

STATE OF TENNESSEE

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Opinion No. 05-085

Whether a Posted Sign is an Adequate Disclaimer Which Would Preclude a Store Owner From Being Charged with a Criminal Offense.

QUESTION

Whether a sign stating “for tobacco use only” above a display case of items often used in connection with illegal drugs is an adequate disclaimer to preclude a store owner from being charged with a criminal offense.

OPINION

The posting of such a sign is a factor relevant to determining the store owner’s intent. The District Attorney General, who is the ultimate charging authority, is the one to determine in the first instance whether there is probable cause to commence a prosecution for the violation of a criminal statute.

ANALYSIS

To convict a person of possession of drug paraphernalia with unlawful intent, the State is required to prove three elements beyond a reasonable doubt: (1) that the defendant possessed an object; (2) that the object possessed was classified as drug paraphernalia; and (3) that the defendant intended to use that object for at least one of the illicit purposes enumerated in the statute. See Tenn. Code Ann. §39-17-425; *State v. Mallard*, 40 S.W. 3d 473 (Tenn. 2001); *State v. Ross*, 49 S.W. 3d 833 (Tenn. 2001). Tenn. Code Ann. §39-17-402 (2) provides:

"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 as defined in subdivision (4). "Drug paraphernalia" includes, but is not limited to:

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

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

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

- (i) Metal, acrylic, glass, stone, or plastic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
- (ii) Water pipes;
- (iii) Carburation tubes and devices;
- (iv) Smoking and carburation masks;
- (v) Chamber pipes;
- (vi) Carburetor pipes;
- (vii) Electric pipes;
- (viii) Chillums;
- (ix) Bongs; and
- (x) Ice pipes or chillers.

Tenn. Code Ann. §39-17-424 provides:

In determining whether a particular object is drug paraphernalia as defined by §39-17-402, the court or other authority making such a determination shall in addition to all other logically relevant factors consider the following:

- (1) Statements by the owner or anyone in control of the object concerning its use;
- (2) Prior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances;
- (3) The existence of any residue of controlled substances on the object;
- (4) Instructions, oral or written, provided with the object concerning its use;

- (5) Descriptive materials accompanying the object which explain or depict its use;
- (6) The manner in which the object is displayed for sale;
- (7) The existence and scope of legitimate uses for the object in the community; and
- (8) Expert testimony concerning its use.

Items typically used for illegal purposes may in fact be used for legitimate purposes, and many items typically used for legitimate purposes may be used as drug paraphernalia. Specific intent is the key to determining whether something is or is not to be regarded as drug paraphernalia. *See, e.g., United State v. Vinson*, 662 F. Supp. 431 (M.D. Tenn. 1987) (whether jewelry which was in the shape of a coke spoon constituted drug paraphernalia turned on the state of mind of defendant).

It certainly could be argued that a sign stating “For tobacco use only” above a display case of items often used in connection with illegal drugs constitutes an “[i]nstruction[] . . . provided with the object concerning its use,” Tenn. Code Ann. §39-17-424(4), that would be relevant evidence of the seller’s intent. It is for the District Attorney General to determine in the first instance whether there is sufficient evidence to commence a criminal prosecution under the drug paraphernalia statute.

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