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CASE NOTES

Criminal Law—COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970—PERSONS WHO SIMULTANEOUSLY ACQUIRE JOINT POSSESSION OF CONTROLLED SUBSTANCE FOR ILLEGAL PERSONAL USE ARE NOT GUILTY OF FELONIOUS POSSESSION WITH “INTENT TO DISTRIBUTE”—*United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977).

Walter Swiderski, Swiderski's fiancée Maritza De Los Santos, and Martin Charles Davis, a government informer, met with a narcotics dealer in a prearranged rendezvous to purchase cocaine. In the presence of Davis and the dealer, Swiderski and De Los Santos each sampled or “snorted” the cocaine. Swiderski then paid the dealer \$1,250 and pocketed the newly purchased packet of cocaine.¹ Shortly thereafter, federal drug enforcement officers arrested both Swiderski and De Los Santos; a search revealed that the packet of cocaine was in De Los Santos' possession.

Swiderski and De Los Santos were convicted in federal district court of felonious² possession of cocaine with “intent to distribute.”³ On appeal,⁴ the defendants presented an issue of first impression to the United States Court of Appeals for the Second Circuit, *i.e.*, whether a joint possessor who passes a jointly purchased drug to a fellow joint possessor may be considered a “distributor” under 21 U.S.C. sections 802 and 841. The Second Circuit reversed the conviction, holding that joint possessors who simultaneously acquire possession of a drug for their own use cannot be guilty of distributing that same drug to each other.⁵

1. As is common in most cases of illegal possession of narcotics, the quantity sold was diluted. The defendants purchased 21.5 grams of a substance containing 4.1 grams of pure cocaine. *United States v. Swiderski*, 548 F.2d 445, 447 (2d Cir. 1977).

For an analysis of the weights and measures employed in cocaine drug traffic, see McLaughlin, *Cocaine: The History and Regulation of a Dangerous Drug*, 58 CORNELL L. REV. 537, 548 n.78 (1973).

2. Compare 21 U.S.C. § 841(b)(1)(A) (1970) with 18 U.S.C. § 1(1) (1970).

3. 548 F.2d at 447. Possession with intent to distribute violates 21 U.S.C. § 841(a) (1970).

4. This was the second time the Second Circuit had reviewed the convictions of Swiderski and De Los Santos. Their first appeal, *United States v. Swiderski*, 539 F.2d 854 (2d Cir. 1976), resulted in reversal of their convictions for errors in jury instructions regarding entrapment. At retrial, the defendants were reconvicted of “possession of cocaine with intent to distribute,” and they initiated this second appeal. 548 F.2d at 447.

5. *Id.* at 450. The joint possessors could be convicted of the misdemeanor of possession of a controlled substance.

I. BACKGROUND

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act,⁶ replacing over fifty diverse federal narcotics statutes.⁷ For the first time, all federal drug laws were revised and consolidated into one statute providing a balanced and consistent approach in the overall federal drug enforcement scheme.⁸

Significant congressional policies, important to an effective analysis of the instant case, underlay passage of the Act. In enacting the 1970 law, Congress drew a distinction between drug offenses involving "others" and offenses involving only illicit "personal" drug use.⁹ In the case of personal drug abuse, Congress sought to avoid severely punishing the individual drug user; under the Act, illegal possession of a controlled substance for personal use became a misdemeanor.¹⁰ But where drug abuse involved "others," there was a manifest congressional effort to stiffen the law and deter all illegal movement of drugs between people by broadening the definition of those subject to felony prosecution.

The 1970 law broadened the scope of felony punishment by making it turn on the concept of distribution rather than on the narrower pre-Act concepts of purchase and sale.¹¹ The Act declared any "distributor" of illicit drugs to be guilty of a felony.¹²

6. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified in relevant part at 21 U.S.C. §§ 801-966 (1970)).

7. H.R. REP. NO. 91-1444, 91st Cong., 2d Sess. 6, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4571 [hereinafter cited as HOUSE REPORT].

For a brief commentary on most of the pre-1970 narcotics control laws, see McLaughlin & Quinn, *The Evolution of Federal Drug Control Legislation*, 22 CATH. L. REV. 586 (1973); Katz, *Possession of Narcotic Drugs Under State and Federal Statutes*, 25 U. MIAMI L. REV. 306 (1971).

8. HOUSE REPORT, *supra* note 7, at 1, reprinted at 4567. A Uniform Controlled Substances Act, modeled after the 1970 federal law, has been made available for state adoption in an attempt to harmonize federal and state drug laws. See 31 COMMITTEE ON SUGGESTED STATE LEGISLATION, THE COUNCIL OF STATE GOVERNMENTS: 1972 SUGGESTED STATE LEGISLATION 220-21 (1971). The Uniform Act has been adopted in most states. See CAL. HEALTH & SAFETY CODE Div. 10 app., at 160 (West 1975).

9. The House Report states that "possession of controlled drugs is made a misdemeanor, except where the possession is for the purpose of distribution to others." HOUSE REPORT, *supra* note 7, at 4, reprinted at 4570 (emphasis added).

The House Report also observes that the "quantity of a drug found in the possession of a person, of course, bears upon the question of whether or not his possession is for his own use, or is for the purpose of illicit transactions involving others, for which much more severe penalties are provided." *Id.* at 11, reprinted at 4577 (emphasis added).

10. 21 U.S.C. § 844(a) (1970). First offenders may be sentenced to one year in prison, fined up to \$5,000, or both. *Id.*

11. See *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973).

12. 21 U.S.C. § 841 (1970).

Congress characterized a "distributor" to be a person who "delivers a controlled substance" to another.¹³ The word "deliver" was defined as "the actual, constructive, or attempted transfer of a controlled substance."¹⁴ Hence, anyone who actually or constructively *delivered* or *transferred* a controlled substance was a "distributor," and such a delivery or transfer constituted a felonious "distribution."¹⁵ These prohibitions of illegal distribution of drugs to others represented a distinct change from the pre-1970 drug laws that generally made only sale of drugs a felony; under the earlier laws, purchase of drugs was usually only a misdemeanor.¹⁶

The law's shift can also be seen in congressional intent to preclude the use of the judicially created procuring agent defense that had developed under the pre-1970 drug laws.¹⁷ Since the earlier laws turned on concepts of illegal sale and purchase, an accused seller could escape felony punishment if it were shown that he merely acted as a "procuring agent" for the ultimate drug purchaser.¹⁸ Such an "agent," like his buyer principal, was subject only to misdemeanor punishment. In enacting the 1970 law, Congress expressly rejected this judicially created defense.¹⁹

Congressional intent to severely punish distributors can also be inferred from the following hypothetical found in the House Report on the 1970 Act:

Suppose for instance that six young men attending college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marijuana cigarettes and there has been, on a day or more, free exchange between them of such forbidden drug. *Each incident of giving a marijuana cigarette to another constitutes a felony.*²⁰

13. *Id.* § 802(11).

14. *Id.* § 802(8).

15. Illegal distribution is punishable by a prison term of up to 15 years, a fine up to \$25,000, or both. *Id.* § 841(b).

16. See *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973); *United States v. Hernandez*, 480 F.2d 1044, 1046 (9th Cir. 1973).

17. See *United States v. Marquez*, 511 F.2d 62, 64 (10th Cir. 1975).

18. *United States v. Masullo*, 489 F.2d 217, 221 (2d Cir. 1973); *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973).

19. 21 U.S.C. § 802(8) (1970); see *United States v. Hernandez*, 480 F.2d 1044, 1046 (9th Cir. 1973).

20. HOUSE REPORT, *supra* note 7, at 84, reprinted at 4651 (emphasis added).

This hypothetical was part of an amendment submitted by Congressman John Dingell of Michigan. The amendment did not specifically deal with the issue raised in the instant case but rather with a crime entitled "continuing criminal enterprise." See 21 U.S.C. § 848 (1970).

The hypothetical's language indicates that Congress assumed that the passing of

Although the final version of the Act made the gratuitous distribution of small amounts of marijuana only a misdemeanor,²¹ the distribution of small amounts of any other illicit drug, whether or not remuneration was received, was still a felony.

Although Congress failed to define the term "possession" in the 1970 Act, the courts have interpreted it to include actual, constructive, and joint possession.²² In narcotics cases, actual possession exists when a person knowingly controls contraband that is on his person.²³ When two or more persons share actual possession of contraband, their possession is termed "joint actual possession."²⁴ Actual or joint actual possession need not be established for a person to be guilty of possession;²⁵ constructive possession of drugs is sufficient.²⁶ A constructive possessor is a person who has dominion and control over a quantity of drugs even though they are on another's person or in another locale.²⁷ A joint

drugs between the hypothetical's characters would be a felonious distribution. The hypothetical was authored before the criminal penalty for gratuitous distribution of small amounts of marijuana was reduced to a misdemeanor; this fact explains the hypothetical's characterization of such distributions as felonies rather than misdemeanors.

21. See 21 U.S.C. § 841(b)(4) (1970); H.R. REP. No. 91-1603, 91st Cong., 2d Sess. 9, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4660; R. BOGOMOLNY, M. SONNENREICH, & A. ROCCOGRANDI, A HANDBOOK OF THE 1970 FEDERAL DRUG ACT 95 (1975).

22. *E.g.*, United States v. Nichols, 401 F. Supp. 1377, 1381-82 (E.D. Mich. 1975):

While the term "possession" is not statutorily defined, it has been uniformly construed to include "constructive" possession Thus it is not necessary to a conviction for possession under § 841(a)(1) that the defendant have actual, physical custody of the controlled substance, but only that it be possessed by someone under his power or influence.

23. See, *e.g.*, United States v. Wynn, 544 F.2d 786, 788 (5th Cir. 1977); Comment, *Possession of Narcotics in Pennsylvania: "Joint" Possession*, 76 DICK. L. REV. 499, 507 (1972).

24. See, *e.g.*, Johnson v. United States, 506 F.2d 640, 642-43 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975); Comment, *Possession of Narcotics in Pennsylvania: "Joint" Possession*, 76 DICK. L. REV. 499, 509 (1972).

25. See, *e.g.*, United States v. Gomez, 529 F.2d 412, 419 (5th Cir. 1976).

26. See, *e.g.*, United States v. Alvarez, 548 F.2d 542, 544 (5th Cir. 1977) (defendant in constructive possession even though marijuana was not on his person or in his presence at time of arrest); United States v. Cortwright, 528 F.2d 168 (7th Cir. 1975) (defendant convicted of distribution although no actual possession was shown); United States v. Padilla, 525 F.2d 308 (9th Cir. 1975) (defendants guilty of possession with intent to distribute even though they never physically possessed the drugs).

27. See, *e.g.*, United States v. Alvarez, 548 F.2d 542, 544 (5th Cir. 1977); United States v. Craig, 522 F.2d 29, 32 (6th Cir. 1975); United States v. Watkins, 519 F.2d 294, 298 (D.C. Cir. 1975); Johnson v. United States, 506 F.2d 640, 642-44 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975). This definition is commonly referred to as the "dominion and control" test. See United States v. Watkins, 519 F.2d 294, 298 (D.C. Cir. 1975); United States v. Bethea, 442 F.2d 790, 793 (D.C. Cir. 1971). For a critique of the dominion and control test and an in-depth review of the various state definitions of constructive possession, see Whitebread & Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 759 n.26 (1972).

constructive possessor, then, is one who shares sufficient dominion and control over a drug although he does not have actual possession.²⁸

II. INSTANT CASE

Although both De Los Santos and Swiderski were charged with "possession of a controlled substance with intent to distribute," the real issue in the case centered on the definition of "distribution," *i.e.*, whether a statutory distribution was possible between two defendants who jointly acquired possession of drugs. Arguably, a distribution between the jointly purchasing defendants was incongruous with the congressional intent and statutory language of the 1970 Act.²⁹

Accepting this argument, the court held that "where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is . . . simple joint possession."³⁰ In the court's view, a statutory distribution within the Act's purview was impossible among joint possessors as long as the above two criteria were met: the joint possessors must have acquired possession of the drugs simultaneously, and the joint possessors must have intended to use the drugs exclusively for their own personal use.³¹

In the absence of any case precedent,³² the court relied on the legislative history for primary guidance in rendering the instant holding. Quoting the House Report on the 1970 Act to the effect that Congress intended to restrain the distribution of controlled substances to "others" through imposition of felony punishment,³³ the court reasoned that by "others" Congress meant third parties not already involved in the original possession and concluded that Congress had not intended to punish joint purchasers

28. *Johnson v. United States*, 506 F.2d 640, 642 n.4 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975): "The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint." See Comment, *Possession of Narcotics in Pennsylvania: "Joint" Possession*, 76 DICK. L. REV. 499, 509 (1972): "[J]oint possession describes the situation where more than one person have simultaneously the power to control and the intent to control a common object . . . [J]oint possession in practice denotes simply constructive possession by several persons at once."

29. Brief for Appellant Walter Swiderski at 16-23, *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977).

30. 548 F.2d at 450.

31. *Id.* at 450-51.

32. *Id.* at 447.

33. *Id.* at 450.

for illegal distribution solely because they shared a controlled substance among themselves.³⁴ Since the defendants did not "transfer" possession of the controlled substances to any "others," congressional intent was deemed to be satisfied and no statutory distribution to have occurred.³⁵

In reaching its holding in the instant case, the court created a new test to determine whether a statutory distribution had taken place. According to the court, if one serves as a "link in the chain of distribution" to another, a "distribution" has occurred.³⁶ Applying this test, the court concluded that since both defendants jointly acquired possession at the outset, neither could serve as a "link in the chain of distribution" to the other. According to this logic, a person can be considered a distributor only when he has effectively served as a "link in the chain of distribution" of drugs to another person not already involved in the original possession.³⁷

III. ANALYSIS

The instant case represents the first time a federal court has held that although drugs were passed between two individuals, no statutory distribution occurred. To evaluate this holding, this Case Note will analyze the legislative intent behind passage of the 1970 Act and explore the holding's potential impact in light of the court's opinion.

The holding in the instant case was based almost exclusively on the court's interpretation of language found in the House Report on the 1970 law. Analysis of congressional intent, however, may justifiably lead to a conclusion contrary to the court's holding. While no single argument may compel such a contrary holding, the arguments considered as a whole may justify a conclusion antithetical to that of the court.

A search of the House Report, the House and Senate committee hearings and floor debates, and the Act's language itself reveals no statement recognizing a single situation where controlled drugs could be passed between individuals without statutory distribution occurring. In fact, while drafting the marijuana amendment, Congress declined a clear opportunity to declare that the passing of marijuana between individuals for no remuneration

34. *Id.* at 450-51.

35. *Id.*

36. *Id.*

37. *Id.*

would not be a statutory distribution. Rather than alter the definition of distribution to accommodate such transfers, Congress instead altered the law's penalty structure by lessening the punishment to that of a misdemeanor.³⁸ Congress could just as easily have declared that a gratuitous transfer of a small amount of marijuana to another person was not a statutory distribution. Congress chose, however, to define such distributions as misdemeanors rather than recognize a situation where the movement of drugs between individuals would not be a distribution.³⁹ In fact, the statutory language of the marijuana amendment specifically recognized that the passing of a small amount of marijuana for no remuneration was still to be considered a statutory distribution.⁴⁰

In addition, the House Report hypothetical suggested that "each incident of giving a marijuana cigarette to another constitutes a felony."⁴¹ This hypothetical, drafted before consideration of the marijuana amendment and not addressed by the court in the instant case,⁴² is an illustration that Congress considered the mere passing of a drug to another to be a distribution deserving a felony penalty.

The facts of the House Report hypothetical and the instant case are strikingly similar but the results are inconsistent. Both involve the exchange of drugs between joint possessors⁴³ for no remuneration. Both involve participants who share a close association. The characters in the hypothetical were distributors—guilty of a felony; the court adjudged the defendants to be mere possessors—guilty of a misdemeanor.

With the court stating that the defendants would be pun-

38. 21 U.S.C. § 841(b)(4) (1970) (emphasis added): "[A]ny person who violates subsection (a) of this section by *distributing* a small amount of marijuana for no remuneration shall be treated as provided in sections (a) and (b) of section 844 of this title."

39. H.R. REP. No. 91-1603, 91st Cong., 2d Sess. 9, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4660.

40. *See id.*

41. HOUSE REPORT, *supra* note 7, at 84, *reprinted at* 4651; *see* note 20 and accompanying text *supra*.

42. Neither the brief for the appellant Swiderski nor for the government discussed the hypothetical.

43. Although the hypothetical does not present enough facts to justify an unequivocal conclusion that the students were joint possessors of the marijuana, such a conclusion is apparently reasonable. First, the students shared a close association with each other, not being mere strangers. Second, the students had a joint proprietary interest in the locale where the contraband was found. Third, they likely had shared in the expense of purchasing the illicit drug. Fourth, the students knowingly shared and possessed the marijuana. Fifth, they were in close proximity to the contraband. It should, however, be noted that the hypothetical makes no specific mention of simultaneous acquisition.

ished solely on the basis of their possession and not for the act of passing drugs to each other, the instant holding has the effect of formally legitimizing the physical exchange of drugs between joint purchasers. This holding goes further than does the marijuana amendment, for example, which metes out punishment for *both* the illegal possession of any amount of marijuana as well as for the act of passing a small amount of marijuana to another for no remuneration.⁴⁴

Congress passed the 1970 Act in the spirit of ending loopholes or exceptions that had developed under some of the pre-1970 drug laws.⁴⁵ Interestingly, the instant case may represent the judicial creation of one of the first exceptions to the Act. The holding represents the first time since enactment of the current law that a federal court has legalized the act of passing a controlled drug between individuals.⁴⁶ By so holding, the court's decision conflicts with a basic congressional policy underlying passage of the 1970 Act—to stop and severely punish the unauthorized movement of all illegal drugs between individuals.⁴⁷

Beyond doubtfully following congressional intent, the court's opinion creates some problems for its future application. The court protects a newly defined group from felony prosecution, *i.e.*, those who jointly and simultaneously acquire drugs with the intent to only share among themselves. On the other hand, one who acquires drugs but who later gratuitously shares the contraband with others would be guilty of felony distribution.⁴⁸ It is questionable, however, whether there is a sufficient difference in the relative culpability and criminality of the two groups to justify classifying the first group as misdemeanants and the second as felons. If the Second Circuit's view is followed, however, such will be the case.

Further, in this case the Second Circuit pioneered new territory in federal narcotics law by distinguishing distribution from mere possession on the basis of a "simultaneous acquisition" of

44. See 21 U.S.C. §§ 841(b)(4), 844 (1970).

45. HOUSE REPORT, *supra* note 7, at 6, reprinted at 4571 (emphasis added): "The bill is designed to meet problems that have arisen under existing narcotic and dangerous drug laws due to recent governmental reorganization, court rulings, and the changing posture of the drug problem facing this country."

46. The act of passing controlled drugs between individuals was legal in some circumstances under the pre-1970 drug laws that turned on concepts of purchase and sale rather than distribution. See *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973); *United States v. Hernandez*, 480 F.2d 1044, 1046 (9th Cir. 1973).

47. See notes 9-12 and accompanying text *supra*.

48. See 548 F.2d at 450-51.

illicit drugs. Since the defendants simultaneously acquired possession, the court observed, they could not distribute the illicit drugs among themselves. In failing to define the key phrase "simultaneous acquisition," however, the court has invited future attempts to tamper with its judicially created exception to the definition of statutory distribution.

The defendants in the instant case, who apparently acquired *actual* possession simultaneously, or nearly so,⁴⁹ were protected by the court's holding. But arguably the court's rationale also shields from felony prosecution one who obtains actual possession of illegal drugs and later shares the drugs with a partner who is considered to have acquired *constructive* possession simultaneously with the actual possessor. As long as both the actual and constructive possessors intend to later share the drugs solely between themselves, the actual possessor may not be deemed to have distributed the drugs to his partner. When two such persons are in a principal-agent relationship, the Second Circuit suggested that the agent acquiring the physical possession should be subjected to a felony charge.⁵⁰ Yet, in such cases where there is simultaneous actual possession by the procuring agent and constructive possession by the principal, the letter, if not the spirit, of the court's test to qualify for the exception is fulfilled. According to the court, it is a legal impossibility for one to "distribute" drugs to another who already possesses them, and such possession would seem to include constructive as well as actual possession.

Although the court conceded that the aim of Congress was to eliminate the procuring agent defense, it has nevertheless opened the way for procuring agents to assert a defense against a charge of distribution or intent to distribute. Should the court's view prevail, however, that the agent is guilty of a felony, again it would be difficult to discern a substantive difference between the relative criminality of the agent's acts and those of the defendants in the instant case.

Moreover, the court created a new "link in the chain of distribution" test to define distribution. Such a test, being circular in nature, is obviously not free from misunderstanding. The use of

49. The court's opinion does not indicate how strict of an interpretation the word "simultaneous" should carry. Whether the court means that the two defendants must acquire actual possession at the exact same moment in time is not clear.

In another area of the law dealing with estates and probate, the word "simultaneous" has taken a very strict meaning. See *In re Estate of Rowley*, 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (1967) (woman killed 1/150,000th of a second before another woman in the same car accident deemed not to have died simultaneously).

50. 548 F.2d at 451.

such an ill-defined test may well create difficulties in future cases.

IV. CONCLUSION

The court's opinion in the instant case was based almost exclusively on one interpretation of congressional intent behind the passage of the 1970 Act. The holding, however, is markedly contrary to the apparent congressional intent as exemplified in the House Report hypothetical, the marijuana amendment, and other congressional language. Aside from the issue of congressional intent, the holding creates obstacles to its practical application and creates the risk of unwarranted expansion.

The simplest and most easily applied interpretation of the Act would be to consider every exchange of a controlled drug between individuals to be a distribution. Following this approach would not be as harsh as some may think since the penalty structure does not mandate any minimum sentences for those convicted of possession or distribution offenses, therefore allowing great flexibility in sentencing based on the relative culpability of the accused.⁵¹ Following the Second Circuit approach, however, would invite future judicial exceptions and would risk a greater probability of unfairness in the treatment of violators based on where and when a drug is acquired and at what point the intent to share is conceived. Furthermore, the Act's flexible penalty structure allows for a fairer differentiation between the relative degrees of misconduct of violators than does manipulating the definition of distribution.

Michael L. Hutchings

51. The collateral consequences resulting from a felony conviction, as opposed to a misdemeanor conviction, may be significant, however.