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Evidence - Can You Be Busted for Your Roomate's Pot - Mulligan v. State

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CASE NOTES

EVIDENCE—Can You Be Busted for Your Roommate's Pot? Mulligan v. State, 513 P.2d 180 (Wyo. 1973).

The offense of illegal possession of a controlled substance[1] provides difficult problems for the legal profession. It only takes a small amount of an illicit drug to produce the desired effects, and therefore such contraband can be easily hidden. Often the offenders are young people who do not have traditional dwelling habits, making it likely that both drug users and nonusers will be living together. The large numbers of offenders[2] and the potentially serious consequences of being convicted of possession of illicit drugs[3] add to the problem, and the result is that the courts must develop safeguards to protect innocent people who are in non-exclusive possession[4] of the place where the drugs are found. The Wyoming Supreme Court, in *Mulligan v. State,*[5] has adopted such a safeguard.

Appellants Larry W. Mulligan and Donald Ray Richardson were tried together and convicted of unlawful possession of marijuana. Both appealed on the ground that there was insufficient evidence to support the convictions. The mari-

1. WYO. STAT. § 35-347.14 (Supp. 1973) lists the substances which are controlled in Wyoming. Included therein are all the common illicit drugs such as morphine, marijuana, heroin, lysergic acid diethylamide (LSD), and mescaline.
2. Overall estimates of the number of people who are using drugs are too tenuous to be of much value, but the FBI reports that there were 431,608 arrests for violation of the drug and narcotics laws in 1972. That figure includes arrests for violations other than simple possession of illicit drugs. FBI, UNIFORM CRIME REPORTS, at 121 (1972).
3. WYO. STAT. § 35-347.31(c) (Supp. 1973), which provides in pertinent part: "It is unlawful for any person knowingly or intentionally to possess a controlled substance." The statute also provides for imprisonment of up to five years and/or a fine of up to $5,000. The elements of the crime are knowledge of the presence of the substance, and possession either actual or constructice. A good definition of constructive possession is found in Spatara v. State, 179 So. 2d 873, 877 (Fla. Ct. App. 1965): "The accused has 'constructive possession' of a chattel where he has knowledge of its presence coupled with the ability to maintain control over it or reduce it to his physical possession, even though he does not have actual personal dominion." *See* Deeter v. State, 500 P.2d 68 (Wyo. 1972), for a case where the Wyoming Supreme Court upheld a conviction for constructive possession of an illicit drug.
4. The term "non-exclusive possession" is used throughout this case note to denote a situation where the defendant was not the only person who had access to the place where the contraband was found. The place could be an apartment as in Mulligan v. State, 513 P.2d 180 (Wyo. 1973), a car as in State v. Faircloth, 181 Neb. 333, 148 N.W.2d 187 (1967), or an area of of ground as in Frazier v. State, 488 P.2d 613 (Okl. Crim. App. 1971).
5. *Supra* note 4.

juana was found pursuant to a search of an apartment rented by Richardson, in which Richardson, Mulligan and a third person lived. At the time of the search, there were at least ten other people in the apartment. When the police arrived, both appellants were outside the apartment. The police found three foil-wrapped packets containing marijuana in a saucer on a dresser in the only bedroom in the apartment. They also found a small bag of marijuana in the living room. On appeal, the state argued that since the appellants controlled the apartment it could be inferred that they had knowledge and possession of the mariquana that was found there, even though there were no other corroborating circumstances.[6] Appellants argued that these inferences could be allowed only if there were exclusive possession of the premises, or non-exclusive possession and other corroborating circumstances. The court accepted the appellants' argument and held: "[W]here a person is in possession, but not exclusive possession of the premises, it may not be inferred that he knew of the presence of marijuana there and had control of it unless there are statements or other circumstances tending to buttress the inference."[7] This holding is simply a corollary of the customary rule that to convict a person on circumstantial evidence it is necessary that the evidence exclude all rational conclusions except that of the defendant's guilt.[8] While non-exclusive possession may raise the *suspicion* that all occupants had knowledge of and control over the contraband found, a mere suspicion is not enough. What is needed is some evidence that connects the defendant with the contraband that is found.

This case note will examine cases from other jurisdictions which have accepted substantially the same rule as the Wyoming court now adopts,[9] and identify the kinds of corrobora-

6. The state's argument was based mainly on People v. Nettles, 23 Ill. 2d 306, 178 N.E.2d 361 (1972).
7. Mulligan v. State, *supra* note 4, at 182, quoting from Feltes v. People, 498 P.2d 1128, 1131 (Colo. 1972).
8. Mulligan v. State, *supra* note 4, at 182.
9. All the cases used in this casenote come from jurisdictions that have adopted the non-exclusive possession rule. A list of those jurisdictions and a case in each which accepts the rule follows:
Alamaba—Parks v. State, 46 Ala. App. 722, 248 So.2d 761 (Crim. App. 1971).
Arizona—State v. Hull, 15 Ariz. App. 134, 486 P.2d 814 (1971).
California—People v. Antista, 129 Cal. App. 2d 47, 276 P.2d 177 (1954).
Colorado—Feltes v. People, *supra* note 7.

tive circumstances which, when coupled with non-exclusive possession, have been held to be sufficient to allow the inferences of knowledge and possession to arise.[10] This note will also consider whether each of the different kinds of circumstances *should* be sufficient to allow the inferences to arise. In general, since the shortcoming of non-exclusive possession by itself is that there is no connection between the defendant and the particular contraband he is charged with possessing, the corroborating circumstance must provide that link before the inference of knowledge and possession should be allowed. If the evidence added to non-exclusive possession does not provide such a link, the defendant should be acquitted.

Excluding All Other Possible Possessors

If there is evidence that excludes all of the other possible guilty parties, the inferences should be allowed. In *Evans v. United States,*[11] the defendant and one Mildred Moore were the only adults who had access to the premises where a small quantity of marijuana was found. Moore denied any knowledge of the marijuana. The defendant made a statement that tended to confirm Moore's denial, but also denied that he had any knowledge of the marijuana. The court held that the trier of fact was entitled to accept Moore's disclaimer, leaving the defendant as the only person who could have placed the marijuana where it was found.[12]

In *Spatara v. State,*[13] the defendant was living with another person, and both were charged with possession of marijuana. They were tried separately, and at the defendant's trial her roommate testified that the drawer in which part of

Florida—Frank v. State, 199 So. 2d 117 (Fla. Ct. App. 1967).
Georgia—Ivey v. State, 226 Ga. 821, 177 S.E.2d 702 (1970).
Indiana—Ledcke v. State, 296 N.E.2d 412 (Ind. 1973).
Maryland—Davis v. State, 9 Md. App. 48, 262 A.2d 578 (1970).
Michigan—People v. Davenport, 39 Mich. App. 252, 197 N.W.2d 521 (1970).
Missouri—State v. McGee, 473 S.W.2d 686 (Mo. 1971).
Nebraska—State v. Faircloth, *supra* note 4.
Oklahoma—Brown v. State, 481 P.2d 475 (Okl. Crim. App. 1972).
Texas—Brock v. State, 285 S.W.2d 745 (Tex. Crim. App. 1956).
Fed. Ct. App.—Evans v. United States, 257 F.2d 121 (9th Cir. 1958).

10. For the view that the only corroborative circumstance that should be sufficient is substantial evidence of the accused's past possession on his person, *see* Whitebread & Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 766 (1972).
11. *Supra* note 9, at 127.
12. *Id.* at 128.
13. *Supra* note 3.

the contraband was found was used by the defendant. The roommate also denied any knowledge of the marijuana, and testified about a telephone call that evidenced the defendant's knowledge of the presence of the marijuana. The court said that the jury could accept the testimony of one accused over that of another, and upheld the defendant's conviction.[14] Because this testimony came from one who had an obvious interest in having it believed, the evidence does not provide as strong a case as did the evidence in the *Evans* case. But it is the job of the trier of fact to choose between conflicting evidence, and their acceptance of the roommate's testimony left the defendant as the only possible guilty party.

Evidence of Actual Possession

Any evidence that the defendant has at some time had actual possession of the contraband adds enough to non-exclusive possession to allow the inferences of possession and knowledge. Thus, when there is testimony that the defendant withdrew a bag containing marijuana from a building, exchanged a small package from the bag for money, and then returned the bag to the building,[15] or when there was a witness who saw the defendant throw the contraband away,[16] the inferences should be allowed.

Substantial Control

The state's argument in *Mulligan,* which was rejected by the supreme court, was that since both appellants were in possession of the premises, albeit non-exclusive possession, both had control of the premises, and therefore it should be inferred that both had knowledge and possession of the contraband found there. The problem with this argument is that the appellants really had only the *right* to control the premises, and there was no evidence that they exercised that right. When there is evidence that a particular defendant exercised substantial control over the particular area or place

14. *Id.* at 876.
15. Mills v. State, 483 S.W.2d 264 (Tex. Crim. App. 1972).
16. People v. Davenport, *supra* note 9. Note that the evidence must be that the witness actually saw the defendant throw the contraband; testimony that the defendant made a motion like he was throwing something away is not enough. Carroll v. State, 90 Ariz. 411, 368 P.2d 649 (1962); State v. Harris, 485 S.W.2d 612 (Tex. Crim. App. 1972).

where the contraband was found, that should be enough to allow the inferences as to that defendant. One court that has evidently accepted the substantial control test is the Arizona Supreme Court in *State v. Villavicenio.*[17] In the *Villavicenio* case the defendant was charged with possessing heroin found in a box on his back porch. The court held that even though the porch was between two rows of apartments, and was accessible to anyone using the area, the defendant had dominion and control over the box and its contents, and hence that there was substantial evidence to support the jury's findings that the defendant had knowing possession of the narcotic.[18]

A good example of substantial control is the circumstance of finding the contraband with or in the personal effects of the defendant. In *King v. State,*[19] marijuana was found in a suitcase which also contained letters addressed to the defendant. In *People v. Kanos,*[20] the contraband was found in a man's coat, and the defendant was the only male living at the premises. In *Petty v. People,*[21] marijuana was found in a box that also contained the defendant's Navy discharge papers. In *State v. Parra,*[22] the police found marijuana debris in a suitcase that also contained letters addressed to the defendant. In each of these cases, the court held that there was sufficient evidence to raise the inferences of knowledge and possession. It seems clear that such evidence links the defendant with the contraband he is charged with possessing, and is therefore sufficient to raise the inferences.

The substantial control test could be a useful tool in situations where there is a strong circumstantial indication that the defendant was in possession of the contraband. In *Feltes v. People*[23] the Colorado Supreme Court upheld the convictions of defendants who were sleeping in bedrooms where substantial amounts of marijuana were found, but overturned the convictions of those who were sleeping in bedrooms where there was only marijuana debris or no contraband at all. The

17. 108 Ariz. 518, 502 P.2d 1337 (1972).
18. *Id.* at 1339, 502 P.2d.
19. 335 S.W.2d 378 (Tex. Crim. App. 1960).
20. 14 Cal. App. 3d 642, 92 Cal. Rptr. 614 (1971).
21. 167 Colo. 240, 447 P.2d 217 (1968).
22. 104 Ariz. App. 524, 456 P.2d 382 (1969).
23. *Supra* note 7.

reason the court gave for upholding the convictions was the proximity of the defendants to the marijuana.[24] Proximity by itself does nothing to connect the defendant with the contraband. In the *Feltes* case, however, there were circumstances present other than proximity. The marijuana was in plain sight on an adjacent bedstand in the bedroom where the defendants were sleeping.[25] Altogether these circumstances tend to show that the defendants had substantial control over the particular place where the marijuana was found, which would be a better basis than proximity for upholding their convictions.

Admissions

Many times statements made by the accused are sufficient to raise the inferences. This is true when the accused admits to smoking some of the marijuana earlier in the evening,[26] or that he threw heroin out a window,[27] or when he says that he is only a visitor, but that he had used the heroin discovered on the premises,[28] or when he is overheard asking a co-defendant if the police found the contraband hidden in the bathroom, commenting that he did not know how they found it.[29]

However, a statement by the defendant to the effect that he has used drugs, or that he presently uses drugs, should not by itself be sufficient to allow the inferences. Such an admission is inadequate because it does nothing to connect the defendant with the particular contraband found. The admission might help strengthen a case, and would be relevant when joined with other circumstances that tend to link the defendant with the contraband,[30] but if the admission is all that is added to non-exclusive possession, all rational conclusions other than the defendant's guilt have not been excluded.

Some courts have thought the defendant's failure to deny a charge that he was in possession of an illicit drug was im-

24. *Id.* at 1132.
25. *Id.*
26. De La Garza v. State, 379 S.W.2d 904, 905 (Tex. Crim. App. 1964).
27. Gomez v. State, 365 S.W.2d 165, 166 (Tex. Crim. App. 1963).
28. Broadway v. State, 3 Md. App. 164, 237 A.2d 820 (1968).
29. People v. Rodriguez, 175 Cal. App. 2d 56, 345 P.2d 330, 332 (1959).
30. People v. Redrick, 55 Cal. 2d 282, 10 Cal. Rptr. 823, 359 P.2d 255, 257 (1961).

portant as an admission by conduct.[31] The Wyoming Supreme Court has recently held in a criminal case, however, that silence in the face of an accusation or question cannot be admitted into evidence because the defendant has a constitutional right to remain silent.[32] Therefore, such evidence could not supply the missing link for non-exclusive possession cases in Wyoming.

Another kind of admission by conduct—evidence that the defendant showed a consciousness of guilt—presents a close question. Such conduct, when displayed at a time when the defendant is confronted with the possibility of contraband being discovered, should be sufficient to raise the inferences. For instance, in *State v. Hull*[33] a police officer knocked on the door and identified himself. Immediately there was rapid activity in the apartment, including the flushing of a toilet and the running of water into a sink. Marijuana was found trapped in the sink drain. In *Guthrey v. State*,[34] when an officer entered the room, the defendant ran into the bathroom and tried to flush a syringe and needle down the toilet. In *King v. State*[35] the defendant tried to flee when she arrived home and found officers there. In *People v. Redrick*[36] the defendant allowed the officer to search his room, but lied about having a key to a storeroom where contraband was found. In each of the above cases the court found that the conduct evidenced a consciousness of guilt which linked the defendant with the contraband. That evidence, when added to non-exclusive possession, was sufficient to allow the inferences to arise.

As McCormick[37] points out, however, there are many possible innocent reasons for such conduct other than the defendant's guilt of the crime charged, and such evidence can be given too much weight. In *People v. Hutchinson*[38] the defen-

31. People v. Rodriguez, *supra* note 29, at 332, 345 P.2d.
32. Gabrielsen v. State, 510 P.2d 534, 538 (Wyo. 1973). The court said: "No constitutional right of an accused person is more sacred than his right not to make a statement or testify against himself, and it was highly improper for any comment or question to be made or asked thereto." *See also* Mr. Justice Guthrie's concurring opinion in the same case beginning on page 539.
33. 15 Ariz. App. 134, 486 P.2d 814 (1971).
34. 507 P.2d 556 (Okl. Crim. App. 1973).
35. *Supra* note 19.
36. *Supra* note 30.
37. MCCORMICK, EVIDENCE § 271 at 655 (2nd Ed. 1972).
38. 71 Cal. 2d 342, 78 Cal. Rptr. 196, 455 P.2d 132 (1969).

dant's mother found some marijuana in a room the defendant shared with three brothers. There was no evidence which indicated to whom the marijuana belonged. The mother accused the defendant of possessing it, and in the argument that ensued threatened to call the police. The defendant said, "God dad, do something with mother. I can't stand this,"[39] and then went to his bedroom. He subsequently left the house through the bedroom window. The defendant testified that he had no knowledge of the marijuana, that he had not heard his mother call the police, and that he left the house to avoid further conflict with his mother. The Supreme Court of California held that the jury could reasonably infer that the defendant's "flight" reflected consciousness of guilt, and upheld his conviction.[40] The defendant's explanation of why he left the house was certainly plausible, and the evidence left at least one rational conclusion other than the defendant's guilt. If the evidence had shown that the defendant had heard his mother call the police and had then left the house, it might have evidenced consciousness of guilt. However, since there was no evidence that the defendant was even aware that his mother had carried out her threat to call the police, there is no evidence to connect the defendant with the contraband, and the inferences should not have been allowed.

Debris

In *People v. Underhill*[41] the defendants were in a car in which marijuana was found. The court held that the fact that the two passengers had marijuana debris on their clothes and other personal effects, plus the fact that they acted nervous when they were arrested, was sufficient to indicate knowledge and possession of the contraband. In *State v. Parra*[42] the fact that debris was found with the personal effects of the defendant was held to provide a sufficient link. In *Feltes v. People*,[43] however, the Supreme Court of Colorado did not think the fact that debris was found in the bedroom where two of the defendants were sleeping, or the fact that debris

39. *Id.* at 133, 455 P.2d.
40. *Id.* at 134, 455 P.2d.
41. 169 Cal. App. 2d 862, 338 P.2d 38, 41 (1959).
42. *Supra* note 22.
43. *Supra* note 7.

was found under the cushions of the couch where one of the defendants was sleeping, was a sufficient link to allow the inferences to be raised.

Evidence of Being Under the Influence of, or Having Recently Used the Contraband

A showing that the defendant was under the influence of the contraband when arrested, or that very shortly before his arrest he had used the contraband, should sufficiently link the defendant with the contraband.[44] There is, however, a California case, *People v. Boddie,*[45] where the defendant was a passenger in a car in which heroin was found in the glove box. The defendant's arm had fresh needle marks that indicated that he had recently administered some drug to himself. When he was arrested the defendant was swaying, and there was expert testimony to the effect that he was under the influence of narcotics at the time of arrest. The court held that these facts were not sufficient to allow the inference that the defendant knew of the heroin in the glove box, and overturned the conviction. While certainly it is within the realm of possibility that the defendant had no knowledge of the heroin, it seems that there was substantial evidence for the trier of fact to conclude that he did.

If the inferences are to be allowed, however, the evidence should show that the defendant had used drugs very shortly before he was arrested. If the evidence shows only that at some other time the defendant has used drugs, the inferences should not be allowed. Such evidence, like an admission of previous use, does nothing to link the defendant with the particular contraband he is accused of possessing. In *Collini v. State*[46] the evidence showed that the defendant had non-exclusive possession, and that he had a reputation as a drug-user. There was no evidence to show when the defendant had last used drugs, and therefore no evidence that linked the defendant with the drug that was found. The court held that the evidence was insufficient to sustain the conviction.

44. *See, e.g.,* Ward v. State, 404 P.2d 59 (Okl. Crim. App. 1965); Davenport v. State, 482 S.W.2d 165 (Tex. Crim. App. 1972).
45. 274 Cal. App. 2d 408, 80 Cal. Rptr. 83 (1969).
46. 487 S.W.2d 132 (Tex. Crim. App. 1972).

In *Davis v. State*[47] a Maryland court gave too much weight to evidence that the defendant had previously used drugs. The evidence that most strongly supported the conviction showed that the defendant lived in an apartment only about two days a week; that there was a box containing narcotic paraphernalia and marijuana in plain view in the living room; that the defendant walked in while the police were searching the premises; and that the defendant had needle marks on his arms. The court sustained his conviction because the contraband was in plain sight, and because the defendant had needle marks on his arms. The fact that the contraband was in plain sight does not connect it with the defendant, since he lived there only a small percentage of the time. When the fact is added that the defendant had previously used drugs (evidenced by the needle marks on his arms) there is still nothing to connect the defendant with the particular contraband he was charged with illegally possessing. The evidence allowed the conclusion to be drawn that the contraband was in the possession of the defendant's roommate, who lived in the apartment all the time, and therefore the inferences should not have been allowed.

Proximity

Evidence that the defendant was in physical proximity with the contraband does not, by itself, provide a sufficient link between the defendant and the contraband. In *State v. McGee*[48] the police entered an apartment where the defendant lived with two others. There were from six to eight people sitting around a table where marijuana was found, including the defendant. The Missouri Supreme Court held that those facts alone were not sufficient to sustain a conviction for illegal possession of an illicit drug. In *Frazier v. State*[49] police received a report that there was marijuana in the backyard of the duplex where the defendant lived. Two police officers arrived, and watched the defendant approach the box and *apparently* take something out of it. The police officers arrested the defendant, who put his hands behind him when he

47. *Supra* note 9.
48. *Supra* note 9.
49. *Supra* note 4.

was stopped. No contraband was found on the defendant's person, but later particles of marijuana were found close to the spot where the defendant had been stopped. The court held that there was no proof that the defendant had placed the box in the yard or the particles on the ground. The defendant's proximity to the contraband and his non-exclusive possession of the area where it was found were not sufficient to sustain his conviction.[50]

In *State v. Faircloth*[51] proximity by itself was considered a sufficient corroborating circumstance to allow the inferences. In *Faircloth* the defendant and two others were taking a long automobile trip. They were stopped by the police, who found contraband in a duffel bag on the floor beneath the defendant. There was no evidence to indicate who owned the duffel bag. The court held that the defendant's proximity to the duffel bag was substantial evidence of his knowledge of the contraband, and upheld the conviction. Such a result turns chance seating arrangements on a long automobile trip into a dangerous game of musical chairs—where the loser goes to jail.

It should be noted, however, that evidence of the defendant's proximity is not entirely irrelevant. As was pointed out earlier,[52] proximity can be an important factor in determining whether the defendant has what has been called substantial control.

Possible Exceptions

Two jurisdictions that have adopted the non-exclusive possession rule have developed exceptions to it. In *Lander v. State*[53] the Georgia Supreme Court held that if a husband and wife live together, the husband is the head of the house and therefore any contraband found on the premises are presumed to be his, even if there are no other corroborating circumstances. This was true even though the title to the real estate was in the wife's name. In *State v. Funk*[54] the Missouri

50. *Id.* at 616.
51. *Supra* note 4.
52. *See* Substantial Control section of this case note, *supra.*
53. 114 Ga. 687, 152 S.E.2d 431, 432 (1966).
54. 490 S.W.2d 354, 363 (Mo. Ct. App. 1973).

Court of Appeals criticizes this exception on the grounds that women are now emancipated, and therefore a husband should not be held responsible for his wife's misdeeds. The court held that even if they were to accept the exception it would not apply in the *Funk* case because in that case there was a teenage stepson living in the house. The court reasoned that in today's permissive society a father should not be held responsible for what his son might have done.

In *Ledcke v. State*[55] the Supreme Court of Indiana held that the mere fact that the defendant was present at a place where marijuana was being processed presented a *prima facie* case that he had knowledge and possession of the marijuana. The court said that if other circumstances and evidence do not provide an explanation for the defendant's presence, that alone is sufficient to sustain a conviction.

Conclusion

The Wyoming Supreme Court has, in *Mulligan v. State*,[56] adopted the rule that when a person does not have exclusive possession of premises where a controlled substance is found, some other corroborating circumstance must be found before that person can be convicted of illegal possession of illicit drugs. Non-exclusive possession does not sufficiently connect the defendant with the contraband to allow the triers of fact to make the necessary inferences that the defendant had knowledge and possession of it. To allow the inferences to arise, the corroborating circumstance should be of a kind that will provide the necessary connection between the defendant and the contraband. The kinds of circumstances which provide such a connection are: (1) evidence that excludes all other possible possessors; (2) evidence of actual possession; (3) evidence that the defendant had substantial control over the particular place where the contraband was found; (4) admissions of the defendant that provide the necessary connection, which includes both verbal admissions and conduct that evidences a consciousness of guilt when the defendant is confronted with the possibility that an illicit drug will be found;

55. *Supra* note 9, at 417.
56. *Supra* note 4.

(5) evidence that debris of the contraband was found on the defendant's person or with his personal effects; (6) evidence which shows that the defendant, at the time of the arrest, had either used the contraband very shortly before, or was under its influence.

The kinds of evidence which might be relevant, but which by themselves do not add the necessary connection are: (1) admissions of previous use; (2) conduct that might be construed as evidencing a consciousness of guilt which was not displayed upon the defendant's confrontation of the possibility that an illicit drug would be discovered; (3) evidence of previous use; (4) evidence that showed the defendant's physical proximity to the contraband.

While many fine distinctions are made as to whether the different kinds of corroborating circumstances should be sufficient to allow the inferences to arise, these distinctions are necessary. To convict a person of illegal possession of an illicit drug there must be circumstances from which the inferences of knowledge and possession can reasonably be drawn. Limiting the circumstances to those that provide a link between the defendant and the contraband minimizes the danger that someone will be convicted for possessing his roommate's illicit drug.

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