

Possession for Sale of Controlled Substance- California Health & Safety Code 11351

California Health and Safety Code 11351 makes it a felony to possess certain controlled substances in order to sell them. Such substances include illegal drugs, such as cocaine, heroin and LSD. Section 11351 also covers common prescription drugs like oxycodone (Oxycontin), hydrocodone (Vicodin) and codeine.

Elements of Crime:

To obtain a conviction on a count of Health and Safety Code 11351, the prosecution must prove each of the following elements beyond a reasonable doubt:

1. That the defendant unlawfully possessed the drug for the purpose of sale, and not solely for personal possession.
 - a. A defendant can be in possession of an illegal substance through actual or constructive possession.
 - (1) Actual – illegal substance on defendant’s person.
 - (2) Constructive - although the substance was not on the defendant’s person, it was in a place which was under the control of the defendant, i.e. under the driver’s seat of defendant’s car, where he/she maintains the right to control what happens with the drug. If a vehicle or dwelling are shared, all those sharing may be deemed to be in constructive possession and thus criminally liable.
2. The defendant had knowledge that the illegal substance was present.
 - a. The defendant knew the drugs existed in an area within defendant’s control.
3. The defendant knew that the substance was illegal in nature.
 - a. The defendant was aware of the substance’s character as being a controlled substance.
4. That the defendant intended to sell the substance while he possessed it.
 - a. The defendant planned on selling the drugs to a third party or was determined to give the drugs to someone else for the purpose of selling them. A “sale” can be for cash or for other items or services of value. Whether there exists an intent to sell depends upon the specific factual circumstances of a given case.
5. The type of controlled substance the defendant had.

- a. The burden is on the prosecution to prove that the substance found on the defendant or in defendant's control has the chemical properties consistent with a known controlled substance.
6. There was a sufficient, i.e. usable, amount of the controlled substance to be used for illegal drug consumption. For an amount to be usable, it must be enough to use as a drug even if it does not produce a narcotic effect on the user.

Defenses:

Defenses can be any fact that negates one of the required elements listed above, including:

1. Evidence that there was no intent to sell the drugs (i.e., the defendant purchased a large quantity for personal use);
2. That the defendant never actually took possession of the substance, or that the defendant had no true knowledge that the substance was present in an area under defendant's control; and/or
3. That the police obtained the evidence through an unreasonable and thus prohibited search and seizure under the 4th Amendment. If the drugs were discovered as the result of an unlawful search or seizure the defendant may be able to challenge the admissibility of the evidence for lack of probable cause. In these circumstances, a judge may suppress the evidence and the case would most likely be dismissed.
4. In almost every criminal case, there are "search and seizure defenses" that are based on illegal police action. If the police officer pulled a vehicle over for an unconstitutional reason, all of the items that were discovered, ie, drugs, etc may be able to be suppressed in court and therefore not use in the criminal proceedings. Generally, this will result in a dismissal of all charges because the District Attorney will simply be unable to proceed.
5. Additional defenses would include arguments that establish that possession of the drugs was nonexistent. The drugs were owned/ possessed by some else.

Drug defense lawyers are sophisticated in establishing defenses to be used in drug cases. Functionally only drug defense lawyers and criminal defense lawyers are sufficiently educated and experienced to recognize defenses that may work in any particular set of circumstances.

Penalties:

As noted in the statute itself, this crime can potentially result in a prison sentence of two to four years. Additionally, under California Health and Safety Code 11372, the court can impose a fine of up to \$20,000 for each offense.

In some cases, the possession for drugs for sale can be punished more severely if certain types of controlled substances are involved. Under California Health and Safety Code

11351.5, offenses involving base cocaine are subject to three to five years in prison and a fine at a maximum of \$20,000 pursuant to California Health and Safety Code 11372.

Furthermore, under California Health and Safety Code 11370.4, substances with heroin, cocaine base, cocaine, methamphetamine, amphetamine or phencyclidine” can result in the defendant receiving an additional term of imprisonment depending on the weight of the substance.

Aggravating factors:

If the defendant is convicted of possessing or purchasing cocaine base for sale, the defendant faces three to five years in county jail, and a maximum \$20,000 fine. Generally, our drug attorneys in Santa Rosa, Napa, San Rafael, Lakeport, Ukiah and Eureka are well versed in dealing with the elimination of aggravating factors.

In addition, if the defendant is convicted of violating Health and Safety Code 11351 and the controlled substance is heroin, cocaine base or cocaine, the defendant may be sentenced to an additional:

1. three years if the substance exceeds one kilogram by weight;
2. five years if the substance exceeds four kilograms;
3. ten years if the substance exceeds ten kilograms;
4. fifteen years if the substance weighs more than 20 kilograms;
5. twenty years if the substance weighs more than 40 kilograms; and,
6. twenty-five years if the substance exceeds 80 kilograms.

If the defendant receives an additional sentence under one of these weight enhancements, the defendant also face fines of up to \$8,000,000.

If the defendant is convicted of possessing or purchasing controlled substances for sale and has at least one prior felony conviction for another California drug crime that involves more than mere personal use, the defendant faces an additional and consecutive three-year term for each prior felony conviction.

Under Health & Safety Code 11366, it is a crime to open or maintain any place with the intent to repeatedly or continuously sell or give away illegal controlled substances at that place. This crime is known as "operating a drug house." Thus, it is common for Health & Safety Code section 11366 to be charged along with possession for sale of a controlled substance. Opening or maintaining a drug house is a wobbler crime. The potential felony sentence is sixteen months, two years or three years in state prison.

Alternatively, probation and up to a year in county jail is possible for first time offenders involving minimal amounts of prohibited substances with no aggravating circumstances.

Important to note: Unlike simple possession a conviction under HS 11351 makes the defendant ineligible for drug diversion (treatment instead of jail time).

Alternative to Conviction:

Those accused of a violation of H&S 11351, may want to contact their criminal drug attorney in Sonoma, Napa, Marin, Lake, Mendocino and Humboldt counties to discuss the alternative of a Penal Code 1001.36 Mental Health diversion. If an individual has any type of emotional difficulties that they have been treating with drugs, they may very well be eligible for a diversion program which, upon successful completion, eliminates a conviction and puts a client in a position to file a Petition To Seal which will remove all evidence of a criminal arrest or criminal charges from their criminal history.

Alternatives to Jail/Prison:

A person convicted of H&S 11351 may also be eligible for sentencing pursuant to Penal Code 1210 or Prop 36. If you are able to avail yourself of this law, it is required that you receive drug treatment and not serve time in jail or prison.

Remember, Even if convicted, after a successful completion of probation, an expungement/dismissal motion pursuant to Penal Code 1203.4 can be filed and we can, in all likelihood have these charges dismissed adding a very favorable entry to the criminal history. This process can be accomplished by the criminal defense attorneys in our offices in Santa Rosa, Napa, San Rafael, Lakeport, Ukiah and Eureka.

The Law Itself: California Health & Safety Code 11351

Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.

(Amended by Stats. 2011, Ch. 15, Sec. 152. (AB 109) Effective April 4, 2011. Operative October 1, 2011, by Sec. 636 of Ch. 15, as amended by Stats. 2011, Ch. 39, Sec. 68.)

Remember, Ronald Dinan and Associates, is a firm of experienced and aggressive criminal defense lawyers, who can help in achieving the best outcome in your case. Many times criminal case dispositions will include reduction or outright dismissal of the number and/or severity of criminal charges, diversion programs, probation, reduced fines with installment payments, alternatives to jail, etc.

To get immediate help with your criminal matter, we invite you to call us to discuss your case. We answer all telephone calls in a polite, professional and helpful manner.

Santa Rosa – 707-571-5550

Lakeport – 707-262-0503

Napa – 707-252-0102

Ukiah – 707-462-5950

Marin – 415-491-0223

Eureka- 707-445-1348