State v. Pedro, 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971) (Scott McCarty, Albuquerque, David H. Getches, Richard B. Collins, Jr., Native American Rights Fund, Boulder, Colo., for defendant-appellant).

83 N.M. 212

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Dan PEDRO, Defendant-Appellant.

No. 660.

Court of Appeals of New Mexico.
Oct. 15, 1971.

By a judgment of the District Court, Chaves County, George L. Reese, Jr., J., the defendant was convicted of the crime of possession of anhalonium and he appealed. The Court of Appeals, Wood, C. J., held that in absence of either evidence or inference in State's case showing that defendant intentionally possessed anhalonium conviction for possession thereof was reversed.

Reversed.

1. Criminal Law ⇐21

Intent is required unless it clearly appears that legislature meant to eliminate intent as a part of the offense.

2. Poisons ⇐4

In absence of a clear showing that legislature intended to make unintentional possession of anhalonium, commonly known as peyote or pellote, a crime, an intent to possess the anhalonium was required to sustain a conviction under statute making it unlawful to possess the substance. 1953 Comp. § 54–5–16.

3. Poisons ⇐9

In absence of either evidence or inference in State's case showing that defendant intentionally possessed anhalonium, conviction for possession thereof was reversed. 1953 Comp. § 54–5–16.

Scott McCarty, Albuquerque, David H. Getches, Richard B. Collins, Jr., Native American Rights Fund, Boulder, Colo., for defendant-appellant.

David L. Norvell, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of violating § 54–5–16, N.M.S.A.1953 (Repl.Vol. 8, pt. 2), defendant appeals. The portion of § 54–5–16, supra, involved in this appeal makes it unlawful "* * * to possess, * * * anhalonium, commonly known as peyote or pellote; * * *" We need consider only one of the issues raised by defendant; that issue, which is dispositive, is whether the statute requires that possession of anhalonium be intentional.

[1, 2] Section 54–5–16, supra, does not state that the possession must have been intentional. In this situation, judicial construction of the statute is required. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941). "Intent" is required unless it clearly appears that the Legislature meant to eliminate "intent" as part of the offense. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969); State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct.App.1969). It does not clearly appear from the statute that the Legislature intended to make unintentional possession of anhalonium a crime. Accordingly, an intent to possess the anhalonium is required. The same result has been reached in other cases where the statute which prohibited possession did not refer to "intent." As to narcotic drugs, see State v. Giddings, 67 N.M. 87, 352 P.2d 1003 (1960), State v. Mosier and Mordecai, (Ct. App.), 83 N.M. 208, 213, 490 P.2d 466, 471, State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970); as to mercury, see State v. Davis, supra; as to burglary tools, compare State v. Lawson, 59 N.M. 482, 286 P. 2d 1076 (1955).

[3] In this case, the trial court ruled that "intent" was not an element of the offense of possession of anhalonium. Being of this view, which was erroneous, the trial court did not determine whether there was an intentional possession. We do not remand the case for such a determination because there is no evidence of intentional possession. Neither evidence nor inference in the State's case shows defendant inten-

tionally possessed anhalonium. The defense evidence is to the effect that defendant, an Arapahoe Indian, was treated for an illness by White Oak, an Arapahoe "Indian Doctor;" that after the treatment, defendant was given "medicine" to carry on his person as a "protection;" that defendant did not know the composition of this medicine. This medicine is the substance on which the prosecution is based.

There being no evidence of intentional possession, the conviction is reversed. The cause is remanded with instructions to set aside the judgment and sentence and to dismiss the charge against defendant.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

83 N.M. 213

STATE of New Mexico, Plaintiff-Appellee,

v.

William Byron MOSIER and James W. Mordecai, Defendants-Appellants.

No. 661.

Court of Appeals of New Mexico.

Sept. 17, 1971.

Rehearing Denied Oct. 12, 1971.

Defendants were convicted in the District Court, Lea County, George L. Reese, Jr., D. J., of possession of more than one ounce of marijuana and one defendant was also convicted of possession of LSD, and they appealed. The Court of Appeals, Hendley, J., held that under evidence that defendants helped unload marijuana after arriving in New Mexico and helped carry it to where it was stored, that defendants "manicured" some of the marijuana and that one of them rolled partially smoked marijuana cigarette, defendants were in possession of marijuana in New Mexico so as to support conviction for violation of New Mexico law and New Mexico trial court did not lack jurisdiction to try defendants.

Affirmed.

1. Criminal Law ⇐97

Under evidence that defendants helped unload marijuana after arriving in New Mexico and helped carry it to where it was stored, that defendants "manicured" some of the marijuana and that one of them rolled partially smoked marijuana cigarette, defendants were in possession of marijuana in New Mexico so as to support conviction for violation of New Mexico law and New Mexico trial court did not lack jurisdiction to try defendants.

2. Criminal Law ⇐97

Under evidence that one defendant had possession of LSD tablets in Texas, brought them to New Mexico and stored tablets in New Mexico, such defendant had possession of LSD in New Mexico so as to support conviction for violation of New Mexico laws and New Mexico trial court did not lack jurisdiction to try defendant.

3. Criminal Law ⇐121

Where witnesses testifying at lengthy hearing on motion for change of venue stated that they had no reason to believe that defendants would not receive fair trial in Lea County and although some witnesses remembered reading about drug-related items in newspapers, they did not recall details or names of the defendants, denial of motion for change of venue was not an abuse of discretion.

4. Criminal Law ⇐145

Defendants who made only oral requests for findings without submitting any and did not request specific findings of trial court which denied defense motion for change of venue without findings waived absence of findings.

5. Criminal Law ⇐857(1)

Jury's deliberation of only ten minutes before reaching verdict did not, in and of itself, constitute jury misconduct on defense theory that such time was insuffi-