

6004 DELIVERING A CONTROLLED SUBSTANCE ON OR NEAR CERTAIN PREMISES — § 961.49

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.]

The information alleges not only that the defendant delivered¹ (name controlled substance)² but also that the defendant delivered³ (name controlled substance) while (on) (within 1,000 feet of) school premises.⁴

If you find the defendant guilty, you must answer the following question:⁵

"Did the defendant deliver (name controlled substance) while (on) (within 1,000 feet of) school premises?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance) while (on) (within 1,000 feet of) school premises.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6004 was originally published in December 1990 and revised in 1995, 1996, and 1999. This revision was approved by the Committee in August 2002. It updated the Comment and made editorial changes in the text.

Section 961.49 was amended by 2001 Wisconsin Act 109, but its basic penalty-enhancing provision was retained.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction is for cases involving § 961.49, which provides for an increase of up to five years in the term of imprisonment for certain controlled substance offenses. It applies to violations of § 961.41(1) and (1m) committed "on or otherwise within 1,000 feet" of certain premises. Schools are the premises

most commonly involved, but see note 4, below. Because the statute provides an enhanced penalty upon the finding of an additional fact, the Committee concluded that the additional fact is to be submitted to the jury. This is the same approach used for other penalty enhancers, see Wis JI-Criminal 990, Using a Dangerous Weapon, and Wis JI-Criminal 994, Concealing Identity.

Subsections (2) and (3) of § 961.49, which provided for sentences for "presumptive minimum" sentences were repealed by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

Section 961.495 applies to simple possession offenses committed within 1,000 feet of the same types of premises covered by § 961.49. It requires the sentencing court to impose 100 hours of community service work in addition to any other penalties imposed. This does not affect the penalty range and therefore does not present a factual issue for the jury.

In State v. Hermann, 164 Wis.2d 269, 474 N.W.2d 906 (Ct. App. 1991), the court refused to interpret the statute to include a mental element. That is, there is no requirement, express or implied, that the defendant know that the delivery is taking place within 1,000 feet of a school. The Hermann court also rejected a variety of constitutionally-based challenges to the statute.

The application of § 161.49 was discussed in State v. Rasmussen, 195 Wis.2d 109, 536 N.W.2d 106 (Ct. App. 1995). Rasmussen's vehicle was stopped for a traffic violation beyond the 1,000 foot zone, and a search disclosed 59 grams of cocaine in the defendant's purse. The trial court dismissed the enhancement provision, finding that the defendant was simply traveling between a tavern and her house when she passed within 1,000 feet of a school. The court of appeals reversed, holding that the evidence was sufficient to show that the defendant possessed cocaine with the intent to deliver and did so within the 1,000 foot zone; that is all that is required to support the application of § 161.49 (now § 961.49).

1. The underlying offense can be a violation of either § 961.41(1) – manufacture or delivery of a controlled substance – or § 961.41(1m) – possession of a controlled substance with intent to deliver or manufacture. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance within 1,000 feet of the designated premises. The statute also applies, however, to possession of a controlled substance with intent to deliver. See the comment preceding note 1, supra.

4. The instruction is drafted for a case involving delivery "on or within 1,000 feet of school premises." This type of place is one of several covered by § 961.49. The list of premises in § 961.49(1) was amended by 1997 Wisconsin Act 327 [effective date: July 15, 1998] to read as follows:

- (a) While the person is in or on the premises of a scattered-site public housing project.
- (b) While the person is in or on or otherwise within 1,000 feet of a any of the following:

- 1. A state, county, city, village or town park.

2. A jail or correctional facility.
3. A multiunit public housing project.
4. A swimming pool open to members of the public.
5. A youth center or a community center.
6. Any private or public school premises.
7. A school bus, as defined in s. 340.01(56).

(c) While the person is in or on the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment.

(d) While the person is within 1,000 feet of the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment, if the person knows or should have known that he or she is within 1,000 feet of the premises of the facility or if the facility is readily recognizable as a facility that provides alcohol and other drug abuse treatment.

"School" is not specially defined for purposes of § 961.49. In State v. Andrews, 171 Wis.2d 217, 491 N.W.2d 504 (Ct. App. 1992), the court referred to § 115.01 for a definition of "public school" and to § 118.165(1) for a definition of "private school." The court held that "a University of Wisconsin campus, such as at Oshkosh, does not fit either definition." 171 Wis.2d 217, 223. The court noted that 21 U.S.C. § 860 apparently served as a model for § 961.49. While the federal statute explicitly refers to colleges and universities, the Wisconsin counterpart does not. The court "presume[d] the difference in language reflects a deliberate choice. . . ." 171 Wis.2d 217, 224.

In State v. Hall, 196 Wis.2d 850, 540 N.W.2d 219 (Ct. App. 1995), the court held that the use of the word "premises" in § 961.49 does not make the statute unconstitutionally vague. The court concluded "that the statute provides fair warning that the region contemplated by the statute begins at the property line." 196 Wis.2d 850, 872-73.

A "daycare center" is a type of "youth center" to which § 961.49 applies. State v. Van Riper, 222 Wis.2d 197, 198, 586 N.W.2d 198 (Ct. App. 1998).

5. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant deliver (name controlled substance) while (on) (within 1,000 feet of) school premises?"