

Tuesday, July 8, 2008

Drug defenses and the opposition.

Â Bill of Rights.Â (From the public domain.)Â Drug prosecutions consume a huge percentage ofÂ felony court dockets.Â (If I have my way with heavily decriminalizing drugs, clogged court dockets will be quickly unclogged.) OnceÂ suppression motions are lost in such cases, what defensesÂ do defendants have left? They include the following: Â - The defendant did not possess the drugs. Possession is generally defined asÂ knowledge, dominion and control. *Livingston v. State*, 317 Md. 408 (1989). Â - The defendant possessed the drugs, but only for personal use, and not with the intent to distribute. Â - Somebody else committed the crime. Â Â Â Â -- This defense is more common where the arresting police officer neitherÂ finds drugs on the defendant's person nor receives drugs from the defendant. For instance, an undercover cop might buy drugs from a suspect and then radio a description of the suspect to the arresting cops; this raises misidentification issues. Cops may try to weaken a misidentification issue by using pre-recorded or marked currency to buy the drugs; however, this does not eliminate the possibility that the arrestee has received the money from the seller in a legitimate way (e.g., where the seller gives the suspect gas money for a ride by the suspect, or pays back a legitimate debt). Â Â Â -- This defense also is available where cops dragnet several suspects into a mass arrest, where no drugs are found on the defendant but are found on other nearby suspects or in the nearby vicinity. Â - The cop or undercover purchaser (often a criminal suspect himself or herself) are lying about the situation and/or are mistaken about the defendant's identity. Â - The cop planted drugs on or near the defendant.Â - The defendant received a package of drugs in the mail, but had no involvement with arranging the delivery nor receipt. Â - The prosecutor has not proven that the alleged drugs are actually controlled dangerous substances, and has not proven chain of custody of the drugs. Challenging the chemist can be risky before the jury, unless it is done without presenting inconsistent case theories to the jury (e.g., the chemist might be cross examined to show that the analysis is consistent with simple possession, or to show that the analysis did not connect the drugs to the defendant). Â What does the prosecution do when the defendant claims s/he only possessed the drugs for personal use? The prosecution sometimes presents the testimony of a police officer to testify as an expert in possession with intent to distribute drugs. It is junk science, but that does not automatically prevent the witnesses from testifying. An example of such junk testimony is found in *Ricky Williams v. Com.*, __ Va. App. __ (June 24, 2008). Each jurisdiction's rules of evidence, statutory law and caselaw need to be consulted in moving to exclude such "experts".Â What happens when the chemist only test-checks some of the alleged controlled dangerous substances? In *Ricky Williams v. Com.*, __ Va. App. __ (June 24, 2008), the chemist only tested one of ten alleged methadone tablets and opined that the remaining nine tablets looked similar to the tablet that tested positive for methadone. Nevertheless, the appellate court permitted the factfinding judge (this was a bench trial) to reach a verdict beyond a reasonable doubt that the defendant had possessed the methadone with intent to distribute it. *Id.* *Williams*Â quoted favorably from the Fifth Circuit, which said that: "Random sampling [of controlled dangerous substances] is generally accepted as a method of identifying the entire substance whose quantity has been measured."Â *U.S. v. Fitzgerald*, 89 F.3d 218, 223 n.5 (5th Cir. 1996), cert. denied, 519 U.S. 987 Â (1996). The chemist had the alleged drugs available to test; it is not too much to insist that a possession with intent to distribute conviction for methadone be precluded without testing each pill, or at least over half the pills. Â Further about *Williams*Â Â since when is a chemist permitted to testify that a pill looks like a methadone tablet? With a defendant's liberty on the line, the chemist should either test each tablet -- particularly when there are so few tablets -- or else should keep quiet about the untested tablets.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:05

I've been thinking about this, and I don't think "random sampling" makes sense of the *Williams* decision. My explanation got kind of long, so I blogged it:

http://www.windypundit.com/archives/2008/07/a_sampling_of_evidence.html
Anonymous on Jul 8 2008, 22:25

There must be a more sensible approach to drug laws in this nation and in each state. They don't stem the tide of drug use, as they're promised to do, and the unfairly punish individuals so that political figures can claim they're tough on crime.
Anonymous on Jul 10 2008, 12:05

I agree with windypundit.com, Mark Druagh, that in the *Williams* case it was improper to allow the chemist to testify as to what other pills were based upon a single test of only one pill and that statistically this is not logical and I am working on blogging on this myself at a later date.

Sincerely,
Glen R. Graham, Attorney
<http://www.tulsacriminaldefenses.com/>

Anonymous on Jul 10 2008, 19:19

Thanks, Windy, JT and Glen for your comments. It's nice to have Windy's non-lawyer perspective. Often the non-lawyers can persuade other non-lawyers to the side of civil liberties more than lawyers can, in the court of public opinion.

JT and Glen: Seeing that you're criminal defense lawyers, please fill me in whether you or other lawyers at your firm prosecuted in the past. If so, how did you feel about prosecuting drug cases, and all other cases for that matter? Thanks. Jon

Anonymous on Jul 10 2008, 20:59

Hi ,
Thanks to all of you .I like the thoughts
you have posted ... but am more agree wit h JT .
Hope for the best ...

Thanks .

Lorra .

Anonymous on Jul 14 2008, 11:26