IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY THOMAS,	§	
	§	No. 560, 2004
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	No. 9506009638
	§	
Plaintiff-Below,	§	
Appellee.	§	

Submitted: August 29, 2005
Decided: November 10, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 10th day of November 2005, upon consideration of the briefs of the parties and the record, it appears to the Court that:

(1) Defendant-appellant, Larry Thomas ("Defendant" or "Appellant") was convicted on several charges relating to his trafficking of cocaine in excess of 100 grams. He appeals his conviction on two grounds: Thomas claims that (1) on the maintaining a vehicle for controlled substances charge, it was an abuse of discretion for the Superior Court not to grant his motion for judgment of acquittal;[1]

[1] In violation of 16 Del. C. § 4755, which reads in pertinent part: (a) It is unlawful for any person… (5) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building,

and (2) the Superior Court abused its discretion when it instructed the jury on direct possession, instead of constructive possession. After a review of the record and the case law, and in particular this Court's recent decision in *Priest v. State*,[2] we find no merit to Thomas' claims and affirm.

(2) The following evidence was adduced at trial: During a routine patrol, Officer Clayton Hewes, then of the Delaware River and Bay Authority Police Department, observed a vehicle stopped on the shoulder of Interstate 295. After pulling over to render assistance, Officer Hewes became suspicious after questioning Harry Hinton (the driver) and Thomas (the passenger). As Officer Hewes began to search the passenger side of the vehicle's interior, both Hinton and Thomas jumped over a guard rail and ran down a hill towards Route 13. Hewes gave chase, but was unable to apprehend the suspects after fracturing his ankle upon falling into a drainage ditch. Officer Hewes then returned to the vehicle and found a bag containing cocaine located on the passenger side front floorboard.

(3) The central issue is the application of our holding in *Priest v. State* to the facts in this case. *Priest* involved the issue of what the State must prove to convict a defendant of maintaining a vehicle for keeping or delivering controlled

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vehicle, boat, aircraft or other structure or place which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances or which is used for *keeping or delivering* them in violation of this chapter. (emphasis added). A violation of §4755 is commonly referred to as a "maintaining a vehicle" charge.

[2] 879 A.2d 575 (Del. 2004).

substances. This Court held that: "to sustain a finding of guilt on a Maintaining a Vehicle charge, the State *must* offer evidence of *some affirmative activity* by the defendant to utilize the vehicle to facilitate the possession, delivery, or use of controlled substances."[3] We reversed the defendant's conviction in *Priest* because of the State's total failure to present evidence of Priest's affirmative activity to utilize the vehicle to facilitate the possession, delivery, or use of a controlled substance.[4]

(4) In vacating Priest's conviction, this Court recognized that: "[a]lthough it is possible to imagine a scenario where a passenger's actions might adequately demonstrate his knowledge that the vehicle was kept or maintained for illegal drug activity, the facts *here* do not support that scenario."[5] The crucial question is whether the facts before us are sufficient to demonstrate that knowledge.

(5) We review the evidence, both direct and circumstantial, in the light most favorable to the State and determine if a rational trier of fact could find beyond a reasonable doubt that Thomas had kept or maintained the vehicle to transport the cocaine.[6] Here the circumstances adequately demonstrated Thomas'

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[3] *Priest*, 879 A.2d at 576 (emphasis added).
[4] *Id.* at 580 (summarizing the evidence presented against Priest).
[5] *Id*. (emphasis added).
[6] *See Fletcher v. State*, 2005 Del. LEXIS 124, *3 ("This Court reviews the denial of a motion for acquittal de novo. The standard of review is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.") (*citing Hardin v. State*, 844 A.2d 982. 989 (Del. 2004); *Seward v. State*, 723 A.2d 365, 369 (Del. 1999)) (footnote omitted).

knowledge that the vehicle was being kept or maintained for illegal drug activity. The trip was more than 150 miles to procure drugs and only two occupants were in the vehicle. The drugs were found on the passenger-side front floorboard, within the immediate area where Thomas was sitting. Both the driver and Thomas fled from law enforcement once a search of the vehicle was underway. At a minimum, the circumstances supported an inference that Thomas was an accomplice of the driver with whom he fled. A person indicted as a principal may also be convicted as an accomplice.[7] Furthermore, the jury found Thomas to be a co-conspirator. Because the evidence is sufficient under *Priest*, we find that Thomas' first argument is without merit.

(6) Thomas' second claim is that it was error for the Superior Court to deny his motion to instruct the jury solely on constructive possession and to omit all reference to direct possession. "A defendant has no right to have the jury instructed in a particular form. However, a defendant is entitled to have the jury instructed with a correct statement of the substantive law."[8] Accordingly, our review is to evaluate the correctness of the Superior Court's instruction.

(7) The trial court instructed the jury on both actual possession and constructive possession. The court instructed that *actual possession* requires:

[7] 11 Del. C. § 275.
[8] *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991).

> A person who knowingly has direct physical control over a thing at a given time… The *possession* of a drug by a passenger in an automobile is *more than* proximity to, or *awareness* of, the drug in the car. The State has the burden of proving a, quote, possession, unquote, that amounts to a conscious dominion, control and authority over the drugs. (emphasis added)

The Superior Court also instructed the jury on *constructive possession* and explained it as:

> In addition to actual possession, possession includes location in or about the defendant's person, premises, belongings or vehicle or otherwise within his reasonable control. In other words, a person who, although not in actual possession, has *both the power and the intention* at a given time *to exercise control* over a substance, either directly or through another person or persons is then in constructive possession of it. In order to prove constructive possession the State must show:
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> One, defendant knew of the location of the drugs.
> Two, that the defendant had the ability to exercise dominion…
> And three, had the intention to guide their destiny.

(8) Thomas argues that the Superior Court's inclusion of the language for direct possession allowed the jury to ignore the evidentiary requirements for constructive possession. Thomas' argument, specifically his reliance on *McNulty v. State*[9] and *Holden v. State*[10], is unpersuasive.

(9) The *McNulty* and *Holden* cases cited by Thomas do not suggest that the Superior Court cannot instruct the jury on both the concepts of direct and

[9] 655 A.2d 1214 (Del. 1995).
[10] 305 A.2d 320 (Del. 1973).

constructive possession. Thomas is entitled to have the jury instructed with a correct statement of the law, but he has no right to demand any particular form of jury instruction.[11] The Superior Court's jury instruction on direct and constructive possession was a correct statement of the law.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[11] *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991).