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Intent to distribute marijuana - 1 ounce or less still a crime

Despite the law decriminalizing the possession of one ounce or less of marijuana, officers may still criminally charge offenders who possess less than an ounce with the intent to distribute.

- **Facts.** *Comm. v. Keefner*, SJC-11019 (February 13, 2012): The Great Barrington police received a call from a woman indicating that her daughter and others were smoking marijuana on her property. They would not stop when she asked.

When police arrived, six people, including Shawn Keefner, were sitting on the front porch. The caller came outside and identified Keefner as one of the people who had been smoking.

Officer Jonathan Finnerty, a drug task force member, recognized Keefner -- having coached him in youth football and having arrested him for marijuana possession and possession of cocaine with intent to distribute. Finnerty searched Keefner and found three sandwich bags of marijuana, a cell phone, and \$98. The total weight of the marijuana was six grams -- less than a ¼ ounce.

On Keefner's cell phone, Officer Finnerty observed a message that had been sent twenty minutes prior to his arrival. The sender of the message was asking to purchase \$20 worth of marijuana. Keefner was arrested and charged with possession with the intent to distribute.

- **Motion to dismiss.** Keefner argued that possession of less than one ounce of marijuana -- even with the intent to distribute -- is not a crime in light of G.L. c. 94C, § 32L, which decriminalized possession of one ounce or less. The district court judge agreed, concluding that the statute punishes those who *sell* one ounce or less of marijuana, but does not punish those that *distribute* marijuana for no payment.
- **Analysis.** According to the SJC, when citizens voted for decriminalization, they only decided to change the possession statute, not the one dealing with distribution. Possession with intent to distribute applies to *any* amount of marijuana, as long as the intent is to distribute it. Therefore, the act that decriminalized the *possession* of one ounce or less of marijuana did not decriminalize *possession with the intent to distribute* one ounce or less.

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- ***The crime exists, but probable cause does not.*** Once confirming that Keefner could have been convicted of possession with intent to distribute for his ¼ ounce, the SJC then ruled in his favor! The court's reason: Officer Finnerty lacked probable cause to search him. While the officer had been informed of recent marijuana *use*, he did not observe any illegal or suspicious activity that would indicate Keefner intended to *distribute* marijuana. Nor was any such information relayed to him by the caller. Although the officer permissibly considered Keefner's prior criminal record, that was not enough, by itself, to create probable cause. Without probable cause for the initial search that produced the marijuana, the evidence derived from that intrusion -- the cell phone message -- had to be suppressed as well.
- ***Future implication 1: Distribution?*** In this case, Keefner obviously intended to distribute marijuana. The message on his cell phone proved that.

But the SJC did acknowledge that it would have been more difficult if Keefner had simply been sharing marijuana with his friends. Although giving any amount of any illegal drug to another person constitutes distribution in Massachusetts, the SJC noted that:

“The ironic consequence of such an interpretation would be that, as a result of the passage of G.L. c. 94C, § 32L, which was intended to decriminalize the possession of a small quantity of marijuana, individuals who share a marijuana cigarette would still be charged criminally, but the charge would now be more serious than simple possession, with a maximum sentence of two years in the house of correction rather than six months.”

Having identified the issue, however, the SJC decided to postpone any decision “for another day.”

- ***Future implication 2: No search for possession?*** The other aspect of *Keefner* is the SJC's continued refusal to allow officers to search for marijuana when they do not have probable cause that more than an ounce may be possessed *or* that the suspect may be engaged in distribution or possession with intent activity. See *Comm. v. Cruz*, 459 Mass. 459 (2011) (G.L. c. 276, § 1 does not permit a search for evidence of a *civil* violation; therefore, police could not search a car based on the smell of burnt marijuana).

This is especially problematic for officers because many times, on the street, it is impossible to distinguish the user from the distributor until *after* the search on scene.

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- **Best approach under the circumstances.** Given the state of the law, I recommend that officers deal with the *Keefner* decision as follows:
 - **Detain.** Police officers should continue to detain, based on reasonable suspicion, anyone who may have ingested or who may be in possession of marijuana. If nothing else, detention facilitates the writing of a marijuana ticket for internal or physical possession under G.L. c. 94C, § 32L and, if your municipality has it, for a violation of the public consumption bylaw/ordinance.
 - **Distribution PC search.** Police officers should also assess whether they have probable cause for distribution or possession with intent to distribute marijuana. Remember, *Keefner* upheld the current definition of distribution -- which is any delivery of an illegal substance that is not jointly and simultaneously acquired. In other words, if officers have probable cause that people are sharing marijuana which they all did not acquire together, then the officers would have probable cause to search for evidence of distribution or possession with intent to distribute. This understanding is the gateway to a search for evidence.
 - **Distribution Charges.** However, unless the search yields obvious evidence of marijuana dealing for money or a quantity of marijuana in excess of one ounce, then officers should refrain from charging for criminal distribution or possession. *Keefner* strongly suggests that, when it comes to marijuana, the court is unlikely to find guilt for distribution based simply on sharing among non-paying acquaintances.
 - **Alternative Charges.** Finally, it is critical that officers get creative when dealing with marijuana-infused situations. In *Keefner*, weren't these kids trespassing? They had been told to leave by the owner because they were engaging in an unwanted act on her property. Weren't they subject to in-presence arrest under G.L. c. 266, § 120 when officers confirmed this?

Or what about disturbing the peace under G.L. c. 272, § 53? Wasn't smoking marijuana on somebody's property objectively annoying conduct - especially when the owner had asked them to stop? Disturbing the peace authorizes in-presence arrest as well, with its ensuing search.

Hope this bulletin helps you on the street . . . *John Sofis Scheft*