

Prosecuting Drug Cases

Presented by

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- I. Why prosecute drug cases?
 - a. We hear about this form of crime being “victimless”.
 - i. Society is the victim
 - ii. Think about the number of other crimes that are committed in order to get drugs
 - 1. Theft
 - 2. Forgery
 - 3. Robbery
 - 4. Burglary
 - 5. Etc...etc...etc...
 - b. War on Drugs
 - i. There is a war on drugs. It may not be what the public likes or wants to think about, but YOU as a prosecutor are at war with the threat and reality of what controlled substances do and how they affect your communities
 - c. What you think about drugs is how you will prosecute these cases
 - i. You need to know how you feel about drugs and the effects they have on you as a prosecutor; what they do to your communities.

II. Basics

- a. Substances are placed in their respective schedules based on whether they have a currently accepted medical use in treatment in the United States, their relative abuse potential, and likelihood of causing dependence when abused. Some examples of the drugs in each schedule are listed below.
- b. Schedule I Controlled Substances
 - i. Substances in this schedule have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.
 - ii. Some examples of substances listed in Schedule I are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), peyote, methaqualone, and 3,4-methylenedioxymethamphetamine ("Ecstasy").
- c. Schedule II Controlled Substances
 - i. Substances in this schedule have a high potential for abuse which may lead to severe psychological or physical dependence.
 - ii. Examples of Schedule II narcotics include: hydromorphone (Dilaudid), methadone (Dolophine), meperidine (Demerol), oxycodone (OxyContin, Percocet), and fentanyl (Sublimaze, Duragesic).
 - iii. Other Schedule II narcotics include: morphine, opium, and codeine.
 - iv. Examples of Schedule II stimulants include: amphetamine (Dexedrine, Adderall), methamphetamine (Desoxyn), and methylphenidate (Ritalin).
- d. Schedule III Controlled Substances

- i. Substances in this schedule have a potential for abuse less than substances in Schedules I or II and abuse may lead to moderate or low physical dependence or high psychological dependence.
 - ii. Examples of Schedule III narcotics include: combination products containing less than 15 milligrams of hydrocodone per dosage unit (Vicodin), products containing not more than 90 milligrams of codeine per dosage unit (Tylenol with Codeine), and buprenorphine (Suboxone).
 - iii. Examples of Schedule III non-narcotics include: benzphetamine (Didrex), phendimetrazine, ketamine, and anabolic steroids such as Depo-Testosterone.
- e. Schedule IV Controlled Substances
 - i. Substances in this schedule have a low potential for abuse relative to substances in Schedule III.
 - ii. Examples of Schedule IV substances include: alprazolam (Xanax), carisoprodol (Soma), clonazepam (Klonopin), clorazepate (Tranxene), diazepam (Valium), lorazepam (Ativan), midazolam (Versed), temazepam (Restoril), and triazolam (Halcion).
- f. Schedule V Controlled Substances
 - i. Substances in this schedule have a low potential for abuse relative to substances listed in Schedule IV and consist primarily of preparations containing limited quantities of certain narcotics.
 - ii. Examples of Schedule V substances include: cough preparations containing not more than 200 milligrams of codeine per 100 milliliters or per 100 grams (Robitussin AC, Phenergan with Codeine), and ezogabine.

III. Possession v. Distribution

- a. Penalties for Possession
 - i. Schedule I & II
 - 1. 3rd degree felony
 - ii. Schedules III, IV, and V
 - 1. Class B misdemeanor
 - iii. Marijuana
 - 1. First conviction, class B
 - 2. Second conviction, class A
 - 3. Third conviction, 3rd degree felony
 - iv. Remember, Lortab (hydrocodone APAP) is a schedule III controlled substance and should be charged as a class B misdemeanor. Percocet, percodan, or any oxycodone based substance is a schedule II controlled substance and should be charged as a third degree felony.
 - v. If there is a prior conviction for distribution or possession with intent to distribute, can enhance one degree for simple possession.
- b. Penalties for Distribution & Possession with Intent to Distribute
 - i. Schedule I & II
 - 1. First conviction, 2nd degree felony

2. Second or SUBSEQUENT (make sure you look up what subsequent means), first degree felony
 - a. There is a good argument to suggest that you can charge, in the same information, a second degree felony in Count I of the information and any SUBSEQUENT counts can be charged as first degree felonies *See State v. Hunt*, 906 P.2d 311 (Utah 1995)
- c. Enhancements
 - i. Remember that just because you can, doesn't mean you should or have to enhance.
 1. Look at the evidence
 2. Look at the history
 3. Don't just enhance simply to use as a bargaining chip
 - ii. Types
 1. Drug Free Zone (58-37-8(4))
 - a. One degree higher than regular charge
 2. Prior Distribution, Possession with Intent, or Arranging
 - a. One degree higher
 - b. Can enhance a simple possession as well
 3. Firearm
 - a. Must be carried, used, or possessed during the commission or in furtherance of the drug offense
 - b. Additional year consecutive

IV. Prescription Fraud

- a. §58-37-8(3)
 - i. Doctor Shopping
 1. Going to multiple providers to get controlled substances without informing the medical providers of getting substances elsewhere
 - a. Make sure you get an 1102 statement from the physician, otherwise, you're going to have mad doctors that have to come in and testify at preliminary hearing
 - b. Get access to DOPL's database for controlled substances
 - i. Go here to request access:
<https://login2.utah.gov/user/create>
 - ii. The information is not admissible at preliminary hearing or trial, but is a very useful investigative tool to see what controlled substances have been prescribed
 1. DO NOT RELY SOLELY ON THE DATABASE
 - ii. Prescription Forgery
 1. Very sophisticated
 2. A lot of prescriptions are made on computers

- a. If you get a forgery case, consider getting a warrant for all computers, etc, to look for templates
 - b. Look for digitized physician signatures
 - i. Add to the warrant printing materials.
 - c. Can order the special paper online if you have a DEA number in many instances
 - 3. The cases can grow and grow fast
 - a. Make sure your investigator has pulled the DOPL report and that you have a copy
 - b. Look for aliases within the database and on the BCI
 - iii. Charging decisions
 - 1. Most of these you have the ability to charge multiple counts
 - 2. I have taken the position to charge one count per provider and hold the defendant accountable for the counts charged, rather than charging 30 counts and reducing
 - a. Go with your office policy
 - b. Discuss this with you officer/agent in charge of the investigation

V. Paraphernalia §58-37c-1, *et. seq.*

- a. Just about anything that can be used in association with controlled substances can be considered paraphernalia
- b. Remember that you may have to

VI. Expert Witnesses

- a. Crime lab
 - i. Remember they are busy
 - ii. if you can get defense to waive chain and chemistry, you will be loved
 - iii. get to know the lab folks
 - 1. they have boilerplate questions to use if you have questions about foundation, etc.
 - iv. more often than not, the issue isn't with the substance being what it is. Most GOOD defense attorneys understand this and will not require testimony as to the drug itself
- b. Officers
 - i. Your officers may be required to testify as experts
 - 1. Possession with Intent to Distribute case
 - a. If you are using the quantity of the drugs as part of your PWI, you will need to follow the rules for experts. *State v. Rothlisberger*, 147 P.3d 1176 (Utah 2006)
 - b. If you have a Drug Task Force, it may be well to talk with the commander of the Task Force to designate one or two of the agents to testify as an expert in this area. They can then be used in cases not initiated by the Task Force as well

VII. Forfeiture §24-1-1, *et. seq.*

- a. Civil

- i. Within 30 days of the seizure, the seizing agency must (1) prepare a detailed inventory, and take steps to protect the property until the forfeiture is complete (cash must be deposited into a separate interest bearing account); (2) notify the prosecutor of the seizure, and (3) give notice to all owners and known interest holders.
- ii. Failure to give notice defeats the forfeiture of that owner or interest holder's interest in the property, unless the agency can give good cause for the error, or the owner otherwise had actual notice of the forfeiture.
- iii. Within 60 days of the seizure, the prosecutor must (1) file a complaint of forfeiture; (2) serve notice to all owners and known interest holders via summons.
- iv. Summons can be served by (1) actual service; (2) certified mail to last known address; or (3) publication.
- v. Failure by the prosecutor to file the forfeiture complaint defeats the forfeiture.
- vi. Prosecution burden is "clear and convincing" evidence that (1) the claimant/owner/interest holder was involved in violations of §§58-37, 37a, 37b, 37c, or 37d; (2) the property was acquired during the period of conduct or within a reasonable time thereafter; (3) there wasn't a likely source for the acquisition of the property except the violation's conduct.
- vii. State cannot forfeit "innocent owner or innocent interest holder's" interest in the property
- viii. Seized property can be ordered released upon a finding of "hardship", including the cost of hiring an attorney. The court can deny the hardship request if the benefit of release is outweighed by the potential that the property will be destroyed, concealed, or removed from the state.
- ix. Seizing agency must have a written policy in place, which shall include designating seizure agent for that agency.
- x. The prosecuting agency may get attorney's fees from the sale of the forfeited property or money, not to exceed 20%.

b. Criminal

- i. Brought as part of the criminal information
- ii. Prosecution burden is "beyond a reasonable doubt"
- iii. Court may enter injunctions or restraining orders. Court is not bound to the rules of evidence in any hearing regarding injunctions and restraining orders.
- iv. Forfeiture to be found by "special verdict" of the jury after the defendant is found guilty of the criminal offense giving rise to the forfeiture.
- v. Non-party claimants cannot intervene in the criminal case, or any appeal, nor bring a separate suit at law or equity against the state or county maintaining the criminal action.

- vi. Once the forfeiture order is entered, the prosecuting office must “publish notice of the order’s intent to dispose of the property as the court directs.”
- vii. Non-party claimant has the right to a jury trial. At trial, the claimant has the burden, and the burden is a “preponderance” of the evidence that: (1) the interest in the property is valid and superior to others, including the defendant; (2) the property was obtained in a bona fide transaction for value; and (3) the claimant did not know that the property was subject to forfeiture.
- viii. Within 30 days of the published notice, or actual notice, a non-party claimant may petition the court to adjudicate his/her legal interest in the property. The petition must be in affidavit form, and subject to penalty of perjury. Civil discovery rules apply, and at the hearing, the claimant can present witnesses and evidence. The prosecution can rebut with witnesses and evidence. After the hearing, the court can quash or modify the forfeiture order.
- c. Provisions for both civil and criminal forfeiture
 - i. Damages/costs of prosecution by a claimant, including ATTORNEY’S FEES and COSTS, can be ordered against the State if it loses a forfeiture action, even if only in part or the action is dismissed. Be very careful when pursuing these.
 - ii. The forfeiture must be proportional to the level of the statute’s violation. Proportionality is determined by the court.
 - iii. Successful claimant has a right of action to sue the seizing agency if the property is damaged or lost while in its custody and care.
 - iv. An indigent claimant has the right to an appointed attorney
 - v. The matters should be held as expeditiously as possible.

BOTTOM LINE

Do the right thing, for the right reason, to the right person and you will be just fine.

Appendix A

Doctor Shopping elements and PC statement (I cut and paste when I screen these cases)

Between June 30 and August 31, 2011 in Davis County, Utah, the defendant received at least two prescriptions for controlled substances from different medical providers without informing the other that she was getting controlled substances from another medical provider.

knowingly and intentionally acquire or obtain possession of, procure or attempt to procure the administration of, obtain a prescription for, or procure the administration of any controlled substance by misrepresentation or failure to disclose receiving any controlled substance from another source.

Drug charge enhancements

Non Marijuana

This charge is subject to enhanced penalties pursuant to Utah Code Ann. § 58-37-8(1)(b)(i).

If prior conviction of DCS or PWI

This charge is subject to enhanced penalties pursuant to Utah Code Ann. § 58-37-8(2)(c).

Marijuana

This charge is subject to enhanced penalties pursuant to Utah Code Ann. § 58-37-8(1)(b)(ii).