

WITNESS OR VICTIM OF A DRUG OR ALCOHOL OVERDOSE

The following instructions are designed to meet the requirements of Penal Law § 220.78.

Part I of these instructions deal with subdivisions one and two of that statute which arguably sets forth an additional element for certain drug crimes.

Part II of these instructions deals with subdivision four of that statute which contains an affirmative defense to certain drug crimes.

PART I: ELEMENT GOVERNMENT MUST PROVE

Introduction for the Court

Penal Law § 220.78(1) and (2) provide that:

(1) "A person who, in good faith, seeks health care for someone who is experiencing a drug or alcohol overdose or other life threatening medical emergency," [or]

(2) "A person who is experiencing a drug or alcohol overdose or other life threatening medical emergency and, in good faith, seeks health care for himself or herself or is the subject of such a good faith request for health care"

"shall not be charged or prosecuted for a controlled substance offense ... or a marijuana offense ..., other than an offense involving sale for consideration or other benefit or gain ...¹ with respect to any controlled substance, marijuana, ...² that was obtained as a result of such seeking or receiving of health care." (Emphasis added).

It remains for the courts to decide how a dispute over whether this statutory requirement that a person "not be charged or prosecuted" for the applicable crime applies in a given case. If that determination is that a jury decide the issue, two instructions are provided in this Part I. The first instruction explains the law; the second instruction sets forth the added element that the government must prove.

¹ At this point the statute lists two other offenses: "possession of alcohol by a person under age twenty-one years under section sixty-five-c of the alcoholic beverage control law, or for possession of drug paraphernalia under article thirty-nine of the general business law."

² At this point the statute adds: "alcohol or paraphernalia."

The Instruction for the Jury

Note on where to insert the following instruction:

In the jury instruction of the applicable crime, immediately before that portion of the instruction which details the elements of the crime and begins with the words: “In order to find the defendant guilty of ...”, insert the following:

Select appropriate alternative:

A person who, in good faith, sought health care for someone who was experiencing a drug or alcohol overdose or other life threatening medical emergency is not liable for the possession [or sale for no consideration or other benefit or gain] of (*specify drug*) which was obtained as a result of such seeking or receiving of health care.

A person who was experiencing a drug or alcohol overdose or other life threatening medical emergency and, in good faith, sought health care for himself/herself or was the subject of such a good faith request for health care is not liable for the possession [or sale for no consideration or other benefit or gain] of (*specify drug*) which was obtained as a result of such seeking or receiving of health care.

The terms “health care” and “drug or alcohol overdose” have the following meanings:

HEALTH CARE means the professional services provided to a person experiencing a drug or alcohol overdose by a health care professional licensed, registered or certified by law³ who, acting within his or her lawful scope of practice, may provide diagnosis, treatment or emergency services for a person experiencing a drug or alcohol overdose.

³ The statute here specifies “under title eight of the education law or article thirty of the public health law.” Penal Law § 220.78(3)(b). If the professional’s authority to provide health care is in issue, it will be necessary to modify the instruction accordingly.

DRUG OR ALCOHOL OVERDOSE means an acute condition including, but not limited to, physical illness, coma, mania, hysteria or death, which is the result of consumption or use of a controlled substance or alcohol and relates to an adverse reaction to or the quantity of the controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined; provided that a patient's condition shall be deemed to be a drug or alcohol overdose if a prudent layperson, possessing an average knowledge of medicine and health, could reasonably believe that the condition is in fact a drug or alcohol overdose and (except as to death) requires health care.⁴

Note on adding the applicable element:

At the end of the list of elements add one of the following two alternatives:

Select appropriate alternative:

; and (# __.) That the (*specify drug*) was NOT obtained as a result of the defendant seeking, in good faith, health care for someone who was experiencing a drug or alcohol overdose or other life threatening medical emergency.

; and (# __.) That the (*specify drug*) was NOT obtained as a result of the defendant seeking or receiving health care because he/she was experiencing a drug or alcohol overdose or other life threatening medical emergency and, in good faith, sought health care for himself/herself or was the subject of such a good faith request for health care.

⁴See Penal Law § 220.78(3)(a). The instruction tracks the statutory definition except that the words “or overdose” after the words “Drug or alcohol overdose” are omitted as redundant.

PART II: AFFIRMATIVE DEFENSE FOR SALE

Introduction for the Court

Notably, the affirmative defense applies with respect to a matter “not covered by subdivision one or two” of Penal Law 220.78. Thus, if there is a factual dispute over whether a matter is covered by subdivisions one or two and a court decides that a dispute over whether the provisions of subdivisions one and two of Penal Law § 220.78 is for a jury to decide, it is theoretically possible that the jury will be required to be instructed both on the applicability of subdivisions one and two as well as the affirmative defense.

Thus, Penal Law § 220.78(4) provides that:

It shall be an affirmative defense to a criminal sale controlled substance offense ... or a criminal sale of marihuana ..., not covered by subdivision one or two of this section, with respect to any controlled substance or marihuana which was obtained as a result of such seeking or receiving of health care, that:

(a) the defendant, in good faith, seeks health care for someone or for him or herself who is experiencing a drug or alcohol overdose or other life threatening medical emergency; and

(b) the defendant has no prior conviction for the commission or attempted commission of a class A-I, A-II or B felony under this article. (Emphasis added).

The Instruction for the Jury

Note: When the affirmative defense applies, omit the final two paragraphs of the instructions on the crime charged, and substitute the following:

Therefore, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of (specify) as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of (specify) as charged in the _____ count, you will not consider this affirmative defense.

Under our law, it is an affirmative defense to the sale [for consideration or other benefit or gain] of any (*specify drug*) which was obtained as a result of the seeking or receiving of health care, that the defendant, in good faith, sought health care for someone or for himself/herself who was experiencing a drug or alcohol overdose or other life threatening medical emergency; and the defendant has no prior conviction for the commission or attempted commission of a class A-I, A-II or B felony under this article.

The terms “health care” and “drug or alcohol overdose” have the following meanings:

HEALTH CARE means the professional services provided to a person experiencing a drug or alcohol overdose by a health care professional licensed, registered or certified by law⁵ who, acting within his or her lawful scope of practice, may provide diagnosis, treatment or emergency services for a person experiencing a drug or alcohol overdose.

DRUG OR ALCOHOL OVERDOSE means an acute condition including, but not limited to, physical illness, coma, mania, hysteria or death, which is the result of consumption or use of a controlled substance or alcohol and relates to an adverse reaction to or the quantity of the controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined; provided that a patient's condition shall be deemed to be a drug or alcohol overdose if a prudent layperson, possessing an average knowledge of medicine and health, could reasonably believe that the condition is in fact a drug or alcohol overdose and (except as to death) requires health care.⁶

Under our law, the defendant has the burden of proving an

⁵ The statute here specifies “under title eight of the education law or article thirty of the public health law.” Penal Law § 220.78(3)(b). If the professional’s authority to provide health care is in issue, it will be necessary to modify the instruction accordingly.

⁶ See Penal Law § 220.78(3)(a). The instruction tracks the statutory definition except that the words “or overdose” after the words “Drug or alcohol overdose” are omitted as redundant.

affirmative defense by a preponderance of the evidence. In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant. A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt the elements of (*specify*), you must find the defendant guilty of that crime as charged in the _____ count.

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (*specify*) as charged in the _____ count.