



LGIT'S ROLL CALL REPORTER **OCTOBER 2005**

MARYLAND'S INTERMEDIATE APPELLATE COURT EXAMINES "CONSTRUCTIVE POSSESSION" OF NARCOTICS

**QUESTION: WHEN CAN A PERSON BE DEEMED IN POSSESSION OF NARCOTICS
THAT ARE NOT LOCATED ON HIS PERSON?**

**ANSWER: WHEN THE DIRECT OR CIRCUMSTANTIAL EVIDENCE ESTABLISHES
THAT THE PERSON EXERCISED "DOMINION OR CONTROL" OVER THE
NARCOTICS, NAMELY, THAT HE EXERCISED SOME RESTRAINING OR DIRECTING
INFLUENCE OVER THEM.**

**CASE: *LaRocca v. State*, No. 2628, Sept. Term 2003
Court of Special Appeals of Maryland, September 29, 2005**

In *LaRocca v. State*, the Maryland Court of Special Appeals examined the issue of what constitutes "constructive possession" of narcotics. Often in narcotics possession cases, the suspect will be found to have been in actual possession of the narcotics. In other words, the narcotics were found on the suspect's person. In contrast to actual possession, "constructive possession" occurs where the suspect does not have narcotics on his person; rather, the circumstances establish that he exercised control over the narcotics, and that he was aware of both the presence and the illegal nature of the narcotics.

The facts of the *LaRocca* case disclosed that in January 2003, James Bradley LaRocca and two of his friends, David Hinkle and Jeremy Miner, were riding through Hagerstown in a Honda Civic registered to Hinkle's mother. Hinkle was driving, LaRocca was in the front passenger seat, and Miner was in the back seat. At LaRocca's request, Hinkle drove to a residence on North Mulberry Street. While en route, Miner produced a marijuana cigarette, lit it, smoked it, and passed it to Hinkle. When they arrived at the residence, Hinkle double-parked in front of the residence and LaRocca went into the house. Coincidentally, two police officers from a street level narcotics unit, dressed in plainclothes, were near the residence, preparing to conduct an undercover "trash pull".

LaRocca exited the house and returned to the car. When LaRocca opened the car door, one of the undercover officers smelled burning marijuana in the vicinity of the Honda. However, the officer could not see inside the vehicle because the windows were tinted and the rear window was covered with snow. The rear license plate also was covered with snow. After the Honda drove off, the plainclothes officers requested a uniformed officer, Officer Lehman,

to follow the car in his marked cruiser, which he did. The undercover officers then followed Officer Lehman in their unmarked car.

Hinkle and Miner continued to smoke marijuana in the Honda. While stopped at a red light, Hinkle noticed police emergency lights in his rear view mirror. Officer Lehman made the traffic stop, and approached the driver's side of the Honda. The undercover officers approached the passenger side, and asked LaRocca and Miner to roll down their windows. When the windows were rolled down, both officers smelled the odor of burnt marijuana coming from inside the car. Hinkle was ordered out of the car, and Sergeant Murray, one of the plainclothes officers, brought him to the rear of the car. When he asked Hinkle if there were any drugs on his person or in the Honda, Hinkle said no. He then consented to a search of his person, which revealed rolling papers and currency. Sergeant Murray next ordered Miner to exit. Miner also consented to be searched, and a small baggie of marijuana was found. Miner was immediately placed under arrest for possession of marijuana.

Finally, LaRocca was ordered to exit the Honda. He also consented to a search of his person, which yielded no drugs or drug paraphernalia. Officer Webster, the other plainclothes officer, then searched the Honda. He found a white plastic bag under the front passenger seat. The bag was opaque, and therefore had to be opened to see what was inside. The bag contained five individually wrapped baggies of marijuana. Officer Webster testified that the bag was located “[j]ust under the rim of the seat, if you just reach your hand under, I guess right where normally the adjustments are, it’s right under there in the front portion of the seat.” In other words, the bag was found in the area immediately behind and next to where LaRocca’s legs had been when he was seated. None of the occupants claimed ownership of the bag of marijuana at the time of the stop.

LaRocca and Hinkle were arrested and charged with possession of marijuana with intent to distribute and simple possession. LaRocca was tried in the Circuit Court for Washington County, and found guilty of both charges. He received a sentence of five years’ imprisonment, with all but two years suspended.

On appeal, the Court of Special Appeals affirmed LaRocca’s conviction for possession with intent to distribute. Focusing on the “possession” element of the crime, the Court observed that the word “possess”, as defined in the Criminal Law Article, means “to exercise actual or constructive dominion or control over a thing by one or more persons.” To support a conviction for a possessory offense, the “evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited drug in the sense contemplated by the statute, *i.e.*, that [the accused] exercised some restraining or directing influence over it.” *State v. Leach* (1983) (quoting *Garrison v. State* (1974)). In other words, to be found guilty, the accused must know of both the presence and the illicit nature of the substance. This knowledge may be proved by direct or circumstantial evidence.

The Court isolated the following factors as being relevant to determining the issue of “constructive” possession:

- 1) proximity between the defendant and the contraband;
- 2) the fact that the contraband was within view or otherwise within the knowledge of the defendant;
- 3) the defendant had ownership or some possessory right in the premises or the automobile in which the contraband is found; or
- 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

In the *LaRocca* case, the following facts convinced the Court of LaRocca's guilt: 1) his proximity to the bag of marijuana; 2) his position in the car; and 3) the mutual use of marijuana and the marijuana-focused purpose of the trip on the night in question. All of these factors permitted an inference that LaRocca knew of the marijuana's presence in the car. And, for all of these reasons, the Court concluded that the evidence adduced at trial was sufficient to support a rational finding, beyond a reasonable doubt, that on the night in question LaRocca was in possession of marijuana with the intent to distribute it.

NOTE: In the *LaRocca* opinion, the Court observed that one of the common threads running through the cases holding evidence sufficient to prove joint constructive possession is the fact that the contraband was within the view *or otherwise within the knowledge of the defendant*. By contrast, one of the factors running through cases holding evidence of joint constructive possession insufficient to convict is the fact that the contraband was secreted away in a hidden place *not shown to be within the defendant's gaze or knowledge or in any way under his control*. Additionally, the cases establish that a defendant's close proximity to narcotics, standing alone, and without additional evidence showing possession, is not sufficient to arrest, much less convict.

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