

6030 POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)**Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime to possess a controlled substance.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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance.

"Possessed" means that the defendant knowingly² had actual physical control of a substance.³

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[A substance 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 substance.]

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

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.]⁴

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.
3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.]⁵

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three 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 6030 was originally published in 1976 and revised in 1987, 1990, 1995, 1996, 1998, 2001, 2010, 2011, 2013, and 2014. This revision was approved in June 2014; it added to the Comment. In 2016, a revision was published to correct a nonsubstantive printing error in the comment.

A separate instruction addresses attempts to possess a controlled substance. See Wis JI-Criminal 6031.

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.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibits possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." Act 31 classifies them as Schedule I substances. See footnote 1.

Possession of THC becomes a felony if the offender has a prior drug conviction. See § 961.48(2). The prior conviction is not an element of the felony possession offense and the state is not required to prove the prior offense beyond a reasonable doubt at trial. *State v. Miles*, 221 Wis.2d 56, 584 N.W.2d 703 (Ct. App. 1998). The court characterized this penalty enhancing provision as one that is not concerned with the factual circumstances surrounding the underlying crime and that does not change the substantive nature of the charged offense. Enhancers of that type do become an element subject to jury determination. Repeater provisions like the one involved in the *Miles* case are in a different group.

The definition of possession offenses provided in § 961.41(3g) provides that no person may possess a controlled substance or analog "unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription . . ." The instruction does not include an element requiring that there be no prescription because the Committee concluded that this issue is properly handled in the same manner as other statutory exceptions. For example, the offense of carrying concealed weapon applies to "any person except a peace officer." § 941.23. The Wisconsin Supreme Court has concluded that whether the defendant is a peace officer, and thus exempted from the statute, is an issue that must be raised by the defendant as an affirmative defense. See *State v. Williamson*, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973), and the discussion in footnote 1, Wis JI-Criminal 1335.

Factual disputes about the applicability of the exception for valid prescriptions would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that it is not

an issue in the case until there is some evidence of the existence of a valid prescription. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

- (3g)(am) – a controlled substance classified in Schedule I or II which is a narcotic drug
- (3g)(b) – a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g)]
- (3g)(c) – cocaine or cocaine base
- (3g)(d) – lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
- (3g)(e) – tetrahydrocannabinols
- (3g)(em) – synthetic cannabinoids
- (3g)(f) – gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
- (3g)(g) – methamphetamine

The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the substance actually is the substance named and whether the defendant actually possessed the substance remain questions for the jury.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibited possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." 2013 Wisconsin Act 351 amended § 961.41(3g)(em) to refer to "a controlled substance specified in s. 961.14(4)(tb)." Act 351 also repealed and recreated sub. (4)(tb) to include the entire list of substances considered to be "synthetic cannabinoids" and repealed subsecs. (4)(te) through (4)(ty). [Effective date: April 25, 2014.]

The term "synthetic cannabinoid" does not appear in the text of sub. (3g)(em) but is used as the title of that subsection. The Committee recommends that, if the parties agree, the term be used in the instruction where it calls for "(name controlled substance)." The actual names of the "synthetic cannabinoids" as they appear in § 961.14(4)(tb) would have no meaning to the jury and are generally unpronounceable.

The state will be required to prove that the substance in question was in fact one of the chemicals designated a "synthetic cannabinoid" under § 961.14(4)(tb).

All the possession offenses listed above prohibit both "possession" and "attempts to possess." Regarding attempts, see Wis JI-Criminal 6031.

2013 Wisconsin Act 194 [effective date: April 9, 2014] created 961.443 which provides for "immunity from prosecution under s. 961.573, for the possession of drug paraphernalia, and under

s. 961.41(3g), for the possession of a controlled substance . . ." for a person who qualifies as an "aider." "Aider" is defined in 961.443(1); it is apparently intended to identify those who try to get help for another person who is having an adverse reaction to the use of a controlled substance.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 493, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Ibid.

3. 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.

4. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

5. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . 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. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

In a case involving delivery, it is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.