

**OPINION
71-475**

May 3, 1971 (OPINION)

Mr. John O. Garaas

State's Attorney

Cass County

RE: Statutes - Food and Drug Act - Does Not Include Narcotics

This is in response to your letter in which you state that on occasions the Police Department has arrested people in possession of drugs, including amphetamines, hallucinogenics and also marijuana. On arrest it has been found that these drugs, including marijuana, were carried in unmarked plastic bags.

You then make reference to section 19-02.1-02 and subsections 1 through 14. You further observe that any violation of the aforementioned subsections constitutes a misdemeanor whereas the possession of certain drugs under section 19-02.1-02(17) as well as the section pertaining to marijuana and the possession thereof (19-03-28.1) makes same a felony. You then ask:

1. Would it be possible to charge and convict persons in possession of narcotic drugs in circumstances described above under any of the first 14 subsections of section 19-02.1-02 of the North Dakota Century Code?
2. Is marijuana a drug within the meaning of subsection 4 of section 19-02.1-01? If so, under the above described circumstances, is it possible to charge and convict a person in possession of marijuana under any of the first subsections of section 19-02.1-02?

Subsections 1 through 14 of section 19-02.1-02 are primarily concerned with and prohibit adulteration, misbranding, false advertising, false labeling, altering, mutilation, obliterating, removing, forging, or counterfeiting, any label, stamp, tag or other identification to deceive or misrepresent. These provisions are primarily directed toward those who are authorized to sell or deliver drugs to persons entitled to have or use them. They are designed to regulate the food and drug business where the sale and possession under certain conditions are authorized. The possession, use and sale of marijuana is prohibited, except as authorized in chapter 19-03. But such chapter does not authorize it, and, as such, it is not a regulated item.

In instances where the Legislature has provided specific legislation on a subject matter, such legislation is to be applied to the situation. North Dakota has a specific statute on the possession, use and sale of marijuana (Section 19-03-28.1). The use, possession and sale of marijuana is not regulated. It is prohibited.

By the enactment of section 19-03-28.1 the Legislature has clearly

indicated that any violation thereof should be prosecuted under said section.

We are further of the opinion that the Legislature intended that any violations pertaining to the use, sale or possession of marijuana should be brought before the district court.

In this respect it is noted that the penalty may be a fine of \$2,000 and imprisonment in the county jail for not less than six months or by imprisonment in the State Penitentiary for not more than two years, or by both such fine and imprisonment. The penalty for the second offense is a fine of not more than \$2,000 or imprisonment in the State Penitentiary for not more than five years or both such fine and imprisonment. It also provides that a person over the age of 18 years who provides, sells, trades or furnishes or gives marijuana to a person under 18 years of age or who utilizes the services of a person under 18 years of age in accomplishing this is subject to imprisonment in the State Penitentiary for a period of not less than five years nor more than 10 years. Under the provisions of chapter 12-01-07 the violation may be considered a felony or a misdemeanor depending upon the judgment imposed by the court. It is thus observed that the violation and the charge is considered a felony, but the court, in imposing a sentence, may make it a misdemeanor by imposing a penalty other than imprisonment in the State Penitentiary.

The entire history of the statutes involved including the enactment of House Bill 1558 which amends many provisions of Chapter 19-02.1 and provides for new legislation in place of Section 19-03-28.1 is in conformity with the thoughts expressed herein.

We cannot accept the concept that the violation of statutes which prohibit the sale, use, or possession of certain drugs, including marijuana, should be treated as mere traffic violations.

It is therefore our opinion that the use, sale or possession or the engaging in the trafficking of marijuana is a violation of section 19-03-28.1 and must be prosecuted under its provisions. We do not believe that subsections 1 through 14 of section 19-02.1-02 have application to the unlawful sale, use, or possession of certain drugs, like amphetamines, hallucinogenics, including marijuana.

HELGI JOHANNESON

Attorney General