

POSSESSION AND SALE OF DRUG PARAPHERNALIA

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House Bill 5492 as introduced
Sponsor: Rep. Kevin Elsenheimer
Committee: Health Policy

First Analysis (3-15-06)

BRIEF SUMMARY: The bill would revise the exemptions regarding possession and sale of drug paraphernalia.

FISCAL IMPACT: The fiscal impact is indeterminate.

THE APPARENT PROBLEM:

An owner and operator of a small business called Concert Connection, located in Alpena, Michigan, offers a variety of items for sale, including hats, t-shirts, wall hangings, black-light hangings, pipes, patches, stickers, posters, and rock and roll memorabilia.

In February 2003, a state police detective who was assigned to an undercover narcotics team investigated the business and observed items that he believed were drug paraphernalia being offered for sale.

Subsequently, the Alpena County prosecuting attorney sent the shop owner written notice, informing him that certain of his products offered for sale—all pipes and instruments used for smoking marijuana, including 'dug-outs,' 'one-hitters,' water pipes (commonly referred to as 'bongs'), and 'bowls,' hand-held metallic scales, cocaine kits, 'bullets,' 'snorters,' and small spoons with or without a chain and glass vial attached—were prohibited under Michigan law.

The shop owner filed an action to seek a ruling from the circuit court as to whether the items noted by the prosecutor constituted drug paraphernalia under MCL 333.7451, or whether the items were exempt from the definition of "drug paraphernalia" under MCL 333.7457(d) and (e). The trial court determined that certain of the items offered for sale at his store—including pipes constructed from glass, stone, and metal with a metal screen filter, bongs (with or without an attached rubber face mask), dugouts, and cocaine bullets—constituted drug paraphernalia under 333.7451, and were not exempt under 333.7457.

The shop owner appealed, arguing that many of the items were not *specifically* designed for drug use. The Michigan Court of Appeals agreed, and ruled that the trial court erred when it failed to apply the exemption. However, the Appeals Court also noted that the exemption in the Public Health Code at 333.7457 appeared to be inconsistent with the prohibition in the Public Health Code at 333.7451. The Court agreed with the trial judge that on their face, the statutes were possibly inconsistent, and that in their application

produced an absurd result, yet the Appeals Court noted that "the language used by the Legislature in both statutes is clear and unambiguous. Moreover, the Legislature, not this Court, created and enacted this absurdity, and we decline to invade the province of the Legislature and engage in 'judicial lawmaking' when the Legislature has spoken on this issue....Rather than usurp the authority of the Legislature to make laws, we leave it to the Legislature to reconsider the language used ...and make appropriate amendments to those statutes to eliminate this loophole and give MCL 333.7451 the teeth it needs to enable it to appropriately limit the sale of drug paraphernalia in the State of Michigan."

In response to the Appeal Court's opinion, legislation has been introduced to narrow the exemptions.

THE CONTENT OF THE BILL:

House Bill 5492 would amend the Public Health Code (MCL 333.7457) to revise the exemptions regarding possession and sale of drug paraphernalia.

Currently, the Public Health Code prohibits the possession and sale of certain materials and devices that are used by those who violate controlled substances laws. The code also lists exemptions from these prohibitions.

Currently exempt under the law is *equipment, a product, or material which may be used in the preparation or smoking of tobacco or smoking herbs other than a controlled substance*. House Bill 5492 would revise this exemption to apply to *equipment, a product, or material **exclusively** used in the preparation or smoking of tobacco or smoking herbs other than a controlled substance*. (The word "exclusively" would be added.)

[Note: The Public Health Code's definition of "drug paraphernalia" prohibits a person from selling or offering for sale drug paraphernalia, knowing 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. The definition also lists, in greater detail, devices and materials used to prepare drugs that cannot be sold.

The Public Health Code also lists exemptions to these prohibitions, including sales to certain licensed health care practitioners licensed under the Occupational Code; hospitals and clinical labs; and to those who provide medical, dental, surgical, or pharmaceutical supplies. In addition, the code exempts equipment which may be used in the preparation of smoking of tobacco or smoking herbs other than a controlled substances; hypodermic syringes or needles sold for the purpose of treating livestock; and objects given away by state or local government agencies to prevent the transmission of infectious agents.]

BACKGROUND INFORMATION:

To read the opinion in its entirety, see the Michigan Appellate Digest which records the opinions of the Michigan Court of Appeals. The opinion is entitled *Wayne Gauthier, d/b/a Concert Connection v Alpena County Prosecutor*, No. 253200, 267 Mich App 167; 703 NW2d 818 (2005).

ARGUMENTS:

For:

In a recent ruling, the Michigan Court of Appeals has noted the possible inconsistency of two provisions within the Public Health Code that, on the one hand, prohibits the use of drug paraphernalia, yet on the other hand, offers broad exemptions from that prohibition. This legislation would narrow the exemptions, and reduce the possibility for inconsistency between the two provisions.

Against:

While this legislation is headed in the right direction, the exemption it seeks to narrow remains too broad. The bill should be amended on the House floor to clarify further still when exemptions would be allowed under the law.

POSITIONS:

The Department of State Police supports the bill. (3-14-06)

The Deputy Sheriffs Association of Michigan supports the bill. (3-14-06)

The Michigan Judges Association supports the bill. (3-14-06)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.