ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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SEP 17 1997
CLERK, SUPREME COURT
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TOMMIE V. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 90,494

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida, and the Appellant in the Fourth District Court of Appeal. Respondent was the Prosecution and the Appellee below. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal Documents

T = Record on Appeal Transcripts

A = Petitioner's Appendix.

STATEMENT OF THE CASE

Petitioner, Tommie V. Johnson, was charged by Information filed in the Nineteenth Judicial Circuit with Count I, trafficking in cocaine in an amount in excess of 28 grams; Count II, possession of cocaine with intent to sell/deliver; and Count III, driving while license suspended (R 6-7).

Petitioner proceeded to a trial by jury on November 27 and December 1, 1995. After the state rested, the trial court granted Petitioner's motion for judgment of acquittal as to Count III, driving while license suspended (T 88; R 30). The jury found Petitioner guilty as charged as to Counts I and II (R 25) and he was so adjudicated (T 146; R 32-33). At sentencing on January 11, 1996, the court sentenced Petitioner to concurrent sentences on Counts I and II of 64.37 months in prison with credit for 128 days time served (T 146-148; R 34-37).

Petitioner timely appealed (R 43). Petitioner's convictions and sentences were affirmed by the Fourth District Court of Appeal on February *19, 1997* (A *1-2). Johnson v. State, 689 So.* 2d 1124 (Fla. 4th DCA 1997). The district court rejected Petitioner's double jeopardy challenge to his convictions for possession of cocaine in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver the same quantity of cocaine, citing to *Gibbs v. State, 676* So. 2d 100 1 (Fla. 4th DCA 1996). The Fourth District also rejected Petitioner's argument that there was insufficient evidence to support either conviction. On March 6, 1997, Petitioner timely requested rehearing and/or certification of conflict and/or certification of a question of great public importance. The district court denied rehearing on April 2, 1997.

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction on May 2, 1997. On August 20, 1997, this Court issued its Order accepting jurisdiction, dispensing with oral argument and setting a briefing schedule.

STATEMENT OF THE FACTS

On September 6, 1995, Deputy Moore stopped a 1978 Cadillac on I-95 which was traveling at 76 miles per hour in a 65 miles per hour zone (T 18-20). Petitioner was the driver/co-ownerof the vehicle. Petitioner's registration reflected that he was the co-registrant along with a lady. There was one male passenger. The keys were in the ignition and the trunk key was on the same key ring (T 2 1-22, 25). Petitioner was arrested for driving on a suspended driver's license (T 22). Petitioner was traveling from Miami to Fayetteville, North Carolina (T 23-24). Officers conducted a search of the car as a result of the custodial arrest and as an inventory search because the car was going to be towed (T 26). Under the spare tire in the trunk they found a paper bag which held three smaller plastic bags, two of which contained cocaine (T 27-28). The items were tested at the regional crime laboratory. The lab report revealed that one plastic bag contained 69 grams of crack cocaine, the second bag contained 41 grams of powder cocaine and the third bag contained a small amount of a cutting agent (T 30-32). Based on Moore's knowledge, training and experience, an individual would not possess that much cocaine for personal use. Petitioner was obviously traffickingjust simply by the amount. There were no usable identifiable latent prints on the packages (T 29). Petitioner did not resist Moore nor was he belligerent in any way (T 50). He was calm and they had a good rapport roadside. The only place drugs were found was in the trunk under the tire (T 50-5 1). They did not see or locate any other signs that would indicate to Moore, based on his knowledge, training and experience that there was anything else related to narcotic use in the car. There were a lot of items in the trunk, including car wash items, a duffle bag, some athletic gear and scattered

clothes (T 52). Moore did not have any personal knowledge as to whether anything in the trunk belonged to Darrell Thomas, the passenger (T 53).

Deputy Vizzo testified Thomas had no identification on him. Vizzo ran the name and date of birth given through the computer to verify that Thomas did not have a driver's license in either state (T 66-67). A warrants check also came back negative. It was possible that Thomas gave the wrong name and date of birth (T 74). Thomas was released after he was asked if he had any property in the vehicle and he said he did not. However, presumably, he had just spent a few days in Miami with Petitioner (T 54, 8 1).

SUMMARY OF THE ARGUMENT

POINT I

Double jeopardy principles prohibit separate convictions and sentences for possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver the same quantity of cocaine where there is one underlying core offense of possession of cocaine. The instant decision of the Fourth District Court of Appeal affirming Petitioner's dual convictions and sentences must be quashed and the cause remanded for further proceedings.

POINT II

The trial court reversibly erred in denying Petitioner's motions for judgment of acquittal as the evidence is wholly insufficient to support convictions for possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver. Discharge is thus required.

ARGUMENT

POINT I

DOUBLE JEOPARDY PRINCIPLES PRECLUDE SEPARATE CONVICTIONS AND SENTENCES FOR POSSESSION OF COCAINE IN AN AMOUNT OVER 28 GRAMS (TRAFFICKING) AND POSSESSION OF COCAINE WITH INTENT TO SELL/DELIVER THE SAME QUANTITY OF COCAINE.

Petitioner was charged with and convicted of trafficking possession of cocaine in an amount in excess of 28 grams (Count I) under Section 893.135(l)(b)l,a, *Florida Statutes* (1995), and possession of cocaine with intent to sell/deliver (Count II) under Section 893.13(1)(a), *Florida Statutes* (1995) (R 6-7, 25). The same quantity of cocaine formed the basis for both counts (T 27-28). Both offenses are aggravated forms (or degree variants) of the same underlying core offense of possession of cocaine. Therefore, Petitioner's convictions and sentences for both offenses are barred by double jeopardy principles.

On appeal to the Fourth District Court of Appeal, the district court rejected Petitioner's double jeopardy challenge to his dual convictions for trafficking possession and possession of cocaine with intent to sell/deliver the same quantity of cocaine (A 1-2). *Johnson v. State, 689* So. 2d 1124 (Fla. 4th DCA 1997). In upholding Petitioner's convictions, the Fourth District relied on its prior holding in *Gibbs v. State, 676* So. 2d 1001 (Fla. 4th DCA 1996), which was then pending before this Court. The Fourth District had held in *Gibbs* that the offense of possession of a controlled substance is somehow not subsumed within the elements of the greater

offense of possession of more than 28 grams of cocaine (trafficking), but had certified the following question to this Court as a question of great public importance:

> May a person be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine?

Gibbs v. *State*, 676 So. 2d at 1006. This Honorable Court recently quashed *Gibbs* after answering the certified question in the negative and holding:

> We have no basis for concluding that the legislature intended that multiple charges for possession of the same quantum of cocaine be prosecuted as separate crimes. Rather, logic compels the conclusion that the legislature intended that traffickingpossession, which requires the possession of more than twenty eight grams of cocaine, be punished more harshly than simple possession, which merely requires the possession of less than twenty eight grams of any illegal drug. The legislative intent is apparent because the trafficking statute authorizes a more severe punishment than the simple possession statute, but the gravamen of the crime underlying each statute is the possession of an illegal drug.

Gibbs v. State, 22 Fla. L. Weekly $504, $505 (Fla. Aug. 21, 1997). The same rationale is applicable at bar, where the gravamen of the crime underlying each statute is the possession of an illegal drug.

On the same day *Gibbs* was decided, this Court quashed a similar holding of the Fourth District Court of Appeal in *Paccione v. State, 22* Fla. L. Weekly S502 (Fla. Aug. 2 1, 1997). In *Paccione,* this Court held that the trial court exceeded its statutory authority by convicting and sentencing Paccione for possession of marijuana with intent to sell and possession of more than

20 grams of marijuana' for the same quantity of marijuana, which arose out of a single criminal episode, ***Id.; see Ricks v. State, 686 So.*** 2d 798 (Fla. 1 st DCA 1997)(double jeopardy principles prohibit multiple convictions and sentences for possession of more than 20 grams of marijuana and possession of marijuana with intent to sell).

The offenses in ***Paccione v. State*** are particularly comparable to those at bar and likewise require a reversal herein. In ***Paccione,*** this Court addressed virtually identical offenses wherein it prohibited dual convictions for possession of marijuana with intent to sell and possession of more than 20 grams of marijuana for the same quantity of marijuana. At bar, Petitioner has been convicted of possession of more than 28 grams of cocaine (trafficking) and possession with intent to sell/deliver the same quantity of cocaine in a single criminal episode. The offenses are not identical ***only*** because they involve different controlled substances. Both ***Paccione*** and this cause involve one count of possession of a controlled substance with intent to sell/deliver and one count of possession of a quantity of a controlled substance. In ***Paccione,*** the lesser offense by degree was the possession of more than 20 grams of marijuana (a third-degree felony), while here, the lesser offense by degree is the possession of cocaine with intent to sell/deliver (a second-degree felony). This is the case only because the legislature has chosen to punish the possession of more than 28 grams of cocaine (trafficking) more harshly (a first-degree felony) than possession of more than 20 grams of marijuana (a third-degree felony) due to the nature of the controlled substance involved. Thus, although the offenses in the instant cause are in effect

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[1] The offense characterizedby this Court as simple possessionwas possessionof more than 20 grams of marijuana (a third-degree felony), as reflected by the statute cited in footnote 2 in ***Paccione*** as well as the record in ***Paccione.***

the mirror image of those in *Paccione, the* underlying offense of possession of a controlled substance is identical.

In *Paccions* v. *State, 22* Fla. L. Weekly at S502 (footnote omitted), this Court set forth the following analysis of the two offenses:

> To be convicted of possession with the intent to sell, the prosecutor must prove that the defendant knowingly possessed the illegal drug with an intent to sell. To be convicted of simple possession, the prosecutor need only prove that the defendant knowingly possessed the illegal drug. *Chicone v. State,* 684 So. 2d 736 (Fla. 1996). While possession with the intent to sell contains an element that possession does not, the converse is not true. Simple possession contains no element not found in possession with the intent to sell. Therefore, under section 775.021(4)(a), *Florida Statutes* (1993), we find that the legislature did not intend to punish the offense of possession with the intent to sell separately from and in addition to the offense of simple possession. Thus, the court exceeded its statutory authority by convicting and sentencing Paccione for both of these crimes, which arose out of a single criminal episode.

Further, the *Gibbs* Court simultaneously held that the elements in the statute prohibiting trafficking possession of cocaine are *not* different from the elements in the statute prohibiting simple possession of cocaine. This Court additionally held that trafficking possession has a "knowing" element and that the quantity requirement of trafficking possession is *not* a separate element which allows the dual prosecution of both trafficking possession and simple possession arising out of the possession of the same cocaine. *Gibbs v. State,* 22 Fla. L. Weekly at S505.

Thus, in the instant cause, as in *Paccione* and *Gibbs,* as the gravamen of the crime underlying each statute is the possession of an illegal drug, double jeopardy principles prohibit

dual convictions and sentences for trafficking possession and possession with intent to sell/deliver arising out of the possession of the same quantity of cocaine.

Additionally, as the *Gibbs* Court recognized, this Court recently reached a similar conclusion in *State v. Anderson, 695 So.* 2d 309 (Fla. 1997), where the Court answered the following certified question in the negative:

> Whether the double jeopardy clause permits a defendant to be convicted and sentenced under both section *837.02, Florida Statutes* (1991), perjury in an official proceeding, and section *903.035, Florida Statutes* (1991), providing false information in an application for bail, for charges that arise out of a single act.

This Court held:

> Both statutes punish the same basic crime *(i.e.,* the violation of a legal obligation to tell the truth) and differ only in terms of the degree of violation...Becausethe two crimes are degree variants of the same underlying crime, Anderson's dual convictions cannot stand. See *generally Art.* I, § 9, *Fla. Const.*

Id. Further, this Court acknowledged in *Gibbs* that "Similarly, the underlying crime here [in *Gibbs]* is the possession of an illegal drug." *Gibbs,* 22 Fla. L. Weekly at S505.

The same is true at bar, where the underlying crime is the possession of an illegal drug.

The *Anderson* rationale is the same rationale previously expressed by this Court in *Sirmons v. State,* 634 So. 2d 153 (Fla. 1994), wherein this Court held that multiple convictions and sentences for offenses that are forms of the same underlying core offense are prohibited. *See also Thompson v. State,* 607 So. 2d 422 (Fla. *1992); Johnson v. State,* 597 So. 2d 798 (Fla. 1992).

Therefore, the challenged dual convictions and sentences in the instant cause are also barred by the well-establishedrationale expressed by this *Court* in *Anderson, Sirmons, Thompson* and *Johnson.*

In *Sirmons,* an automobile was taken from the victim at knife point. This Court held that dual convictions and sentences for grand theft and robbery with a weapon were improper, explaining:

> In *Johnson,* the defendant had been convicted of grand theft of cash and grand theft of a firearm for the snatching of a purse that contained both money and a firearm. We determined that the dual convictions and sentences were improper because "the value of the goods or the taking of a firearm merely defines the degree" of the theft and does not result in two separate crimes. *Johnson, 597 So.* 2d at 799. In other words, the dual convictions could not stand because each offense was simply an aggravated form of the underlying offense of theft, distinguished only by degree factors. In a similar vein, we recently held in *Thompson* that a defendant cannot be convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft where both charges arose from the same fraudulent sale. *Thompson, 607 So.* 2d at 422. We agreed with the Fifth District Court of Appeal that section *775.02* 1(4)(b)2., *Florida Statutes* (1989), bars the dual convictions because both fraudulent sale and felony petit theft are simply aggravated forms of the same underlying offense distinguished only by degree factors. *Thompson v. State, 585 So.* 2d 492, 493-94 (Fla. 5th DCA *199* 1), *approved & adopted by, Thompson v. State,* 607 So. 2d 422 (Fla. 1992). In the present case, Sirmons was convicted of robbery with a weapon and grand theft of an automobile. As in *Johnson* and *Thompson,* these offenses are merely degree variants of the core offense of theft. The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery. Likewise, the fact that an automobile was taken enhances the core offense to grand theft. **In sum, both offenses are aggravated forms of the same underlying offense, distinguishedonly by degree factors.** Thus,

> Sirmons' dual convictions based on the same core offense cannot stand.

Id at 153-154 (emphasis supplied). This was reiterated in *Gibbs v. State,* 22 Fla. L. Weekly at S505, when this Court acknowledged that its conclusion in *Sirmons* "was based upon the offenses being 'aggravated forms of the underlying offense, distinguished only by degree factors."'

The circumstances at bar are identical as there was only one core offense of possession of cocaine. Possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver are but aggravated forms (or degree variants) of the same underlying offense of possession of cocaine. Thus, also under *Sirmons, Anderson, Johnson* and *Thompson,* separate offenses were not committed in the instant cause and multiple convictions and sentences are therefore prohibited by the operation of the constitutional bar against double jeopardy.

Again, in *Gibbs,* the core offense was possession of a controlled substance. The identity of the substance and its amount are aggravating factors which merely transform the offense of simple possession, a third-degree felony, into a first-degree felony. In *Paccione,* the core offense was possession of marijuana. The fact that the marijuana in question was more than 20 grams aggravated this possession of marijuana, a misdemeanor, into the third-degree felony of possession of marijuana (just as the fact that the object stolen in *Sirmons* was an automobile aggravated the misdemeanor core offense of theft into a third-degree felony of grand theft), and the fact that Paccione's possession of the marijuana was with intent to sell worked another

aggravation of the core offense into a second-degree felony (just as the core offense in *Sirmons* was aggravated into a first-degree felony punishable by life in prison where the defendant used force and a firearm in its commission). Similarly, at bar, where the core offense is possession of cocaine, this core offense may be aggravated from a third-degree felony to a second-degree felony if the possession is with intent to sell. And again, here, as in *Gibbs*, the quantity possessed is an aggravating factor which merely transforms the offense of simple possession (a third-degree felony) into a first-degree felony because the legislature has chosen to punish possession of more than 28 grams of cocaine more harshly than possession of less than 28 grams of cocaine. See *Gibbs v. State,* 22 Fla. L. Weekly at S505.

Thus, in light of this Court's holdings in *Paccione, Gibbs, Anderson, Sirmons, Thompson* and *Johnson,* Petitioner submits that his dual convictions for possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver the same quantity of cocaine are prohibited on double jeopardy principles and cannot stand.

Again, this situation is patently different from that faced by this *Court* in *State v. McCloud,* 577 So. 2d 939 (Fla. 1991). *See Paccione v. State,* 22 Fla. L. Weekly $502. In *McCloud,* this Court held that possession of a controlled substance is not a lesser-included offense of *sale* of a controlled substance, because not every sale involves possession of the contraband in question.

Section 775.021(4)(b), *Florida Statutes* (1995), does not mandate a different result because, as previously discussed, only one core violation of the criminal statutes occurred with respect to Petitioner's course of conduct in this single criminal episode.

"Absent evidence of clear legislative intent to the contrary, courts presume that where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense." *Gibbs v. State,* 22 Fla. L. Weekly at S505, citing *Rutledge v. United States,* _ U.S. _ , 116 S. Ct. 1241, 1245, 134 L. Ed. 2d 419 (1996).

Although an objection would not be necessary to preserve this issue for appellate review, Petitioner did object below on double jeopardy grounds to dual convictions and sentences for these offenses (T 138-139).

Thus, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District Court of Appeal in part, wherein it affirms dual convictions for possession of the same cocaine arising out of a single act, and remand this cause to the district court for further proceedings.

POINT II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE STATE'S EVIDENCE WAS WHOLLY INSUFFICIENT TO PROVE CONSTRUCTIVE POSSESSION.

In addition to the issue upon which Petitioner sought to invoke the jurisdiction of this Court (see Point I, *supra*), Petitioner will address the sufficiency of the evidence in this cause as the district court also erred in finding the evidence was sufficient before reaching the issue upon which jurisdiction is predicated.

Petitioner contends that the state utterly failed to present a prima facie case of constructive possession in this prosecution for possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver (R 6-7, 25). Thus, the trial court erred when it denied Petitioner's motions for judgment of acquittal (T 85-86, 88, 94). Petitioner's convictions and sentences must be vacated and Petitioner discharged.

The pertinent testimony at the trial was as follows: Deputy Moore stopped the vehicle Petitioner was driving on I-95 for traveling at 76 miles per hour in a 65 miles per hour zone (T 18-20). Petitionerwas the driver/co-owner of the vehicle. Petitioner'sregistrationreflectedthat he was the co-registrant along with a lady. There was one passenger. The keys were in the ignition and the trunk key was on the same key ring (T 2 1-22, 25). Petitioner was arrested for driving on a suspended driver's license (T 22). Petitioner was traveling from Miami to Fayetteville, North Carolina (T 23-24). Officers conducted a search of the car as a result of the custodial arrest and as an inventory search because the car was going to be towed (T 26). Under

the spare tire in the trunk they found a paper bag which held three smaller plastic bags, two of which contained cocaine (T 27-28). The items were tested at the regional crime laboratory. The lab report revealed that one plastic bag contained 69 grams of crack cocaine, the second bag contained 4 1 grams of powder cocaine and the third bag contained a small amount of a cutting agent (T 30-32). Based on Moore's knowledge, training and experience, an individual would not possess that much cocaine for personal use; thus he opined Petitioner was obviously trafficking just simply by the amount. There were no usable identifiable latent prints on the packages (T 29). Petitioner did not resist Moore nor was he belligerent in any way (T 50). He was kind of calm and they had a good rapport roadside. The only place drugs were found was in the trunk under the tire (T 50-5 1). There were a lot of items in the trunk, including car wash items, a duffle bag, some athletic gear and scattered clothes (T 52). Moore did not have any personal knowledge as to whether anything in the trunk belonged to Darrell Thomas, the passenger (T 53). Deputy Vizzo testified Thomas had no identification on him. Vizzo ran the name and date of birth given through the computer to verify that Thomas did not have a driver's license in either state (T 66-67). A warrants check also came back negative. It was possible that Thomas gave the wrong name and date of birth (T 74). Thomas was released after he was asked if he had any property in the vehicle and he said he did not. However, presumably, he had just spent a few days in Miami with Petitioner (T 54, 81).

Where illegal contraband is found in a vehicle jointly occupied by two or more persons, the state has the burden to show constructive possession on the part of the accused. ***E. H. v. State,*** 579 So. 2d 364 (Fla. 4th DCA 1991); ***Hively v. State, 336*** So. 2d 127 (Fla. 4th DCA 1976); *S.B.*

v. *State,* 657 So. 2d 1252 (Fla. 2d DCA 1995). As Petitioner was not in actual possession of the cocaine found concealed under the spare tire in the trunk, the state was thus required to establish Petitioner's guilt by proving constructive possession.

Constructive possession exists where the accused, without physical possession of the controlled substance, knows of its presence on or about the premises and has the ability to maintain control over the controlled substance. *Brown v. State,* 428 So. 2d 250,252 (Fla.), cert. *denied, 463* U.S. 1209,103 *S.* Ct. 3541, *77* L. Ed. 2d 1391 (1983); *Hively v. State, 336 So.* 2d at 129. To establish constructive possession, the state must show that the accused had dominion and control over the contraband, knew the contraband was within his presence, and knew of the illicit nature of the contraband. *Brown, 428 So.* 2d at *252; Wale v. State, 397 So.* 2d 738,739 (Fla. 4th DCA 1981); *Brooks v. State,* 501 So. 2d 176 (Fla. 4th DCA 1987).

If the premises on which drugs are seized are not in exclusive, but only joint possession of the accused, knowledge of the presence of drugs will not be inferred but must be established by evidence *other than* evidence of the accused's non-exclusive possession of the premises. *Manning v. State, 355 So.* 2d 166 (Fla. 4th DCA 1978); *Medlin v. State, 279 So.* 2d 41 (Fla. 4th DCA 1973). As in *Manning,* no such "other evidence" was presented at bar.

Indeed, *Manning* dictates a reversal herein. In *Manning,* the defendant was arrested upon entering and sitting behind the wheel of a parked automobile with four other companions. A vehicle search revealed 2% ounces of marijuana in the unlocked center console. The Fourth District held:

> The mere fact that appellant was in the driver's seat of a jointly occupied vehicle in which drugs are found would not be sufficient to allow a jury to find him guilty of the offense charged. *Thomas v. State,* 297 So. 2d 850 (Fla. 4th DCA 1974); ***Hively*** *v. State, 336* So. 2d 129 (Fla. 4th DCA 1976). In ***Hively,*** *supra,* marijuana was found in a pipe lying on the center console of a vehicle driven by defendant with one Leslie Bardon in the passenger seat. Notwithstanding the fact that appellant had borrowed the automobile to take Bardon home, this court held that a jury issue was not created as to defendant's knowledge of the presence of marijuana in the automobile. **We note that there was no showing as to who owned the automobilein the instant case, but we are of the opinion that proof of appellant's ownership of the vehicle would not have cured the defect in the case at bar.**

Manning ***v.*** *State,* 355 So. 2d at 166-167 (emphasis supplied).

At the time *Manning* was decided, cases involving ownership combined with joint possession were sparse. *Id.* at 167; *compare Russ v. State, 279 So.* 2d 92 (Fla. 3d DCA 1973)(where a defendant-owner'sconviction for possession of drugs found under the dash board was affirmed, but he was *alone* at the time of his arrest [he argued the car had been used earlier by another person]). The same is still true today. Thus, in *Manning,* the district court further held:

> **The courts in Florida have implied in similar, although factually distinguishable situations, that mere proof of ownership alone, does not infer knowledge of the presence of contraband.** ***Ellis*** *v. State,* 346 So. 2d 1044 (Fla. 1st DCA 1977); *Tomlin v. State,* 333 So, 2d 501 (Fla. 2d DCA 1976); ***Medlin*** *v. State, supra.* One case outside this jurisdiction is *Commonwealth* v. Wisor, 466 Pa. 527,353 A. 2d 817 (Penn. 1976). In *Wisor,* a defendant was charged with possessing marijuana in a pipe lying in the space between the front right passenger seat of a car occupied by six persons including defendant who was the owner-driver thereof. **The court held that "the fact of**

> **ownership does not support the inference that appellant knew the pipe was under the seat."** *Id.* at 818. We **agree.**

Manning, 355 So. 2d at 167 (emphasis supplied). Thus, although there was no proof of ownership in *Manning,* the Fourth District's holding would have been the same had there been proof that Manning was the owner of the vehicle. At bar, the state's purely circumstantial case against Petitioner was based solely on the fact that Petitioner was the driver/co-owner of the *jointly-occupied* vehicle in which cocaine was found **concealed** under the spare tire in the trunk. As Manning's conviction was reversed, the same result is required at bar.

In *Hively v. State, 336* So. 2d 127, the Fourth District held that the evidence was **insufficient** under circumstances far more incriminatingthan are present *sub judice.* The district court determinedthat there was insufficient evidence to present a jury issue as to the question of the defendant's knowledge of the presence of marijuana in a vehicle he had borrowed, but did not exclusively possess. The district court held there was no jury question even though the evidence included the following: the bag containing marijuana was found in close proximity to the defendant; there was a pipe on the console between the automobile's bucket seats; there were two roaches and a roach clip in the automobile ashtray; and the odor of marijuana was present in the automobile.

At bar, the state completely failed to present a prima facie case of constructive possession. The purely circumstantial evidence presented by the state was that Petitioner was the driver/co-ownerof the vehicle, which was also occupied by a male passenger who had driven with him on a trip to Miami and was returning with him to North Carolina. A bag containing

cocaine and a cutting agent was found in the trunk, concealed under the spare tire. Thus, the state failed to introduce *any* evidence that Petitioner had the requisite knowledge of the presence of the contraband, much less its illicit contents. There was also no evidence introduced that Petitioner exercised dominion and control over the concealed cocaine. The state attempted to show dominion and control merely by the fact that the key ring in the ignition also contained a trunk key and that he was driving a car he co-owned, but did not exclusively occupy. Petitioner's mere co-ownership of the vehicle did not constitute sufficient circumstantial evidence to support the conviction, The deputy acknowledgedthat Petitioner was calm and they had a good rapport roadside. Significantly, the deputy also testified that he did not see or locate any signs that would indicate to him, based on his knowledge, training and experience, that there was anything else related to narcotic use in the car. The passenger had traveled with Petitioner to and from Miami and presumably would have had access to the trunk during the trip. Thus, the state utterly failed to present a prima facie case as to the offense alleged.

Other constructive possession cases support Petitioner's position in the case at bar and likewise dictate a reversal. *See Green v. State*, 667 So. 2d 208 (Fla. 2d DCA 1995) (evidence that defendant was driver of a rental vehicle occupied by defendant's brother who had rented vehicle, that defendant exhibited nervousness upon being stopped for speeding, that there was a spicy odor in the vehicle, and that cocaine was found hidden in secret compartment over vehicle's glove box was insufficient to prove constructive possession of cocaine; error to deny motion for judgment of acquittal where circumstantial evidence was consistent with reasonable hypothesis that defendant's brother placed cocaine in rental car without defendant's knowledge);

S.B. v. *State*, 657 So. 2d 1252 (state failed to prove juvenile had constructivepossessionof small quantity of marijuana found in plastic container located in plastic grocery bag in trunk of vehicle in which juvenile was one of several passengers; because plastic bag was accessible to several people, knowledge of presence of contraband and juvenile's ability to maintain control over it may not be inferred, but must be established by independent proof; juvenile's admission that he owned the grocery bag, without more, was not sufficient to establish constructive possession of marijuana in plastic container which juvenile testified he had never seen until officer removed it from bag); *Smith* v. *State,* 5 19 So. 2d 750 (Fla. 4th DCA 1988) (insufficient evidence of a prima facie case of constructive possession where cocaine was located in a can on property jointly occupied by defendant *and* where defendant's fingerprint was found on a scale located five feet from the cocaine); *Diuz v. State,* 467 So. 2d 1061 (Fla. 3d DCA 1985) (man squatting on a porch appearing to be looking at bags of marijuana found insufficient to establish constructive possession of marijuana or that he had dominion or control over the contraband where there were two others with the defendant on the porch when the police first observed them).

Close proximity to contraband, without more, is legally insufficient to prove possession. *Harvey* v. *State,* 390 So. 2d 484 (Fla. 4th DCA 1980); *Williams* v. *State,* 573 So. 2d 124 (Fla. *4th* DCA 1991); ***Hively v. State,*** *336 So.* 2d 127; ***Pena*** *v. State,* 465 So. 2d 1386 (Fla. 2d DCA 1985); *Hons* v. *State,* 467 So. 2d 829 (Fla. 2d DCA 1985) (circumstantial evidence of defendant's proximity within another's residence to two bags of marijuana in open view, even coupled with deputy's observation from a distance of what appeared to be defendant and two others smoking

marijuana could ***not*** support inference of possession and control over the marijuana to the exclusion of every reasonable doubt).

In ***Pena v. State,*** 465 So. 2d 1386, the appellate court reversed Pena's conviction and sentence after finding that the evidence was insufficient as a matter of law to prove that Pena knowingly sold or delivered cocaine or was knowingly in actual or constructive possession of the ***drug.*** In ***Pena,*** undercover officers had arranged to meet Evans and Marques at a shopping center parking lot to make a drug buy. When they arrived at the shopping center, the defendant, Pena, was also present in the car. He was sitting in the back seat of the vehicle. When the officer asked if all the cocaine was there, Evans, Marques and Pena all nodded affirmatively. The officers had no previous knowledge of Pena or his possible involvement until he arrived in the car. Evans handed the officers some cocaine wrapped in a newspaper, whereupon all parties were arrested. A subsequent search of the car produced a box of cocaine in the trunk and a brown paper bag of cocaine on the right back floorboard, near where Pena had been sitting. Pena denied any knowledge of cocaine in the car. The Second District held:

> Regardless of one's suspicions, the above evidence was insufficient as a matter of law to prove that Pena knowingly sold or delivered the cocaine or was knowingly in actual or constructive possession of the drug. The mere fact that the cocaine was found in a car of which Pena had joint possession does not establish his constructive possessionof it. ***Manning v. State,*** 355 So. 2d 166 (Fla. 4th DCA 1978); ***Thomas v. State,*** 297 So. 2d 850 (Fla. 4th DCA 1974); ***Chariott v. State,*** 226 So. 2d 359 (Fla. 3d DCA 1969). To establish constructive possession, the state had to prove that Pena had dominion and control over the cocaine, knew the cocaine was within his presence, and knew of its illicit nature. ***Brown v. State,*** 428 So. 2d 250 (Fla.), ***cert. denied,*** U.S. ___, 103 s. ct. 3541, 77 L. Ed. 2d 1391 (1983). The state produced no direct evidence

> that Pena knew the purpose of the trip to Cleat-water, had any knowledge of the drugs in the car or any control over them. Mere proximity to contraband, without more, is legally insufficient to prove possession. *Johnson v. State, 456 So.* 2d 923 (Fla. 3d DCA 1984). Pena's affirmative nod to the officers' question is meaningless because Pena spoke no English and even required an interpreter at trial.

Pena v. State, 465 So. 2d at 1388.

In addition, because proof of possession in the case at bar rested exclusively upon circumstantial evidence, this evidence was insufficient to prove Petitioner committed the offenses when the following well-established rule governing circumstantial evidence is applied. Where proof of possession rests exclusively upon circumstantial evidence, that proof must not only be consistent with guilt, but also inconsistent with any reasonable hypothesis of innocence. *Peek v. State,* 395 So. 2d 492 (Fla.), *cert. denied, 45* 1 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d *342* (198 1); *Murphy v. State,* 5 11 So. 2d 397 (Fla. 4th DCA 1987).

As set forth in *Davis v. State,* 90 So. 2d 629 (Fla. 1956),

> When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.... Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby

> adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Id. at 63 1-32 (citations omitted). *See also* ***McArthur*** *v. State, 35* 1 So. 2d 972 (Fla. 1977); *Mayo v. State,* 7 1 So. 2d 899 (Fla. 1954). More recently, in *State* v. *Law,* 559 So. 2d 187 (Fla. 1989), this Court enunciated the special standard which must be applied where a conviction is wholly based on circumstantial evidence:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

Id. at 188 (citation omitted). *Accord Williams v. State, 437 So.* 2d 133, 135 (Fla. 1983), *cert. denied, 466* U.S. 909 (1984). Further, although the state is not required to conclusively rebut every possible variation of events which could be inferred from the evidence, it must produce substantial, competent evidence from which the jury can exclude every reasonable hypothesis of innocence except that of guilt. Otherwise, a trial court must grant a motion for judgment of acquittal. *State v. Law, 559 So.* 2d at 188-189.

The circumstantial evidence upon which the state relied fails to exclude every reasonable hypothesis of innocence. But most significantly, the state failed to introduce **any** evidence that Petitioner had knowledge of the presence of the cocaine or its illicit nature. Further, only minimal circumstantial evidence was introduced as to Petitioner's ability to exercise dominion and control over the cocaine merely through his co-ownership of the vehicle and resulting possession of a trunk key on the key ring in the ignition.

The evidence *sub judice* was insufficient as a matter of law to sustain Petitioner's convictions. Where the state fails to meet its burden of proving each and every element of the offense charged beyond a reasonable doubt, the case should not be submitted to the trier of fact and a judgment of acquittal should be granted. *Ponsell v. State,* 393 So. 2d 635 (Fla. 4th DCA *198* 1); *Murphy v. State.*

Therefore, as there is insufficient evidence to support Petitioner's convictions for possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver, the trial court erred in denying his motions for judgment of acquittal. The instant decision of the Fourth District Court of Appeal must be quashed, Petitioner's convictions and sentences vacated and Petitioner discharged.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District and remand this cause with appropriate directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Belle B. Turner, Assistant Attorney General, 444 Seabreeze Blvd. 5th Floor, Daytona Beach, Florida 32118, this 15th day of September, 1997.

Susan D. Cline

Attorney for Tommie V. Johnson

IN THE SUPREME COURT OF FLORIDA

TOMMIE V. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 90,494
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

TOMMIE V. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-0469

Opinion filed February 19, 1997

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Joe Wild, Acting Circuit Judge; L.T. Case No. 95-890-CFA.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach for appellee.

PARIENTE, J.

Defendant appeals from his convictions and sentences for trafficking in cocaine more than 28 grams and possession of cocaine with intent to sell/deliver. Defendant received concurrent sentences of 64.37 months in prison with credit for 128 days time served and was ordered to pay a $50,000 fine for trafficking in cocaine together with a surcharge of $2,500. We affirm both the convictions and sentences.

The issue of defendant's constructive possession was properly submitted to the jury. The jury could have found, based on the facts of this case, that defendant was the driver/owner of the vehicle and in sole possession of the key to the trunk where the cocaine was found under the spare tire. See Jordan v. State, 548 So. 2d 737,739 (Fla. 4th DCA 1989).

Defendant also attacks his convictions for trafficking in cocaine and possession with intent to sell/deliver because both charges arose from one underlying core offense of possession of cocaine. Defendant concedes that affirmance on this point is required based on Gibbs v. State, 676 So. 2d 1001 (Fla. 4th DCA), review granted, No. 88,409 (Fla. Nov. 4, 1996). In Gibbs, our court held that there is no double jeopardy violation based on convictions for trafficking in cocaine in excess of 28 grams and simple possession.

Our court in Gibbs relied on &ate v. McCloud 577 So. 2d 939 (Fla. 1991), which rejected a double jeopardy attack on dual convictions for sale of cocaine and possession of the same quantum of cocaine. Our supreme court in McCloud concluded that because sale of cocaine can occur without possession, possession is not au essential element of sale and is therefore not a necessarily included lesser offense. Id. at 940-41.

This case is a stronger case than Gibbs for rejecting a double jeopardy challenge because the second offense here is not simple possession as in Gibbs, but possession with intent to sell/deliver. There are several ways to analyze the differences between these crimes.

Pursuant to section 893.135(1)(b), Florida Statutes (1995), a person traffics in cocaine either by knowingly selling, delivering or bringing into this state 28 grams or more of cocaine or by being in actual or constructive possession of 28 grams or more of cocaine. It is thus possible to commit the offense of trafficking in cocaine without having actual or constructive possession of the cocaine, or, alternatively, without actually intending to sell the cocaine. See Gibbs, 676 So. 2d at 1008 (Gross, J., concurring). Trafficking in cocaine also requires proof that the quantity of cocaine was at least 28 grams.

For the crime of possession with intent to sell/deliver cocaine, section 893.13(1)(a), an essential element is proof of specific scienter; i.e., intent to sell or deliver the cocaine. This element is not an essential element of trafficking. Possession with intent to sell/deliver thus requires an essential element that is not an essential element of trafficking.

In this case, the trial court instructed only on simple possession as a lesser included offense of both charges. Possession with intent to sell/deliver cocaine is neither a necessarily included lesser offense nor a permissive lesser included offense of trafficking. See § 775.021(4)(b)(3).

As to defendant's third point on appeal, that the five percent surcharge was not orally pronounce4 section 960.25 establishes a five percent surcharge which shall be imposed for any criminal offense. Because the surcharge is mandatory, the trial court was not obligated to announce it orally to include it in the written sentence. See Reyes v. State, 655 So. 2d 111, 116-17 (Fla. 2d DCA 1995).

POLEN and SHAHOOD, JJ., concur.

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