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 knowingly[2] 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)[5]. (Name controlled substance) is a controlled substance whose possession is prohibited by law.

[IF THERE IS EVIDENCE THE SUBSTANCE WAS TETRAHYDROCANNABINOL, SUBSTITUTE THE FOLLOWING FOR ELEMENT 2:

2. The substance was tetrahydrocannabinol.[6] Tetrahydrocannabinol with a Delta-9 THC concentration above 0.3 percent is a controlled substance whose possession is prohibited by law.][7]

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.][8]

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, 2014, 2016, 2021, and 1/2024. This revision was approved by the Committee in August 2024. It added an alternative second element for use in cases where there is evidence that the substance in question is THC. This language instructs the user on what is considered THC based on the dry weight of the substance, as provided in subsection 961.14(4)(t)(3).

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

Section 961.14(4)(t)(1)–(4) specifies the following four exceptions for substances that test positive for tetrahydrocannabinols:

1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in s. 961.38 (1n) (a) or that is possessed as provided in s. 961.32 (2m) (b).
2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
3. Tetrahydrocannabinols contained in hemp, as defined in s. 94.55 (1).
4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

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).

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of a controlled substance or a controlled substance analog if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

> An aider is immune from prosecution under s. 961.41(3g) for the possession of a controlled substance or a controlled substance analog . . . under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase "circumstances surrounding" means that the facts forming the basis for the possession of a controlled substance or a controlled substance analog charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

An "aider" means a person who does any of the following:

(a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Calls the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court before trial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

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. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been possessed by the defendant is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section

961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been possessed by the defendant. 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)." (see discussion in footnote 5). 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.

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. Id.

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. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the substance possessed by the defendant tested positive for

cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the substance possessed by the defendant tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

6. Wis. Stat. § 961.14(4)(t) states that tetrahydrocannabinols do not include the substances listed in subs. 961.14(4)(t)(1)-(4). The Committee believes that in cases where a substance is alleged to be THC, the most common issue will be whether the State can meet its burden under sub. (t)(3). Therefore, the bracketed language in the alternative second element is drafted to address that specific subsection.

Under sub. (t)(3), THC does not include tetrahydrocannabinols contained in hemp, as defined in § 94.55(1), which provides the following:

> In this section, "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis or the maximum concentration allowed under federal law up to 1 percent, whichever is greater, as tested using post-decarboxylation or other similarly reliable methods. "Hemp" does not include a prescription drug product that has been approved by the U.S. food and drug administration.

For cases in which the question is whether the State can meet its burden under sub. (t)(2) or (t)(4), this language will need to be modified.

Sub. (t)(1) pertains to an affirmative defense.

7. The Committee has concluded that the bracketed language concerning whether the substance was a tetrahydrocannabinol under sub. (t)(3) is an accurate statement of the law. See note 6 supra. However, the law appears to be unsettled with regard to § 961.56(1), which provides the following:

> (1) It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

Section 961.56(1) was enacted prior to the enactment of 2019 Wisconsin Act 68, which amended § 961.14(4)(t) to state that tetrahydrocannabinols do not include the substances listed in subs. 961.14(4)(t)(1)-(4). As of 2024, the Committee could not locate any opinions involving § 961.56(1) in relation to § 961.14(4)(t). The few opinions found pertain to forfeitures and the return of property.

8. 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.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that 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.

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