STATE OF NEW YORK

9656

IN ASSEMBLY

January 30, 2018

Introduced by M. of A. LAVINE -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to establishing certain offenses based on homicide due to criminal sale of a controlled substance, establishing the offense of criminal sale of a controlled substance to a child in the first degree, expanding the definition of controlled substances with respect to certain offenses, increasing the felony classification of certain controlled substance offenses and including electronic prescriptions and blank prescription forms in the definition of certain controlled substance offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The penal law is amended by adding three new sections 125.28, 125.29 and 125.30 to read as follows:

§ 125.28 Homicide due to criminal sale of a controlled substance in the third degree.

A person is guilty of homicide due to criminal sale of a controlled substance in the third degree when he or she:

1. Commits the offense of: (a) (i) criminal sale of a controlled substance in the fifth degree as defined in section 220.31 of this chapter; (ii) criminal sale of a controlled substance in the fourth degree as defined in section 220.34 of this chapter; (iii) criminal sale of a controlled substance in the third degree as defined in section 220.39 of this chapter; (iv) criminal sale of a controlled substance in the second degree as defined in section 220.41 of this chapter; or (v) criminal sale of a controlled substance in the first degree as defined in section 220.43 of this chapter; and

(b) the controlled substance sold causes, or contributes to, the death of the person to whom the controlled substance was sold.

2. It shall be a rebuttable presumption that the controlled substance sold pursuant to subdivision one of this section caused or contributed to the death of the person where the type of controlled substance sold, alone or in combination with other substances, is determined to be the

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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cause of death of the person when the death occurs within twenty-four hours of the sale.

3. The provisions of article two hundred sixteen of the criminal procedure law shall not apply to a violation of this section. Nothing contained in this section shall prevent the court from sentencing a person convicted under this section to any other sentence authorized by law under articles sixty-five and seventy of this chapter.

4. Where a person (hereinafter "seller") violates the provisions of paragraph (a) of subdivision one of this section but the seller, in good faith, sought health care for the other person whose death resulted from the ingestion of the controlled substance sold, while that other person was experiencing the drug or alcohol overdose or other life threatening medical emergency that led to that person's death, the seller shall not be charged or prosecuted under this section or article two hundred twenty of this chapter when the sale was not for consideration or other benefit or gain.

5. It shall be an affirmative defense to a violation of this section or a violation of article two hundred twenty of this chapter where a seller violates paragraph (a) of subdivision one of this section and the sale was for consideration or other benefit or gain, but the seller, in good faith, sought health care for the other person whose death resulted from the ingestion of the controlled substance sold, while that other person was experiencing a drug or alcohol overdose or other life threatening medical emergency that led to that person's death, and the defendant has no prior conviction for the commission or attempted commission of a class A-I, A-II or B felony under article two hundred twenty of this chapter.

Homicide due to criminal sale of a controlled substance in the third degree is a class D felony.

§ 125.29 Homicide due to criminal sale of a controlled substance in the second degree.

A person is guilty of homicide due to criminal sale of a controlled substance in the second degree when he or she:

1. Commits the offense of: (a) (i) criminal sale of a controlled substance in the fifth degree as defined in section 220.31 of this chapter; (ii) criminal sale of a controlled substance in the fourth degree as defined in section 220.34 of this chapter; (iii) criminal sale of a controlled substance in the third degree as defined in section 220.39 of this chapter; (iv) criminal sale of a controlled substance in the second degree as defined in section 220.41 of this chapter; or (v) criminal sale of a controlled substance in the first degree as defined in section 220.43 of this chapter; and

(b) the controlled substance sold causes, or contributes, to the death of the person to whom the controlled substance was sold; and

(c) (i) an additional substance was added to the controlled substance sold which enhances the effects of the controlled substance and/or increases the danger of ingestion; or

(ii) the person to whom the controlled substance was sold was impaired by one or more substances at the time of the sale; or

(iii) the person knew, or had reason to know, that the person to whom the controlled substance was sold was using, or intended to use, one or more other substances in conjunction with the controlled substance sold; or

(iv) the person knew, or had reason to know, that the person to whom the controlled substance was sold had completed a rehabilitation program, or overdosed, within thirty days of the sale.

2. It shall be a rebuttable presumption that the controlled substance sold pursuant to subdivision one of this section caused or contributed to the death of the person where the type of controlled substance sold, alone or in combination with other substances, is determined to be the cause of death of the person when the death occurs within twenty-four hours of the sale.

3. The provisions of article two hundred sixteen of the criminal procedure law shall not apply to a violation of this section. Nothing contained in this section shall prevent the court from sentencing a person convicted under this section to any other sentence authorized by law under articles sixty-five and seventy of this chapter.

4. Where a person (hereinafter "seller") violates the provisions of subdivision one of this section but the seller, in good faith, sought health care for the other person whose death resulted from the ingestion of the controlled substance sold, while that other person was experiencing the drug or alcohol overdose or other life threatening medical emergency that led to that person's death, the seller shall not be charged or prosecuted under this section or article two hundred twenty of this chapter when the sale was not for consideration or other benefit or gain.

5. It shall be an affirmative defense to a violation of this section or a violation of article two hundred twenty of this chapter where a seller violates the provisions of subdivision one of this section and the sale was for consideration or other benefit or gain, but the seller, in good faith, sought health care for the other person whose death resulted from the ingestion of the controlled substance sold, while that other person was experiencing a drug or alcohol overdose or other life threatening medical emergency that led to that person's death, and the defendant has no prior conviction for the commission or attempted commission of a class A-I, A-II or B felony under article two hundred twenty of this chapter.

Homicide due to criminal sale of a controlled substance in the second degree is a class C felony.

§ 125.30 Homicide due to criminal sale of a controlled substance in the first degree.

A person is guilty of homicide due to criminal sale of a controlled substance in the first degree when he or she:

1. Commits the offense of criminal sale of a controlled substance to a child in the first degree as defined in section 220.49 of this chapter and the controlled substance sold causes, or contributes, to the death of the person to whom the controlled substance was sold.

2. It shall be a rebuttable presumption that the controlled substance sold pursuant to subdivision one of this section caused or contributed to the death of the person where the type of controlled substance sold, alone or in combination with other substances, is determined to be the cause of death of the person when the death occurs within twenty-four hours of the sale.

3. The provisions of article two hundred sixteen of the criminal procedure law shall not apply to a violation of this section. Nothing contained in this section shall prevent the court from sentencing a person convicted under this section to any other sentence authorized by law under articles sixty-five and seventy of this chapter.

4. It shall be an affirmative defense to a violation of this section or a violation of article two hundred twenty of this chapter where a person (hereinafter "seller") violates subdivision one of this section and the sale was for consideration or other benefit or gain, but the

seller, in good faith, sought health care for the other person whose death resulted from the ingestion of the controlled substance sold, while that other person was experiencing a drug or alcohol overdose or other life threatening medical emergency that led to that person's death, and the defendant has no prior conviction for the commission or attempted commission of a class A-I, A-II or B felony under article two hundred twenty of this chapter.

Homicide due to criminal sale of a controlled substance in the first degree is a class B felony.

§ 2. Subdivision 13 of section 220.16 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 14 is added to read as follows:

13. phencyclidine and said phencyclidine weighs one thousand two hundred fifty milligrams or more[.]; or

14. one or more preparations, compounds, mixtures or substances containing heroin and said preparations, compounds, mixtures or substances are of an aggregate weight of 1.5 grams or more, or such preparations, compounds, mixtures or substances are packaged in fifty or more containers, packets or "decks".

§ 3. Subdivision 7 of section 220.18 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 8 is added to read as follows:

7. methadone and said methadone weighs two thousand eight hundred eighty milligrams or more[.]; or

8. one or more preparations, compounds, mixtures or substances containing heroin and said preparations, compounds, mixtures or substances are of an aggregate weight of twelve grams or more, or such preparations, compounds, mixtures or substances are packaged in four hundred or more containers, packets or "decks".

§ 4. Subdivision 2 of section 220.21 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 3 is added to read as follows:

2. methadone and said methadone weighs five thousand seven hundred sixty milligrams or more[.]; or

3. one or more preparations, compounds, mixtures or substances containing heroin and said preparations, compounds, mixtures or substances are of an aggregate weight of twenty-four grams or more, or such preparations, compounds, mixtures or substances are packaged in eight hundred or more containers, packets or "decks".

§ 5. Subdivision 7 of section 220.41 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 8 is added to read as follows:

7. methadone and the methadone weighs three hundred sixty milligrams or more[.]; or

8. one or more preparations, compounds, mixtures or substances containing heroin and the preparations, compounds, mixtures or substances are of an aggregate weight of 1.5 grams or more, or such preparations, compounds, mixtures or substances are packaged in fifty or more containers, packets or "decks".

§ 6. Subdivision 2 of section 220.43 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 3 is added to read as follows:

2. methadone and the methadone weighs two thousand eight hundred eighty milligrams or more[.]; or

3. one or more preparations, compounds, mixtures or substances containing heroin and the preparations, compounds, mixtures or

substances are of an aggregate weight of six grams or more, or such preparations, mixtures or substances are packaged in two hundred or more containers, packets or "decks".

§ 7. Section 220.48 of the penal law, as added by section 28 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

§ 220.48 Criminal sale of a controlled substance to a child in the second degree.

A person is guilty of criminal sale of a controlled substance to a child in the second degree when, being over twenty-one years old, he or she knowingly and unlawfully sells without consideration or other benefit or gain a controlled substance in violation of section 220.34 or 220.39 of this article to a person less than seventeen years old.

Criminal sale of a controlled substance to a child in the second degree is a class B felony.

§ 8. The penal law is amended by adding a new section 220.49 to read as follows:

§ 220.49 Criminal sale of a controlled substance to a child in the first degree.

A person is guilty of criminal sale of a controlled substance to a child in the first degree when, being over twenty-one years old, he or she knowingly and unlawfully sells a controlled substance for consideration or other benefit or gain in violation of section 220.34 or 220.39 of this article to a person less than seventeen years old.

Criminal sale of a controlled substance to a child in the first degree is a class A-II felony.

§ 9. The closing paragraph of section 220.50 of the penal law, as amended by chapter 627 of the laws of 1990, is amended to read as follows:

Criminally using drug paraphernalia in the second degree is a class [~~A misdemeanor~~] E felony.

§ 10. Section 220.55 of the penal law, as added by chapter 970 of the laws of 1971, is amended to read as follows:

§ 220.55 Criminally using drug paraphernalia in the first degree.

A person is guilty of criminally using drug paraphernalia in the first degree when he commits the crime of criminally using drug paraphernalia in the second degree and he has previously been convicted of criminally using drug paraphernalia in the second degree.

Criminally using drug paraphernalia in the first degree is a class [~~D~~] C felony.

§ 11. Subdivision 15 of section 220.00 of the penal law, as added by chapter 118 of the laws of 1986, is amended to read as follows:

15. "Prescription for a controlled substance" means a direction or authorization, by means of an official New York state prescription form, an electronic prescription, a written prescription form or an oral prescription, which will permit a person to lawfully obtain a controlled substance from any person authorized to dispense controlled substances.

§ 12. Section 220.65 of the penal law, as amended by chapter 31 of the laws of 2014, is amended to read as follows:

§ 220.65 Criminal sale of a prescription for a controlled substance, a blank prescription form or of a controlled substance by a practitioner or pharmacist.

A person is guilty of criminal sale of a prescription for a controlled substance or of a controlled substance by a practitioner or pharmacist when: 1. being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, he or she knowingly and unlawfully sells a prescription for a controlled substance or a blank

prescription form. For the purposes of this section, a person sells a prescription for a controlled substance unlawfully when he or she does so other than in good faith in the course of his or her professional practice; or

2. being a practitioner or pharmacist, as those terms are defined in section thirty-three hundred two of the public health law, he or she, acting other than in good faith, while purporting to act within the scope of the power, authority and privileges of his or her license, as that term is defined in section thirty-three hundred two of the public health law, knowingly and unlawfully sells a controlled substance **or a blank prescription form**.

Criminal sale of a prescription for a controlled substance or of a controlled substance by a practitioner or pharmacist is a class [~~C~~] **B** felony.

§ 13. This act shall take effect on the first of November next succeeding the date upon which it shall have become a law.