

17.03

Definition Of Subsequent Offense Of Possession Of Cannabis

A person commits the offense of subsequent offense of possession of cannabis when he, having been convicted of the offense of _____, knowingly possesses a substance containing cannabis and that substance containing the cannabis weighs more than [(10) (30)] grams.

Committee Note

720 ILCS 550/3(l), 550/4(c), and 550/4(d) (West, 1999).

Give Instruction 17.04.

The first conviction must precede the *conduct* constituting the subsequent offense. See *People v. Phillips*, 56 Ill.App.3d 689, 371 N.E.2d 1214, 14 Ill.Dec. 161 (5th Dist.1978); *People v. Miller*, 115 Ill.App.3d 592, 450 N.E.2d 767, 71 Ill.Dec. 79 (2d Dist.1983).

Generally, when the degree or class of an offense depends on a prior conviction, the State must prove the existence of that prior conviction as an element of the offense. See *People v. Hicks*, 119 Ill.2d 29, 518 N.E.2d 148, 115 Ill.Dec. 623 (1987); *People v. Palmer*, 104 Ill.2d 340, 472 N.E.2d 795, 84 Ill.Dec. 658 (1984); *People v. Mays*, 80 Ill.App.3d 340, 399 N.E.2d 718, 35 Ill.Dec. 652 (3d Dist.1980). However, 725 ILCS 5/111-3(c), as amended by P.A. 86-964, effective July 1, 1990, provides that a prior conviction when used to increase the classification of an offense is not an element of the crime and may not be disclosed to the jury unless otherwise permitted by the issues. As a result, after the effective date of P.A. 86-964, prior convictions will not be presented to the jury and this instruction should not be used. See *People v. Kennard*, 204 Ill.App.3d 641, 561 N.E.2d 1188, 149 Ill.Dec. 492 (1st Dist.1990). For offenses occurring after June 30, 1990, use Instruction 17.01.

Subsequent offense enhancement for possession applies only when a defendant is charged with possessing (1) more than 10 grams but less than 30 grams, or (2) more than 30 grams but less than 500 grams. 720 ILCS 550/4.

When possession of more than 10 or 30 grams of a substance containing cannabis is charged, weight then determines the penalty for the offense and is an essential element to be decided by the jury. See *People v. Kadlec*, 21 Ill.App.3d 289, 313 N.E.2d 522 (3d Dist.1974); *People v. Hill*, 169 Ill.App.3d 901, 524 N.E.2d 604, 120 Ill.Dec. 574 (1st Dist.1988). When the jury must determine this element, use the bracketed weight in this instruction and in Instruction 17.04.

Particular care must be taken when disputes about weight support lesser included offenses. See example in the Committee Note to Instruction 17.01 and *People v. Smith*, 67 Ill.App.3d 952, 385 N.E.2d 707, 24 Ill.Dec. 566 (5th Dist.1978).

When the prosecution must prove the quantity of the substance as an element of the offense, it need not prove that the defendant *knew* the quantity was of any specific amount. See *People v. Cortez*, 77 Ill.App.3d 448, 395 N.E.2d 1177, 32 Ill.Dec. 796 (1st Dist.1979); *People v. Ziehm*, 120 Ill.App.3d 777, 458 N.E.2d 588, 76 Ill.Dec. 188 (2d Dist.1983).

Although the quantity may not always be required in the verdict forms, *People v. Roy*, 172 Ill.App.3d 16, 526 N.E.2d 204, 122 Ill.Dec. 64 (4th Dist.1988), to insure clarity the Committee recommends that each verdict form contain the same quantity language used in the definitional and issues instructions supporting the verdict.

See Committee Note to Instruction 17.01, concerning verdict forms and disputes of weight.

Insert in the blank the prior conviction.

Use applicable bracketed material.