

Paraphernalia: Smokin' Hot Legal Issue Again

At 11 AM, on March 6, three police officers from the Calgary Police Service entered the Bongs and Such store at 4829 Macleod Trail SW. in Calgary, Canada and presented a search warrant for all the glass, wood metal pipes, bongs and metal tubing on the store's shelves. Over the next 4-and-one-half hours they went through the inventory and bagged what one witness described as "almost everything in the store." At the same time, on the same day, other officers were serving similar warrants on three other stores in Calgary, two in the 100 block of 7th Avenue SW and another on the 100 block of 8th Avenue, SW. All told, according to a press release provided by the City of Calgary, the police seized "Approximately 3,000 marijuana and crack cocaine pipes and hundreds of other pieces of drug paraphernalia" from the four businesses. Additionally, at one of them police found eight pounds of marijuana, just over four ounces of hash and an 45 grams of cannabis oil.

Three of the raids were said to have been carried out in an orderly fashion, but one of the stores was reportedly "totally trashed," by police, witnesses told Cannabis Culture.

According to Calgary Police Service Drug Unit Staff Sergeant Monty Sparrow, "This was probably one of the few investigations targeting these types of businesses in recent memory." Calgary Sun crime reporter Sarah Kennedy said they were probably the first paraphernalia busts in Calgary in "at least ten years."

The official reason for the busts, said Sparrow, was because police had been given tips on the four stores that they were selling their products with the knowledge that they were "going to be used for illicit drug use". Sparrow noted that under Canada's Random Virtue law the police could not normally raid or confiscate the items from stores, even if they suspected the items could be considered paraphernalia. "The thing with the tips we got was that people told us that if you went into these stores and asked for a crack pipe they'd sell you one, which makes them illicit items intended for drug use."

Interestingly, Bongs and Such, which has been in business for several years, has no crack pipes for sale, and has been meticulously clean about the way it does business. Their pipes generally run in the \$35 range and their bongs mostly go for \$80-and-up. They also carry a full line of vaporizers, but do not carry crack pipes.

Several people in the industry in Calgary noted that they thought Bongs and Such was probably included in the raids because the owners of the two Bongs and Such locations (only one was raided) are outspoken political activists. They recently held an auction to raise funds for Marc Emery's extradition defense and have been bold enough to take out full page ads advertising their wares in the Calgary Sun.

After one ad was run in August, 2005, Bill Hillis, one of the owners of Bongs and Such was quoted on Global TV as responding "You bet," when asked if the store condoned pot smoking.

Because no charges had been filed as CC is going to press, none of the owners of Bongs and Such or the other stores involved were available for comment.

The Calgary Sun's Kennedy said she thinks that while activism might have played a part in Bongs and Such being targeted, she thought that the primary reason for the raids—as they're so rare—was that a local acting police inspector was aiming at becoming a permanent police inspector and that several other police in the district of Calgary where the busts occurred were going for promotion. "It's police promotion time," she said.

Though few stores are bothered by the police with regard to smoking accessories in Canada, the Canadian paraphernalia laws are actually quite draconian. According to the Drug Paraphernalia and Literature sections of the Canadian Criminal Code—a uniform code enforced across Canada, as opposed to the US model of a Federal Criminal Code being supplemented by individual State Criminal Codes—paraphernalia is defined as an "instrument for illicit drug use". The Code goes on to say that means "anything designed primarily or intended under the circumstances for consuming or to facilitate the consumption of an illicit drug." Penalties for being found guilty of breaking the paraphernalia law can reach a \$100,000 fine and six months in jail—or both—on a first offence, and a \$300,000 fine and a year in jail—or both—on subsequent offences.

According to Sparrow, such harsh penalties are not likely to be meted out. "The stores, if found guilty, will probably be fined and lose the items that were seized. On top of that their licenses will be in jeopardy. But that all depends on a conviction and as of now none of the stores owners or employees have even been charged yet."

The busts sent shock waves through the smoking accessory community throughout Canada temporarily, but when no further busts occurred, things quickly quieted down.

One smoking accessory shop owner in Calgary who asked that neither he nor his store be identified, noted that while he did not anticipate any further pipe seizures, the busts "are a good reminder for people to keep things on the up and up. There's not much enforcement for these things up here in Canada but you still have to remember to be clean and keep your employees sharp about what they can talk about. If someone comes in asking for something illegal, you just have to refuse to sell to them and then ask them to leave. Period."

Meanwhile, in the US…

While the bong busts in Calgary are a rarity in Canada, it's a different story in the US, where fanatical anti-drug crusaders frequently put the heat to local and state politicians over the issue. The last several months alone have seen a number developments in the anti-paraphernalia movement around the US.

In January of this year, Philadelphia, home of the Liberty Bell and the Philly Blunt, banned the blunt. Retail stores were ordered to remove all "blunts and other drug paraphernalia" from their stock. At the time the bill was passed, Jerry Rocks, a Philadelphia police detective was quoted in the local papers as saying, "It's not just a blunt bill; it's an anti-drug bill."

Utilizing the DEA's definition of paraphernalia, the law prohibited selling any items "where the seller knows, or under the circumstances reasonably should know" that they would be used to "convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation" of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act.

Cigar manufacturers immediately challenged the legality of the law and on March 7, before it had ever been enforced, it was overturned by Judge Gary S. Glazer, who ruled that the Philadelphia city ordinance was in conflict with Pennsylvania state law. In his ruling Judge Glazer noted, in part, that the ordinance subjected "legitimate businesses selling legal dual-use products to the arbitrary enforcement of the City of Philadelphia Department of Licenses and Inspections."

The Pennsylvania state law on paraphernalia requires that authorities prove the intent of the seller, buyer or user was to use the item illegally—which the local law would have circumvented. So unless and until Philadelphia challenges Glazer's ruling to a higher court—and there is no indication at present the city will do that—sheaves of sweet blunt tobacco are back on the shelves of stores throughout the City of Brotherly Love.

A lawmaker in Minnesota has also been trying to get bong and blunts banned recently. State Senator Amy Koch (R-Buffalo) has introduced a bill that would make it illegal to sell or possess, for any reason, anything generally categorized as drug paraphernalia. In particular, she is trying to outlaw any bong, dugout, glass pipe, one hitter or any other pipe traditionally used with marijuana—including pipes made of "ivory, onyx, glass, metal, stone or any other material", with the exception of hookahs. The bill would carry make all such sales or possession a misdemeanor, which carries a penalty of up to 90-days in jail and a \$1,000 fine.

Koch's bill, which was introduced last year and did not become law, is being reintroduced to "protect children," she says. Essentially, what the bill does is remove any "intent to use in an illegal manner" from the existing Minnesota paraphernalia law, which is patterned after the federal DEA paraphernalia law.

Koch was quoted in a recent Pioneer Press story as saying: "We recognize that you can smoke pot out of a pop can, an apple, a light bulb," Koch said. "We're going after the bong."

Robert Vaughn, perhaps the best known paraphernalia defense attorney in the US categorized the Koch bill this way: "Let me say that if history repeats itself this will be another Minnesota attempt to make paraphernalia illegal that dies in a committee somewhere. They've introduced bills like this up there for several years and nothing ever comes of them."

"Most of these anti-paraphernalia laws are variations of the DEA model that came out in 1979. That makes items used to facilitate drug use illegal, but the real question is the intent of the persons involved in the transaction." In other words, does the seller know the buyer is going to use the illegally?

Which, Vaughn notes, is difficult to prove and time consuming on the part of police—as in the months spent on the Calgary raids.

Vaughn, who has litigated paraphernalia cases since the early 1980s in 35 states, says that apart from Minnesota, and despite the recent reversal of the new paraphernalia law in Philadelphia, Kansas City, Missouri is also trying to tighten up its statutes. "That one has the National Association for the Advancement of Colored People, the NAACP supporting it, but I don't know why. I do know that two years ago the President of the local chapter of the NAACP in Tampa, Florida was trying to tighten up the paraphernalia laws there," and wound up in hot bongwater himself.

"He'd gone into a store that was selling these things and created a stir, enough of a stir to be thrown out, and then he broke a number of things and finally was charged with vandalism."

Michigan, home of liberal Ann Arbor, site of the annual Hash Bash, has actually gotten a new law put in place regarding paraphernalia that went into effect on March 20, 2007. The old law, part of the Michigan Health Code, exempted from the classification of paraphernalia all "equipment, a product, or material which may be used in the preparation or smoking of tobacco or smoking herbs other than a controlled substance." The new law simply removes that line from the old law, instantly making hundreds of items that were legal March 19 illegal today.

Greg Francisco, a former US Coast Guard officer in the Drug Interdiction section and now member of Law Enforcement Against Prohibition (LEAP) and a member of the board of Michigan NORMAL, wrote about the change in the law in his blog recently. "This law puts a new burden on struggling Michigan businesses, at a time when our state economy is foundering. And a burden upon the state budget as well.

It casts a shadow over legitimate, tax paying businesses that will now be forced to make a best guess and then hope for the best.

"It cuts off a source of sales tax revenue to the state.

"It will further tie up over stretched law enforcement personnel who will now be forced to add, Bong Patrol, to their duties. Clogged courts dockets will be further bogged down trying to rule on the legitimacy and context of various otherwise ordinary objects like cigars, corncobs and cigarette papers.

"What it won't do is stop anyone who wants to from smoking cannabis, hashish or crocodile dung. Apples, soda cans, tin foil, a straight pin, a car cigarette lighter. These common items are just a very short list of things that can be, and regularly are, used to consume cannabis. Can we expect a brownie mix law next?"

Michigan is unique among US states, however, in that law enforcement can't just come in and seize paraphernalia. A 48-hour notice must be given declaring that certain items are considered drug paraphernalia and will be seized—and, in all probability, a fine levied—if they are not removed within that time frame.

The Michigan law change stemmed from a paraphernalia case that occurred in 2003, when Presque Isle, Michigan prosecutor Richard Steiger served the 48-hour notice on a store called Concert Connection, owned by Wayne Gauthier. Gauthier, in turn, asked for a court ruling on the legality of the items Steiger called drug paraphernalia, noting that all of them could be used with tobacco. The court ruled in his favor, and when the state appealed to a higher court, that court too ruled in Gauthier's favor. But according to Francisco "The Court of Appeals then went on to issue an appeal of their own, to wit: that the State Legislature plug the loophole that allowed Gauthier to stay in business."

Despite the new law, says Vaughn, because of the 48-hour rule, Michigan continues to be relatively decent regarding paraphernalia. "My clients universally say 'Hell, why didn't they just tell me not to sell those things?' rather than having their stores ransacked without notice. So Michigan is unique that way. It gives you a chance to change what you're doing to comply with the law."

Whether the new law will hold up remains to be seen. Allen St. Pierre, Executive Director of NORML says "These bills are so broadly worded that it's difficult to interpret. I'm sure the constitutionality of the new Michigan law will be challenged by the first person with the financial means to do so."

One state paraphernalia law currently in the court system is New Hampshire's, a state St. Pierre describes as "schizophrenic" when it comes to paraphernalia. The case started in 2002, when local police raided an established store named Smoke Signals Pipe and Tobacco Shop, in Dover, NH.

"One day the store, which had been in business for years without any problem," says St. Pierre, "was suddenly busted for selling what they always sold. The police just began taking things, calling them paraphernalia."

According to Mark Sisti, the attorney defending Smoke Signals, "the police seized just about every pipe and piece of glassware they had. But the court returned hundreds of pieces of glassware it said were legal merchandise. So we photographed everything that was returned, making a record of what the court said was legal."

"But then three or four weeks later some police officer gets a search warrant and comes in and seized the same things that the court just gave back."

At the trial, Sisti said, the store owner was found not guilty of selling paraphernalia, and so Sisti moved for a return of the seized property. "And the judge, after a finding of not-guilty, says he wouldn't return the items because they were all drug paraphernalia."

Sisti appealed the ruling and it's now before the State Supreme Court. Arguments have already been heard and he's hoping a decision is made in the next several months. The Court could choose only to look at the narrow scope of the particulars in the Smoke Signal's case, but Sisti is hoping they take a look at the broader issue of the paraphernalia laws in the state as well. "I think the Supreme Court will have to go to the big issue on this one. This is an issue that will be returned to over and over again if they don't settle it now."

An interesting note on the case is that Smoke Signals is reported to have the finest selection of cigars in Dover, and is "regularly frequented by cigar smoking policemen," said Sisti. "I think the fact that the store is also selling what they consider to be paraphernalia is just driving them nuts."

The Hemp Candy Situation

Though not paraphernalia, also falling under the legal microscope is hemp candy. On Tuesday, March 20, the Georgia House of Representatives overwhelmingly passed a bill that bans the sale of cannabis-flavored hemp candy to minors. A similar bill making its way through the Georgia State Senate would ban the candies altogether and make the first offence a misdemeanor. The bill would make a second offence for "any person knowingly to sell, deliver, distribute, or display for sale...any marijuana or hemp flavored candy" a felony punishable by a mandatory minimum of a year in jail and a fine of at least \$1,000. Maximum penalty for a second offence would be 5-years in prison and a \$5,000 fine.

Though hemp candies have been made and occasionally marketed for nearly a century, what's causing the ruckus in Georgia are the lollipops and gummy candies manufactured by Chronic Candy of Riverside, CA. The company, started by Tony Van Pelt in January, 2000, decided to go edgy with its advertising, and calls its line of marijuana-flavored lollipops—made using legal hemp essential oils with no THC—names like The Chronic, The Buzz and White Widow. The company also produces a green gummy candy that goes by the names Sticky Icky Buds and the new Purple Kush Gummies.

The sponsor of the Georgia House bill, Representative Judy Manning, recently told the press that "This kind of product is being taken to concerts like the old ice cream pop—it's quite detrimental to our children."

And in announcing the state Senate version of the same bill, Senator Vincent Fort asked: "Should a 9-year-old be able to go into a store and get a bag of chips, a soda pop and some dope candy? That's ridiculous!"

Van Pelt and his associates insist the candy was never meant to be marketed to minors. J. Kron, who has been with the company since its inception, told Cannabis Culture that "We don't even allow minors into our store. We don't advertise this to kids. The only people doing that are the legislators who keep talking about it in the newspapers. I know I don't want to see a seven-year-old sucking on our lollipops. I don't even allow it for the minors in my own family. These are adult novelties."

Van Pelt himself—whose company also produces a clothing line, much of it made from hemp and organic cotton, as well as cosmetics and

accessories—calls the Georgia attempt at a statewide ban “Outrageous. And the thing of it is they’re not just banning candy, what they’re really doing is banning the name, which makes this a freedom of speech issue. Because there is nothing illegal about the products themselves.”

A look at the law being considered indicates he’s right. Portions of the Senate Agriculture and Consumer Affairs Committee’s amended version of Fort’s Senate Bill 511 notes that “Federal, state and local governments spend millions of dollars annually on programs educating people about the hazards of drugs and the marketing of marijuana or hemp flavored candy could have an adverse impact upon these programs. The sale of marijuana flavored candy….is a marketing ploy that perpetuates an unhealthy culture and should not be permitted in the State of Georgia…. Marijuana or hemp flavored candy falling into the hands of unsuspecting persons may serve as a gateway to future use of marijuana and other drugs.”

If passed, the ban on all sales of such candies would be the first statewide ban on them in the US. Both Chicago, IL and Suffolk County, NY have banned them locally, and several states have limited their sale to adults only.

Among the few Georgia legislators who don’t back the ban is Representative Mark Hatfield, who thinks the legislature is overstepping its bounds in trying to legislate taste. “How will a court determine whether or not the taste of something will fit within the parameters of the bill?” he recently asked.

There is no word yet on any legal action being taken against the new energy drink Cocaine, which promises a rush with “no crash”. The Red Bull knockoff is being sold in eight US states, including New York, California and Texas.

Keith Stroup, the founder of NORML, has seen paraphernalia laws and laws outlawing hemp products since NORML’s inception. “I think these laws have always been an ignorant approach to policy making. If legislators want to outlaw marijuana I understand it—I don’t like it but I understand it—that’s one thing. But to outlaw pipes that might be used with marijuana, or candy that has a marijuana name, well, that seems wrongheaded to me. But there is no anti drug proposal that is so outrageous and idiotic that it won’t have a majority of elected officials voting for it. I assume those officials go home at night and feel warm and fuzzy and thinking they’ve made America and Americans safe from drugs. But in reality all they’ve done is make criminals out of people who are otherwise law abiding citizens. It’s like making hammers illegal because someone once used one to hit someone on the head. It’s intellectually offensive. It indicates they’re more interested in making headlines and getting reelected than they are in making smart policy.” SIDEBAR:

For a state-by-state review of marijuana and paraphernalia laws, see the NORML website page at http://norml.org/index.cfm?Group_ID=4516

Click on individual states for their laws. States with no paraphernalia law will utilize the federal DEA paraphernalia laws as guidelines.

About the Author

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