

NARCOTICS PARAPHERNALIA: THE NEW ABC DRAGNET

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“What were you THINKING?” That’s not just an opening line in nearly all TV sitcoms. That’s also a fundamental element in proving necessary knowledge by you or your employee that the product just sold to an undercover police officer was drug paraphernalia. Without that prior disposition to sell that product for use as drug paraphernalia, there could not be a successful prosecution before the Department of Alcoholic Beverage Control. That is, until now.

Effective January 1, 2003, the Legislature added Business and Professions Code Section 24200.6 which provides:

The department may revoke or suspend any license if the licensee or the agent or employee of the licensee violates any provision of Section 11364.7 of the Health and Safety Code. For purposes of this provision, a licensee, or the agent or employee of the licensee, is deemed to have knowledge that the item or items delivered, furnished, transferred, or possessed will be used to plant, propagate, cultivate, grow, harvest, 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, if the department or any other state or local law enforcement agency notifies the licensee in writing that the items, individually or in combination, are commonly sold or marketed for that purpose.

Why is this statute important, and how did it change the law of ABC prosecution for offenses involving sale of narcotics paraphernalia?

What the employee sold, delivered, transferred or possessed with intent to do so may or may not have been narcotics paraphernalia depending upon what the employee was thinking. Whether the product involved was paraphernalia depended upon whether your employee thought it was narcotics paraphernalia before the undercover officer entered your licensed premises and talked your employee into selling that otherwise innocuous product for use in smoking rock cocaine.

Health and Safety Code Section 11364.7 has been on the books since as presently constituted since 1982 with an amendment in 1991. It has long been a misdemeanor to violate this section. This section provides in relevant part:

- (a) Except as authorized by law, any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer, or manufactures with the intent to deliver, furnish, or transfer, drug paraphernalia, knowing, or under circumstances where one **reasonably should know**, that it will be used to plant, propagate, cultivate, grow, harvest, 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, except as

provided in subdivision (b), in violation of this division, is guilty of a misdemeanor.

Under 11364.7 (d) the ABC already had authority to revoke a license for violation of this section. So what's the difference under 24200.6? The difference is the local law enforcement agency can now answer the question: "What were you THINKING?" in advance of the investigation. The police department or the ABC can enter your licensed premises, take inventory of products the officers have learned from their experience on the street to be useful in preparation or ingestion of narcotics and notify you, the licensee, of those products' illicit uses or purposes. You as the licensee and all your employees and agents are now charged with the knowledge that those certain delineated products constitute narcotics paraphernalia.

Previously, an undercover investigator would enter a licensed premises and engage your employee in a conversation about a product or products and attempt to elicit information about the employee's state of mind. Without the preconceived idea by your employee that the product was (or could be used as) drug paraphernalia, prosecution under that section would fail. In March of 1998, the ABC Appeals Board issued a scholarly approach to narcotics paraphernalia prosecutions in *Harper v. Department*, AB 6894 (appeal brought by the undersigned). In *Harper* the Appeals Board cited the pivotal 1985 criminal appeal of *People v. Nelson* decided by the

Appellate Department of the Superior Court. What the Court in *Nelson*

taught us was:

[W]e conclude that the "designed for use or marketed for use" language in [the statute's] definition of "drug paraphernalia" reflect the Legislature's attempt to assign the appropriate scienter to each category of offender within that section's ambit. [Citation omitted.]

In other words, the "designed for use" phrase pertains to the state of mind of the manufacturer of an item while the "marketed for use" phrase refers to the seller, including distributor, of the item. The common denominator in both instances is that the requisite state of mind belongs to the person in control of the item at the time the item is manufactured, or delivered, furnished or transferred, etc.

The new statute guts the knowledge (scienter) requirement by artificially providing the knowledge to the licensee in advance of the investigation.

The old investigation and prosecution involved an officer finding out if your employee already knew that the one inch square baggies, the glass vial, the metal scouring pad (without soap), the decorative metal pipe and the tiny brass screen could be used to sell or store or ingest some narcotic or drug. Prosecution hinged on what your employee said in response to the officer's questions. When the officer asked: "Got anything to

smoke rock cocaine with?” and your employee brings out the glass vial, scouring pad and the pipe and said, “This’ll work...it always has” the ABC accusation was on the way to be Registered in Sacramento.

On the other hand, if your employee answered that question, “What on God’s green earth are you talking about?” the ABC just might not file that case. If somewhere in between, the ABC might file and then the ALJ had to decide, “What was the employee thinking about that stuff before the cops walked in?”

In *Harper*, the undercover cops wheedled a 67-year old clerk to sell products the cops virtually told the clerk were drug paraphernalia. The ALJ sustained the accusation but the Appeals Board reversed, finding:

“Although the ALJ found that appellant’s employees knew the baggies were being displayed and sold as drug paraphernalia, the finding rests entirely on the employee’s responses to the questions of the police officers as to whether the baggies would be suitable for the use to which he would put them. There is no evidence of any pre-existing intent on the part of the two employees to display or market anything as drug paraphernalia.

This is a case where a 67-year old clerk was overly helpful to a customer seeking a common household product which ordinarily sold for one dollar. The notion that his actions come within Sec. 11364.7, subdivision (a) is one we do not accept.

The *Harper* case and could look very different after adoption of 24200.6. Now the police department would simply see the baggies on display on some undercover visit to your premises. Then the police or the ABC would send written communication to the licensed premises indicating that the baggies "...are commonly sold or marketed..." as narcotics paraphernalia. Finally, the police would then enter the premises, see the baggies still on display, and the ABC could just file the accusation. The Constitutional requirement of prior knowledge pronounced by the Court in *Nelson* and the Appeals Board in *Harper*, would be automatically satisfied without a word spoken. The ABC prosecution would consist of copies of the letter sent by the police identifying the baggies as paraphernalia and the subsequent photograph of the baggies still on display and (possibly) also include the sale of the baggies by your employee to the officer on that subsequent visit.

The legislation, to make ABC prosecution simpler, does not include any need for acknowledgement by the licensee of receipt of this written notification, only that it was sent by the Department or the police. "I never got any such written notification" is not a defense. The "I had no idea that this stuff could be used as narcotics paraphernalia" is not a defense. If

the products have been previously identified as paraphernalia, the license may be revoked if those products are later found in your premises.

Before you abandon your business and leave the state, be mindful of the following: *Nelson*, came as a constitutional challenge to 11364.7. The Court upheld the constitutionality of the statute based upon the concept of prior knowledge of intended use of the identified products. 24200.6 virtually eliminates the requirement of knowledge from the equation. This begs for future constitutional challenge. Note that 24200.6 pertains only to ABC prosecutions. That's where this fight will be fought.

"Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."