

UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
(N.J.S.A. 2C:35-10)¹

Count _____ of the indictment charges the defendant with unlawful possession of a controlled dangerous substance.

(Read Count)

The statute upon which this count of the indictment is based states in pertinent part:

It is unlawful for any person knowingly or purposely, to obtain or to possess, actually or constructively, a controlled dangerous substance [or controlled dangerous substance analog].²

In order for you to find defendant guilty of the charge, the State must prove the following elements beyond a reasonable doubt:

1. S _____ is a controlled dangerous substance.

OR

1. S _____ is a controlled substance analog.

2. That the defendant possessed or obtained S _____.

3. That the defendant acted knowingly or purposely in possessing or obtaining S _____.

The first element that the State must prove beyond a reasonable doubt is that S _____ is CDS. Here, the State alleges that defendant possessed (name of controlled dangerous substance).

OR

The first element that the State must prove beyond a reasonable doubt is that S _____ is a controlled dangerous substance analog.

A "controlled substance analog" is a substance which (1) has a chemical structure substantially similar to that of a controlled dangerous substance and (2) was specifically

¹ To be used when the quantity of the CDS is not an element of the offense. With the exception of marijuana and hashish, possession of any amount of CDS is a crime. Therefore, it is not necessary for the jury to make a finding as to quantity. In cases involving marijuana and hashish, there is the additional element of quantity - 50 grams in respect to marijuana and 5 grams in respect to hashish. N.J.S.A. 2C:35-10a(3). Possession of lesser amounts of these drugs is a disorderly persons offense. N.J.S.A. 2C:35-10a(4). Thus, in a marijuana or hashish possession case, these additional elements must be charged, and when appropriate a charge on the lesser included disorderly persons offense must be given. The jury should be instructed that in the event they find the defendant guilty, they should determine whether the State has proven beyond a reasonable doubt the specified quantity was possessed.

² To be charged when the indictment alleges possession of a controlled dangerous substance analog.

**UNLAWFUL POSSESSION OF A
CONTROLLED DANGEROUS SUBSTANCE**
(N.J.S.A. 2C:35-10)

designed to produce an effect substantially similar to that of a controlled substance.³ In this case the indictment alleges that the defendant distributed _____ which is an analog of the controlled dangerous substance _____. Thus, to establish this element the State must prove beyond a reasonable doubt that _____ has a substantially similar chemical structure to the controlled dangerous substance _____ and that _____ was specifically designed to produce an effect substantially similar to the controlled dangerous substance _____.

The second element that the State must prove beyond a reasonable doubt is that defendant possessed or obtained S _____. To "obtain" means to acquire, to get, to procure.

To "possess" an item under the law, one must have a knowing, intentional control of that item accompanied by knowledge of its character. So, a person who possesses an item such as (_____ **IDENTIFY RELEVANT ITEM(S)**) must know or be aware that he/she possesses it/them, and he/she must know what it is that he/she possesses or controls (that it is _____). [**WHERE APPLICABLE**, charge: Possession cannot merely be a passing control, fleeting or uncertain in its nature.] In other words, to "possess" an item, one must knowingly procure or receive an item or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so.

The State must prove beyond a reasonable doubt that a possessor acted knowingly in possessing the item. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of the high probability of their existence. A person acts knowingly as to a result of his/her conduct if he/she is aware that it is practically certain that conduct will cause such a result. Knowing, with knowledge, or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inferences from conduct, words or acts. Therefore, it is not necessary for the State to produce witnesses to testify that a particular defendant stated, for example, that he/she acted with knowledge when he/she had control over a particular thing. It is within your power to find that

³ N.J.S.A. 2C:35-2.

**UNLAWFUL POSSESSION OF A
CONTROLLED DANGEROUS SUBSTANCE**
(N.J.S.A. 2C:35-10)

proof of knowledge has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances.

A person may possess _____ (an item) even though it was not physically on his/her person at the time of the arrest, if he/she had in fact, at some time prior to his/her arrest had control over it.

Possession means a conscious, knowing possession, either actual or constructive.

[CHARGE THOSE FOLLOWING PARAGRAPHS WHICH APPLY TO YOUR CASE]

ACTUAL POSSESSION

A person is in actual possession of an item when he/she first, knows what it is: that is, he/she has knowledge of its character, and second, knowingly has it on his/her person at a given time.

CONSTRUCTIVE POSSESSION⁴

Possession may be constructive instead of actual. As I just stated, a person who, with knowledge of its character, knowingly has direct physical control over an item at a given time is in actual possession of it.

Constructive possession means possession in which the possessor does not physically have the item on his or her person but is aware that the item is present and is able to and has the intention to exercise control over it. So, someone who has knowledge of the character of an item and knowingly has both the power and the intention at a given time to exercise control over it, either directly or through another person or persons, is then in constructive possession of that item.

JOINT POSSESSION

Possession may be sole or joint. If one person alone has actual or constructive possession of an item, possession is sole. If two or more persons share actual or constructive knowing possession of an item, possession is joint.

[RESUMPTION OF MAIN CHARGE]

⁴ In State v. Spivey, 179 N.J. 229 (2004), the New Jersey Supreme Court affirmed a conviction under N.J.S.A. 2C:39-4.1(a), Possession of a Firearm While Committing Certain Drug Offenses. There, the Court noted that the statute suggests a temporal and spatial link between possession of the firearm and the drugs. The Court held: "The evidence must permit the jury to infer that the firearm was accessible for use in the commission of the [drug] crime." In the appropriate case, therefore, the possession charge may be supplemented by this language.

**UNLAWFUL POSSESSION OF A
CONTROLLED DANGEROUS SUBSTANCE**
(N.J.S.A. 2C:35-10)

The third element that the State must prove beyond a reasonable doubt is that the defendant acted knowingly or purposefully in obtaining or possessing S _____. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.⁵

A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he/she is aware of the existence of such circumstances or he/she believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.⁶

Knowledge and purpose are conditions of the mind. They cannot be seen and can only be determined by inferences from conduct, words or acts. Therefore, it is not necessary for the State to produce witnesses to testify that a particular defendant stated, for example, that he/she acted with knowledge when he/she had control over a particular thing. It is within your power to find that proof of knowledge has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances.

If you find that the State has proven all of these elements beyond a reasonable doubt, then you must return a verdict of guilty. If you find that the State has failed to prove any one of these elements beyond a reasonable doubt, then you must return a verdict of not guilty.⁷

⁵ N.J.S.A. 2C:2-2b(1).

⁶ N.J.S.A. 2C:2-2b(2).

⁷ N.J.S.A. 2C:35-10 provides that if this offense is committed on, or within 1,000 feet of school property or a school bus, and if the defendant is not sentenced to a term of imprisonment, the defendant's sentence must include 100 hours of community service. It is an open question whether the mandatory community service sentencing provision of N.J.S.A. 2C:35-10(a) would be considered an element of the offense that would then be required to be found by a jury prior to imposition.