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Evidence - Narcotics - Quantity Required for Conviction of Possession. Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970)

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in which the Supreme Court reversed the conviction of a professional counselor who had given information to married couples regarding the use of contraceptives in violation of Connecticut law. The Court reasoned that a married couple's right to decide whether or not to receive information and devices or to practice birth control is protected by an implied constitutional right of privacy.[22] Recognizing this right necessarily implies that a state cannot be allowed to prohibit the dissemination of information and devices which are essential to its existence.

The *Dellapia* court joins the growing minority of jurisdictions which have extended *Stanley* beyond its facts.[23] In its logical and narrowly circumscribed extension, which provides a legitimate source for adult material acquired for private enjoyment, however, the court recognizes a concurrent governmental right to enforce statutory provisions that protect a recognized public interest.[24]

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Evidence—NARCOTICS—QUANTITY REQUIRED FOR CONVICTION OF POSSESSION. *Robbs v. Commonwealth*, 211 Va. 153, 176 S.E. 2d 429 (1970).

In September 1968, the defendant was convicted by a trial court, sitting without a jury, of possession of heroin under section 54-488 of the Virginia Code,[1] a part of the Uniform Narcotic Drug Act. On appeal she contended that the evidence was insufficient to sustain her conviction in that it failed to establish possession of a useable quantity of the narcotic.

22. Although the right of privacy is not explicitly enumerated, it is within the penumbra of specific guarantees of the Bill of Rights. *Id.* at 484.

23. For a thorough discussion of the logic of extending *Stanley* beyond its facts see Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, 68 MICH. L. REV. 185, 229 (1969); Laughlin, *A Requiem for Requiems: The Supreme Court at the Bar of Reality*, 68 MICH. L. REV. 1389 (1970); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 1, 147 (1969); Note, *The New Metaphysics of the Law of Obscenities*, 57 CALIF. L. REV. 1257, 1278, 1279 (1969); 21 BAYLOR L. REV. 503 (1969).

24. *See* note 12, *supra*.

1. "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article." This section, along with the rest of the Uniform Narcotic Drug Act, was repealed by the General Assembly in April, 1970. It was replaced by *The Drug Control Act*, ch. 650, [1970] Va. Acts. The corresponding language of the new law is found in VA. CODE ANN. § 54-524.101(c) (Supp. 1970): "It is unlawful for any person knowingly or intentionally to possess a controlled drug unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner . . . ."

In affirming the conviction, the Virginia Supreme Court of Appeals held that a useable amount of a narcotic is not required for a conviction of possession.[2]

A majority of the jurisdictions which have considered this question have held that quantity is immaterial to a conviction for possession of a narcotic.[3] Others have limited convictions to cases involving a useable quantity,[4] while a third group have declined to rule expressly on the issue.[5]

The question was first considered in 1953, when a Maryland court held that the quantity possessed was immaterial.[6] This rule has remained unchanged in Maryland, and was reaffirmed as recently as 1970.[7]

Two states, Alabama and Texas, reached contra decisions on the issue in 1956. The rule adopted in Alabama[8] was identical to that of Maryland, but in Texas it was held that the Uniform Narcotic Drug Act did not authorize conviction for possession of "a small piece of wet cotton containing a trace of a narcotic such as may have been wiped from a needle following an injection." [9] This standard was clarified the following year when the court held that "there must be possessed an amount sufficient to be applied to the use commonly made thereof." [10] It was subsequently qualified, however, to the extent that the state is not required to allege a useable amount in its indictment.[11]

In 1961, Colorado followed Maryland and Alabama by holding that "possession of a modicum . . . brings one within the inhibitions of the statute." [12]

In 1962, however, Arizona joined Texas by ruling that the evidence was insufficient to sustain a conviction when "the amount was incapable of being put to any effective use." [13] Arizona subsequently departed from the Texas interpretation by holding that when the amount was so small that a layman could not decide on its useability, the state was

2. Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).
3. Courts of Appeals for the Second and Ninth Circuits, and the courts of Alabama, Colorado, Florida, Maryland, Missouri, New Jersey, Utah, Wisconsin.
4. Arizona, California, District of Columbia, Texas.
5. Idaho, Illinois, Minnesota, New York.
6. Peachie v. State, 203 Md. 239, 100 A.2d 1 (1953).
7. Frasher v. State, 8 Md. App. 439, 260 A.2d 656 (1970).
8. Schenher v. State, 38 Ala. App. 573, 90 So. 2d 234 (1956).
9. Greer v. State, 163 Tex. Crim. 377, 292 S.W.2d 122 (1956).
10. Pelham v. State, 164 Tex. Crim. 226, —, 298 S.W.2d 171, 173 (1957).
11. Locke v. State, 169 Tex. Crim. 361, 334 S.W.2d 292 (1960).
12. Mickens v. People, 148 Colo. 237, 241, 365 P.2d 679, 681 (1961).
13. State v. Moreno, 92 Ariz. 116, —, 374 P.2d 872, 875 (1962).

required to offer "positive evidence that the amount in possession is a useable amount." [14]

In the same year the New York Appellate Division declined to establish an absolute requirement of a useable quantity for a conviction, but, in reversing a conviction, the court appeared to give weight to the fact that the quantity involved was so small that it was consumed in tests necessary for identification.[15]

The next state to consider this question was Utah, which in 1964 held that "[t]he determinative test is possession of a narcotic drug, and not useability of a narcotic drug." [16] Wisconsin followed suit in 1965, ruling that the "amount need not be a useable amount" [17] to sustain a conviction for possession.

California, one of the four states which did not adopt the Uniform Narcotic Drug Act,[18] decided the issue in 1966. Reviewing previous case law, the court held that the legislature had not intended to impose sanctions on "*useless* traces or residue" [19] and that possession of such an amount "does not constitute sufficient evidence in itself to sustain a conviction." [20]

In 1967, the District of Columbia followed the reasoning of the Texas, Arizona, and California courts in holding that "where there is only a trace of a substance . . . and there is no additional proof of its useability as a narcotic, there can be no conviction. . . ." [21] The Court of Appeals for the D. C. Circuit subsequently defined this rule to require evidence that the amount "was more than a trace, and that it was capable of quantitative analysis." [22] The court further qualified the rule in the District by stating: "This court has never held that the Government must prove the specific quantum of a narcotic drug possessed by the accused as a predicate for his conviction of narcotic offenses." [23] Also in 1967, the Court of Appeals for the Second Circuit ruled that a con-

14. State v. Urias, 8 Ariz. App. 319, —, 446 P.2d 18, 20 (1968).

15. People v. Pipin, 16 App. Div. 2d 635, 227 N.Y.S.2d 164 (1962).

16. State v. Winters, 16 Utah 2d 139, —, 396 P.2d 872, 875 (1964).

17. State v. Dodd, 28 Wis.2d 643, —, 137 N.W.2d 465, 469 (1965).

18. The California statute imposes sanctions on "every person who possesses any narcotic . . . ." CAL. HEALTH & SAFETY CODE § 11500 (West 1964). Thus its guidelines on quantity required for a conviction of possession are virtually identical to those of the Uniform Narcotic Drug Act. *See* note 1, *supra*.

19. People v. Leal, 64 Cal. 2d 504, —, 413 P.2d 665, 670, 50 Cal. Rptr. 777, 782 (1966).

20. *Id.*

21. Edelin v. United States, 227 A.2d 395, 399 (D.C. Ct. App. 1967).

22. Hinton v. United States, 424 F.2d 876, 882 (D.C. Cir. 1969).

23. *Id.*

viction for possession could be sustained "as long as the evidence was sufficient . . . to sustain the jury's verdict that . . . [the defendant possessed] cocaine in some amount." [24]

Three states were presented with this question in 1968. Illinois hedged somewhat by holding only that where the amount is not consumed during chemical analysis, a rebuttable presumption is raised that the amount "was sufficient for common use." [25] The court therefore only inferred that a conviction would not be affirmed if the amount were insufficient for common use. Missouri[26] and New Jersey[27] expressly held that any measurable quantity was sufficient to sustain a conviction.

In 1969, the Court of Appeals for the Ninth Circuit followed that of the Second: "The Federal law only requires that some measurable amount of narcotic drug be contained in the substance which is the subject of the Indictment." [28]

Three states besides Virginia considered this problem in 1970. Florida adopted the majority rule that "the quantity possessed is immaterial." [29] In Minnesota, a conviction involving an unuseable amount was overturned, but the reason was that possession itself was not established rather than any insufficiency in the quantity.[30] The Idaho court found it unnecessary to rule on the question since the evidence indicated possession of a large amount.[31]

By its holding in *Robbs*, the Virginia Supreme Court of Appeals has adopted the majority rule that the quantity of a narcotic is immaterial to a conviction for the offense of possession. The court reached its decision through interpretation of a statute which was no longer in force in Virginia. The language of the replacement legislation, however, does not indicate an intent which would produce a contrary result.[32] Thus, in this case of first impression, the court expressly rejected any

24. United States v. Wanton, 380 F.2d 792, 795 (2d Cir. 1967).

25. People v. Hartfield, 94 Ill. App.2d 421, —, 237 N. E. 2d 193, 198 (1968).

26. State v. Young, 427 S.W.2d 510 (Mo. 1968).

27. State v. Humphreys, 101 N.J. Super. 539, 245 A.2d 40 (1968). On appeal the rationale used by many courts in holding quantity immaterial was aptly summarized: "Line-drawing among varying quantities of marijuana is unrealistic, since the small quantity readily warrants the inference that the defendant possessed a larger usable amount, and it is the possession of the latter amount which is the ultimate triable issue in the case." State v. Humphreys, 54 N.J. 406, —, 255 A.2d 273, 276 (1969).

28. Jordan v. United States, 416 F.2d 338, 344 (9th Cir. 1969).

29. State v. Eckroth, 238 So. 2d 75, 77 (Fla. 1970).

30. State v. Resnick, —, Minn. —, 177 N.W.2d 418 (1970).

31. State v. Segovia, 93 Idaho 594, 468 P.2d 660 (1970).

32. *See* note 1, *supra*. *See also* REPORT OF THE PHARMACY AND DRUG LAWS STUDY COMMISSION, H. Doc. No. 27 (1970) (Va.).

requirement of a useable amount to sustain a conviction for illegal possession of a narcotic, and established that the quantity was sufficient if it were capable of chemical analysis and identification.

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Federal Procedure—STANDING TO SUE IN ENVIRONMENTAL PROTECTION SUITS. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

The Sierra Club[1] sought a declaratory judgment and injunctive relief from the proposed development of a resort area and the construction of a highway on federal lands under the administrative jurisdiction of the Departments of Agriculture and Interior.[2] The plaintiffs contended that in granting permits for the development the Secretaries exceeded their authority, and that the result would be "permanent destruction of natural values" and "irreparable harm to the public interest." The district court granted a preliminary injunction[3] and the defendants appealed. The Court of Appeals for the Ninth Circuit reversed, holding that the injunction was improperly granted.[4] Although determining that the defendants should prevail on the merits, the court disposed of the case on the theory that the plaintiffs lacked the necessary standing to sue.

"Simply stated but difficult to apply, standing has been called 'one of the most amorphous concepts in the entire domain of the public

1. The Sierra Club is a non-profit California corporation organized for the purpose of protecting the integrity of the environment and promoting conservation, and has a history of involvement in the preservation of scenic and recreational resources. Although the Club draws upon the entire country for its membership, the court found that there was no allegation in the complaint that local residents of the Mineral King Valley were members.

2. The Secretary of Agriculture, pursuant to acceptance of the lowest bid for the project, issued a permit for development to Walt Disney Industries. The proposed plan called for the construction of overnight accommodations, automobile parking facilities, a cog railway, ski trails and lifts, and sewage treatment plants. The State of California, with the permission of the Secretary of Interior, proposed to construct an access road and power transmission lines through the Sequoia National Park and Forest to facilitate the proposed resort.

3. Sierra Club v. Hickel, No. 51,464 (N.D. Cal., July 23, 1969). The court asserted jurisdiction and granted relief under the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. V, 1970), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The injunction was issued under the authority of 5 U.S.C. § 705 (Supp. V, 1970).

4. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* Sierra Club v. Morton, 91 S.Ct. 870 (1971), reprinted in 1 ENVIRONMENTAL REP. 1669 (1970).