

To: New Jersey Law Revision Commission
From: Abhishek Bose
Re: Overdose Prevention Act
Date: April 8, 2019

MEMORANDUM

Executive Summary

The Overdose Prevention Act (OPA) (N.J.S. 24:6J-1 et seq.) confers immunity upon qualifying persons from being arrested, charged, prosecuted, or convicted for certain enumerated possessory drug offenses. The immunity covers persons who act in good faith to request medical assistance for individuals perceived to be experiencing a drug overdose (N.J.S. 2C:35-30) and persons who themselves experience a drug overdose and seek immediate medical assistance or for whom medical assistance is sought (N.J.S. 2C:35-31).

Although the Legislature crafted the definition of a drug overdose within the OPA carefully, a published opinion by New Jersey's Appellate Division appears to suggest that further clarification could result in a more easily applied statute.

Statute

The Overdose Prevention Act, found at N.J.S. 24:6J-1 et seq., was enacted at the same time as N.J.S. 2C:35-30 and N.J.S. 2C:35-31 to form a comprehensive statutory scheme conferring immunity on certain individuals who seek medical assistance for themselves or others experiencing the effects of a drug overdose, and on those for whom the assistance is sought. By way of example, N.J.S. 2C:35-30 provides, in pertinent part, that:

a. A person who, in good faith, seeks medical assistance for someone experiencing a drug overdose shall not be:

(1) arrested, charged, prosecuted, or convicted for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of, a controlled dangerous substance or controlled substance analog pursuant to subsection a., b., or c. of N.J.S.2C:35-10;

(2) arrested, charged, prosecuted, or convicted for inhaling the fumes of or possessing any toxic chemical pursuant to subsection b. of section 7 of P. L.1999, c. 90 (C.2C:35-10.4);

(3) arrested, charged, prosecuted, or convicted for using, obtaining, attempting to obtain, or possessing any prescription legend drug or stramonium preparation pursuant to subsection b., d., or e. of section 8 of P.L.1999, c. 90 (C.2C:35-10.5);

(4) arrested, charged, prosecuted, or convicted for acquiring or obtaining possession of a controlled dangerous substance or controlled substance analog by fraud pursuant to N.J.S.2C:35-13;

(5) arrested, charged, prosecuted, or convicted for unlawfully possessing a controlled dangerous substance that was lawfully prescribed or dispensed pursuant to P.L.1998, c. 90 (C.2C:35-24);

(6) arrested, charged, prosecuted, or convicted for using or possessing with intent to use drug paraphernalia pursuant to N.J.S.2C:36-2 or for having under his control or possessing a hypodermic syringe, hypodermic needle, or any other instrument adapted for the use of a controlled dangerous substance or a controlled substance analog pursuant to subsection a. of N.J.S.2C:36-6;

(7) subject to revocation of parole or probation based only upon a violation of offenses described in subsection a. (1) through (6) of this section, provided, however, this circumstance may be considered in establishing or modifying the conditions of parole or probation supervision.

b. The provisions of subsection a. of this section shall only apply if:

(1) the person seeks medical assistance for another person who is experiencing a drug overdose and is in need of medical assistance; and

(2) the evidence for an arrest, charge, prosecution, conviction, or revocation was obtained as a result of the seeking of medical assistance...¹

Background

The trial court in the case of *State v. W.S.B.*² applied the Overdose Prevention Act's immunity in granting a defendant's motion to dismiss an indictment charging him with third-degree possession of a controlled dangerous substance.³ The Court explained that a police officer responded to a report of a person, who was allegedly described by an unidentified third party as "intoxicated" in the waiting area of a train station.⁴ The officer found a person, later identified as the defendant (W.S.B), lying on the floor of the station, the officer then observed the defendant nodding in and out of consciousness when asked questions, being unaware of his location, and displaying "pinpoint" eyes.⁵ Recognizing these symptoms were indicative of the effects of heroin use, the officer called emergency medical technicians.⁶

The emergency medical technicians transported W.S.B from the train station to a local hospital.⁷ Defendant was diagnosed there with an intentional drug overdose, but survived after

¹ N.J.S. 2C:35-30.

² *State v. W.S.B.*, 453 N.J. Super. 206 (2018).

³ *Id.* at 219.

⁴ *Id.* at 220.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

receiving treatment.⁸ Hospital staff found several used and unused bags of a powdery substance in defendant's backpack, the substance was turned over to law enforcement to be tested and later revealed to be heroin.⁹ A grand jury thereafter indicted defendant for the heroin possession offense. Defendant moved to dismiss the indictment, invoking the OPA.¹⁰

After considering the written submissions and hearing oral arguments, the trial court issued an opinion finding that these circumstances as stated above qualified for immunity under the Act.¹¹ The court concluded that a "good faith request for medical assistance had been made under N.J.S.A. 2C:35–31, involving a person that a layperson would reasonably believe was exhibiting an acute condition indicative of a drug overdose, as defined in N.J.S.A. 24:6J–3."¹²

On appeal, the State argued that the trial court erred in dismissing the indictment under the OPA, contending that the Act does not immunize situations it characterizes as mere "intoxication" from drug use.¹³ However, the Appellate Division affirmed the trial court's ruling and stated as a matter of first impression:

For the reasons that follow, we hold that the broad definition of a "drug overdose" that the Legislature chose to adopt in N.J.S.A. 24:6J–3 does not turn on concepts of "intoxication." Instead, the OPA immunity hinges upon whether the discrete elements specified within that definition are met... having dissected the statute in this manner, it becomes apparent that the Legislature crafted the definition of a drug overdose within the OPA rather carefully, and with the policy objectives of the law in mind. To be sure, the statute could be even clearer in some respects.¹⁴

Analysis

Currently N.J.S. 24:6J-3 defines "drug overdose" as "an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled dangerous substance or another substance with which a controlled dangerous substance was combined and that a layperson would reasonably believe to require medical assistance."¹⁵ The court struggles with some key linguistic aspects of the statute in its opinion:

"The pivotal concept for the present case (and no doubt others that arise under the OPA) is the wording of the Legislature's definition in N.J.S.A. 24:6J–3 of a "drug overdose," a term which is cross-referenced in the immunity provisions of N.J.S.A. 2C:35–30 and –31... Having dissected the statute in this manner, it becomes apparent that the Legislature crafted

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 221. Emphasis added

¹⁵ N.J.S. 24:6J-3 Emphasis added.

the definition of a drug overdose within the OPA rather carefully, and with the policy objectives of the law in mind. To be sure, the statute could be even clearer in some respects, such as providing a more detailed explication of what forms of “physical illness” qualify as an “acute condition.” Would, say, a bad stomach ache or an intense headache caused by drug use suffice? Perhaps not, but ultimately such questions may turn on the degree of severity (i.e., acuteness) presented by the facts. We need not resolve in this opinion all of the theoretical possibilities. All we can do here is simply identify and attempt to explain the core elements of the law. If the Legislature wishes to provide further clarity, it can surely enact amendments to do so”¹⁶

The court also states that an effort to clarify language within the statute would largely have to be done in the absence of guidance:

Even if we were to regard the Legislature’s definition of a “drug overdose” in N.J.S.A. 24:6J–3 as ambiguous, or as being somehow prone to yield absurd outcomes, extrinsic sources concerning the provision are not particularly informative. The available legislative history does not provide any direct or explicit insight concerning the definition that the Legislature crafted. We have not found, nor been furnished with, written legislative reports or materials that specifically address the intended meaning of the term, beyond the words of the statute itself. In addition, we have not been able to glean any illuminating commentary from the audio recordings of the legislative sessions on the OPA that took place in the State Senate and General Assembly.¹⁷

Conclusion

Staff seeks authorization to conduct additional research and outreach to determine whether it would be appropriate to clarify the language in N.J.S. 24:6J–3 to more accurately reflect the Legislature’s intent in enacting the statute, and whether there currently exists sufficient guidance to support Commission recommendations in this area.

¹⁶ *Id.* at 225.

¹⁷ *Id.* at 226.