

Deconstructing The Law of Constructive Possession

Part One

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The legal office has been covered in plastic for most of this week due to the fact that a new roof is being put on the police department.¹ Now one might suppose that less work was being done by your esteemed legal adviser, what with his desk, computer, file cabinets, and bookcases being literally “under wraps” and the loud noises of construction making it hard to concentrate, but I can safely assure you that just as much work was done this week in the legal office as is typically done in any ordinary week.²

What all this construction did get me thinking about was the fascinating legal doctrine of constructive possession.³ In those crimes where possession of something is an element (usually your controlled substances offenses), the government can prove that possession in one of two ways. Possession is easy to prove in those cases where the item or contraband is actually controlled by or found on the person of the defendant. This is called “actual possession.” However, in those cases where the item is found in close proximity to the defendant or in a location controlled by defendant but not in the defendant’s actual possession, the government can still prove that defendant constructively possessed the item if it can show that the defendant had the “power and intent to control its disposition or use.”

But the law of constructive possession can be very hard to grab hold of⁴ because the court decisions in this area are very fact-specific. In other words, whether or not the evidence is sufficient to prove constructive possession is going to turn on the specific facts of each case. This means that it becomes very important for the charging officer to include in his or her report and testimony ALL of the facts that support the conclusion that the defendant possessed the item. In today’s legal update, we’ll look at the main

¹ Although I’m not sure why we’re putting on a new roof, because when this economy turns around the City is going to build us a whole brand new police station. Any day now!

² I am not ignorant of the fact that this could either mean that your legal adviser somehow soldiered through under less than ideal conditions or that very little work is EVER done in the legal office. We’ll just leave that “hanging chad” dangling for now.

³ Get it? Construction. Constructive Possession. Sure it’s a stretch, but give me a break – I put these updates out so often it’s hard to come up with a super clever idea every time.

⁴ Ha! A little “possession” humor. Grab hold of. Possess. Maybe you can’t hear me over all of this roofing noise.

rules of proving constructive possession. Next time, we'll look at some specific cases to see how the courts analyze this issue.

We'll start with a case that is near and dear to my heart because I was the Assistant District Attorney who prosecuted it eight years ago in Durham.⁵ Durham Police Officer J.R. Broadwell was dispatched to an address in response to a concerned citizen's call that drugs were being sold on the street there. When he arrived, he saw the defendant, Franklin McNeil, and another person at that location. The officer asked the men if he could talk to them and noticed that the defendant was extremely nervous. In fact, he testified that the defendant was trying to light a cigarette but his hands were shaking so badly that he could not get it lit.

Based on this observation and others, the officer started to frisk the defendant. The defendant immediately put his hand in his pocket and ultimately fled from the officer. The officer chased the defendant, who ran into a nearby house. The officer entered the house and saw the defendant make a motion like he was dropping an item behind a chair. After a brief scuffle, the officer arrested the defendant, and then recovered 22 individually wrapped crack rocks from behind the chair.

After escorting the defendant back to his patrol car, the officer noticed three more bags of a powdery substance in the area where the defendant had initially been standing. The officer picked the baggies up and said,⁶ "Well, well, look what we have here!" The defendant at this point told the officer that the bags found in the house were his, but not the bags found near the car.⁷ Mr. McNeil was convicted of Possession With Intent To Sell Cocaine and being a Habitual Felon and sent to prison.⁸

The court's opinion is actually quite interesting to read because it traces the constructive possession doctrine back to prohibition days and discusses the case of State v. Norris,⁹ where the court reports that "when authorities appeared to search the defendant's property pursuant to a warrant, the defendant immediately went to feed some hogs while the defendant's wife ran out of the house with three pints of liquor in her lap and some in a fruit jar and hid it near the house under some pea vines. Shortly thereafter, the defendant's son ran across the branch, pouring out the liquor which he had in half-gallon jars, as he ran and the defendant's daughter took some sacks and threw them over a 30-gallon drum."¹⁰ Additionally, two cases of home brew were found in the chicken

⁵ Shameless self-promotion, I know. The case is State v. McNeil, 359 N.C. 800 (2005).

⁶ In his best Sherlock Holmes voice, no doubt.

⁷ The real tragedy of this case (for the defendant) which is not clear from simply reading the court's opinion is that the SBI analyzed these substances and determined that the baggies recovered from the house contained crack cocaine while the baggies recovered from the ground contained only baking soda. Mr. McNeil had confessed to possessing the crack cocaine, but vehemently denied possessing the baking soda.

⁸ This was not a case that I predicted would find its way to the N.C. Supreme Court, especially on the issue of constructive possession (because there seemed to be some real good circumstantial evidence of ACTUAL possession), but there you go.

⁹ 206 N.C. 191 (1934).

¹⁰ This was obviously a family business.

coop, 3 dozen bottles in the case, and the authorities located two 50-gallon barrels containing ‘mash.’¹¹

Interesting cases aside, what is important for our purposes is that the court reiterated the general rules of constructive possession. Here they are:

CONSTRUCTIVE POSSESSION RULE #1: If the defendant has exclusive possession of the place where the contraband is found, this is enough to support a finding of constructive possession.

Exclusive possession means that the defendant is the only person in control of that place and no one else has access. An example of this would be drugs found in a car owned and driven by the defendant and no one else is in the vehicle at the time. The judge or jury could still find the defendant not guilty due to the surrounding facts and circumstances, but the case will not be dismissed due to lack of evidence of possession.

CONSTRUCTIVE POSSESSION RULE #2: If the defendant does NOT have exclusive possession of the place where the contraband is found, the state must show “other incriminating circumstances” to support a finding of constructive possession.

The vast majority of cases deal with drugs or other contraband found in areas that are not under the exclusive control of a single person. The prime example here is a vehicle with multiple occupants where drugs are found underneath one of the seats or floor mats. No one has exclusive possession of the interior of the vehicle, so there must be other incriminating circumstances to prove that any single person has constructive possession.

Although these cases are very fact-specific, by looking at cases through the years, there are a few “incriminating circumstances” that courts consider important in making this determination:

INCRIMINATING CIRCUMSTANCES

1. Defendant’s proximity to the contraband.¹² This is probably the most important, but there have been cases where constructive possession was found where the defendant was not even present when the contraband was discovered.¹³ Courts are quick to point out that mere proximity to contraband is not enough to prove guilt.
2. The fact that no one besides defendant was present.¹⁴ Again, this certainly helps when true, but it is not a requirement.

¹¹ The Prohibition era gets my vote as the most interesting period in this nation’s history. What a crazy time!

¹² State v. Spencer, 281 N.C. 121 (1972). Just so you know that I’m not making this stuff up, I’ll include the cites to some example cases that talk about these particular circumstances. These cites mostly come from the North Carolina Prosecutor’s Trial Manual, Fourth Edition, by the great Bob Farb.

¹³ State v. Williams, 307 N.C. 452 (1983); State v. Allen, 279 N.C. 406 (1971).

¹⁴ State v. Harvey, 281 N.C. 1 (1972).

3. Items were found on the premises that identify the defendant.¹⁵ If the contraband is found in close proximity to items clearly owned by defendant, such as his wallet, that tends to show possession. Also, items such as utility bills or mail found in a house containing contraband that have the defendant's name on them tend to show control of the premises and therefore possession of the contraband.
4. Suspicious or nervous behavior of defendant.¹⁶ The fact that the defendant tries to avoid the police, acts very nervously around them, or does other suspicious things can show that he is aware that he is in possession of something he shouldn't be.
5. Finally, in drug cases, a large amount of money in the possession of the defendant¹⁷ without a good explanation could be evidence of involvement with controlled substances.

So remember, when making a case based on constructive possession where the defendant did not have exclusive control of the location, make careful note of all of the facts and circumstances that help show that he had the power and intent to control the disposition or use of the contraband, especially the ones discussed above. As we'll see next time in part two of this topic, the difference between a conviction and a dismissal will hinge on how well you are able to articulate these things. So tune in next time!

And before I go, let me sum up two other life lessons that you should have picked up from today's legal update. (1) When you are carrying both baking soda and crack cocaine, be sure and label the bags correctly and (2) it's way too late to stash your mash when the police are already knocking at the door. Now to enjoy my brand new skylight.

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¹⁵ State v. Williams, 307 N.C. 452 (1983).

¹⁶ State v. Hough, ___ N.C. App. ___ (Mar. 2, 2010); State v. Hudson, ___ N.C. App. ___ (Aug. 17, 2010).

¹⁷ State v. Hart, 179 N.C. App. 30 (2006).