

25.15(a) RETAIL SALE OF DRUG PARAPHERNALIA

§ 893.147(6), Fla. Stat.

To prove the crime of Retail Sale of Drug Paraphernalia, the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) knowingly and willfully [sold] [offered for sale] at retail one or more objects defined as drug paraphernalia.**
- 2. The object[s] [was] [were]:**

Give as applicable. § 893.145(12)(a)–(c), (g)–(m), Fla. Stat.

- a. [a] metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe[s].**
- b. [a] water pipe[s].**
- c. [a] carburetion tube[s] and device[s].**
- d. [a] chamber pipe[s].**
- e. [a] carburetor pipe[s].**
- f. [an] electric pipe[s].**
- g. [an] air-driven pipe[s].**
- h. [a] chillum[s].**
- i. [a] bong[s].**
- j. [an] ice pipe[s] or [a] chiller[s].**

Definitions.

Optional definitions of knowingly.

“Knowingly” means with actual knowledge and understanding of the facts or the truth.

“Knowingly” means an act done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

“Willfully” means intentionally and purposely.

The term “drug paraphernalia” means an object used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing [a controlled substance] [a substance described in § 877.111(1), Florida Statutes] into the human body.

The Court instructs you that (name of substance) is a [controlled substance] [substance listed in § 877.111(1), Florida Statutes].

Relevant factors. § 893.146, Fla. Stat.

In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:

- 1. Statements by an owner or by anyone in control of the object concerning its use.**
- 2. The proximity of the object, in time and space, to a direct violation of the drug laws.**
- 3. The proximity of the object to controlled substances.**
- 4. The existence of any residue of controlled substances on the object.**
- 5. Evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of the drug laws. The innocence of an owner, or of anyone in control of the object, as to a direct violation of the drug laws shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.**
- 6. Instructions, oral or written, provided with the object concerning its use.**
- 7. Descriptive materials accompanying the object which explain or depict its use.**
- 8. Any advertising concerning its use.**
- 9. The manner in which the object is displayed for sale.**
- 10. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.**
- 11. Evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.**
- 12. The existence and scope of legitimate uses for the object in the community.**
- 13. Expert testimony concerning its use.**

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

It is unclear whether the exception for pipes primarily made of briar, meerschaum, clay, or corn cob is an element or an affirmative defense. In the absence of case law, trial judges will have to make that determination if the issue arises.

The crime in § 893.147(6)(a), Fla. Stat., is reclassified from a first-degree misdemeanor to a third-degree felony upon a second or subsequent violation. *See* § 893.147(6)(b), Fla. Stat. As of August 2017, it is unclear whether a prior violation will be treated as an element of the crime which must be proven to the jury or as a sentencing factor which may be proven to the judge. If treated as an element, it is error to inform the jury of a prior violation of Retail Sale of Drug Paraphernalia. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty of a Retail Sale of Drug Paraphernalia, the historical fact of a previous violation shall be determined beyond a reasonable doubt in a bifurcated proceeding. *See State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

This instruction was adopted in 2014 [143 So. 3d 893] and amended in 2017.