STATE OF CONNECTICUT *v.* CHARLES WILLIAMS (SC 16415)

Sullivan, C. J., and Norcott, Katz, Palmer and Zarella, Js.

Argued May 30—officially released September 4, 2001

Counsel

Robin S. Schwartz, special deputy assistant state's attorney, with whom, on the brief, were *James Thomas*, state's attorney, and *George Ferko*, assistant state's attorney, for the appellant (state).

Carlos E. Candal, special assistant public defender, with whom, on the brief, was *Mark Rademacher*, assistant public defender, for the appellee (defendant).

Opinion

NORCOTT, J. The state appeals, following a grant of certification, from the judgment of the Appellate Court reversing the conviction of the defendant, Charles Williams, on the charge of criminal possession of a firearm in violation of General Statutes (Rev. to 1999) § 53a-217.[1] The state claims that the Appellate Court improperly determined that the trial court inappropriately had refused the defendant's requested jury instruction regarding the doctrine of nonexclusive possession.[2]

State v. *Williams*, 59 Conn. App. 771, 785, 758 A.2d 400 (2000). The state also claims that the trial court's failure to provide the jury with the requested instruction, if improper, was harmless. We conclude that, under the circumstances of this case, the defendant was not entitled to an instruction regarding the doctrine of nonexclusive possession and, therefore, we reverse the judgment of the Appellate Court.

The opinion of the Appellate Court contains the following facts that a jury reasonably could have found. ''On January 26, 1999, Officer Andrew Lawrence of the Hartford police department was driving in his patrol car when he observed the defendant drive through a stop sign. Lawrence activated his lights and siren, called for backup and pursued the defendant. The defendant pulled into a driveway, got out of the car and knocked on the door or rang the doorbell of a [private] home. Soon thereafter, the defendant walked away from the house and proceeded down the street, leaving the car in the driveway.

''Lawrence did not follow the defendant. Instead, while monitoring the defendant as he was walking away, Lawrence approached the vehicle and looked through the car window. Inside, he saw a .38 caliber semiautomatic pistol on the driver's seat. Once backup officers arrived, Lawrence pursued the defendant while the car was secured by the other officers. Lawrence caught up with the defendant, who had since rounded a street corner, and arrested him.

''The state filed a two count information alleging that the defendant used a motor vehicle without the owner's permission in violation of General Statutes § 53a-119b (a) (1)[3] and that the defendant was in criminal possession of a firearm in violation of § 53a-217 (a) (1). On May 25, 1999, the defendant filed a motion to suppress all items seized by the police.[4] The trial court's signed oral decision on the motion to suppress focused on the issue of whether the 'viewing of a weapon in plain view of the driver's seat of a vehicle [constituted] probable cause to arrest the operator of said vehicle for the crime of weapon in a motor vehicle in violation of [General Statutes] § 29-38[5] . . . .' The court denied the motion on July 16, 1999.'' *State* v. *Williams*, supra, 59 Conn. App. 773. A jury trial commenced on July 20, 1999.

''At the end of the state's case, the defendant moved for a judgment of acquittal on both counts. The trial court granted the motion as to the first count of using a motor vehicle without the owner's permission, but denied the motion as to the second count of criminal possession of a firearm.'' Id., 774.

Thereafter, the defendant presented evidence ''to dispute the issue that the weapon found in the car was in his exclusive possession.[6] At the time of his arrest, the defendant [allegedly had been seen by Lawrence] driv-

ing a rental car owned by National Car Rental. Tammy Dinatale, a representative of National Car Rental, testified that at the time the weapon was found in the car, the vehicle was rented to another individual, [Kirk] Scott.

''The defense also presented Madeline Williams, the defendant's sister, as a witness. Williams testified [that at] approximately 9 a.m. on the morning of the defendant's arrest, Williams drove herself and the defendant out to breakfast in her own car. Afterwards, the defendant asked Williams to bring him to a friend's house, Scott, to get a compact disc [that he previously had loaned to Scott].'' Id., 783–84. According to Williams, she and ''the defendant drove to Scott's house, and Williams accompanied the defendant to Scott's residence. Scott handed the defendant a key to the rental car. Williams and the defendant then proceeded to the rental car to retrieve the compact disc from the vehicle. At that point, before Williams and the defendant reached the vehicle, the officer approached the defendant and arrested him.'' Id., 784.

''On July 20, 1999, the defendant filed a request to charge the jury on the theory of nonexclusive possession, which was denied the following day by the court.[7] The jury returned a guilty verdict on July 21, 1999.'' Id., 774. The defendant then filed a postverdict motion for judgment of acquittal. Id. The trial court denied that motion and rendered judgment in accordance with the jury verdict sentencing the defendant to five years imprisonment.

The defendant appealed to the Appellate Court, claiming that the trial court improperly had: (1) denied his motion to suppress; (2) denied his motion for judgment of acquittal; and (3) refused to instruct the jury concerning the defense of nonexclusive possession. Id., 772. The Appellate Court held that the trial court properly had denied the defendant's motion to suppress and his motion for judgment of acquittal. Id., 776, 778. The Appellate Court concluded, however, that the trial court improperly had refused to instruct the jury on the defendant's theory of nonexclusive possession. Id., 778. According to the Appellate Court, the testimony of Williams ''contradicted the sequence of events offered by the state and raised the issue of the defense of nonexclusive possession.'' Id., 784. The Appellate Court, therefore, reversed the judgment of conviction and remanded the case for a new trial. Id., 785. This certified appeal followed.

We granted the state's petition for certification to appeal limited to the following issues: ''(1) Did the Appellate Court properly conclude that the defendant was entitled to a jury instruction regarding the doctrine of nonexclusive possession? (2) If the answer to question one is 'yes,' was the error harmless?'' *State* v. *Williams*, 254 Conn. 952, 762 A.2d 906 (2000). We conclude that the defendant was not entitled to a jury instruction

regarding the doctrine of nonexclusive possession and, accordingly, we reverse the judgment of the Appellate Court.[8]

The state contends that a jury instruction regarding the doctrine of nonexclusive possession was not warranted because there was no evidence produced at trial to support the claim that the defendant and at least one other individual shared joint access to the weapon. The defendant, however, insists that the Appellate Court properly determined that he was entitled to the requested instruction because there was evidence presented that, if believed, would support a finding that he did not have exclusive possession of the vehicle in which the weapon was found. We agree with the state.

''Where the defendant is not in exclusive possession of the premises where the [illegal item is] found, it may not be inferred that [the defendant] knew of the presence of the [illegal item] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference. *Evans* v. *United States*, 257 F.2d 121, 128 (9th Cir.), cert. denied, 358 U.S. 866, 79 S. Ct. 98, 3 L. Ed. 2d 99, reh. denied, 358 U.S. 901, 79 S. Ct. 221, 3 L. Ed. 2d 150 (1958) . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Delossantos*, 211 Conn. 258, 277, 559 A.2d 164, cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989); see also *State* v. *Berger*, 249 Conn. 218, 225, 733 A.2d 156 (1999) (same); *State* v. *Alfonso*, 195 Conn. 624, 633, 490 A.2d 75 (1985) (same). The doctrine of nonexclusive possession ''was designed to prevent a jury from inferring a defendant's possession of [an illegal item] solely from the defendant's nonexclusive possession of the premises where the [illegal item was] found.'' *State* v. *Nesmith*, 220 Conn. 628, 636 n.11, 600 A.2d 780 (1991). When the doctrine applies, an instruction focuses the jury's attention on the defendant's knowledge and intent to possess, precluding it from inferring possession from the mere fact that the defendant, along with others, occupied or had access to the premises wherein the contraband was found. See *United States* v. *McKissick*, 204 F.3d 1282, 1291 (10th Cir. 2000) (proof of nonexclusive constructive possession alone insufficient to justify implication of knowledge; state must present some corroborating evidence of knowledge); *Chicone* v. *State*, 684 So. 2d 736, 740 (Fla. 1996) (same); see also *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986) (''[t]he essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental element'').

''As a general rule, a defendant is entitled to have instructions on a defense for which there is evidence produced at trial to justify the instruction, no matter how weak or incredible the claim.'' *State* v. *Varszegi*,

236 Conn. 266, 282, 673 A.2d 90 (1996); see *State* v. *Havican*, 213 Conn. 593, 597, 569 A.2d 1089 (1990) (" '[i]f the defendant asserts a recognized legal defense and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to a theory of defense instruction' "). As a specific matter, in deciding whether the trial court improperly failed to provide the jury instruction on nonexclusive possession of the premises, as requested by the defendant, "we must adopt the version of the facts most favorable to the defendant which the evidence would reasonably support." (Internal quotation marks omitted.) *State* v. *Henning*, 220 Conn. 417, 428, 599 A.2d 1065 (1991); see also *State* v. *Lewis*, 245 Conn. 779, 810, 717 A.2d 1140 (1998); *State* v. *Edwards*, 234 Conn. 381, 389, 661 A.2d 1037 (1995).

Our decision in *State* v. *Nesmith*, supra, 220 Conn. 628, is illustrative of these principles and presents a similar scenario to the present case. In *Nesmith*, the defendant had been charged with possession of narcotics in conjunction with his arrest in a vacant apartment known by police to harbor drug users. Id., 629–30. At the time of his arrest, from six to eleven people had occupied the front room of the abandoned apartment. Id., 630. Upon seeing the police enter, the defendant attempted to move toward an unoccupied room in the rear of the apartment. Id. An officer pursued the defendant into the empty room and witnessed him drop something to the floor. Id. After restraining the defendant and ordering him to return to the front room where other officers had detained the other occupants of the apartment, the officer investigated the back room further and found a number of envelopes and plastic vials containing narcotics on the floor. Id.

The defendant's testimony at trial directly contradicted the state's version of the facts. According to the defendant, he was waiting for a friend in the hallway outside the apartment when a police officer grabbed him and brought him inside the apartment. Id., 630–31. The defendant claimed that he was then directed to sit on the floor with approximately eleven other detainees. Id., 631. While sitting with the other detainees, the defendant explained, he had observed the man next to him drop the narcotics. Id. The defendant, therefore, requested a jury charge on the doctrine of nonexclusive possession. Id., 633. The trial court refused to provide such a charge and the defendant was convicted. Id.

In affirming the judgment of conviction, the Appellate Court reasoned that "[t]he common factor in cases that have applied [the doctrine of nonexclusive possession] is the fact that the narcotic substances were accessible to others and were found in areas that were also occupied by others." *State* v. *Nesmith*, 24 Conn. App. 158, 161, 586 A.2d 628 (1991). The Appellate Court noted, however, that the defendant had been charged only with

possession of the narcotics found in the back room. Because no evidence was adduced at trial to demonstrate that any other person had been present in the back room, the situation was not one involving nonexclusivity. Id., 161–62. Thus, the Appellate Court concluded that the trial court properly refused to give the requested charge. Id., 162.

We affirmed the Appellate Court, explaining that the version of the facts most favorable to the defendant ''established possession of the narcotics without requiring that the jury draw an inference based solely on the defendant's presence on the premises.'' *State* v. *Nesmith*, supra, 220 Conn. 633–34. We acknowledged that two conflicting stories had been presented through the evidence, each of which identified a different individual as the person discarding the drugs. Id., 635–36. The jury, as fact finder, was entitled to believe the story that it found credible. We concluded that ''there was no risk that the jury would infer the defendant's possession of the drugs from the mere fact that he was in nonexclusive possession of the premises because the evidence established that either the defendant or another detainee identified by the defendant discarded the drugs.'' Id., 636 n.11.

In the present case, we are faced with two mutually exclusive accounts of the facts, neither of which require a charge regarding nonexclusive possession. We review these conflicting accounts seriatim.

The defendant presented evidence that he and his sister drove to Scott's residence, in a vehicle other than the rental car that Lawrence allegedly had seen the defendant driving, in order to retrieve a compact disc. Once arriving at Scott's residence, the defendant borrowed Scott's key and proceeded to the rental car. It was at that point, before the defendant had ever reached the rental car, that he was arrested. This version of the facts, taken in the light most favorable to the defendant, supports a conclusion that the defendant was never in the vehicle in which the weapon was recovered. Thus, the defendant's claim should not be categorized as one of nonexclusive possession, but more appropriately as one of no possession at all.

The doctrine of nonexclusive possession provides that ''where there exists access by two or more people to the [contraband] in question, there must be something more than the mere fact that [contraband was] found to support the inference that the [contraband was] in the possession or control of the defendant.'' *State* v. *Nesmith*, supra, 24 Conn. App. 161. Thus, the charge is appropriate in circumstances where the defendant has possession of the premises along with at least one other individual. The defendant's version of the facts, however, calls for neither a conclusion of joint nor exclusive access to the vehicle, but rather one of no access. The nonexclusive possession doctrine is typi-

cally implicated where the defendant admits that he had access to the premises, but denies that he had possession of the illegal item. See, e.g., *State* v. *Delossantos*, supra, 211 Conn. 262 (defendant was sole occupant of vehicle that contained cocaine hidden in rear of car, but denied knowledge of its presence); *State* v. *Alfonso*, supra, 195 Conn. 634 (defendant present in apartment where marijuana found, but denied ownership). Under the defendant's theory, however, he never had access to the premises. The nonexclusive possession doctrine, therefore, is inapplicable to the defendant's version of the facts.[9]

Even if we adopt the state's version of the facts as those most favorable to the defendant, as the defendant appears to argue, a nonexclusive possession charge was not required. The state presented evidence that Lawrence observed the defendant exit the vehicle, he peered through the car window, and he saw a weapon located on the driver's seat. In doing so, the state conceded that the defendant was not in physical possession of the firearm at the time of his arrest and acknowledged that, in order to establish possession of the firearm for a conviction under § 53a-217 by constructive possession, it was required to prove beyond a reasonable doubt that the defendant had exercised intentional dominion and control over the firearm and that he had knowledge of its character. See General Statutes § 53a-3 (2);[10] *State* v. *Hill*, supra, 201 Conn. 516 (concluding with respect to constructive possession that "control must be exercised intentionally and with knowledge of the character of the controlled object").

If the defendant had driven the vehicle and the weapon was located on the driver's seat, as alleged by the state, then either the defendant was sitting on the weapon while driving or he placed the weapon on the driver's seat as he exited the vehicle. Either act demonstrates that the defendant had dominion and control over the weapon with knowledge of its character, thereby establishing possession. See General Statutes § 53a-3 (2). This court previously has explained that "[t]he essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent. In our criminal statutes involving possession, this control must be exercised intentionally and with knowledge of the character of the controlled object." *State* v. *Hill*, supra, 201 Conn. 516.[11] Thus, if believed, the state's evidence supports a conclusion that the defendant exhibited the requisite control and knowledge of the weapon necessary to establish possession.

The defendant contends that the state's evidence, coupled with the fact that Scott rented the vehicle and lived nearby, warranted a nonexclusive possession charge. He relies on *State* v. *Delossantos*, supra, 211

Conn. 258, for support of this proposition. In *Delossantos*, the defendant, who was the sole occupant of a borrowed vehicle, was pulled over by the police for traveling in excess of the posted speed limit. Id., 261. As a result of the stop and subsequent search of the vehicle, a bag containing cocaine was discovered hidden underneath a leather cover in the hatchback area of the vehicle. Id., 262. The defendant was charged with possession of cocaine with intent to sell. Id., 260. He testified at trial that he was unaware of the presence of cocaine in the vehicle. Id., 262. The jury found the defendant guilty and he appealed, claiming that the court erred with respect to its jury instructions on constructive possession. Id., 276. This court concluded that the trial court properly instructed the jury that " '[i]f the defendant was not in exclusive possession of the car where the narcotics were found at the time he was apprehended, it may not be inferred that the defendant knew of the presence of the narcotics and had control over them unless there are other incriminating statements, evidence or circumstances tending to buttress such an inference.' " Id., 277. Thus, the jury was not permitted to infer, without some evidence, that the defendant knew that cocaine was *hidden* in the rear of the car. The defendant's attempt to liken the present case to the situation in *Delossantos* is misplaced.

Unlike *Delossantos*, the item in question in the present case was not secreted, but rather was in plain view.[12] Under the state's version of the facts, the defendant either sat on the weapon or placed it on the driver's seat as he exited the vehicle. Based on the evidence, *no one else* had access to the vehicle between the time that Lawrence had witnessed the defendant driving, and the officer's discovery of the firearm.[13] "The evidence thus established possession of the [weapon] without requiring that the jury draw an inference based solely on the defendant's presence [in the vehicle]." *State* v. *Nesmith*, supra, 220 Conn. 634. Moreover, it would have been improper under these circumstances for the court to have instructed the jury on nonexclusive possession because the evidence would not have supported a finding that there was joint or simultaneous access to a weapon that the defendant either sat upon or held. See *State* v. *Diggs*, 219 Conn. 295, 299, 592 A.2d 949 (1991) ("[t]he court . . . has a duty not to submit to the jury, in its charge, any issue upon which the evidence would not reasonably support a finding"). Accordingly, there was no need for a nonexclusive possession charge.

The cumulative evidence offered in this case reasonably could support two mutually exclusive versions of what transpired prior to the defendant's arrest. Either the defendant was never in the vehicle, or he was in it and, because of the weapon's location on the driver's seat, was in sole possession of the weapon. The jury, as fact finder, was entitled to accept the version of the facts that it found credible.[14] Neither version, however,

evidences the defendant's nonexclusive possession of the weapon. "[A] defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible . . . ." (Internal quotation marks omitted.) *State* v. *Havican*, supra, 213 Conn. 597. We conclude that no such foundation was established and, therefore, the trial court properly denied the defendant's request to charge the jury on nonexclusive possession.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion SULLIVAN, C. J., and PALMER and ZARELLA, Js., concurred.

[1] General Statutes (Rev. to 1999) § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm or electronic defense weapon when he possesses a firearm or electronic defense weapon and (1) has been convicted of . . . a class D felony . . . ."

[2] See, e.g., *State* v. *Alfonso*, 195 Conn. 624, 633, 490 A.2d 75 (1985) (concluding that, if defendant not in exclusive possession of premises where contraband found, jury may not infer that defendant knew of presence of contraband and had control thereof " 'unless there are other incriminating statements or circumstances tending to buttress such an inference' ").

[3] General Statutes § 53a-119b (a) provides in relevant part: "A person is guilty of using a motor vehicle without the owner's permission when: (1) He operates or uses, or causes to be operated or used, any motor vehicle unless he has the consent of the owner . . . ."

[4] The defendant sought to suppress the firearm and ammunition as well as items seized from his person following a search incident to his arrest, including a cellular telephone and $1890 in cash. The defendant also sought to suppress evidence concerning the key to the vehicle that had been found in his pocket.

[5] General Statutes § 29-38 provides in relevant part: "(a) Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 or any machine gun which has not been registered as required by section 53-202, shall be fined not more than one thousand dollars or imprisoned not more than five years or both, and the presence of any such weapon, pistol or revolver, or machine gun in any vehicle shall be prima facie evidence of a violation of this section by the owner, operator and each occupant thereof. . . ."

[6] The defendant stipulated to the fact that he had been convicted of burglary in the third degree, a class D felony, prior to his arrest in this case. See General Statutes §§ 53a-103 and 53a-103a. Thus, the only disputed issues at trial were the operability of the firearm and the defendant's possession thereof.

[7] Specifically, the defendant requested that the trial court instruct the jury that "[w]here the defendant is not in exclusive possession of the [vehicle wherein] the firearm was found, you may not infer that he knew of its presence and that he had control of it, unless he made some incriminating statement, or unless there are [some] other circumstances [that] tend to support such an inference." The trial court denied that request and indicated that " 'what I am going to charge [the jury] is that possession means intentional dominion and control over the firearm accompanied by knowledge of its character. Mere presence in the vicinity of the firearm, however, is not enough to establish possession. . . . [I]f that's what your claim is that will be covered in the charge that I plan on giving. . . . I am going to charge [that] mere presence in the vicinity of a firearm, however, is not enough to establish possession. So to that end I am going to deny the request, your specific request to charge under the exclusive possession section because I think it is adequately covered in the charge that I am going to give under the elements of the crime.' " *State* v. *Williams*, supra, 59 Conn. App. 779–80 n.3.

[8] Because of our conclusion that no error occurred in denying the defendant's request to charge the jury on the doctrine of nonexclusive possession, we need not address the second certified issue.

[9] Any rejoinder claiming that the defendant's version of the evidence demonstrates that he, through possession of the key to the rental car, had nonexclusive possession of the vehicle, is unavailing. The fact that the key was found on the defendant's person is entirely consistent with his theory of defense, which claims that he obtained the key from Scott in order to retrieve a compact disc from the vehicle. The defendant's contention, therefore, was that he did not have possession of the vehicle, nonexclusive or otherwise, at any point in time. Thus, an instruction regarding nonexclusive possession is not supported by the defendant's own evidence.

An instruction on the defendant's theory of defense is required only when ''the evidence indicates the availability of that defense . . . .'' *State* v. *Fuller*, 199 Conn. 273, 278, 506 A.2d 556 (1986). Contrary to the approach promulgated by the dissent, this court is not required to encumber the burden of contriving a variety of possible scenarios under which the defendant may then be entitled to an instruction regarding nonexclusive possession when the parties themselves presented no such situation.

[10] General Statutes § 53a-3 (2) provides that '' '[p]ossess' means to have physical possession or otherwise to exercise dominion or control over tangible property . . . .''

[11] See also *United States* v. *McKissick*, supra, 204 F.3d 1291 (''In cases involving joint occupancy of a place where contraband is found, mere control or dominion over the place in which the contraband is found is not enough to establish constructive possession. . . . In such cases, the government is required to present direct or circumstantial evidence to show some connection or nexus individually linking the defendant to the contraband. . . . The government must present some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the . . . contraband.'' [Citations omitted; internal quotation marks omitted.]).

[12] It should be noted that there was no dispute that the weapon was located on the driver's seat of the vehicle.

[13] We recognize that the car was rented to Scott and, therefore, at least one other individual had access to the vehicle at some point. The issue presented in this case, however, is not whether any other individual had access to the vehicle at *any point in time*, but rather, whether any other individual had access to the vehicle during the relevant time frame. Under the circumstances of this case, that time frame began when Lawrence witnessed the driver exit the vehicle and the weapon could be seen resting on the driver's seat. Thus, the fact that Scott was the legal renter of the vehicle is of no consequence to our analysis.

Similarly, Dinatale's testimony that Scott had reported the vehicle stolen and then claimed that he had loaned it to a friend is irrelevant. The dissent suggests that this provides evidence to support the claim that others had possession of the vehicle. The dissent, however, fails to mention that the reported theft of the vehicle occurred the day before the alleged incident and, therefore, prior to the relevant time frame.

[14] It is also worth noting that under the charge given by the trial court, the jury could not have convicted the defendant on the basis of his factual scenario. It is a fundamental principle that ''jurors are presumed to follow the instructions given by the judge.'' (Internal quotation marks omitted.) *State* v. *Smith*, 212 Conn. 593, 599, 563 A.2d 671 (1989); *State* v. *Williams*, 202 Conn. 349, 364, 521 A.2d 150 (1987); *State* v. *Barber*, 173 Conn. 153, 156, 376 A.2d 1108 (1977). During its charge, the trial court explained that ''[p]ossession means intentional dominion and control over the firearm accompanied by knowledge of its character. Mere presence in the vicinity of the firearm, however, is not enough to establish possession.'' Presuming that the jury followed these instructions, it could not have found the defendant guilty based on mere possession of the key within close proximity to the vehicle. Consequently, the jury necessarily convicted the defendant under the state's version of the facts, which did not require an instruction on nonexclusive possession.