## 6000 NOTE ON THE KNOWLEDGE REQUIREMENT IN CONTROLLED SUBSTANCE CASES

The statutes defining controlled substance offenses typically do not contain a mental element. For example, § 961.41(1) provides simply that "it is unlawful for any person to manufacture, distribute or deliver a controlled substance . . ." In interpreting these statutes, courts have held that it must be proved that persons charged "knew or believed" that the substance they delivered, manufactured, or possessed was a controlled substance. This note discusses some of the issues that arise in trying to apply this knowledge requirement.

### The Source of the Knowledge Requirement

The source of the knowledge requirement in Wisconsin is State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). The court held that under § 161.30(12)(d) (1969 Wis. Stats.) [now § 961.30(12)(d)], "the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. The 1969 statute under which Christel was charged contained no specific knowledge requirement, but the court cited two authorities in a footnote to the phrase quoted above: Wis JI-Criminal 6030 (and cases cited therein); and a federal case, Wright v. Edwards, 470 F.2d 980 (5th Cir. 1972).

Wis JI-Criminal 6030, as it existed in 1973, required that the defendant "knew or believed that the substance he possessed was (name controlled substance) ." The cited authorities for this conclusion were other instructions where "possession" was an element: Wis JI-Criminal 1481 Receiving Stolen Property; and Wis JI-Criminal 1417 Possession Of A Firebomb. Note 2 to Wis JI-Criminal 1417 is especially relevant: "[The offense] . . . appears to be strict liability, but 'possession' carries with it a connotation of 'knowing or conscious possession.'"

In Wright v. Edwards, cited above, the issue was whether a state statute simply prohibiting the "possession of marijuana" included an element of criminal intent or guilty knowledge. The court held that while intent in the traditional common law sense of a guilty mind is not a constitutional requisite under a statute of this type, due process demands that the State show a specific intent to possess the prohibited substance, that is, that the act was purposely, not accidentally done.

Wisconsin cases since Christel have reaffirmed the knowledge requirement without discussing it in detail. See, for example, Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978); Kabat v. State, 76 Wis.2d 224, 251 N.W.2d 38 (1977); State v. Smallwood, 97

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Wis.2d 673, 294 N.W.2d 51 (Ct. App. 1980); and, State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

The Wisconsin Supreme Court revisited the issue in State v. Sartin, 200 Wis.2d 47, 546 N.W.2d 499 (1996). Sartin was a passenger in a car in which bags of cocaine and cocaine base were found. He admitted accepting money to transport the bags and knowing that what they contained was "probably illegal," but denied knowing they contained cocaine. He claimed that the trial court erred in not instructing the jury that the state must prove he knew the bags contained cocaine. The Wisconsin Supreme Court summarized the history of the knowledge requirement as described above and reaffirmed the rule expressed in the cited cases:

> . . . [t]he only knowledge that the State must prove . . . is the defendant's knowledge or belief that the substance was a controlled or prohibited substance. The State is not required to prove the defendant knew the exact nature or precise chemical name of the substance. . . The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. People v. James, 348 N.E.2d 295, 298 (Ill. App. 1976). We find that it would be unreasonable to assume that the legislature intended that the State prove that the accused knew the exact nature or chemical name of the controlled substance. 200 Wis.2d 47, 61.

The court in Sartin also addressed some of the potential problems that have been outlined in this note. See the discussion below.

**Two Aspects To The Knowledge Requirement**

The cases from Christel through Sartin suggest some of the potential problems that arise in trying to apply the knowledge requirement. The requirement appears to have two different aspects: 1) knowing, conscious possession as opposed to accidental, unknowing possession; and, 2) knowing the nature of the substance knowingly possessed or delivered. [This analysis, contained in an earlier version of this Note, was cited with apparent approval in State v. Sartin, 200 Wis.2d 47, 54 (at note 3), 546 N.W.2d 449 (1996).]

**1) Knowing, conscious, possession or delivery**

This aspect of the problem appears to be straightforward and is most clearly raised in possession cases. It may arise where the amount of substance possessed is so small that there may be doubt whether the defendant knew it was in his possession at all. The Kabat

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case, cited above, is an illustration of this problem. Kabat's conviction for possession of marijuana rested on the presence of marijuana ash and residue in a pipe. The Wisconsin Supreme Court reversed the conviction on the ground that the presence of such a small amount of material was not a sufficient basis upon which to base a finding that the defendant was in "knowing possession."

[Note: Kabat does not require that there be a "usable amount" as a basis for a possession conviction. Possession of any amount is sufficient to support a conviction as long as that possession is "knowing." See Fletcher v. State, 68 Wis.2d 381, 228 N.W.2d 708 (1975), and State v. Dodd, 28 Wis.2d 643, 137 N.W.2d 465 (1965). Also see, Peasley v. State, 83 Wis.2d 224, 265 N.W.2d 506 (1978): possession of 1/3 gram of cocaine was sufficient, in light of all the evidence, to support a finding of possession with intent to deliver.]

Other examples which illustrate this aspect of the problem are the person with flakes of marijuana in a pants cuff; the person who has been set up by the concealment of narcotics in his or her clothing; or the person who has received an unsolicited and unexpected package or marijuana in the mail. It is the same issue addressed by the previously cited footnote to Wis JI-Criminal 1417: the use of the word "possession" carries with it a connotation of "knowing or conscious possession." [See Wis JI-Criminal 920 for discussion of cases reaffirming this interpretation.]

The same type of reasoning applies in delivery cases with even greater force – implicit in the word "delivery" is knowledge of the material being transferred. In the judgment of the Committee, "delivery" is used in the sense of "intentional transfer of knowing possession."

**2) Knowledge of the nature of the substance (knowingly) possessed**

The second aspect of the knowledge problem is more troublesome. When the defendant John Smith knows he has a substance in his pocket, what must he know about the identity of that substance? State v. Sartin, cited above, confirmed the basic rule of the Christel-Kabat-Lunde-Smallwood line of cases that defendants need not know the scientific name or the precise nature of the substance as long as they know the substance is a "controlled substance."

Unlike most definitions of terms used in the criminal law, the definition of "controlled substance" does not use general or descriptive terms. "Controlled substance" is defined in § 961.01(4) as ". . . a drug, substance or immediate precursor included in schedules I to V of subch. II." The definition simply says that a "controlled substance" is

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any substance listed in the statutory schedules. Literal application of the knowledge requirement to the statutory definition would seem to require knowledge that the substance was listed in the schedules, yet few people are likely to be familiar with the complicated chemical names that appear in those schedules. And the cases (see, for example, Lunde and Smallwood, cited above) hold that knowledge of the chemical name is not required.

In many cases, there will be no dispute about the defendant's knowledge of the nature of the substance, as in cases involving sales to an undercover officer where the defendant has offered to sell a particular substance to the officer. In other cases, the State may undertake to prove the defendant knew the precise nature of the substance. In such situations, the uniform instructions provide for using the name of the substance in the instructions.

In other cases, the facts may be unclear whether the defendant knew the nature of the substance possessed or delivered. One possible case is where the defendant believes he or she possesses one substance (for example, heroin) but actually possesses another (for example, morphine). In that case, the defendant may be found guilty since both substances are controlled.

If the defendant is honestly mistaken about the controlled or illegal nature of the substance, a different result may follow. For example, where the defendant honestly believes the substance to be caffeine, not a controlled substance, and it is actually heroin, the mistake can be a defense because it negatives the state of mind required for the crime – knowledge or belief that the person possessed a controlled substance.

**Knowing a Substance by a "Street Name"**

Another common situation is one where the defendant knows the substance by a slang or street name and does not know its proper or chemical name. The uniform instructions provide that knowledge of the street name is sufficient if there is proof that the substance was in fact a controlled substance, that the name known to the defendant was the street name for that substance, and that the defendant did know the substance by the street name.

**Mistake about the Schedule in Which a Substance Is Listed**

State v. Sartin, cited above, resolved a potential problem presented by the case where the defendant believes the substance is a controlled substance, but believes it is, for example, a substance listed in Schedule IV, but it is in fact listed in Schedule I. The

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schedule determines the penalty and there can be a substantial difference in the penalty between offenses involving Schedule I and Schedule IV substances. A decision of the Wisconsin Court of Appeals had suggested that where the difference in schedules results in different penalties, knowledge of the identity of the substance is required:

> Knowledge as to the exact nature or chemical name of the controlled substance is necessary only when the evidence points to substances of different schedules and penalties. State v, Smallwood, 97 Wis.2d 673, 678.

Sartin held that the quoted provision was dicta ("unnecessary to the resolution of the issue before [the court] and therefore is not binding in subsequent cases as legal precedent):

> We expressly overrule any language in Smallwood which suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

**Proof of the Knowledge Element**

Establishing the mental element in a controlled substance case, like proving intent in any criminal prosecution, can be difficult to accomplish without using circumstantial evidence. In cases where the mental element is disputed, all the circumstances surrounding the incident will be relevant. Section 961.41(1m) offers guidance as to the types of facts that may be present:

> Intent under this subsection [intent to manufacture, distribute or deliver] may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

Facts of this type may be relevant in any case where the mental element is contested.

In State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990), the defendant was charged with possession of cocaine based on residue in the threads of the cap to a small glass vial. She maintained that she knew the vial had once contained cocaine, but thought it was empty at the time of the arrest. The court reaffirmed that the state must

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prove that the defendant knew she possessed a controlled substance and found that there was a reasonable basis in the evidence for such a finding by the jury:

> The jury could reasonably infer that the defendant looked at the vial when replacing its cap, saw the white powder residue on the threads holding the cap, and therefore, knew that there was cocaine residue on the vial at the time of her arrest. Alternatively, the jury could conclude that unless one takes extraordinary measures to remove the contents of a bottle after all usable amounts are gone, some of the contents will remain behind . . . [T]he jury could reasonably infer that the defendant knew that the vial contained residual amounts of cocaine at the time of her arrest. 153 Wis.2d 493, 509.

**COMMENT**

Wis JI-Criminal 6000 was originally published in 1981 and revised in 1996. This revision, which involved adopting a new format, was approved by the Committee in October 2009.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.