

OVERDOSE PREVENTION ACT
DEFENDANT SUBJECT OF CALL FOR ASSISTANCE
(N.J.S.A. 2C:35-31)

[TO BE GIVEN AT CONCLUSION OF SUBSTANTIVE CDS CHARGE]

Apart from his/her general denial of guilt, the defendant relies upon the Overdose Prevention Act as a defense to the charge of _____. The Overdose Prevention Act is a law which provides protection from conviction of certain offenses, whenever the evidence supporting the charge was obtained as the result of a good faith request for medical assistance for another person experiencing a drug overdose. This defense can protect both those who request medical assistance for someone else, whom they perceive to be experiencing a drug overdose; and also the individual experiencing the overdose, who is the subject of the request. In this case, the defendant asserts that he/she was experiencing a drug overdose, and medical assistance was sought as a result, leading to the discovery of the evidence the State has introduced.

The relevant statute states:

A person who experiences a drug overdose and who seeks medical assistance or is the subject of a good faith request for medical assistance shall not be convicted for:

[CHOOSE AS APPROPRIATE:

- obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of, a controlled dangerous substance or controlled substance analog, N.J.S.A. 2C:35-10;
- inhaling the fumes of or possessing any toxic chemical, N.J.S.A. 2C:35-10.4;
- using, obtaining, attempting to obtain, or possessing any prescription legend drug or stramonium preparation, N.J.S.A. 2C:35-10.5;
- acquiring or obtaining possession of a controlled dangerous substance or controlled substance analog by fraud, N.J.S.A. 2C:35-13;
- unlawfully possessing a controlled dangerous substance that was lawfully prescribed or dispensed, N.J.S.A. 2C:35-24;
- using or possessing with intent to use drug paraphernalia, N.J.S.A. 3C:36-2; or
- having under his control or possessing a hypodermic syringe, hypodermic needle, or any other instrument adapted for the use of a controlled dangerous substance or a controlled substance analog, N.J.S.A. 2C:36-6.]

These provisions shall only apply if the person seeks medical assistance for another person who

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experiences a drug overdose, and the evidence for an arrest, charge, prosecution, or conviction was obtained as the result of the seeking of medical assistance.

In order to establish this defense, the burden is on the defendant to establish that it applies, by a preponderance of the evidence.¹ The term "preponderance of the evidence" means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses, but means that evidence which carries the greater convincing power to your minds.

Therefore, the defendant must establish the following elements of the defense:

1. He/She sought medical assistance for himself/herself, or that someone else sought medical assistance for him/her in good faith;
2. He/She was experiencing a drug overdose; and
3. The evidence the State seeks to use against him/her was obtained as the result of the request for medical assistance.

First, the defendant must establish that he/she sought medical assistance for himself/herself, or that someone else sought medical assistance for him/her in good faith. "Medical assistance" means professional medical services that are provided to a person experiencing a drug overdose by a health care practitioner, acting within the practitioner's scope of professional practice, including professional medical services that are mobilized through telephone contact with the 911 telephone emergency service.² "Good faith" means that the call for assistance must not have been an attempt to exploit the protection available under the law, when the person does not genuinely appear to be acutely ill.³

Second, the defendant must establish that he/she was experiencing a drug overdose. A drug overdose is an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled dangerous substance or another substance with which a controlled dangerous substance was combined and that a layperson would reasonably believe to require medical assistance.⁴ "Acute" means there must be some degree of severity of the condition.⁵ The condition cannot be mild or inconsequential, but

¹ State v. W.S.B., 453 N.J. Super. 206, 232-33 (App. Div. 2018).

² N.J.S.A. 24:6J-3.

³ State v. W.S.B., 453 N.J. Super. 206, 229 (App. Div. 2018).

⁴ N.J.S.A. 24:6J-3.

⁵ State v. W.S.B., 453 N.J. Super. 206, 227 (App. Div. 2018).

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on the other hand, the condition need not be so severe to produce a coma or death.⁶ The nature and urgency of the situation is to be viewed through the eyes of an average person.⁷

Third, the defendant must establish that the evidence the State seeks to use against him/her was obtained as the result of the request for medical assistance. If you find that the first two elements of the defense have been satisfied by the defendant, you must then determine which evidence was obtained as a result of the request for medical assistance. Such evidence cannot be considered by you in determining whether the State has met their burden of proving guilt of this offense beyond a reasonable doubt. However, you may consider any evidence that was obtained by other means.

Therefore, to establish the Overdose Prevention Act as a defense to the charge of _____, the defendant must prove, by a preponderance of the evidence, that he/she sought medical assistance for himself/herself, or that someone else sought medical assistance for him/her in good faith; that he/she was experiencing a drug overdose as I have defined it; and the evidence the State seeks to use against him/her was obtained as the result of the request for medical assistance.

Keep in mind, however, that although the burden rests upon the defendant to establish the elements of the Overdose Prevention Act by a preponderance of the evidence, the burden of proving the defendant guilty of the offense charged beyond a reasonable doubt is always on the State, and that burden never shifts to the defendant.

If you find that the State has not proven the elements of the offense beyond a reasonable doubt, or if you find that defendant has proven the elements of the Overdose Prevention Act by a preponderance of the evidence, you must find the defendant not guilty.

If, however, you find that the State has proven the elements of the offense beyond a reasonable doubt; and that defendant has not proven the elements of the Overdose Prevention Act by a preponderance of the evidence, you must find the defendant guilty of this offense.

⁶ Ibid.

⁷ Ibid.