

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2401

2005 SENATE JUDICIARY

SB 2401

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2401

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 8, 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 1490
Committee Clerk Signature <i>Mina L. Solberg</i>			

Minutes: Relating to increased penalties for possessing a firearm during a controlled substance offense; penalty.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Sen. David O'Connell, Dist. #6, Introduced the bill (meter 44) I am passing out an amendment due to an error in the introduced bill.- Att. #1

Bob Bennett, Assistant Attorney General (meter 147) referred to the reason for the amendment.

The committee discussed what "possession" meant - Att. #2 provided for committee. The committee had great debate on possession or "within" reach. Actual possession means on your person and constructive possession is within your control; i.e. trunk of your car... closet... In an apartment if drugs were in the fridge then all occurrence would be considered "constructive possession." **Sen. Trenbeath** asked if there was a "pattern jury instruction" for this definition?

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Senate Judiciary Committee

Bill/Resolution Number SB 2401

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Mr. Bennett did not think so, only on constructive possession. Is there a statutory definition to cover actual? No.

Committee questioned at length the definition of firearm - Att. #3.

Sen. Traynor asked what gave rise to this legislation? None that I am aware of.

Senator Triplett asked that if by only moving firearms up are we encouraging bad behavior with destructive devices. Why do we not move the entire section up? Discussion of on bullet or box would fall under "explosive devices" .

Testimony in Opposition of the Bill:

none

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2401

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 9, 2005

Tape Number	Side A	Side B	Meter #
1	X		2340 - 3990
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Relating to increased penalties for possessing a firearm during a controlled substance offense.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following:

The committee requested that page 2 be returned to the bill. The bill was give to committee first and third page only. They also discussed an amendment

Sen. Nelson made the motion to do pass amendment attachment #1 from 2/8 and **Senator**

Hacker seconded the motion. All were in favor and the motion passes.

Senator Triplett made the motion to do pass as amended and **Sen. Trenbeath** seconded the motion. All members were in favor and motion passes.

Carrier: **Sen. Trenbeath**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Date: 2/9/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2401

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Amend (Att #1 2/8) Do Pass

Motion Made By Sen Nelson Seconded By Sen. Hacker

Senators	Yes	No	SenatorsSen. Nelson	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #: 2

Senate Judiciary Committee

☐ Check here for Conference Committee

Action Taken Do Pass As Amended

Motion Made By Sen. Triplett Seconded By Sen. Trenbath

[illegible]

Total	(Yes)	6	No	0
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Absent	0
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Floor Assignment *Sen. Trenbeath*

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2401: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2401 was placed on the Sixth order on the calendar.

Page 1, line 13, remove the overstrike over the overstruck semicolon and remove the underscored period

Page 1, line 15, remove the overstrike over the overstruck semicolon and remove the underscored period

Page 2, line 30, overstrike the period and insert immediately thereafter "or"

Page 3, line 11, remove "or the defendant had a firearm in the defendant's actual"

Page 3, line 12, remove "possession at the time of the offense"

Renumber accordingly

2005 HOUSE JUDICIARY

SB 2401

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2401

House Judiciary Committee

☐ Conference Committee

Hearing Date 3/14/05

Tape Number	Side A	Side B	Meter #
1	xx		14-30
Committee Clerk Signature <i>David Penrose</i>			

Minutes: 12 members present, 2 members absent (Reps. Maragos & Charging).

Chairman DeKrey: We will open the hearing on SB 2401.

Sen. David O'Connell: Sponsor of the bill, introduced the bill. I know Bob Bennett is coming to explain some of the bill. Basically what happened, in Fargo and Grand Forks, and one officer here in Bismarck, too were concerned about the meth and carrying a concealed weapon. It's getting more dangerous for law enforcement. So that's the reason the bill was put in. The Senate put an amendment on this, because the way the bill was drafted, it actually decreased the penalty and so that's the reason for it.

Chairman DeKrey: Are you enhancing the penalty if they have a firearm, is that what it is.

Sen. David O'Connell: That's the reason for the bill, yes.

Representative Delmore: Maybe there's something I'm not seeing but, I don't see the meth mentioned, it says marijuana or, then a d) at the top of page 3, is that already in code, do you know.

Sen. David O'Connell: I can't answer that one.

Chairman DeKrey: Thank you. Further testimony in support.

John Olson, ND Peace Officers Association: Support. We are not prepared to go into a lengthy description of all of it, the details of the bill. But my understanding of it is, with all of the increased ways that possession, actual possession of a firearm in the commission of any one of those crimes would increase the penalty.

Chairman DeKrey: Thank you. Further testimony in support of SB 2401. Testimony in opposition. Neutral testimony. Are you appearing on behalf of the AG, or just for information.

Bob Bennett, AG's office: I'm here to provide information to the committee, and I did testify at the Senate hearing on this, at the request of Sen. O'Connell, just to provide some background information on this.

Chairman DeKrey: Basically, what we've been told is that if you have a firearm on you, in a meth offense, that it's going to up the penalty.

Bob Bennett, AG's office: Just a little background. This 19-03.1-23.1 was originally adopted many years ago, in which it involved any penalties for certain controlled substance offenses, for instance near the school or amounts, which would increase the top end sentence, it's a lot like the habitual offender law, in which you had multiple felonies, multiple convictions, you could increase your punishment from a C to B felony or B to an A. That is what this bill does, as well. There are two parts to the bill, first of all if you violate the penalty section of the controlled substances law, 19-03.1-23 and it involved any of these factual events, on pages 1 and 2 of the bill, then there would be enhanced penalties, such as found on page 3 of the bill. The addition included, to the amounts of controlled substances and near schools, etc., the amendment to the

statute would now involve where a defendant had a firearm in the defendant's actual possession at the time of the offense, so if an individual has a controlled substance offense, in 19-03.1-23, and it is proven, and it's going to require allegations in the complaint or information, and proof beyond a reasonable doubt, finding by the court or the jury, that the defendant did in fact have a firearm in the actual possession of the offense, then that will upgrade the offense from what the original offense would be. For instance, if it is a class C felony offense, potentially 5 years imprisonment, now it would be a class B felony, once that finding is done. If there is, for instance, a meth offense, which is normally manufacturing, possession with intent to deliver, a Class A felony, that would be increased to a AA felony, which could be up to life in prison, if they have the firearm. So there will be significant enhancements. Again, it is not a minimum penalty, it is an enhancement or increase of penalty.

Representative Klemin: How would you define actual possession.

Bob Bennett, AG's office: We do have jury instructions in ND, 22.4-2 that talks about possession. This is in the ND jury instructions criminal, K22.4-2, which states that, and this is kind of a summary of what the law has been over the years and decided in a couple of cases there, possession is defined as actual or constructive and may be proven by direct or circumstantial evidence, a person who knowingly has direct physical control over an object, is in actual possession of it. A person knowingly has the ability and intent to exercise control over an object, then he's in constructive possession of it. We do have specific definitions under our case law, as to what actual possession is. Direct physical control will be actually having it, constructive possession is you know it's there and you're able to exercise control over it, you just don't have it in your actual physical possession.

Representative Klemin: Give us an example. Let's say that he has it on his person. That would be actual possession.

Bob Bennett, AG's office: Yes, that's correct.

Representative Klemin: But let's say that he had it stored away in a trunk somewhere in the house. Is that actual possession or constructive possession.

Bob Bennett, AG's office: That would be constructive possession, if it's stored in an area that he has access to.

Representative Klemin: Then this only applies to actual possession and not constructive possession.

Bob Bennett, AG's office: That's correct. This would only involve situations where, for instance a raid of the house is being done, there's drugs manufactured there, and in the closet is a shotgun in a case. That would be constructive possession, you might constructively possess it, due to the fact that they could exercise control over it, but there would be no actual possession of it. But if the shotgun is sitting on the table, while they are doing their drug transactions, that's actual possession.

Representative Delmore: Did you discuss at all, knives and other weapons, firearm restrictions when drafting the bill.

Bob Bennett, AG's office: I was not involved in the drafting of the bill, I know that there have been some concerns about the firearms in individual's, in individuals possessing firearms during traffic stops and during drug raids when, in fact, people are now, especially with meth, people are actually having firearms on the person when they are making the drug transactions, manufacture. I'm not aware of any discussions of other dangerous weapons, such as clubs, etc.

Representative Koppelman: Is this section dealing with all controlled substances, or meth only.

Bob Bennett, AG's office: It applies to any violation of the controlled substance law, any drug involved in 19-03.1-23.23, is the general penalty section.

Representative Koppelman: So we're talking the penalty, it would depend on which controlled substance that they were using.

Bob Bennett, AG's office: That's right, and it's not limited to just, for instance, to if they're in possession that generally a Class C felony, other than very small amounts of marijuana, but most of the manufacturing or distributing are either possession with intent are either A's or B's, depending on the drug; narcotics and amphetamines are generally A felonies, the other hallucinogenic are marijuana, LSD, things like this, are generally B felony offenses.

Representative Koppelman: So if I reading the bill correctly, it doesn't, it just says the defendant has firearms in defendant's actual possession at the time of the offense. If I'm reading it correctly, it doesn't have anything to do with an aggressive act with that firearm, commission of a crime with that firearm, so we all think of the extreme examples, somebody's on meth and totally out of control, and they have a gun, they're dangerous, be careful about that. But if somebody is convicted of possession of marijuana, for example, and they happened to have a firearm, which otherwise would be a perfectly legal act, just because they are guilty of this controlled substance offense, now that compounds the penalty is this passes, pretty seriously.

Bob Bennett, AG's office: Yes, again this would be something the prosecutor would have to allege in the complaint, allow the person to respond to, there would have to be a specific finding beyond a reasonable doubt, but yes it would significantly enhance the punishment. I think one of

the impetus for the bill, is that there are federal offenses already relating to being armed, while engaged in those types of activities, rather than having a separate offense, there would be the issue of the enhancement, as a deterrent and also the fact, based upon the nature of the drugs, we have bigger problems with people being armed with firearms because of that.

Representative Bernstein: I know you were talking about if the gun was here or there, but say you get stopped in traffic, and it was on the seat alongside of them, would that be actual possession.

Bob Bennett, AG's office: Probably yes. I'm equating the case law relating to drug possession, stolen property possession, that when it's right next to the person, they can have direct physical control over that firearm. Now if it's in the glove box, inside of a zippered case in a truck or back seat, it may be constructive, but if it's right there, its in actual possession.

Representative Boehning: What if you had a concealed weapons permit to carry a concealed weapon. How does that impact this.

Bob Bennett, AG's office: If you have a license to carry a concealed weapon, you probably aren't going to be arrested for having a weapon on your person, if it's loaded, but if you're committing this offense, it would have no impact at all, except for the fact that they will probably take away your license, if you're convicted.

Representative Boehning: I was just reading here, on page 1, line 14, I see we go down to 16 years of age with this, what penalty in here, under this bill, what happens to someone who's 16, gets caught with meth, a class A felony, you're going to process as a class AA felony. Being you're a juvenile.

Bob Bennett, AG's office: On line 14, this would have, this is an independent charge in the firearm. We currently have under law, certain drug offenses that if you're involved in delivery, it's not automatic, but pretty close to automatic transfer to adult court for certain types of drug offenses. Under subsection b, this for the independent of the firearm, but if someone is at least 16 years of age, at the time of the offense, and it involved delivery of a controlled substance to a minor, in those types of cases, and it would be enhanced even under the current law, let's say delivery of meth for a AA felony, if that individual was transferred to adult court, they could face possibility of life in prison without parole or life in prison with possibility of parole in 30 years.

Representative Koppelman: If someone has a concealed weapons permit, if I understood your answer right, what you're saying is that they probably wouldn't be charged with this, even though....

Bob Bennett, AG's office: No, they wouldn't be charged with carrying a concealed weapon, or a loaded weapon, because a concealed weapons permit may allow you to carry a loaded firearm or weapon, in a vehicle and carrying a concealed. They would not be charged with that offense, because they have the permit, but they can still be charged if they had a firearm while they are engaged in the drug transaction.

Representative Koppelman: So, if they were guilty of the drug charge, the fact that they had a weapon, a concealed weapons permit, they could still be charged with having a weapon.

Bob Bennett, AG's office: That's correct. It would be no different than if they were waiving it around in the Capitol building and had a concealed weapons permit. Then you have terrorizing, attempted murder, and whatever else.

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House Judiciary Committee
Bill/Resolution Number SB 2401
Hearing Date 3/14/05

Chairman DeKrey: Thank you. Further testimony. We will close the hearing. What are the committee's wishes in regard to SB 2401.

Representative Delmore: I move a Do Pass.

Representative Bernstein: Seconded.

12 YES 0 NO 2 ABSENT

DO PASS

CARRIER: Rep. Meyer

Date: 3/14/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2401

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

Do Pass

Motion Made By

Rep. Delmore

Seconded By

Rep. Bernstein

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	<input checked="" type="checkbox"/>		Representative Delmore	<input checked="" type="checkbox"/>	
Representative Maragos	<input checked="" type="checkbox"/>		Representative Meyer	<input checked="" type="checkbox"/>	
Representative Bernstein	<input checked="" type="checkbox"/>		Representative Onstad	<input checked="" type="checkbox"/>	
Representative Boehning	<input checked="" type="checkbox"/>		Representative Zaiser	<input checked="" type="checkbox"/>	
Representative Charging	<input checked="" type="checkbox"/>				
Representative Galvin	<input checked="" type="checkbox"/>				
Representative Kingsbury	<input checked="" type="checkbox"/>				
Representative Klemin	<input checked="" type="checkbox"/>				
Representative Koppelman	<input checked="" type="checkbox"/>				
Representative Kretschmar	<input checked="" type="checkbox"/>				

Total (Yes)

12

No

0

Absent

2

Floor Assignment

Rep. Meyer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 14, 2005 11:22 a.m.

Module No: HR-46-4845
Carrier: S. Meyer
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2401, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2401 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

SB 2401

PROPOSED AMENDMENT TO SENATE BILL NO. 2401

Page 3, line 11 remove "or the defendant had a firearm in the defendant's actual"

Page 3, line 12 remove "possession at the time of the offense"

Renumber accordingly

1-8-13

1994

NDJI-CRIMINAL

K - 22.42

Possession

Possession may be actual or constructive and may be proven by direct or circumstantial evidence.

A person who knowingly has direct physical control over an object is in actual possession of it.

A person who knowingly has the ability and intent to exercise control over an object is in constructive possession of it.

[Two or more persons may simultaneously possess the same object.]

* * * * *

In Interest of K.S., 500 NW2d 603, 606 (ND 1993)

State v. Connery, 441 NW2d 651, 655 (ND 1989)

FIREARM DEFINITION

12.1-01-04. General definitions. As used in this title, unless a different meaning plainly is required:

10. "Firearm" means any weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and includes any such weapon, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon.