

Defending Kean University Students for Criminal Arrest

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By Kenneth A. Vercammen, Past Chair NJ State Bar Municipal Court and DWI Section

Our office often represents college students charged with criminal and disorderly persons offenses. We provide representation throughout New Jersey. Criminal charges can cost you. If convicted of possession of drugs or a crime, you can face jail, high fines, Probation over 18 months and other penalties. Dont give up! Our Law Office can provide experienced attorney representation for marijuana, underage drinking and other criminal matters. Our website njlaws.com provides information on criminal offenses we can be retained to represent people.

Consequences of a Criminal Guilty Plea in Superior Court

- 1 If you plead guilty you will have a criminal record
2. Before the judge can accept your guilty plea, you will have to stand up in open court and tell the judge what you did that makes you guilty of the particular offense in front of all persons in

the courtroom.

3. You can go to jail, pay thousands of dollars in fines, and may be barred from future employment
3. You may not be able to get a job as a teacher, public employee, banking industry, real estate or other state regulated field.
4. On employment applications, you will have to answer yes that you were convicted of a crime.
5. You must pay a \$75 Safe Neighborhood Services Fund assessment for each conviction. You must pay a minimum Violent Crimes Compensation Board assessment of \$50 (\$100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty.
6. If you are being sentenced to probation, you must pay a fee of up to \$25 per month for the term of probation.
- 7 In all drug cases, the statute requires mandatory drivers license suspension. New Jersey does not have a special license to go to work or school.
8. In indictable matters, you will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing.
9. You must pay restitution if the court finds there is a victim who has suffered a loss.
10. If you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty.
11. If you are not a United States citizen or national, you may be deported by virtue of your plea of guilty.

12. You must wait 5-10 years to expunge a first offense. 2C:52-3

13. You lose the presumption against incarceration in future cases. 2C:44-1

14. You may lose your right to vote.

The defense of a person charged with possession of marijuana or other criminal offense is not impossible. There are a number of viable defenses and arguments which can be pursued to achieve a successful result. Advocacy, commitment, and persistence are essential to defending a client accused of involvement with marijuana, hashish or other illegal cannabis derivatives. The Superior Court handles possession of larger amounts of marijuana, or other illegal drugs and possession with intent to distribute drugs

The Municipal Court has 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 cocaine, hashish or other CDS to police [County Prosecutors often downgrade possession of small amounts of cocaine to this offense;] NJSA 2C:36-2, possession of drug paraphernalia. All other drug offenses are heard in the Superior Court.

If convicted, the court must impose a minimum \$500.00 Drug Enforcement Reduction penalty and a \$50.00 lab fee for each CDS charge. Moreover, the court must suspend the defendants drivers license for 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. Fines and jail vary depending on the amount of marijuana, hashish or other illegal drugs and whether the case is heard in Superior Court or Municipal Court. Jail time and fines is explained in greater details in other articles on njlaws.com.

The retainer fee will be discussed at the initial interview. Defense attorneys require the full retainer to be paid prior to my entering an appearance. Depending on the case, County and prior offenses, fees range between \$1,000-\$7,000.

My standard procedure, once we are retained, is to immediately send a discovery letter/letter of representation to both the Prosecutor and the Court Clerk. I try to stay in close contact with the client. I also can provide the client with a brochure setting forth phone numbers and addresses for substance abuse treatment programs with a recommendation they seek help for any problem. Proof of attendance of such a program is of benefit at sentencing or an application for PTI or conditional discharge.

A timely Motion to Suppress Evidence can be made pursuant to Rule 3:5-7. Do it immediately; do not wait to receive discovery.

Conditional Discharge or Pre-trial Intervention/ PTI for 1st time offenders

If the Suppression Motion is unsuccessful or not a viable option, counsel should discuss the possibility of filing an application for Pre-trial Intervention.

For small amounts of marijuana and paraphernalia, heard in Municipal Court, N.J.S.A. 2C: 36A-1 provides that a person not previously convicted of a drug offense either under Title 2C or Title 24 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 with the court, defense counsel 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. Defense counsel 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. For applicable caselaw on Conditional Discharges, see *State v Sanders* N.J. Super 515 (App. Div. 1979), *State v Banks* 157 N.J. Super. 442 (Law Div. 1978), *State v Grochulski* 133 NJ Super 586 (Law Div. 1975), *State v Teitelbaum*. 160 NJ Super 450 (Law Div. 1978), *State v Bush* L34 NJ Super 346 (Cty Ct 1975), *State v DiLuzio* 130 NJ Super 220 (Law Div. 1974). The defendant must be required to pay a \$45.00 application fee, plus the mandatory \$500.00 DEDR penalty. The court further has the option to suspend a defendants drivers license for between six months and two years.

The Conditional Discharge period is also between one year 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.

Pre-trial Intervention may be available for first time offenders charged with certain non- violent offenses heard in Superior Court. More details on PTI is available on website njlaws.com.

TRIAL PREPARATION

The prosecutor is responsible for providing full discovery. Rules 3:13-3, 7:7-7, *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 TRIAL

In drug cases, the burden of primary possession/constructive possession remains on the State. Plea bargaining is not permitted in Municipal Court drug cases (while it is available in such varied charges as murder, careless driving, or the burning of old tires). Plea bargaining is permitted in Superior Court indictable cases.

Defense counsel can subpoena its necessary witnesses and prepare for trial. 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. 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, defendant's 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.

Mere presence in a premises with other persons 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, 524 (App. Div. 1975).

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

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

The following ideas are sometimes used by defense attorneys to provide defend criminal charges.

1. No discovery Send a discovery letter/letter of representation to both the District Attorney/Municipal Prosecutor, Police Records Bureau of the law enforcement agency which issued the complaint and the Court Clerk. Failure of the state to provide discovery may be grounds to dismiss the charges.
2. Suppression A timely Motion to Suppress Evidence must be made.
3. Subpoena witnesses defense Counsel should 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 pivotal in determining credibility. Failure to subpoena a witness may be malpractice if your necessary witness is not present.
- 4 No lab tests 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. If the State intends to proffer 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, should be served by the state on defense counsel. This includes an actual copy of the lab certificate. Defense counsel must notify the prosecutor in writing of defendants objection to the admission into evidence of the certificate, plus set forth the

grounds for objection. 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. If the state cant introduce lab results, the state cant use.

5. Chain of Custody The State must then establish a chain of custody. The prosecutors witness will call additional witnesses to prove the locations of the seized drugs from the moment of initial seizure to the time of the testing of the illegal drug. Defense counsel can contest the chain of custody.

6. Confession excluded If the state will be attempting to introduce a confession or other incriminating statements, defense counsel may request an Evidence Rule Hearing to determine if the requirements of *Miranda v. Arizona* 384 US. 436 (1966) have been violated.

7. Constructive possession not proven The burden of primary possession/constructive possession remains on the State. The State must prove it was defendants conscious intention to obtain or possess the item while being aware it was drugs. 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.

Conclusion

It is well established that the prosecution of a defendant for possession of marijuana, hashish or other illegal cannabis derivatives is a criminal proceeding. In such a proceeding the burden of proof is upon the state to establish all elements of the offense beyond a reasonable doubt.

Unfortunately, plea bargaining is not permitted in Municipal Court drug cases (while it is available in such varied charges as murder, careless driving, or the burning of old tires). Defense

counsel must subpoena its necessary witnesses and prepare for trial. Never attempt to represent yourself if you are facing serious charges.

Marijuana, or other drug offenses carry substantial penalties which will effect your client 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. Drug law and other defenses are explained in greater details in other articles on njlaws.com.

Call Kenneth Vercammen & Associates PC for confidential representation 732-572-0500

About the Author

Kenneth A. Vercammen is a trial attorney in Edison, Middlesex County, New Jersey. He often lectures for the New Jersey State Bar Association, New Jersey Institute for Continuing Legal Education and Middlesex County College on personal injury, criminal / municipal court law, and drunk driving. He has published 125 articles in national and New Jersey publications on municipal court and litigation topics. He has served as a Special Acting Prosecutor in seven different cities and towns in New Jersey and also successfully defended hundreds of individuals facing Municipal Court and Criminal Court charges.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, arbitration hearings, and contested administrative law hearings.

Since 1985, his primary concentration has been on litigation matters. Mr. Vercammen gained other legal experiences as the Confidential Law Clerk to the Court of Appeals of Maryland (Supreme Court), with the Delaware County, PA District Attorney Office handling Probable

Cause Hearings, Middlesex County Probation Dept as a Probation Officer, and an Executive Assistant to Scranton District Magistrate, Thomas Hart, in Scranton, PA.

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