

**POSSESSION OF A CONTROLLED SUBSTANCE
OTHER THAN MARIJUANA**

G.L. c. 94C, § 34

The defendant is charged with the unlawful possession of a controlled substance, namely _____ .

To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the substance in question was a controlled substance, namely _____ ;

Second: That the defendant possessed some perceptible amount of that substance;

Third: That the defendant did so knowingly or intentionally.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the substance was _____. I instruct you as a matter of law that our statutes define _____ as a controlled substance. In determining whether the substance in question was in fact _____, you may consider any relevant evidence presented.

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See G.L. c. 94C, § 31 for the statutory schedule of controlled substances.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed some perceptible amount of the controlled substance,

- The judge may here use the detailed instruction on “Possession” from Instruction 3.220 or the shorter version below, if appropriate.

A person possesses something when they have direct physical control or custody of it at a given time (or when they have constructive possession of it).

- If warranted by the evidence, continue with the supplemental instruction constructive and/or joint possession.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed the controlled substance knowingly or intentionally.

- The judge may use the detailed instruction on “Intent” from instruction 3.120, the detailed Instruction on “Knowledge” from Instruction 3.140, or the shorter versions below, if appropriate.

In other words, the defendant must have acted consciously, voluntarily and purposely, and not because of ignorance, mistake or accident. This means that the Commonwealth must prove beyond a reasonable doubt that the defendant knew they possessed a controlled substance. However, it is not required to prove that they knew which particular controlled substance it was. We often must

decide from the actions of others what they knew or what they intended. You are to decide what the defendant knew or intended from the evidence, together with any reasonable inferences that you choose to draw from it.

Commonwealth v. Rodriguez, 415 Mass. 447, 454 (1993); *Commonwealth v. DePalma*, 41 Mass. App. Ct. 798, 801 (1996).

We often must decide from the actions of others what they knew or what they intended. You are to decide what the defendant knew or intended from the evidence, together with any reasonable inferences that you choose to draw from it.

If the Commonwealth proved all the elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth failed to prove any element beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

Constructive Possession

A person also possesses

something even without having physical custody of it if they have: (1) knowledge of its existence, (2) the ability to

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exercise control over it, either directly or through another person, and (3) the intent to exercise control over it.

However, I caution you that merely being present in the vicinity of controlled substances, even if one knows that it is there, does not amount to possession.

If relevant: **So, too, possession is not proved simply by evidence that a person was associated with another who controlled the substance or the place where it was found.**

Commonwealth v. Fernandez, 48 Mass. App. Ct. 530, 531-32 (2000) (constructive vs. actual possession are not different theories; simply different ways to prove the same legal principle). See Commonwealth v. Than, 442 Mass. 748, 754-755 (2004); Commonwealth v. Owens, 414 Mass. 595, 607 (1993) (constructive possession of controlled substance requires proof that defendant knew location of illegal drugs plus ability and intent to exert dominion and control). See Than, supra, 442 Mass. 748 at 751 (constructive possession inferable from defendant's proximity to gun in motor vehicle, where evidence that, when stopped by police, defendant "first leaned forward and to the right before complying with the order to raise his hands[,] . . . [and] [a] loaded handgun was found protruding from under the passenger seat in the vehicle he was operating"); Alicea v. Commonwealth, 410 Mass. 384, 387 (1991) (defendant's presence in vehicle with contraband is not itself sufficient); Commonwealth v. Ramos, 51 Mass. App. Ct. 901, 903 (2001) (constructive possession not inferable from proximity of gun to defendant's personal letters that were found in an envelope "addressed to the defendant, at a different address"); Commonwealth v. Ramos, 30 Mass. App. Ct. 915 (1991); Commonwealth v. Handy, 30 Mass. App. Ct. 776, 780-781 (1991) (constructive possession supported by proof of ownership or tenancy, personal effects in proximity to contraband, large amounts of cash, or admissions); Commonwealth v. Arias, 29 Mass. App. Ct. 613, 618 (1990), aff'd, 410 Mass. 1005 (1991) (constructive possession inferable from presence in early morning in heavily-barricaded, sparsely-furnished apartment, in absence of owner or tenant); Commonwealth v. Rarick, 23 Mass. App. Ct. 912, 912 (1986) (in shared dwelling, possession of controlled substance may be inferred from proximity to defendant's effects in areas particularly linked to defendant); Commonwealth v. Rodriguez, 16 Mass. App. Ct. 944, 945-946 (1983) (same); Commonwealth v. Gill, 2 Mass. App. Ct. 653, 656-657 (1974) (same); Commonwealth v. Miller, 4 Mass. App. Ct. 379, 383-384 (1976) (same rule applicable to van; possession also inferable from attempted flight); Commonwealth v. Deagle, 10 Mass. App. Ct. 563, 567-568 (1980) (proximity and knowledge do not establish possession unless they permit inference of control).

Joint Possession

A person can “possess” something even if they are not its sole owner or holder. For example, a person is considered to “possess” something if it is owned or held jointly with another person who is keeping it for both of them. A person is also considered to “possess” something when they have agreed with another person to put it in a place where both of them will have access to it.

Commonwealth v. Beverly, 389 Mass. 866, 870 (1983) (possession of controlled substance need not be exclusive; it may be joint and constructive); *Commonwealth v. Conroy*, 333 Mass. 751, 755 (1956) (lookout was in joint possession of accomplice's burglarious tools); *Commonwealth v. Conlin*, 188 Mass. 282, 284 (1905) (depositing bag of burglarious tools with another while retaining key was possession); *Commonwealth v. Gonzalez*, 23 Mass. App. Ct. 990, 992 (1987) (possession may be joint and constructive); *Commonwealth v. Ronayne*, 8 Mass. App. Ct. 421, 426 (1979) (joint flight from burglary supported inference of joint possession of, though only one defendant carried, tire iron); *Commonwealth v. Johnson*, 7 Mass. App. Ct. 191, 194 (1979) (joint possession of items in auto trunk inferable against passenger only with other evidence).

NOTES:

1. **Class of substance no longer referenced in instruction; sentencing.** The particular controlled substance alleged in the complaint is an essential element of the offense for the Commonwealth to prove, and different penalties attach to each class of controlled substances. *Commonwealth v. McGilvery*, 74 Mass. App. Ct. 508, 511 (2009). While the set penalties are based on whether the substance is a Class A, B, C, D, or E controlled substance, the class of a particular substance is determined as a matter of law, not as a matter of fact. See *Commonwealth v. Lezynski*, 466 Mass. 113, 119 (2013). Mass. G. Evid. §202 (judicial notice of law is mandatory). The question for the jury is whether the Commonwealth has proven the identity of the particular substance alleged. As such, the revised instruction no longer includes reference to what class the alleged substance falls into. If the jury has found that the Commonwealth has proven beyond a reasonable doubt the identity of the particular controlled substance alleged in the complaint, then the judge can take judicial notice as a matter of law that it falls within the specified class and sentence accordingly. Of course, the drug proven and class judicially noticed must be consistent with what is charged in the complaint. *McGilvery*, 74 Mass. App. Ct. at 512 (different classes are not lesser included offenses of each other).

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2. **DPH, State Police or U. Mass. Medical School certificate of analysis.** Although G.L. c. 94C, § 47A, provides for the introduction of a certificate of analysis, it may only be admitted in conjunction with live testimony from the analyst who performed the underlying analysis, *Melendez Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009), or by stipulation. If the defendant is stipulating to the identify of the controlled substance and not just to the introduction of the certificate of analysis, the stipulation must be signed by the prosecutor, defense counsel, and defendant, and placed before the jury before the close of evidence. *Commonwealth v. Ortiz*, 466 Mass. 475, 484-85 (2013). See also Mass. R. Crim. P. 23(a).