

POSSESSION OF GAMBLING RECORDS

(N.J.S.A. 2C:37-3)

The defendant has been charged with a violation of our statutes relating to the possession of gambling records. The indictment reads as follows: **(Read Indictment)**

The statute provides as follows: (charge the appropriate alternate)

1. A person is guilty of possession of gambling records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise, including any paper or paper product in sheet form chemically converted to nitrocellulose having explosive characteristics as well as any water soluble paper or paper derivative in sheet form. N.J.S.A. 2C:37-3a(1))

OR

2. A person is guilty of possession of gambling records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article of a kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise (N.J.S.A. 2C:37-3a(2))

In order to find the defendant guilty, you must be satisfied that the State has proven beyond a reasonable doubt, each of the following elements of the offense charged: (charge the appropriate alternate)

1. That the writing, paper, instrument or article marked as Exhibit _____ is of the kind commonly used in the operation or promotion of a bookmaking scheme or enterprise

OR

1. That the writing, paper, instrument or article marked as Exhibit _____ is of the kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise.
2. That the defendant possessed, or had under his control the writing, paper, instrument or article; and
3. That the defendant knew that the writing, paper, instrument or article was of the kind commonly used in the operation or promotion of a bookmaking scheme or enterprise

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OR

3. That the defendant knew that the writing, paper, instrument or article was of the kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise.

BOOKMAKING:

A bookmaking scheme or enterprise is defined as activity that advances gambling by unlawfully accepting bets from members of the public upon the outcome of future contingent events as a business. (N.J.S.A. 2C:37-1g).

LOTTERY:

A lottery means an unlawful gambling scheme in which firstly, the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some media, one or more of which chances are to be designated the winning ones, and secondly, the winning chances are to be determined by a drawing or some other method based upon the element of chance, and thirdly, the holders of the willing chances are to receive something of value. (N.J.S.A. 2C:37-1h).

POLICY:

A policy scheme or enterprise, sometimes called "a numbers game", is a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme. (N.J.S.A. 2C:37-1i).

(CHARGE APPROPRIATE ALTERNATE)

It is not necessary for the State, in order to sustain its burden, to prove an actual particular bookmaking scheme or enterprise in order to prove possession of gambling records.

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OR

It is not necessary for the State, in order to sustain its burden, to prove an actual particular lottery or policy scheme or enterprise, in order to prove possession of gambling records.

The word "possess" as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character.

Thus, the person must know or be aware that (he/she) possesses the item (in this case _____), and the person must know what it is that (he/she) possesses or controls (that it is a _____).

This possession cannot merely be a passing control that is fleeting or uncertain in its nature. In other words, to "possess" within the meaning of the law, the defendant must knowingly procure or receive the item possessed or be aware of (his/her) control thereof for a sufficient period of time to have been able to relinquish control if (he/she) chose to do so. (Define "knowing" N.J.S.A. 2C:2-2 and any other definition relevant to the item allegedly possessed).

A person may possess (_____) (an item) even though it was not physically on (his/her) person at the time of the arrest if the person had in fact, at some time prior to (his/her) arrest, had control and dominion over it.

When we speak of possession, we mean a conscious, knowing possession. The law recognizes two kinds of possession: they are actual possession and constructive possession.

ACTUAL POSSESSION

A person is in actual possession of a particular article or thing when (he/she) knows what it is, that is, the person has knowledge of its character and knowingly has it on (his/her) person at a given time.

CONSTRUCTIVE POSSESSION

The law recognizes that possession may be constructive instead of actual. A person who, with knowledge of its character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

Constructive possession means possession in which the person does not physically have the property, but though not physically on one's person, (he/she) is aware of the presence of the property and is able to exercise intentional control or dominion over it.

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A person who, although not in actual possession, has knowledge of its character, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

JOINT POSSESSION

The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint; that is, if they knowingly share control over the article.

DEFENSES

(CHARGE THE APPROPRIATE DEFENSE AS RAISED BY EVIDENCE)

a. The defendant contends that (he/she) is not guilty of possession of a writing, paper, instrument or article commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise because the writing, paper, instrument or article that the defendant allegedly possessed represented ten plays or less. It is a defense to this charge

that the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself in a number not exceeding ten. N.J.S.A. 3C:37-3b(1).¹

Defendant must prove this defense by clear and convincing evidence.

The defendant's burden of proving this defense by clear and convincing evidence is less than the State's burden of proving the defendant's guilt beyond a reasonable doubt. The defendant need not prove beyond a reasonable doubt that (he/she) had writings, papers, instruments, or articles in a number not exceeding ten. If the evidence submitted by the defendant in support of this defense produces in your mind a firm belief that (his/her) defense is true, the defendant has carried the burden of proof by clear and convincing evidence.

¹

This defense is only applicable if a violation of N.J.S.A. 2C:37-3a (2) is charged.

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AND/OR²

b. The defendant contends that (he/she) is not guilty because (he/she) did not use or intend to use the writing, paper, instrument or article allegedly possessed in the operation or promotion of a bookmaking scheme or enterprise (or in the operation, promotion or the playing of a lottery or policy scheme or enterprise).

I have used the phrase "intend to use." Intending to do something means the purpose to do something, a resolution to do a particular act or accomplish a certain thing. Intent is a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts.

If the defendant neither used nor intended to use the writing, paper, instrument or article allegedly possessed in the operation or promotion of a bookmaking scheme or enterprise (or in the operation, promotion or playing of a lottery or policy scheme or enterprise), this is a defense to the charge of possession of gambling records. N.J.S.A. 2C:37-3b(2). The defendant must prove this defense by clear and convincing evidence (2C:37-2c).

The defendant's burden of proving this defense by clear and convincing evidence is less than the State's burden of proving the defendant's guilt beyond a reasonable doubt. The defendant need not prove beyond a reasonable doubt that (he/she) did not use or intend to use the writing, paper instrument or article allegedly possessed in the operation or promotion of a bookmaking scheme or enterprise (or in the operation, promotion or playing of a lottery or policy scheme or enterprise). If the evidence submitted by the defendant in support of this defense should produce in your mind a firm belief that (his/her) defense is true, the defendant has carried the burden of proof by clear and convincing evidence.

GRADING UNDER

N.J.S.A. 2C:37-3

If you find defendant guilty of possession of gambling records, you must also determine unanimously and beyond a reasonable doubt whether:

(1) In the case of a bookmaking scheme or enterprise, the records defendant possessed represented more than five bets totaling \$1,000 or more; or

(2) In the case of a lottery or policy scheme or enterprise, the records defendant possessed constituted, reflected or represented more than 100 plays or chances.

²

This defense is applicable to any subsection of N.J.S.A. 2C:37-3.

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I shall send a special question sheet into the jury room with you so that you can record this determination. If you do not find unanimously and beyond a reasonable doubt, as I have previously defined those terms, that defendant's possession fell into either of these two categories, there will be a space on the sheet for you to so indicate.

SPECIAL QUESTION SHEET

If you find the defendant guilty of possession of gambling records beyond a reasonable doubt, then you must answer the following questions:

(1) Do you find that defendant possessed records of a bookmaking scheme or enterprise which represented more than five bets totaling \$1,000 or more?

_____ Yes _____ No

(2) Do you find that defendant possessed records of a lottery or policy scheme or enterprise which constituted, reflected or represented more than 100 plays or chances?

_____ Yes _____ No

(3) Do you find that defendant possessed gambling records fewer in number or less in dollar amount than as stated in the above two alternatives?

_____ Yes _____ No