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From: Saved by Windows Internet Explorer 7
Sent: Tuesday, September 09, 2008 9:51 AM
Subject: Bench & Bar of Minnesota



December 1999

Minnesota's Controlled Substances Law: A History

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Legislative and caselaw developments over the years have produced sentencing guidelines for controlled substance offenses that have steadily -- and questionably -- increased the severity of the sentences given to drug offenders.

At the July 1999 meeting of the Minnesota Sentencing Guidelines Commission, the author was asked to prepare a handout describing the history of controlled substance crimes in Minnesota, and to attempt to describe some of the case law which has had an impact on the severity of the sentences given to drug offenders.



In the following narrative, at each point of the history where a significant change in the law has occurred, the law is applied to a hypothetical offender. That offender -- here referred to as John Smith -- is a person who possesses one-half an ounce of powder cocaine (about 13 grams -- approximately \$1,200 worth of the drug). John admits to selling cocaine, but he also uses the drug. He has no criminal history.

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No attempt is made to address the issue of the impact this sentencing process has had on the number of minority inmates incarcerated at Minnesota correctional facilities.

Legislative and sentencing guidelines changes over the past ten years have dramatically increased the penalties for drug offenses. Some of this increase has been intentional

and based on publicly debated policy reasons; some of this increase has been unintentional, and not based on any policy reasons whatsoever.

This has led to the current dilemma faced by the Sentencing Guidelines Commission: for certain drug offenses, downward durational departures outnumber presumptive sentences imposed by courts. Courts are faced with the situation where a person selling \$1,200 worth of cocaine receives (per the guidelines) the same sentence as a person who approaches a stranger at gunpoint and commits a rape. Courts appear loath to treat these two offenders similarly; as a result, the presumptive sentence has, in effect, become a departure from the norm.

Initial Sentencing Guidelines

On May 1, 1980, when the Minnesota Sentencing Guidelines came into effect, there was a fairly simple statutory scheme prohibiting sale and possession of controlled substances. It was unlawful to sell (under a wide variety of definitions, including "possess with intent to sell") or possess a variety of controlled substances. Minn. Stat. §152.09 (1980). The Minnesota Sentencing Guidelines reflected this simple statutory scheme -- all controlled substance sale crimes were ranked at severity levels VI-II, as shown in Table I. In 1982 the severity level for sale of cocaine was increased to IV.

Neither the severity level ranking, nor the offense itself, was based on the amount of the particular controlled substance that was sold. Because of this, the Sentencing Guidelines Commission created an aggravated (upward) sentencing departure category for a "major controlled substance offense" when it first promulgated the guidelines. Under Minnesota Sentencing Guidelines §II.D.2.b.(5), a court was allowed an aggravated departure from the presumptive guidelines sentence when:

The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:

- (a) the offense involved at least three separate transactions wherein

controlled substances were sold, transferred, or possessed with intent to do so; or

(b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or

(c) the offense involved the manufacture of controlled substances for use by other parties; or

(d) the offender knowingly possessed a firearm during the commission of the offense; or

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy; or

(f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or

(g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (*e.g.* pharmacist, physician, or other medical professional).

John Smith's sentence: 12 months stayed. John Smith has admitted to possession with intent to sell cocaine. This offense, a severity level IV offense (severity level III before August 1, 1982), carries a 12-month stayed sentence, so John would receive probation. There do not appear to be any grounds for departure to a greater duration, although one might argue that this could have been an intended sale of an amount larger than for personal use.

"a person may actually sell drugs to police a dozen times before that person is arrested. Under Hernandez, that drug dealer is accruing a criminal history score even though he has never been convicted of a crime."

1986 Changes

In 1986, the Minnesota Legislature amended the sale portion of the drug crimes statute. The Legislature created two levels of drug offenses:

- **Sale of larger amounts of drugs.** The more serious level drug offense -- involving sale of seven or more grams of narcotics (for those drugs sold by weight) or sale of ten or more dosage units (things like LSD) -- was ranked by the Sentencing Guidelines Commission as a severity level VII offense. At that time, a severity level VII offense carried a sentence of 24 months -- but this sentence was presumed to be executed; for the first time, the guidelines presumed imprisonment for a drug offense.
- **Other Sales of Drugs.** Sale of smaller amounts of most drugs remained at severity level VI -- 21 months stayed. The severity level of sale of a small amount of cocaine was increased. It had been a severity level IV offense since 1982, but was increased to a severity level VI offense. The punishment: 21 months (stayed).
- **Possession of Cocaine.** The Sentencing Guidelines Commission increased the severity level for cocaine possession from I to III.

John Smith's sentence: 24 months in prison. Since John Smith possessed more than seven grams of cocaine, and intended to sell cocaine, he was, per the guidelines, packed off to prison for 24 months.

1987 Changes

In 1987, for the first time, the Minnesota Legislature implemented different threshold levels for harsher penalties for powder and crack cocaine sales. The threshold for the higher penalty was set at three grams for crack and 10 grams (sold on one or more occasions within a 90-day period) for powder.

The Guidelines Commission continued to rank the sales of the larger amounts of drugs at severity level VII and the other sales at severity level VI.

John Smith's sentence: 24 months in prison. Since John Smith possessed more than ten grams of cocaine, and intended to sell cocaine, his sentence remained the same.

1989 Changes

In 1989, the Minnesota Legislature radically altered the controlled substance statutory scheme. It created several levels of controlled substance offenses -- first, second, third, fourth, and fifth degree offenses -- in decreasing order of severity. *See* 1989 Minn. Laws Ch. 290, art. 3, §§8-12, codified at Minn. Stat. §§152.01-.028.

According to the legislative history, all first, second, and third degree offenders were presumed to be people who were drug dealers -- whether or not the person convicted of the offense was convicted of actually selling drugs, or simply had possessed the drugs in question. For example, a person was guilty of a first-degree "sale" crime if the person sold 50 grams of a narcotic drug; a person would also be guilty of a first-degree "possession" crime if that person possessed 500 grams of a narcotic drug. The latter possession crime was treated the same as a sale crime because the statutory scheme presumed the latter person was a drug dealer.

According to the legislative history, the rationale for treating these two offenses (sale of 50 grams versus possession of 500 grams) identically was that they involved, in reality, the same type of offender. The person who possessed 500 grams was a drug wholesaler who typically sold in smaller amounts (about 50 grams). The intent to sell on the part of the possessor of 500 grams would be presumed.

This logic held true for all first-, second-, and third-degree offenses. The first-degree offenders were major drug wholesalers, the second-degree offenders were mid-level drug dealers, and the third-degree offenders were street-level drug dealers. The statutory scheme presumed a certain level of "dealership" -- relative position within the drug hierarchy -- whether or not the person sold drugs at all.

Two critically important things changed with this new statutory scheme. First, *all* people who either possessed or sold drugs at the levels indicated for first-, second-, or third-degree offenses were presumed to be drug dealers. Second, because of this, the definition of "sale" of drugs no longer included "possession with intent to sell." This was because of the presumption that a person was a drug dealer if he or she possessed a certain amount of drugs; defining "sale" to include "possession with intent to sell" would have been redundant (and would have improperly increased the punishment of certain offenders).

A logical difficulty arose, however, in applying the aggravated departure grounds (the ones promulgated under the old statutory scheme) to the new offenses. The aggravated departure grounds seem to have been integrated into the new statutory scheme. If, for example, a person was convicted of a first-degree offense, the statute presumed that the person was a major drug wholesaler. Under the guidelines, however, the court could depart (based on the old statute) because:

(b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy[.] (§II.D.2.b.(5))

The Guidelines Commission did not change the departure grounds, despite the fact that many of the departure grounds were now presumed to be inherent in the statutory scheme.

Currently, then, the sentencing guidelines allow the courts to depart from the presumptive sentence based on factors that are presumed in the controlled substances statutory scheme. *See, e.g., State v. Stevens*, C0-94-221 (Minn. App. April 12, 1994)(unpublished)(affirming durational departure).

The Guidelines Commission did, however, increase penalties for these new offenses.

First-degree offenses were ranked at severity level VIII. These were, in the words of the legislative history, the true drug kingpins, the drug wholesalers. These people -- who possessed 500 grams of powder cocaine (roughly one pound), or were selling 50 grams of powder cocaine (roughly two ounces) at a time -- were viewed to be similar to a person who raped someone using a threat of serious bodily injury. Severity level VIII offense punishments were increased during this same period, so this offense carried a presumptive sentence of 86 months in prison.

Second-degree offenses. People who possessed 50 grams (roughly two ounces), or who sold ten grams, were guilty of a second-degree offense. This offense was ranked at severity level VII, which carried a newly increased sentence of 48 months in prison.

Third-degree offenses. People who possessed ten grams of cocaine, and who sold any amount of cocaine, were guilty of a third-degree offense. The presumed sentence was 21 months (stayed).

John Smith's sentence: 21 months, stayed. John Smith's presumptive sentence actually decreased at this point -- primarily because the definition of "sell" no longer included "possession with intent to sell."

The Roof Caves In -- *State v. Russell*

In setting up the new statutory scheme in 1989, the Minnesota Legislature decided to set the thresholds for powder cocaine offenses much higher than those for crack cocaine offenses. (See Table 2) That is, a person who possessed 25 grams (one ounce) of crack cocaine would be treated the same as a person who possessed 500 grams (roughly one pound) of powder cocaine. That person would go to prison for 86 months.

This system -- which mirrored the punishments set up for federal cocaine offenses -- had a disparate impact on minority (primarily African-American) offenders. The bulk of people prosecuted for crack cocaine offenses were African Americans, and the bulk of people prosecuted for powder cocaine offenses were white. Crack cocaine offenders were going to prison; powder cocaine offenders were not.

In *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), the Minnesota Supreme Court declared that this disparate treatment of powder cocaine and crack cocaine was unconstitutional under the Minnesota Constitution. The Court ruled that because of the disparate impact of the law (treating crack cocaine far more harshly) on African-American offenders, there had to be a compelling rationale for the different treatment. The Court also suggested (without actually ruling) that the presumption that all people possessing drugs at the first-, second-, and third-degree levels were drug dealers might also be unconstitutional.

The net result: the Court decreased penalties for crack cocaine offenders, categorizing them at the same level as powder cocaine offenders. The Court also called into question the legitimacy of one of the cornerstones of the new drug scheme -- assuming that people who possessed

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certain amounts of drugs were actually selling smaller amounts of those drugs.

The Legislature responded quickly. In a near unanimous move (one spurred primarily by a sense that the Minnesota Supreme Court had overstepped its bounds in issuing *Russell*), the Legislature did two things that dramatically increased penalties for drug offenses.

1. Increased penalties for powder cocaine to those formerly set for crack cocaine. To deal with the Court's concern about the disparity in the punishment of the two types of cocaine offenses, the Legislature simply set up a new system which punished both offenses the same: going back to the old system for crack cocaine (possessing 25 grams was a first-degree offense), and lowering the thresholds for powder cocaine (possession of 25 grams now became a first-degree offense).

This meant that for powder cocaine offenses, the Legislature had abandoned the notion that the first-degree offenders were the "true drug wholesalers" in the system. This does not appear to have been based on any policy decision to abandon that rationale for the statutory scheme.

2. Added "possession with intent to sell" back into the definition of "sell." This change addressed the concern expressed in *Russell* that the drug statutes presumed intent to sell for certain levels of possession. This also increased (unintentionally) the severity level of most offenses. Since the statutory scheme assumed you were dealing drugs if you possessed larger amounts, and police officers could testify as "experts" on the amount of drugs that a drug dealer normally possesses, all second-degree possessory offenses could become first-degree sale offenses. *See State v. Collard*, 414 N.W.2d 733 (Minn. App. 1987)(police may testify as to amounts of drugs usually possessed by users as opposed to amounts possessed by drug dealers), *pet. for rev. denied* (Minn. Jan. 15, 1988).

This latter increase in the severity of offenses turned out, in a subsequent opinion, to have been unnecessary; the Supreme Court ruled that the "irrebuttable presumption" contained in the statutory scheme was proper. *State v. Clausen*, 493 N.W.2d 113 (Minn. 1992).

John Smith's sentence: 86 months in prison. John possessed more than ten grams of cocaine, and John "sold" that cocaine (since he possessed it with intent to sell), so his offense transformed into a first-degree offense.

Some prosecutors would argue for an even longer sentence because John fits the criteria for a departure: he possesses amounts greater than for personal use, and he occupies a high position in the drug hierarchy.

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"Buying The Guidelines"

A criminal defendant charged with a series of offenses may accrue a criminal history score, for purposes of sentencing on the later offenses, equal to the score he would have accrued if all the offenses had been prosecuted in separate proceedings, at separate times. *See State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). This means, for example, that a person who commits seven burglaries on separate occasions (and who is sentenced on the same date for all seven), will accrue a criminal history score (for purposes of sentencing), during the sentencing hearing. He will get a criminal history point for the first offense and the second offense will be sentenced based on that new criminal history score. By the time he has reached sentencing for the seventh offense, he has reached the maximum criminal history score -- six -- and is sentenced accordingly.

Unlike the burglary situation described above, in drug-related prosecutions the police often control the number of offenses a drug dealer will commit. For example, as part of a police undercover operation, a person may actually sell drugs to police a dozen times before that person is arrested. Under *Hernandez*, that drug dealer is accruing a criminal history score even though he has never been convicted of a crime. Some police officers have a name for this manipulation of the sentencing guidelines -- "buying the guidelines" -- since each drug buy increases the criminal history score of the defendant. In *State v. Gould*, 562 N.W.2d 518 (Minn. 1997), police approached a person with a criminal history score of three (this person had a history of drug sales), had him sell to the police three times (to increase his score to the maximum six), and then had him sell to police one more time -- so that he would receive the maximum sentence. The Minnesota Supreme Court ruled that this manipulation was permissible but suggested that the Guidelines Commission should rectify this situation; the Guidelines Commission studied the matter, but made no changes.

This result seems unjust for at least two different reasons. First, allowing the police to manipulate the criminal history score by continuing to buy drugs from a person seems

unfair, and contrary to the purposes behind *Hernandez*. No officer would fail to arrest a burglar, or a robber, in an effort to catch that offender committing more offenses, thereby increasing the criminal penalties; this practice is accepted in the drug area.

Second, this manner of sentencing again ignores the presumption within our controlled substance statutes -- that a person convicted at the first-, second-, or third-degree levels is presumed to be engaged in the ongoing practice of selling drugs.

John Smith's sentence: At least 158 months in prison.

Assuming that police did not arrest John after his sale of cocaine, and waited for him to sell cocaine on three additional occasions, John -- who started without a criminal history -- would have a score of six (since each of these serious offenses is weighted to count as two points) by the time he was sentenced on the last offense. His presumptive sentence -- which now, by operation of all of these decisions, presumes he has a long criminal history and is a drug kingpin -- is now over 15 years in prison. The guidelines also would allow the court to depart from this sentence. Since the offender made three sales, the amounts are greater than for personal use, and the offender occupies a high position in the drug hierarchy, a double departure (to 316 months in prison) would be allowed under current law. ▲

Table I -- 1980 Sentencing Guidelines

Severity Level	Sentence (months)	Offenses
VI	21, stayed	sale of heroin, LSD
IV	12, stayed	sale of cocaine
III	12, stayed	sale of other narcotics; possession of cocaine, LSD, heroin
II	12, stayed	sale of marijuana

Table II – 1989 Thresholds for Cocaine Offenses

	Sale		Possession	
Degree	Crack	Powder	Crack	Powder
First	10 grams	50 grams	25 grams	500 grams
Second	3 grams	10grams	6 grams	25 grams
Third	Any amt.	Any amt.	3 grams	10 grams