

HARK & HARK

ATTORNEYS AT LAW

Newsletter

Spring 2005

At HARK & HARK we truly appreciate your business and sincerely thank you for choosing us as your attorneys. Richard Hark and William Brogley handle all aspects of criminal litigation. From pre-arrest cooperation to post-trial motions and appeals, we diligently, effectively, and professionally represent our clients.

We accept this responsibility and approach our cases very seriously. We keep updated with the changing Pennsylvania, New Jersey, and federal criminal laws. This newsletter will highlight a new Pennsylvania sentencing law that became effective March 1, 2005. The new law changes the mandatory minimum sentencing procedures a Pennsylvania state judge must follow after a defendant is found guilty of selling any illegal drug. The specific provision is section 9712.1 of the sentencing laws. The new rule reads:

(a) **Mandatory sentence.**--Any person who is convicted of a violation of section 13(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act, and when at the time of the offense¹ the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

¹ Drug Offense is defined as: the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

Now, if a person is convicted of Possession with the Intent to Deliver ("PWID")¹, the sentencing judge must determine if a gun was present during the commission of the PWID crime for which that defendant was found guilty. "Physical possession or control" is defined very broadly. A judge will analyze the

facts to see if, during an arrest or the execution of a search warrant, a gun was found "within reach" of any person charged, near a stash in the house from which drugs are being sold, or in a car that was stopped and searched. A defendant need not be the primary defendant in the case. Any person charged with conspiracy to sell by 1) acting as the look out, 2) helping on one or two deals, 3) answering a house door, or 4) being in the wrong place talking to the wrong person at the wrong time will be charged with the PWID offense and be exposed to the five year minimum.

The judge need only conclude "by a preponderance of the evidence," not beyond a reasonable doubt, that a gun was present during the commission of the crime by one of the charged defendants. Under section 9712.1(c), the defendant does not have to be found guilty of any gun charge. Possessing a gun is not an element of the PWID offense. Typically, these offenses include Violation of the Uniform Firearms Act, sections 6106 and 6108, or Possession of an Instrument of Crime, section 907 ("PIC").

Rather, at the sentencing hearing, "the court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a **preponderance of the evidence**, if this section is applicable." This standard is not beyond a reasonable doubt. The judge must decide whether defendant knew, or had reason to know, of the gun and should the defendant be severely punished because the judge does not like the facts of the case, this defendant, and/or the defendant's prior record of gun and/or drug convictions. If the judge concludes a gun was present, then the judge must sentence the defendant to a **minimum of five (5) years** in jail. This means if the defendant and/or accomplice possess a gun while committing a drug sale offense, both could spend at least five (5) years in prison.

Under section (e), if the judge does not impose the five year mandatory minimum and the

(continued on page 2)

¹ The PWID conviction is for any schedule I or II narcotic. This list includes, but is not limited to, crack, cocaine, heroin, PCP, oxycontin, zanax, and marijuana

