

BACE LAW REPORT

LEGAL NEWSLETTER

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Marijuana Possession in Massachusetts: The First Ticket.

The Voters in the Commonwealth overwhelmingly approved a ballot initiative that decriminalized the possession of less than one ounce of Marijuana in early November. The vote was a clear victory for the Committee for Sensible Marijuana Policy, and other proponents of the initiative, which passed resoundingly with sixty-five percent (65%) of the vote. However, the implications of the new law, which officially went into effect January 2nd, and the practical enforcement procedures of the law are not nearly as clear as the voter's desire to decriminalize the substance.

Is Marijuana Still Illegal?

Yes, the substance is still illegal, but possession of small amounts (under one ounce) are now *decriminalized*, and result in a civil penalty rather than an arrest and criminal implications. A civil penalty, as opposed to

criminal prosecution, is analogous to a traffic ticket. Speeding tickets and parking violations, for example, are generally civil penalties, that do not result in criminal prosecution or reporting to a Criminal Offender Record Information (CORI) report.

The text of the new Act states in relevant part:

“...possession of one ounce or less of marihuana shall only be a **civil offense**, subjecting an offender who is eighteen years of age or older to a civil penalty of **one hundred dollars** and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification.” M.G.L. Ch. 94C § 32L. Offenders who are under the age of 18, are subject to the \$100 civil penalty and forfeiture of the marijuana as well, but are also required to complete a drug awareness program within one year of the offense, or face an enhanced penalty for failure to comply. The penalty *does not* increase in severity for repeated offenses - The \$100.00 fine applies for each subsequent offense.

The Commonwealth's existing penalties

for growing, dealing, distributing, or driving under the influence of marijuana remain unchanged. Those infractions will still result in criminal liability. But, the new law clearly states that no action may be taken against an offender's license for mere possession of an ounce or less of marijuana in violation of Section 32L.

It appears, and logically follows then, that if an offender is ticketed for possessing less than one ounce of the substance, but possesses in such a way that gives rise to probable cause that the individual was dealing the substance, criminal prosecution could potentially result. Further complicating the scenario, it appears that public use of the substance, or any of its derivatives can be prosecuted as a misdemeanor.

The complications abound: possession results in a fine without implications to driver's licensing, however, intoxication under the substance while driving results in criminal prosecution. Possession results in a fine, but possession in a way that gives probable cause for distributing can result in criminal prosecution. The questions surrounding enforcement continue when one examines police searches, seizures, and enforcement in schools.

Searches & Schools

The Commonwealth's Executive Office of Public Safety and Security (EOPSS) issued a broad question and answer document in order to aid the public and law enforcement regarding the new Act. The paper addresses police searches of offenders, and points out some of the interesting issues, but should not be relied upon as legal analysis.

In general, as a broad simplification of the law, where police believe they have probable cause to believe there is evidence of a crime, and the circumstances do not permit the acquisition of a warrant, then a warrantless search may be conducted. Given the fact that possession of a small amount of marijuana is no longer a crime, the question becomes the following: if probable cause exists that an individual is in possession of a small amount of marijuana, can a search be conducted? According to the EOPSS, the police may search, and the standard remains, "probable cause." This is a gross oversimplification of the issues, and further analysis is beyond the scope of this newsletter. However, it appears that law enforcement will have to make judgments as to the amount of marijuana at the scene, without accurate measurements to determine whether the offense is a ticket, or a criminal proceeding.

There appears, according to the EOPSS, no authority to arrest an offender or search an offender incident to an arrest under the new Section 32L. However, if probable cause exists that the amount is more than an ounce, criminal liability could attach, and thus a search incident to an arrest would appear lawful.

Further, marijuana that is seized pursuant to an arrest for a crime is often tested and logged for later use in the criminal proceeding. However, the marijuana seized under Section 32L will likely not be tested or held for use in a criminal proceeding, because the proceedings are *civil* and analogous to a parking ticket. Thus, question remain as to how the Commonwealth will prove the contraband was Marijuana should an offender appeal the ticket.

The Commissioner of Elementary and Secondary Education released an Advisory Opinion regarding the Act, which in summary appears to state that the reduction of the penalty to a civil infraction will have no practical implications on educators' authority to discipline students based on Marijuana possession.

The First Ticket

The Boston Globe reported on January

3rd, that a Western Massachusetts man became the Commonwealth's first ticket pursuant to Section 32L. It appears that the individual was written a ticket, out of a standard ticket book for \$100.00. Springfield's *The Republican* newspaper reported shortly after that the Police Department was flooded with calls from other enforcement agencies across the state, inquiring as to how the officers had enforced the new law.

Other than the intention of the voters to decriminalize possession of less than an ounce of Marijuana, little can be analyzed with any clarity regarding the new Act. It does drastically change the implications for possession of a small amount of the substance, but the practical implications will have to be flushed out as the Act is implemented across the Commonwealth.

Regardless of whether or not the possession of a small amount of the substance has been decriminalized, if you have been suspected or accused of either criminal charges associated with marijuana possession, or face a civil penalty - contact your attorney for further advice and counsel.

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