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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 7, 1995

Elizabeth Berry, Chief of Police
Town of Pine Ridge
1015 Fish Hatchery Road
West Columbia, South Carolina 29172

Re: Informal Opinion

Dear Chief Berry:

You have asked whether a 17 year-old could be charged with violation of S.C. Code Ann. Section 20-7-380 where there is evidence that the individual had been drinking when the officer stopped the vehicle, no one else was in the car, and, subsequently, during a routine inventory of the automobile, liquor was discovered in the trunk.

Section 20-7-380 provides in pertinent part:

> It is unlawful for any person under the age of twenty-one years to purchase, or knowingly have in his possession, any alcoholic liquors. Any possession is prima facie evidence that it was knowingly possessed. [emphasis added].

It is my opinion that the doctrine of "constructive possession" would be applicable to this statute. An analogous case is State v. Halyard, 274 S.C. 397, 264 S.E.2d 841 (1980). There, the defendant was prosecuted for possession of a sawed-off shotgun. At the time of his arrest, he had the shotgun protruding from underneath the driver's side of the car. The defendant asserted that the trial court erred in refusing to direct a verdict of acquittal in his favor when there was insufficient evidence to prove him as being in possession of the shotgun. Rejecting this argument, the Court's analysis bears repeating here:

This court has repeatedly recognized that a conviction for possession of contraband drugs requires proof of actual or constructive possession, coupled with knowledge of the presence of the drugs. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control over the substance. Such possession may be established by circumstantial as well as direct evidence. More than one person may possess the same property simultaneously. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976); see also State v. Wise, 272 S.C. 384, 252 S.E.2d 294 (1979); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974); State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973).

Although this court has never before so held, the same principles are applicable to possession of firearms or other objects. See United States v. Richardson, 504 F.2d 357 (5th Cir. 1974), cert den. 420 U.S. 978, 95 S.Ct. 1406, 43 L.Ed.2d 659 (1974). The rule is that unless there is a failure of competent evidence tending to prove the charge in the indictment, a trial judge should refuse a defendant's motion for a directed verdict of acquittal. State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). We believe the evidence here, taken in the light most favorable to the State was more than sufficient to make a jury issue as to whether appellant was in constructive, if not actual, possession of the sawed-off shotgun at the time he was arrested. Courts in other jurisdictions have held on similar facts that the question of possession was properly submitted to the jury and that the jury was justified in finding the defendant in possession of the firearm. See County Court of Ulster v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); People v. Gant, 70 Cal. Reptr. 801, 264 Cal. App. 2d 420 (1968); Kennedy v. State, 136 Ga. App. 305, 220 S.E.2d 788 (1975); People v. Cannon, 18 Ill. App. 3d 781, 310 N.E.2d 673 (1974) and cases cited therein; Commonwealth v. Albano, 373 Mass. 132, 365 N.Ed.2d 808 (1977); State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

See also, State v. Perez, ____ S.C. ____, 430 S.E.2d 503 (1993) ["constructive possession" established where person is aware of presence of contraband and has ability to control its disposition.]

It is well-settled that the presence of contraband in the trunk of an automobile can constitute "constructive possession" of such contraband, depending upon the facts and circumstances. For example, in State v. Marsh, 78 Or. App. 290, 716 P.2d 261 (Or. App. 1986), the defendant was convicted of the crime of being an ex-convict in possession of a firearm. The defendant was a passenger riding in the car and the gun was subsequently discovered in an inventory of the vehicle. Evidence submitted that the defendant knew the weapon was in the car was deemed by the court to be sufficient for proof of constructive possession by the defendant of the gun. Other cases are in accord. People v. Warrington, 597 N.Y.S.2d 119 (1993); United States v. Bell, 954 F.2d 232 (4th Cir. 1991); People v. Ehu, 24 Ill. App. 3d 340, 320 N.E.2d 536 (1974).

Of course, it goes without saying that the test prescribed by the Court in State v. Halyard must be met in order to establish constructive possession of the liquor. The Halyard Court requires that there must be knowledge of the presence of the contraband, together with proof of constructive possession. These are usually questions for the jury.

In possession of liquor cases, our Court has usually given considerable weight to the connection between the odor of alcohol and the establishment of knowledge of the person in constructive possession. For example, in State v. Terrell 131 S.C. 440, 128 S.E. 409 (1925), the Court approved of the trial judge's reasoning in denying a new trial for conviction of possession of unlawful liquors. The trial judge's analysis was stated as follows in denying the defendant a new trial:

> I think I will let it stand (verdict), gentlemen. If it was simply the liquor out there in the yard or around the premises hidden around, it might be a different proposition, but these officers testified they found two jugs and both had had liquor in them, and I think, when you couple the two together, the liquor in the yard and empty jugs in the house smelling of whiskey, and this being the defendant's house, these being his premises that he was in charge of, I think the jury was justified in convicting him, and I will let it stand.

The Supreme Court held that "[t]hese reasons show that this ground of the motion for a new trial was properly overruled." 131 S.C. at 441. See also, State v. Moorer, 160 S.C. 379, 158 S.E. 729 (1929).

Based upon the foregoing, it is my opinion that a charge pursuant to Section 20-7-380 could be brought. It is also my opinion that the doctrine of "constructive possession" would be applicable to Section 20-7-380, thus enabling the State to prove that the individual was in possession of the liquor in violation of Section 20-7-380. Of course, so long as there is competent evidence presented by the State, it would ultimately be a question for the jury as to whether the test enunciated in State v. Halyard -- knowledge, together with constructive possession -- would be met sufficient to convict.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Attorney General

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