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Opinion No. 11-28

Applicability of Tennessee Law to Synthetic Forms of LSD and Cocaine

QUESTIONS

Under Tennessee's current drug statutes, LSD is designated as a Schedule I controlled substance and cocaine is designated as a Schedule II controlled substance. Tenn. Code Ann. § 39-17-406(d)(15) (2010); Tenn. Code Ann. § 39-17-408(b)(4) (2010). Possession, manufacture, distribution, and sale of controlled substances are prohibited by Tenn. Code Ann. § 39-17-417(a) (2010). Recently, products such as "White Lightning" have become available that mimic the effects of cocaine, LSD, and other controlled substances, but such products are not marketed as controlled substances. Based on these new products, you have raised the following questions:

1. Does Tennessee Code Annotated § 39-17-438, as amended by Chapter 922 of the Public Acts of 2010, prohibit the production, manufacture, distribution, or possession of synthetic forms of the drugs LSD and cocaine, including, but not limited to, the product known as "White Lightning"?

2. If not, does Tennessee Code Annotated § 39-17-423 or any other provision of Tennessee Code Annotated prohibit the production, manufacture, distribution, or possession of synthetic forms of the drugs LSD and cocaine, including, but not limited to, the product known as "White Lightning"?

OPINION

1. No. Tennessee Code Annotated § 39-17-438 relates specifically to the active chemical ingredient in salvia divinorum and synthetic cannabinoids. It does not reach synthetic forms of LSD and cocaine, nor does it reach "White Lightning," unless such products contain the active chemical ingredient in salvia divinorum or synthetic cannabinoids.

2. Yes, under some circumstances. Tennessee law prohibits the production, manufacture, distribution, or possession of synthetic forms of cocaine. Tennessee law also proscribes the production, manufacture, distribution, or possession of any product containing any quantity of lysergic acid diethylamide or that contains any of its salts, isomers, and salts of isomers. Tenn. Code Ann. § 39-17-423 further prohibits the sale, delivery, distribution, or manufacture for sale or exchange of any substance represented to be a controlled substance and that is substantially similar in color, shape, size, and markings or lack thereof. A product, however, that neither contains any controlled substance nor represents itself to be a controlled

substance would not be prohibited. From the facts available, "White Lightning" appears to fall into this latter category.

ANALYSIS

1. Tennessee Code Annotated § 39-17-438 deals specifically with the production, manufacture, distribution, or possession of the active chemical ingredient in the hallucinogenic plant salvia divinorum or the synthetic cannabinoids JWH-018, JWH-073, HU-210 and HU-211. If a product purporting to be synthetic cocaine or synthetic LSD does not contain any of these chemical ingredients, it would not be proscribed under Tenn. Code Ann. § 39-17-438. It might, however, be proscribed under other sections of the Tennessee Code limiting or prohibiting the production, manufacture, distribution, or possession of controlled chemical substances, depending on its active chemical ingredients. As discussed in greater depth below, "White Lightning" does not appear to have any of the substances listed in Tenn. Code Ann. § 39-17-438 as its active chemical ingredient. Therefore, Tenn. Code Ann. § 39-17-438 would not prohibit its production, manufacture, or distribution.

2. Tenn. Code Ann. § 39-17-406 sets forth lists of substances classified as Schedule I controlled substances.[1] These lists include LSD and other hallucinogenic substances, as well as any material, compound mixture, or preparation which contains any quantity of the listed hallucinogenic substances, or which contains any salts, isomers, and salts of isomers of these substances. Thus, a product purporting to be synthetic LSD[2] which contained any quantity of LSD or any salt, isomer, or salt of isomer of LSD or any of the other Schedule I hallucinogens would be proscribed under Tennessee law.

Tenn. Code Ann. § 39-17-408 sets forth lists of substances classified as Schedule II controlled substances. These lists include cocaine, derivatives of cocaine, and substances that are chemically equivalent to cocaine, including synthetic cocaine. *See State v. Greene*, 1990 WL 192007, at *3 (Tenn. Crim. App. Dec. 5, 1990) ("a careful reading of T.C.A. § 39-6-408(a)(4) [now Tenn. Code Ann. § 39-17-408(b)(4)] reveals that synthetic cocaine is also prohibited"); *see also* Tenn. Code Ann. § 39-17-408(b)(4) (Schedule II includes substances produced "by means of chemical synthesis").

Even if a product purporting to be synthetic LSD or synthetic cocaine were found not to contain a controlled substance, it may still qualify as a counterfeit controlled substance under Tenn. Code Ann. § 39-17-423. This provision prohibits the sale, delivery, distribution, or manufacture for sale or exchange of any substance represented to be a controlled substance, as classified in Tenn. Code Ann. §§ 39-17-406 through 39-17-412, and that is substantially similar in color, shape, size, and markings or lack thereof.

The opinion request presents the specific question of whether Tennessee law, in its present form, reaches "White Lightning." "White Lightning" does not appear to be a synthetic

[1] Federal law contains similar provisions and substance lists. 21 U.S.C. §§ 812-813.

[2] We note that LSD is itself a synthetic hallucinogen. *See* http://www.deadiversion.usdoj.gov/drugs_concern/lsd/lsd.htm.

form of LSD or cocaine. "White Lightning" is one of a number of names under which methylenedioxypyrovalerone (MDPV) is sold. MDPV is sold as bath salts, insect repellent, or plant fertilizer and labeled "not for human consumption." In spite of this warning, it appears that users are snorting or otherwise ingesting the MDPV. MDPV causes increased blood pressure, increased heart rate, agitation, hallucinations, extreme paranoia, and delusions. Press Release, American Association of Poison Control Centers, U.S. Poison Centers Raise Alarm About Toxic Substance Marketed as Bath Salts (Dec. 21, 2010), *available at* http://www.aapcc.org/dnn/NewsandEvents/NewsMediaResources.aspx. MDPV is not currently a controlled substance under Tennessee law or federal law.[3]

If "White Lightning" were chemically analyzed and found not to contain any controlled substance, as appears to be the case[4], the next question would be whether "White Lightning" falls under the classification of a counterfeit controlled substance under Tenn. Code Ann. § 39-17-423. From the facts available, it probably would not.

Under Tenn. Code Ann. § 39-17-423, a product purporting to be a controlled substance must also substantially imitate or be substantially similar in "color, shape, size, and markings or lack thereof, to a Schedule I, II, III or IV controlled substance." "White Lightning," which is a white powder, bears some substantial physical similarity to cocaine. Caroline Moses, *Legal Versions of Cocaine, LSD, Ecstasy for Sale in Tenn.*, Oct. 7, 2010, http://www.wsmv.com/print/25319707/detail.html. However, it is sold openly in gas stations and other retail outlets, in factory packaging, labeled as not for human consumption and purporting to be an insect repellant or bath salts. *Id*. Tenn. Code Ann. § 39-17-423 specifically excludes from its purview any substance that may be legally purchased at a drug or grocery store without a prescription, so long as the substance is not represented to be a controlled substance.

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[3] At the time of this writing, the Tennessee Senate and House are considering bills that would add MDPV to the list of Schedule I substances. *See* SB 0329, 107th Gen. Assem., Reg. Sess. (Tenn. 2011); HB 0304, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

[4] It is our understanding that this testing may have already occurred with "White Lightning," revealing that it did not contain any controlled substances. Caroline Moses, *Legal Versions of Cocaine, LSD, Ecstasy for Sale in Tenn.*, Oct. 7, 2010, http://www.wsmv.com/print/25319707/detail.html.

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