

**920 POSSESSION**

"Possession" means that the defendant knowingly<sup>1</sup> had actual physical control of the item.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]<sup>2</sup>

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]<sup>3</sup>

**COMMENT**

Wis JI-Criminal 920 was originally published in 1986. The comment was revised in 1990. The 2000 revision made nonsubstantive changes in the text and updated the comment.

Wis JI-Criminal 920 is intended to offer a basic definition of "possession." Its substance is incorporated into instructions for offenses having "possession" as an element.

This instruction, and the discussion of "constructive possession" in note 2, was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The definition of "possession" in this instruction was cited with approval in State v. Peete, 185 Wis.2d 4, 16, 517 N.W.2d 149 (1999).

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

2. The basic definition requires "actual physical control." The bracketed, optional paragraphs are intended for cases where the object is arguably under the defendant's control but not directly in his physical possession.

Cases sometimes refer to "constructive possession" to resolve this question, placing substantial reliance on the concept without making clear the exact role it is playing. After reviewing such cases, it seems that it is preferable not to refer to "constructive possession" as a substitute or alternative for "real" possession. Rather, it should be viewed as a description of circumstances that are sufficient to support an inference that the person exercised control over, or intended to possess, the item in question. These are aspects of "real," not "constructive," possession.

A decision of the Wisconsin Court of Appeals is consistent with this analysis. State v. R. B., 108 Wis.2d 494, 322 N.W.2d 502 (Ct. App. 1982), involved a charge of possession of beer by a minor in violation of § 66.054(20), since recodified as § 125.07(4). The state argued that R. B. "constructively" possessed beer because he knew there was beer present, it was immediately accessible to him, and he could easily exercise "dominion and control" over it whenever he chose to do so.

The court of appeals found the evidence insufficient to support a finding of "possession."

We conclude that the mere presence of R. B. at the party, even coupled with his knowledge of the presence of beer and its accessibility to him, is insufficient to constitute possession for purposes of sec. 66.054(20)(b). Even under Dodd, the opportunity to possess, standing alone, does not establish possession. There must additionally be the exercise of some dominion or control over the substance. Unfortunately, the terms "dominion" and "control" are nothing more than labels used by courts to characterize a given set of facts. They are not informative in any functional manner and have been appropriately subject to criticism. See Whitebread and Stevens, Constructive Possession In Narcotics Cases: To Have And Have Not, 58 Va. L. Rev. 751 (1972). To be functional, the dominion and control necessary to permit conviction based on constructive rather than actual possession requires that the facts permit the inference of an intent to possess.

Constructive possession is a legal concept used by courts to find possession where the facts and circumstances demand that the individual acquire the legal status of a possessor. In applying this concept, however, we must keep in mind that the basic question is whether the defendant did in fact possess the prohibited item. Blind application of the constructive possession concept as proposed by the state would require a finding of possession in many instances where possession in fact does not exist. This case is a good example. Under the state's theory of constructive possession, liability would be imposed upon a minor for being present at a place where beer is being used. Presumably, the individual who knows of its use must either leave or report a violation. Arguably, absent express statutory prohibition of a minor being in the presence of beer, judicial use of a possession statute to impose such broad liability usurps the legislature's proper function.

If the doctrine of constructive possession is to have a rational role in the law, the inquiry must focus on the control element of the general possession offense. Unless actual control exists, there must be found from the surrounding facts and circumstances, aided by reasonable inferences, an intent to exercise control over the prohibited item. Without such a finding, there can be no constructive possession. The trial court finding that R. B. did not intend to possess the beer must therefore defeat

the conviction. Intent to possess or evidence that would support an inference of possession are absent.

108 Wis.2d 494, 496-98.

3. See, for example, Curl v. State, 40 Wis.2d 474, 482-83, 162 N.W.2d 77 (1968).

Also see, Schmidt v. State, 77 Wis.2d 370, 379, 253 N.W.2d 204, 208 (1977): "[p]ossession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, providing that the accused has knowledge of the presence of the drug."