

BURNING MAN

Law Enforcement on the Playa

August 3, 2011

[The following is a general summary of Nevada and federal laws that may be enforced at the August/September 2011 Burning Man event in Black Rock City, Nevada. This summary does not constitute legal advice, nor is any attorney-client relationship formed between you and the authors of this summary. If you require legal advice, please contact a Nevada-licensed criminal defense attorney with any questions or concerns regarding the facts of your situation.]

Every year a significant number of people attending the Burning Man festival find themselves in trouble with the law and, contrary to popular belief, the consequences can be dire. What's more, in many cases the incidents are completely preventable.

There is a dangerous misconception amongst burners that the Playa falls outside of the jurisdiction of law enforcement agencies, or that those agencies will apply the law and perform their duties less rigorously at Burning Man than elsewhere. This is absolutely not the case.

The Playa, including your camp, is public land and falls under the jurisdiction of the state of Nevada and the federal government of the United States. In particular, both federal and state drug laws are fully applicable, and fully enforced, on the Playa.

Jurisdiction and the Different Law Enforcement Agencies

The Playa can present a confusing jurisdictional landscape. At any one time a number of law enforcement agencies, both state and federal, are present and they may often be enforcing different laws and policies. Regardless, you should always remember that officers representing these agencies are there to do their jobs, and that means enforcing the law. They take this very seriously and so should you.

Black Rock Rangers

Black Rock Rangers are people who volunteer with the Burning Man organization to be “non-confrontational community mediators.” Their objective, in addition to providing general information and assistance to Burning Man participants, is to attempt to intervene in situations that may otherwise result in law enforcement involvement. They are not law enforcement officers, they have no police power, and would likely not be involved in any type of “investigation” unless another Burner’s health, safety, or welfare was at issue.

Bureau of Land Management Rangers

Bureau of Land Management (BLM) Rangers are federal law enforcement officers. They have police powers to enforce all federal laws on the Playa (which is located on federal property),

including the power to arrest. Encounters by BLM Rangers with persons who are found to be in possession of small quantities of controlled substances (typically marijuana, but sometimes ecstasy, methamphetamine, etc.) will often result in a federal misdemeanor citation, which will be forwarded to the U.S. Attorney for adjudication in federal court at the U.S. District Court in Reno. BLM Rangers also arrest a small number of people for felonies each year (reportedly 8 in 2010).

State Law Enforcement Officers

State law enforcement officers are responsible for enforcing laws of the State of Nevada at Burning Man. The Playa is physically located in Pershing County, while the roads into the event are located in Washoe County. State law enforcement on the Playa is typically controlled by the Pershing County Sheriff's Department, with Washoe County Sheriff's Department providing support under contract with the Burning Man organization. Historically, encounters by Pershing County Sheriff's deputies with those found to be in possession of controlled substances are less likely to result in a misdemeanor citation, and more likely to result in arrest and felony charges than similar encounters with BLM Rangers. This accounts for the often vastly divergent treatment by law enforcement of identical conduct between Burners (e.g.: in 2010, possession of one dose of ecstasy resulted in one Burner receiving a citation by a BLM Ranger, whereas possession of one dose of ecstasy resulted in another Burner being arrested for a Category B felony by a Pershing County Sheriff's deputy). Whether a state misdemeanor (either by citation or upon arrest) or a felony is charged, the case will be handled by the Pershing County District Attorney's office in the Pershing County court system, located in Lovelock, Nevada. The Pershing County District Attorney filed 35 felony cases arising from the Burning Man event in 2010, and many more misdemeanor cases.

Always remember: if it's illegal off the Playa, it's illegal on the Playa. That includes drug possession, use and distribution.

Confrontations with Law Enforcement – Common Sense

Law enforcement officers are present and actively searching for evidence of drug possession, use, or distribution. They may be equipped with night vision equipment and able to see you even in the dark. You should assume and conduct yourself as if you are being watched by law enforcement at all times.

It goes without saying that if you do find yourself in an encounter with law enforcement, you should be courteous and respectful at all times. You should be aware of your rights; you should also be aware of the best time, place and manner in which to assert them.

At all times, you have the choice of whether to answer a law enforcement agent's questions to you, just as you can choose whether to engage in conversation with anyone on the Playa. Common sense is a good thing to have here. If the officer is asking questions in the case of an

emergency (for instance, the officer asks what someone has ingested in the case of an apparent drug overdose, or seeks the parents of a lost child), let your conscience and/or common sense be your guide. The same goes for friendly conversations and requests/offers of assistance (“The Temple is beautiful this year,” “Is the Barbie Death Camp near here?” or “Do you need a push for your mutant vehicle?”). However, if you are otherwise minding your own business and a law enforcement officer seeks non-emergency related information about you or a member of your group (“Where are you going?” “What’s in the bag?” or “Where are you camped?”), you are NOT required to answer, except to identify yourself with your real name if asked. After identifying yourself, you may politely decline to answer any questions and request to leave.

If the officer does not allow you to leave, the encounter has evolved into a detention (seizure), during which the officer may briefly investigate by asking questions of you or others, frisk you for weapons, or call for the assistance of back-up officers. In order to detain you, the officer must have “reasonable suspicion” that a crime has occurred or will occur. Typically, if you are detained on the Playa, the police officer will be investigating you for the use or possession of controlled substances. If you are detained, you should steadfastly refuse to answer any further questions, and if questioning continues, inform the officer that you will not answer any questions without your attorney present.

You should NEVER consent to a search of your person, bags, belongings, automobile, trailer, tent, or campsite. In order to search your person (other than a safety frisk for weapons), belongings, or private quarters (closed tent, trailer) on the Playa, a law enforcement officer must have either a search warrant or “probable cause” that a crime has occurred (e.g.; marijuana smoke rising out of a tent window, or a positive canine alert after a dog sniff of your person.) Your consent to search is an exception to the warrant requirement and avoids the legal necessity (to your detriment) for the officer to obtain a warrant or develop probable cause. An officer may also search your tent or trailer without a warrant or probable cause under certain emergency situations (“exigent circumstances”), such as when he/she believes a person is in danger, the officer is in pursuit of a person fleeing investigation/apprehension, or he/she has good reason to believe that evidence is currently being destroyed (e.g., the sound of a repeatedly flushing toilet in an RV from which a dazed person has just emerged with a glass pipe). In a recent case, however, the Ninth Circuit Court of Appeals ruled that the same privacy interest that applies to a person’s tent or trailer does not apply to an undeveloped campsite surrounding a tent that is visible to all; accordingly, no privacy interest exists in the “public” area around your tent/trailer, and you must assume that the police do not need a warrant, probable cause, or a search warrant to enter your camp and search the area around your tent/trailer.

The United States Supreme Court has determined that you have less of a privacy interest in your motor vehicle than you do in your “home” (tent/trailer). Although whether a parked RV (Class A, B, or C motorhome) counts as a vehicle or a “home” is dependent on several circumstances, you should assume that a parked RV on the Playa during Burning Man counts as a vehicle.

As with your tent/trailer, under federal law the police do not need a warrant or probable cause to search your art car on the Playa if they have reason to believe that exigent circumstances exist. (This rule is slightly different under Nevada law (see below), and which rule applies will depend on whether the case is prosecuted in federal or state court. Be conservative and assume that the federal law will apply to art cars on the Playa.) A court is more likely to find exigent circumstances with a vehicle than with a tent/unhitched trailer, due to the moveability of the vehicle, and therefore it is legally easier for the police to search a vehicle than a stationary tent/trailer. As with your tent or trailer, do not ever consent to a search of your art car, and inform any passengers that they should not do so either, as anyone with apparent authority may validly provide consent to the police to search. As always, the best medicine is prevention; if no controlled substances or other contraband are allowed in/on the art car, you will never be in the position of having to argue these issues to a judge.

If you believe that you have been detained or your property searched illegally, do not argue with the police officer or attempt to leave; simply make a mental note of all the facts and circumstances surrounding the detention and search, including the time and duration of your detention, the words of the police officer and your own, if any, and any property and the location thereof seized during the search. Report these facts to your attorney later if you are arrested or cited. If you were detained or your person/property was searched in violation of your constitutional rights and your case proceeds to trial, your attorney can argue for suppression of the evidence under the “exclusionary rule” (disallowing the admission at trial of the evidence that the police found as a result of their illegal behavior).

What will happen, and what should you do if you or a friend are arrested or receive a citation?

If the law enforcement officer develops probable cause that a crime has occurred and you committed it, you may be cited or arrested. If you are cited, you will be informed via a citation document (“ticket”) when to return to court to address your charge. Law enforcement agents have been known to advise Burning Man attendees to “just pay” the bail (fine) amount on the ticket to resolve the issue quickly; however, you should NOT do so, as this is an admission of guilt that will be reflected in a criminal record. Instead, contact a qualified Nevada criminal defense attorney upon returning home for advice on the best course of action for your circumstance. In some cases, an attorney may be able to handle your citation for you without your having to return to Nevada.

Do not be fooled by a law enforcement officer’s offer to “go easy” on you and issue you a citation in lieu of arrest if you “cooperate” by giving a statement or consenting to a search. Police officers are legally allowed to engage in some deception in investigating a crime, and are not required to follow through on any “bargain” they apparently strike with you; nor can they bind the District or U.S. Attorney with regard to which charges or penalties will be enforced against you after the facts of the case are submitted to the prosecuting agency.

If you are arrested, do not panic. Do not make any statements, even if you are innocent, as nothing that you can say at this point will assist you, or convince the arresting officer to “unarrest” you. If you are “Mirandized” or asked any questions at any time after you are arrested, say that you need to speak to an attorney before you answer any questions. All questioning by the police officer should stop at this point. If it doesn’t, simply refuse to answer any further questions. You will be transported to the Pershing County Detention Facility, where you will be required to submit to booking. The booking process involves answering a series of basic identifying questions (which you do not have a right to refuse) about your physical characteristics and contact information, and submitting to fingerprints and a booking photo. Answer these questions and submit to the booking process without engaging in any extraneous conversation. A bail amount (the amount of money that you must pay before getting out of the jail in order to ensure your return to court) will also be set at this time. The amount of bail depends on a standardized bail schedule and the law enforcement officer’s discretion. It can vary from a couple hundred dollars to tens of thousands of dollars, depending on the crime charged and whether the arresting law enforcement officer believes that the severity of the alleged crime warrants an increase in the standard bail amount. If you are in possession of a bag or backpack at the time of your arrest, it will be subjected to an “inventory search,” after which any contraband found will be booked into evidence, and the remaining items will be held as personal property.

After booking, you will be given an opportunity to contact someone to assist you in getting out of jail. As part of your general emergency planning (which you should do when making any travel plans), you should consider in advance of Burning Man how you would get funds to a trusted person to post cash bail or bond, or who you would contact to post bail on your behalf. If you use a jail telephone, do not discuss the specific facts of your case over the phone, as jail calls are monitored and recorded, and your statements can be used in a prosecution against you.

Bail is posted at the jail. If you are unable to post cash bail, bail bonds can be obtained through local bail bond agencies. Several bail bond agencies make themselves available at the Pershing County detention facility during the Burning Man event for such emergencies. In Nevada, bail bondsmen will charge 15% of your total bail in order to post a bond with the court on your behalf, and will keep that amount as their fee. If the amount of bail is large, the bail bondsman will also require you to post additional cash or other collateral, such as a house title. If you are able to post cash bail instead of a bail bond, the full amount (minus court fines and fees) will be reimbursed to you upon the conclusion of your case.

After bailing out of jail, you will be given a date on which to appear in court. If you remain incarcerated, your charges will be filed with the court within 3 days of your arrest, and a preliminary hearing will be scheduled within two weeks. Whether you bail out or remain incarcerated, your first call should be to a qualified criminal defense attorney, who will advise you on how best to proceed.

A note on getting to the Playa and back

In recent years, local law enforcement agencies, with funding and assistance of the USDOJ's Drug Enforcement Agency (DEA), have stepped up enforcement of federal and state controlled substance laws on Nevada's roads and highways by creating interstate drug interdiction task forces.

In an interstate interdiction traffic stop, a police officer will typically pull a vehicle over for a standard traffic violation. If the police officer suspects that the vehicle contains a controlled substance (typical causes for suspicion include a smell of marijuana in or about the vehicle, nervous driver or passengers, lots of empty fast food bags and pillows/sleeping bags, indicating a minimum number of stops), the police officer will engage the driver/passengers in questions regarding drugs. The conversation will almost always include a request for consent to search the vehicle. Refusal to submit to a search will often be met with direct threats by the officer to have a canine "sniff" the vehicle and/or to obtain a search warrant, and implied threats that if the driver/passengers do not cooperate with the investigation, that they will suffer more dire legal consequences than if they submit to questioning and a search.

The best way to avoid this circumstance is to avoid being stopped by obeying all Nevada traffic laws while in the state. Typical reasons for officers to stop vehicles are speeding, following too closely to the vehicle in front, failure to signal a lane change, and malfunctioning vehicle equipment, including taillights. Follow all posted speed limits, (including the reduced speed limits in Nevada's many construction zones), allow one second of travel time or more for every 10 miles per hour of speed between you and the vehicle in front of you, travel in the slow lane unless passing with appropriate traffic signals, and ensure all your vehicle equipment is working and appropriate registration is in place to avoid a traffic stop.

If you are stopped, politely decline to make any statements (and advise your passengers not to make any statements, as differing accounts between driver and passengers of the origin, destination, travel plans, etc. of your party are often cited as reasonable suspicion to detain you or probable cause to search the vehicle) beyond identifying yourself and providing the officer with the vehicle registration, insurance, and your valid driver's license. Also, NEVER consent to a search of your vehicle, and instruct your passengers in advance not to consent as well, since, as explained above, any person with apparent authority may validly consent to a vehicle search. In order to search your vehicle in Nevada, a police officer needs either a search warrant or both probable cause and exigent circumstances (an emergency). A positive canine alert (which can range from anything from the dog sitting to scratching to drooling) does NOT provide a police officer with the legal ability to search your vehicle without a warrant; it only provides him/her with probable cause to obtain a warrant (unless, again, exigent circumstances also exist). If the police plan to search your vehicle, they will do so one way or another – whether any evidence they obtain will be admissible against you in court depends on whether they follow the law. Do

not assist them by providing information that will allow them to develop probable cause to search, or by consenting to a search and thereby voiding the requirement that they do so.

You should also be aware that in an interstate traffic stop, if the police suspect that you have violated a controlled substance law, they will likely seize any cash that they find in the vehicle or on your person and attempt to keep it through a separate legal proceeding called forfeiture. This can happen even if you are not arrested or eventually charged with any crime. For this reason, (as well as to guard against theft in general) it is advisable not to travel to Burning Man with large amounts of cash in your vehicle.

Should you be arrested or cited after an interstate interdiction traffic stop, contact a qualified criminal defense attorney immediately to advise you on how to further proceed.

Applicable Drug Laws – Offences and Penalties

Federal Drug Laws and Penalties

Marijuana

While first offense possession of marijuana would be charged federally as a misdemeanor, a second or third offense may be charged as a felony. 21 U.S.C. §844(a). The penalty for a first offense is up to 1 year imprisonment and a minimum fine of \$1,000.00. A second offense carries a term of imprisonment of 15 days to 2 years, and a minimum fine of \$2,500.00, while a third offense is punishable by 90 days to 3 years prison, with a minimum fine of \$5,000.00. All sales of marijuana are felonies under 21 U.S.C. §841. Sale of less than 50 kilograms can carry a term of up to 5 years and a maximum fine of \$250,000.00. 21 U.S.C. § 841(b)(1)(D).

Other Controlled Substances

The federal sentencing scheme for possession and trafficking in controlled substances is highly complex, and the penalty for those crimes are commensurate with the amount of drug possessed, type of drug possessed, and previous conviction history. Penalties for federal drug crimes range from a minimum of 1 year to life in prison, with fines reaching up to \$4 million. For example, possession of between 5 and 49 grams of methamphetamine or LSD is punishable by not less than 5 years or more than 40 years in prison, with a fine of up to \$2 million, while possession of any amount of ecstasy is punishable by up to 20 years in prison and a fine of \$3 million.

Nevada Drug Laws and Penalties

Marijuana

The severity of the penalty for possession of marijuana in Nevada depends upon the weight possessed and the circumstances under which the defendant possessed it. The penalties for possession of less than one ounce of marijuana in Nevada are:

1. For a first offense, a misdemeanor, punishable by a fine of up to \$600.00. The defendant is also required to submit to a drug abuse assessment and if such assessment determines that he is a drug addict, to a drug treatment program.
2. For a second offense, a misdemeanor, punishable by a fine of up to \$1000 and mandatory treatment in a drug treatment program.
3. For a third offense, a gross misdemeanor, punishable by up to 1 year in jail and a fine of up to \$2,000.00.
4. For a fourth or subsequent offense, a Category E felony, punishable by 1-4 years in the Nevada State Prison and a fine of up to \$5,000.00. This offense carries mandatory probation.

NRS 453.336(4)(a)-(d).

Simple possession of greater than one ounce of marijuana:

1. For a first or second offense is a Category E felony punishable by 1-4 years in prison, up to a \$5,000.00 fine, with probation mandatory for the first offense. NRS 453.336(a).
2. A third or subsequent simple possession charge is a Category D felony punishable by 1-4 years in prison and a \$5,000 fine. NRS 453.336(b).

Regardless of weight, possession of marijuana for the purpose of sale is a Category D felony, punishable by 1-4 years in prison and a \$5,000 fine. NRS 453.337. Sale of marijuana is a Category B felony punishable for a first offense by 1-6 years in prison and a \$10,000 fine. NRS 453.321(2)(a). The penalty for a second offense is 2-20 years and a fine of up to \$20,000.00, and a third or subsequent offense is punishable by 3-15 years and a fine of up to \$20,000.00. Probation is not available for a second or third offense.

Trafficking in marijuana is not likely to be a charge faced by attendees at Burning Man, as it requires the possession of 100 pounds or more of marijuana. The crime of trafficking in a controlled substance in Nevada only requires proof of possession of the per se amount of controlled substance, which for marijuana at Level I is 100 - 2000 pounds. Trafficking Level I for marijuana is a Category C felony punishable by 1-5 years in prison and a fine of up to \$25,000.

Medical marijuana cards, licenses, or prescriptions do not provide a legal defense to federal possession of marijuana charges for any amount of marijuana. Holders of Nevada medical marijuana cards may legally possess up to one ounce of marijuana, NRS 453A.200(3)(b)(1), and are subject to Nevada Department of Health regulations for its use; however, (again) the card does not provide a defense to a federal marijuana charge. Holding a valid medical marijuana card from another state is not a defense to a charge of possession of marijuana in Nevada, but such a defendant may raise many of the affirmative defenses at trial that are available to Nevada medical marijuana card holders. NRS 453A.310.

Other Controlled Substances

Possession of any amount of a Schedule I controlled substance except marijuana (with the exception of legally prescribed medication, which does NOT include medical marijuana prescribed to an out-of-state patient) is a felony in Nevada. Schedule I controlled substances include methamphetamine, ecstasy, cocaine, heroin, etc. The sentencing exposure for simple possession of a controlled substance is the same as for greater than one ounce of marijuana, described above. The sentencing exposure for sales is also the same as that for greater than one ounce of marijuana, also described above. Note that a simple possession of a controlled substance charge can carry a prison term of up to 4 years and a \$5,000.00 fine, while a sales charge can carry a term of up to 20 years and a \$20,000.00 fine.

Trafficking in a controlled substance is the most serious drug crime in Nevada. The penalties for trafficking depend on the weight of the controlled substance. The district attorney need not prove an intent to sell or transport a controlled substance to prove a charge of trafficking; under NRS 453.3385 he/she need only prove possession, or “dominion and control,” over the per se amount of controlled substance. In addition, if convicted, a defendant may not be granted probation in lieu of prison at sentencing, unless the offender agrees to perform “substantial assistance” (i.e., “snitch”). The determination of whether the defendant has rendered sufficient assistance is at the discretion of the sentencing judge. NRS 453.3405(2).

Trafficking in a Schedule I controlled substance Level I is a Category B felony and applies when the controlled substance (except marijuana) weighs at least 4 but less than 14 grams. The penalty for Level I Trafficking is 1 - 6 years prison and up to a \$50,000 fine. NRS 453.3385(1).

Trafficking Level II is a Category B felony and applies when the controlled substance weighs at least 14 but less than 28 grams. The penalty is 2 - 15 years in prison, and a fine of up to \$100,000. NRS 453.3385(2).

Trafficking Level III is a Category A felony, and applies where the controlled substance weighs greater than 28 grams (approximately 1 ounce). The penalty is either a definite term of 10 - 25 years prison or 10 years to life, with up to a \$500,000 fine. NRS 453.3385(3).

The categorization of trafficking crimes as Category A or B makes trafficking offenders ineligible under Nevada law for many prison alternative sentencing programs that would otherwise be available to reduce an offender’s prison sentence. In addition, NRS 453.3405 (1) makes trafficking offenders ineligible for any early release programs, requiring that the minimum sentence be served before parole eligibility.