



Drug Offenses and Sentencing

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Relevant Terms



ORS 475.005 (6) (in pertinent part):

“Controlled substance” means a drug or its immediate precursor classified in Schedules I through V under the federal Controlled Substances Act, 21 U.S.C. 811 to 812, as modified under ORS 475.035.

Excluded from definition of **“controlled substance”**:

- Marijuana plants, flowers, seeds, resins, compounds
- Psilocybin or psilocin, when used in accordance with ORS 475A.210 to 475A.722



Relevant Terms



Scheduling: based on factors such as evidence of pharmacological effect (medical use), potential for abuse, history of abuse, significance of abuse, risk to public health

Scheduling affects offense level and crime category for sentencing



Relevant Terms



Schedule I: no currently accepted medical use, high potential for abuse

- Examples: heroin, lysergic acid diethylamide (LSD), MDMA, marijuana (federally only, see next slide)

Schedule II: medical use but still high potential for abuse

- Examples: cocaine, methadone, oxycodone, fentanyl, methamphetamine (federally, but see next slide)



Relevant Terms



For the most part, Oregon scheduling follows federal scheduling, but some notable exceptions:

- Methamphetamine is Schedule I under Oregon law (ORS 475.065)
- Marijuana is not scheduled under state law



Relevant Terms



“**Possess**” or “**possession**” is not defined in ORS chapter 475; courts have looked at Criminal Code definition (ORS 161.015) for meaning: actual physical control (“actual possession”), or knowing exercise control or having the right to control (“constructive possession”)



Relevant Terms



ORS 475.005 (8) (in pertinent part):

“Deliver” or **“delivery”** means the actual, constructive or attempted transfer, other than by administering or dispensing, from one person to another of a controlled substance



Relevant Terms



ORS 475.005 (15) (in pertinent part):

“Manufacture” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance...and includes any packaging or repackaging of the substance or labeling or relabeling of its container



Relevant Terms



- **“Substantial quantity”** (SQ) – ORS 475.900 (1)(a) & (2)(b)
 - Possession, manufacture or delivery of over a specified amount of a controlled substance
- **“Commercial drug offense”** (CDO) - ORS 475.900 (1)(b)
 - Possession, manufacture or delivery accompanied by 3 or more factors, including possession of \$300 or more in cash, unlawful possession of a firearm, possession of packaging materials, drug transaction records or stolen property, modification of structures
- These affect offense level and crime category for sentencing purposes



Drug Offenses



Two statutory structures:

Individually-described drug prohibitions

- ORS 475.854 unlawful possession of heroin
- ORS 475.876 unlawful manufacture of cocaine
- ORS 475.890 unlawful delivery of methamphetamine

Schedule-based “catch-all” prohibitions

- ORS 475.752 (1)(b) unlawful manufacture or delivery of controlled substance in Schedule I
- ORS 475.752 (3)(b) unlawful possession of controlled substance in Schedule II



Drug Offenses



Offense levels: **Class E violations**

- Possession of less than 40 pills, tablets, capsules or user units of hydrocodone, methadone or oxycodone
- Possession of less than 1 gram of heroin
- Possession of less than 1 gram, or less than 5 user units, of fentanyl
- Possession of less than 1 gram, or less than 5 pills, tablets or capsules, of MDMA
- Possession of less than 2 grams of cocaine or methamphetamine
- Possession of any amount of another controlled substance in Schedule I, II, III or IV (other than a commercial drug offense (CDO))



Drug Offenses



Offense levels continued: **Class A misdemeanors**

- Possession of 1 gram or more, but less than 5 grams, or 5 or more but less than 25 user units, of fentanyl
- Possession of 40 or more, but less than 200, user units of LSD
- Possession of 12 or more, but less than 60, grams of psilocybin or psilocin
- Possession of 40 or more pills, tablets, capsules or user units of hydrocodone, methadone or oxycodone (or if CDO possession)



Drug Offenses



Offense levels continued: **Class A misdemeanors**

- Possession of 1 gram or more, but less than 5 grams, of heroin
- Possession of 1 gram or more, but less than 5 grams, or 5 or more but less than 25 pills, tablets or capsules, of MDMA
- Possession of 2 grams or more, but less than 10 grams, of cocaine
- Possession of 2 grams or more, but less than 10 grams, of methamphetamine



Drug Offenses



Offense levels continued: **Class C felonies**

- Delivery or manufacture of hydrocodone
- Possession of methadone or oxycodone if CDO
- Possession of cocaine or methamphetamine if CDO or SQ
- Possession of Schedule II controlled substance if CDO or SQ
- Manufacture or delivery of Schedule III controlled substance



Drug Offenses



Offense levels continued: **Class B felonies**

- Manufacture or delivery of hydrocodone within 1,000 feet of a school, or delivery to minor
- Manufacture or delivery of methadone, oxycodone, cocaine or methamphetamine
- Possession of heroin or MDMA if CDO or SQ
- Possession of Schedule I controlled substance if CDO or SQ
- Manufacture or delivery of Schedule II controlled substance



Drug Offenses



Offense levels continued: **Class A felonies**

- Manufacture or delivery of methadone, oxycodone, cocaine or methamphetamine within 1,000 feet of a school, or delivery to minor
- Manufacture or delivery of heroin or MDMA (including within 1,000 feet of school)
- Manufacture or delivery of Schedule I controlled substance
- Manufacture or delivery of Schedule I, II or III controlled substance within 1,000 feet of school (ORS 475.904)
- Manufacture or delivery of Schedule I or II CS to minor



Sentencing



Penalties: **Class E violations**

- Maximum/presumptive fine = \$100; minimum fine = \$45
- In lieu of fine, person may within 45 days of citation complete screening or other treatment contact; upon verification, court must dismiss citation (ORS 153.062)
- Court can enter default judgment
- If person fails to appear, court may not issue show cause order (ORS 153.064) and person may not be prosecuted for failure to appear (ORS 153.992)



Sentencing



Penalties: **Misdemeanors**

- Statutory maximum sentences (ORS 161.615 and 161.635):
 - Class A: 364 days (jail), \$6,250 fine
 - Class B: 6 months, \$2,500 fine
 - Class C: 30 days, \$1,250 fine



Sentencing



Penalties: **Felonies**

- Statutory maximum sentences (ORS 161.605 and 161.625):
 - Class A: 20 years (imprisonment), \$500,000 fine
 - Class B: 10 years, \$375,000 fine
 - Class C: 5 years, \$125,000 fine

BUT...



Sentencing



Felony Sentencing Guidelines

- Enacted by Oregon Criminal Justice Commission rule
- Approved by legislature

| Crime Seriousness | A | B | C | D | E | F | G | H | I | Prob Term | Max Depart | PPS |
|-------------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|-----------|------------|---------|
| 11 | 225-269 | 196-224 | 178-194 | 164-177 | 149-163 | 135-148 | 129-134 | 122-128 | 120-121 | 5 Years | | 3 Years |
| 10 | 121-130 | 116-120 | 111-115 | 91-110 | 81-90 | 71-80 | 66-70 | 61-65 | 58-60 | | | |
| 9 | 66-72 | 61-65 | 56-60 | 51-55 | 46-50 | 41-45 | 39-40 | 37-38 | 34-36 | | | |
| 8 | 41-45 | 35-40 | 29-34 | 27-28 | 25-26 | 23-24 | 21-22 | 19-20 | 16-18 | 3 Years | 18 Mos. | 2 Years |
| 7 | 31-36 | 25-30 | 21-24 | 19-20 | 16-18 | 180-90 | 180-90 | 180-90 | 180-90 | | | |
| 6 | 25-30 | 19-24 | 15-18 | 13-14 | 10-12 | 180-90 | 180-90 | 180-90 | 180-90 | 2 Years | 12 Mos. | 1 Year |
| 5 | 15-16 | 13-14 | 11-12 | 9-10 | 6-8 | 180-90 | 120-60 | 120-60 | 120-60 | | | |
| 4 | 10-11 | 8-9 | 120-60 | 120-60 | 120-60 | 120-60 | 120-60 | 120-60 | 120-60 | 1 ½ Years | 6 Mos. | 1 Year |
| 3 | 120-60 | 120-60 | 120-60 | 120-60 | 120-60 | 120-60 | 90-30 | 90-30 | 90-30 | | | |
| 2 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 1 ½ Years | 6 Mos. | 1 Year |
| 1 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | 90-30 | | | |



Sentencing



Felony sentencing guidelines grid

- Letters at top = criminal history scale
- Numbers on left = crime seriousness/crime category
- Yellow = presumptive imprisonment; numbers are months of incarceration
- Green, blue and pink = presumptive probation; top number is total sanction units, bottom number is maximum sanction units that may be imposed as jail term



Sentencing



Felony sentencing guideline crime categories

- Crime category 10 (ORS 475.925 and 475.930) (SSSQ)
 - Delivery or manufacture of 500 grams or more of cocaine or methamphetamine
 - Delivery or manufacture of 100 grams or more of heroin, fentanyl or ecstasy
- Crime category 9 (ORS 475.907 and 475.930) (SSQ)
 - Delivery of cocaine, methamphetamine, heroin or ecstasy to minor
 - Delivery or manufacture of 100 grams or more of cocaine or methamphetamine
 - Delivery or manufacture of 50 grams or more of heroin, fentanyl or ecstasy



Sentencing



Felony sentencing guideline crime categories (continued)

- Crime category 8
 - Delivery or manufacture of substantial quantities of controlled substance
 - Possession, delivery or manufacture constituting commercial drug offense
- Crime category 6
 - Delivery of heroin, cocaine, fentanyl, methamphetamine or MDMA for consideration
 - Possession of substantial quantities of a controlled substance
- Crime category 4: other delivery or manufacture offenses



Sentencing



Other options:

- Conditional discharge (ORS 475.245): similar to pre-plea diversion; applies to many possession offenses; requires consent of district attorney (DA)
- Pre-plea probation (ORS 137.532): applies to most misdemeanors and Class C felonies; requires acceptance into specialty court and consent of DA and court
- Probation without entry of judgment (ORS 137.533): applies to most misdemeanors, requires motion from DA



Hubbell/Boyd



Returning to that definition of “delivery” in ORS 475.005:

“the actual, constructive or attempted transfer, other than by administering or dispensing, from one person to another of a controlled substance”

What does “attempted transfer” mean?



Hubbell/Boyd



In 1988, the Court of Appeals in *State v. Boyd* held that “attempt” has the same meaning as for an attempted crime in the Criminal Code:

Attempt = a person “intentionally engages in conduct which constitutes a substantial step towards commission of the crime.” (ORS 161.405)

Possessing controlled substances with the intent to deliver = a substantial step towards transferring the controlled substance

Possession with intent to deliver = attempted transfer = delivery



Hubbell/Boyd



However, in 2021, the Court of Appeals in *State v. Hubbell* overturned *Boyd*

- **Issue of legislative intent**
- ORS chapter 475 is outside the Criminal Code and did not import the meaning of “attempt” from ORS 161.405
- “Attempted transfer” means “an unsuccessful effort to cause the controlled substances to pass from one person to another.”



Hubbell/Boyd



2023: *Hubbell* affirmed by the Oregon Supreme Court:

Oregon declined to adopt “possession with intent to manufacture or deliver” language from UCSA

“Attempted transfer” = “the person has made some effort to undertake the act...of causing controlled substances to pass from one person to another.”

“[Attempted transfer] is NOT established by evidence that a person possessed a large quantity of a controlled substance and had a general intent to transfer it at an undetermined future time.”



Hubbell/Boyd



Remaining questions after these decisions:

- What exactly is an attempted transfer?
 - We know it's something more than possession with intent
 - “Some additional evidence that the person made an effort to engage in the act of transferring is required”
- What actions are sufficient to constitute an attempted transfer?



Questions?



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