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Possession and Control of Drugs in Pennsylvania: What Is It?

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INTRODUCTION

The rapid growth of drug prosecutions at the county level of the judicial system is now filtering upward to the Commonwealth's appellate courts. It was not until January 1971, that the Pennsylvania Supreme Court first considered the section of the Drug, Device, and Cosmetic Act[1] which prohibits the possession or control of dangerous or narcotic drugs.[2] Following this decision the superior court rendered two opinions which exclusively relied on the rationale developed by the supreme court. Prior to these decisions there was no judicial guidance as to what quantum of evidence was sufficient to convict for possession of drugs. The collective result of these rulings has been the emergence of a limited definition and interpretation of the Act.

These decisions have only partially defined the boundaries of what is possession or control of dangerous drugs. Many problems remain unconsidered and unanswered. The purpose of this comment is to analyze these problems, and to suggest possible interpretations of the Act that will resolve them. A four step analysis is used to define and resolve these unanswered questions. First, an examination is made of the Pennsylvania decisions alluded to above. From these decisions, a tentative definition of the term possession is constructed and compared to definitions devised in other jurisdictions. Then, the specific problems to be considered are listed; examples are provided for clarification and illustration.

At this point the direction of the inquiry turns to other jurisdictions and their resolution of these questions. A detailed review of the reasoning used in these jurisdictions is undertaken; their reasoning is compared and contrasted to the developing Pennsylvania doctrine. Finally, an examination is made of how courts in other jurisdictions have resolved the issue of guilt in common factual settings under which drugs

1. PA. STAT. ANN. tit. 35, § 780 *et seq.* (1961) [hereinafter cited as Act].
2. *Id.* § 780-4: "The following acts . . . are hereby prohibited: (q) The possession, control, dealing in, dispensing, selling, delivery, distribution, prescription, trafficking in, or giving of, any dangerous or narcotic drug . . . ." [All further references to the Act will refer exclusively to the "possession and control" phrase in subsection (q) unless otherwise noted.]

are found so that Pennsylvania courts and attorneys will have some guidance when they are faced with similar circumstances.

The Emerging Pennsylvania Concept

In *Commonwealth v. Tirpak*,[3] the Pennsylvania Supreme Court first considered what circumstances gave rise to an inference of possession or control of dangerous drugs. In *Tirpak*, the court reversed, without dissent, a superior court decision[4] which held that an inference of possession or control of marijuana was reasonable when a jar of the drug was found within eight feet of the four appellants; when there were still warm marijuana cigarettes in an ashtray; and when the owner of the house pled guilty to possession. The court held the mere fact the appellants had the opportunity to commit or join in possession or control of the marijuana was insufficient to prove them guilty of possession or control where no marijuana was found on their person.

Citing *Tirpak* as its sole authority, the superior court reversed two marijuana possession convictions. In *Commonwealth v. La Rosa*,[5] no marijuana was found on the appellant's person, but several packets of the drug were discovered in a cabin occupied by the appellant and eight others. Also, a packet containing marijuana residue was found on the front porch of the cabin with the name Joe written on it. The appellant's name was Joe. In *Commonwealth v. Schuloff*,[6] an apartment rented by the appellant as a co-lessee was searched at night pursuant to a warrant, while Schuloff and three others were asleep in their bedrooms. Marijuana was found hidden in a couch in the living room, but no one admitted to owning it.

An examination of *Tirpak* and the two superior court decisions indicates what general circumstances will not support a possession conviction. Showing that a person is present when drugs are being used or where they are being stored, without more, cannot sustain a possession conviction. This is especially true where, as in the three cases cited, the accused does not have exclusive access to, or is not in sole occupancy of, the place where the crime is being committed.

In *Commonwealth v. Dasch*,[7] the court reversed a possession con-

3. 441 Pa. 534, 272 A.2d 476 (1971).
4. Commonwealth v. Tirpak, 216 Pa. Super. 310, 263 A.2d 917 (1970).
5. 218 Pa. Super. 203, 275 A.2d 693 (1971).
6. 218 Pa. Super. 209, 275 A.2d 835 (1971).
7. 218 Pa. Super. 43, 269 A.2d 359 (1970).

viction where scraps[8] of marijuana were found mixed with debris on the floor of a car driven by the appellant and owned by his mother. In reversing the conviction the court emphasized two points: the commonwealth bore the burden of proof to show that the appellant *knew* there was marijuana in the car; and that it was difficult to conceive of anyone possessing or controlling the marijuana scraps swept from the car as there was no evidence that the appellant *knew* of its presence. Any number of intervening circumstances could have been responsible for the presence of the marijuana scraps in the car.[9] An inference of possession, control and knowledge from these facts could only be based on conjecture and suspicion, and not on evidence sufficient to prove guilt beyond a reasonable doubt.[10]

A possession test based on the four Pennsylvania cases outlined above may be stated as follows: The proximity to drugs, the presence on property where drugs are located, or the association with people who do control drugs or the property on which they are found is not sufficient, absent other circumstances, to support a finding of possession.[11] To state the test more succinctly, the mere presence at the scene of a crime (a violation of the Act), without more, is not sufficient to justify a finding of guilt.[12]

The Unanswered Questions

Conspicuously absent in Pennsylvania case law is a clear statement by the courts as to what are the elements of the crime of possession or control of drugs. Because these elements have not been listed the courts have not defined them, nor have they considered what factual situations would support an inference as to the existence of one or more of these elements.

Another question not ruled upon by the Pennsylvania appellate courts is whether traces of a drug would be sufficient evidence to convict for possession. Would the existence of an unusable amount of marijuana in a defendant's pocket, a burnt residue in a pipe, or a chemical trace of heroin in a syringe be sufficient evidence to support a possession conviction?

8. *See* note 35.
9. 218 Pa. Super. 43, 48, 269 A.2d 359, 362.
10. *Id.*
11. *See* Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).
12. Commonwealth v. Reece, 437 Pa. 422, 427, 263 A.2d 463, 466 (1970).

Nor, have the courts considered whether the quantum of proof necessary to prove possession would change if drugs were discovered in an automobile, as opposed to a dwelling, as was the case in *Tirpak*, *Schuloff*, and *La Rosa*. To phrase the issue more broadly: what other circumstances would be necessary to support a finding of possession or control?

Other problems not yet considered by the Pennsylvania courts would include the case of a conspirator who is to be tried for the possession of drugs which were found on the person of a co-conspirator; the criminal liability of a third party who brought a potential buyer and seller of drugs together, but who was not otherwise involved in the transaction. Similarly, what if the accused only momentarily possessed drugs as he would if he were to take a puff from a pipe of marijuana being passed among a group of people, or what if the accused is the addressee of an intercepted package of drugs? Under what circumstances may the people in these situations be convicted for possession or control of drugs?

Suggested Solutions

While the Pennsylvania courts have not specifically stated what constitutes possession and control, they have apparently adopted the test used in the federal courts[13] and a majority of the state courts.[14] This test is set forth in *People v. Groom*[15] and catalogs the elements in a three point list: (1) it must be shown that the accused exercised dominion and control over the drug; (2) that he had knowledge of its physical presence; and (3) that he had knowledge[16] of its narcotic nature.

Control

The first element of the test, control, presents no difficulties since, unlike the California[17] and federal[18] statutes, the Pennsylvania legis-

13. Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962). The court did not list the elements, but it did specifically refer to "control and knowledge," those elements suggested in the text of this paper.

14. *See* Annot., 91 A.L.R.2d 810, 821 (1963) for an extensive listing of those states that require the elements suggested in the text.

15. 60 Cal. 2d 694, 696, 388 P.2d 359, 361 (1964).

16. Annot., 91 A.L.R.2d 810, 826 (1963) *cites Boric v. Florida*, 79 So. 2d 775 (Fla. 1955) as being representative of a state court decision that does not require the scienter of knowledge. As evidence of the rapidly changing state of the law as to drug violations it should be noted this decision was reversed in *Frank v. Florida*, 199 So. 2d 117 (Fla. 1967).

17. Cal. Health and Safety Code § 11530 (West 1971).

lature directly incorporated this element into the language of the Act. Control is a mandated part of the Pennsylvania possession concept.

Knowledge

Difficulty arises as to the element of knowledge as defined in parts two and three of the test. Courts,[19] other than Pennsylvania, have held that an accused cannot be convicted for possession unless a showing is made that he knew of the drug's presence and of its narcotic nature. Conversely, the court has not stated that proof of possession, without a showing of knowledge, is sufficient to support a conviction.

The superior court has ruled both ways on this issue. The court in *Dasch* and *Commonwealth v. Yaple*[20] (both decided on the same day) directly contradicted itself. In *Yaple* the court stated that knowledge was not an essential element of the offense,[21] yet in *Dasch* the court stated knowledge was an ingredient of the offense.[22]

As noted above, the majority of states have ruled that knowledge is an element of the crime of possession. This is the better rule as the rationale behind malum prohibitum crimes (those crimes that do not require proof of knowledge or intent to obtain a conviction) is not present in drug possession cases. The penalties for violating the Act, unlike those provided for malum prohibitum violations, are not relatively small.[23] Long jail sentences and heavy fines are expressly provided for in the Act, especially for repeated violations. A conviction for a violation of the Act is a felony, and unlike a conviction for a violation of a malum prohibitum statute, a felony conviction does grave damage to an offender's reputation.[24] A felon has difficulty in getting a job, he cannot own a gun, he cannot leave the country without registering; nor may he serve on juries, run for office, or vote.[25] The Act, unlike a malum prohibitum statute, is not a mere regulatory

18. 21 U.S.C. § 176a (1970); *Hernandez v. United States*, 300 F.2d 114, 117 (9th Cir. 1962) states that, "this interpretation of the statute equating 'possession with . . . control . . . has been adopted by other circuits. . . ."
19. Annot., 91 A.L.R.2d 810, 821 (1963).
20. 217 Pa. Super. 232, 273 A.2d 346 (1970).
21. *Id.* at 242-43, 273 A.2d at 351.
22. The court explained its holding in *Yaple* by stating that knowledge of the drug's narcotic nature was not an element of the offense, *Commonwealth v. Bready*, 220 Pa. Super. 157, 160 n.2, 286 A.2d 654, 656 n.2 (1971). Knowledge of the drug's presence, as required by Dasch, apparently is an element of the offense.
23. Morissette v. United States, 342 U.S. 246, 256 (1952).
24. Morissette v. United States, 242 U.S. 246 (1952).
25. *See generally* Note, *The Legal Status of Convicts During and After Incarceration*, 37 VA. L. REV. 105 (1951).

enactment;[26] the offense is not a violation of an affirmative duty of care[27] as is provided for in the typical malum prohibitum statute.

It is difficult to divide malum in se acts (acts wrong in themselves; common law offenses such as murder, larceny, etc.) from malum prohibitum acts;[28] the courts should not improvise presumptions of knowledge or intent which conflict with the overriding presumption of innocence.[29] Even the legislative power to facilitate convictions by substituting presumptions for proof is not without limit.[30] The differences between the Act and the typical malum prohibitum regulation are vast. The inference of knowledge as to the latter is not justified as to the former.

Having discussed the elements of the crime of possession, a general definition of the term may be stated as follows: possession is to have something in one's power; actual possession exists when the drugs are in the immediate possession or control of the party while constructive possession exists when there is no actual dominion over the drugs, but where there is an intent and capability to maintain control and dominion.[31] Proof of possession may be shown by the use of either direct or circumstantial evidence;[32] proof of exclusive control is strong circumstantial evidence tending to show knowledge of the presence and nature of any drugs found.[33]

Quantity

May possession be found when the amount of the drug involved is not a usable amount, but rather is only a minute quantity or chemical trace? No case on point has been decided by the Pennsylvania appellate courts.[34] However, the decisions in *Dasch* and *La Rosa* indicate that a usable[35] amount is required to sustain a conviction.

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26. Clem's Cafe Liquor License Case, 425 Pa. 94, 100, 227 A.2d 491, 494 (1967).
27. Morissette v. United States, 342 U.S. 246, 255-56 (1952).
28. Clem's Cafe Liquor License Case, 425 Pa. 94, 100, 227 A.2d 491, 494 (1967).
29. Morissette v. United States, 342 U.S. 246, 275 (1952).
30. *Id.*
31. Rodella v. United States, 286 F.2d 306, 311-12 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961); People v. Mermuys, 2 Cal. App. 3d 1083, 1089, 82 Cal. Rptr. 902, 906 (1969).
32. *Id.*
33. Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962) *citing* Evans v. United States, 257 F.2d 121 (9th Cir.), *cert. denied*, 358 U.S. 866 (1958).
34. Commonwealth v. Taylor, 7 Adams L.J. 24 (1965) wherein the court held that any quantity was sufficient to support a conviction.
35. The courts have not empirically defined what quantity of a drug would qualify as a trace, scrap, residue, or an unusable amount. These terms are used interchangeably in

In *Dasch* the court stated it was difficult to conceive of anyone having possession of scraps of marijuana found on the floor of the car, and that it was even more difficult to conceive of anyone controlling them. It is submitted that this holding, and the decision in *La Rosa*, may be used to support the proposition that one may not be convicted for possession of drugs where the amount involved is too small to be used or sold.

In *La Rosa* two separate units of drugs were involved; those found in the cabin with eight other persons present, and the residue of marijuana found in an envelope with the appellant's name on it. As to the usable quantity of drugs in the cabin, *Tirpak* obviously controlled. *Tirpak* did not so clearly control as to the residue in the envelope. It is submitted the court did not convict the appellant for possessing the marijuana in the envelope because the quantity was (as in *Dasch*) an unusable amount; a quantity too small to be used or sold.

Support for this contention is found in other jurisdictions.[36] These courts, as well as the Pennsylvania courts, have stated the principle reason for prohibiting the possession of drugs is that their use is offensive to society because of the deleterious effect they have on the user.[37] Therefore, if the amount of drugs involved is so small that it cannot be used or sold, it cannot cause the harm which gives society the right to penalize its sale or possession.[38] Common sense dictates that an unusable quantity of drugs is not what the legislature intended to prohibit when it outlawed the possession of drugs because of their danger to the user or to society.[39] Accordingly, it is submitted that no possession conviction should be permitted if the amount of the drug involved is not usable.

Middlemen

May a person who brings a willing buyer and seller of drugs together be convicted for possession? The federal courts have held that a casual

this paper and refer to any quantity of a drug that would be insufficient to cause any effect on the user. This is the view adopted by the California courts.

36. State v. Moreno, 92 Ariz. 116, 374 P.2d 872 (1962); People v. Leal, 64 Cal. 2d 504, 413 P.2d 665 (1966); Michens v. People, 148 Colo. 1237, 365 P.2d 679 (1961); Edelin v. United States, 227 A.2d 395 (D.C. Ct. App. 1967); People v. Pippen, 16 App. Div. 2d 635, 227 N.Y.S.2d 1964 (1962); Pelham v. State, 16 Tex. Crim. App. 377, 298 S.W.2d 171 (1957). *See generally* Annot., 91 A.L.R.2d 810, 829 (1963).

37. Commonwealth v. Garrick, 210 Pa. Super. 124, 232 A.2d 8 (1967).

38. People v. Leal, 64 Cal. 2d 504, 511, 413 P.2d 665, 670 (1966).

39. *Id.*

facilitator of a sale who knows that a given principal possesses and trades in narcotics, but who lacks a working relationship with the principal that would enable him to assure delivery, may not be said to have possession of any drugs sold.[40] The situation exemplified by this rule is when X, an undercover narcotics agent, asks Y if he can sell him some drugs. Y replies that he does not sell drugs but that Z might be able to accommodate him. Y introduces X to Z and waits until the transaction is over. Y does not receive any money from Z, nor does he promise X that Z will be able or willing to sell him drugs.[41]

Lucero v. United States[42] illustrates the functioning of this rule. In *Lucero* the appellant's guilt as to the transaction which was the subject of the first count of the indictment was affirmed because the appellant was the moving party in the transaction. He vouched for the quality of the heroin, set the price, and assured delivery (he did not make the actual delivery). However, as to the second transaction, the court reversed the appellant's conviction because the evidence only showed that he was in the vicinity of the sale and that he drove the seller away after the transaction.

Conspiracy

Possession by a co-conspirator is not, by itself, sufficient to sustain a possession conviction as to the other conspirators.[43] Actual or constructive possession must be shown as to each conspirator.[44] If a defendant-conspirator could be convicted of possession of drugs which were in the hands of a co-conspirator, the statutory term possession would include possession by persons over whom the defendant had no control; or of whose existence he may have been totally unaware; or of whose identity he may not have known.[45] If such a construction of the term possession were permitted, the burden upon the defendant would be difficult if not impossible to discharge.[46]

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40. United States v. Jones, 308 F.2d 26, 30 (2d Cir. 1962); similarly, the middleman may not be convicted for sale of drugs. See United States v. Moses, 220 F.2d 166 (3d Cir. 1955); United States v. Prince, 264 F.2d 850 (3d Cir. 1959).
41. United States v. Camarillo, 431 F.2d 616 (9th Cir. 1970) is the prototype for this illustration.
42. 311 F.2d 457 (10th Cir. 1962), *cert. denied*, 372 U.S. 936 (1964).
43. Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).
44. *Id.* at 123.
45. *Id.* at 122.
46. *Id.*

Momentary Possession

In *Yaple* the superior court asserted that the duration of possession was immaterial citing Maryland and Texas decisions as authority. Other jurisdictions do not follow this formulation of the law. In *Eckroth v. Florida*,[47] the court held that taking a puff from a pipe filled with marijuana and passing it to another was "a mere 'passing control, fleeting and shadowy in its nature,' "[48] and could not sustain a possession conviction.

The court reached this conclusion by noting that if a flask of liquor were substituted for the passing pipe, a conviction for the unlawful possession of liquor could not be obtained. Pennsylvania has adopted this same rule of law as to the possession of a bottle of liquor,[49] and it is therefore submitted that the Pennsylvania courts should rule that a possession conviction cannot be obtained when there is a momentary possession of a pipe or cigarette containing marijuana.[50]

This analogy is best suited to the passing of a pipe or cigarette because a drug user does not share a syringe or bottle of pills in the same way as he does a bottle of liquor or pipe of marijuana. A further point in favor of this analogy is the generally accepted fact that the unlawful possession of marijuana is more equivalent to the abuse of alcohol than it is to the use of hard or addicting drugs.[51]

Receipt of Mailed Drugs

There exists little authority to guide the courts in determining what circumstances would be sufficient to convict the addressee of a package containing drugs when they are shipped and intercepted in the mail. A recent Illinois decision held that an addressee who simply followed up a post office notification to claim a package (addressed to another, but mailed in care of the addressee) could not be convicted for possession.[52]

47. 227 So. 2d 313 (Fla. 1969).
48. *Id.* at 316.
49. Commonwealth v. Benson, 105 Pa. Super. 123, 160 A. 243 (1932).
50. Some federal courts have adopted the view that possession does not include the momentary grasping of drugs. *See*, Hernandez v. United States, 300 F.2d 114, 118 n.7 (9th Cir. 1962).
51. In *People v. McCabe*, 49 Ill. 2d 338, 275 N.E.2d 407 (1971), the Illinois Supreme Court stated that the consequences of marijuana abuse were not comparable to hard drug use. Accordingly, the court held that a statute which required the same penalty for the sale of marijuana as for the sale of hard drugs was in violation of the equal protection clause of the Constitution.
52. People v. Ackerman, 274 N.E.2d 125 (Appellate Court of Ill., 3d Dist. 1971).

In *Commonwealth v. Chester-Standard*,[53] the Allegheny County Court of Common Pleas, sitting en banc, granted the defendant's motion in arrest of judgment where his conviction was based solely on a package of marijuana which was removed from the mail before the defendant received it. The court, citing *La Rosa* as its sole authority, stated the motion was granted "for the reason that the Commonwealth had failed to prove actual possession on the part of the defendant."[54]

Using these decisions as a guide it appears that certain criteria must be met before a defendant may be convicted for possession of mailed drugs. First, it must be proven the accused actually took physical possession of the package; it must then be shown that he opened the package and gained knowledge of the presence and narcotic nature of the drugs; and that he then exercised sufficient control over the drugs to indicate an intent to retain them. At this point, the elements required to prove possession would be present, and a conviction could be obtained.

Projections from Tirpak, Schuloff, Dasch, and La Rosa

As the Pennsylvania appellate courts have not, as yet, considered any possession cases in light of the rationale developed in *Tirpak, Schuloff, Dasch*, and *La Rosa* there exists little guidance as to what circumstances will support a finding of possession. To aid attorneys and the courts in determining what common factual settings in which drugs may be found will be sufficient to sustain a possession conviction, a summary and analysis of decisions from other jurisdictions is outlined below. In considering these decisions a distinction is made between cases involving automobiles and dwellings. This is done, not because the principles change with geography, but because the split facilitates the presentation.

As discussed above, an essential element of the offense is the knowing possession of drugs, and as was stated in *Tirpak* proof of possession cannot be based on guilt by association, suspicion, or conjecture. In each of the following situations the court reversed the appellant's conviction because proof of knowing possession was not shown. The courts held

53. No. 5340 (C.P. Allegheny County, July 2, 1971). *See also* Commonwealth v. McCray, No. 3995 (C.P. Allegheny County, 1971) where a motion in arrest of judgment was granted discharging defendant from a charge of possession of marijuana. Although a packet of marijuana was found in defendant's apartment, the evidence failed to show he was aware the package had been delivered or that he had the opportunity to have possession or control of the marijuana.

54. *Id.* at 2.

that the convictions were based on inference, suspicion, and conjecture —not proof beyond a reasonable doubt.

The fact that a suspect is a passenger in a car which has narcotics concealed in it, cannot by itself, support a finding of possession. Courts have refused to convict a passenger when drugs were concealed under the back seat,[55] in the spare tire,[56] in the camper portion of a minibus,[57] or in a bag lying on the front seat floor.[58] Nor is the fact the passenger is under the influence of drugs sufficient evidence to convict him for the possession of drugs found in the car.[59] Similarly, the fact a suspect is sitting alone in another's parked car in which narcotics are concealed is insufficient evidence to support a guilty verdict.[60]

Nor may it be inferred that the driver or owner of a car automatically has knowledge of any drugs present in the car.[61] In *People v. Van Soyc*,[62] several marijuana cigarettes were discovered intermingled with regular cigarettes in a cigarette package which was on the dashboard of Van Soyc's car. Also, two loose marijuana cigarettes were found near the cigarette pack. Van Soyc and his two companions denied ownership of the drugs. The court, in reversing sentence, held that Van Soyc's presence at the scene of the crime was not sufficient evidence to support an inference of guilty knowledge.

Courts have been reluctant to find possession and control of drugs in circumstances where more than mere presence in a car in which drugs are concealed is shown. In *Davis v. United States*,[63] drugs were discovered hidden under the cool cushion of a police car several hours after Davis had been detained in it. The conviction was reversed as there was no evidence that the drugs had not been concealed there either before or after Davis' occupancy of the car. In *People v. Foster*,[64] a packet of heroin was thrown by the passenger sitting by the right front car window, however, before the car was brought to a stop the passengers had all switched positions and the police could not determine who was the original passenger by the window. All three suspects denied throwing the packet. In both these cases, the courts stated there was no

55. United States v. Bonds, 435 F.2d 164 (9th Cir. 1970); Bettis v. United States, 408 F.2d 563 (9th Cir. 1969).
56. Gonzales v. United States, 301 F.2d 31 (9th Cir. 1962).
57. Montoya v. United States, 402 F.2d 847 (5th Cir. 1968), cited with approval in Commonwealth v. Whittner, 444 Pa. 556, 281 A.2d 870 (1971).
58. People v. Williams, 5 Cal. 3d 211, 485 P.2d 1146 (1971).
59. People v. Boddie, 274 Cal. App. 2d 408, 80 Cal. Rptr. 83 (1969).
60. People v. Williams, 5 Cal. 3d 211, 485 P.2d 1146 (1971).
61. *See* Commonwealth v. Dasch, 218 Pa. Super. 43, 269 A.2d 359 (1970).
62. 269 Cal. App. 2d 370, 75 Cal. Rptr. 490 (1969).
63. 382 F.2d 221 (9th Cir. 1967).
64. 115 Cal. App. 2d 866, 253 P.2d 50 (1953).

showing of possession; they stated that to sustain the convictions would be permitting guilt to be based on surmise and conjecture.

To establish possession by an occupant of a car it must be proven that his presence in the car had some relationship to the presence of the drugs.[65] That is, it must be shown, by either direct or circumstantial evidence, he knew of the presence of the drugs and that he exercised control over them. This showing may be made by some conduct, utterance, relationship between the parties, attitude or circumstance; but the evidence must be very clear to satisfy the test of guilt beyond a reasonable doubt.[66]

The above are examples of the *Tirpak* rationale being applied to factual settings not yet encountered by the Pennsylvania appellate courts. These decisions are presented as a guide to aid in determining what facts will support a finding of possession when drugs are discovered in similar settings in Pennsylvania.

Tirpak, La Rosa, and *Schuloff* concern only a few of the many combinations of circumstances under which drugs may be found in dwellings, but these cases illustrate the features common to most possession cases where the accused is not convicted. These features are that the accused did not have exclusive access to drugs that were openly present, nor did he have exclusive access to the places where drugs were concealed. The Pennsylvania courts in reversing the appellants' convictions noted that any one of several people could have possessed the drugs, *i.e.*, there was no evidence to prove beyond a reasonable doubt who actually did possess them. The courts in the cases listed below used this same rationale; their decisions should offer guidance to the Pennsylvania courts when they consider analogous circumstances.

When the accused has exclusive control or access to the place where drugs are discovered, a strong inference supporting a finding of possession is raised.[67] For example, when drugs are found in the accused's unshared bedroom,[68] or in a dresser drawer used exclusively by one of two roommates,[69] a conviction for possession may be obtained.

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65. Bettis v. United States, 408 F.2d 563, 568 (9th Cir. 1968). *People v. Tharp,* 272 Cal. App. 2d 268, 78 Cal. Rptr. 412 (1969) illustrates this principle. Marijuana was discovered in a suitcase which contained a razor, after-shave lotion and men's clothing. The appellant's conviction was affirmed as he was the only male passenger in the car.

66. Bettis v. United States, 408 F.2d 563, 568 (9th Cir. 1969). In Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962) such a showing was made as to the driver of the car as he rented and operated it.

67. Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).

68. People v. Bustamante, 16 Cal. App. 3d 213, 94 Cal. Rptr. 64 (1971).

69. Spataro v. State, 179 So. 2d 873 (Fla. 1965).

Where, however, the accused is not in exclusive possession of the premises it may not be inferred that he had knowledge of the presence of drugs and control over them.[70] Thus, when a small quantity of marijuana is found in a nightstand in a married couple's bedroom,[71] or when a small quantity of marijuana is discovered within the reach of both the lessee of an apartment and his guest,[72] a conviction cannot stand. In these circumstances the trier of fact could only speculate as to who had knowing possession and control of the drugs.

Similarly, a possession conviction has not been permitted when marijuana was found between the mattress and box-spring of one of two beds in a shared room,[73] when drugs were found in a motel room rented by one person but shared by two,[74] when marijuana was found in a closet containing both male and female clothes[75] (co-defendant had been living there for three months), or when drugs were discovered while the appellant was in an acquaintance's apartment where he had spent the night,[76] or had spent several days.[77]

The courts, alluding to insufficient evidence, have been reluctant to find possession in circumstances from which a stronger inference of possession could be raised. In *People v. Antista*[78] the police, in the appellant's absence, raided his apartment and found a visitor in the apartment using marijuana. They also discovered marijuana concealed in storage places which the appellant claimed he never used. The evidence indicated that the appellant customarily left his key under his doormat so that friends could enter the apartment in his absence. The court held that the evidence was insufficient to show knowledge and hence possession of the marijuana.

In *People v. Evans*[79] the police discovered narcotics stuck under a bar with chewing gum at the place where the appellant had been sit-

70. Evans v. United States, 257 F.2d 121, 128 (9th Cir. 1958); *see also* Commonwealth v. Davis, 444 Pa. 11, 280 A.2d 119 (1971).

71. Delgado v. United States, 327 F.2d 641 (9th Cir. 1964). The courts have no difficulty in finding joint possession when large quantities of marijuana are found. In *People v. Harrington*, 2 Cal. 3d 991, 471 P.2d 961 (1970) the appellants' (husband and wife) conviction was affirmed when two pounds of marijuana was found in their apartment.

72. Cass v. United States, 361 F.2d 409 (9th Cir. 1966). In discussing joint control, the court at page 411 stated that it was ridiculous to conceive of two or more people having joint control over the small quantity of marijuana involved (1/5 ounce plus one marijuana cigarette). The court stated it would be pure speculation as to whether the defendant singly or jointly possessed the narcotics.

73. Frank v. State, 199 So. 2d 117 (Fla. 1967).

74. Kirtley v. State, 245 So. 2d 282 (Fla. 1971).

75. People v. Monson, 255 Cal. App. 2d 689, 63 Cal. Rptr. 409 (1967).

76. People v. Tabizan, 166 Cal. App. 2d 271, 332 P.2d 697 (1958).

77. Torres v. State, 253 So. 2d 451 (Fla. 1971).

78. 129 Cal. App. 2d 47, 276 P.2d 177 (1954).

79. 72 Ill. App. 2d 146, 218 N.E.2d 781 (1966).

ting when they entered. As there was no evidence to show that the appellant had placed the drugs under the bar the court held the evidence to be insufficient to prove constructive possession.

In *Williams v. United States*,[80] the appellant was overheard discussing entering into a future sale of marijuana to a third party. Marijuana was subsequently discovered in a trash can near the cafe where the conversation took place. His conviction was reversed because all that the evidence showed was a willingness to sell in the future, and this fell short of proving present possession.[81]

As may be seen in the above examples the courts required clear and convincing proof as to who possessed the marijuana, especially if the quantity involved was small. The courts were reluctant to convict when the accused did not have exclusive possession of the marijuana, nor were they anxious to find joint possession if the quantity involved was small. It is hoped that these decisions will offer some guidance in determining whether an accused has possession or control of drugs, especially when small amounts of marijuana are involved.

Conclusion

The courts are beginning to realize the concept of possession is a highly ambiguous one;[82] and that no sharp line can be drawn to distinguish those congeries of facts which would or would not constitute sufficient evidence to convict for possession of drugs.[83] Factors which exert some effect on the courts' determination as to whether there is possession are the quantity and nature of drug involved. This can be seen from the holdings in *Tirpak*, *La Rosa*, and *Schuloff* wherein the facts showed that the only drug involved was marijuana for personal use. Similarly, most of the cases cited above involve small quantities of drugs (especially marijuana) for personal use.

More importantly, it is suggested that the court's use of a stringent possession standard in marijuana cases is a tacit recognition of its social acceptability and widespread use, especially among the young. It is a generally accepted fact that marijuana may be found in any social setting where alcohol may be consumed, and as with alcohol, not all people

80. 290 F.2d 451 (9th Cir. 1961).
81. Other cases in which possession was not found: United States v. Ramos, 282 F. Supp. 354 (S.D. N.Y. 1968); People v. Hunt, 4 Cal. 3d 231, 481 P.2d 205 (1971); People v. Jackson, 23 Ill. 2d 360, 178 N.E.2d 320 (1961).
82. Hernandez v. United States, 300 F.2d 114, 119 (9th Cir. 1962).
83. People v. Redrick, 55 Cal. 2d 282, 287, 359 P.2d 255, 259 (1961).

in the group will use it even though it is present. To convict for possession all persons present in a room or in a car where marijuana is discovered would be a gross distortion of reality and of the standard of proof of guilt beyond a reasonable doubt.

This reasoning is valid whether the drug is discovered at a party as in *Tirpak*, a shared apartment as in *Schuloff*, or any other setting noted in this article. Courts no longer will convict a person for possession of drugs merely because he is present where drugs are being used or stored, especially marijuana. Proof of possession may not be based on suspicion or conjecture, but rather it must be shown beyond a reasonable doubt.

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