

1984 S.C. Op. Atty. Gen. 116 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-47, 1984 WL 159854

Office of the Attorney General

State of South Carolina

Opinion No. 84-47

April 24, 1984

***1** Honorable Dill Blackwell

Member

House of Representatives

335A Blatt Building

Columbia, South Carolina 29211

Dear Representative Blackwell:

You have requested this Office to review Senate Bill 97 concerning drug paraphernalia so as to redefine paraphernalia and to provide for a criminal rather than a civil penalty. It is the opinion of this Office that the proposed amendments are constitutional and specifically that the criminal penalty does not violate the Constitutions of the United States or South Carolina.

Generally, states and cities have passed one of three types of drug paraphernalia statutes or ordinances. Some jurisdictions prohibit the sale and possession of paraphernalia, typically enforced by civil penalties like our present statute § 44-53-391. Other ordinances merely regulate the sale of paraphernalia, rather than banning it outright. Finally, other statutes and ordinances, tracking the Model Drug Paraphernalia Act (Model Act) prohibit the sale and possession of drug paraphernalia and enforce it with criminal penalties, similar to the proposed amendments in Senate Bill 97. Suffice it to say that the recent decisions have been virtually unanimous in upholding these statutes against constitutional attacks, particularly in the wake of [Village of Hoffman Estates v. Flipside](#), 455 U.S. 489 (1982).

Senate Bill 97 is virtually identical to the Model Drug Paraphernalia Act, which has been upheld by every federal circuit court considering its constitutionality. [Garner v. White](#), 726 F. 2d 1274 (8th Cir. 1984) (Arkansas); [Camille Corp. v. Pharnes](#), 705 F. 2d 223 (7th Cir. 1983) (Illinois); [Stoianoff v. Montana](#), 695 F. 2d 1214 (9th Cir. 1983); [Weiler v. Carpenter](#), 695 F.2d 1348 (10th Cir. 1982); [Kansas Retail Trade Coop. v. Stephan](#), 695 F. 2d 1343 (10th Cir. 1982); [General Stores v. Bingaman](#), 695 F. 2d 502 (10th Cir. 1982); [Tobacco Accessories and Novelty Craftsmen v. Treen](#), 681 F. 2d 378 (5th Cir. 1982); [Levas and Levas v. Village of Antioch](#), 684 F. 2d 446 (7th Cir. 1982); [New England Accessories Trade Ass'n v. City of Nashua](#), 679 F. 2d 1 (1st Cir. 1982); [Florida Businessmen for Free Enterprise v. City of Hollywood](#), 673 F. 2d 1213 (11th Cir. 1982); [NORML v. Kloch](#), 691 F. 2d 495 (4th Cir. 1982) (per curiam); [Accord Mid-Atlantic Accessories Trade Ass'n v. State of Maryland](#), 500 F. Supp. 834 (D.Md. 1980); [Penn. Accessories Trade Ass'n v. Thornburgh](#), 565 F. Supp. 1568 (M.D. Pa. 1983); [The Town Tobacconist v. Kimmelman, Attorney General](#), 462 A. 2d 573 (N.J. 1983); [State v. Murphy](#), 674 P. 2d 1220 (Utah 1983).¹ The only circuit court decision holding Model Act legislation unconstitutional was twice vacated by the U. S. Supreme Court and its constitutionality was ultimately upheld on remand. [Record Revolution No. 6 v. City of Parma](#), 709 F. 2d 534 (6th Cir. 1983). The two circuit court decisions striking down non-Model Act legislation are clearly distinguishable from this Bill. See: [Record Head Corp. v. Sachen](#), 682 F. 2d 672 (7th Cir. 1982) (ordinance interpreted to lack a mens rea element and factors listed as useful in identifying drug instruments held to be of doubtful relevance); [Geiger v. City of Eagen](#), 618 F. 2d 26 (8th Cir. 1980).

***2** To date, the overwhelming majority of cases interpreting the Model Act have been pre-enforcement facial challenges. Only a few courts have attempted to interpret and apply the law in specific criminal proceedings. In each of those cases, however, the constitutionality of the statute was upheld. [State v. Murphy](#), *supra* (Utah); [State v. Dunn](#), 662 P. 2d 1286 (Kan. 1983); [Cochran v. Commonwealth](#), 450 A. 2d 756 (Pa. 1982).

In the criminal section of the amendments, the defendant is required to ‘know the drug related nature of the object’ before he can be found guilty of a crime. Therefore, persons cannot be prosecuted unless they ‘know’ that an object’s design renders it primarily useful with illegal drugs. A similar, but broader, ‘reason to know’ standard is contained in the Model Act. In [Flipside](#), 455 U.S. at 500, the U. S. Supreme Court held that an ordinance that made unlawful the sale of objects ‘designed or marketed for use with illegal cannabis’ satisfied fair notice even ‘under the test appropriate to . . . a criminal law.’ If the [Flipside](#) definition would satisfy fair notice under the stringent test applied to criminal statutes, then Bill 97 by virtue of its additional specificity in requiring the prosecution to specifically show the defendant knew the drug related nature of the object is constitutionally permissible. [Accord](#); [Garner v. White](#), 726 F. 2d 1274 (8th Cir. 1984) (‘know or have reason to know’); [State v. Murphy](#), 674 P. 2d 1224 (Utah 1983) (‘knowing’); [Camille Corp. v. Phares](#), 705 F. 2d 223 (7th Cir. 1983) (‘should reasonably know’). [State v. Dunn](#), 662 P. 2d 1286 (Kan. 1983).

CONCLUSION

It is the opinion of this Office that Senate Bill 97 concerning drug paraphernalia provides constitutionally sufficient notice of the criminal conduct prescribed by requiring a subjective intent on the part of the seller that the prohibited items constitute drug paraphernalia and are to be used as drug paraphernalia. In addition, the numerous items listed to be considered in determining whether an item is drug paraphernalia and the seller’s intent with regard to that item provide adequate guidelines to guard against arbitrary enforcement. For these reasons, it is our opinion that this Bill is facially constitutional.

Respectfully,

T. Travis Medlock
Attorney General

Footnotes

- 1 These decisions have upheld the constitutionality of the Model Act under these challenges: vagueness, lack of fair notice, discriminatory enforcement, First Amendment, overbreadth, Commerce Clause, equal protection, just compensation, due process, and cruel and unusual punishment.

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