

**STATE OF LOUISIANA**

\*

**NO. 2002-K-0505**

**VERSUS**

\*

**COURT OF APPEAL**

**JERMAINE ROACH**

\*

**FOURTH CIRCUIT**

\*

**STATE OF LOUISIANA**

\*

\*

\*\*\*\*\*

ON SUPERVISORY WRIT DIRECTED TO  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 422-752, DIVISION "K"  
HONORABLE ARTHUR HUNTER, JUDGE

\*\*\*\*\*

**JOAN BERNARD ARMSTRONG**

**JUDGE**

\*\*\*\*\*

(Court composed of Judge Joan Bernard Armstrong, Judge Terri F. Love and  
Judge Max N. Tobias, Jr.)

**HARRY F. CONNICK**, DISTRICT ATTORNEY, ORLEANS PARISH  
**STEPHENIE LOUTHAN**, ASSISTANT DISTRICT ATTORNEY  
**DAMON STENTZ**, ASSISTANT DISTRICT ATTORNEY  
619 SOUTH WHITE STREET  
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF-RELATOR

**MELISSA A. BARBIER**  
ORLEANS INDIGENT DEFENDER PROGRAM  
2700 TULANE AVENUE, ROOM 112  
NEW ORLEANS, LA 70119

COUNSEL FOR DEFENDANT-RESPONDENT

**GRANTED;**

**WRIT**

**REVERSED;**  
**REMANDED.**

We grant certiorari to consider the correctness of a trial court ruling granting the defendant's motion to suppress the evidence. For the following reasons, we now reverse the ruling of the trial court and remand the case for further proceedings.

On July 5, 2001 the State filed a bill of information charging the defendant, Jermaine Roach, with one count of possession of cocaine and one count of possession of heroin. The defendant entered a not guilty plea on August 8, 2001. A motion to suppress and preliminary hearing was held on February 28, 2002. At that time the trial court found no probable cause as to the possession of heroin charge and granted the motion to suppress evidence as to that contraband. The State objected and applied for supervisory writs to this court.

The sole witness at the motion hearing was Officer Octavio Baldassaro. He stated that, on June 26, 2001, he was assigned to the Fourth District and was working with Officer Ritchie LeBlanc. At approximately 1:45 a.m. the officers were on foot patrol in the 2100 block of Leboeuf Court

when they decided to do a routine check of an abandoned residence, Apartment 1-A. The officers had prior knowledge that the apartment was abandoned; they also had made numerous narcotics arrests at the location. The officers entered and walked into a rear bedroom where they observed the defendant sitting in a wheelchair. Officer Baldassaro recognized the defendant from a prior narcotics arrest of the defendant in the same apartment in which Officer Baldassaro assisted. Officer Baldassaro observed a syringe containing a clear liquid and two clear plastic bags containing white powder in the defendant's lap. The officer believed that both the liquid and powder were cocaine. Also, the officer saw a plate containing a white residue, a spoon, match box, and a paper filter; the plate was on the ground between the defendant's feet. The defendant was arrested.

During cross-examination, Officer Baldassaro noted that the syringe tested negative, the plastic bags tested positive for cocaine, and the spoon tested positive for heroin. Officer Baldassaro also testified on cross-examination that the apartment had electricity and the lights were on. There was paraphernalia, particularly syringes, throughout the house, but no other persons were present at the time of the defendant's arrest.

After the officer testified, defense counsel argued that any items found

on floor “should not be considered admissible evidence” against the defendant because there was “not any probable cause to link him,” and that “there should be found no probable cause for that arrest [for heroin]”. The assistant district attorney responded with the fact that the plate and spoon were found on the floor at the defendant’s feet in contrast to “all the other paraphernalia that was all over the apartment, which the officer did not charge him with.” The trial court apparently accepted the defense counsel’s argument as it then found “no probable cause” and granted the motion to suppress as to the heroin charge only.

The State is before this court arguing that the defendant was in constructive possession of the items at his feet as they would be within his dominion and control; the State further argues that the items were in plain view and subject to a warrantless seizure.

In State v. Smith, 96-2161, p. 3 (La. App. 4 Cir. 6/3/98), 715 So.2d 547, 549, this court discussed the plain view exception:

In order for an object to be lawfully seized pursuant to the "plain view" exception to the Fourth Amendment, "(1) there must be a prior justification for the intrusion into a protected area; (2) in the course of which the evidence is inadvertently discovered; and (3) where it is immediately apparent without close inspection that the items are evidence or contraband." State v. Hernandez, 410 So.2d 1381, 1383 (La. 1982); State v. Tate, 623 So.2d 908, 917 (La. App. 4 Cir.), writ denied 629 So.2d 1126 and 1140 (La. 1993).

In Tate, this court further noted: "In Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the Court held that evidence found in plain view need not have been found "inadvertently" in order to fall within this exception to the warrant requirement, although in most cases evidence seized pursuant to this exception will have been discovered inadvertently." Tate at 917.

At no time did the trial court find or defense counsel argue that the police officers did not have the right to be in the abandoned apartment. Thus, the officers had a right to be where they were when they observed what to them was immediately apparent as contraband in the defendant's lap and on the plate at his feet. Therefore the spoon containing heroin residue was lawfully seized.

The problem in this case is that the defense and trial court jumped from a consideration of whether there was sufficient probable cause to link the spoon to the defendant so as to justify his arrest for (constructive) possession of the residue on the spoon to the conclusion that the evidence itself is not admissible at trial. That was error. A finding of insufficient probable cause for the defendant's arrest is the appropriate inquiry at the preliminary hearing portion of the proceedings. Once the court finds insufficient probable cause for the defendant's arrest and/or continued detention on the charge, the remedy is the defendant's release without bond

on that charge. La. C.Cr.P. art. 296. However, as noted by this Court in State v. Bradford, 98-1428, p. 4 (La. App. 4 Cir. 12/9/98), 729 So.2d 1049, 1051: "The admissibility of evidence is dependent upon the circumstances of the search, not upon whether there was probable cause to believe a defendant had committed the crime." Further, as noted in State v. Perron, 2001-0214, p. 6 (La. App. 4 Cir. 1/16/02 ), 806 So.2d 924, 928:

The mere presence of a defendant in the area where the narcotics were found is insufficient to prove constructive possession. See State v. Collins, 584 So.2d 356, 360 (La. App. 4 Cir. 1991).

A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. State v. Jackson, 557 So.2d 1034, 1035 (La. App. 4 Cir. 1990). A person may be deemed to be in joint possession of a drug which is in the physical possession of another if he willfully and knowingly shares with the other the right to control it. State v. Smith, 245 So.2d 327, 329 (La. 1971). Determination of whether a defendant had constructive possession depends on the circumstances of each case. State v. Cann, 319 So.2d 396, 397 (La. 1975). "In determining whether defendant exercised the requisite dominion and control the jury may consider his knowledge that illegal drugs are in the area, his relationship with one found to be in actual possession, his access to the area where drugs were found, his physical proximity to the drugs and the evidence that the area was frequented by drug users." State v. Reaux, 539 So.2d 105, 108 (La. App. 4 Cir. 1989). See also State v. Williams, 594 So.2d 476 (La. App. 4 Cir. 1992); State v. Kingsmill, 514 So.2d 599 (La. App. 4 Cir. 1987); State v. Maresco, 495 So.2d 311 (La. App. 4 Cir 1986).

In the present case, no one else was present in the apartment. The

testimony was clear that the plate containing the spoon, matches, and filter was between the defendant's feet. A syringe containing a liquid and powdered drugs was in his lap, indicating his awareness of drugs. This evidence appears without question to support a finding that, more probably than not, the defendant was in constructive possession of the spoon and the heroin residue on it.

For the foregoing reasons, we grant the State's writ application, reverse the ruling of the trial court and remand this case for further proceedings.

**GRANTED;**

**WRIT**

**REVERSED;**  
**REMANDED.**