

**6112 POSSESSION OF A PRESCRIPTION DRUG WITHOUT A VALID PRESCRIPTION — § 450.11(7)(h)****Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime for a person to possess a prescription drug unless (he) (she) obtained it with a valid prescription.<sup>1</sup>

**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 prescription drug.

"Possessed" means that the defendant knowingly<sup>2</sup> had actual physical control<sup>3</sup> of a prescription drug.

[It is not necessary that the quantity be substantial. Any amount is sufficient.]<sup>4</sup>

A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.<sup>5</sup>

2. The defendant knew or believed that the substance was a prescription drug.<sup>6</sup>
3. The prescription drug was not dispensed<sup>7</sup> to the defendant upon a prescription order issued by a practitioner.

### Deciding About Knowledge

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

### 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 6112 was approved by the Committee in July 2009. A non-substantive editorial correction was made in 2013.

This instruction is drafted for violations of § 450.11(7)(h), which reads as follows: "No person may possess a prescription drug unless the prescription drug is obtained in compliance with this section." Section 450.11(1) provides that "[n]o person may dispense any prescribed drug or device except upon the prescription order of a practitioner." Reading these two sections together yields the offense addressed by this instruction: possessing a prescription drug without a valid prescription. The penalty for violations of § 450.11(7)(h) is set forth in sub. (9)(b).

Subsection (9)(c) of § 450.11 provides as follows:

In any action or proceeding brought for the enforcement of this section, it shall not be necessary to negate any exception or exemption contained in this section, and the burden of proof of any such exception or exemption shall be upon the defendant.

The instruction does not address any "exceptions or exemptions."

1. This is a paraphrase of the definition of the offense in §450.11(7)(h), which reads as follows: "No person may possess a prescription drug unless the prescription drug is obtained in compliance with this section." Section 450.11(1) provides that "[n]o person may dispense any prescribed drug or device except upon the prescription order of a practitioner." Reading these two sections together yields the offense addressed by this instruction: possessing a prescription drug obtained without a valid prescription.

2. 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). Also see note 5.

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[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.]

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. Section 450.01(20)(a) provides that "prescription drug" means "a drug, drug product, or drug-containing preparation that is subject to 21 USC 353(b) or 21 CFR 201.105." Subsection (20)(b) of § 450.01 provides that for purposes of specified subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

(1) A drug intended for use by man which –

(A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(B) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug; shall be dispensed only

(i) upon a written prescription of a practitioner licensed by law to administer such drug, or

(ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or

(iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

21 Sec. 201.105 Veterinary drugs, reads as follows:

A drug subject to the requirements of section 503(f)(1) of the act shall be exempt from section 502(f)(1) of the act if all the following conditions are met: (a) The drug is:

(1)(i) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or (ii) In the possession of a retail, hospital, or clinic pharmacy, or other person authorized under State law to dispense veterinary prescription drugs, who is regularly and lawfully engaged in dispensing drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or (iii) In the possession of a licensed veterinarian for use in the course of his professional practice . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

6. This knowledge element is included by analogy to controlled substance offenses, where case law has added a knowledge requirement. See, State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973), and State v. Sartin, 200 Wis.2d 47, 546 N.W.2d 449 (1996), discussed in Wis JI-Criminal 6000, Note On The Knowledge Element In Controlled Substance Cases.

7. "Dispense" is defined in § 450.01(7).