

# CONSTRUCTIVE POSSESSION IN NEW YORK

## WHAT IT IS AND WHY IT MATTERS

*A Case Based on Constructive Possession Often Provides Questionable Facts or Evidence that a Skilled Defense Attorney Can Poke Holes Into and Raise Just Enough Doubt to Prevent a Jury from Returning a Guilty Verdict*



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In the State of New York, many criminal offenses include an element that requires the prosecution to prove possession of an item of contraband. Possession of a controlled substance, for example, is a criminal offense that requires the State of New York to prove that the defendant possessed the contraband in order to secure a conviction. Though it may seem simple for the prosecution to prove the possession element, in many cases proving possession is extremely difficult. The difficulty lies in the fact that possession can be either actual or constructive. When a criminal prosecution is based on constructive possession, the prosecutorial burden is inherently more difficult. As a defendant, a case based on constructive possession often provides questionable facts or evidence that a skilled defense attorney can poke holes into and raise just enough doubt to prevent a jury from returning a guilty verdict.

## **PROVING THE ELEMENTS OF A CRIME – THE PROSECUTOR’S BURDEN**

In the United States, an accused is innocent until proven guilty. This means that



in a criminal prosecution the State, through the prosecuting attorney, always has the burden of proving the defendant’s guilt beyond a reasonable doubt. To do this, the prosecutor must prove each element of the crime beyond a reasonable doubt. Take, for

example, the crime of “Criminal Possession of a Controlled Substance in the First Degree” found in Article 220.21 of the New York Penal Law which reads as follows:

A person is guilty of Criminal Possession of a Controlled Substance in the First Degree when he or she knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of eight ounces or more; **or**
2. methadone and said methadone weighs five thousand seven hundred sixty milligrams or more.

In that crime, the elements of the offense include:

1. knowingly possessing
2. unlawfully possessing
3. a certain type of drug or substance (one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances)
4. the substance is a certain weight or more (of an aggregate weight of eight ounces or more; or methadone and said methadone weighs five thousand seven hundred sixty milligrams or more).

The prosecutor must prove both knowing and unlawful possession of the contraband in question in order to convict the defendant. Possession, therefore, is an important element of the crime.

## **DEFINING ACTUAL POSSESSION**

For the prosecutor, proving the element of possession is much easier when the defendant was found in “actual” possession of the item in question. Actual

possession means that the defendant had immediate and direct physical control over the contraband. By way of illustration, assume that you are in an airport getting ready to board a plane. As you go through security you are chosen for a heightened security check. When the officer conducts the “pat down”, a baggie full of what appears to be illegal drugs is found in your pants pocket. Because the contraband was found on your person you were in “actual” possession of the contraband.

## DEFINING CONSTRUCTIVE POSSESSION

Constructive possession on the other hand, is difficult to define. In fact, scholars, judges, and attorneys continue to this day to argue over the definition of



constructive possession as well as when and how constructive possession applies in a criminal prosecution. The Supreme Court of the United States has even said "there is no word more ambiguous in its meaning than possession" (*National Safe Deposit Co. v. Stead*, 232 U.S. 58, 34 S. Ct. 209, 58 L. Ed.

504 [1914]). Despite its ambiguity, constructive possession is frequently used to convict people accused of crimes when law enforcement officers find themselves in a situation where they are convinced that contraband belongs to an individual yet it was not found directly on the person. Though a universally accepted definition for “constructive possession” remains elusive, the most widely accepted definition contemplates a situation in which the defendant had

**“knowledge of the item in question and had the intent to maintain dominion and control over the item.”**

## **NEW YORK LAW – PRESUMPTIVE POSSESSION**

As a general rule the prosecutor has the burden of proving all elements of a crime, including that the defendant was in possession of contraband if that is an element. In New York, however, New York Penal Law 220.25 effectively shifts the burden onto the defendant to prove he or she was *not* in possession by creating a presumption of possession of a controlled substance under certain circumstances where constructive possession would otherwise need to be proven. Section 220.25 reads, in pertinent part, as follows:



The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found.

Exceptions to the presumption are made for drivers of vehicles for hire, individuals with a valid prescription, and situations where the controlled substance is concealed upon the person of an occupant.

Section 220.25 goes on to say:

The presence of a narcotic drug, narcotic preparation, marihuana or phencyclidine in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found.

Exceptions to this presumption are made if the individual has a valid prescription or if the controlled substance is concealed upon the person of one of the occupants.

## **PROVING CONSTRUCTIVE POSSESSION**

Although New York law creates a presumption of possession in certain circumstances, there are numerous other situations where the State of New York must prove constructive possession. Possession of a firearm, for example, can be a criminal offense in New York. To better understand the difficulty inherent in making a constructive possession argument, consider the following scenarios, assuming that the defendant in the case cannot lawfully possess a firearm:

1. The defendant is operating his own vehicle and is stopped by the police whereupon a firearm is located underneath the driver's seat.
2. The defendant is driving someone else's vehicle and is stopped by the police whereupon a firearm is located under the driver's seat.

3. The defendant is driving his own vehicle with three passengers in the vehicle. The vehicle is stopped and a search uncovers a firearm under the driver's seat; however, the passenger behind the driver also had easy access to where the firearm was found.
4. Same scenario as number 3 except the defendant is now the passenger who was riding behind the driver.

Absent a presumption of possession, some of the above scenarios are less clear than others. In the first scenario a strong constructive possession argument can be made; however, it is more difficult to argue *beyond a reasonable doubt* that the defendant possessed the firearm in the subsequent scenarios.

If you have been charged with a criminal offense in New York that requires the prosecution to prove constructive possession in order to convict you of the offense, call the Law Offices of Adam M. Thompson immediately to ensure you receive the aggressive representation you need.

**Contact Us Today About Your Case**

If you would like to have Mr. Thompson personally review your case, please fill out our **free case review form**. Mr. Thompson will review your evaluation form and respond in writing to your request. If you would like to speak to Mr. Thompson immediately about your case, call for a free telephone consultation

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Cornell University Law School, [Constructive Possession](#)

Virginia Law Review, [Constructive Possession in Narcotics Cases, To Have and Have Not](#)

New York Courts, [Constructive Possession](#)

New York Laws, [Criminal Possession of a Controlled Substance; Presumption](#)



## About the Author



### Adam M. Thompson

Seasoned New York attorney Adam Thompson, the Law Offices of Adam M. Thompson's senior partner and owner, has over 25 years of courtroom and trial experience. He is a well-respected litigator who fights hard for every client, bringing enormous energy, unmatched determination, and contagious enthusiasm to each case.

This is reflected in his excellent results and reputation. He has successfully handled thousands of cases, obtained personal injury settlements worth millions of

dollars, and obtained not guilty verdicts in some of the most difficult high-profile criminal cases.

Mr. Thompson is often a featured legal expert and analyst for major television, cable, and radio news media sources, including CNN, HLN, FOX, ABC, NBC, WPIX, WOR, and more. [Click here](#) to see one of Mr. Thompson's dozens of media appearances.

His cases have been profiled in newspapers, magazines, TV, and radio programs worldwide. Please see the [representative cases page](#) to learn more about these victories.

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