

1978

State of Utah v. Willie Mae Walker : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

:-----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
15568

WILLIE MAE WALKER, aka
DELL WALKER, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE PETER F. LEARY, JUDGE

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FILED

JUN 14 1978

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
WILLIE MAE WALKER, aka : 15568
DELL WALKER, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with one count of unlawful possession of a controlled substance with intent to distribute for value in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1973).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of one count of unlawful possession of a controlled substance with intent to distribute for value on September 1 and 2, 1977, in the District Court of the Third Judicial District, in and for Salt Lake County, Utah, the Honorable Peter F. Leary, presiding. On September 26, 1977, appellant was sentenced for

the indeterminate term (up to fifteen years) in the Utah State Prison. Appellant has since been released from custody on a \$25,000 bail bond.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgment of the lower court.

STATEMENT OF FACTS

In early 1976, Salt Lake County Deputy Sheriff Michael George received information from a confidential informant (CI No. 20) that the informant had purchased heroin from one Del Walker, aka Willie Mae Walker, at 511-513 West Second South in Salt Lake City, known as Del's Cafe. Later, on or about July 7, 1976, another confidential informant (CI No. 30) informed Officer George that heroin had been observed personally by the informant on the premises of Del's Cafe and the informant described to Officer George in detail the location and amounts of the controlled substance. A few days later on July 13, 1976, CI No. 30 again was an eyewitness to unlawful drug trafficking on the premises (State's Exhibit A).

On July 14, 1976, Officer George swore out an affidavit for search warrant before Salt Lake City Judge M. D. Jones "on the persons of Del Walker and a male person

known only as "Billie," [Robert Westley] on the premises known as 511 and 513 West 2nd South, adjoining buildings known as Del's Cafe and rooms apurtenant thereto. . . ."

The two buildings at 511-513 West Second South are actually one building that shares a party wall and has one entrance that serves both sides of the premises. The common structure is under the supervision of appellant (Tr.66). The buildings were not licensed or used as apartments nor were there separate paying tenants living there (Tr.66,176-177). The officers who conducted the search, therefore, had no prior notice of the upper floor's use for occupancy by approximately six persons. Appellant allowed her friends to live on the upper floor free of charge when they did not have money for rent (Tr.66,82-83, 176-177).

Officer George was able to give credibility to the two confidential informants' information when he swore out the affidavit. This credence was based on past experience by CI No. 20 who had provided reliable and verified information to police officers during the prior six months which resulted in several arrests and one conviction. Confidential Informant No. 30 had made a previous "controlled purchase" of heroin and had provided officers with valuable and verified information such as telephone numbers, names and addresses of known narcotics dealers (State's Exhibit A).

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On the basis of the above affidavit, a search warrant was issued and on the same day--July 14, 1976--at approximately 8:30 p.m., several police officers arrived at Dels' Cafe, 511-513 West Second South (Tr.76-77). Two officers stationed themselves at the bar of the cafe to keep the appellant and Fifi, the cook, from sounding a buzzer that would ring upstairs. While one officer positioned himself outside at the door, other officers including Jim Duncan, Deputy Sheriff; Randall Anderson, Deputy Sheriff; and George; climbed the stairs to the upper floor (Tr.39,78,93).

According to the testimony at trial, the upper floor consisted of three bedrooms, one office, one storage room, one bathroom, and one washroom (Tr.39-40). None of the three bedrooms had separate bathroom or kitchen facilities and all of appellant's occupants shared a common living room--pool table area and private upstairs bar (Tr.40). Common hallways, washroom and bathroom were also jointly used by the occupants (Tr.40). The only room with a functioning lock was the room where the heroin was discovered (Tr.170). Thus, the other six rooms were open and freely accessible to all the occupants.

The police found the office locked with "two or three locks," one of which was a deadbolt (Tr.40), and

broke down the door. Upon searching the room, they discovered in a night stand a brown prescription-type bottle filled with 56 balloons of a substance later ascertained as heroin (Tr.41,105). The heroin was estimated to have a street value of approximately \$1,680 (Tr.48). Also found in the nighstand were two envelopes addressed to Willie C. Walker at 511 West Second South (Tr.66-69; Exhibit 5P). Woman's furs, jewelry, clothing, a cash box, cash and business receipts were also discovered in the room--all of which were later identified as belonging to appellant (Tr.53,54,80,170). The officers who were present, according to their testimony, did not find any men's clothing or shaving gear in the room (Tr.54,81,87,189). However, appellant testified that clothing and toiletries belonging to Robert Westley were in the room (Tr.169).

The officers apprehended Robert Westley, who was dressed in pajamas, in another room (Tr.94-95). Four balloons of heroin were found on Westley's person.

The officers read appellant her Miranda rights (Tr.66,81), and questioned her regarding the room where the suspected heroin was found. Appellant indicated that she had control over the second floor of the cafe, that none of the rooms were being rented at that time and that she had exclusive control over the locked room in which the drugs were discovered (Tr.66,82-83,177,189). Appellant also told the officers that she had the only key to that room (Tr.82-83,

189), which she claimed she used as a business office (Tr.83).

At trial, appellant denied telling the police officers that she had exclusive control over the office and also denied that she had the only key saying instead that she merely had a key to the closet (Tr.182).

By appellant's own testimony, one of the occupants, Louie Shelton, was a user of heroin (Tr.185). She also claimed that she knew Westley would often enter the office with bad headaches, lock the door, remain there for about 45 minutes, then exit feeling much better (Tr.171-172). At the trial, appellant testified she did not use heroin herself but she recognized the balloons inside the brown prescription bottle (Exhibit 3P) as being the common method of packaging heroin. She testified, "You'll see it on the floors, on the streets, every place. But I hadn't seen them in that room. I see empty ones all the time right now." (Tr.184-185). The jury returned a unanimous verdict against the defendant on September 2, 1977. Judgment on the verdict was entered by the judge September 26, 1977.

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE DEFENDANT COULD BE CONVICTED OF THE CRIME OF POSSESSION OF NARCOTICS WITH THE INTENT TO DISTRIBUTE.

The theory upon which the State has proceeded in this case is constructive possession. Generally courts have held that such may be proved by circumstantial evidence. In State v. Krohn, 15 Or.App. 63, 514 P.2d 1359 (1973), the court said:

"To prove constructive possession of a dangerous drug or narcotic, the state must show that the defendant knowingly exercised control of or the right to control the unlawful substance State v. Moore, 97 Or.App.Adv.Sh. 930, 511 P.2d 880 (1973), but this may be shown by circumstantial evidence." 514 P.2d at 1362.

See also People v. Lopez, 169 Cal.App.2d 344, 337 P.2d 570 (1959); People v. Showers, 68 Cal.Rptr. 459, 440 P.2d 939 (1968). The Utah Supreme Court has ruled that dominion and control neither means that the drug be found on the person of the accused nor that the accused must have had sole and exclusive possession of the narcotic. State v. Winters, 16 Utah 2d 139, 396 P.2d 872 (1964); State v. Bankhead, 30 Utah 2d 135, 514 P.2d 800 (1973).

Appellant relies on Mulligan v. State and Richardson v. State, Wyo., 513 P.2d 180 (1973)¹ to support her theory

1 In Mulligan, *supra*, the Wyoming court applies a very strict standard on the use of circumstantial evidence in narcotics cases. The standard of proof for circumstantial evidence was such that it must exclude every reasonable hypothesis other than that of guilt. This part of Mulligan was specifically overruled by the court in Blakely v. State, Wyo., 542 P.2d 857 (1975), where the court adopted the concept that circumstantial evidence should be evaluated by the jury on the same basis as direct evidence.

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that possession or control of the drugs must be shown to be exclusive before she can be convicted of unlawful possession of narcotics. However, contrary to the assertions of the appellant, there was sufficient evidence presented by the State at the trial that defendant's possession and control of the drugs was exclusive. The room in which the heroin was found was referred to by the prosecution as "O" (Tr.39), since the room was purportedly a business office. See Exhibit IP, a diagram of the second floor of Del's Cafe. The defense, however, referred to the particular room in which the drugs were found as "room 6." The defense counsel at the trial had his own diagram of the second floor to which defense witnesses were directed, on which the rooms were numbered. This diagram, exhibit 9D at the trial, did not come up with the rest of the record on appeal. However, it may be inferred from the testimony of the defense witnesses, from the closing arguments of the counsel for the defense (Tr.211,212), and appellant's brief, page 2, that "room 6" was indeed the room in which the drugs were discovered by the police officers.

The appellant tries to show that Robert Westley, also known as "Billie," was living in, or had access to the room where the narcotics were found, and thus that the defendant's possession or control over the heroin was not exclusive. There was no substantial evidence

presented at the trial that Westley had any kind of control over that room. The testimony of one of the arresting officers, Randall Anderson, was that the room was locked with at least two locks, one of which was a dead bolt type of lock (Tr.40). Inside they found the heroin, as well as business records, a cash register tray and some money (Tr.53,54,80). Also discovered in the room were woman's clothing, jewelry and furs, all of which the defendant admitted were her's (Tr.80,170). In the nightstand in which the heroin was found were also discovered by the officers two envelopes, which were both addressed to the defendant (Tr.41,66-69). There were no articles of men's clothing or shaving gear found in the room (Tr.54,81,87,189). Upon being examined at the trial concerning his confrontation with the defendant at the time of the arrest, Officer Randall Anderson testified according to the following:

"Q. (By Mr. Austin) Where did you come into contact with her on that day.

A. Outside the office area there.

Q. Who was present when you were talking to her?

A. Myself and Deputy George.

Q. Did you read her her rights?

A. Deputy George previously had given her her rights.

Q. Did you ask her any questions at that time?

A. Yes, I did.

Q. What questions did you ask her?

A. I asked her if she had any rent receipts for the other rooms upstairs.

Q. What was her response to you at that time?

A. She stated no she did not, that she had friends who stayed in there periodically. However, they did not rent the rooms. I then stated, 'In other words they're under your control?' She said, 'That's right.'" (Tr.66).

Officer Michael George also spoke with the defendant at the time of her arrest. He testified as follows:

"Q. What questions did you ask her regarding narcotics that you found upstairs; alleged narcotics?

A. The first question I asked her is who was staying in the room, the second on the right, which was described where Deputy Anderson had found the narcotics. She stated at that time no one was staying there. That was her business office, and she had control over the office area.

Q. Did you ask her anything further regarding that room?

A. I did. She stated that she had people staying there from time to time. No one stayed in there for the past few days. She stated that a party by the name of Billy had been staying there, but stated Billy was staying in her bedroom; the first one on the left. I asked her who 'Billy' was. She stated that's her boyfriend who was later identified as Robert Westley.

Q. Did you ask her regarding any keys to rooms on the other floors?

A. I did.

Q. What question did you ask?

A. She stated she had control over all the rooms. She had the keys.

Q. She had the keys? Did you ask her regarding the keys to this particular room where the alleged narcotics were found?

A. Yes, sir; I did. She stated that she had the only key to that door. That was the business office at that time." (Tr.82,83).

Under rebuttal direct examination by the prosecution Officer George testified again concerning statements made by the defendant at the time of her arrest:

"Q. When you had this conversation with the defendant in this case, after you read her her Miranda rights, did you ask her who had control of that room?

A. I did.

Q. What was her response?

A. She stated she had exclusive control to that room, and she had the only key to that room.

Q. You had a conversation with her regarding the man who's been identified as Robert Westley?

A. I did.

Q. What was the substance of that conversation?

A. Well, when I asked her who was staying in the room that I have just described where the narcotics were found, I asked her if anybody was staying there. She stated nobody was staying there and nobody had been

staying there for the last few days. However, her boy friend, Billy, had been staying there a few days ago." (Tr.189).

The defendant went on to tell Officer George that Billie, i.e., Robert Westley, was "staying in her bedroom; the first one on the left." (Tr.82). This is exactly the room in which Officer Jim Duncan testified he found Robert Westley in his pajamas (Tr.94,95). The room in which the heroin was discovered was the second room on the right, at the top of the stairs (Tr.82). See also Exhibit 1P.

Apparently there was some confusion on the part of the defense as to who exactly did live in room 6, where the heroin was found. At the trial under direct examination by defense counsel the defendant testified that Robert Westley lived in room 7 rather than room 6 (Tr.165). Evidently the defendant changed her mind as to who was living in room 6, in which the drugs were found, some time prior to the trial. In an "affidavit in support of motion to suppress search warrant" (R.37), June 21, 1977, the defendant, under oath, testified that one Gwendolyn Faye Campbell lived in the room, which the defense referred to at the trial as "room 6." The defendant at the trial, however, testified that Gwendolyn Faye Campbell lived in room 4 (Tr. 166). The only witness for the defense who testified that Westley lived in room 6 was Chalmers Hood. However, Hood

also testified that he did not arrive in Salt Lake City until September of 1976 (Tr.118). The arrest took place on July 14, 1976. Officer George testified that Hood was absolutely not present at that address when the search warrant was executed (Tr.188). Hood could not possibly have known where Westley was living at the time of the arrest. All of the evidence presented by the State at the trial points to the fact that the defendant had exclusive control of the particular room where the heroin was found on July 14, 1976.

Appellant tries to infer that Westley had control of the room by giving evidence to show that the heroin found on the person of Westley was similar to that found in the room. It does not follow from that evidence that Westley had any kind of control over the room, or access to the drugs therein. The respondent does not find the evidence compelling that the drugs found on Westley and those found in the appellant's business office were from the same stock. However, even if they did come from the same stock, the more logical explanation as to how Westley obtained the heroin, which was found on him, is that he got it from the appellant, with whom he had a romantic relationship, according to her testimony at the trial (Tr.169). Simply because Westley was found with drugs on his person which may have come from the appellant's

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own stock which she kept in her business office does not mean he had any kind of joint control over the drugs with her. The evidence shows that she possessed the heroin in a large quantity with an intent to distribute (Tr.69,85,99). The fact of Westley's possession of such drugs is simply evidence that she did indeed distribute those narcotics which she kept locked in her office.

There is sufficient circumstantial evidence to support the finding of the jury that the drugs were held with an intent to sell and distribute. The amount of heroin discovered was an unusually large quantity. All three arresting officers who testified at the trial gave their opinions that the heroin was held with an intent to sell (Tr.69,85,99). State v. Bankhead, *supra* at 803, points out that circumstantial evidence may be used to prove that the accused possessed the narcotics for sale rather than for her individual use.

There was sufficient evidence presented at the trial court from which the jury could conclude that the defendant was guilty. This Court stated in State v. Wilson, 565 P.2d 66 (Utah 1977):

"The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury. Consequently we are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict. In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime. In applying the rules above stated to the instant case, we are not persuaded that the verdict should be overturned." 565 P.2d at 68.

The Wilson case involved a prosecution for possession of heroin with intent to distribute for value. The defendant testified that he was out of town when the alleged sale took place, while the prosecution's witness testified that she had made the purchase from defendant in Salt Lake City on the date in question. The Court stated that it was a proper function of the jury to determine which of these obviously conflicting testimonies it would believe.

The position of this Court concerning the review of the sufficiency of evidence is further stated in State v. Romero, 554 P.2d 216 (Utah 1976):

"This court has long upheld the standard that on an appeal from conviction the court cannot weigh the evidence nor say what quantum is necessary to establish a fact beyond a reasonable doubt so long as the evidence given is substantial. Further, this court has maintained that its function is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given defendant's testimony." 554 P.2d at 218.

The jury in the instant case has obviously chosen to give more weight to the testimonies of the police officers than to that of the defendant. In this case, the testimony of the witnesses for the prosecution afforded the jury a substantial basis on which they could reasonably find that the defendant constructively possessed the heroin by virtue of her exclusive control over the room in which it was found. Their determination of guilt should remain undisturbed.

POINT II

THE LOWER COURT CORRECTLY REFUSED TO ALLOW TESTIMONY FROM THE WITNESS JAMES HOUSLEY THAT ROBERT WESTLEY OCCUPIED THE ROOM IN WHICH THE HEROIN WAS DISCOVERED.

The appellant tries to show that Robert Westley did have occupancy or control over the room in which the

heroin was found on July 14, 1976. Her argument is unsound on several points. Defense counsel claims this case is a Brady v. Maryland problem, and that the prosecution attempted to cover up evidence and also that the prosecution removed certain evidence from the courtroom during the trial. Appellant neglects to point out in her brief that the evidence which was removed from the courtroom was the four balloons of heroin found on Westley, Exhibit 7D. This was done as a result of a misunderstanding between Mr. Leedy, counsel for the defense, and Mr. Austin, the prosecutor (Tr.57-63). The four balloons were quickly returned to the courtroom once it was apparent what had happened (Tr.63). The court ruled that the chain of evidence for the defense was not broken (Tr.63).

This case is definitely not similar to Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the defense counsel had requested the prosecution to allow him to examine the extrajudicial statements of the defendant's companion. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to the petitioner's notice until after he had been tried, convicted and sentenced. In the case now before the Court there is absolutely no evidence

that the prosecution withheld any evidence during the trial, which might be favorable to the appellant, nor is there evidence that the defense counsel made any request for such evidence, as had been made in the Brady case.

Housley had visited Del's Cafe and had seen Westley getting out of bed but was unable to say exactly when, other than that he had known Westley "from late December of 1975 until sometime in the summer of 1976" and that the date of his visit was "prior to the time that Dell was arrested on this charge." (Tr.133). Housley was not a prosecutor for the county attorney's office at the time he visited Del's Cafe and saw Westley (Tr.130).

The evidence which the defense was trying to introduce through Housley's testimony was properly excluded by the judge. The issue here is whether Westley had control or occupancy of the room in which the heroin was found on July 14, 1976. Housley knew nothing as to this issue.

Jones on Evidence, 6th Ed., sec. 4.1, p. 379, states:

"A witness having no knowledge of the proposition which is the subject of proof could hardly be expected to give relevant testimony."

Utah Rules of Evidence, Rule 45, give the judge the discretion to exclude evidence if he feels that its probative value is outweighed by other considerations.

See also McCormick's Handbook of the Law of Evidence, 2d ed., pp. 438-440. This discretionary power of the judge

to exclude evidence is very broad, Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977); Williams v. Queen Fisheries, 2 Wash.App. 691, 469 P.2d 583 (1966); Olson v. Hardware Dealers Mutual Fire Ins. Co., 45 Wis.2d 569, 173 N.W.2d 599 (1970). If there was any probative value in the excluded testimony of Housley the trial judge evidently felt it was outweighed by its remoteness in time, and the inability of Housley to say when his visit took place. Evans v. Gaisford, 122 Utah 156, 247 P.2d 431 (1952), held that remoteness of the evidence to the issue is one of the elements the judge can take into consideration in weighing its probative value. The trial judge here did not abuse his discretion in sustaining the objection to Housley's testimony, which would have had little if any probative value in showing that the appellant did not have exclusive control over her locked office in which the heroin was kept on July 14, 1976.

At the trial the counsel for the defense made a proffer of evidence, concerning the testimony of Housley which was excluded by the judge (Tr.133-134). This proffer was not recorded and is nowhere contained in the record. The only place the proffer is mentioned is Appellant's Brief. This, however, is insufficient in an appeal. The Utah Court in Watkins v. Simonds, 14 Utah 2d 406, 385 P.2d 155 (1963), stated: "This court cannot consider facts stated in the

briefs which may be true but absent in the official record. See also Cooper v. Foresters Underwriters, Inc., 123 Utah 215, 257 P.2d 540 (1953); Skyline v. Datacap, 545 P.2d 512 (Utah 1976). Appellant's proffer should not be considered by the court in this appeal by virtue of its not being properly within the record.

A. EVEN IF SUCH TESTIMONY FROM HOUSLEY SHOULD HAVE BEEN ALLOWED, IT WAS A HARMLESS ERROR FOR THE COURT TO REFUSE TO ALLOW IT.

Even if the testimony of Housley had been admitted by the court, and it was shown that Westley had had access to or occupancy of the room previous to the execution of the search warrant no prejudicial error would have been committed. Were this the case, the ruling of the lower court should still stand, under Utah Code Ann. § 77-42-1 (1953). The fact that other persons may have had access to the room in which the narcotics were found will not necessarily disturb a finding that there was constructive possession of the narcotics by the defendant. The Illinois court in People v. Embry, 20 Ill.2d 331, 169 N.E.2d 767 (1960), said:

"In People v. Mack, 12 Ill.2d 151, 145 N.E.2d 609, we held that where narcotics were found in an apartment which had been rented to the defendant, the element of possession was established, in spite of the fact that other persons

had access to the apartment.
The proof here that defendant
paid the rent on the apartment
and was present when the drugs
were found therein is sufficient
to establish that he was in
possession of them, in spite of
the fact that other persons were
likewise present at the time."
169 N.E.2d at 769.

The Illinois Court held similarly in People v. Nettles,
23 Ill.2d 306, 178 N.E.2d 361 (1961). In Nettles, when
the police arrested the defendant he told them "anything
you find in the apartment is mine." The defendant was
convicted even though there were three others present in
his apartment at the time of the search. The statement of
the defendant in Nettles is similar to those made by the
defendant in the instant case when she told the arresting
officer that she was in control of the entire premises on
the second floor and in exclusive control of the room
containing the drugs (Tr.66,82,83,189).

In State v. Villavicencio, 108 Ariz. 518, 502
P.2d 1337 (1972), the defendant was found guilty of
possession of drugs which had been hidden in a box found
next to his apartment building. The court affirmed and
ruled that the defendant constructively possessed the
drugs even though the area was "completely open and
accessible to anybody who would want to walk through."

The court said "Exclusive control of the place in which the narcotics are found is not necessary." Supra at 1339. Numerous other cases support this proposition.

There is also a line of cases in which courts have held that where drugs were found on premises of which the defendant was in nonexclusive possession, the fact that they were found among or near his personal belongings was a circumstance sufficient to link him with possession of such drugs. In People v. Flores, 155 Cal.App.2d 347, 318 P.2d 65 (1957), the court affirmed the conviction of the defendant for possession of heroin. The drugs had been discovered in the pocket of a jacket in a closet along with two blank applications one of which bore the defendant's name. A pair of pants belonging to the defendant was also found in the closet. The proximity of belongings of the defendant to the drugs, even though "quite a few people had access to the house" was sufficient circumstantial evidence upon which the jury could have found the defendant guilty. In the instant case the heroin was found in a nightstand also containing two envelopes which were addressed to the defendant (Tr.41,66-69). In the room were discovered clothing, jewelry, money, and business receipts, all of which belonged to the defendant (Tr.53,54,80). The proximity of the drugs to her own personal belongings would have been

sufficient evidence to support a verdict of guilty even if she were shown to have had nonexclusive possession of the premises.

POINT III

THE COURT PROPERLY REFUSED TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTION NOS. 1 AND 3 CONCERNING ACCESS TO OR EXCLUSIVE CONTROL OF A ROOM WHERE NARCOTICS ARE FOUND.

Among others the court gave the following instruction which focused primarily on the elements of the crime required by Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1973), the statute under which the defendant was charged:

"INSTRUCTION NO. 12. Before you can convict the defendant of the crime of UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

1. That on or about the 14th day of July, 1976, in Salt Lake County, State of Utah, the defendant, Willie Mae Walker, unlawfully possessed a controlled substance, namely, heroin.

2. That such possession by defendant was intentional.

3. That such controlled substance was knowingly possessed by defendant.

4. That such possession of the controlled substance by the defendant was with the intent to distribute it for value.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict

the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty." (R.71).

The court, through Instruction 11, instructed the jury as to the legal definition of the word "possession" in accordance with the definition give in Utah Code Ann. § 58-37-2(26) (Supp. 1973):

"The word 'possession' means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, obtaining, as distinguished from distribution, of controlled substances and includes individual, joint or group possession of controlled substances. For a person to be a possessor of a controlled substance, it is not required that he be shown to have individually possessed, the controlled substance, but it is sufficient if it is shown that he jointly participated with one or more persons in the possession of any substance with knowledge that such activity was occurring." (R.70).

The general rule with regard to jury instructions is that there is no grounds for reversal where the instruction was non-prejudicial and that if an error was committed, "A reasonable probability of a more favorable result, for defendant, in the absence of such error, must exist." State v. Hutcheson, No. 15390 (May 30, 1978); State v. Romeo, 42 Utah 46, 128 Pac. 530 (1912); State v. Condit, 101 Utah 558, 125 P.2d 801 (1942).

The Court stated in State v. Thompson, 110 Utah 113, 170 P.2d 153 (1946):

" . . . it is the duty of the court to apply the law to the facts supported by the evidence and to not instruct on any question which is not involved in the case under the evidence." 170 P.2d at 162.

The instructions which were given fairly addressed themselves to the facts of the case as were presented at the trial and supported by the evidence. The instructions proposed by the appellant were properly refused for several reasons:

1. The language of appellant's proposed instruction does not focus on the facts supported by the evidence presented at the trial. Appellant's proposed Instruction No. 3 states:

"The mere fact that Willie May Walker may have had access to the room where the heroin was found is insufficient evidence to prove that she had possession or control of the substance found therein." (R.95).

The weight of the evidence strongly suggests that defendant's access to the room was more than a "mere fact." The evidence presented as discussed in Point I shows that she did indeed have exclusive control of the room. Appellant's requested instructions would have had the effect of watering down the evidence presented and of confusing or misleading the jury.

2. Appellant cited no case authority from Utah

showing that where others had access to a room in which narcotics are found the defendant cannot be found guilty of constructive possession. Courts across the nation have gone both ways on this issue and respondent would suggest as was shown in Point II(A), that the more reasonable theory is the one which requires an examination of all the facts and circumstances of the case, and which allows for joint possession or control. The jury instruction which was given did allow for joint possession or control, in accordance with Utah statute. For the court to have given appellant's proposed jury Instruction Nos. 1 and 3 would have been to presume an interpretation of law which was not necessarily the correct one, and which avoided the facts supported by the evidence at the trial.

There was no prejudicial error in the instructions which were given and the verdict should not be disturbed.

POINT IV

THE SEARCH AND SEIZURE OF EVIDENCE FROM THE UPPER FLOOR OF APPELLANT'S PREMISES WERE BOTH LAWFUL AND SUCH EVIDENCE SHOULD BE PERMITTED AT TRIAL.

After swearing out a search warrant affidavit before Salt Lake City Judge M. D. Jones, the police officers went to the premises in question to conduct a search for illegally possessed heroin. The underlying basis of

the second floor: (a) since all the rooms were used by the occupants in a common or joint usage, the police officers were justified in searching the upper floor thoroughly; (b) neither the outward appearance of appellant's premises nor the licensing for hotel purposes were present so as to give the policemen prior notice of the upper floor's use; (c) searches must be judged according to what fair-minded persons would regard as proper in determining both if the search was valid and in assessing what is reasonable under the Fourth Amendment requirements.

Before these three subpoints can be discussed, an initial foundation of the sufficiency of the search warrant's probable cause must be laid. Where information from informants is used in securing a search warrant and the sufficiency of probable cause is in question, Jones v. United States, 362 U.S. 257 (1960), is regarded as setting forth the dispositive criteria for the supporting affidavit. Jones involved a search warrant for the suspected use of narcotics, the basis of which was information supplied by two informants. The affiant police officer had no personal knowledge of the use of drugs on the premises. The Supreme Court upheld the affidavit supporting the search warrant, ruling:

"The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact

that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.

In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." 362 U.S. at 269.

As to corroboration, the court further stated:

"The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale. . . ." Id. at 271.

This "substantial basis" test of Jones was accepted in the Utah case of State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972). The defendant in Treadway was convicted of unlawfully possessing marijuana. The basis for the search warrant involved was information phoned in by the manager of a motel who had observed the marijuana in the defendant's room. The affiant also swore that another officer had conducted a surveillance and believed the drugs were present. This Court found the affidavit was sufficient and enunciated the following standard:

"An affidavit may be based on hearsay information and need not reflect the direct, personal observations of the affiant; however, the magistrate must be informed of some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. The probability, and not a prima facie showing, of criminal activity is the standard of probable cause. The magistrate is obligated to render a judgment based upon a common-sense reading of the affidavit. Although the information is almost completely hearsay, the warrant may be upheld, if there be sufficient information in the affidavit to prove a 'substantial basis' for crediting the hearsay." (Citations omitted.)
Id. at 847-848.

In accord, State v. Fort, 572 P.2d 1387 (Utah 1977).

The facts in the instant case satisfy the standards established by Jones and Treadway. That is, affiant George had a "substantial basis" for giving credit to the two confidential informants' observations regarding appellant's drug activities. The informants' past histories of supplying information which resulted in the arrest "of several felons" and providing "names, addresses and telephone numbers of known narcotics dealers, which information has subsequently been verified" support George's reliance on the information. (State's Exhibit A.) Affiant's statements concerning the two informants' assertions were sufficient to allow a magistrate to find that the confidential sources were reliable and credible.

A. IT IS CLEAR THAT THERE WAS COMMON USAGE BY APPELLANT'S ASSOCIATES AND ROOMERS OF ALL ROOMS ON THE SECOND FLOOR.

As was noted in the statement of facts, appellant was very generous in providing shelter for her friends and acquaintances. These occupants were allowed to inhabit the upper floor rooms with or without paying rent, depending on if the roomers had the money to pay rent (Tr.66,176-177). The open living room area and shared bathroom, kitchen and hallway facilities point to the common usage aspect of the second floor.

The facts and circumstances of the search here are very similar to three cases in which search warrants were upheld. In State v. Tapp, 26 Utah 2d 392, 490 P.2d 334 (1971) a search warrant was issued even though the affiant did not stipulate precisely whether the defendant was in possession of some alleged marijuana or whether defendant was indeed residing at the address listed on the warrant. Yet this Court ruled that the search which uncovered the suspected marijuana was proper. In assessing the validity of the search warrant, the court declared:

"... it is not necessary that the affiant have certain knowledge of the commission of crime or of the location of evidence incident thereto. It is only required that there be sufficient knowledge of the probability thereof that a person of reason and prudence would act thereon." 490 P.2d at 337. (Emphasis added.)

Thus, the Utah Court has ruled that the location of evidence to be seized is necessary in the warrant only to the extent that the affiant has "sufficient knowledge of the probability" that the evidence would be found on the premises. Certain knowledge is not the test.

Here the confidential informants obtained information that heroin was being used and sold on the upper floor of appellant's premises. The search warrant was based on that information and the "sufficient knowledge" test of Tapp was met.

With respect to the common usage of the second floor rooms, the California Supreme Court ruled in People v. Gorg, 157 Cal.App.2d 515, 321 P.2d 143 (1958), that joint occupancy by criminal suspects will justify a search of all the rooms in the apartment. In Gorg, defendant and two other persons, Fontaine and Hyde, rented an apartment with three bedrooms but common bathroom, kitchen and living room. Each tenant paid rent separately to the landlord and shared utility expenses. The three bedrooms opened into the common living room. The warrant named Fontaine and authorized a search of "all rooms and buildings used in connection with the premises. . . ." Gorg appealed his conviction when incriminating evidence was uncovered in the search of the entire premise. In response to Gorg's claim that the search

was illegal, the California court determined that:

"While a search warrant for one building on a tract of land occupied by a named person will not justify a search of another separate building on the same tract of land occupied by another person [citations omitted], and will not justify a search of a separate floor of the same building occupied by an unnamed tenant [citations omitted] such rule only applies where there are separate and distinct living quarters occupied by different persons. A rule of reason must be applied. Here the living unit was one distinct unit occupied by three persons. When the police, pursuant to the warrant, searched the living room and found marijuana, and then searched Fontaine's bedroom and found marijuana, they acted as reasonable and prudent men in searching the other two bedrooms that were unlocked and an integral part of the same living quarters." 321 P.2d at 148. (Emphasis added.)

In the instant case, there were no separate and distinct living quarters (Tr.40), and, in fact, the upper floor area was one distinct living unit not only because of the numerous common areas shared by all the occupants, but also because appellant had control over the whole second floor (Tr.66,82-83). Thus, the Gorg ruling is very much on point here in that the police officers acted as prudent and reasonable men in searching all the rooms on the upper floor, especially since, as in Gorg, the rooms other than the officer were "unlocked and an integral part of the same living quarters."

One last case may be cited with regard to common occupancy. In Renner v. State, 187 Tenn. 647, 216 S.W.2d 345 (1948), a suspected criminal and another person were sharing an upper floor consisting of five separate rooms at No. 1476 1/2 Market Street. Two rooms were rented to defendant and three rooms were rented to one McKinney. The court declared "parenthetically, that both parties seemed to make themselves at home all over the place like one big family having a common interest." When defendant objected to the search warrant being incompetent on appeal, the court rejected his contention because:

" . . . the warrant does not purport to confine the search to only that part of the described premises which is occupied by a specified person, . . . but purports to direct a search of all of 1476 1/2 Market St. without regard to what person or persons may separately occupy separate portions of that address. . . . It results that the description was sufficiently specific, if a search may validly be issued to search a specified premises without naming the person or persons in possession of the premises." 216 S.W.2d at 347.

Just as the "sufficiently specific" requirement is set out by the Tennessee court, a similar test must be met in this state. Utah Code Ann. § 77-54-7 (Supp. 1973), declares that search warrants must describe the place to be searched with "reasonable particularity." In the present case, the

affidavit for search warrant gave adequate "reasonable particularity" when directing the search to be made of the premises located at 511-513 West Second South "adjoining buildings known as Del's Cafe and rooms apurtenant thereto" (State's Exhibit A), for the following reasons: the premises share a party wall and have only one entrance that allows access to both buildings; the two buildings are actually one single unit under the undivided control of appellant; even if there are one or more persons present in the unit it is immaterial without a showing that such persons are tenants in the sense that they have a residence there exclusive of appellant's overriding control. This has not been shown by appellant.

As is stated in 11 A.L.R.3d at 1341-42:

"The general rule that a search warrant directed against a multiple-occupancy structure must particularize respecting the subunit to be searched is usually held inapplicable where the premises in question are occupied by several families or persons in common rather than individually, or where it is shown that notwithstanding the joint occupancy, defendant was in control of the whole of the premises."

It is respondent's position that the facts do not support the conclusion that the two buildings involved constitute a multi-occupancy dwelling as relied on by appellant in United States v. Hinton, 219 F.2d 324 (C.A. 7, 1955), but serve as a single unit controlled exclusively by one person and for this reason the description in the search warrant

meets the particularity requirements of the Utah Code.

As to the reference to the search of a male person known only as "Billie," whether this is an adequate description for the purpose of a lawful search of "Billie" has no relevance to the lawful search of the premises. The warrant's particularity and lawfulness will not stand or fall on the additional warrant purpose of the search of "Billie." Martini v. State, 200 Md. 609, 92 A.2d 456 (1952); In Re G., 64 Misc.2d 129, 314 N.Y.S.2d 547 (1970).

B. OUTWARD APPEARANCE DID NOT INDICATE NOR WAS THERE ANY LICENSE TO INDICATE THAT THE UPPER FLOOR WAS A HOTEL, APARTMENT BUILDING OR ROOMING HOUSE.

It has been held that where the multi-unit character of the premises is not externally apparent and it was known to the officer applying for and executing the warrant, there is no requirement that the affidavit or search warrant specify the subunit to be searched. United States v. Santore, 290 F.2d 51 (2d Cir. 1952), cert. den. 365 U.S. 834 (1960). In Santore, defendant contended that since the house which was searched was not a one-family house, but two-family--the basement and second floor being occupied by one family and the first floor by another--the warrant did not describe the premises with proper particularity. Defendant

moved to suppress all evidence because of a claimed illegal search and seizure. In rejecting the Hinton, supra, distinction, the court ruled:

" . . . we think that the issued warrant described the premises to be searched with that 'practical accuracy' we have held to be necessary. [Citations omitted.] The description in the warrant was in accordance with the outward appearance of the structure, [citations omitted] and in view of the concealment by Orlando [a co-defendant] of the interior alteration made by him it would be absurd to say that the Government was on notice as to it. The agents were not warned of a possible dual occupancy of the house until after they had shown the copy of the warrant to Orlando and had entered inside. At that moment it was too late for them, consistent with the success of their mission, to have retreated and obtained a new warrant." 290 F.2d at 67.

In the present case, an inquiry to the Salt Lake City licensing and health departments would have revealed that no licenses existed for the operation of the premises as a dwelling for more than one family or person. As noted by appellant in her testimony at trial and in a deposition for affidavit in opposition to the search warrant, the premises had previously been used as a hotel, but the license for such use had been allowed to lapse (Tr.177;R.4). Thus, the police officers involved in the search should be allowed the justifiable inference that the premises were no longer

a multiunit structure and, in accordance with Santore, supra, should not be penalized for the description of the premises as set down in the search warrant.

C. SEARCHES MUST BE JUDGED ACCORDING TO WHAT FAIR-MINDED PERSONS WOULD REGARD AS PROPER IN DETERMINING WHAT IS REASONABLE UNDER THE FOURTH AMENDMENT REQUIREMENTS.

A basic, common-sense standard has been established by this Court in determining whether searches are proper or not. In State v. Criscola, 21 Utah 2d 272, 444 P.2d 517 (1968), it was noted that courts should be wary of applying the principle of constitutional protection against unreasonable searches too broadly. The Court determined that while unjustifiable searches were surely to be voided, as guaranteed by the Constitution:

" . . . it is equally important that such protections be applied in circumstances they were intended to cover and that they do not become so extended beyond their reasons for being that even where there is no danger or likelihood of any such abuse, they provide a cloak of protection by which those engaged in criminal activities may escape detection and punishment. The essential thing is to keep within the reasonable middle ground, between the protecting of the law-abiding citizenry from high-handed or officious intrusions into their private affairs; and the imposing of undue restrictions upon

conscientious officers doing their duty in the investigation of crime. It was undoubtedly in an awareness of the desirability of avoiding the difficulty just mentioned that the language of the Fourth Amendment does not denounce all searches, but only those which are 'unreasonable.'

The question to be answered is whether under the circumstances the search or seizure is one which fair-minded persons, knowing the facts, and giving due consideration to the rights and interests of the public, as well as to those of the suspect, would judge to be an unreasonable or oppressive intrusion against the latter's rights." 444 P.2d at 519.

This same reasoning was echoed again by this Court in State v. Richards, 26 Utah 2d 318, 489 P.2d 422 (1971); State v. Kaae, 30 Utah 2d 73, 513 P.2d 435 (1973); State v. Farnsworth, 30 Utah 2d 435, 519 P.2d 244 (1974); State v. Lopes, 552 P.2d 120 (Utah 1976); and State v. Folkes, 565 P.2d 1125 (Utah 1977).

In the instant case, neither the magistrate who approved the warrant nor the trial judge considered the search to be unreasonable. In light of the Criscola test, such determination should be given great weight when the validity of the warrant is questioned by appellant on appeal.

POINT V

EVIDENCE MAY PROPERLY BE SEIZED WHEN IN THE COURSE OF A LEGAL SEARCH OFFICERS INADVERTENTLY COME ACROSS INCRIMINATING EVIDENCE IN PLAIN VIEW.

The envelopes found in appellant's office were ancillary evidence further establishing that she was the occupant of the room where the heroin was discovered (Tr.41,66-69). While the envelopes were not listed on the search warrant as items to be seized, the case of Coolidge v. New Hampshire, 403 U.S. 443 (1971), holds that there are specific circumstances when unlisted items may be taken as evidence. Coolidge notes that while police may seize evidence in plain view without a warrant, it is crucial that such "plain view" seizures be allowed only within a very narrow framework. After the Supreme Court listed the two constitutional objectives of search warrant requirements--magistrate's scrutiny to eliminate searches not based on adequate probable cause and the limitation of searches so as to avoid the abhorrent "general search"--the court ruled:

" . . . [t]he 'plain view' doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as 'hot pursuit' or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure

of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous--to the evidence or to the police themselves--to require them to ignore it until they have obtained a warrant particularly describing it." 403 U.S. at 467-468.

Thus, Coolidge allows "plain view" incriminating evidence to be seized if a lawful search is already under way. This was clearly the case in the present matter at bar, since the envelopes were discovered in the same nightstand where the heroin was found. (Tr.66-69).

This Court has upheld the "plain view" theory in the recent case of State v. Folkes, supra. Here a criminal activity of illegal drug use was observed by two policemen who proceeded to arrest the suspects and gather incriminating evidence. This Court held the police officers:

"... could take anything in the immediate area which was so involved in the criminal conduct that it would serve as evidence in proof of the crime. Though the bottle from which the narcotic had been taken was placed on the dresser

in the adjoining bedroom, it was in the immediate vicinity; and it was in plain view in that no search was required to discover it. In fact the charge that there was a 'search' in this case is for that reason a distortion of language, because there was really no 'search' involved." 565 P.2d at 1127-1128.

A parallel can be drawn to the present case: the envelopes were seized in the "immediate vicinity" of the 56 balloons of heroin; the envelopes would serve as "evidence in proof of the crime" (i.e., possession); and the envelopes were in "plain view in that no search was required to discover [them]."

The Utah Court has also upheld this "plain view" rationale in State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276 (1972); State v. Allred, 16 Utah 2d 41, 395 P.2d 535 (1964); State v. Martinez, 28 Utah 2d 80, 498 P.2d 651 (1972); and State v. Kaae, supra.

Another important aspect of the envelope's admissibility is the United States Supreme Court's determination that there is no basis in distinguishing "mere evidence" seized in a lawful search from fruits or instrumentalities of crime or contraband. Warden v. Hayden, 387 U.S. 294 (1964). The Court there ruled:

" . . . [n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the 'right of the people to be secure in their persons, houses, papers, and effects. . . ,' without regard to the use to which any of these things are applied. This 'right of the people' is certainly unrelated to the 'mere evidence' limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband." 387 U.S. at 301-302.

This same rationale was used in State v. Jones, 202 Kansas 31, 446 P.2d 851 (1968), where the seizure of a handkerchief with the defendant's monogrammed initial on it was deemed proper because it was "lying in close proximity to the .32 caliber pistol" (which was used in the commission of a murder). The court rejected defendant's claim that the handkerchief was "mere evidence" and should therefore be excluded. The Kansas high court held that "the mere evidence rule was never the law in Kansas . . . and the Supreme Court of the United States recently abandoned the mere evidence rule in Warden v. Hayden." 446 P.2d at 866.

The seizure of the handkerchief in Jones and the seizure of the envelopes in the instant case are most analogous. Both were discovered in "close proximity" to the crucial evidence (i.e., pistol in Jones and heroin in the present case) and both linked the defendants to the

crime. Respondent submits further that both were properly seized within the scope of the searches. The envelopes were important bridging evidence which were in plain view during the course of the legal search and were properly seized to afix appellant's control over the office where the incriminating heroin was found.

CONCLUSION

Respondent contends that there was sufficient evidence presented at the trial upon which the jury could conclude beyond a reasonable doubt that the defendant was guilty of unlawful possession of heroin. The weight of the evidence showed that she had exclusive control over the room in which the heroin was discovered on July 14, 1976. The testimony of James Housley regarding the previous occupation of that room by Robert Westley was properly excluded by the judge, since Housley was unable to say exactly when he had visited the premises and seen Westley.

The trial judge properly used his discretion in refusing to allow that testimony since it might have confused the issues or misled the jury had it been permitted. The trial judge did not abuse his discretion in refusing to give the defendant's proposed Instruction Nos. 1 and 3.

Even if an error had been committed there was no reasonable probability that a decision more favorable to the defendant would have resulted. There was no error on the part of the judge.

The search conducted of the upper floor rooms was a proper action by the police officers since all the rooms were under appellant's control, no prior indication was given the officers regarding the unlicensed use of the second floor as a rooming house and the search was reasonable and fair under the circumstances.

The two envelopes seized were clearly in "plain view" and were properly gathered as incriminating evidence against appellant. They were also in "close proximity" to the seized heroin.

Respondent asserts that the rulings of the lower court were proper and prays that the decision be affirmed.

Respectfully submitted,

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