SUPREME COURT OF FLORIDA

STANLEY CAMPBELL

Petitioner,

v.

CASE NO. 75,873
1st District - No. 88-02599

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF APPELLANT

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Appeal from the Circuit Court
Duval County, Florida
Honorable David C. Wiggins, Judge Presiding

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POINT I

APPELLEE INCORRECTLY INTERPRETS THE FIRST DISTRICT COURT OF APPEALS HOLDING IN AN ATTEMPT TO DRAW ATTENTION AWAY FROM THE REAL ISSUE OF POSSESSION.

The Court never stated or inferred that the requested Garces based instruction on temporary control (See Garces v. State 485 So.2d 847 (Fla. 3d DCA, 1986) was a "incomplete statement of the law", or could "misle[a]d or confuse[ ] the jury" [Appellee's Brief-8]. Rather, the First District focused on the elements of possession and affirmed the trial court based on its conclusion as to the proof presented. The Court distinguished the instant case from Garces and Roberts v. State 505 So.2d 547 (Fla. 3d DCA, 1987) by accepting "inferences" of dominion and control that were not accepted previously and ignored the prior rulings on temporary control and possession. Nevertheless, The First District Court of Appeal certified the case based on "strong factual similarities" between this case and Garces and Roberts. Campbell v. State 558 So.2d 34, 41 (Fla. 1st DCA, 1989), thus conceding the tenuousness of the distinctions drawn.

The requested Garces-based instruction was not "incomplete" or "confus[ing]". The Court stated that it "could be seen as appropriate" but weighed the evidence on its own and decided that Appellant's temporary control was not the same as the defendant's temporary control in Garces and Roberts. Id. at 38. Thus, it is not possible, as Appellee tries to maintain, to uphold the First District's ruling and the Third District Court of Appeal's holdings' in Garces and Roberts because the distinctions drawn are

of little significance to the issue of dominion and control.

The current interpretation of possession includes the Garces definition of temporary control that was denied by the trial court. It is up to the jury to weigh the evidence to determine whether the defendant had temporary control for testing purposes only, or actually obtained dominion and control of the banned substance. Temporary control is not the equivalent of dominion and control for the purposes of possession under §893.135, Fla.Stat., thus the request for an instruction on temporary control could not be an incomplete statement of the law. Denial of the request to apply Garces' instruction constituted a fundamental error.

POINT II

APPELLEE INCORRECTLY DEFINES THE KEY WORDS REQUIRED TO DETERMINE POSSESSION UNDER §893.135, FLA.STAT. AND DISTORTS THE FACTS OF APPELLANT'S CASE.

Appellant's temporary control of the cocaine for testing purposes and expressed desire to purchase the cocaine does not constitute possession under Garces and Roberts. Appellee ignores the accepted definition of possession which includes the elements of dominion and control, and replaces it with "delivery" and "acceptance" [Appellee's Brief-11]. In fact, Appellee dismisses dominion and control as unrequired buzz words [Appellee's Brief-11], even though a long line of cases, including the First District in the case at bar, focus on these elements to determine possession. See Campbell 558 So.2d at 37, Garces 485 So.2d at 848.

The First District Court of Appeal accepted the holdings of Garces and its progeny on temporary control and possession, then

failed to apply these principals. Appellee argues that this was correct based on alleged "delivery" and "acceptance" but these are not elements of possession. Delivery and/or acceptance were present in both Garces and Roberts, but were not held to be equivalent to possession.

Garces is a leading case defining possession under §893.135, Fla.Stat. A primary element of possession of contraband is "dominion and control" over the substance. Elias v. State 526 So.2d 1014,1015 (Fla. 2d DCA, 1988). The Garces court concluded that temporary control of a banned substance for verification purposes did not constitute dominion and control. Garces 485 So.2d at 848. This principal was upheld one year later in Roberts and applied recently by the First District Court of Appeal in Jefferson v. State 549 So.2d 222 (Fla. 1st DCA, 1989). While the First District noted the many similarities between Garces, Roberts and this case, it denied the previous cases' applicability based on "inferences" of acceptance. The Court stacks inferences upon inferences to conclude that Appellant had possession of the contraband. This is not correct under prior case law. Undeniably, the defendants in Garces and Roberts expressed similar intent to possess contraband, but their interests did not give them dominion and control.[1]

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[1] An analogous situation would be a standard over-the-counter clothing purchase. The buyer tries on the merchandise and expresses their desire to purchase the product. If the buyer does not keep possession of the product, but merely handles it to inspect, then returns it to the seller or places it on the rack, then it matters not what the buyer may have said or what his intention was. Until he takes dominion and control over the

After redefining the term "possession" Appellee then takes great liberties with the words delivery and acceptance to make Appellant's actions fit their new definition. Appellant was handed a one kilogram sample bag of contraband by the officer. He inspected it, then put it down on the seat of the car [T-70-71]. Appellee contends that these actions constitute delivery of four (4) kilograms of cocaine. In Roberts, which Appellee cites with approval [Appellee Brief-11], the Court held that there was no delivery, even though the officers were in the process of bringing the bales of marijuana, already paid for by the defendants, into the house at the time the arrests were affected. Roberts 505 So.2d at 549. If anything, Roberts is a stronger case for delivery of contraband than the instant case.

Appellee's argument that approval of the quality of the sample constituted acceptance and possession of four (4) kilograms of cocaine is equally unsustainable. In Garces, also cited with approval by Appellee [Appellee Brief-10-11], there was no acceptance although the defendant had an initial discussion on the method of exchange, tested the cocaine and commented on the quality of the product prior to his arrest. Garces 485 So.2d at 848. The Third District did not comment on "acceptance" or inference of

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product he has not possessed it, whether legally purchasing it or illegally possessing it. The buyer must give the merchant money before they are free to leave with the article. Interest and intent to purchase does not constitute possession. Here, Appellant's approval of the quality of the product for its intended usage did not give him dominion and control. He was required to pay money in order to receive his merchandise.

acceptance and possession based on Garces' approval of the quality of the cocaine. Yet, Appellee maintains that Appellant's comments on the quality and potential use of the contraband somehow gave him possession.

The facts that these two leading Florida cases on possession and trafficking, lends stronger support for delivery and acceptance than does the instant case, yet the Courts in those cases found no possession. Appellee's insistence that the officer's actions constituted delivery and Appellant's response equalled acceptance is unsustainable based on the scope and range of the prior holdings.

Finally, the State relies on a Federal case, Santiago v. U.S. 889 F.2d 371 (1st Cir., 1989) in an attempt to support its possession charge. In Santiago there clearly was delivery, but delivery was not the key to sustain the conviction. As noted by the court "[b]ut for arrest...the cocaine would have remained in the conspirator's possession...[t]he drugs...had been unambiguously turned over to petitioner" Santiago 889 F.2d at 376-377. There the defendant was handed the drug-laden shoes, then passed them to a cohort and ordered him to buy the agent new shoes. The object of this phase, the delivery, was complete. No more was required for the defendants to receive possession of the contraband.

Santiago is completely inapplicable to the case at bar for multiple reasons. First, the fact pattern is totally different. Appellee brushes aside the differences between a controlled delivery and a controlled sale, but the two are not analogous. In

Santiago the contraband was "unambiguously" handed over. Id. at 377. The informant released possession to the defendants. In the instant case, Appellant handled and "approved" of the sample [T-45], but no cocaine had been handed over. Appellant did not know that the "sellers" were police officers so freedom to leave the scene after the completion of the transaction is not an issue [Appellee's Brief-12]. Simply put, Appellant had yet to establish dominion and control from the dealers. He returned the sample. Possession would not change hands until the Appellant had completed his part of the deal.

Secondly, in Santiago there was obviously no requirement for payment before the passing of the contraband. Here, it is clear that Appellant had to pay the "sellers" first, before he gained possession of the contraband. Though Appellee continually refers to the $3,000 as a "down payment", the parties referred to the $3,000 as "good faith money" [T-18]. Appellant was required to send the money to the agents in Ft. Lauderdale, in order to continue negotiations and show good faith, as well as pay the seller's expenses for the trip to Jacksonville [T-18, 30-31]. Additionally, Officer O'Hara testified that "no money was exchanged" for cocaine [T-71, 73-74]. Appellant's unwise decision to send unknown persons $3,000 clearly bought him nothing other than a potential meeting with the sellers.

Even if the money is thought of as a down payment, rather than as good faith money as referred to by the parties, under Roberts this still would not be a factor in determining possession.

> "The arrests were made before the marijuana was delivered, not before the money was exchanged. However, in either case, the contraband cannot be said to have come under dominion and control of the defendants so as to establish the charge of possession."

Roberts 505 So.2d at 550. Thus, the First District's findings that the $3,000 gave Appellant ownership of the cocaine is contradictory, both to the holdings of Roberts, as well as to the evidence presented at trial. This cannot be sustained.

Finally, while Santiago deals with some elements of this case, this is a Federal case that is not interpreting the Statute at hand. Garces and Roberts, the two leading cases on temporary control and possession, specifically interpret §893.135 Fla.Stat. Garces and Roberts both hold that to convict a defendant of possession under the trafficking statute, the State must show that the defendant had more than temporary control of the banned substance. Santiago does not deal with this in any way, thus is inapplicable as a basis for convicting Appellant.

POINT III

THE APPELLEE'S FOCUS ON THE RELIEF SOUGHT IS AN ATTEMPT TO DISTINGUISH THIS APPEAL FROM PRIOR APPEALS AND BLUR THE TRUE ISSUE OF WHAT CONSTITUTES POSSESSION.

Appellee's obvious attempt to confuse the issue by noting the different specific relief sought in Garces and this case should not affect the Court's decision. There is no requirement in the United States' judicial system that facts of each case cited and the relief sought in those cases must be directly on point. After hearing the appeal, this Court may use its discretion to apply the

applicable relief based on the facts and the law. *See* Garces 485 So.2d at 848-849. (Defendant appealed denial of motion for acquittal based on lack of proof of possession to sustain trafficking charge. Relief granted--conviction for lesser offense of attempt.)

The real issue to be addressed here is whether the evidence presented at trial justified the application of the Garces ruling on temporary control and possession. At trial, Appellant contended that under controlling case law in Florida he never had possession of the cocaine. As Garces states:

> "[t]emporary control of the contraband in the presence of the actual owner, for the purpose of verifying that it is what it purports to be, or to conduct a sensory test for quality, prior to the completed transaction, without more, does not constitute legal possession."

Garces 485 So.2d at 848. The ruling on temporary control certainly applies to the case at bar. Appellant admittedly had temporary control of the sample bag of cocaine when he tested it, but he never established dominion and control in any way. Under current case law dominion and control determines whether a defendant has possession of a banned substance. Since this case clearly appears to be in the confines of Garces and Roberts, Appellant is entitled to relief similar to that granted in those cases, to wit: reversal of the finding of possession and an order to enter a conviction for attempted possession under §893.135 and §777.04(1), Fla.Stat.

At the very least, Appellant is entitled to a new trial with the proper special instruction read to the jury. If there is any

evidence presented at trial to support the requested instruction, it should be given. Pope v. State 458 So.2d 327, 329 (Fla. 1st DCA, 1984). The evidence presented must convince the jury, which is to be instructed on applicable case law. It need not convince the trial court. The Court should not weigh the inferences to decide whether or not to apply the instruction. Smith v. State 424 So.2d 726, 732 (Fla., 1982) If a reasonable man may be convinced by the evidence that the defendant never obtained more than temporary control of the contraband, then the instruction should have been given.

CONCLUSION

For the foregoing reasons, the Supreme Court should exercise its discretion and grant Appellant appropriate relief based on controlling Florida Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 25th day of July, 1990, to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

William J. Dorsey