IN THE SUPREME COURT OF FLORIDA

JORGE GARCIA, :

Petitioner, :

vs. : Case No.SC03-1677

STATE OF FLORIDA, :

Respondent. :

_____:

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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ISSUE I.

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT SUFFICIENT EVIDENCE EXISTED TO SUSTAIN THE DRUG POSSESSION CHARGE?

The state argues that proof of concealed and disguised contraband in a solely occupied vehicle is per se sufficient evidence for obtaining a drug possession conviction. Answer Brief at 9, 11-12, 14-17. This argument eliminates the state's burden of proving knowledge of the nature of the concealed and disguised item, in this case an innocuous taped black ball, and additionally knowledge that the concealed item was used to hide and disguise contraband. The state's argument makes all single vehicle occupants strictly and criminally liable for the contents of every container within the vehicle.

This Court has determined that drug possession requires proof of scienter or knowledge. Chicone v. State, 684 So.2d 736. 741 (Fla. 1996). Recently, this Court affirmed Chicone in determining that scienter or knowledge is constitutionally required in proving violations of the registration requirements of the sex offender registration statutes. State v. Giorgetti, SC02-1812, filed March 4, 2004. The Court in Giorgetti quoted the following from Chicone: "Scienter . . . is not a mere technicality in the law, but a legal principle which must be observed in order to safeguard innocent persons from being made the victims of unlawful acts perpetrated by others, and of which they have no knowledge. It is a safeguard which must be preserved in the

interest of justice so that constitutional rights of our citizens may be preserved." Id. at 17, quoting Chicone, 684 So.2d at 739 (quoting Frank v. State, 199 So.2d 117, 121 (Fla. 1st DCA 1967).

The due process clauses of the state and federal constitutions require proof of every criminal element beyond a reasonable doubt. State v. Cohen, 568 So.2d 49 (Fla. 1990), quoting In re Winship, 397 U.S. 358, 361 (1970).[1]

There were no facts presented in this case that showed Mr. Garcia knew there was contraband in his truck, other than the presence of the black taped ball found under the passenger seat. The state recites no facts that show Mr. Garcia's knowledge of the contraband inside the black taped ball, other than Mr. Garcia's sole occupancy of the vehicle. Answer Brief at 14-16.

Vehicles are conveyances which are often readily open to the public and traditionally have been deemed to hold a lesser privacy interest than homes. Cardwell v. Lewis, 417 U.S. 583, 590 (1974). This is so because vehicles transport people and are usually briefly occupied by others besides the owner or driver. Id. This same logic and reason that reduces the application of the fourth amendment protection against unreasonable searches and seizures, must be considered when determining criminal liability for the area determined

[1] Additionally, the state's burden of proof is not lessened when an affirmative defense is asserted. When an affirmative defense is proved, the state is required to established the nonexistence of the defense beyond a reasonable doubt. Wright v. State, 442 So.2d 1058, 1060 (Fla. 1st DCA 1983).

to be readily accessible to others and thus requiring less constitutional protection.

When an innocuous object, like the black taped ball at issue here, is found inside a vehicle driven by a single occupant, knowledge of the contents of the innocuous object cannot be proved simply by proving the single occupant drove or even owned the vehicle. Something more must be proved to tie the sole occupant or owner to the contraband. Examples of such additional proof are facts showing the contraband being concealed in an area accessible only to the owner or key holder, Johnson v. State, 712 So.2d 380 (Fla. 1998), or the presence of other facts, like a price list, Delva v. State, 575 So.2d 643 (Fla. 1991), or visible traces of a drug, that show the sole occupant should have reasonably known of the concealed contraband's presence.

Without such additional proof being required to obtain a felony drug conviction, all vehicle owners or single occupants are strictly and criminally liable for the contents of every concealed container inside each vehicle. Under the state's view, every driver is required to act like police officers and to protectively search each object and container of each vehicle prior to admitting any additional occupants, or be held criminally responsible for the contents of whatever innocent looking item might be left inside the vehicle.

The state fails to address how the stacking of inferences in this case is constitutionally permissible, but instead stacks the inferences in its arguments. Answer Brief at 11. The state fails to distinguish between exclusive possession of the whole truck and exclusive possession of the innocuous black taped ball found within the truck. Instead

the state makes the repeated blanket assertion that exclusive possession of a vehicle implies knowledge of all the contents within the vehicle, unless proved otherwise. Answer Brief at 11-12, 16-17.

The constitutional problems with such an argument are readily apparent in this case. Under the state's reasoning, Mr. Garcia is presumed to know what is inside the innocent looking object and is then required to defend the crime of drug possession by proving the object is not his. Not only is the state relieved of its burden of proof, but an impossible burden of proof is placed upon the accused. How could Mr. Garcia or anyone else prove an innocent looking item, like the black taped ball in this case, did not belong to him? Mr. Garcia defended against the charge with all logical facts available to him, by denying knowledge, exhibiting behavior consistent with a lack of knowledge, and by stating others had been inside the vehicle. Upon seeing the black taped ball, the police officers did not think the ball contained contraband, because the item was innocuous in appearance. No person could reasonably be expected to prove a lack of ownership or knowledge of an innocuous item found within an exclusively occupied vehicle, when the item found is not identified. While certain items can be linked with a person or are suspicious in appearance, others, like a black taped ball, are innocuous and generic and have no identifiable characteristics.

Mr. Garcia presented evidence that was unrefuted, showing he acted innocently regarding the presence of the black taped ball, that there was no other evidence inside the truck of drug use or possession, that others had been inside the truck recently, that the truck was recently

stolen and items not belonging to him remained in the truck when it was returned to him. (II:T207-211. 216). The state failed to prove dispute these facts with evidence. The state seeks now to uphold the conviction by relying solely on the exclusive possession of the truck and the one time inventory of the truck prior to its return to Mr. Garcia. Those facts do not place in dispute the innocent behavior of Mr. Garcia upon seeing the black taped ball, the fact that others were in the truck more recently than the truck was inventoried, the lack of other evidence of drug use or possession in the truck, and the items found in the returned truck that did not belong to Mr. Garcia.

Respondent states, "Petitioner claims the state failed to establish his ownership of the vehicle." Answer Brief at 14. Petitioner has not relied on lack vehicle ownership proof as a defense to the charges at trial or on appeal.[2]

The state claims that the jury could decide this case based on "the inconsistencies of the defense's version of events." Answer Brief at 16. The state does not tell us on what factual inconsistencies the jury could have relied on in this case. Additionally, the state wrongly relies on precedent which discusses the standard of proof required to

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2 Respondent perhaps confuses a defense argument made at trial to support the mistrial motion made after the state's initial closing argument, with an asserted defense to the charges. The defense argued at trial that the state failed to prove Mr. Garcia owned the truck and should not have then asserted that fact during closing argument. (III:T263), but lack of ownership was not an asserted defense to either the trafficking or drug possession charge. The defense mentioned briefly in closing argument that the state failed to prove who owned the truck. (III:T282). This remark was made as an example of the state having failed to meet its burden, not to place truck ownership as a factually contested issue. (III:T282).

establish probable cause for an arrest, Maryland v. Pringle, 124 S.Ct. 795 (2003), to persuade this Court that the evidence in this case was sufficient to meet the proof beyond a reasonable doubt standard. Answer Brief at 11. This Court will not confuse the probable cause standard with the state's burden of proof beyond and to the exclusion of every reasonable doubt. State v. Cohen, 568 So.2d 49 (Fla. 1990), quoting In re Winship, 397 U.S. 358, 361 (1970).

The state argues that sole occupancy is sufficient to establish knowledge of the contraband, because the state cannot otherwise sustain this conviction. Although the state presented evidence regarding the police inventory of the released truck to rebut the defense evidence regarding the recent theft, that evidence did not resolve the remaining undisputed facts concerning the access of others to the truck and Mr. Garcia's lack of surprise or response to the existence of the black taped ball in the truck. The state at trial did not dispute the facts that others had access to Mr. Garcia's truck earlier that evening and did not present any other evidence, like visible traces of the drug in other parts of the truck, or a pricing slip or other drug paraphernalia, which would rebut and place in dispute the fact that Mr. Garcia did not know about the innocuous object or its contents. As often happens when the state fails to meet its evidentiary burden in the trial court, the state now seeks to correct its own insufficient case by asking this Court to establish a broad rule of law that creates criminal liability for not only Mr. Garcia, but for all similarly situated innocent persons. The state seeks to make a sole vehicle occupant strictly liable for all the contents of the vehicle, because

that is the only argument that can sustain Mr. Garcia's conviction. This Court should not dispense with the knowledge requirement for sole vehicle occupants, merely to "'ease the prosecutor's path to conviction.'" State v. Giorgetti, SC02-1812 at 15 (Fla., filed March 4, 2004)(quoting Staples v. United States, 511 U.S. 600, 605 (1994)).

The only fact the state adduced at trial to prove drug possession against Mr. Garcia was his single occupancy of the truck. Being in sole possession of this greater whole vehicle does not prove beyond a reasonable doubt constructive possession of the contraband concealed inside the smaller innocuous container hidden within the vehicle. Because the state's argument and the district court's opinion urge upholding a conviction proved by less than reasonable doubt, this Court should quash the lower court's decision and discharge Mr. Garcia for the drug possession conviction.

ISSUE II.

WHETHER THE DISTRICT COURT ERRED IN RULING THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE ESSENTIAL ELEMENT OF GUILTY KNOWLEDGE WAS FUNDAMENTAL ERROR?

The state argues this point without any mention of the jury question in this case concerning the difference between trafficking and simple drug possession. Answer Brief at 18-31. The jury asked during its deliberations, "What is the difference between trafficking and possession of methamphetamine?" (III:T317). The trial court answered this question by reading jury instructions for trafficking and simple possession, which included a guilty knowledge instruction for trafficking and omitted a guilty knowledge instruction for simple possession. The fundamental error in this case, then, concerns the misleading instructions telling the jury that guilty knowledge is required for the greater offense of trafficking, but not for the lesser included offense of simple possession.

This Court recently reiterated the fundamental error standard as follows, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. In other words, fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Cardenas v. State, 2004 WL 351171, at 4. 29 Fla. L. Weekly S90 (Feb. 26, 2004), citing Reed v. State, 837 So.2d 366, 370 (Fla. 2002) (quoting State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991))(emphasis omitted). It is inconceivable how the omission of the guilty knowledge instruction for

the simple possession charge could be anything but "pertinent or material to what the jury must consider in order to convict" when the jury itself has indicated in writing it is confused about instructions that omit the guilty knowledge charge for the lesser possession offense. Fundamental error in this case is not found in legal argument, but is actually demonstrated through the jury question in the record. Had the jury been properly instructed that guilty knowledge was required for a simple drug possession conviction, the jury very likely would have acquitted Mr. Garcia of that charge. A more fundamental error cannot be stated.

This Court recently remanded a drug possession case to the district court for consideration of this Court's decision in Reed v. State, 837 So.2d 366 (Fla. 2002), when the trial court failed to instruct the jury on guilty knowledge and the district court affirmed, relying on the district court's opinion in Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001). Barnes v. State, 852 So.2d 231 (Fla. 2003). The First District, applying this Court's decision in Reed, concluded that fundamental error occurred when the trial court failed to instruct on guilty knowledge, but instead gave the jury the exact same instruction read to Mr. Garcia's jury. Barnes v. State, 2004 WL 61239, 29 Fla. L. Weekly D238 (Fla. 1st DCA, filed Jan. 14, 2004). In Barnes the facts showed Mr. Barnes was found in actual possession of hydrocodone pills, but denied knowing the pills were illegal drugs. In so ruling, the First District stated, "The elimination of an element of proof would have allowed the jury to convict Appellant because he knew the substance was present, even if the jury believed he did not know its

illicit nature. Because the incomplete instruction given reduced the State's burden of proof, it was material to what the jury had to determine in order to convict Appellant." Id. Similarly, here the jury was permitted to convict Mr. Garcia for drug possession, when all the state proved was exclusive truck possession, and not knowledge of the illicit nature of the black taped ball.

Fundamental error occurred here where the defense plainly disputed guilty knowledge of the contraband and where the jury was told that proof of guilty knowledge was not required for simple drug possession. Reversal and a new trial with the proper instructions are required.

ISSUE III.

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE PRESUMPTION OF KNOWLEDGE OF THE PRESENCE OF THE CONTROLLED SUBSTANCE FROM THE EXCLUSIVE POSSESSION OF IT?

This case does not present facts at all similar to the facts that over thirty years ago gave rise to the presumption of knowledge from exclusive possession in Medlin v. State, 273 So.2d 394 (Fla. 1973). In Medlin the evidence concerning Medlin's giving a sixteen year old girl a capsule, saying it would make her go "up," and another pill, telling her it would make her go down from the high created by the other pill. Id. 273 So.2d at 395. When Medlin was arrested, he was in exclusive possession of the same pill he had given the young girl. Id. The presumption that arises in Medlin is that proof of the "prohibited act" gives rise to a presumption that the defendant did the act knowingly and intentionally. Id. at 397. This Court in Medlin noted that Mr. Medlin defended his case by stating he did not know what the pills contained, and this defense was rebutted by the girl's evidence that he told her what one pill was an upper and another was a downer. Id. Thus Medlin does not apply to this case in which the state did not rebut the defense of a lack of knowledge with any evidence that Mr. Garcia knew the black ball was inside his recently stolen truck or that he knew what was inside the black ball.

The district court applied the Medlin presumption in this case, when the prohibited act of possession was never proved by the state. In this case all the state proved was that the taped black ball was

inside the recently stolen and recovered truck driven solely by Mr. Garcia, and that the truck had been previously inventoried after the police recovered it. (T106-107, 164). In Medlin the state proved the drugs were found on Medlin's person and that he knew what was inside the pills.

The state's wrongly relies on Medlin to support of the presumption of knowledge instruction wrongly given in this case. Medlin concerned actual possession of the drug on Medlin's person, while this case concerns only actual possession of a truck, in which drugs were found hidden in an innocent objected secreted under the passenger seat. The dangers of applying the presumption of knowledge to this case are illustrating by how far the state must stretch the Medlin presumption to fit the facts of Mr. Garcia's case.

Additionally the state justifies the wrongly given presumption of knowledge instruction with the fundamentally flawed instruction on drug possession read to the jury in this case. Answer Brief on 33-34. Somehow the state concludes that giving this wrong instruction on the presumption of knowledge was cured by the fundamentally flawed instruction on drug possession. According to the state, the two wrong instructions somehow together make legally adequate instructions.

The two wrong instructions, however, compound the error in this case. This is apparent from the state's failure to dispute that the jury could have reasonable viewed the instruction on the presumption of knowledge as permitting a drug possession conviction merely by proof of exclusive possession of the truck. The state then does not dispute that the jury could have convicted Mr. Garcia for drug possession

merely because he solely occupied the truck. This instruction telling the jury it could convict for drug possession then lessened the state's burden of proof regarding the essential element of guilty knowledge of the contraband concealed inside the innocuous container. This permissive presumption lead to a conviction based on less than proof beyond a reasonable doubt and is a violation of due process. Reversal and a new trial are required.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to John M. Klawi-foksky, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of April, 2004.

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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