IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellee,

vs. Case No. 95,721
2d DCA Case No. 98-00641

NORRIS WILLIAMSON,

Respondent/Appellant.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S INITIAL BRIEF ON MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12 point courier-New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

On May 12, 1997, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, charged Respondent Norris Williamson with one count each of burglary of a dwelling, possession of controlled substance, and petit theft.(R. 9, 10) During the trial, defense counsel requested that the jury be instructed, before the jury could convict, that Williamson knew of the illicit nature of the substance. (R. 123) Circuit Court Judge Cynthia A. Holloway denied the requested instruction, and the defense claimed upon review that the denial was reversible error. (R. 125)

The testimony adduced at trial was as follows:

> Ms. Shirline Smith testified that she owned a house that had caught fire and was boarded up.[1] The main part of the house was still in good condition. (R. 38) On April 25, 1997, Tampa Fire Department inspector Hector Noyas was investigating a series of arsons in the area of Ms. Smith's house. While on his patrol, he went down the alley by the house of Shirline Smith and saw Norris Williamson walking away from the back of the Smith house carrying a small sized refrigerator. Inspector Noyas stopped Williamson and asked him if he lived there. (R. 63, 64) Williamson said that he did "sometimes." Noyas knew from his previous conversations with Ms. Smith that Williamson did not live at the house. (R. 69) Noyas called the Tampa Police Department. (R. 70) Officers Patrick Kennedy and Officer Jerry Matos arrived, and a search of Williamson found two knives, five rings, and some pills on Williamson's person.

[1]The house had caught fire five days prior to the burglary.

> (R. 88) The pills turned out to contain codeine. According to the police officers testimony, Williamson advised the officers that he went inside the house and found the rings on the floor and took them, and then he found the pills next to the refrigerator and took them too. (R. 94) The State then rested and the defense moved for judgment of acquittal, which was denied. The defense presented no evidence, but in closing, defense counsel argued that Williamson had no idea what was in the pill bottle he had taken. (R. 150)

Judge Holloway determined that Respondent waived his right to testify. The defense then requested a special jury instruction based on Chicone v. State, 684 So. 2d 736 (Fla. 1996). Judge Holloway denied the requested jury instruction. Closing arguments ensued, and the jury was instructed as follows:

> "Before you can find Mr. Williamson guilty of possession of codeine, the state must prove the following three elements beyond a reasonable doubt: First, that Mr. Williamson possessed a certain substance; second the substance was codeine; and third, that Mr. Williamson had knowledge of the presence of the substance.
>
> To possess means to have personal charge of or to exercise the right of ownership, management or control over the thing possessed.
>
> Possession may be actual or constructive. If a thing is in the hand of or on the person or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person. If a thing is in a place over which the person has control over or in which the person has hidden or concealed it, it is in the constructive possession of that person. If a person has the exclusive possession of a

> thing, knowledge of its presence may be inferred or assumed."
>
> (T174-175)

The jury retired to deliberate and returned a verdict of guilty of all charges.

The Second District Court of Appeal on March 31, 1999, held that the trial court's refusal to give Respondent's requested jury instruction was erroneous and was not harmless error and reversed Respondent's conviction. The Second District Court of Appeal certified the following three questions to be of great public importance with far reaching statewide consequences:

> 1. DOES CHICONE v. STATE, 684 So. 2d 736 (Fla. 1996), RECEDE FROM MEDLIN, 273 So. 2d 394 (la. 1973)(INDICATING THAT THE STATE MUST PROVE GUILTY KNOWLEDGE IN CONSTRUCTIVE POSSESSION BUT NOT ACTUAL POSSESSION CASES)?
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> 2. DOES CHICONE APPLY WHEN THE DEFENSE PRESENTS NO EVIDENCE?
>
> 3. DOES CHICONE CREATE A NEW ELEMENT TO THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE?

SUMMARY OF THE ARGUMENT

The Chicone opinion does not recede from Medlin because the Florida Supreme Court, despite having ample opportunity, did not expressly overrule Medlin's suggestion that guilty knowledge must be shown in a constructive possession case but not in an actual exclusive possession case.

Actual exclusive possession gives rise to a rebuttable presumption or inference that Respondent knew the illicit nature of the substance he possesses. The Chicone instruction does not apply when the defense presents no evidence to form a factual basis for the jury to consider whether Respondent is without knowledge of the illicit nature of the substance he possesses.

The Chicone opinion does not create a new element to the crime of possession of a controlled substance. The Chicone court never went so far as to say that knowledge of the illicit nature of the substance was an independent element of the charge for which a special instruction must always be given, but instead held that scienter was implicit in the concept of possession.

The Second District Court of Appeal opinion held it was error to deny Mr. Williamson's request for a Chicone instruction, that it should be reversed and Mr. Williamson's conviction reinstated as to the charge of controlled substance possession.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN DENYING RESPONDENT'S REQUEST FOR A CHICONE INSTRUCTION IN THE WILLIAMSON CASE?

(As stated by Petitioner/Appellee)

A. THE CHICONE OPINION

Initially, Petitioner/Appellee State of Florida notes that the Florida Supreme Court opinion in Chicone v. State, 684 So. 2d. 736 (Fla. 1996) is a broad-ranging opinion that was never tied to the facts of the Chicone trial below. The defendant, Jerry Jay Chicone, was charged with possession of cocaine and possession of paraphernalia. Because defense counsel did not order the trial transcribed, the appeal came to both the Fifth District Court of Appeal and to the Florida Supreme Court without a record of the facts adduced at trial. It is unknown whether Mr. Chicone's possession was exclusive or joint, whether the contraband was discovered on his person or property, whether he was in his home or in public, whether he was actually using the paraphernalia to ingest cocaine at the time of the arrest, or whether other circumstances relevant to the knowledge issue were excluded that would have affected the Court's opinion.

B. THE CHICONE OPINION DOES NOT RECEDE FROM MEDLIN.

In Williamson v. State, 24 Fla. L. Weekly D852 (Fla. March 31,

1999) the Second District Court of Appeal stated:

> "On the possession of a controlled substance charge, defense counsel requested that the jury be instructed that Williamson had to know the illicit nature of the substance, but the trial court declined to give the instruction. When specifically requested by the defendant, "the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed." Chicone v. State, 684 So. 2d. 736 (Fla. 1996).
>
> In Oliver v. State, 707 So. 2d 771 (Fla. 2d DCA 1998), this court relied on Chicone and reversed the defendant's conviction for possession of cocaine and paraphernalia. This court held that "the trial court's error in denying Oliver's special jury instructions was not harmless where lack of guilty knowledge was Oliver's principal defense." Id. At 772-73.

In Lambert v. State, 24 Fla. Weekly D695 (Fla. March 5, 1999), the Second District Court of Appeal noted that the Chicone decision did not distinguish between cases involving constructive possession and those involving actual possession. Specifically, when it required that upon request the trial court must deliver the special jury instruction on knowledge.

The Chicone court discussed previous decisions such as Medlin v. State, 273 So. 2d. 395 (Fla. 1973), which held that proof that the defendant committed a prohibited act (delivery of a controlled substance) raised a rebuttable presumption that the defendant was aware of the nature of the drug delivered. The Medlin opinion suggested that guilty knowledge must be shown in constructive

possession cases but not in actual possession cases. This interpretation is consistent with that part of the standard jury instruction which reads, "If a person has the exclusive possession of a thing, knowledge of its presence may be inferred or assumed."

The Chicone opinion places the burden of proof on the State to prove knowledge of the illicit nature of the contraband. But because it does not expressly overrule the Medlin presumption, Petitioner answers the first certified question in the negative. The Chicone decision does not recede from Medlin.

C. **CHICONE DOES NOT APPLY WHEN THE DEFENSE PRESENTS NO EVIDENCE.**

In Scott v. State, 722 So. 2d. 256, (Fla. 5th DCA 1998) [2] the

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In Scott, the defendant was convicted of possession of contraband in a correctional facility. A random search of defendant's locker revealed cannabis hidden inside of his eyeglass case. Although there was sufficient evidence to show he "possessed" the cannabis inside the locker, there was insufficient evidence to establish his exclusive possession of the cannabis or that he knew the cannabis was in his locker. (Scott's position was that he was unaware that cannabis was concealed in his glasses case inside the locker, not that he didn't know the substance thus concealed was cannabis.) Scott asked the trial court to give a Chicone instruction but was denied. The appellate court found the failure to give the instruction harmless because the supreme court has not decided if a special instruction concerning a defendant's knowledge is required if he challenges only the possession of the substance. The Fifth District court of Appeal certified the following questions: Does the illegal possession of a controlled substance raise a rebuttable presumption (or inference) that the defendant had knowledge of its illicit nature? If so, if the defendant fails to raise the issue that he was unaware of the illicit nature of the substance, is he nevertheless entitled to a Chicone instruction? Can the failure to give the requested instruction be harmless error? State v. Scott, Case No. 94,701, is presently pending in the Florida Supreme Court. Review was

district court of appeal observed,

> "Chicone does not hold that knowledge of the illicit nature of the substance is an independent element of the charge for which a special instruction must always be given. Instead, the Chicone court recognized the authority of the legislature to determine the elements of a crime and adopted the view that since the legislature did not indicate otherwise, scienter (knowing the illicit nature of the substance) was implicit in the concept of possession (how can one knowingly possess an illegal drug unless one knows the substance possessed is an illegal drug?). For this reason the court held that the standard jury instruction on possession is adequate ***unless*** the defendant requests a more specific instruction regarding knowledge of the illicit nature of the substance. However, we urge, implicit in the right to have the jury instructed on this more specific instruction is the requirement that there be something before the jury that responds to the presumption or inference that the defendant is aware of the illicit nature of the substance created by the proof of the possession of the substance."
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> Scott, 722 So. 2d. at 257.

In the instant case, the appellate record shows that Respondent Norris Williamson admitted to finding the pills and taking them. The defense presented no evidence to rebut that Williamson did not know that he was in possession of a controlled substance. There was nothing in evidence at Respondent's trial that "responds to the presumption or inference that the defendant was aware of the illicit nature of the substance created by the

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granted April 13, 1999.

proof of possession of the substance." In other words, there was nothing in evidence to rebut the inference that Respondent knew the illicit nature of the substance.

In Scott, supra, the court reasoned that

> "[I]t appears that the defendant has the burden of going forward with an explanation as to why he was unaware of the illicit nature of the substance (man, I don't know what cannabis looks like) in order to overcome this presumption. In this regard, the defendant's obligation seems not unlike one found in possession of recently stolen property who must explain why he did not know the property was stolen. Section 812.022(2) Florida Statutes (1997); Currington v. State, 711 So. 2d. 218 (Fla. 5th DCA 1998); J.J. v. State, 463 So. 2d. 1168 (Fla. 2d DCA 1984)."
>
> Id.

As in Scott, in the instant case, there was no factual basis to create an issue as to whether Williamson knew of the illicit nature of the substance in order to warrant the requested instruction. Therefore, Petitioner/Appellee State of Florida argues that the Chicone instruction is not required when the defendant presents no evidence.

D. CHICONE DOES NOT CREATE A NEW ELEMENT TO THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE.

The Chicone court never went so far as to say that knowledge of the illicit nature of the substance was an independent element of the charge for which a special instruction must always be given.

In Chicone the Court recognized the authority of the

legislature to determine the elements of a crime and adopted the view that, since the legislature did not indicate otherwise, scienter (knowing the illicit nature of the substance) was implicit in the concept of possession. As the court pointed out in Scott, supra, how can one knowingly possess an illegal drug unless one knows the substance possessed is an illegal drug? In Chicone, the Supreme Court held that the standard jury instruction on possession is adequate **unless** the defendant requests a more specific instruction regarding knowledge of the illicit nature of the substance.

In an exclusive actual possession case, no more than the standard jury instruction should be required, and the request for the special jury instruction should be granted when and only when the defendant presents evidence to rebut the presumption that he knew the illicit nature of the substance possessed.

In the instant case, Respondent Williamson asked for the Chicone instruction but never presented any evidence for the jury to consider that put at issue whether or not Respondent had knowledge of the illicit nature of the controlled substance in his possession. In the absence of some evidence, however slight, the request for a Chicone instruction should be denied. Thus the trial court did not err in denying Respondent's request for a Chicone instruction. The denial should be viewed as harmless error, if error at all, in the instant case. Respondent's conviction as to

the possession of a controlled substance should be re-instated.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court should reverse the decision of the Second District Court of Appeal, as to the holding relating to the certified questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Frederick W. Vollrath, Esquire, Post Office Box 18942, Tampa, FL 34679 on this _____ day of June, 1999.

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