

To: Florida Supreme Court
From: Bart Schneider
Date: 11/10/05
Re: SC05-1434

I respectfully request the Court to consider the following comments to the proposed standard instructions on "Possession," which were published in the October 15, 2005 Bar News. (The standard instruction on "possession" is repeated in the trafficking and drug paraphernalia proposals. For purposes of these comments, I will discuss proposal **1-F**, simple possession.)

I have four issues with the "possession" proposals.

Issue One - Element #1 of the proposed instruction states: "D possessed a certain substance." Later, the definition of "possessed" is given as "...to have personal charge of or exercise the right of ownership, management, or control over the thing possessed." I think it is better to give the instruction as "D had personal charge of or exercised the right of ownership, management, or control over the substance," instead of giving a term and then having to define that term later.

Issue Two – The proposed instruction states: "If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed." This instruction is not legally correct. If two people are carrying a bale of marijuana, knowledge of its presence can be inferred – because they are both in actual possession - even though neither has exclusive possession. Also, if cannabis is found in a common area in a house, in plain view of both occupants, knowledge of its presence can be inferred, even though they are not in exclusive possession. Bradshaw v. State, 509 So. 2d 1306 (Fla. 1st DCA 1987).

Issue Three - The proposed instruction states: "An issue in this case is whether D knew that the controlled substance was illegal." That instruction leaves open the possibility that the defendant is not guilty because even though he knew he was carrying cannabis, he thought cannabis was legal in Florida.

Issue Four – The elements are set out in the beginning of the instruction as #1-3. Later, the jurors are told: "An issue in this case is whether D knew that the controlled substance was illegal." Doesn't it make more sense to list "knowledge of the illicit nature" as element #4, which should only be read when applicable?

To address these concerns and a few other changes, I propose the following standard instruction:

25.7 DRUG ABUSE – POSSESSION

§893.13(1)(f)(6)(a), Fla. Stat.

Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.

To prove the crime of ~~(crime charged)~~ Possession of a Controlled Substance, the State must prove the following [~~three~~][four] elements beyond a reasonable doubt:

1. (Defendant) ~~possessed a certain substance~~ knew of the presence of the substance.
2. ~~The substance was (specific substance alleged).~~ (Defendant) had personal charge of or exercised the right of ownership, management, or control over the substance.
3. (Defendant) ~~had knowledge of the presence of the substance.~~ The substance was (specific substance alleged).

Give if defendant disputes either knowledge of the presence of the substance or knowledge of the illicit nature of the substance. See Garcia v. State, 901 So. 2d 788 (Fla. 2005).

4. (Defendant) knew of the illegal nature of the substance.

Give only if jurors are instructed on element #4

Knowledge of the illegal nature of a substance means either the defendant knew the exact nature of the controlled substance or the defendant did not know the exact nature of the substance, but did know that the substance was illegal.

Give only if jurors are instructed on element #4 and if appropriate. See §893.101(3) Fla. Stat.

Knowledge of the illegal nature of the substance may be inferred where the defendant was in actual or constructive possession. You may accept or reject the inference depending on the evidence presented at trial.

Possession

To "~~possess~~" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means that the person knows of the presence of the controlled substance and :

- a. the thing controlled substance is in the hand of or on the person, or
- b. the thing controlled substance is in a container in the hand of or on the person, or
- c. the thing controlled substance is so close as to be within ready reach and is under the control of the person.

Give if applicable.

~~Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.~~

Constructive possession means that the person knows of the presence of the controlled substance and the thing controlled substance is in a place over which the person has either ownership, management, or control, or in which the person has concealed it.

Possession may also be exclusive or joint.

Exclusive possession means that the person was the only one in actual possession or was the only person who was in or controlled the place where the controlled substance was located.

Joint possession occurs when two or more persons are carrying a controlled substance or when two or more people own, manage, or control a place in which a controlled substance is located.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996).

~~If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.~~

~~Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.~~

~~If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.~~

~~If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.~~

Give if appropriate

Knowledge of the presence of a controlled substance may be inferred where the defendant was in [actual possession][exclusive constructive possession][joint constructive possession where the controlled substance was in plain view in a common area in a place controlled by the defendant and the defendant was present in that place]. You may accept or reject the inference depending on the evidence presented at trial.

Evidence of mere proximity to a controlled substance does not establish ownership, management, or control of that controlled substance when the controlled substance was not in a place over which the person had control. In such cases, you can only find guilt if the facts and circumstances convince you beyond a reasonable doubt that the defendant knew of the presence of the controlled substance and exercised the right of ownership, management, or control over the controlled substance.

Lesser Included Offense

No lesser included offenses have been identified for this offense.

Comment

~~If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. See State v. Medlin, 273 So. 2d 394 (Fla. 1973).~~

~~—Note §893.13(1)(g), Fla. Stat., if the charge involves possession or delivery without consideration of not more than 20 grams of cannabis.~~

This instruction was adopted in 1981 and amended in 1989 and 1997, and 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of these comments has been sent by U.S. mail to Judge Dedee S. Costello, Bay County Courthouse, P.O. Box 1089, Panama City, Florida, 32402-1089, this 10th day of November, 2005.

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