

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-

Lower Case No.: 4D05-4580

STATE OF FLORIDA,

Petitioner,

v.

CHARLES MITCHELL, JR.,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the defendant/Appellant and Petitioner was the prosecution/Appellee in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Palm Beach County, Florida and the Fourth District Court of Appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. Fla. R. App. P. 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE

Respondent was found guilty of trafficking in cocaine and trafficking in marijuana. The trial court sentenced Respondent to twenty years in prison with a mandatory minimum term of eighteen years. The Fourth District Court of Appeal reversed Respondent's conviction and sentence. Mitchell v. State, 958 So. 2d 496 (Fla. 4th DCA 2007) (Appendix).

STATEMENT OF THE FACTS

The opinion of the Fourth District Court of Appeal describes the relevant facts as follows:

Palm Beach County Sheriff's deputies responded to a Lake Worth residence after receiving a 911 hang-up call. Appellant

Mitchell answered their knock. The deputies asked Mitchell to exit the residence. When one of the deputies heard a female crying, he entered the apartment to check on her safety. As he passed through the home to find the female, Ms. Salazar, he observed in plain view numerous small Ziploc bags which contained suspected marijuana. He described them as looking as though they had been thrown on the floor during some sort of struggle.

While one deputy spoke to Salazar in the kitchen, another cleared the rooms of the house and then discovered more contraband. In an open closet he viewed a bag of cocaine, a large bag of marijuana, an electronic scale, and smaller individually-packaged baggies of marijuana. After these drugs were found, the deputies handcuffed Mitchell, who was still outside the residence and had not re-entered the house. The officer placed him in the back of a patrol car. No drugs were found on Mitchell.

Mitchell did not make any statements to police officers. However, Salazar did talk. She told the officers that the baggies of marijuana on the floor belonged to Mitchell. She denied knowledge of the other drugs in the house. She also told the deputy that Mitchell lived at the home where she would periodically stay the night with him.

The deputies secured a search warrant that day and found more drugs in the home. They found drugs in every room except the bathroom. In all, they found in excess of twenty-five pounds of marijuana and over 400 grams of cocaine. They also found \$29,000 in cash.

In the main bedroom they found male clothing and one set of female clothing. In another

bedroom they found children's furniture and toys. No evidence linked these to Mitchell, except a deputy testified that the clothing would have fit a person about the size of Mitchell. The deputies found plane tickets in Mitchell's name, and they observed pictures of Mitchell with other people throughout the residence. They also found a court event form with Mitchell's name on it next to a digital scale and razor blade. Testing revealed no usable fingerprints on any of the contraband.

Mitchell's van was parked outside the home, and the deputies searched the van but found no drugs. They also searched Salazar's car and found 11.5 pounds of marijuana, almost \$6,000 in cash, items belonging to Salazar's daughter, and a registration form for Mitchell's van. No one was charged for the contraband found in the car.

At trial Salazar testified that she and Mitchell had an off-and-on relationship. She said that she incriminated Mitchell the night of the incident, because the deputies threatened her with the loss of her children.

She testified that she, not Mitchell, leased the Lake Worth house, and she still had possession of the home. She identified a copy of the lease in her name which was admitted in evidence. The phone bill and security system contract were in her name. However, Mitchell's name appeared on the electric bill. Salazar explained that this was because she could not obtain service in her own name. According to Salazar, Mitchell did not have a key to the home and did not reside there.

Salazar testified that four months before the incident she purchased a home in Port St. Lucie. At the time of the incident and

discovery of drugs, Mitchell's sister and her boyfriend were living at the home. Mitchell's sister was a good friend, and Salazar continued to visit the home frequently. Salazar still had a key to the home. Mitchell never resided in the Lake Worth home, but spent time with her there and at his mother's home in West Palm Beach. One of the deputies testified that a leasing agent for the building told him that a relative of Mitchell lived in the apartment.

On the night the officers responded to the Lake Worth home, Salazar and Mitchell had been fighting at a nightclub close to the Lake Worth home, so they decided to leave the club and go to the Lake Worth residence rather than drive all the way to Port St. Lucie. The fight continued when they arrived at the house, and during the fight the contents of her purse were strewn across the floor.

Based upon this evidence, Mitchell's counsel requested a special jury instruction on constructive possession where the contraband is found on jointly possessed premises. The trial court denied the request and read the jury the standard jury instruction on possession. The jury found Mitchell guilty on both charges, and the court imposed concurrent twenty-year sentences. Mitchell appeals his convictions and sentences, challenging the court's failure to read his special jury instruction instead of the standard instruction.

Id. at 497-98.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal determined that Respondent was not in actual possession of drugs because the

police did not directly observe Respondent in possession of the drugs. This finding directly conflicts with decisions of the First and Fifth District Court of Appeals where actual possession was proved by circumstantial evidence.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN GREEN V. STATE, 754 SO. 2D 163 (FLA. 5TH DCA 2000) AND STATE V. WILLIAMS, 742 SO. 2D 509 (FLA. 1ST DCA 1999).

The decision of the Fourth District Court of Appeal hinged upon the determination that the case involved constructive, rather than actual, possession. The Fourth District Court of Appeal reasoned that this was not a case of actual possession:

Mitchell correctly states that this is a case of constructive possession, but the state argues that it is a case of actual possession. All one needs to read is that portion of the standard jury instruction to recognize that this is not a case of actual possession, which requires the contraband to be in the hand of or within ready reach of the defendant. Actual possession refers to physical possession. See Scruggs v. State, 785 So. 2d 605, 607 (Fla. 4th DCA 2001). Because Mitchell was not even in the home when the officers entered, having been removed by the officers, the drugs could not be within his ready reach.

Mitchell, 958 So. 2d at 499. The Fourth District Court of Appeal accepted Respondent's argument that there can be no

actual possession unless a defendant is directly observed by police in actual possession of the drugs. This is an erroneous view of the law that conflicts with decisions of the First and Fifth District Courts of Appeal.

In State v. Williams, 742 So. 2d 509 (Fla. 1st DCA 1999), police found a clear baggy of crack cocaine on the driver's seat of a vehicle after the occupants exited the vehicle. Although the drugs were not found until after the defendant exited the car, the First District Court of Appeal concluded that "[t]he jury heard competent substantial evidence from which it reasonably could have concluded that Williams had actual possession of the crack cocaine." Id. at 514. The First District Court of Appeal reasoned, "the space immediately underneath or beside [the defendant's] body, where the contraband was found, was within [the defendant's] ready reach and exclusive personal control and access for purposes of the jury instruction on actual possession." Id. at 513-14.

In Green v. State, 754 So. 2d 163 (Fla. 5th DCA 2000), police discovered cocaine in a bag and in a box on the floorboard of a car. The defendant's fingerprints were found on the exterior of the box and other evidence suggested that the defendant knew about and handled the cocaine. Id. at 163-64. The Fifth District Court of Appeal determined that, "[t]his

evidence appears sufficient for the jury to conclude that Green either had constructive or actual possession of the cocaine found in the vehicle and within his reach." Id. at 164.

The First and Fifth District Courts of Appeal correctly recognized that a defendant need not be viewed by police in actual possession to be found in actual possession of drugs. Thus, the instant decision conflicts with Green and Williams.

When the decision of a district court conflicts with decisions of other district courts of appeal, this Court's jurisdiction is discretionary. Art. V, § 3(b)(3), Fla. Const. This Court should exercise its discretion to hear this case for at least three reasons. See Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 485 (2005) ("jurisdictional briefs in discretionary cases should always demonstrate that the case is significant enough to be heard").

First, the outcome of the instant decision was incorrect. The trial judge refused to give the proposed special jury instructions because the jury could conclude from the evidence that Respondent was in actual possession of the drugs. There was significant evidence from which the jury could reasonably conclude that Respondent was in actual possession of the drugs

before the police arrived. Most of this evidence is described in the instant decision. See Mitchell, 958 So. 2d at 497-98. For example, Respondent's girlfriend told police that the drugs belonged to Respondent and there was a court event form with Respondent's name on it next to a digital scale and razor blade. See id.

Second, the trafficking statute does not allow for the interpretation made by the Fourth District Court of Appeal. The trafficking statute proscribes the actual or constructive possession of certain amounts of marijuana and cocaine. "Any person . . . who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . commits a felony in the first degree." § 893.135(1)(b)(1), Fla. Stat. (2005). "Any person . . . who is knowingly in actual or constructive possession of, in excess of 25 pounds of cannabis, or 300 or more cannabis plants, commits a felony in the first degree" § 893.135(1)(a), Fla. Stat. (2005). The statute does not require the actual possession to occur in the presence of the police. See § 893.135, Fla. Stat. (2005). The legislature could have, but did not, specify that actual possession is proscribed only when the police see the person in actual possession of the drugs.

Third, the actual possession analysis is at odds with case

law concerning actual possession of deadly weapons. See Smith v. State, 645 So. 2d 124 (Fla. 1st DCA 1994), rev. denied, 654 So. 2d 920 (Fla. 1995) ("The state may prove that a defendant carried, displayed, used, threatened, or attempted to use a weapon during the commission of a felony by means of circumstantial evidence."); Gibbs v. State, 623 So. 2d 551, (Fla. 4th DCA 1993) ("a finding of actual possession [of a firearm as defined in section 790.001(6)] may be based on circumstantial evidence).

CONCLUSION

Based on the foregoing argument, Respondent requests that this Honorable Court accept jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been sent by U.S. mail to Roy Black, 201 South Biscayne Boulevard, Suite 1300, Miami, FL 33131, this 2d day of August 2007.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

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