

# Defense of Drug Charges in New Jersey

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Kenneth Vercammen has defended individuals charged with drug offenses in both Superior Court and Municipal Court. The Municipal Courts of New Jersey have jurisdiction to hear the following drug-related offenses:

NJSA 2C:5-10(a)(4), possession of 50g or less of marijuana or 5g or less of hashish;

NJSA 2C:35-10(b), using or being under the influence of CDS;

NJSA 2C:35-10(c), failure to deliver CDS to police;

NJSA 2C:36-2, possession of drug paraphernalia

Violation of these statutes constitute disorderly person offenses. If convicted, the court may impose a \$500.00 Drug Enforcement Reduction penalty and a \$50.00 lab fee for each CDS charge. The court has discretion to fine a defendant up to \$1,000 and/or incarceration for up to six months. The \$50.00 VCCB penalty also must be imposed.

Moreover, the court must suspend the defendants drivers license for a time period between six months and two years. In addition, probation for up to two years, drug counseling, periodic urine testing, alcohol and/or psychiatric counseling and community service may be imposed.

If you elect to initially plead not guilty, your attorney will send a discovery letter/letter of representation to both the Municipal Prosecutor and the Municipal Court Clerk. If you have a drug problem, it is recommended that you attend a substance abuse treatment programs to seek help for any addiction. Proof of attendance of such a program is of benefit at sentencing or in obtaining an application for conditional discharge.

## CONDITIONAL DISCHARGE

New Jersey State statute N.J.S.A. 2C: 36A-1 provides that a person not previously convicted of a

drug offense and who has not previously been granted supervisory treatment under 24:21-27, 2C:43-12 or 2C: 36A-1 may apply for a conditional discharge. The court upon notice to the prosecutor and subject to 2C: 36A-1(c) may on the motion of the defendant or the court, suspend further proceedings and place the defendant on supervisory treatment (i.e., probation, supervised or unsupervised attendance at Narcotics Anonymous, etc.).

Since the granting of a conditional discharge is optional to the court, you should be prepared to prove, through letters, documents, or even witnesses, that the defendants continued presence in the community or in a civil treatment program, will not pose a danger to the community.

You should be prepared to convince the court that the terms and conditions of supervisory treatment will be adequate to protect the public and will benefit the defendant by serving to correct any dependence on or use of controlled substances. The defendant must be required to pay a \$45.00 application fee, plus the mandatory \$500.00 DEDR penalty, and \$50.00 lab fee. The court further has the option to suspend a defendants drivers license between six months and two years.

The conditional discharge period is also between six months and two years. If the defendant is convicted of a drug offense during the CD period or violates the conditions set by the court, the prosecution resumes. The defendant may even apply for a conditional discharge after he/she is found guilty, but before sentence is imposed. If the CD is granted at this point in the proceeding, the 6 to 24 month license suspension is mandatory.

## SUPPRESSION MOTION

A timely Motion to Suppress Evidence must be made pursuant to Rule 3:5-7. The court rules have been amended to provide the Suppression Motion can be held directly in the Municipal Court. Your attorney can subpoena witnesses, sometimes even serving a subpoena duces tecum on the arresting officer to compel him to bring to court the object allegedly observed in plain view. Credibility will be tested when the object that was claimed to be in plain view inside a car is actually only one-half inch long. Cross-examination is very important.

## PRE-TRIAL

The Municipal Court prosecutor is responsible for providing discovery. Rules 3:13-3, 7:4-2, State v Polasky, N.J. Super. 549 (Law Div. 1986); State v Tull, 234 N.J. Super. 486 (Law Div. 1989); State v Ford, 240 N.J. Super. 44 (App. Div. 1990). The State must prove the substance seized was a controlled dangerous substance (CDS).

To prove the substance is CDS, either the lab technician who examined the substance must be called testify, or the State will have to admit the lab certificate prepared pursuant to N.J.S.A. 2C:35-19. If the State intends to introduce the lab certificate at the trial, a notice of an intent to proffer that certificate and all reports relating to the analysis of the CDS shall be served on defense counsel at least 20 days before the proceeding begins. This includes an actual copy of

the lab certificate.

Within 10 days of receipt, the Defense counsel must notify the Prosecutor in writing. This will not only alert the Prosecutor to the Defendants objections concerning the admission of the lab certificate into evidence, but also set forth grounds for the objection, 2C:35-19c. Failure by defense counsel to timely object shall constitute a waiver of any objection to the certificate, thus, the certificate will be submitted into evidence.

## THE TRIAL

The burden of primary possession/constructive possession remains on the State. Plea bargaining is not permitted in Municipal Court CDS cases (while it is available in such varied charges as murder, careless driving, or the burning of old tires). The State must prove knowledge or purpose on the part of the defendant.

Knowledge means that the defendant was aware of the existence of the object and was aware of its character. Purpose means it was defendants conscious intention to obtain or possess the item while being aware of its character. Knowledge of the character of the substance may be inferred from the circumstances. 33 N.J. Practice Criminal Law & Procedure (Miller) Sec. 378 p. 563 (2nd Ed 1990).

If actual possession cannot be demonstrated, defendants constructive possession may sometimes be shown by proof that the narcotics were subject to dominion and control. If two or more persons share actual or constructive possession, then their possession is joint. However, mere presence on premises where CDS is found is not sufficient, in itself, to justify an inference that a particular defendant was in sole or joint possession of the substance. *State v McMenemy* 133 N.J. Super. 521, S24 (App. Div. 1975).

In *State v. Shipp*, 216 N.J. Super. 662, 666 (App. Div. 1987), it was held that there was insufficient evidence that the defendant, a passenger in the front seat, had constructive possession of CDS secretly contained in envelopes in a vinyl bag resting on the back seat next to another passenger in the car.

In addition to establishing if the item seized is a CDS through either a lab report or the State Police chemist, the State must establish the chain of custody. The prosecutors witness will call witnesses to prove the location of the seized drugs from the moment of initial seizure to the time of the testing of the illegal drug.

If the state will be attempting to introduce a confession or other incriminating statements, defense counsel may request on evidence rule 8 hearing to determine if the requirements of *Miranda v. Arizona* 384 US. 436 (1966) have been violated. If the defendant elects to take the stand, defense counsel must be certain that he testifies with complete candor and does not try to embellish his protestations of innocence.

## CONCLUSION

Drug related offenses carry substantial penalties which will effect a person for the rest of his life. The space limits of this article do not allow detailed explanation of the extensive caselaw on controlled dangerous substances. Do not permit drug use and you will not have to worry about the substantial penalties.

### New Drug Possession Law:

2C:35-10 Possession, use or being under the influence, or failure to make lawful disposition

2C:35-10. Possession, Use or Being Under the Influence, or Failure to Make Lawful Disposition.

a. It is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog, unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970, c.226 (C.24:21-1 et seq.). Any person who violates this section with respect to:

(1) A controlled dangerous substance, or its analog, classified in Schedule I, II, III or IV other than those specifically covered in this section, is guilty of a crime of the third degree except that, notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to \$35,000.00 may be imposed;

(2) Any controlled dangerous substance, or its analog, classified in Schedule V, is guilty of a crime of the fourth degree except that, notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to \$15,000.00 may be imposed;

(3) Possession of more than 50 grams of marijuana, including any adulterants or dilutants, or more than five grams of hashish is guilty of a crime of the fourth degree, except that, notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to \$25,000.00 may be imposed; or

(4) Possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish is a disorderly person.

Any person who commits any offense defined in this section while on any property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of any such school property or a school bus, or while on any school bus, and who is not sentenced to a term of imprisonment, shall, in addition to any other sentence which the court may impose, be required to perform not less than 100 hours of community

service.

b. Any person who uses or who is under the influence of any controlled dangerous substance, or its analog, for a purpose other than the treatment of sickness or injury as lawfully prescribed or administered by a physician is a disorderly person.

In a prosecution under this subsection, it shall not be necessary for the State to prove that the accused did use or was under the influence of any specific drug, but it shall be sufficient for a conviction under this subsection for the State to prove that the accused did use or was under the influence of some controlled dangerous substance, counterfeit controlled dangerous substance, or controlled substance analog, by proving that the accused did manifest physical and physiological symptoms or reactions caused by the use of any controlled dangerous substance or controlled substance analog.

c. Any person who knowingly obtains or possesses a controlled dangerous substance or controlled substance analog in violation of subsection a. of this section and who fails to voluntarily deliver the substance to the nearest law enforcement officer is guilty of a disorderly persons offense. Nothing in this subsection shall be construed to preclude a prosecution or conviction for any other offense defined in this title or any other statute.

Amended 1988, c.44, s.5; 1997, c.181, s.6.

2C:35-10.2 Possession, etc. of gamma hydroxybutyrate; penalties 4. a. It is a crime of the third degree for any person, knowingly or purposely, to obtain, or to possess, gamma hydroxybutyrate unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970, c.226 (C.24:21-1 et seq.).

b. Notwithstanding the provisions of N.J.S.2C:43-3 or any other law, a fine of up to \$100,000.00 may be imposed upon a person who violates this section.

L.1997,c. 194, s.4.

2C:35-10.3 Possession, etc. of flunitrazepam; penalties 6. a. It is a crime of the third degree for any person, knowingly or purposely, to obtain, or to possess, flunitrazepam, unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970, c.226 (C.24:21-1 et seq.).

b. Notwithstanding the provisions of N.J.S.2C:43-3 or any other law, a fine of up to \$100,000.00 may be imposed upon a person who violates this section.

L.1997,c. 194, s.6.