

No.

**In the
Supreme Court of the United States**

KARIM DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the First Circuit**

APPENDIX

J. HILARY BILLINGS, ESQ.
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January 9, 2016

DOCUMENTS

1. Decision of the First Circuit in *United States v. Davis*, 873 F.3d 343 (1st Cir. 2017)APP.P.A1
2. Ruling on the record at Sentencing Hearing, April 16, 2016 (selected pages) in *United States v. Davis* (D. Me. Docket Nos. 2:15-cr-186-GZS and 2:16-cr-26-GZS).APP.P.B5
3. United States Constitution, Amendment VAPP.P.C9
4. Federal Sentencing Guidelines, § 4B1.2APP.P.D10
5. New York Penal Law, §§ 110.00, 220.00, 220.31, and 220.39
.....APP.P.E11

873 F.3d 343
United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,
v.
Karim DAVIS, a/k/a/ Wise, Defendant, Appellant.

Nos. 16-2059, 16-2060
|
October 11, 2017

Synopsis

Background: Defendant pled guilty in the United States District Court for the District of Maine, George Z. Singal, J., to possession with intent to distribute heroin and cocaine base and conspiracy to possess with intent to distribute the same. Defendant appealed his sentence.

Holdings: The Court of Appeals, Lynch, Circuit Judge, held that:

[1] prior New York conviction of criminal sale of a controlled substance in the fifth degree qualified as a predicate “controlled substance offense”;

[2] prior New York conviction of attempted criminal sale of a controlled substance qualified as a predicate “controlled substance offense”; and

[3] any error in applying criminal-livelihood enhancement was harmless.

Affirmed.

West Headnotes (4)

[1] Criminal Law

⚡ Review De Novo

Whether a prior conviction qualifies as a predicate offense under the career offender Guideline is a question of law that Court of Appeals reviews de novo. U.S.S.G. § 4B1.1.

Cases that cite this headnote

[2] Sentencing and Punishment

⚡ Miscellaneous particular offenses

Defendant's prior New York conviction of criminal sale of a controlled substance in the fifth degree qualified as a predicate “controlled substance offense,” as required to support application of enhancement under career offender Guideline at sentencing for drug trafficking offenses. U.S.S.G. § 4B1.1(b); N.Y. Penal Law § 220.31.

Cases that cite this headnote

[3] Sentencing and Punishment

⚡ Miscellaneous particular offenses

Defendant's prior New York conviction of attempted criminal sale of a controlled substance qualified as a predicate “controlled substance offense,” as required to support application of enhancement under career offender Guideline at sentencing for drug trafficking offenses; although statutory language that “a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime” was broad, it was narrowly applied only to conduct that came “dangerously near” commission of the completed crime. U.S.S.G. § 4B1.1(b); N.Y. Penal Law § 110.

Cases that cite this headnote

[4] Criminal Law

⚡ Habitual and Second Offenders

Any error in applying criminal-livelihood enhancement in sentencing defendant who was also subject to the career offender enhancement was harmless, at sentencing for drug trafficking offenses, where, in light of application of career offender enhancement, the criminal-livelihood enhancement had no impact on defendant's final sentence. U.S.S.G. §§ 2D1.1(b)(15)(E), 4B1.1(b)(3), 4B1.3.

Cases that cite this headnote

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. George Z. Singal, U.S. District Judge]

Attorneys and Law Firms

*344 J. Hilary Billings, Assistant Federal Defender, on brief for appellant.

Renée M. Bunker, Assistant United States Attorney, and Richard W. Murphy, Acting United States Attorney, on brief for appellee.

Before Lynch, Stahl, and Thompson, Circuit Judges.

Opinion

LYNCH, Circuit Judge.

Karim Davis challenges his 151-month prison sentence on appeal, after he pled guilty in 2016 to drug crimes, arguing that the district court erred in (1) sentencing him as a career offender based on his prior drug convictions under N.Y. Penal Law §§ 110 and 220.31; and (2) applying the criminal-livelihood enhancement under U.S.S.G. § 2D1.1(b)(15)(E). There was no error, and we affirm his sentence.

I.

After indictment in 2015, Karim Davis pled guilty in August 2016 to two counts of drug trafficking: (1) possession with intent to distribute heroin and cocaine base and (2) conspiracy to possess with intent to distribute the same, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. The first count arose from crimes alleged in Davis's 2015 indictment, and the second, from an information the Government filed in 2016 based on Davis's alleged conspiracy to distribute drugs from April 2014 to June 2015.

The Presentence Investigation Report (PSR) found Davis responsible for 479 grams of heroin and 31.4 grams of cocaine base. Under the Sentencing Guidelines, this merited a base offense level of 26. The PSR recommended

a two-level enhancement because the offense was “part of a pattern of criminal conduct engaged in as a livelihood,” U.S.S.G. § 2D1.1(b)(15)(E); and an additional three-level increase for Davis's leadership role as a manager or a supervisor, *id.* § 3B1.1(b). As a result, Davis's adjusted offense level was 31.

However, the PSR indicated that the career-offender guideline under U.S.S.G. § 4B1.1(b) governed Davis's total offense level because he had “at least two prior felony convictions of ... a controlled substance offense.” The report identified his first predicate offense as a criminal sale of a controlled substance, in violation of N.Y. Penal Law § 220.31, and his second predicate offense as an attempted criminal sale of a controlled substance, in violation of N.Y. Penal Law § 110.

Section 4B1.1(b) of the Guidelines states that “if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply.” It also mandates that “[a] career offender's criminal history category in every case under this subsection shall be Category VI.”

For Davis's offense, the career-offender guideline prescribed an offense level of 32. *See* U.S.S.G. § 4B1.1(b)(3). Because this was higher than the offense level otherwise applicable—31—Davis received an enhancement for being a career offender. After a three-level reduction for acceptance of responsibility, the PSR recommended a total offense level of 29. Together with a criminal history category of VI, the resulting Guidelines Sentencing Range (GSR) was 151–188 months of imprisonment. *See* U.S.S.G. ch. 5, pt. A, sentencing table.

At the sentencing hearing, the district court adopted the PSR's recommendation over Davis's objections. The judge also found that Davis qualified for the criminal-livelihood enhancement, but emphasized that “the same guideline range would occur regardless of what [he found] on that *345 topic.” Ultimately, the district court sentenced Davis at the bottom of the GSR: 151 months of imprisonment.

II.

[1] On appeal, Davis argues that his two prior drug convictions under New York law do not constitute predicate offenses under the Guidelines career-offender provision, U.S.S.G. § 4B1.1. “Whether a prior conviction qualifies as a predicate offense under U.S.S.G. § 4B1.1 is a question of law that we review de novo.” United States v. Almenas, 553 F.3d 27, 31 (1st Cir. 2009).

Davis’s first argument, that his conviction under N.Y. Penal Law § 220.31 is not a “controlled substance offense” under U.S.S.G. § 4B1.1, is foreclosed by this Court’s precedent in United States v. Bryant, 571 F.3d 147 (1st Cir. 2009), and United States v. Melvin, 628 Fed.Appx. 774 (1st Cir. 2015).¹

[2] Under the career-offender provision, a “controlled substance offense” includes any offense under state law that “prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance,” or “the possession of a controlled substance” with “intent” to do the same. U.S.S.G. § 4B1.2(b). And under N.Y. Penal Law § 220.31, a person commits a criminal sale in the fifth degree “when he knowingly and unlawfully sells a controlled substance,” which includes “to sell, exchange, give or dispose of to another, or to offer or agree to do the same,” *id.* § 220.00 (emphasis added). We held in Bryant that a conviction for attempted criminal sale of a controlled substance under § 220.39, qualifies as a career offender predicate.² 571 F.3d at 157–58; *see also* Melvin, 628 Fed.Appx. at 776 n.3 & 777. The district court correctly concluded that Davis’s conviction under N.Y. Penal Law § 220.31 qualifies as a predicate for the career-offender enhancement.

[3] Davis’s second argument, that a conviction for attempted criminal sale of a controlled substance under N.Y. Penal Law § 110 does not qualify as a predicate offense, is also meritless. Section 110 provides that “[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.” Although the statutory language is broad, New York courts have narrowly applied it only to conduct that “came ‘dangerously near’ commission of the completed crime.” People v. Kassebaum, 95 N.Y.2d 611, 721 N.Y.S.2d 866, 744 N.E.2d 694, 698 (2001). This standard is more stringent than the Model Penal Code’s “substantial step” test.” People v. Acosta, 80 N.Y.2d 665, 593 N.Y.S.2d 978, 609 N.E.2d 518, 521 (1993).

Davis contends that allowing a conviction under N.Y. Penal Law § 110 to qualify as a predicate offense stretches the Guidelines’ definition of a “controlled substance offense” too far because it would sweep in attempted “offers-to-sell.” Specifically, he argues that “because the categorical analysis must focus upon the elements of the inchoate crime of attempt, and not the elements of the substantive criminal sale of a controlled substance,” an attempted offer-to-sell under § 110 comprises acts that fall outside the definition of attempted *346 possession with intent to distribute under § 4B1.2(b). Davis asserts that to be found guilty under § 110, the defendant need not even be in possession of the controlled substance or have the ability to proceed with the sale.

We disagree. Davis cites no authority for the proposition that under the categorical approach, we are restricted to examining elements of the inchoate crime, without reference to the corollary substantive crime. In fact, our precedent is to the contrary. *See, e.g., United States v. Whindleton*, 797 F.3d 105, 111 (1st Cir. 2015) (“[A]n offer to sell a controlled substance—like attempt to sell or a conspiracy to sell—is necessarily related to and connected with its ultimate goal, the distribution of controlled substances.” (emphasis added)).

“[I]t is well established under New York law” that conviction for offer to sell requires “a bona fide offer to sell—i.e., that defendant had both the intent and ability to proceed with the sale.” Bryant, 571 F.3d at 158 (quoting People v. Samuels, 99 N.Y.2d 20, 750 N.Y.S.2d 828, 780 N.E.2d 513, 515 (2002)). And in Bryant, we expressly held that conviction for attempted criminal sale of a controlled substance under § 220.39—which includes offers-to-sell—qualifies as a career-offender predicate. *See id.* at 157–58. We find no meaningful difference between a conviction for attempted sale of a controlled substance under that provision and one under N.Y. Penal Law § 110 for the purposes of the categorical analysis.

That ends the matter. The district court correctly sentenced Davis under the career-offender guideline.

III.

Davis also alleges that the district court erred in finding that he qualified for the criminal-livelihood enhancement under U.S.S.G. § 4B1.3. Not so.

[4] Because the district court correctly sentenced Davis as a career offender, the criminal-livelihood enhancement under U.S.S.G. § 2D1.1(b)(15)(E) had no impact on his final sentence. Irrespective of that enhancement, Davis is subject to the offense level set forth in § 4B1.1(b)(3)—32—and its corresponding GSR: 151–188 months of imprisonment. Any error, therefore, would have been harmless. See United States v. Gordon, 852 F.3d 126, 134 (1st Cir. 2017) (finding affirmance proper where error is harmless).

In any case, Davis's only rejoinder to the enhancement—that the district court did not consider the “costs

of the product sold or the amount of mark up the defendant, in fact, received”—is squarely foreclosed by our recent decision in Gordon. There, we expressly held that district courts could “rely exclusively on evidence of [the defendant's] gross income in applying § 4B1.3 app. n.2(A).” Id. at 131.

IV.

Accordingly, the district court's sentence is affirmed.

All Citations

873 F.3d 343

Footnotes

- 1 In fact, the defendant's own briefing concedes that “controlling First Circuit precedent is contrary to [this] assertion[].”
- 2 Although Bryant involved a different statutory provision, the wording of N.Y. Penal Law § 220.39 (at issue in Bryant) and that of § 220.31 (at issue here) are identical, with the exception that § 220.39 specifies a list of prohibited controlled substances. This listing has no impact on the categorical analysis.

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MAINE

3
4 UNITED STATES OF AMERICA, CRIMINAL ACTION
5 Plaintiff Docket Nos: 2:15-186-GZS
6 2:16-26-GZS

7 -versus-

8 KARIM DAVIS,
9 Defendant

10 Transcript of Proceedings

11
12 Pursuant to notice, the above-entitled matter came on
13 for **Sentencing** held before **THE HONORABLE GEORGE Z.**
14 **SINGAL**, United States District Court Judge, in the
15 United States District Court, Edward T. Gignoux
16 Courthouse, 156 Federal Street, Portland, Maine, on the
17 16th day of August 2016 at 2:05 p.m. as follows:

18 Appearances:

19 For the Government: Benjamin M. Block, Esquire
20 Assistant United States Attorney

21 For the Defendant: J. Hilary Billings, Esquire

22 Also Present: Melissa Elworthy, U.S. Probation

23 Lori D. Dunbar, RMR, CRR
24 Official Court Reporter

25 (Prepared from manual stenography and
computer aided transcription)

1 provisions of the guidelines but, rather, be treated
2 under the 2D1.1 substantive provisions in the
3 guidelines.

4 And I think I would rest on our representations
5 regarding role in the offense and drug quantity in our
6 memorandum, unless the Court has any other questions.

7 THE COURT: I don't, thank you. All right,
8 anything else from the Government?

9 MR. BLOCK: Your Honor, I -- with respect to
10 Exhibits 5 through 9, I believe those documents contain
11 sufficient evidence to support both the number of
12 participants, the leadership role Mr. Davis played, and
13 the quantity of drugs that was found in the presentence
14 report. Unless the Court has --

15 THE COURT: I have no additional questions.

16 MR. BLOCK: Okay. Thank you.

17 THE COURT: Thank you. All right, I'm going
18 to find that he's a career offender based on the
19 convictions set forth by the Government. I also find
20 based on the evidence presented today and the contents
21 of the presentence investigation report that the drug
22 amounts set forth in the presentence report was
23 correct. And also based on the evidence I find he is
24 subject to the enhancement of being a manager or
25 supervisor in a criminal activity involving five or

1 THE DEFENDANT: I just want to say that I sold
2 drugs. I'm only going to mention -- all that stuff
3 that they said in there, it's not me, man. That's all.

4 THE COURT: Thank you, Mr. Davis. Anything
5 else from the Government?

6 MR. BLOCK: No, Your Honor, thank you.

7 THE COURT: All right.

8 I've reviewed, as I indicated earlier, all of the
9 papers filed with me. I've also reviewed the contents
10 of the written presentence investigation report, which
11 I take into account. I also will take into account
12 everything I've heard from counsel, the evidence
13 presented today, and the allocution of this defendant.
14 I've ruled on all disputed issues.

15 At this time I make the following guideline
16 calculations: I find the facts as set forth in the
17 presentence report as revised, base offense level is
18 26. I do find that he is engaged in a pattern of
19 criminal conduct engaged as a livelihood, increasing it
20 to 28. I find he's a manager or supervisor of criminal
21 activity involving five or more participants in
22 arranging these drug trips and in the prostitution, but
23 I'm going to base it simply on the drugs. Three levels
24 are added. He also has two prior felony convictions of
25 controlled substance offenses, at least 18 years of age

1 at the time of the instant offense. He's a career
2 offender, making it 32. He's accepted responsibility,
3 reducing it to 29. He has a criminal history category
4 of VI, resulting in an advisory guideline range of 151
5 to 181. Supervised release is three years. He's
6 ineligible for probation. The fine range is \$15,000 to
7 \$2 million. Special assessment fee of \$200 is
8 mandatory.

9 Government have objections? Other than the issue
10 of livelihood.

11 MR. BLOCK: No, Your Honor.

12 THE COURT: Reserving all of your other
13 objections, do you have any additional objections,
14 Mr. Billings?

15 MR. BILLINGS: No, Your Honor.

16 THE COURT: All right. I've determined the
17 sentence I'm imposing is sufficient but not greater
18 than necessary to effectuate the goals of 18 USC
19 Section 3553(a). In setting the sentence I've
20 carefully considered the advisory guideline range.
21 I've taken into account all of the factors set forth in
22 Section 3553(a), most important, the nature and
23 circumstances of the offense, the history and
24 characteristics of this defendant, the seriousness of
25 the offense, the need for just punishment, and the need

United States Code Annotated
Constitution of the United States
Annotated

Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy;
Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text

Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

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 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Unconstitutional by U.S. v. Detwiler, D.Or., Oct. 05, 2004

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Four. Criminal History and Criminal Livelihood (Refs & Annos)
Part B. Career Offenders and Criminal Livelihood

USSG, § 4B1.2, 18 U.S.C.A.

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

Currentness

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1991; November 1, 1992; November 1, 1995; November 1, 1997; November 1, 2000; November 1, 2002; November 1, 2004; November 1, 2007; November 1, 2009; November 1, 2015; August 1, 2016.)

COMMENTARY

<Application Notes:>

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title G. Anticipatory Offenses
Article 110. Attempt (Refs & Annos)

McKinney's Penal Law § 110.00

§ 110.00 Attempt to commit a crime

Currentness

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

Credits

(L.1965, c. 1030.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARY

by William C. Donnino

The Crime

In addition to *People v. Naradzay*, 11 N.Y.3d 460, 872 N.Y.S.2d 373, 900 N.E.2d 924 (2008), cited in the Practice Commentary, *see also People v. Cano*, 12 N.Y.3d 876, 883 N.Y.S.2d 784, 911 N.E.2d 846 (2009)(where the Court sustained a conviction for attempted use of a child in a sexual performance, attempted promoting a sexual performance by a child, and attempted criminal sexual act in the third degree because the defendant came “dangerously near” commission of those crimes “when he arrived at the location of what he thought would be a sexual rendezvous with an underage boy”).

Excluded Conduct

(2) In holding that a person could attempt to commit stalking in the third degree [Penal Law § 120.50(3)], the Court of Appeals analogized to those statutes which require strict liability because portions of the stalking statute “penalize behavior that is likely to cause harm, and do not require proof of actual harm to establish guilt. While the conduct penalized is defined as engaging in ‘a course of conduct ... likely to cause’ certain consequences, there is nothing impossible about attempting to engage in such a course of conduct.” *People v. Aponte*, 16 N.Y.3d 106, 109, 918 N.Y.S.2d 766, 944 N.E.2d 204 (2011).

PRACTICE COMMENTARY

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title M. Offenses Against Public Health and Morals
Article 220. Controlled Substances Offenses (Refs & Annos)

McKinney's Penal Law § 220.00

§ 220.00 Controlled substances; definitions

Effective: February 23, 2013
Currentness

1. "Sell" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.
2. "Unlawfully" means in violation of article thirty-three of the public health law.
3. "Ounce" means an avoirdupois ounce as applied to solids or semisolids, and a fluid ounce as applied to liquids.
4. "Pound" means an avoirdupois pound.
5. "Controlled substance" means any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marihuana, but including concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of such law.
6. "Marihuana" means "marihuana" or "concentrated cannabis" as those terms are defined in section thirty-three hundred two of the public health law.
7. "Narcotic drug" means any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone.
8. "Narcotic preparation" means any controlled substance listed in schedule II(b-1), III(d) or III(e).
9. "Hallucinogen" means any controlled substance listed in schedule I(d) (5), (18), (19), (20), (21) and (22).
10. "Hallucinogenic substance" means any controlled substance listed in schedule I(d) other than concentrated cannabis, lysergic acid diethylamide, or an hallucinogen.
11. "Stimulant" means any controlled substance listed in schedule I(f), II(d).

WESTLAW

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
§ 220.31 Criminal sale of a controlled substance in the fifth degree
McKinney's Consolidated Laws of New York Annotated Penal Law (Approx. 2 pages)
THE NY OFFENSES AGAINST PUBLIC HEALTH AND SAFETY
Article 220. Controlled Substances Offenses (Refs & Annos)

McKinney's Penal Law § 220.31

§ 220.31 Criminal sale of a controlled substance in the fifth degree

Currentness

A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance.

Criminal sale of a controlled substance in the fifth degree is a class D felony.

Credits

(Added L.1973, c. 276, § 19. Amended L.1979, c. 410, § 16.)

Editors' Notes

PRACTICE COMMENTARY

by William C. Donnino

See Practice Commentary at the end of Penal Law § 220.00.

Notes of Decisions (50)

McKinney's Penal Law § 220.31, NY PENAL § 220.31
Current through L.2016, chapters 1 to 519.

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NOTES OF DECISIONS (50)

- Knowledge or intent
- Possession
- Sellers
- Agents of sellers
- Purchasers
- Agents of purchasers
- Offer to sell
- Facilitation of sale
- Weight
- Profit from sale
- Guilty pleas
- Identity of substance
- Sufficiency of evidence
- Sentence
- Review

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title M. Offenses Against Public Health and Morals
Article 220. Controlled Substances Offenses (Refs & Annos)

McKinney's Penal Law § 220.39

§ 220.39 Criminal sale of a controlled substance in the third degree

Currentness

A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:

1. a narcotic drug; or
2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or
3. a stimulant and the stimulant weighs one gram or more; or
4. lysergic acid diethylamide and the lysergic acid diethylamide weighs one milligram or more; or
5. a hallucinogen and the hallucinogen weighs twenty-five milligrams or more; or
6. a hallucinogenic substance and the hallucinogenic substance weighs one gram or more; or
7. one or more preparations, compounds, mixtures or substances containing methamphetamine, its salts, isomers or salts of isomers and the preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more; or
8. phencyclidine and the phencyclidine weighs two hundred fifty milligrams or more; or
9. a narcotic preparation to a person less than twenty-one years old.

Criminal sale of a controlled substance in the third degree is a class B felony.