

**POSSESSION OF FIREARM WHILE COMMITTING CERTAIN
DRUG CRIMES
(N.J.S.A. 2C:39-4.1a)**

[Defendant] is charged with possessing a firearm while in the course of committing, attempting to commit, or conspiring to commit a violation of certain laws.¹ This charge is based on a statute which reads:

"Any person who has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a violation of [certain drug crimes] is guilty of a crime ..."

For you to find [defendant] guilty of this charge, the State must prove beyond a reasonable doubt the following elements:²

1. That there was a firearm.
2. That [defendant] possessed the firearm.
3. That, at the time alleged in the indictment, [defendant] was in the course of committing, attempting to commit, or conspiring to commit, _____ [the specific drug offense charged].

The first element that the State must prove beyond a reasonable doubt is that there was a firearm. A firearm means any handgun, rifle, shotgun, machine gun, automatic or semi-automatic rifle, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile or bullet, or any gas vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances.

¹ The citations contained within N.J.S.A. 2C:39-4.1 are: N.J.S.A. 2C:35-3; N.J.S.A. 2C:35-4; N.J.S.A. 2C:35-5, N.J.S.A. 2C:35-5.2; N.J.S.A. 2C:35-5.3; N.J.S.A. 2C:35-6, N.J.S.A. 2C:35-7, N.J.S.A. 2C:35-7.1; or N.J.S.A. 2C:35-11.

² In State v. Harrison, 358 N.J. Super. 578, 584 (App. Div., 2003), the court held that, so long as defendant had constructive possession of a weapon, a conviction under this statute will stand, even though physical proximity between defendant and the drugs and weapon was lacking. Certification of this matter was granted by the Supreme Court, sub nom State v. Spivey, 177 N.J.495 (2003).

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The second element that the State must prove beyond a reasonable doubt is that [defendant] possessed the firearm. The word possess as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. Therefore, [defendant] must have known or have been aware that he possessed the firearm, and he must have known that what he possessed was a firearm. The possession cannot merely be a passing control, fleeting or uncertain in its nature. So, to possess within the meaning of the law, [defendant] must have knowingly procured or received the firearm or must have been aware of his control of it for a sufficient period of time to have been able to relinquish control if he chose to do so. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of the high probability of their existence. A person acts knowingly as to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. Knowing, with knowledge, or equivalent terms have the same meaning.

Possession means a conscious, knowing possession. Someone may possess an object even though it was not physically on his person at the time if he had in fact at some time prior to his arrest control and dominion over it.

Possession may be either actual or constructive. A person is in actual possession of an item if he knows what it is [that is, he/she has knowledge of its character] and knowingly has it on his person at a given time. Alternatively, possession may be constructive, instead of actual. Constructive possession is possession in which the person does not physically have the property, but although the property is not physically on his person, he/she is aware of the presence of the property and is able to exercise intentional control or dominion over it. So, a person who, although not in actual possession, has knowledge of its character, and 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.

Similarly, possession can be either 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

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constructive possession over a thing, they possess the thing jointly if they knowingly share control over it.

[If possession is in a motor vehicle: charge Model Jury Charge on Possession of Weapon, etc., in Motor Vehicle, per N.J.S.A. 2C:39-2].

“Knowingly” refers to a condition of the mind. It cannot be seen. Often, it can be determined only by inferences drawn from a defendant’s conduct, words or acts as presented in the evidence you have heard and seen. So, it is not necessary that the State produce a witness or witnesses to testify that an accused said, for example, that he acted purposely when he engaged in the conduct with which he is charged. You may find that proof of “knowingly” has been furnished beyond a reasonable doubt by inferences which you may draw from the nature of the acts and the circumstances surrounding the conduct under investigation as you have heard from the evidence.

The third element that the State must prove beyond a reasonable doubt is that [defendant] possessed the firearm while he/she was in the course of committing, attempting to commit, or conspiring to commit the crime of _____. The term “in the course of committing” means that, at the time [defendant] possessed the weapon, he/she was also committing a drug crime, namely _____. The term “attempting to commit” means that, at the time [defendant] possessed the weapon, he/she was also purposely engaged in conduct which would constitute [the stated drug crime]_____, if the attendant circumstances were as a reasonable person would believe them to be; or doing anything with the purpose of causing the result which is a specific element of [the stated drug crime]_____, or purposely doing anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of that crime.³

The term “conspiring to commit” means that, at the time [defendant] possessed the weapon, he/she also had the purpose of promoting or facilitating the commission of [the stated drug crime] _____ and either (1) agreed with another person or persons that they or one or more

³ See Model Jury Charge – Attempt and N.J.S.A. 2C:5-1 (a).

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of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime, or (2) agreed to aid another person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.⁴

If the State has proven each of the elements of this offense beyond a reasonable doubt, [defendant] must be found guilty of this charge. However, if the State has failed to prove, beyond a reasonable doubt, any one of the elements of this offense, you must find him/her not guilty of this charge.

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See Model Jury Charge – Conspiracy and N.J.S.A. 2C:5-2(a).