

The Real War on “Fake” Drugs

The City of Abilene’s Approach to Regulating Synthetic Drugs

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Blame it on the 80's

I will readily admit to being an unapologetic child of the 80's...the greatest of the great decades. I am quite certain the 80's gave us the last great social renaissance, forever changing movies, music, fashion and technology. All hail the 80's. Unfortunately, the 80's also made me very slow to react to the dangers of the synthetic drug epidemic. Why you might ask? Jeff Spicoli. Now, for my fellow children of the 80's, Spicoli is mythical, he's epic, he's one righteous dude. I grew up watching an entire group of guys try to be Spicoli.

When I first began to hear about synthetic drugs around 2010, I immediately thought of all the Spicoli wannabes from the 80's. I wondered if this was what they ended up doing after high school. Maybe they really had paid enough attention in chemistry after all. I looked into the issue a little and saw that the state was banning some chemical compounds, and figured that if they were not doing anything the state saw as illegal, then let them go about their business of smoking anything they can find. At that point, the synthetic compounds had not yet made their way to Abilene. When they did, they came to town fast, and they hit the population hard.

So what are Synthetic Drugs?

According to the Partnership for Public Health Lawⁱ, Synthetic drugs are chemically produced and mimic or enhance the effects of illicit drugs. These drugs fall into two categories:

Synthetic cannabinoids: also known as synthetic marijuana, are designed to elicit the same "high" that users get from the THC (tetrahydrocannabinol) contained in marijuana. The synthetic cannabinoid is sprayed onto plant material, which is dried for smoking or oral ingestion. These products are sold in retail stores as herbal incense, potpourri or herbal smoking blends with product names like K2, Angry Birds, Spice, Blaze and Black Mamba. Reported harmful effects include nausea, increased agitation, elevated blood pressure and acute kidney injury

Synthetic cathinones: function as synthetic stimulants, designed to affect the central nervous system similar to drugs such as cocaine and amphetamines. These drugs are laboratory produced. They are sold in powder form for snorting and may be injected intravenously or taken by mouth. These products are typically sold in retail stores as bath salts or jewelry cleaner with product names like Ivory Wave, Bloom, Vanilla Sky and White Lightning. Reported harmful effects include chest pain, increased heart rate, hallucinations, paranoia and delusions.ⁱⁱ

Marketing 101

Traditional drug enforcement through the criminal justice system follows very sound principles. Everyone knows and understands the rules, the laws and protocol. The bad guys grow,

produce, traffic, distribute and sell their product through the underground channels while the good guys work diligently, undercover, to find these bad guys, control buy the illegal product and arrest the bad guys. The good guys send the product to a lab to confirm what their field test indicated and we have a case ready for prosecution. The lines really are not very blurry, and there is a vast ancillary employment sector that relies on these non-blurry lines to make decisions every day. Pre and post-employment drug testing as well as drug testing in conjunction with every level of athletic competition all rely on the known parameters developed over decades of dealing with substances known to be traditionally illegal or known by prescriptive compounds.

Synthetic drug marketing took the traditional model, and made it useless as an effective tool for law enforcement. Those in the business of manufacturing synthetics understand that lab testing is the backbone of any traditional drug enforcement effort. Law enforcement must seize a product, send that product to a certified lab while maintaining chain of custody, and have those results confirm that the product is illegal. By manipulating the compounds on a regular basis, it can be very difficult for law enforcement to obtain consistent results.ⁱⁱⁱ

Further complicating this aspect is the inconsistent lists of banned substances and chemical compounds among the states^{iv} and at the federal level^v. By constantly altering the chemical compounds to avoid those on a banned list, the manufacturers tout that their products are legal. The packets do not, however, list what those ingredients are...a fact that can be used against them.

Another marketing ploy, in addition to the synthetics being a legal alternative to illicit drugs they mimic, is the naming of the products to target teens and young adults. In Abilene, the populations that were most negatively impacted by the synthetic products were teens and young adults. They were drawn to products with names like Angry Birds available in colorful packets with familiar images on them...marketed as legal and safe. The shops themselves would post signs stating "nobody under 21" allowed in their store and they would post signs on their displays stating "not for human consumption"...both glaring contradictions to the actual, intentional marketing of a product made specifically to get folks high.

You might have a synthetic drug problem if...

To some extent, Abilene was like the live frog in the pot of water...by the time the water is boiling the frog just sits there and does nothing. From the time synthetics were first on the nightly news around early 2010, until late 2012, we were unaware that we had a slowly growing problem. When our police brought the issue to our attention and we began to look into the issue, we were able to identify 10-13 businesses that were operating as Head Shops or Smoke Shops that were actively selling synthetic drugs. The locations varied and shops would open

and then quickly close, but most were within a block or two of residential neighborhoods and many were within walking distance to schools. Because the substances were not “illegal”, we monitored the locations, began gathering information and waited to see if the state would take action in the 2013 legislative session.^{vi} No seriously, we actually thought the state might do something proactive to help municipalities and law enforcement with this issue.

The school district began reporting issues to our police regarding students having bad reactions to synthetics. The number of police calls for service involving citizens on synthetics began to climb dramatically. The number of emergency room patients experiencing bad trips on synthetics was increasing every month.^{vii} Concerned parents were calling for action as well as local businesses being impacted by the shops. Abilene was now officially dealing with a public health crisis.

Let's see how other Cities in Texas are dealing with this issue.

Like most of you, Abilene has a list of cities we use as comparison cities. For us, it's a Council adopted list of ten cities that they believe best represents like values and community issues...some larger cities and some smaller cities so there is a range. What we found when we first began gathering information from these cities was...nothing. Some of these cities were exactly where we were at, just beginning to see how to deal with synthetics. One or two had a plan, but when we reviewed their plan, it just wouldn't fit for us.

When we broadened our search, we found that the most common approach in Texas was to ban synthetics altogether...just pass an ordinance prohibiting the sale of synthetics, wait 10 days after publication and POOF! No more synthetics, no more problem, give the city attorney a raise and a parade. If that was successful for your town, I honestly commend you. We discussed numerous concerns with attempting that approach in Abilene. It was our belief that we would simply be running a bluff that would be problematic to effectively prosecute, and even under the best scenario would only push the issue into the county. We did not believe we would actually be addressing the public health concern or moving head shops out of neighborhoods. We were seeking a more long-term solution. Outright bans sound decisive for a council to adopt and they can be politically appealing. However, when the problem does not go away after recommending that approach, it is the responsibility of my office to explain why the approach failed. It is imperative to educate the public as well as your public officials on the broader issues and challenges that your police department faces with synthetics. We worked closely with our police chief and his narcotics staff to craft that message and then have him deliver it to our council and in every public hearing we ultimately had on this matter.

From a practical standpoint, using the traditional drug enforcement model we discussed earlier:

1. Undercover police go into a head shop and make a purchase
2. Police send synthetic to DPS lab (at one point this was a 6-9 month wait)
3. DPS lab will only test for compounds on the state banned substances schedule and since that list was adopted by the legislature in 2011, most compounds had been changed and would not test positive
4. A product that does not test positive under the state statute is still sending kids to the ER
5. You have no case, and as many as 9 months have passed.

So we also discussed a different scenario:

1. Undercover police go into a head shop and make a purchase
2. Police send synthetic to a private lab with as quick as a 48 hour turnaround
3. Private lab will test for compounds on the state and federal banned substances schedule
4. Product does not test positive on the state schedule but tests positive on the federal schedule
5. Coordinate a federal prosecution case with the DEA and Asst. U.S. Atty. out of Lubbock.

Because the timeline for the actual police enforcement was unpredictable, it became apparent that we needed a multi-faceted approach with elements that could immediately begin addressing concerns and problems that our community was experiencing, identify long term solutions for those problems, and implement that solution. At the same time, we knew we lacked the funds to adopt an ordinance that would require lab testing to prove every case, but we wanted to continue testing synthetics through a private lab hoping for a positive hit on substances banned under the DEA published federal schedule.

I like to hunt with a shotgun.

A shotgun is an amazing weapon. If a lawyer were a gun, they would be a shotgun, right? We specialize in pleading everything remotely possible and praying to God that one of them is actually plausible. Hunting bird with a shotgun soothes my inaccurate soul and fills my garage freezer with dove every fall. The war on synthetic drugs was destined to be fought with a shotgun, and so we did. The inherent advantage of a shotgun shell over that of a rifle shell is the sheer advantage of the amount of lead in the air. We were not trying to be stealth or keep our distance from this issue; it was our stated intent to have our people around the stores daily to make sure we had lots of lead in the air. Here was first round of ammo: The City of Abilene Code of Ordinances, Chapter 19 “Nuisance”.^{viii}

I know that does not sound very threatening. The idea was that the shops that were selling the products were detrimentally impacting the surrounding neighborhoods and we needed to

begin with basic nuisance citations and enforcement of existing codes. We met with the most vocal citizens that were calling for action and requested their help. We explained that this was going to require patience and perseverance while several legal processes worked their way through the system. We asked them to commit to testifying in court as well as any public hearing for ordinance amendments. We asked them to recruit others who had been impacted by synthetics to come forward and share their stories.

The citizen group and our police were less than enthusiastic about our first round of ammo. Understand, they were hoping for the “ban the synthetics and plan the parade” option and I gave them...littering, nuisance violations, building code issues etc. I asked for patience, again, and explained the bigger picture, the long term solution, was forced relocation on one hand, as well as finding the appropriate law enforcement solution on the other. We wanted to draw the attention of the shops, and to some degree, annoy them by requiring their time and financial resources to deal with legitimate Class C citations.

What does it take to relocate a public nuisance? The Hammer of Thor...our second round.

Everyone knows the great advantage that any city enjoys over counties is our Hammer of Thor, otherwise known as our zoning and subdivision regulations. It is a power that we and we alone embrace and understand. Attorneys that are accustomed to defending criminal charges stare in horror at the letter citing zoning regulations and building code violations and certificates of occupancy. At least we hope they do...that’s what we tell the planners to encourage them. To get to the point where we could either A) close a business under Texas Civil Practice and Remedies Code Chapter 125 “Common and Public Nuisances” or B) justify the adoption of an ordinance that would essentially force the relocation of almost every head shop due to separation and zoning classification.

To begin this process we first we had to establish that these businesses were a public nuisance and that their secondary impacts on the surrounding neighborhoods were detrimental to the public in general. As a result, our officers began gathering pictorial evidence of all of the daily activity around the businesses; they continued writing citations for any legitimate offense that was identified on the properties; and we sent letters to the stores that received citations advising them that their continued operation constituted a public nuisance.

Many of the stores in Abilene were leased locations. Some landlords did not like the attention or the letters that they received from the City and we began to see some immediate results at a location or two. We modeled a zoning ordinance amendment for head shops on those that have been used for sexually oriented businesses, as well as using definitional components from the City of San Antonio and a municipal ordinance in California that dealt with head shops. It was our position that when a business self-regulates and posts signs that nobody under 21 may

enter, then they have no valid argument to remain near schools and neighborhoods. We also knew, based on our municipal court sampling, that the synthetic drug proponents would not likely speak at any public hearing...again, they do not like a light shined on their businesses.

Our zoning ordinance that defined the appropriate zoning districts, as well as established separation requirements for any business defined as a head shop,^{ix} passed our Planning and Zoning Commission without a dissent and with excellent input from our recruited citizens. Several head shop owners attended the public hearing, but did not speak.^x Our Commission had questions about the need for an amortization period (originally 180 days) as well as why we could not simply ban head shops outright.

We brought the ordinance to our Council as an emergency measure to be passed on one reading, as allowed by our charter. At our City Council meeting, even more citizens came out to speak in favor of the ordinance. The Council shortened the amortization period to four months and we had another discussion regarding outright bans on synthetics as well as head shops. I would caution you that we could not find any case law upholding a four month amortization period, a six month amortization period was the shortest we felt was defensible under case law at the time. However, we were not challenged by any businesses.^{xi}

So our ordinance passed and was published and 10 days later it went into effect. At that time we still had 8 head shops operating in Abilene. One thing about the Hammer of Thor though, it's swift and often silent. Six of those stores had been operating without a certificate of occupancy, so they were not legally operating in their locations. Yes, we knew this before the Council meeting; no, I didn't feel any duty or responsibility to advise them of this problem they were about to experience. So, once the 10 days were up, our zoning staff and their Hammer, in conjunction with the City Marshals and Abilene Police Narcotics officers, advised those without CO's that they were not entitled to an amortization period and must close immediately and find a conforming location.^{xii} To our surprise they all immediately complied, albeit one with the assistance of a warrant served by our narcotics division for the sale of banned substances, so then there were two.

A legal shotgun for dove holds three shells.

The third shell we fired was a thing of beauty and, honestly, very fortuitous timing. The thing that had bugged us from the beginning was this whole labeling and marketing ploy...no listed ingredients, use names and artwork of popular games, hide behind a "not for human consumption" label. I had a conversation with our Chief about a raid and arrest that took place in Brownwood several years ago. The gist of the sting was that a citizen was holding private parties and selling sex toys. How many of you just paused and thought...oh my goodness that's illegal? The problem wasn't so much the activity, but the absence of a label on the products.

Let's not go into the details of why I remember this, that doesn't really matter, however, I asked the chief to call the Consumer Protection Division of the Office of the Attorney General's Office and ask them for assistance. Our chief was able to share enough information with the AG's office over the phone that two Assistant AG's made the trip to Abilene to review the evidence. Assistant AG Joyce Iliya and Assistant AG Patricia Stein were overwhelmingly supportive and helpful and identified multiple violations of existing laws under which the AG could pursue remedies, due to the deceptive nature of the packaging and marketing.^{xiii} Further, Theresa James, Asst. City Atty., determined that this also constituted a prosecutable violation under the Penal Code^{xiv}, an offense our District Attorney indicated a willingness to prosecute^{xv}. AAG's Stein and Iliya welcome the opportunity to assist any community with synthetic enforcement.^{xvi}

Timing is everything.

So we had:

Zoning in place to address future concerns....CHECK

AG and DA on board to prosecute and seek civil and criminal penalties...CHECK

Private lab results confirming a federal violation???

Timing is critical with any drug enforcement operation and it really could not have been any better for us. Our officers' diligent work and patience resulted in successful buys at the largest and only remaining local head shop that tested positive for federal banned substances. The results came back in time for Abilene to apply for a federal warrant with the DEA in Lubbock as part of a nationwide federal synthetic drug enforcement operation named Operation Synergy. Our police, along with federal and county agents, effectively served federal warrants on the two locations of only remaining head shops operating in Abilene, effectively ending the open sale of synthetics in our community. Today, we have two head shops operating within our community in appropriately zoned locations in compliance with our separation requirements. They do not sell synthetic drugs. Our undercover officers regularly monitor the locations. We are now dealing with an occasional street sale of synthetics, which was expected, and should be anticipated.

Collateral Damage.

The Mall of Abilene is home to Earthbound Trading Company. From what I can tell, Earthbound is like Hippie Target...they sell very eclectic and hip stuff that's too edgy for Pier 1, and too cool for Spencer's Gifts. One of their products is a hookah, a Turkish water pipe. One problem - that makes them a head shop under our definition. I received a very polite letter from their "Buyer"

educating me on what exactly is and is not really drug paraphernalia and should or should not be defined in a manner that labels cultural and ethnic products such as a hookah as head shop products. I, equally politely, educated him on the Hammer of Thor, and how the keeper of the Hammer and his staff would be happy to find Earthbound a compliant location where they could continue to sell their cultural and ethnic drug paraphernalia, or they could remove that one product from their store and continue selling their hemp t-shirts, black lights, and velvet posters of Jimi Hendrix and Bob Marley. I am happy to say they are still a tenant of our Mall.

And that's how we fought the real war on fake drugs in Abilene, Texas.

ⁱ Full document found in Appendix

ⁱⁱ See *Regulation of Synthetic Drugs*, Partnership for Public Health Law.

ⁱⁱⁱ See Memorandum from Chief of Police to City Council found in Appendix

^{iv} See Texas Health and Safety Code, Chapter 481 "Texas Controlled Substances Act".

^v See 21 U.S. Code § 812 – "Schedules of controlled substances".

^{vi} See SB 263 / HB 1333 83rd Texas Legislature (2013)

^{vii} Number of calls in 2013 (January-21; February-21; March -36; April - 35; May - 46).

^{viii} See Nuisance Enforcement Letter from City Attorney found in Appendix

^{ix} See Abilene Zoning Packet found in Appendix.

^x See Zoning Packet found in Appendix.

^{xi} See Amortization Of Head Shop Use letter from Planning and Development found in Appendix.

^{xii} See Certificate of Occupancy Letter from Planning and Zoning in Appendix.

^{xiii} See 16 CFR 500.2 – 500.3 and Texas Health and Safety Code Chapter 431, "Texas Food, Drug, and Cosmetic Act".

^{xiv} See Texas Penal Code §32.42 "Deceptive Trade Practices".

^{xv} See sample criminal complaint for prosecution of violations of Penal Code §32.42 found in Appendix.

^{xvi} See Enforcement Letter from Attorney General in Appendix.