Third District Court of Appeal

State of Florida

Opinion filed July 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-0398
Lower Tribunal No. 16-2959

J.J., a juvenile,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Maria de Jesus Santovenia and Richard Hersch, Judges.

Carlos J. Martinez, Public Defender, and Deborah Prager, Robert Kalter, and Natasha Baker-Bradley, Assistant Public Defenders, for appellant.

Ashley Moody, Attorney General, and David Llanes, Assistant Attorney General, for appellee.

Before EMAS, C.J., and SALTER, FERNANDEZ, LOGUE, SCALES, LINDSEY, HENDON, MILLER, GORDO, and LOBREE, JJ.

LOGUE, J.

On Motion for Rehearing en Banc

We grant the State's motion for rehearing en banc, withdraw the panel opinion issued on March 18, 2020, in J.J. v. State, 45 Fla. L. Weekly D603, 2020 WL 1281167 (Fla. 3d DCA 2020), and substitute the following opinion in its stead.

INTRODUCTION

This case presents an issue of first impression in Florida regarding the Fourth Amendment to the United States Constitution. J.J. appeals the trial court's denial of his motion to suppress baggies of cannabis discovered in his clothes as part of a search incident to arrest. J.J. was arrested for possession of cocaine when he was found seated with two others next to a stove being used to cook crack cocaine in the small kitchen of a private house.

Proximity alone is not enough to establish constructive possession of contraband. But probable cause of joint, constructive possession can be based on the totality of the circumstances including proximity that occurs in the privacy of an automobile during "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." Maryland v. Pringle, 540 U.S. 366, 373 (2003).

J.J. was obviously in the middle of such an enterprise, albeit not in an automobile. Although no Florida court has yet done so, federal circuit and district courts have extended Pringle's rationale beyond automobiles to drug operations in private locations remarkably similar to this case. Because we find the analysis of

the Fourth Amendment in these cases persuasive and analogous to the situation here, we affirm the trial court's determination that the police had probable cause to arrest J.J.

FACTS

The facts at trial were established by the testimony of the arresting officer and the video footage of the body cameras of the officers at the scene. The police discovered J.J., a sixteen-year-old juvenile, seated beside a stove in a small kitchen in a private house. On the stove in plain view were an unknown amount of white powder, a fork with white powder, pots, pans, a beaker, and a digital scale of the sort used for weighing drugs whose weighing pan contained white powder. Whether or not a cocaine solution was being mixed and heated at the moment the officers stepped into the kitchen, the facts supported a reasonable inference by the officers that cocaine had recently been cooked and preparations were in place to cook more.

The video shows J.J. seated in a rocking chair directly in front of the stove. The chair was turned sideways to the stove such that J.J. could see anyone approaching the stove and a person would have to reach over J.J.'s body to touch the items on the stove. The arresting officer testified J.J. was seated a "foot" from the stove. If J.J. had put out his elbow, "he'[d] touch his elbow to the stove." Two other people were also in the kitchen. The other occupants of the kitchen were

located on the other side of the room not within "arm['s] length." The video shows that one of the other occupants, a woman in a white t-shirt, stood up and tried to block the officers' view of the stove.

While standing directly in front of J.J., an officer loudly asked him and the others in the room "Whose crack is this?" and "Who is cooking?" The video reflects J.J. mumbled a response, but his words are inaudible. The two other occupants kept silent. The video shows the arresting officers separated J.J. from the others and searched him. The search revealed he was carrying several baggies of cannabis. J.J. was taken out to the street, read his Miranda rights, and questioned. He denied any knowledge of the crack cocaine cooking operation or of any of the other six to eight individuals in the house.

J.J. was arrested for possession of cocaine but was prosecuted for misdemeanor possession of cannabis. At trial, he moved to suppress the cannabis as the product of an unlawful search. The trial court denied the motion and, after a non-jury trial, adjudicated him delinquent. J.J. appealed the denial of his motion to suppress.

ANALYSIS

A. Probable Cause Defined.

Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity"; it "is not a high bar." District of

Columbia v. Wesby, 138 S.Ct. 577, 586 (2018) (emphases added) (quotations and citations omitted) (concluding that particularized probable cause for illegal entry existed to arrest twenty-one people attending a party with strippers in an abandoned building).

As explained by Chief Justice Canady, "[t]he probable cause standard merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that evidence of a crime may be found. It does not demand any showing that such a belief be correct or more likely true than false." Harris v. State, 71 So. 3d 756, 776 (Fla. 2011) (Canady, C.J., dissenting) (emphases added) (quotations and citations omitted), rev'd sub nom. Florida v. Harris, 568 U.S. 237 (2013).

Indeed, "[p]robable cause is more than bare suspicion but is less than beyond a reasonable doubt and, indeed, is less than a preponderance of the evidence." United States v. Burnett, 827 F.3d 1108, 1114 (D.C. Cir. 2016) (emphases added) (citation omitted). "Probable cause doesn't require proof that something is more likely true than false. It requires only a fair probability, a standard understood to mean something more than a bare suspicion but less than a preponderance of the evidence at hand." United States v. Denson, 775 F.3d 1214, 1217 (10th Cir. 2014) (emphases added) (quotations and citations omitted).

B. Constructive Possession.

Constructive possession requires that the defendant had (1) "knowledge of the presence of contraband," and (2) the "ability to exercise dominion and control over it." Jennings v. State, 124 So. 3d 257, 262 (Fla. 3d DCA 2013) (citing Reynolds v. State, 983 So. 2d 1192, 1194 (Fla. 3d DCA 2008)). Constructive possession can be difficult to establish when contraband is in the vicinity of two or more persons because "a search or seizure of a person must be supported by probable cause particularized with respect to that person." Ybarra v. Illinois, 444 U.S. 85, 91 (1979). Nevertheless, "possession of contraband, including illegal drugs, may be joint as well as constructive." State v. Nobles, 477 So. 2d 32, 33 (Fla. 1st DCA 1985) (citing Estevez v. State, 189 So. 2d 830 (Fla. 2d DCA 1966)).

C. Pringle and its Progeny.

In Pringle, the United States Supreme Court held that there was probable cause to believe a passenger was in joint and constructive possession of contraband when he was found with others in an automobile that contained several bags of cocaine and a large amount of cash which suggested that the car was being used as a venue to conduct drug deals. Pringle, 540 U.S. at 371-72. The police had not actually witnessed a drug deal and there was no evidence that the passenger was touching or had touched the money or cocaine. Id. In these circumstances, the Court held, looking at the totality of the circumstances, probable cause was not

based solely on "mere propinquity" but also on the discovery of the defendant in a private location in the middle of "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." Id. at 372, 373. The Court specifically noted the location at issue was not a public place like "a public tavern." Id. at 373.

The Court concluded:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe [the defendant] committed the crime of possession of cocaine, either solely or jointly.

Id. at 372. Pringle thereby illustrates an example of "proximity plus" that satisfies the test for probable cause. In the totality of the circumstances, the factors in addition to proximity are: (1) private location, and (2) occurrence during "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." Id. at 373.

A substantial body of federal law has extended the reasoning of Pringle beyond automobiles to drug operations in other private locations. The rationale of Pringle has been applied to:

(1) **hotel rooms**, United States v. Romero, 452 F.3d 610, 618 (6th Cir. 2006) ("It was reasonable for the officers to infer that Santiago was involved in the drug-dealing enterprise that was being conducted out of the hotel

room, because drug dealing is 'an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.' " (quoting Pringle, 540 U.S. at 373)); Cox v. Pate, 283 F. App'x 37, 40 (3d Cir. 2008) ("Based on the contraband recovered during the execution of the search warrant, we agree with the District Court that there was probable cause to arrest McAfee, who was one of the occupants of the hotel room." (citing Pringle, 540 U.S. 366));

(2) **apartments**, United States v. Cowan, 674 F.3d 947, 954 (8th Cir. 2012) ("As with the car in Pringle and the hotel room in Romero, the officers had probable cause to believe Cowan, who was present in the apartment, was engaged in a common drug trafficking enterprise with the apartment's occupants.");

(3) **cabins**, United States v. Hull, No. CR15-165(19) (JRT/LIB), 2016 WL 3566208, at *4 (D. Minn. June 27, 2016) ("Where officers make observations giving rise to probable cause that drug dealing is occurring in a small space, and only a small number of people are located in that space, then officers generally have probable cause to suspect that all of the individuals present are engaged in illegal drug activities because drug dealing is 'an enterprise to which a dealer would be unlikely to admit an

innocent person with the potential to furnish evidence against him.' " (quoting Pringle, 540 U.S. at 373)); and

(4) **homes**, Walker v. Cty. of Trenton, Civ. No. 11-7231 (JAP), 2013 WL 353346, at *6 (D.N.J. Jan. 29, 2013) ("[T]he police had probable cause to arrest Walker and Wells, since they were both present in the premises where the police found contraband." (citing Pringle, 540 U.S. at 373)).

Regarding homes, in Martin v. City of N. College Hill, No. 1:07-CV-00367, 2008 WL 4070275, at *6 (S.D. Ohio Aug. 27, 2008), the Southern District of Ohio had to determine whether there was probable cause to arrest a person found with the owner in a home where a kidnapped seventeen year old girl was being held in the basement. The Court relied on Pringle explaining that "to have probable cause, [the arresting officers] only need to show that the circumstances warranted their suspicion. They are not required to show that they had enough evidence to convict [the person arrested] at trial." Martin, 2008 WL 4070275, at *6 (citing Pringle, 540 U.S. at 371) ("The present case, on the other hand, involves the kidnapping of a seventeen year old girl who could not be easily hidden and who was somehow transported to the basement of the house in which [the suspect] was found.").

The reason for extending Pringle to a house is that "those who are permitted to observe obvious criminal activity in a home are, absent indications to the contrary, likely to be complicit in the offense." United States v. Heath, 455 F.3d

52, 57 (2d Cir. 2006) (citing United States v. Pennington, 287 F.3d 739, 747 (8th Cir. 2002)). Indeed, a suspect's location in a private residence with others where drugs are openly being processed has been found, along with other circumstances, to support not just probable cause, but a jury's finding of guilt of constructive, joint possession beyond a reasonable doubt.[1]

A case remarkably like the instant case is United States v. Holder, 990 F.2d 1327 (D.C. Cir. 1993). In Holder, the defendant appealed his conviction contending the trial court erred in failing to grant his motion to suppress cocaine and a firearm found as a result of a search incident to arrest. Id. at 1327-28. The police entered an apartment and found another individual seated at a table containing, and set up to process, crack cocaine. Id. The defendant was standing a few feet away in a nearby hallway. Id. There was no evidence that the defendant was touching or had touched the cocaine. Id. at 1327-29. On these facts, the defendant argued, (as the defendant does here) the police lacked probable cause particularized as to him regarding possession because "there was no indication that

[1] United States v. Soto, 959 F.2d 1181, 1185 (2d Cir. 1992) ("The jury could also have reasonably determined that only trusted members of the operation would be permitted entry into the apartment, because allowing outsiders to have access to an apartment with large quantities of narcotics in plain view could compromise the security of the operation."); United States v. Gordils, 982 F.2d 64, 72 (2d Cir. 1992) ("[B]ecause permitting outsiders to have such access would compromise the security of the operation. . . . a jury could have reasonably concluded that Bastar was a member of Gordils's narcotics organization and possessed the heroin found in the apartment." (citation omitted)).

[the defendant] rented the apartment, lived in it, or was in any way connected to it beyond his presence at the time of the search." Id. at 1329. The Court rejected this argument. Id. at 1329-30.

The Court first noted that access to a private apartment "is presumably limited, and thus a person's admission to the apartment normally would raise a stronger inference of connection to the activities conducted within." Id. at 1329. Moreover, the Court reasoned, "the drugs were openly on display, and therefore appellant's proximity to the drugs clearly reflected his knowledge of, and probably his involvement in, narcotics activity." Id. This was true because "[e]ven if the drugs were not [the defendant's] and instead belonged only to [the other occupant], the circumstances indicated that [the other occupant] trusted [the defendant] and considered him sufficiently complicit to allow him a full view of the drug distribution scene." Id. "Although [the defendant] may be correct that mere presence in an apartment where drugs are found will not, without more, support a conviction for possession, the standards required for proof of possession beyond a reasonable doubt and for probable cause for an arrest are quite different." Id. (emphases added) (citations omitted). "That he was present, for whatever reason, when the drugs were in plain view . . . amply satisfies probable cause." Id.

The reasoning of Holder applies with particular force here. J.J. was both physically closer to the drugs than the defendant in Holder and J.J. was closer to

the drugs than any other occupant, where the defendant in Holder was further away than the other occupant. Like Holder, the fact that the cocaine processing operation was taking place in a room in the privacy of a house enhances the probability that only trusted members of the operation had access. Also, like Holder, the fact that the drug operation was openly on display, enhances the probability that J.J. had both knowledge of and some participation in the operation. And, finally, like Holder, although these circumstances may not, without more, support a conviction for possession, "the standards required for proof of possession beyond a reasonable doubt and for probable cause for an arrest are quite different." Id.

D. The Dissent's Attempts to Distinguish Pringle.

The dissent adopts the prior panel opinion. We are not persuaded by the prior panel opinion's attempts to distinguish Pringle. The panel's main argument in this regard was to emphasize the well-recognized principle that proximity does not establish possession. In so arguing, however, the panel focused on proximity "in isolation, rather than as a factor in the totality of the circumstances." Pringle, 540 U.S. at 371, n.2. This was error. The standard for probable cause does not rely on one factor and does not consider the various factors in isolation. Id. at 371. Instead, it "depends on the totality of the circumstances." Id. And, Pringle held that probable cause existed in the totality of the circumstances, when, in addition to "mere propinquity," the facts included (1) a private location (2) during "an

enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." Pringle, 540 U.S. at 373. Here, we have these additional factors. Contrary to the panel's contention, therefore, when considering the totality of the circumstances, the arresting officers had facts – beyond mere proximity – to support a finding of probable cause to arrest J.J.

The panel next pointed to the officers' purported "failure to conduct any particularized inquiry prior to arresting and searching J.J." including the failure to "direct . . . questions to J.J. individually prior to taking him into custody and placing him under arrest." There are two serious flaws in this argument. First, the police here conducted a particularized inquiry. While standing directly in front of J.J., an officer asked him and the others in the room "Whose crack is this?" and "Who is cooking?" The video reflects J.J. mumbled an inaudible response. Even if the Fourth Amendment procedurally requires a defendant be provided an opportunity to give an innocent explanation for his location in the middle of a drug operation before he is arrested, the police gave J.J. that opportunity here.

More importantly, there is no such requirement in the Fourth Amendment. While probable cause must be particularized to a defendant, Ybarra, 444 U.S. at 91, the Fourth Amendment does not dictate any particular investigative procedure whereby certain specific questions must be asked of the suspect or about the suspect before probable cause is established. There is simply no authority for

panel's suggestion to the contrary. It is not even clear from the panel opinion exactly what additional questions the panel believed the Constitution required the arresting officers to ask.

To foist such an ill-defined, courtroom-focused procedure on officers in the field violates the essential nature of the probable cause analysis which is intended to be "a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Pringle, 540 U.S. at 370 (quotations and citations omitted). The probable cause standard is based on the reality that "many situations which confront officers in the course of executing their duties are more or less ambiguous." Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)). The panel's attempt to impose a mandatory line of unspecified questions before arrest reflects exactly the sort of "rigid rules, bright-line tests, and mechanistic inquiries" concerning probable cause that the Supreme Court has repeatedly condemned. Harris, 568 U.S. at 244.

Finally, the panel pointed to the "failure of the State to establish J.J.'s status in the residence–whether as a resident, guest, invitee, visitor, or merely the son accompanying an adult resident, guest, invitee or visitor." In Pringle, however, the State never established Pringle's relationship to the automobile – whether he

owned it, rented it, or was related to the owner, renter, or driver of automobile – which may well have provided an innocent explanation for his location in the middle of a drug enterprise. Nevertheless, the Supreme Court found that the low standard for probable cause was met because of his location with others in that private space with the money and cocaine. Pringle, 540 U.S. at 371. Indeed, none of the probable cause cases discussed above turned on the defendant's relationship to the property as suggested by the panel.[2]

For example, in Holder, as mentioned above, the court specifically rejected the defendant's argument that the police lacked probable cause because "there was no indication that [the defendant] rented the apartment, lived in it, or was in any way connected to it beyond his presence at the time of the search." Holder, 990 F.2d at 1329. This argument failed, the Holder court indicated, in the face of the facts that Holder (like J.J, in the instant case) was (1) in close proximity; (2) to drugs in plain view; and (3) in a private place with others where only accomplices would normally have access. Id.

[2] See, e.g., Cowan, 674 F.3d at 951 (the State never established Cowan's relationship to the apartment at issue – whether he owned it, rented it, or was related to the owner or renter); Hull, 2016 WL 3566208, at *4 (the State never established Hull's relationship to the cabin at issue – but instead merely focused on his location in the "small space" of the cabin with five others where the drugs were found).

The panel's argument in this regard conflated "probable cause" and "beyond a reasonable doubt." The absence of such information might negate proof beyond a reasonable doubt, but it does not negate the probable cause of constructive possession that arises from J.J.'s proximity to a crack cocaine cooking operation in the privacy of the kitchen.

In contrast to the federal Fourth Amendment cases discussed above, the cases cited by the panel are not on point. The panel argued that a line of Florida probable cause cases should be read as limiting Pringle to drug operations in automobiles, and not to drug operations in other private locations. But most of these cases predate Pringle. More importantly, these probable cause cases involved drugs found in public, not private locations, like drugs dropped in a crowded park, street, or bar.[3] The rationale of Pringle – presence with contraband in a private

[3] Hatcher v. State, 15 So. 3d 929, 930 (Fla. 1st DCA 2009) (involving a bag of cocaine between two men on a table located next to the street and outside the front fence of a house); McGowan v. State, 778 So. 2d 354, 357 (Fla. 2d DCA 2001) (involving a paper bag with cocaine on the street next to parked car where four men were standing); Edwards v. State, 532 So. 2d 1311, 1312 (Fla. 1st DCA 1988) (involving a bag of cocaine that fell out of a tree into a group of five men gathered in the public area of a housing project). All three cases based their holdings on the public nature of the location: "[m]ere proximity to contraband found in a public place and in the vicinity of several other people does not warrant a finding that the police officer had probable cause to believe that the person or persons closest to the contraband possessed it." Hatcher, 15 So. 3d at 931 (quoting Edwards, 532 So. 2d at 1314) (emphasis added)). See McGowan, 778 So. 2d at 357 (same). Moreover, Thompson v. State, 551 So. 2d 1248, 1250 (Fla. 1st DCA 1989) involved crack cocaine at the foot of the defendant in a pool hall.

location where only an accomplice would normally be admitted – obviously does not apply to public venues. Indeed, Pringle expressly distinguished cases involving public places, like taverns. Pringle, 540 U.S. at 373. These cases therefore support the undisputed interpretation that Pringle should not be extended to public places; we do not read them to support the panel's contention that Pringle is limited to only drug operations in automobiles.

The other probable cause cases cited by the panel not only predate Pringle, but they involved contraband hidden from view: in those cases no indication existed that the defendant even had knowledge of the concealed contraband.[4] Here, J.J. was discovered within a foot of the cocaine and cocaine-encrusted cooking utensils in plain view.

The remaining cases relied upon by the panel, which include the great bulk of the panel's cases, are not even probable cause cases. They involve the higher standards needed to establish beyond a reasonable doubt for a conviction or

[4] Zandate v. State, 779 So. 2d 476, 477 (Fla. 2d DCA 2000) (holding no probable cause to believe passenger had constructive possession of marijuana concealed in closed ash tray); Walker v. State, 741 So. 2d 1144, 1146 (Fla. 4th DCA 1999) (holding no probable cause to believe passenger had constructive possession of gun hidden in closed bag in back seat of automobile); Rogers v. State, 586 So. 2d 1148, 1152 (Fla. 2d DCA 1991) (holding no probable cause to believe passenger had constructive possession of cocaine hidden in seat pocket of van).

preponderance of the evidence for a probation violation, not the lower standard for probable cause.[5]

CONCLUSION

J.J. was seated next to a stove openly used to cook crack cocaine in the small kitchen of a private dwelling when and where only an accomplice would normally be admitted. These facts may not establish constructive possession beyond a reasonable doubt. Indeed, they may not establish that possession was more likely than not. But they clearly support a "substantial chance" of possession, which is all the Fourth Amendment requires for probable cause. Wesby, 138 S.Ct. at 586 (holding probable cause is "not a high bar" and "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.") (emphases added) (citation omitted); Pringle, 540 U.S. at 371.

Affirmed.

FERNANDEZ, SCALES, LINDSEY, MILLER, GORDO, and LOBREE, JJ., concur.

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[5] See Smith v. State, 175 So. 3d 900 (Fla. 1st DCA 2015); Thompson v. State, 172 So. 3d 527 (Fla. 3d DCA 2015); Matoral v. State, 946 So. 2d 1240 (Fla. 4th DCA 2007); Hargrove v. State, 928 So. 2d 1254 (Fla. 2d DCA 2006); Cruz v. State, 744 So. 2d 568 (Fla. 2d DCA 1999); Johnson v. State, 456 So. 2d 923 (Fla. 3d DCA 1984).

EMAS, C.J., and SALTER and HENDON, JJ., dissenting.

Based on the controlling Florida decisions and other authorities cited in the panel majority opinion, J.J. v. State, 45 Fla. L. Weekly D603 (Fla. 3d DCA Mar. 18, 2020), we respectfully dissent from the opinion on rehearing en banc.