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Possession of Narcotic Drugs

Possession of Narcotic Drugs—*Ritter v. Commonwealth*

Possession of narcotic drugs, including marijuana, is deemed illegal in Virginia by statute.[1] The concept of possession has been a major controversy in criminal proceedings in Virginia and other states. Generally, legal possession has meant the holding of property in one's own power or command.[2] There may be either an actual physical holding, which consists of the power to control the property plus the intent to control the property,[3] or constructive possession, where there is an absence of actual physical control, but a capacity to control along with the intent to control such property.[4]

Whether constructive possession of marijuana would be sufficient for conviction under the Virginia statute was recently considered in *Ritter v. Commonwealth*.[5] The police obtained a warrant to search Ritter's house for narcotic drugs. After finding no such drugs, they asked Ritter's mother to check the mailbox.[6] In doing so she found a package addressed to her son.

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[1] Ch. 451, §§ 1 (14), (19), [1952] Va. Acts of Assembly 737 (repealed 1970); ch. 86, § 2, [1934] Va. Acts of Assembly 82 (repealed 1970). Possession of narcotics is now made illegal by VA. CODE ANN. § 54-524.101 (c) (Cum. Supp. 1970).

[2] *See* Field Furniture Co. v. Community Loan Co., 257 Ky. 825, 79 S.W.2d 211 (1934); 73 C.J.S. *Property* § 14(c) (1951); 72 C.J.S. *Possession* (1951); 1 C.J.S. *Actual* (1936); R. BROWN, THE LAW OF PERSONAL PROPERTY 19-22 (2d ed. 1936).

[3] *See* People v. Rumley, 100 Cal. App. 2d 6, 222 P.2d 913 (1950); People v. Johnston, 73 Cal. App. 2d 488, 166 P.2d 633 (1946); People v. Bassett, 68 Cal. App. 2d 241, 156 P.2d 457 (1945); 73 C.J.S. *Property* § 14(c) (1951); 72 C.J.S. *Possession* (1951); 1 C.J.S. *Actual* (1936); R. Brown, THE LAW OF PERSONAL PROPERTY 19-22 (2d ed. 1936).

[4] *See* Rodella v. United States, 286 F.2d 306, 311 (9th Cir. 1960); 73 C.J.S. *Property* § 14(c) (1951); 72 C.J.S. *Possession* (1951); R. Brown, THE LAW OF PERSONAL PROPERTY 19-22 (2d ed. 1936).

[5] 210 Va. 732, 173 S.E.2d 799 (1970).

[6] The search warrant used by the officers to investigate the Ritter residence did not extend to the mailbox where the marijuana was found. However, this fact was not known by Mrs. Ritter when she was asked by the police to check the mail. Items seized from an area not covered by a search warrant may only be admissable if consent for the search is voluntarily given by the resident. The Supreme Court has stated in Bumper v. North Carolina, 391 U.S. 543 (1968), that such consent will be considered involuntary if the consenting resident submits to the demands of police officers armed with a search warrant which is later proven invalid as to the area searched.

Judge Gordon, in his dissent in *Ritter*, argued that the *Bumper* rule was not correctly applied by the majority to the existing factual situation. Judge Gordon believed that Mrs. Ritter retrieved the mail under the compulsion of what she thought was a valid search warrant. The majority of the court never really addressed itself to the voluntariness of Mrs. Ritter's actions, but rather assumed that she acted voluntarily because she knew the package was in the mailbox and never objected to surrendering it. Judge Gordon states his position as follows:

> Looking in the mailbox was part of an overall search of the premises, ostensibly

She handed it to the police[7] who took it to Ritter and asked him to open it. He did so, and when questioned as to its contents replied that it was "pot." When asked if the package was his, Ritter answered, "It must be mine, it's got my name on it." A search incident to the arrest disclosed a receipt for a money order, approximately equal to the value of marijuana in the package, which had been forwarded to the area from which the package had been mailed. The Virginia Supreme Court of Appeals upheld Ritter's conviction stating that the marijuana was not only in his actual dominion when given to him by the police officers, but also in his constructive possession when it was placed in his mailbox.

Prior to *Ritter,* Virginia held that criminal control of narcotic drugs had to be actual and exclusive while constructive possession created only civil liability.[8] Also, in order to raise the presumption of guilt, the defendant

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made under the authority of a search warrant. And Ritter's mother did not, I believe, look freely and without compulsion. Rather, I must conclude that Ritter's mother looked into the mailbox and handed over the package because she knew that the officers would look and seize what was found, if she did not. This conclusion, that her actions resulted from coercion, appears dictated by Bumper v. North Carolina . . . .

210 Va. at 743, 173 S.E.2d at 807.

[7] Ritter also objected to the seizure of the package from the mailbox on the ground that his mother could not validly consent to the search and seizure of his personal mail. The Supreme Court of Appeals, however, felt that the seizure was justified under the holding of Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), *cert. denied,* 372 U.S. 964, *reh. denied,* 373 U.S. 947 (1963). *Rees* held that the parents of the defendant could validly consent to the search of their home when their son was only an occasional guest in the home and the area searched was under the exclusive control of the parents. *Rees* does lend subtantial support to the *Ritter* holding, although it may be factually distinguished in that Ritter was a high school student living with his parents, while Rees was an adult, making only occasional visits. Ritter considered his parents' home to be his place of residence, whereas Rees did not. The *Ritter* holding seems, therefore, to extend parents' right to consent to searches of areas of a home which they jointly occupy with their children.

Federal courts have lent additional support to this aspect of the *Ritter* decision. *See* Woodard v. United States, 254 F.2d 312 (D.C. Cir.), *cert. denied,* 357 U.S. 930 (1958). *But cf.* Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

However, since the Fourteenth Amendment protects people rather than areas, then it may be questioned how the rights of non-consenting defendant may be waived by the consent of the owner of the premises. *See* Katz v. United States, 389 U.S. 347, 353 (1967); United States v. Poole, 307 F. Supp. 1185, 1189 (E.D. La. 1969).

[8] *See* Henderson v. Commonwealth, 130 Va. 761, 107 S.E. 700 (1921); Tyler v. Commonwealth, 120 Va. 868, 91 S.E. 171 (1917).

> A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. He can only be required to account for the [properties] which he actually and knowingly possessed, as, for example, where they are found upon his person, or in his private apartment. . . . If they are found upon

must have had actual knowledge of the presence and character of the substance in addition to exclusive and actual custody.[9] With the *Ritter* decision, Virginia concurs with the majority of jurisdictions which holds that constructive possession of a narcotic drug is sufficient evidence for conviction, providing that knowledge of the existence of narcotics may be inferred from the defendant's acts, declarations or conduct.[10]

Since the Virginia statute contained a myriad of prohibited acts, the court as a matter of public policy decided to utilize a broad interpretation as to what constitutes possession.[11] This expanded interpretation adheres to the

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premises owned or occupied as well by others as himself, or in a place to which others had equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone. *Id.* at 871, 91 S.E. at 172.

[9] *See* Henderson v. Commonwealth, 130 Va. 761, 107 S.E. 700 (1921). *See generally* Tyler v. Commonwealth, 120 Va. 868, 91 S.E. 171 (1917).

[10] *See* Petley v. United States, 427 F.2d 1101 (9th Cir. 1970) (constructive possession of marijuana in duffel bag, although bag was in the protective custody of the airline); United States v. Cepelis, 426 F.2d 134 (9th Cir. 1970) (one has constructive possession of narcotics if he knows of its presence and has the power to exercise dominion and control over it); United States v. Pardo-Bolland, 348 F.2d 316 (2d Cir. 1965), *cert. denied,* 382 U.S. 944 (1965) (constructive possession shown by holding claim check of baggage containing narcotics); United States v. Landry, 257 F.2d 425 (7th Cir. 1958); State v. Hunt, 91 Ariz. 149, 370 P.2d 642 (1962); Carroll v. State, 90 Ariz. 411, 368 P.2d 649 (1962); People v. Henderson, 121 Cal. App. 2d 816, 264 P.2d 225 (1953); People v. Gallagher, 12 Cal. App. 2d 434, 55 P.2d 889 (1936); People v. Sinclair, 129 Cal. App. 320, 19 P.2d 23 (1933); People v. Galloway, 28 Ill. 2d 355, 192 N.E.2d 370 (1963), *cert. denied,* 376 U.S. 910 (1964); People v. Fox, 24 Ill. 2d 581, 182 N.E.2d 692 (1962); People v. Embry, 20 Ill. 2d 331, 169 N.E. 2d 767 (1960); People v. Matthews, 18 Ill. 2d 164, 163 N.E.2d 469 (1959); People v. Mack, 12 Ill. 2d 151, 145 N.E.2d 609 (1957); Henson v. State, 236 Md. 518, 204 A.2d 516 (1964); Armwood v. State, 229 Md. 565, 185 A.2d 357 (1962); Bryant v. State, 229 Md. 531, 185 A.2d 190 (1962); State v. Worley, 375 S.W. 2d 44 (Mo. 1964); State v. Caffey, 365 S.W. 2d 607 (Mo. 1963); State v. Edwards, 317 S.W.2d 441 (Mo. 1958); State v. Reed, 34 N.J. 554, 170 A.2d 419 (1961); State v. Johnson, 112 Ohio App. 124, 165 N.E.2d 814 (1960). *See also,* Gallegos v. People, 139 Colo. 166, 337 P.2d 961 (1959); Gonzales v. People, 128 Colo. 522, 264 P.2d 508 (1953); De La Garza v. State, 379 S.W.2d 904 (Tex. 1964); Massiate v. State, 365 S.W.2d 802 (Tex. 1963); Watson v. State, 164 Tex. Crim. 593, 301 S.W.2d 651 (1957); Cornelius v. State, 158 Tex. Crim. 356, 256 S.W.2d 102 (1953) (constructive possession where custody of the narcotic remains in the agent over whom the defendant exercises control).

[11] *See* Brief for Appellee at 15, Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970). *See also* Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).

VA. CODE ANN. § 54-488 (1950) states that

> [i]t shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article.

Virginia's § 54-488 is similar to the Michigan statute, § P.A. 1952, no. 266, § 18.1123 Stat. Ann. 1957 Rev. which states: "Any person not having a license . . . who shall

legislative intent of prohibiting the possession of marijuana coupled with actual or inferred knowledge of the presence of the drug.[12]

There is a split of authority as to whether mere possession of marijuana without knowledge of the character of the drug makes one guilty of an illegal holding, or if such detention must be accompanied with knowledge of the presence and the character of the substance. A minority of jurisdictions has held that such knowledge is not essential for conviction.[13] However, the majority deems knowledge of the character of the drug as well as knowledge of the presence of the drug to be essential.[14] Illinois[15] and Cali-

possess or have under his or her control any naroctic drug shall be deemed guilty of a felony." Virginia's reasoning was similar to that of Michigan in construing its statute. The Michigan court stated:

> Here, we are construing an act regarding a multitude of activities the legislature has demonstrated a substantial purpose to regulate by license or to eliminate by penal sanctions. . . . In this act the legislature has spoken in broad, all embracing proscriptive language forbidding even possession for personal consumption or use.

The court further explained that because possession and control are made separate offenses under the Michigan statute, then the possession forbidden was not that possession that is known in the law of property or of torts, which is described in terms of control.

"These considerations lead us to conclude that the possession of narcotics forbidden by the Michigan act is broad enough to include narcotics knowingly [in constructive possession]." People v. Harper, 365 Mich. 494, 113 N.W.2d 808, 813-4 (1962), *cert. denied*, 371 U.S. 930 (1962).

[12] *See* ch. 451 §§ 1 (14), (19), [1952] Va. Acts of Assembly 737 (repealed 1970); ch. 86, § 2 [1934] Va. Acts of Assembly 82 (repealed 1970); VA. CODE ANN. § 54-524.101(c) (Cum. Supp. 1970).

[13] *See* Broic v. State, 79 So. 2d 775 (Fla. 1955); Jenkins v. State, 215 Md. 70, 137 A.2d 115 (1957) (the state need not prove knowledge or willful intent); Commonwealth v. Lee, 331 Mass. 166, 117 N.E.2d 830 (1954); State v. Larkins, 3 Wash. App. 203, 473 P.2d 854 (1970); State v. Boggs, 57 Wash. 2d 484, 358 P.2d 124 (1961). *But cf.* Annot., 91 A.L.R.2d 810 (1963). There is a conflict as to whether the defendant must also know the drugs' character as narcotic as well as their presence. *Id.* at 821.

[14] *See* Mickens v. People, 148 Colo. 237, 365 P.2d 679 (1961); State v. Oliver, 247 La. 729, 174 So. 2d 509 (1965), *cert. denied*, 382 U.S. 862 (1965); State v. Richard, 245 La. 465, 158 So. 2d 828 (1963); State v. Maney, 242 La. 223, 135 So. 2d 473 (1961); State v. Nicolosi, 228 La. 65, 81 So 2d 771 (1955) (possession without knowledge is not possession in the legal sense of the word, and therefore knowledge is an essential ingredient of illegal possession of narcotics); Overton v. State, 78 Nev. 198, 370 P.2d 677 (1962); Wallace v. State, 77 Nev. 123, 359 P.2d 749 (1961); State v. Giddings, 67 N.M. 87, 352 P.2d 1003 (1960) (actual knowledge of the presence and character of narcotics is essential and the state must prove such knowledge on the part of the defendant); Gonzales v. State, 157 Tex. Crim. 8, 246 S.W.2d 199 (1951).

[15] The defendant's knowledge of the narcotic substance may be inferred from his acts, declarations, or conduct. *See*, People v. Pigrenet, 26 Ill.2d 224, 186 N.E.2d 306 (1962); People v. Embry, 20 Ill. 2d 331, 169 N.E.2d 767 (1960); People v. Mack, 12 Ill. 2d 151, 145 N.E.2d 609 (1957).

This view was further expanded by stating that where the narcotic is found on the

fornia[16] extend this view by holding that such essential knowledge might be inferred from the acts, declarations, or conduct of the defendant.

Virginia is in agreement with the majority view in that knowledge of the character of the substance must be shown in order to convict the defendant of illegal possession of marijuana.[17] The court follows the expanded view of Illinois by stating that Ritter's statements and the fact that the package containing marijuana was found in his mailbox addressed to him implied knowledge of such contraband material.[18] The principal case interprets the Virginia statute[19] as requiring mere possession of marijuana combined with the requisite knowledge of its existence, rather than inferring ownership to be an essential element of the crime.[20]

The Virginia legislature clearly manifests that in addition to *Ritter,* it intends to insure against the possibility of absolute guilt in the future for possession of marijuana by making it unlawful, under the newly enacted Drug Control Act,[21] for any person to knowingly or intentionally possess marijuana, except as expressly authorized by the act.

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premises under the control of the defendant, this fact gives rise to an inference of knowledge of possession by the defendant. *See,* People v. Robinson, 102 Ill. App. 2d 171, 243 N.E.2d 594 (Ct. App. 1968); People v. Galloway, 28 Ill. 2d 355, 192 N.E.2d 370 (1963), *cert. denied,* 376 U.S. 910 (1964) People v. Nettles, 23 Ill. 2d 306, 178 N.E.2d 361 (1961), *cert. denied,* 369 U.S. 853 (1962).

[16] *See* People v. Wilson, 268 Cal. App. 2d 581, 74 Cal. Rptr. 131 (Dist. Ct. App. 1968) (defendant's knowledge of the narcotic was inferred from his answer that it was grass when questioned about it); People v. Toms, 163 Cal. App. 2d 123, 329 P.2d 90 (Dist. Ct. App. 1958) (prior conduct such as previous convictions on narcotic charges are admissable to show knowledge); People v. Flores, 155 Cal. App. 2d 347, 318 P.2d 65 (Dist. Ct. App. 1957) (presence of injecting equipment is sufficient to show defendant's knowledge of the presence and character of the narcotics).

[17] *See* cases cited note 12 *supra.*

[18] Ritter v. Commonwealth, 210 Va. 732, 741-2, 173 S.E.2d 799, 806 (1970).

[19] Ch. 451, §§ 1 (14), (19), [1952] Va. Acts of Assembly 737 (repealed 1970); ch. 86, § 2 [1934] Va. Acts of Assembly 82 (repealed 1970); VA. CODE ANN. § 54-524.101 (c) (Cum. Supp. 1970).

[20] *See* Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796 (1955). The court held that where a small amount of heroin was found on the floor in front of the back seat of a car, and all five occupants of the car denied possession of the heroin, there could be no conviction because any of the five could have had possession and there was no proof of ownership of the narcotic. *Contra,* People v. Matthews, 18 Ill. 2d 164, 163 N.E.2d 469 (1959).

[21] VA. CODE ANN. § 54-524.101 (c) (Cum. Supp. 1970) provides in pertinent part as follows:

> It is unlawful for any person knowingly or itentionally [*sic*] to possess a controlled drug unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any

The *Ritter* decision has been a step forward in prosecution for illegal control of drugs. It has put Virginia in accord with the majority of jurisdictions that allow convictions for illegal custody of drugs to be based on constructive possession. However, both *Ritter* and the enactment of the new legislative act[22] have retained the safeguards against indiscriminate convictions for possession of narcotic drugs by requiring knowledge of both the presence and character of the drug.

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person convicted of a violation of this subsection with respect to a drug classified in Schedule III or the controlled drug marijuana shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be confined in jail not exceeding twelve months, or both . . . .

[22] *Id.*