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1980 Florida Legislature- Drug Paraphernalia Banned: Florida Statutes 893.145-893.147

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Abstract

With the adoption of Florida Statutes §§893.145, 893.146, and 893.147, the Florida Legislature has escalated the battle to prohibit the possession, manufacture, sale and advertisement of drug paraphernalia.

KEYWORDS: Legislature, Paraphernalia, Florida

1980 Florida Legislature — Drug Paraphernalia Banned: Florida Statutes 893.145-893.147.

With the adoption of Florida Statutes §§893.145, 893.146, and 893.147,¹ the Florida Legislature has escalated the battle to prohibit

1. FLA. STAT. §§ 893.145-47 (Supp. 1980):

893.145 Drug paraphernalia defined. The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterances, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use,

the possession, manufacture, sale and advertisement of drug parapher-

or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

- (a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.
- (b) Water pipes.
- (c) Carburetion tubes and devices.
- (d) Smoking and carburetion masks.
- (e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.
- (f) Miniature cocaine spoons, and cocaine vials.
- (g) Chamber pipes.
- (h) Carburetor pipes.
- (i) Electric pipes.
- (j) Air-driven pipes.
- (k) Chillums.
- (l) Bongs.
- (m) Ice pipes or chillers.

893.146 Determination of paraphernalia. In determining whether an object is drug paraphernalia, a court or other authority or jury shall consider, in addition to all other logically relevant factors, the following:

- (1) Statements by an owner or by anyone in control of the object concerning its use.
- (2) The proximity of the object, in time and space, to a direct violation of this act.
- (3) The proximity of the object to controlled substances.
- (4) The existence of any residue of controlled substances on the object.
- (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
- (6) Instructions, oral or written, provided with the object concerning its use.
- (7) Descriptive materials accompanying the object which explain or depict its use.
- (8) Any advertising concerning its use.
- (9) The manner in which the object is displayed for sale.
- (10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor

nal. Taken with some modifications from the Model Drug Paraphernalia Act (MDPA),² the new statutes are the latest in Florida's attempts to stem the tide of increasing drug abuse.

Not a unidimensional conflict, Florida's struggle reflects our society's drug dilemma. A nationwide study of high school seniors during 1975-79 showed an appreciable rise in illicit drug use, particularly marijuana and cocaine. Trends in use at lower grade levels showed mari-

or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

893.147 Possession, manufacture, delivery, or advertisement of drug paraphernalia;

(1) Possession of drug paraphernalia. It is unlawful for any person to possess drug paraphernalia. Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Manufacture or delivery of drug paraphernalia. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, 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 this act. Any person who violates this section is guilty of a felony of the third degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

(3) Delivery of drug paraphernalia to a minor. Any person 18 years of age or over who violates subsection (2) by delivering drug paraphernalia to a person under 18 years of age is guilty of a felony of the second degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

(4) Advertisement of drug paraphernalia. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

2. DRUG ENFORCEMENT AGENCY, DEP'T OF JUSTICE, MODEL DRUG PARAPHERNALIA ACT (1979) [hereinafter cited as MDPA].

juana use rising steadily at all grades down through the eighth grade.³ Florida's own intense problem is demonstrated by U.S. Customs statistics showing that almost 44% of the cocaine seized nationwide in 1978-79 was in the Miami district.⁴

Supporting drug paraphernalia laws are parents groups, the Drug Enforcement Administration of the U.S. Department of Justice, state and local law enforcement agencies, the White House,⁵ and various state and local bodies, including the Florida Legislature. From their perspective, the legal sale of drug paraphernalia encourages drug abuse, particularly among children and teens, through easy availability of drug accessories. Peter Bensinger, administrator of the Drug Enforcement Administration, presented their arguments in his statement before the House Select Committee on Narcotic Abuse and Control, "the paraphernalia industry, by its very existence . . . is condoning — even advocating — the use of illegal controlled substances."⁶ He further characterized the paraphernalia industry as a "multi-million dollar big business that facilitates and glamorizes drug use"⁷ while preying on the drug fantasies of youth. It is a natural step from this point of view to an attack on the "head shops"⁸ that distribute drug accessories. Parents' groups participate by lobbying for state and local laws, pressuring merchants, and waging fierce public relations campaigns.⁹ Even McDonald's joined the fight by changing the design of its coffee stirrers when drug users were discovered using them to inhale cocaine and PCP, an animal tranquilizer¹⁰ commonly known as angel dust. The

3. L. JOHNSON, J. BACHMAN, & P. O'MALLEY, 1979 HIGHLIGHTS: DRUGS AND THE NATION'S HIGH SCHOOL STUDENTS, FIVE YEAR NATIONAL TRENDS (DHEW Pub. No. (ADM) 80-930 1979).

4. NAT'L INSTITUTE ON DRUG ABUSE, *Drug Abuse Indicator Trends*, 1 PROCEEDINGS 115 (1979).

5. Myers, *DEA Legal Counsel Official Explains Paraphernalia Issue*, 10 NARCOTICS CONTROL DIG. 6 (1980).

6. *Hearings of the House Select Committee on Narcotics Abuse and Control*, 96th Cong., 1st Sess. (1979) (statement of Peter Bensinger).

7. *Id.* at 1.

8. See *High Ol' Times, Inc. v. Busbee*, 449 F. Supp. 364, 366 n.2 (1978) for a definition.

9. Satchell, *Head Shops: Gateway to the Drug Scene*, Fort Lauderdale News/Sun Sentinel, June 15, 1980, (Parade Magazine), at 5, col. 4.

10. N.Y. Times, Dec. 8, 1979, §1, at 8, col. 6.

fight continues in Florida with the advent of sections 893.145-893.147.

Aligned against these groups are head shop owners, the paraphernalia industry, and libertarians. In their view, anti-paraphernalia laws penalize legitimate businesses and deprive adults of their free speech¹¹ and property rights through their vagueness, overbreadth and propensity to selective enforcement. They allege further that anti-paraphernalia laws are absurd and impractical, akin to "banning swizzle sticks to prevent alcoholism."¹² In addition, they point to the disparity between the trend toward decriminalizing marijuana while imposing criminal sanctions on possession of paraphernalia.¹³

Historical Background

Although expanding drug use and the mushroom-like growth of the accessories industry have sparked renewed interest in anti-paraphernalia laws, this conflict is not a new one. Nor is it Florida's first experience with drug paraphernalia laws. In 1969, Florida enacted its first statute prohibiting both possession and sale of drug paraphernalia. However, only a few possession cases¹⁴ and no sale cases arose under that statute. The sale prohibition was consequently repealed when Florida adopted the Uniform Controlled Substances Act in 1973.¹⁵

Florida's 1969 provision was similar to general "implements of crime"¹⁶ laws, with the added element of intent that the "device, con-

11. Antanoff, *Those Mothers Are Trampling Adult Rights*, 59 HIGH TIMES 8 (1980). The Florida Bar was also opposed to Senate Bill 291 on the latter two grounds, Fla. Bar News, May 15, 1980, at 10, col. 3.

12. Antanoff, *supra* note 11, at 8.

13. *Id.*

14. Kirtley v. State, 245 So. 2d 282 (Fla. 3d Dist. Ct. App. 1971); Goble v. State, 324 So. 2d 97 (Fla. 4th Dist. Ct. App. 1975); Turner v. State, 329 So. 2d 360 (Fla. 1st Dist. Ct. App. 1976); Davis v. State, 371 So. 2d 721 (Fla. 1st Dist. Ct. App. 1979); Dacus v. State, 307 So. 2d 505 (Fla. 2d Dist. Ct. App. 1975); Merit v. State, 342 So. 2d 993 (Fla. 4th Dist. Ct. App. 1977); Falin v. State, 367 So. 2d 675 (Fla. 3d Dist. Ct. App. 1979); D.M.M. v. State, 275 So. 2d 308 (Fla. 2d Dist. Ct. App. 1973).

15. Florida adopted the major provision of the U.S.C.A. with numerous variations, omissions and additions in The Florida Comprehensive Drug Abuse Prevention and Control Act. 9 Uniform Laws Annotated 190 (1979).

16. Christianson, *Heroin Paraphernalia: Breakdown of a Fix*, 10 CRIM. L. BULL. 493 (1974).

trivance, instrument, or paraphernalia be used for unlawfully¹⁷ administering any controlled substance. Today the Drug Enforcement Administration uses the implements of crime analogy to support the MDPA, comparing it to other federal paraphernalia laws.¹⁸ However, it was that same analogy which weakened some prior implement of crime statutes. In *Rosenberg v. United States*,¹⁹ the District of Columbia Court of Appeals held that lactose, dextrose, quinine, and gelatin capsules were not “instruments,” “tools,” or “implements” within the meaning of a statute making it illegal to possess the implements of a crime.²⁰ In 1973, the same court reversed the appellant’s conviction in *Williams v. United States*.²¹ The Court found that the possession of a small, wooden pipe without further evidence as to its shape and size, and absent evidence as to nature and significance of marijuana residue, did not have the “sinister” implication of possession of the implements and tools of a crime.²² Mere possession of the pipe was not sufficient to support a conviction of possessing the implements of a crime, e.g., narcotics paraphernalia.

The general “implements of crime” statutes have another flaw in their application to non-traditional drug paraphernalia. That flaw is the inability of statutes initially drawn up for heroin control²³ to extend to other items such as the rolling papers used with marijuana, the pipes used with hashish, and the mirrors and razor blades used with cocaine. The items used to administer these controlled substances are far removed from the more blatant paraphernalia of heroin use, and are not commonly thought of as narcotics paraphernalia. This common experience provided the underlying reasoning in *Cole v. State of Oklahoma*²⁴

17. FLA. STAT. § 893.13(3)(a)(4) (1969).

18. Myers, *supra* note 5, at 6. Myers cites examples in which the DEA compares drug paraphernalia laws to federal firearms statutes (26 U.S.C. § 5845), moonshine paraphernalia laws (26 U.S.C. § 5686), wagering paraphernalia laws (18 U.S.C. §§ 1952, 1953), counterfeiting paraphernalia statutes (18 U.S.C. § 492), wiretapping and eavesdropping paraphernalia statutes (18 U.S.C. § 2512), and illicit tobacco paraphernalia statutes (26 U.S.C. § 5763).

19. 297 A.2d 763 (D.C. 1972).

20. *Id.* at 766.

21. 304 A.2d 287 (D.C. 1973).

22. *Id.* at 289.

23. Christianson, *supra* note 16, at 508-10.

24. 511 P.2d 593 (Okla. Crim. App. 1973).

where that state's drug paraphernalia statute was found invalid. The court noted that a person of ordinary intelligence could not determine what was or was not legal to possess.²⁵

Although Florida attempted to cure the flaw of a general implements of crime statute by adding the element of criminal intent, the provision was unsatisfactory from a prosecutorial point of view. Depending on the charges, possession of narcotics paraphernalia could either be a felony of the third degree or a misdemeanor of the first degree.²⁶ Failure to charge a felony in informations and confusion by trial courts in classifying offenses caused sentences to be reduced.²⁷

The standard of actual knowledge²⁸ found necessary by the courts was also difficult to prove. Evidence of possession was legally insufficient unless it could be shown by direct evidence that the defendant had actual knowledge of the presence of drug paraphernalia, or unless there was sufficient circumstantial evidence from which a jury could lawfully infer such knowledge.²⁹

Possession of narcotics paraphernalia was frequently tacked onto charges of possession of a controlled substance³⁰ in an effort to obtain convictions by broadening the charges. In light of these circumstances, it is likely that Florida prosecutors would have joined with the *Rosenberg*³¹ trial judge's appeal for a "comprehensive and up-to-date narcotics paraphernalia statute."³² The inadequacy of implements of crime statutes in dealing with non-traditional narcotics paraphernalia meant the struggle was not over.

Analysis of Florida's New Drug Paraphernalia Statute

The Drug Enforcement Administration presented the MDPA to states and local communities as the next strategy in the fight against drug abuse.³³ In adopting a modified version of the act, Florida endeav-

25. *Id.* at 595.

26. 371 So. 2d 721.

27. *Id.*; 329 So. 2d 360; 342 So. 2d 993.

28. 275 So. 2d 308; 245 So. 2d 282; 324 So. 2d 97.

29. 324 So. 2d at 98.

30. 245 So. 2d 282; 307 So. 2d 505; 324 So. 2d 993; 324 So. 2d 97.

31. 297 A.2d 763.

32. *Id.* at 766.

33. MDPA, *supra* note 2, at Prefatory Note.

ors to go far beyond the short statutory paragraph³⁴ which formerly dealt with drug paraphernalia. The new statute includes a definition of drug paraphernalia and gives common examples, provides a procedure for determining whether the object is drug paraphernalia, and prohibits possession, manufacture, delivery, and advertisement of drug paraphernalia.³⁵ It also amends two current sections of Florida Statutes to provide for the forfeiture of drug paraphernalia and to delete provisions relating to drug paraphernalia respectively.³⁶ Penalties,³⁷ a severance clause,³⁸ and an effective date³⁹ complete the law. Florida's new statute differs, however, from the original language of the MDPA,⁴⁰ particularly, in one critical area.⁴¹ The section prohibiting possession of drug paraphernalia does not include the intent element embodied in the original language "to use, or to possess with intent to use . . . in violation of this act."⁴²

At this point, two crucial inquiries must be presented for consideration. First, can the new statute survive challenges that it violates constitutional guarantees of due process and equal protection? Second, will the new statute be an effective tool in controlling drug abuse?

In response to these questions, MDPA proponents contend that it contains all the elements necessary to succeed where other statutes and ordinances have failed.⁴³ In support of this, they refer to *Record Revolution, No. 6, Inc. v. City of Parma*⁴⁴ and *World Imports, Inc. v. Woodbridge Township*,⁴⁵ where MDPA-based ordinances nearly identi-

34. FLA. STAT. § 893.13(3)(a)(4) (1969).

35. FLA. STAT. § 893.145-47 (Supp. 1980).

36. FLA. STAT. §§ 893.12(2), 13(3)(a) (1969).

37. FLA. STAT. § 893.13(3)(a) (Supp. 1980).

38. FLA. STAT. § 893.13(6) (Supp. 1980).

39. FLA. STAT. § 893.13(7) (Supp. 1980) (effective date October 1, 1980).

40. MDPA, *supra* note 2.

41. *Florida Businessmen for Free Enterprise v. Florida*, No. TA 80-0954, slip op. at 6 (N.D. Fla. Sept. 30, 1980).

42. *Cf.* text of FLA. STAT. § 893.146(11) (Supp. 1980) cited in note 1 *supra* (deletion of the intent requirement).

43. *See* MDPA, Prefatory Note and comments at 6; Florida Prosecutor, Aug. 1980, at 1.

44. No. C-80-38 (N.D. Ohio Apr. 14, 1980), currently on appeal to the Sixth Circuit Court of Appeals.

45. No. 80-1414 (D.N.J. June 8, 1980).

cal to Florida's new statute were held constitutional.

While there has been a rash of current cases⁴⁶ challenging drug paraphernalia statutes and ordinances, most of these statutes have not been MDPA-based. Again, however, the lack of intent in the possession section of the Florida statute distinguishes it from the statutes dealt with in those cases.⁴⁷ The arguments presented in these cases, however, have relevance in challenges to MDPA-based laws, such as Florida's. The success of the new law can be predicted to some extent from the experience of other jurisdictions, and from the experience of some Florida cities and counties⁴⁸ which enacted drug paraphernalia laws prior to and contemporaneous with state adoption of the MDPA.⁴⁹

The primary grounds for the challenge of most drug paraphernalia laws have been similar, i.e. (1) violation of the due process clause of the fourteenth amendment by being both vague and overbroad, (2) denial of the equal protection clause of the fourteenth amendment, and (3) impermissible burden on interstate commerce.⁵⁰ It was on the first basis that Indiana's statute⁵¹ was found invalid.⁵² Not only did it un-

46. *Geiger v. City of Eagan*, 618 F.2d 26, 28 n.5 (8th Cir. 1980) gives a list of such cases:

Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, No. 78-C-2114 (N.D. Ill. Feb. 11, 1980); *Indiana Chapter NORML v. Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (en banc); *Mid-Atlantic Accessories Trade Ass'n v. Prince George's County*, No. B-79-2385 (D. Md. Dec. 21, 1979); *Record Museum v. Lawrence Township*, 481 F. Supp. 768 (D.N.J. 1979); *Tobacco Road, Inc. v. City of Norre*, No. 70-71000 (E.D. Mich. June 20, 1979); *Cardarella v. City of Overland Park*, No. 86246 (Kan. Dist. Ct. Feb. 8, 1980); *Weingart v. Town of Oyster Bay*, No. 79-C-2932 (E.D.N.Y. Dec. 17, 1979).

47. No. TA 80-0954, slip op. at 6-7 (N.D. Fla. Sept. 30, 1980).

48. See *Florida Businessmen for Free Enterprise v. City of Hollywood*, No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980); *Florida Businessmen for Free Enterprise v. Pinellas County*, No. 80-482 Civ-T-H (M.D. Fla. May 18, 1980). See also *FBFFE, Florida Newsletter*, Apr. 15, 1980, at 1.

49. *Id.*

50. No. C-80-38, slip op. at 5 (N.D. Ohio Apr. 14, 1980).

51. IND. CODE §§ 35-24.1-4-8 (1971) (repealed 1975); 35-48-4-8 (1971) (amended 1977). For an article discussing Indiana's experience prior to 1976, as well as a discussion of Florida's statute, see Note, *Paraphernalia for Marijuana and Hashish Use; Possession Statutes and Indiana's Pipe Dream*, 10 VAL. U.L. REV. 353 (1975-76).

52. No. TH-75-142-C (S.D. Ind. Feb. 4, 1980) (en banc).

constitutionally fail to meet due process requirements of definiteness and notice to those subject to the sanction, it also provided insufficient guidelines to those charged with enforcing the law.⁵³

Vagueness and overbreadth existed because many objects arguably within the scope of the statute included instruments which could be used for legitimate purposes as well as for the administration of drugs.⁵⁴ This reasoning also played a role in *Bambu Sales, Inc. v. Gibson*,⁵⁵ where a major distributor of cigarette papers obtained a declaratory judgment. While the ordinance challenged in *Bambu* was specific rather than vague, it was overbroad since it included articles with "overwhelmingly lawful uses."⁵⁶ Alternatively, in the challenge to Florida's new statute, vagueness was found to be the only meritorious argument.⁵⁷

These same contentions can arguably be applied to section 893.145 of Florida's new statute.⁵⁸ However,⁵⁹ in *Record Revolution, No. 6* and *World Imports*,⁶⁰ the specific definition of drug paraphernalia accompanied by the pivotal *mens rea* requirement save the law from vagueness and overbreadth.

Defendants argued in *Florida Businessmen for Free Enterprise v. State*⁶¹ that the three tests of intent in the definition of drug paraphernalia, "used, intended for use, or designed for use,"⁶² established the intent requirement for the entire statute.⁶³ Both sides of the controversy agreed that a statute requiring proof of use, intent to use, or knowledge that an item would be illegally used would meet the standard necessary to uphold the law as constitutional.⁶⁴ The court there did not find the definition of drug paraphernalia as dispositive in establishing the intent

53. *Id.*, slip op. at 12-14.

54. *Id.*

55. 474 F. Supp. 1297 (D.N.J. 1979).

56. *Id.* at 1305.

57. No. TA 80-0954, slip op. at 5 (N.D. Fla. Sept. 30, 1980).

58. FLA. STAT. § 893.145 (Supp. 1980).

59. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

60. No. 80-1414 (D.N.J. June 8, 1980).

61. No. TA 80-0954 (N.D. Fla. Sept. 30, 1980).

62. FLA. STAT. § 893.145 (Supp. 1980).

63. No. TA 80-0954, slip op. at 6 (N.D. Fla. Sept. 30, 1980).

64. *Id.*, slip op. at 6.

requirement for the possession offense.⁶⁵ “Nothing in the definition can be fairly said to link the use, intent, or design to the person charged with a paraphernalia crime.”⁶⁶ Consequently, the possession offense was found to be an unconstitutionally defined crime and was struck down.⁶⁷

An examination of the definition itself may show some weakness in its language. The “used” test is clear, e.g. if an individual actually uses an item with a controlled substance, then that item is drug paraphernalia.⁶⁸ However, even here intent cannot be bootstrapped from mere possession. There must be sufficient circumstantial evidence to support this presumption,⁶⁹ such as statements and attendant circumstances. Failure to include the intent element in the possession offense renders moot this “used” test in Florida’s new statute.

The other two intent tests do not share the clarity of the “used” test. “Intended for use”⁷⁰ is susceptible of several interpretations. Is this the intent of the purchaser, retailer, or manufacturer? If it is the former, then there is undue burden on both the retailer and the manufacturer to determine the subjective intent of the purchaser.⁷¹ In addition, they face prosecution for the use of an item far beyond their control.

Problems of transferred intent may also arise if the “intended for use”⁷² element is considered that of the seller. Either purchaser or manufacturer could be prosecuted on the basis of the seller’s intent. Finally, if the intent is considered to be that of the manufacturer, both purchasers and retailers may be subject to prosecution even though they may lack any criminal intent. These problems were recognized in a recent challenge to an MDPA-based city ordinance, *Florida Businessmen for Free Enterprise v. City of Hollywood*,⁷³ where the court

65. *Id.*

66. *Id.*, slip op. at 8.

67. *Id.*, slip op. at 9, 12.

68. FLA. STAT. § 893.145 (Supp. 1980).

69. *Screws v. United States*, 325 U.S. 91, 107 (1945).

70. FLA. STAT. § 893.145 (Supp. 1980).

71. *Knoedler v. Roxbury Township*, 485 F. Supp. 990, 993 (D.N.J. 1980).

72. FLA. STAT. § 893.145 (Supp. 1980).

73. No. 80-6157 Civ-NCR (S.D. Fla. Aug. 29, 1980).

found that these interpretations would not survive judicial scrutiny.⁷⁴ Rather, the court supported the DEA'S view of intent that each defendant "must have general criminal intent with respect to the offenses alleged."⁷⁵

The court in *Indiana Chapter of NORML, Inc. v. Sendak*⁷⁶ also found the last intent test, "designed for use,"⁷⁷ insufficiently clear. In contrast, the *Record Revolution*⁷⁸ court dismissed concerns over the latter two tests of intent by construing the definition of drug paraphernalia in terms of the intent of the individual or entity charged with violation of the law.⁷⁹ The court noted that a blanket prohibition of every item used with drugs would be imprecise and lead to selective enforcement.⁸⁰ By defining drug paraphernalia in terms of the intent of the individual or entity in control, MDPA-based laws have purportedly avoided this problem. The law supposedly would not affect first amendment rights or innocently held property of individuals who lack guilty intent.⁸¹

For an item to be classified as drug paraphernalia, one of the three types of intent must be present.⁸² Without proof of the requisite intent, there can be no conviction for the sale or manufacture of drug paraphernalia because the item in question would not be drug paraphernalia.

The Drug Enforcement Administration contends that a statute which "embodies a specific intent to violate the law"⁸³ is not unconstitutionally vague. Alternatively, it can be argued that this statute is not vague only to those who do intend to violate the law. Other innocent individuals without guilty intent are left with only their own subjective understanding of what the law requires. Further, the intent standard

74. *Id.*, slip op. at 7.

75. *Id.*

76. No. TH 75-142-C (S.D. Ind. Feb. 4, 1980).

77. FLA. STAT. § 893.145 (Supp. 1980).

78. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

79. *Id.* at 9.

80. *Id.* at 8, citing *United States v. Brunnet*, 53 F.2d 219 (W.D. Mo. 1931).

81. MDPA, *supra* note 2, at 9, 12.

82. *Id.* at 6.

83. *Id.* at 7, citing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); 325 U.S. 91, 101.

seems to be contradicted by the latter portion of section 893.146(5),⁸⁴ which gives one of the factors to be used in determination of drug paraphernalia: "The innocence of an owner, or of anyone in control of the object, as to a direct violation of the act shall not prevent a finding that the object is intended for use, or designed to use, as drug paraphernalia."⁸⁵ If the owner or one in control of an object is innocent, e.g., does not have the guilty intent or knowledge, then the item is not drug paraphernalia under a "used for, intended for use, or designed for use"⁸⁶ standard.

An additional problem exists with the necessary element of intent. It can only be proven at the trial level. Prior to that, law enforcement is free to selectively enforce the law, possibly rendering Florida's statute violative of the equal protection clause of the fourteenth amendment. In fact, the new statute may have been designed for this purpose. A Florida Senate Staff analysis and economic impact statement indicates that the intent of the legislature was to affect the retail sales of "head shops."⁸⁷ As in *Record Museum v. Lawrence Township*,⁸⁸ the law cannot be lawfully applied only to head shops. Advocates of Florida's new law argue that it does apply to all individuals, as did the court in *Record Revolution*.⁸⁹ Nonetheless, factors to be used in the determination of what is drug paraphernalia suggest otherwise. Specifically, section 893.146(10) states: "Whether the owner, or anyone in control of the object is a *legitimate* [emphasis added] supplier of like or related items to the community, such as a licensed distributor or dealer or tobacco products."⁹⁰ This section seems to indicate that a licensed distributor or dealer of tobacco products can sell items that might otherwise be deemed drug paraphernalia while a retailer not in this category may not. The court in *Record Revolution* found the undefined term "legitimate" to also fail the test of vagueness by creating a danger of arbi-

84. FLA. STAT. § 893.146(5).

85. FLA. STAT. § 893.146(5) (Supp. 1980).

86. FLA. STAT. § 893.145 (Supp. 1980).

87. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, Apr. 17, 1980 (Bill No. and Sponsor: S.B. 291, Senator Poole).

88. 481 F. Supp. 768 (D.N.J. 1979).

89. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

90. FLA. STAT. § 893.146(10) (Supp. 1980).

trary and discriminatory enforcement.⁹¹ On the other hand, the court in *Florida Businessmen for Free Enterprise v. City of Hollywood*⁹² found no vagueness either in the indicia of what may be considered drug paraphernalia, or on the issue of legitimacy.⁹³

The "reasonably should have known" phraseology⁹⁴ in Florida's new statute at section 893.147(2)⁹⁵ and section 903.147(4)⁹⁶ has also been an issue in other cases challenging MDPA-based laws. The court in *Record Revolution*⁹⁷ found that the element of actual knowledge would protect the due process rights of criminal defendants, while the constructive knowledge standard would not.⁹⁸ The *Record Revolution* court cited *Knoedler v. Roxbury's*⁹⁹ discussion of the problems:

[T]he seller faced with the Roxbury Ordinance has to . . . determine what the customer intends to do with the items of purchase. Certainly in a case where the purchaser announces his or her intention to utilize the paraphernalia purchased for an illegal purpose, the seller would be placed in no dilemma; however, the question arises as to what would create a reasonable belief in the mind of the seller in the absence of such an unlikely announcement by the purchaser. Does the purchaser's age, sex, mannerism or dress afford to a seller reason to believe that the paraphernalia will be used for an illegal purpose. Or should the nature of the purchaser's companions or the items he or she carries be determinative? These questions indicate the difficulty that a merchant, as well as a law enforcement officer, would have, in the absence of an admission by the purchaser, in determining what gives rise to a reasonable belief that a purchaser intends to utilize the paraphernalia for an illegal purpose. An additional concern is whether it is proper to charge an owner of a department store, or any other store, with responsibility for a sales clerk's determination as to whether the person purchasing an item, especially an innocuous one such as a weight scale or a spoon, in-

91. No. C-80-38, slip op. at 12 (N.D. Ohio April 14, 1980).

92. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

93. *Id.* at 6.

94. FLA. STAT. §§ 893.147(2), 893.147(4) (Supp. 1980).

95. FLA. STAT. § 893.147(2) (Supp. 1980).

96. FLA. STAT. § 893.147(4) (Supp. 1980).

97. No. C-80-38 (N.D. Ohio April 14, 1980).

98. *Id.*, slip op. at 15.

99. 485 F. Supp. 990.

tends to utilize it for some improper and illegal purpose.¹⁰⁰

In light of this discussion, the court in *Record Revolution* noted that “defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual’s ability to perceive”¹⁰¹ provided insufficient guidelines to both sellers and law enforcement officials. *World Imports Inc. v. Woodbridge Township*,¹⁰² and *Florida Businessmen For Free Enterprise v. City of Hollywood*¹⁰³ stand in opposition to this reasoning,¹⁰⁴ holding that the “reasonably should have known”¹⁰⁵ standard does not significantly differ from the actual knowledge standard.¹⁰⁶ In their view, there would be no difference between the two standards in practical application.¹⁰⁷

In addition to the possibility of selective enforcement against retailers, there is an issue which current cases have not discussed, e.g., the strong probability of selective enforcement against individuals. Current jewelry fashions include small spoon or razor blade necklaces which law enforcement may consider drug paraphernalia, and for which an individual could be arrested regardless of his or her intent. The same is true of possession of ornamental water pipes, bowls, sifters, alligator clips, scales, mirrors with “cocaine” imprinted on them, and a myriad of other objects. Display of these items may be considered symbolic speech since that action may be a non-verbal expression of support for reform of drug laws or as a protest to current drug laws. “Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”¹⁰⁸ With the threat of arrest, individuals may avoid conduct which is privileged under the first amendment.

100. No. C-80-38, slip op. at 15 (N.D. Ohio Apr. 14, 1980).

101. *Id.*, slip op. at 15.

102. No. 80-1414 (D.N.J. June 8, 1980).

103. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

104. No. TA80-0954 (N.D. Fla. Sept. 30, 1980).

105. FLA. STAT. § 893.14 (Supp. 1980).

106. No. 80-1414, slip op. at 6; No. 80-6157-Civ-NCR, slip op. at 6.

107. No. 80-6157-Civ-NCR, slip op. at 6.

108. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1971) (footnotes omitted).

Prohibitions on advertisement of drug paraphernalia, such as section 893.147(4),¹⁰⁹ have also been challenged on grounds of vagueness, overbreadth and undue interference with first amendment protected commercial speech. In *Record Museum v. Lawrence Township*,¹¹⁰ declaratory and injunctive relief was granted on these grounds. The court noted that even speech which has only a commercial purpose warrants first amendment protection.¹¹¹ Further, seeking out speech of particular content and preventing its dissemination completely, exceeds legitimate restrictions on commercial speech.¹¹² These arguments were dismissed in *Record Revolution*¹¹³ and in *Florida Businessmen for Free Enterprise v. State*¹¹⁴ when the court held that if the speech solicited illegal activity it was not protected.¹¹⁵ However, some courts set standards for a first amendment exception higher than these courts. For an exception to apply, the speech must be directed to "inciting or producing imminent lawless action and likely to incite or produce such action."¹¹⁶ Arguably, the purpose of advertisements for items that may be used as drug paraphernalia is not to advocate illegal acts, but rather to present availability of goods for sale. Alternatively, if instructions or statements are included as to the use of controlled substances or encouraging their use, this would fall under the exception to protected speech. Advertisements of availability of goods do not, unless it can be shown that the advertiser actually possessed the guilty knowledge or intent required. Nor could advertisements from other states be prohibited. Interstate dissemination of information by the citizen of a state in which an activity is legal may not be barred under the guise of state police power.¹¹⁷ Contrary to these arguments, the court in *Florida Businessmen for*

109. FLA. STAT. § 893.147(4) (Supp. 1980).

110. 481 F. Supp. 768.

111. *Id.* at 774.

112. *Virginia Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976).

113. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

114. No. TA 80-0954 (N.D. Fla. Sept. 30, 1980).

115. *Id.*, slip op. at 11; No. C-80-38, slip op. at 21 (N.D. Ohio April 14, 1980).

116. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1040 (1978), citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

117. 456 F. Supp. at 1041 (1978), citing *Bigelow v. Virginia*, 421 U.S. 809 (1975).

*Free Enterprise v. City of Hollywood*¹¹⁸ reasoned that the “free flow of information concerning drug paraphernalia has a potentially deleterious effect upon the community.”¹¹⁹ The court concluded that the challenged ordinance was valid and that possession, manufacture, and delivery of drug paraphernalia could be proscribed. It then reasoned that “advertising intended to ‘promote the sale of objects designed or intended for use as drug paraphernalia’ [could also] be prohibited.”¹²⁰

The advertising restriction in *High Ol’ Times, Inc. v. Busbee*¹²¹ also failed for lack of either a compelling state interest or a significant state policy to be effected.¹²² Commercial speech cannot be banned on the basis of an unsubstantiated belief that its impact is detrimental.¹²³ Inability to demonstrate that the chosen statutory course would lead to the desired result invalidated the proposed restriction in *High Ol’ Times*.¹²⁴ However, *Florida Businessmen for Free Enterprise v. City of Hollywood*¹²⁵ held that the community’s interest was validly served by preventing proliferation of drug paraphernalia.

In the wake of that decision it is interesting to examine the underlying purpose of drug paraphernalia laws. Such an examination raises a chicken-egg debate: Does possession, sale, and manufacture of items which could be used as drug paraphernalia contribute to drug abuse, or, does drug abuse foster the possession, sale, and manufacture of drug paraphernalia? To mix metaphors, the proverbial horse is out of the barn on the latter question as it appears that the development of the accessories industry is a recent phenomenon growing out of the popularity of recreational drug use. With adoption of the MDPA,¹²⁶ Florida is attempting to close the door to an already empty stall. The new statute will affect the manufacture and sale of some items which may be used as drug paraphernalia, but it will not affect drug abuse. The rate of recreational drug use combined with the easy availability of common

118. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

119. *Id.*, slip op. at 9.

120. *Id.*

121. 456 F. Supp. 1035.

122. *Id.* at 1043.

123. *Linmark Assoc., Inc., v. Willingboro*, 431 U.S. 85, 95-96 (1977).

124. 456 F. Supp. at 1043.

125. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

126. MDPA, *supra* note 2.

substitutes for paraphernalia assures this.

The final grounds of challenge to MDPA-based laws has been unconstitutional infringement on the commerce clause by impermissible burden on interstate commerce.¹²⁷ Using the three part test of *Pike v. Bruce Church, Inc.*,¹²⁸ the court in *Record Revolution*¹²⁹ found the ordinance served a legitimate concern, the intent elements limited the scope of the ordinance, and the impact on interstate commerce was thus minimized.¹³⁰ In contrast, the court in *Bambu*¹³¹ ruled that the plaintiff's constitutional rights included the right to own and deal in property, e.g., cigarette papers, and to engage in interstate commerce of them. Infringement of those rights caused the ordinance to be overbroad and unenforceable as to the manufacturer and distributors.¹³² Section 893.147(2) could arguably fall on either of these opposite sides.

Conclusion

Due to problems of vagueness and overbreadth, the section 893.145(1) standard of "intended for use, or designed for use" should be deleted from Florida's new drug paraphernalia statute. For the same reasons so should section 893.146(5) and section 893.146(1) and the "reasonably should know" standard of section 893.147(2) and section 893.147(4). In adopting a modified version of the MDPA, Florida may only have succeeded in making the symptoms of drug abuse illegal without addressing the problem of drug abuse itself. The legitimate purpose of protecting children from undue influence and encouragement to abuse drugs may be better served by more effective drug abuse education and prevention programs, demonstration of family and societal attitudes discouraging drug abuse, and laws prohibiting sale and distribution to minors of items most commonly used as drug paraphernalia. It is not necessary to go to the lengths of Florida's new statute to achieve this result.

Faye Jones

127. No. C-80-38, slip op. at 25 (N.D. Ohio Apr. 14, 1980).

128. 397 U.S. 137, 142 (1970).

129. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

130. *Id.*, slip op. at 26.

131. 474 F. Supp. 1297.

132. *Id.* at 1305-06.