

POSSESSION OF RADIO TO INTERCEPT EMERGENCY COMMUNICATIONS
WHILE COMMITTING OR ATTEMPTING TO COMMIT A CRIME
(N.J.S.A. 2C:33-22)

The defendant is charged with possession of a radio to intercept emergency communications while committing or attempting to commit a crime. The statute provides in pertinent part:

Any person who, while in the course of committing or attempting to commit a crime, including the immediate flight therefrom, possesses or controls a radio capable of receiving any message or transmission made on or over any police, fire or emergency medical communications system, shall be guilty of a crime ...

In order for you to find the defendant guilty of this offense, you must find that the State has proved the following elements beyond a reasonable doubt:

1. the defendant knowingly possessed or knowingly controlled a radio capable of receiving any message or transmission made on or over any police, fire or emergency medical communications system; and
2. that the defendant possessed or controlled that radio while in the course of committing or attempting to commit a crime.

The first element that the State must prove beyond a reasonable doubt is that the defendant knowingly possessed or knowingly controlled a radio capable of receiving a message or transmission made on or over a police, fire or emergency medical communications system.

A police, fire or emergency medical communications system is a radio system or other communications system used by police officers, firefighters and/or emergency medical personnel to communicate among themselves and/or with each other.¹

POSSESSION
(N.J.S.A. 2C:2-1)

To “possess” an item under the law, one must have a knowing, intentional control of that item accompanied by a 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, and he/she must know what it is that he/she possesses or controls (**that it is**

¹ Radar devices used to monitor vehicle speed are not a “police, fire, or emergency medical communications system.” N.J.S.A. 2C:33-23.

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_____). [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 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 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 AS 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 POSSESSION

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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.

The second element that the State must prove beyond a reasonable doubt is that the defendant was in the course of committing or attempting to commit a crime.²

Here, the State contends that defendant was in the course of **INSERT CRIME COMMITTED OR ATTEMPTED]** _____.]³

An act is considered to be in the course of committing a crime if it occurs during an attempt to commit a crime, during the commission of the crime itself, or during the immediate flight after the attempt to commit or the commission of the crime.

If you find that the State has proved, beyond a reasonable doubt, the elements as I have just explained them, then you must find the defendant guilty. If, on the other hand, you find that the State has failed to prove any of the elements beyond a reasonable doubt, then you must find the defendant not guilty.

² When the case involves an attempt theory, attempt should be charged. See Model Charge for N.J.S.A. 2C:5-1. Note that attempt requires a purposeful state of mind. State v. Robinson, 136 N.J. 476 (1994).

³ The State must identify the crime that defendant was in the course of committing or attempting to commit when he/she possessed a radio capable of receiving a message made over an emergency communications system. The court's charge should advise the jury of the elements of the underlying crime. Cf. State v. MacIlwraith, 344 N.J. Super. 544, 548 (App. Div. 2001).