

RECENT DEVELOPMENTS IN CRIMINAL LAW

Felon in Actual Possession of Firearm by Imputed Concealment

Ean Lavar Johnson was charged with possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1, based on a traffic stop. The officer stopped the vehicle for a child restraint violation after seeing a small child standing up in the vehicle. When the officer approached the vehicle, he could smell marijuana, and saw that the driver appeared intoxicated. The officer further recognized the defendant, a passenger in the back seat of the vehicle, from prior drug arrests and maintained a spotlight on him to see if he attempted to discard narcotics from the vehicle. When the defendant exited the vehicle, the officer looked inside and found a .25 automatic pistol on the floorboard of the car where the defendant's feet had been. None of the occupants of the vehicle claimed the weapon when questioned by the officer.

At trial, the officers did not claim to have seen any furtive movements or passing of contraband before the defendant and the other passengers exited the vehicle. None of the officers saw the defendant holding the weapon, and no fingerprints were found on the pistol. One of the passengers gave a written statement some six days after the arrest to the effect that the weapon was hers, and this was corroborated by the second passenger. The defendant likewise testified that the weapon was not his, and that the driver and passenger were friends of his who had given him a ride just moments before the vehicle was stopped by the police. He further testified that he had not seen the driver or other passenger with the pistol.

The jury convicted the defendant, who was sentenced to 15 years at hard labor without benefit of parole, probation, or suspension of sentence. On appeal to the Second Circuit, the conviction was overturned. The Court of Appeal found that "the evidence was not sufficient to prove either who possessed the firearm or that it was the defendant, and not the other passengers in the car, that had sufficient dominion and control over the firearm to constitute constructive possession."

The Supreme Court granted the State's application for certiorari, and reinstated the verdict of the trial court. Reviewing the testimony and the record, the Supreme Court found that the Court of Appeal had substituted its own credibility determination for that of the trier of fact, and reversed the Appeal Court's decision. The Supreme Court found that the defendant had been in actual possession, rather than constructive possession, based on the testimony of the officer who believed that the defendant had attempted to hide the weapon by placing his feet on top of the pistol. Justices Johnson and Knoll dissented, finding respectively that the evidence did not support the intent to possess the firearm, and that the evidence was insufficient to prove any possession beyond a reasonable doubt.

State v. Johnson, 2003-1228 (La. 4/14/04), 870 So.2d 995

Evidence of Conspiracy to Possess with Intent to Distribute

Nathaniel Mitchell, his girlfriend, his adult daughter, and his infant granddaughter were stopped on Interstate 20 in Webster Parish about 9:00 p.m. on June 26, 2000. The stated reason for the stop as improper lane usage and suspicion of DWI. Conflicting testimony was presented at trial

regarding the consent to search, but the Court of appeal affirmed the Trial Court's determination that the consent was valid, and the search revealed: 36 bags of suspected crack cocaine, six baggies of suspected marijuana, six suspected marijuana blunts, over \$1,000.00 in cash, and two handguns.

The defendant was arrested and charged with possession of cocaine and marijuana with intent to distribute, and two counts of conspiracy to commit possession of cocaine and marijuana with intent to distribute. Defendant was convicted on all counts after jury trial, and appealed.

On Appeal, the Second Circuit affirmed the possession of cocaine with intent to distribute, based on the manner of packaging and the volume exceeding reasonable personal consumption. The Court found that the issue of the marijuana was "a much closer question," but found intent to distribute based on the fact that the baggies were in a fanny pack which would be easy to conceal and to discard and the absence of smoking paraphernalia in the vehicle, among other reasons.

The Second Circuit did reverse the convictions for conspiracy, due to the State's lack of evidence on the issue of cooperation between two or more people. The State failed to question the girlfriend or daughter about their possible role in distributing the drugs, and no evidence was presented to show that they handled the drugs or hid the drugs when the vehicle was searched. The only effort by the State to "tie in" the conspiracy element came in closing argument, where the State argued that "someone" packaged the drugs for sale and that the defendant and "someone else" would distribute the drugs. Accordingly, the Court ruled that the evidence was insufficient to support the jury's conclusion that a conspiracy existed. There was no evidence offered of specific acts to show a joint venture or enterprise between the defendant and his passengers, even when viewed in the light most favorable to the prosecution.

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