

Drug Possession

Drug Misuse & Trafficking Act (NSW) 1985

Drug possession matters are the bread and butter of a criminal law practice. Yet I regularly see lawyers appear in court with no knowledge of the elements of the offence, the available defences, the legislation or the legal precedents. This article seeks to assist practitioners appearing in the Local Court of NSW.

The physical aspect of possession is 'exclusive physical control'.¹ Holding for a short time for the purposes of concealment is still possession.² Possession of minute amounts of a drug does not constitute possession.³ But, under NSW law, purity of the drug is not taken into account. So 3g of cocaine is 3g of cocaine regardless of whether the admixture is 10% or 90% pure.

Mens Rea of Possession

It is necessary for the prosecution to prove knowledge of the existence of the drug.⁴ Proof of the belief that the drugs were present will suffice.⁵ If a person forgets that he has the drugs in his possession he can still be convicted.⁶

Possession does not require proof that the defendant knew precisely where the item was or that he knows that it is in his bag at the time.⁷ When a person hides drugs so effectively that others are unlikely to find them, they are still in his possession.⁸

The Shared House

Mere knowledge of the existence of the drugs, their location in the premises, and sanction of them being there does not amount to possession.⁹ In a shared house situation the mere finding of the drugs will not amount to possession unless the possibility of sole possession by others is excluded.¹⁰

Drugs in Cars

Where drugs are found in a car, a passenger cannot be convicted of possession without further evidence.¹¹ Where the owner of a car has the drugs locked in the boot but he does not have the keys, prima facie he does not have exclusive physical control.¹² Mere possession of the keys to a car does not of itself prove knowledge of the contents of the car, especially if

1 DPP v Brooks (1974) 2 WLR 899

2 Todd (1977) 6 A Crim R 105

3 Williams v The Queen (1978) 140 CLR 591

4 He Kaw Teh (1985) 157 CLR 523, 59 ALJR 620

5 Kural v R [1987] HCA 16; (1987) 162 CLR 502 (7 May 1987)

6 Martindale [1986] Crim LJ 737, Kennedy (1998) 100 A Crim R 377

7 DPP v Fairbanks [2012] NSWSC 150

8 Delon (1992) 29 NSWLR 29

9 Hinton (1978) PSR 1749

10 Phillipetti (1984) 13 A Crim R 335, Burns (19/8/88 CCA), Bazley (23/3/89) and Dib (1991) 52 A Crim R 65

11 R v Harris [1961] Crim LJ 256, Lester & Byast (1955) 39 Cr App R 157

12 Barron v Valdamis [1978] ACLD 374

others have access to the car.¹³

Possession of an Implement

It is an offence to have in your possession an implement for the administration of a prohibited drug. There is an exemption for hypodermic syringes¹⁴ for genuine medical conditions. It is necessary to show that the person possessed the utensils for future use.¹⁵

Defences to Supplying

Giving drugs to someone to hold for you is not supplying¹⁶ nor is the holder giving the drugs back to you.¹⁷ Where the defence is that the defendant is simply holding the drugs for someone else, the jury should be specifically directed that this is a defence at law.¹⁸ However, holding drugs for someone else, which you then give to someone else, is supply.¹⁹

Sentencing

First offences of drug possession are routinely dismissed without conviction under s10 Crimes (Sentencing Procedure) Act. The advocate should submit that the offender was naïve, fell in with a bad crowd and made a foolish mistake. More details on Section 10 can be found here.

Subsequent offences are more difficult as the offender cannot claim naivety and has rebuffed the leniency shown by the court for the first offence. It is best for the offender to acknowledge they have a drug problem and apply to undertake the Magistrates Early Referral Into Treatment (MERIT) Program.

MERIT is a twelve week program whereby the offender engages in weekly sessions with a counsellor to manage their drug use and must submit to urine tests. A positive MERIT report will be taken into account on sentence. For subsequent offences, the advocate should consider an application under s32 Mental Health (Forensic Provisions) Act. More information is available [here](#).

Chris Nowlan
Barrister-at-Law
Phone (02) 9024 9533
chris@chrisnowlan.com

13 R v Amanatidis (2001) 125 A Crim R 89

14 s11 Drugs Misuse & Trafficking Act (NSW) 1985

15 Erickson v Pittard [1976] 2 NSWLR 528

16 R v Maginnis [1987] 2 WLR 765

17 R v Carey (1990) 50 A Crim R 163, (1991) 55 A Crim R 120, R v Tuckey (1991) 57 A Crim R 468

18 Regina v Frazer (2002) 128 A Crim R 89

19 R v Blair (2005) 152 A Crim R 462