penalty for the possessor,[20] and it would presume that the prosecutor had followed this guidance. Such presumption seems unrealistic in view of the fact that the felony conviction is easier to obtain.

State v. Mulcare, 189 Wash. 625, 66 P.2d 360 (1937). See also Siipola v. Ness, 90 F. Supp. 18 (W. D. Wash. 1950).

[13] It seems anomalous that the prosecution, under the narcotics laws, should find it easier to convict of the greater charge. This is contrary to the usual approach in which the prosecutor would charge the lesser crime in order to insure a conviction. See 30 IND. L. J. 74, 78 n.19 (1954).

[14] 48 Wn. 2d 545, 295 P.2d 324 (1956).

[15] See State v. Pirkey, 203 Ore. 697, 281 P.2d 698 (1955).

[16] See Baker, *The Prosecutor—Initiation of Prosecution,* 23 J. CRIM. L., C. & P.S. 770 (1933). See also Comment, 65 YALE L. J. 209 (1955).

[17] Comment, 65 YALE L. J. 209, 213-14 (1955). *Cf.* State *ex rel.* Rosbach v. Pratt, 68 Wash. 157, 122 Pac. 987 (1912).

[18] *Cf.* Metzger v. Quick, 46 Wn. 2d 477, 483, 282 P.2d 812, 815 (1955).

[19] 66 Wash. Dec. 2d at 235, 401 P.2d at 991.

[20] The harsher penalty would be invoked against the individual who is more dangerous to society, *i.e.*, the possessor who dispenses the drugs to others. Presumably, the prosecutor would not seek this punishment for one who was an addict and not a "pusher."

Apparently unconsidered by the court were the constitutional questions raised by the United States Supreme Court in *Robinson v. California.*[21] In *Robinson,* a California statute making it illegal "to be addicted to the use of narcotics"[22] was held unconstitutional as violative of the eighth amendment. The court held that to punish the "status" of being a narcotics addict was cruel and unusual punishment, but, in dictum, specifically affirmed the right of the state to punish such "acts" as possession.[23]

The holding in *Robinson* seems clearly to invalidate at least part of the Washington use statute, which states "any person addicted to the use of narcotics . . . shall be guilty of a gross misdemeanor." Further, since use itself is, in many cases, simply the manifestation of the "status" of addiction, it could be argued that the whole of the statute is unconstitutional as applied to the addict.[24] If such is the case, the Washington court's dictum that the prosecutor could charge under the use statute is incorrect, at least insofar as the addict is concerned.[25]

Moreover, despite the dictum in *Robinson,* it is arguable that the holding in that case precludes prosecution for illegal *possession* if the defendant can show that such possession was compelled by his status of addiction.[26] That possession is a manifestation of use and addiction is recognized by the "use" statute itself, which provides: "The unlawful possession of narcotic drugs as defined herein [by the possession statute] shall be prima facie evidence of an intent to illegally use such drugs." The court in the principal case adopted the approach of the

[21] 370 U.S. 660 (1962).

[22] CAL. HEALTH & SAFETY CODE § 11721.

[23] The Court said, 370 U.S. at 664: "A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics. . . ."

[24] Note, 79 HARV. L. REV. 635, 650-55 (1966). A mere claim of addiction, of course, should not suffice. There should be some showing of an unchangeable status—a "sickness" beyond the control of the individual.

In the principal case, the opinion does not say that the defendant was *both* a possessor and a user-addict. However, this seems implied by the defendant's claim that he could have been prosecuted under either statute at the prosecutor's discretion.

[25] At present, Washington narcotics law empowers municipal health officials to examine suspected habitual narcotic users and requires such persons to submit to treatment, at public expense, until cured. WASH. REV. CODE § 69.32.070 (1959). The state board of health may, by general regulation, determine that quarantine or isolation of habitual users is necessary. *Ibid.* And, under Washington law, any person convicted under the use statute, or any person imprisoned and found to be an habitual user, *shall* be treated at public expense for addiction. WASH. REV. CODE § 69.32.090 (1959). The prison authorities are directed to make available a part of the prison for use as a clinic. However, the statute provides that such treatment should not interfere with the service of any sentence imposed for the commission of crime. *Ibid.*

[26] Nearly every user must "possess" at some time prior to use. Thus the narcotic user-addict must necessarily be, at some time, subject to prosecution under the possession statute. The only logical exception would be where the drug was administered by someone else.

New Jersey Supreme Court in claiming that use does not necessarily show possession.[27] This approach seems only superficially to avoid the argument that to punish an addict for possession of narcotics is indirectly punishing him for his status of addiction. The Washington court did not satisfactorily deal with this problem, simply stating, "Of course, we recognize that often the user of narcotics is also a possessor."[28]

Courts which have dealt with the problem have rejected the argument that punishment for possession is often punishment for the status of addiction.[29] In rejecting this argument, reliance is placed on the dictum in *Robinson* and the distinction between "acts" (possession), which are punishable, and "status" (addiction), which is not.[30] Three recent federal court cases, however, suggest the contrary. In *Driver v. Hinnant*,[31] the Fourth Circuit Court of Appeals held that defendant could not be criminally punished for the "act" of being drunk in public, as such act was an involuntary manifestation of the status of being an alcoholic. The same result was reached in *Easter v. District of Columbia*,[32] in which the court pointed out that the essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime.[33] And, in *United States v. Freeman*,[34] the Second Circuit Court of Appeals reversed defendant's conviction for unlawful possession of narcotics, and remanded the case for determination whether defendant lacked substantial capacity to conform his conduct to the requirements of law.[35]

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[27] See note 10 *supra*.

[28] 66 Wash. Dec. 2d at 235, 401 P.2d at 991. The court did not elaborate on this statement.

[29] United States *ex rel.* Swanson v. Reincke, 344 F.2d 260 (2d Cir. 1965); *cf.* Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964), *cert. denied*, 379 U.S. 1004 (1965).

[30] United States *ex rel.* Swanson v. Reincke, *supra* note 29, at 262-63; Browne v. State, *supra* note 29, 129 N.W.2d at 179.

[31] 356 F.2d 761 (4th Cir. 1966).

[32] 34 U.S.L. WEEK 2534 (D.C. Cir. March 31, 1966).

[33] The analogy to alcoholic cases breaks down with respect to the original acts which brought about the status. Drinking alcohol is not, in and of itself, unlawful for the adult, and such lawful acts might lead the innocent individual to the status of alcoholism. But the first taking of drugs is, in almost all cases, unlawful. Thus, in many cases, the addict broke the law in acquiring his "status."

[34] 357 F.2d 606 (2d Cir. 1966).

[35] This language is drawn from the American Law Institute test for criminal responsibility, which the court adopted, with one modification, in *Freeman*, 357 F.2d at 622:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The *Freeman* case suggests the possibility of a successful plea that some forms of narcotic addiction constitute insanity. The Court of Appeals, however, states: "We

The principle of these cases is clear: punishment should not be permitted for the necessary manifestations of an involuntary condition when the individual is without substantial capacity to prevent those manifestations. If it is unlawful to punish for a "status," it should also be unlawful to punish the "acts" which necessarily arise as a result of that status. This principle would seem to apply to the principal case. If the defendant was an addict, his possession of drugs may well have been compelled by that status. If he was without substantial capacity to control that status or the acts which it compelled, then he should not be criminally liable under the possession statute.[36]

EXPOSURE TO UNRELATED BUT INADMISSIBLE EVIDENCE CONSTITUTES REVERSIBLE ERROR

Defendant was charged with unlawful possession of burglary tools,[1] and fraudulent attempt to obtain narcotics.[2] With agreement of defense counsel, the charges were consolidated for trial. At the close of the state's case, the trial court granted defendant's motion to suppress evidence relating to the burglary tools charge because it was obtained by an illegal search, dismissed the charge of unlawful possession of burglary tools, and instructed the jury to disregard all evidence or inferences concerning that charge. The trial court denied defendant's motion for a mistrial, and he was subsequently convicted of fraudulent attempt to obtain narcotics. On appeal, a divided Washington Supreme Court reversed and *held*: Notwithstanding a trial court's explicit instructions, exposure of a jury to evidence and exhibits relating to a charge of possession of burglary tools is so prejudicial to a defendant

wish to make it absolutely clear that mere recidivism or narcotics addiction will not of themselves justify acquittal under the American Law Institute standard...." 357 F.2d at 625.

[36] Such statute should be unconstitutional *only* if applied to the addict, and a defendant should have the burden of showing he falls within this class. Criminal punishment should be provided for the non-addict unlawful possessor. Such approach would be consistent with the dictum in *Robinson,* which upheld the right of the state to punish unlawful possession. In this way there would continue to be control over the narcotics "pusher." However, this would seem to encourage narcotics pushers to be addicts as well, and in this way avoid criminal liability.

An indication as to how the Washington court would hold as to such an argument might be found in State v. Collins, 50 Wn. 2d 740, 314 P.2d 660 (1957). In that case, the court rejected the Durham rule, the irresistible-impulse doctrine, and the American Law Institute's substantial capacity test for criminal responsibility. The rejection was affirmed in *In re* White v. Rhay, 64 Wn. 2d 15, 390 P.2d 535 (1964).

[1] WASH. REV. CODE § 9.19.050 (1956).

[2] WASH. REV. CODE § 69.33.380(1) (1959).