1343 POSSESSION OF A FIREARM — § 941.29(1m)

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person has been convicted of a felony.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

"Firearm" means a weapon which acts by the force of gunpowder.[2] [It is not necessary that the firearm was loaded or capable of being fired.][3]

"Possess" means that the defendant knowingly[4] had actual physical control of a firearm.[5]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[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.]

[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.]

2. The defendant had been convicted of a felony before (date of offense).[6]

[(Name of felony) is a felony in Wisconsin.][7]

[The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved.][8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1343 was originally published in 1983 and revised in 1984, 1986, 1987, 1993, 1996, 1999, 2007, 2011, and 2016. This revision was approved by the Committee in October 2019; it added to the Comment.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in new sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996), is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or over broad and it does not deny the equal protection of the laws. Id.

Section 2 of Chapter 141, Laws of 1981, related to the applicability of the law and was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29, that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. The instruction is drafted for cases involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1m)(a) through (g). This instruction is suitable for use in cases involving subs. (1m)(a) and (b). (See discussion in note 7.) For cases involving subs. (1m)(c) through (em), the instruction must be modified. [Subsection (1m)(em) was created by 2009 Wisconsin Act 258.] For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29.

The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest."

The Wisconsin Attorney General has concluded that subsec. (5)(a) has been invalidated by congressional action. Effective November 15, 1986, 18 U.S.C. app. § 1203, was repealed in favor of 18 U.S.C. § 921(a)(20). "Any pardon granted . . . since November 15, 1986, will give the recipient the right to . . . possess . . . firearms unless the pardon 'expressly provides that the person may not ship, transport, possess or receive firearms.' 18 U.S.C. § 921(a)(20)." OAG-6-89, Feb. 20, 1989.

2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

3. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

4. 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).

5. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

6. The date of the offense should be inserted in this blank.

7. The statute applies to persons convicted of a felony in Wisconsin and also to persons convicted of crimes in other states that would be felonies in Wisconsin. In the Committee's judgment, the way the second element is phrased should be suitable for handling either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

The Committee also concluded that the statute need not be interpreted to require that the defendant "know he was convicted of a felony" or know that he was prohibited from possessing a firearm. A person may fairly be held to know the nature of a crime of which he was convicted and to know the disabilities that may attend such a conviction.

Section 939.23(1) provides: "When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" The Committee generally applies the converse of this rule: if a statute does not use one of the "intent words" – in this case it would most likely be "knowingly" – a mental state is not required.

[Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2) which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2)

was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.]

Where the out-of-state conviction is under a statute that is broader than its Wisconsin counterpart, courts should evaluate whether the conduct that led to the conviction would be considered a felony if committed in Wisconsin. If it would, the out-of-state conviction can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, 642 N.W.2d 230.

Wisconsin law clearly distinguishes between a pardon and a restoration of rights. Under § 941.29(5)(a), a pardon – not merely a restoration of rights – remains necessary for a felon to be relieved of his or her firearms disabilities. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

8. Defendants may offer to stipulate to the fact of their felon status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**. The effect of a stipulation in a prosecution for violating § 941.29 has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. With this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understand (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?
2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court therefore accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

