

UNLAWFUL POSSESSION OF A HANDGUN
PRIOR NERA CONVICTION
(FIRST DEGREE)
N.J.S.A. 2C:39-5(j)

NOTE

[The following should be charged before the beginning of the second trial if it is tried before the same jury that decided the possessory charge of a weapon or firearm]

Now there is an additional charge for you to consider.

Count _____ charges the defendant with possession of a handgun by a previously convicted person.

(Read Certain Persons count of the Indictment)¹

You must disregard completely your prior verdict, and consider anew the evidence previously admitted on the possession of a weapon. The defendant is entitled to the presumption of innocence and the State must prove each and every element beyond a reasonable doubt.²

Defendant(s) is charged in with Unlawful Possession of a Handgun by a person with an enumerated prior conviction. The statute upon which this count is based reads, in pertinent part, as follows:

Any person who knowingly has in his possession any handgun . . . without first having obtained a permit to carry the same, who has previously been convicted of a crime enumerated in N.J.S.A. 2C:43-7.2 . . . is guilty of a crime.

In order to convict the defendant, the State must prove each of the following elements beyond a reasonable doubt:

1. S-___ is a handgun (**CHARGE IF APPROPRIATE**: That there was a handgun);
2. That the defendant knowingly possessed the handgun; and
3. That the defendant did not have a permit to possess such a weapon.
4. That the defendant has a prior conviction of an enumerated crime in N.J.S.A. 2C:43-7.2, which is the State alleges is the crime of:

(SELECT APPROPRIATE)

¹ If defendant is stipulating to the predicate offense, do not read the crime listed in the Certain Persons count.

² See State v. Ragland, 105 N.J. 189, 195 (1986).

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- (a) Murder;
- (b) Aggravated Manslaughter or Manslaughter;
- (c) Vehicular Homicide;
- (d) Aggravated assault, pursuant to subsection b. of N.J.S.A. 2C:12-1;
- (e) Disarming a law enforcement officer, pursuant to subsection b. of N.J.S.A. 2C:12-11;
- (f) Kidnapping;
- (g) Aggravated Sexual Assault, pursuant to subsection a. of N.J.S.A. 2C:14-2,
- (h) Sexual Assault, pursuant to subsection b. of N.J.S.A. 2C:14-2 or paragraph (1) of subsection c. of N.J.S.A. 2C:14-2;
- (i) Robbery;
- (j) Carjacking;
- (k) Aggravated Arson, pursuant to paragraph (1) of subsection a. of N.J.S.A. 2C:17-1;
- (l) Second-degree burglary (N.J.S.A. 2C:18-2);
- (m) Extortion, pursuant to subsection a. of N.J.S.A. 2C:20-5;
- (n) Booby traps in manufacturing or distribution facilities, pursuant to subsection b. of N.J.S.A. 2C:35-4.1;
- (o) Strict liability for drug induced deaths;
- (p) Terrorism;
- (q) Producing or possessing chemical weapons, biological agents or nuclear or radiological devices;
- (r) First-degree Racketeering
- (s) Firearms trafficking, pursuant to subsection i. of N.J.S.A. 2C:39-9;
- (t) Causing or permitting a child to engage in a prohibited sexual act, knowing that the act may be reproduced or reconstructed in any manner, or be part of an exhibition or performance, pursuant to paragraph (3) of subsection b. of N.J.S.A. 2C:24-4.

The first element that the State must prove beyond a reasonable doubt that (**CHOOSE APPROPRIATE** (S-__ is a handgun)(there was a handgun). Under our law, a handgun is any

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pistol, revolver or other firearm originally designed or manufactured to fire or eject any solid projectile, ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by action of an explosive or the igniting of flammable or explosive substances by the use of a single hand.³

The second element that the State must prove beyond a reasonable doubt is that the defendant knowingly possessed the handgun.

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 _____**). **[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 the 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.

³ N.J.S.A. 2C:39-1(f) and N.J.S.A. 2C:39-1(k).

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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

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.

[MERE PRESENCE – Read if Appropriate⁴]

Defendant's mere presence at or near a place where [contraband] is/are discovered is not in itself, without more, proof beyond a reasonable doubt that defendant was in constructive possession of [that contraband]. It is, however, a circumstance to be considered with the other evidence in determining whether the State has proven possession of the [contraband] beyond a reasonable doubt.

Where defendant is one of the persons found in the area where [contraband] is/are discovered, you may not conclude, without more, that the State has proven beyond a reasonable

⁴ State v. Randolph, 228 N.J. 566, 590-93 (2017).

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doubt that he/she had possession of the [contraband] unless there are other circumstance(s) tending to permit such an inference to be drawn.⁵ Such evidence can include, but is not limited to [choose as appropriate]: placement and accessibility of the [contraband]; defendant's access to and connection with the place where the [contraband] was/were found; his/her proximity to the place where the [contraband] was/were found; his/her demeanor when confronted by police after the [contraband] was/were found; whether defendant made any inculpatory statements after the [contraband] was/were found; whether defendant possessed other [contraband] on his/her person or property when the [contraband] was/were found; [any other evidence deemed part of the totality of circumstances].⁶

In summary, the State must prove more than defendant's mere presence at the time that the [contraband] was/were found. There must be other circumstance(s) tying defendant to the [contraband] in order for the State to prove constructive possession beyond a reasonable doubt.^{7]}

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.

(RESUME MAIN CHARGE- CHARGE IN ALL CASES)

The third element that the State must prove beyond a reasonable doubt is that the defendant did not have a permit to possess such a handgun. If you find that the defendant knowingly possessed the handgun, and that there is no evidence that defendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such permit.⁸ Note, however, that as with all other

⁵ State v. Jackson, 326 N.J. Super. 276, 280 (App. Div. 1999); See State v. Brown, 80 N.J. 587, 593 (1979) and State v. Sapp, 71 N.J. 476 (1976), rev'g on dissent 144 N.J. Super. 455, 460 (1975).

⁶ State v. Randolph, supra, 228 N.J. at 590-93, citing State v. Palacio, 111 N.J. 543, 549-54 (1988) and State v. Shipp, 216 N.J. Super. 662, 664-66 (App. Div. 1987). See Palacio, Shipp, and State v. Montesano, 298 N.J. Super. 597, 615 (App. Div. 1997), certif. denied 150 N.J. 27 (1997), for circumstances more specifically related to presence in or near an automobile in which drugs are found.

⁷ State v. Whyte, 265 N.J. Super. 518, 523 (App. Div. 1992), aff'd o.b. 133 N.J. 481 (1993); Jackson, 326 N.J. Super. at 280.

⁸ If appropriate, see N.J.R.E. 803(c)(10) and State v. Ingram, 98 N.J. 489 (1985), regarding absence of a permit.

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elements, the State bears the burden of showing, beyond a reasonable doubt, the lack of a valid permit and that you may draw the inference only if you feel it appropriate to do so under all the facts and circumstances.

The fourth element the State must prove beyond a reasonable doubt is that the defendant has a prior conviction for a crime enumerated in N.J.S.A. 2C:43-7.2, which the State alleges is:

(SELECT APPROPRIATE)

- (a) Murder;
- (b) Aggravated Manslaughter or Manslaughter;
- (c) Vehicular Homicide;
- (d) Aggravated assault, pursuant to subsection b. of N.J.S.A. 2C:12-1;
- (e) Disarming a law enforcement officer, pursuant to subsection b. of N.J.S.A. 2C:12-11;
- (f) Kidnapping;
- (g) Aggravated Sexual Assault, pursuant to subsection a. of N.J.S.A. 2C:14-2,
- (h) Sexual Assault, pursuant to subsection b. of N.J.S.A. 2C:14-2 or paragraph (1) of subsection c. of N.J.S.A. 2C:14-2;
- (i) Robbery;
- (j) Carjacking;
- (k) Aggravated Arson, pursuant to paragraph (1) of subsection a. of N.J.S.A. 2C:17-1;
- (l) Second-degree burglary (N.J.S.A. 2C:18-2);
- (m) Extortion, pursuant to subsection a. of N.J.S.A. 2C:20-5;
- (n) Booby traps in manufacturing or distribution facilities, pursuant to subsection b. of N.J.S.A. 2C:35-4.1;
- (o) Strict liability for drug induced deaths;
- (p) Terrorism;
- (q) Producing or possessing chemical weapons, biological agents or nuclear or radiological devices;
- (r) First-degree Racketeering
- (s) Firearms trafficking, pursuant to subsection i. of N.J.S.A. 2C:39-9;

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If you find that the State has failed to prove any of the elements of the crime beyond a reasonable doubt, your verdict must be not guilty. On the other hand, if you are satisfied that the State has proven each and every element of the crime beyond a reasonable doubt, your verdict must be guilty.