Third District Court of Appeal

State of Florida

Opinion filed March 18, 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, Richard Hersch and Maria De Jesus Santovenia, Judges.

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

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

Before EMAS, C.J., and SALTER and LOGUE, JJ.

PER CURIAM.

J.J., a sixteen-year-old juvenile, was prosecuted for marijuana possession discovered during a search incident to his arrest. He has appealed the denial of his motion to suppress on two grounds. Finding one of those grounds dispositive—the absence of probable cause particularized to the juvenile as a basis for the arrest, as J.J. was not in actual or constructive possession of cocaine found on a stove in the kitchen where he sat—we reverse his adjudication for possession of cannabis and remand with a direction to suppress the evidence seized from his person at any further adjudicatory hearing.

Facts and Procedural History

The warrantless search in this case was contended to be a lawful search-incident-to-arrest, and the state contended that the probable cause for the arrest was established by J.J.'s close proximity to the cocaine on the kitchen stovetop. Officer testimony and video captured by the officer's body camera show: J.J. was one of three persons in the kitchen as the officer entered (and among those individuals, J.J. was closest to the stove); the others in the kitchen were adults; J.J. was seated in a rocking chair that did not face the stove; he was not touching the stove; and J.J. was looking at his cellphone and holding it with both hands when the officer entered.[1]

[1] The officer's entry to the residence was prompted by his earlier observation of what appeared to be a hand-to-hand drug transaction, but J.J. was not one of the suspected participants in the transaction. The individual suspected to be a participant in the drug transaction fled into the residence and went through a hallway to a room past the kitchen. The officer, in pursuit, entered the residence. Given our disposition

The officer testified that on the stovetop, he could see a fork, a scale, and a glass beaker, each with a white substance on them. The officer suspected the white substance was crack cocaine, and arrested J.J. for possession of cocaine. He did not direct any questions to J.J. individually prior to taking him into custody and placing him under arrest. The officer conducted a search incident to arrest and found baggies of marijuana in J.J.'s pocket.

The state presented no evidence that J.J. was touching or had touched the cocaine, stovetop, or paraphernalia found on the stovetop. Nor did the state present any evidence that J.J. lived at the premises. Indeed, there was no evidence at all regarding J.J.'s status as an owner, tenant, or visitor of the residence, or whether this juvenile was with a parent or guardian. There were six to eight people in the residence, but J.J. was the only juvenile there. Two other people were in the kitchen with J.J. However, because J.J. was the closest in proximity to the stovetop, the officer arrested J.J. for possession of the cocaine and paraphernalia on the stovetop.

The officer searched J.J. incident to that arrest, finding marijuana in J.J.'s pocket. J.J. filed a motion to suppress the seized marijuana. The trial court denied the motion, and the case proceeded to hearing. The trial court found J.J. delinquent on the charge of possession of cannabis and adjudicated J.J. This appeal followed.

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of the issue of probable cause to arrest J.J., we need not, and therefore do not, address the remaining issue raised by J.J.—the validity of the officer's warrantless entry into the residence.

Analysis

Our consideration of the trial court's suppression ruling is subject to a mixed standard of review:

> We review the trial court's grant of a motion to suppress using a mixed standard of review; the appellate court defers to the trial court's findings regarding the facts and applies the de novo standard of review to legal conclusions. See Riggs v. State, 918 So. 2d 274, 278 (Fla. 2005) (holding that, when reviewing rulings on motions to suppress, "we 'accord a presumption of correctness ... to the trial court's determination of historical facts, but [we] independently review mixed questions of law and fact that ultimately determine constitutional issues' "); Hidelgo v. State, 25 So. 3d 95 (Fla. 3d DCA 2009).

State v. Delgado, 92 So. 3d 314, 316 (Fla. 3d DCA 2012). An additional consideration in this case, however, is the officer's bodycam video footage in the record. Our deference to the trial court's superior vantage point regarding credibility findings and the live testimony of witnesses is not fully applicable to our consideration of the video. See Parker v. State, 873 So. 2d 270, 279 (Fla. 2004).

The record before us, and the video in particular, establish that J.J. was in neither actual nor constructive possession of the contraband alleged to justify his arrest. The state concedes that the juvenile was not in actual possession of the cocaine or other paraphernalia. Thus, the question is whether J.J. constructively possessed the cocaine and paraphernalia, such that the officer had probable cause to arrest J.J.

"To establish constructive possession, the state must prove that the defendant 'had dominion and control over the contraband, had knowledge that the contraband was within his presence, and had knowledge of the illicit nature of the contraband.'" E.A.M. v. State, 684 So. 2d 283, 284 (Fla. 2d DCA 1996) (quoting Skelton v. State, 609 So. 2d 716, 716-17 (Fla. 2d DCA 1992)); O.L.M. v. State, 767 So. 2d 617, 618-19 (Fla. 3d DCA 2000) ("mere location of the substance" is not independent proof of constructive possession when such alleged possession is non-exclusive; quoting Murphy v. State, 511 So. 2d 397, 399 (Fla. 4th DCA 1987)). In the instant case, the cocaine and paraphernalia were in open view. There is no dispute over J.J.'s knowledge that the contraband was in his presence. Nor is there any dispute over whether J.J. knew the illicit nature of the substance. The issue is whether there was probable cause, under a theory of constructive possession, that J.J. had "dominion and control" over the contraband.

The standard jury instruction on possession of a controlled substance is also illustrative on this point:

> Control can be exercised over a substance whether the substance is carried on a person, near a person, or in a completely separate location. Mere proximity to a substance does not establish that the person intentionally exercised control over the substance in the absence of additional evidence. Control can be established by proof that (defendant) had direct personal power to control the substance or the present ability to direct its control by another.

Fla. Std. Jury Instr. (Crim.) 25.7 (emphasis added).

The state contends that because J.J. was the individual closest to the contraband, he exercised dominion and control over it, providing probable cause for the officer to arrest J.J. This is incorrect.

As our sister court observed in Martoral v. State, 946 So. 2d 1240, 1243 (Fla. 4th DCA 2007):

> Knowledge of the presence of the drugs and the ability to exercise dominion and control over the drugs are not the same thing. See Jean v. State, 638 So. 2d 995, 996 (Fla. 4th DCA 1994) (recognizing that knowledge and dominion and control are separate elements and stating that "[i]t is conceivable that an accused might be well aware of the presence of the substance but have no ability to maintain control over it"). **In the case law, the concepts of "dominion" and "control" involve more than the mere ability of the defendant to reach out and touch the item of contraband.** Thus, even where drugs are found in plain view, the evidence will be insufficient to establish constructive possession unless there is evidence that the defendant exercised dominion and control over the drugs.

(Emphasis added).

This is consistent with this Court's own precedent:

> To establish constructive possession, the state must show that the accused had dominion and control over the contraband, knew of the presence of the contraband, and was aware of the illicit nature of the contraband. Kuhn v. State, 439 So. 2d 291 (Fla. 3d DCA 1983); Brown [v. State, 428 So. 2d 250, 252 (Fla. 1983)]. However, if the contraband is found on premises which are under joint rather than exclusive possession of a defendant, "knowledge of the contraband's presence and the ability to control it will not be inferred, but must be established by independent proof." Winchell v. State, 362 So. 2d 992 (Fla. 3d DCA 1978), cert. denied, 370 So. 2d 462 (Fla.1979); Brown, 428 So. 2d at 252. **Mere proximity to contraband, without more, is legally insufficient to prove possession.** Bass v. United States, 326 F.2d 884

> (8th Cir.), cert. denied, 377 U.S. 905, 84 S.Ct. 1164, 12 L.Ed.2d 176 (1964); Johnson v. State, 456 So. 2d 923 (Fla. 3d DCA 1984).

Torres v. State, 520 So. 2d 78, 80 (Fla. 3d DCA 1988) (emphasis added). See also Thompson v. State, 172 So. 3d 527, 530 (Fla. 3d DCA 2015) (reaffirming that "[m]ere proximity to contraband, without more, is legally insufficient to prove possession") (quoting Johnson v. State, 456 So. 2d 923, 924 (Fla. 3d DCA 1984)).

This concept of constructive possession and the mere proximity doctrine applies whether in the context of a trial (under a reasonable doubt standard) or a motion to suppress evidence seized in a search incident to arrest (under a probable cause standard). The instant case required the state to present evidence—beyond mere proximity—to support a finding of probable cause to arrest J.J. Simply put, the state failed to do so. While the facts in this case may have provided the officer with founded suspicion to question J.J., the facts in this case did not provide probable cause to arrest J.J. J.J.'s mere proximity to the cocaine and paraphernalia was insufficient to establish his dominion and control over them, and therefore the officer was without probable cause to arrest J.J. As we held in a similar circumstance in Harper v. State, 532 So. 2d 1091, 1094 (Fla. 3d DCA 1988):

> In this case, the founded or reasonable suspicion constitutionally required to support the Terry stop we have identified is readily apparent. Harper was found in a base house within feet of cocaine on one side and a torch which was at once a potential weapon and an item of narcotics paraphernalia, on the other. While his mere proximity, particularly when others were also present, may not have been sufficient to constitute probable cause to believe Harper was guilty of

> unlawful possession, see Johnson v. State, 456 So. 2d 923 (Fla. 3d DCA 1984), the present circumstances were more than sufficient to meet the markedly reduced standard of founded suspicion. Ruiz [v. State, 526 So. 2d 170, 172 (Fla. 3d DCA 1988)]; [State v. Lewis, 518 So. 2d 406, 408 (Fla. 3d DCA 1988)]; State v. Perera, 412 So. 2d 867 (Fla. 2d DCA 1982), pet. for review denied, 419 So. 2d 1199 (Fla. 1982). Hence the seizure of Harper's person under Terry was permissible.

Our sister courts have likewise rejected the notion that mere proximity to contraband provides probable cause to arrest the person closest to that contraband. Edwards v. State, 532 So. 2d 1311, 1314 (Fla. 1st DCA 1988) ("Mere 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.") (citations omitted); Hatcher v. State, 15 So. 3d 929, 931 (Fla. 1st DCA 2009) (same)[2]; Thompson v. State, 551 So. 2d 1248, 1250 (Fla. 1st DCA 1989) ("Although we find that Officer Beckman had a reasonable founded suspicion and could temporarily detain appellant when he saw rock cocaine in plain view near where appellant was standing, this founded suspicion did not rise to the level of probable cause to arrest appellant for possession so that the subsequent search could be validated as a search incident to lawful arrest. As this court said in Edwards v. State, 532 So. 2d 1311, 1314 (Fla. 1st

[2] The cases relating to contraband found "in a public place," as in Edwards, are not distinguishable from this case, because our record is devoid of information regarding J.J.'s relationship to the premises where the arrest took place. The state failed to present any evidence as to when or how J.J. entered the premises and whether he entered as a resident, guest, child of an occupant, or otherwise.

DCA 1988), mere proximity to contraband found in a public place and in the vicinity of several other people does not warrant a finding that the person or persons closest to the contraband possessed it."); Rogers v. State, 586 So. 2d 1148, 1152 (Fla. 2d DCA 1991) (reversing trial court's denial of motion to suppress contraband discovered in search of defendant's purse incident to her arrest for constructive possession of other drugs found nearby her, holding that "mere proximity to contraband is insufficient to create probable cause of constructive possession"); Zandate v. State, 779 So. 2d 476, 477 (Fla. 2d DCA 2000) ("[m]ere proximity to contraband does not create probable cause of constructive possession"); Walker v. State, 741 So. 2d 1144, 1146 (Fla. 4th DCA 1999) ("Mere proximity to contraband does not create probable cause of constructive possession."); McGowan v. State, 778 So. 2d 354 (Fla. 2d DCA 2001) (reversing trial court's denial of motion to suppress and holding that there was insufficient evidence—beyond defendant's mere proximity to the drugs—to provide probable cause to arrest defendant for constructive possession of those drugs). In the instant case, neither the testimony nor the video in this record provides the requisite evidence of dominion or control to establish probable cause that J.J. constructively possessed the cocaine and paraphernalia on the stovetop.

The Dissent

As to the dissent's view of the body camera video, the video shows the arresting officer walk into the kitchen, walk past J.J.—without difficulty or moving J.J.—to get to the stovetop where the cocaine and paraphernalia were located. The state's brief characterizes J.J.'s position as "within arm's reach of the stove," but does not allege obstruction or actual control. The dissent simply equates "proximity" with "dominion and control," contrary to our precedent and the jury instruction approved by the Florida Supreme Court and quoted in a prior section of this opinion.

While the officer inferred that cocaine had been cooked at some earlier point, the video does not show—and the officer did not testify—that cocaine was being cooked at the time the officer entered the kitchen. Nor was any evidence presented regarding the person or persons who may have been involved in any cooking.

The dissent relies upon several federal cases in support of its position that there was probable cause to arrest J.J. for constructive possession of the contraband found in the residence. These cases are distinguishable and inapplicable to the case presently before us. The dissent's citation and short quotations from District of Columbia v. Wesby, 138 S.Ct. 577, 586 (2018), involve a record and colorful tale of partygoers who took over a vacant home without permission, scattered and hid as officers arrived to investigate the neighbor's complaint, and were questioned before arrests were made.

The dissent also relies upon a quote from United States v. Heath, 455 F.3d 52, 57 (2d Cir. 2006). However, the quote is pure dicta and the case inapposite, as it expressly declined the government's invitation to extend the contextually-limited holding of Maryland v. Pringle, 540 U.S. 366 (2003) (constructive possession and probable cause to arrest multiple individuals for contraband found in an automobile), to constructive possession and probable cause to arrest multiple individuals for contraband found in a residence: [3]

> We need not, at this time, address the government's primary contention on appeal—that Heath's arrest was constitutional under Pringle—because, **assuming *arguendo* that Heath was arrested without probable cause**, we find that the evidence at issue may well have been admissible under the inevitable discovery doctrine, notwithstanding the putative Fourth Amendment violation. In so doing, we emphasize that the inevitable discovery doctrine is available only where there is a high level of confidence that each of the contingencies required for the discovery of the disputed evidence would in fact have occurred. In circumstances such as those before us, where the government contends that the challenged evidence would inevitably have been discovered during a search incident to a valid arrest, one of the contingencies that must be resolved in the government's favor involves a police officer's discretionary decision to arrest and search the person on whom the evidence would presumably have been found.

Heath, 455 F.3d at 55 (emphasis added).[4]

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[3] This Court has recognized the important distinction between a resident of premises containing contraband and a mere visitor to such premises. See, e.g., Johnson v. State, 456 So. 2d 923, 924 (Fla. 3d DCA 1984); Bennett v. State, 46 So. 3d 1181, 1184 (Fla. 2d DCA 2010); the holding of each case on this point is quoted further below in this opinion.

[4] The dissent also relies upon United States v. Holder, 990 F.2d 1327 (D.C. Cir. 1993). It is true that the facts of Holder are similar to those in the present case, and

We note that this Court has applied Pringle to find probable cause for an arrest of a passenger in a vehicle which was the site of a drug transaction. See B.C. v. State, 59 So. 3d 3321 (Fla. 3d DCA 2011). And in Perry v. State, 916 So. 2d 835 (Fla. 2d DCA 2005), the Second District acknowledged the United States Supreme Court's decision in Pringle, but reversed the trial court's denial of a motion to suppress, holding that police did not have probable cause to arrest the front-seat passenger of a car after a search of the area between the two front seats revealed a closed bag containing drug paraphernalia. The Second District, distinguished Pringle, in part, on the fact that

> the officers in Pringle did not immediately arrest all three occupants of the vehicle upon discovering the drugs in the back seat. Rather, the officers conducted the equivalent of a Terry stop and investigation of the vehicle's occupants prior to deciding to arrest each of them for possession of the drugs found in the vehicle.

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that the court in Holder found probable cause to arrest the defendant based upon the fact that he was merely present with others in a private apartment in close proximity to drugs in plain view. However, Holder has never been adopted by the United States Supreme Court, the Florida Supreme Court, this Court, or any of our sister district courts of appeal. We are not bound by (nor is the majority persuaded by) this decision. Indeed, Holder conflicts with decisions we are bound by—the decisions of this Court—which as previously discussed, hold that an individual's mere proximity to illegal narcotics in plain view does not establish constructive possession and thus does not provide probable cause to arrest the individual found closest to it. See, e.g., Harper v. State, 532 So. 2d 1091, 1094 (Fla. 3d DCA 1988).

> Perhaps if the officers had performed the same investigative inquiry in this case that was performed in Pringle, they could have arrested both [the driver] and Mr. Perry if neither of them admitted ownership of the paraphernalia in the black bag.

Id. at 840-41.

In like fashion, the officers in the instant case conducted no investigation to develop probable cause before arresting J.J., the person closest in proximity to the stovetop. We can find no reported Florida case (nor any from the United States Supreme Court) that extends Pringle to find probable cause for an arrest and search of a person in the room of a private residence, where he is one of several people in that room (and the only juvenile), his status in the premises is unknown, but he happens to be closest in proximity to suspected drugs and drug paraphernalia. We decline the state's invitation (and the dissent's entreaty) to extend the holding in Pringle to the circumstances presented here.

Our conclusion is buttressed not only by the officer's failure to conduct any particularized inquiry prior to arresting and searching J.J., but also by the related 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. This Court and our sister courts have recognized the important distinction between a resident of premises containing contraband and a mere visitor to such premises. See, e.g., Johnson v. State, 456 So. 2d 923, 924 (Fla. 3d DCA 1984) ("Mere proximity to contraband, without more, is legally insufficient to prove

possession. In many instances, however, the ability to control narcotics will be inferred from the ability to exercise control over the premises where they are found. For this reason, the cases have sharply distinguished between the culpability of a mere visitor from that of an owner or an occupant of premises containing illicit drugs in plain view."); Torres, 520 So. 2d at 80 (holding that where "contraband is found on premises which are under joint rather than exclusive possession of a defendant, 'knowledge of the contraband's presence and the ability to control it will not be inferred, but must be established by independent proof'"); Bennett, 46 So. 3d at 1184 ("Mere proximity to contraband is not enough. Therefore, the fact that contraband was in the defendant's plain view does not support an inference that the defendant had control over it unless the defendant had control over the premises.").

Conclusion

Based on controlling precedent and the record before us, we reverse the adjudication of delinquency for possession of cannabis and the commitment order. We remand the case with directions to suppress the evidence seized from J.J.'s person in any further adjudicatory hearing in this case.

Reversed and remanded with directions.

EMAS, C.J., and SALTER, J., concur.

J.J., a juvenile, v. The State of Florida
Case No. 3D18-398

LOGUE, J. (dissenting)

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 in the small kitchen of a private house next to a stove being used to cook crack cocaine.

Proximity alone is not enough to establish constructive possession of contraband. But probable cause of joint, constructive possession can be based on proximity when that proximity 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.

Although no Florida court has yet done so, federal circuit and districts courts have extended Pringle's rationale beyond automobiles to private residences to find probable cause in facts remarkably similar to this case. The majority, however, holds Pringle does not extend to "an arrest and search of a person in the room of a private residence, where he is one of several people in that room (and the only juvenile), his

status in the premises is unknown, but he happens to be closest in proximity to the suspected drugs and drug paraphernalia." Because I find the federal cases persuasive and analogous to the situation here, I respectfully dissent.

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. 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, a digital scale of the sort used for weighing drugs whose weighing pan contained white powder, pots and pans, and a beaker. Whether or not a cocaine solution was being boiled 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 turned sideways directly in front of 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 his adjudication challenging the trial judge's denial of the 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).

As explained by Judge (now Justice) Kavanaugh, "[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). And, as stated by Judge (now Justice) Gorsuch, "[p]robable 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, 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 372-73. 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. 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 circumstances like those in the instant case. 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 North 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. Id. There, the Court relied on Pringle when it explained 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.[5]

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 [the defendant] rented the

[5] 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)).

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. (emphasis added) (citations omitted). "That he was present, for whatever reason, when the drugs were in plain view . . . amply satisfies probable cause." Holder, 990 F.2d at 1329.

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 a private 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. at 1329.

D. The Majority's Attempts to Distinguish Pringle.

The majority's main method to distinguish Pringle is to emphasize that mere proximity is not sufficient to prove possession. But Pringle held that probable cause existed when, in addition to "mere propinquity," the facts include (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 372. Here, we have these additional facts. Contrary to the majority's argument, therefore, the arresting officers had facts – beyond mere proximity – to support a finding of probable cause to arrest J.J.

The majority next points 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 procedures whereby certain questions must be asked of the suspect or about the suspect before probable cause is established. There is simply no authority for majority's holding to the contrary. It is not even clear from the majority opinion exactly what additional questions it believes the Constitution required the arresting officers to ask. To superimpose 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). This

holding of the majority opinion 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.

The majority additionally argues the "State presented no evidence that J.J. was touching or had touched the cocaine, stovetop, or paraphernalia found on the stovetop." But that is true for every case cited in the above discussion, starting with Pringle, yet the Supreme Court and the lower federal courts upheld probable cause without such evidence. And that is true, by the way, for virtually every constructive possession case. If the majority is suggesting the Fourth Amendment requires actual proof of touching the contraband before probable cause of constructive possession exists, the majority would be suggesting that the Fourth Amendment imposes the elements of actual possession on constructive possession. In the final analysis, the majority's argument in this regard, like much of its argument, confuses the standard for probable cause required for an arrest with the standards for beyond a reasonable doubt required for a criminal conviction or preponderance of the evidence required for a probation violation. The standard for probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Wesby, 138 S.Ct. at 586 (emphases added) (citation omitted). That "substantial chance" of constructive possession required for probable cause can exist without the officers having actual proof that J.J. touched the cocaine.

Finally, the majority points 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 the 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. Id. at 371.

Similarly, 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. at 1329. Indeed, none of the probable cause cases discussed above turned on the defendant's relationship to the property as suggested by the majority.[6]

[6] See, e.g., Cowan, 674 F.3d at 951(the State never established Cowan's relationship to the apartment at issue where he – whether he owned it, rented it, or was related to the owner or renter); Hull, 2016 WL 3566208, at *4 (the State never established

The majority's argument in this regard again reflects the manner it conflates probable cause with 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 in the privacy of the kitchen in the middle of a crack cocaine cooking operation.

In contrast to these federal Fourth Amendment cases, the cases cited by the majority are not on point. Rather than address the lower standard for probable cause, many of them involve the higher standards needed to establish reasonable doubt for a conviction or preponderance of the evidence for a probation violation.[7]

Even when they involve probable cause, the cases cited by the majority are not analogous to the facts here. Most involved public, not private locations.[8] The

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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).

[7] 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).

[8] 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

rationale of Pringle – discovery with contraband in a private 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.

The remaining probable cause cases cited by the majority involved contraband hidden from view and therefore in those cases no indication existed that the defendant even had knowledge of the concealed contraband.[9] Here, J.J. was discovered within a foot of the cocaine and cocaine-encrusted cooking utensils in plain view.

CONCLUSION

J.J. was seated next to a stove openly used to cook crack cocaine in a small kitchen of a private dwelling when and where only an accomplice would normally

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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.

[9] 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).

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.