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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 30, 1996

Chief Steve Harwell
Edisto Beach Police Department
2414 Murray Street
Edisto Beach, South Carolina 29438

Re: Informal Opinion

Dear Chief Harwell:

You state that there are:

> increasing problems where junior and senior proms are being held at rented and private homes and alcoholic beverages are available for consumption by underage persons. There seems to be no standard practice of Law Enforcement agencies when having to deal with this problem and recently civil law suits have evolved from police not taking proper action. There is no longer the assumption that common sense prevails. The problem continuously exists when we are dispatched to wild out of order house parties being conducted and the police possibly failing to take the correct action thus being sued when an underage person or juvenile is intoxicated and leaves the scene and is injured or killed.
>
> The Edisto Beach Police Department has a written policy which basically allows the responding officers to confiscate alcohol[ic] beverages in plain view when a violation is observed and a criminal charge is to be made. Also the adult in charge of the party is charged with contributing. However, I feel we may be violating someone's rights by use

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Request Letter

> of constructive possession to confiscate and charge persons under the statutes provided for possession and consumption of alcohol by underage and juvenile offenders, thus, these are the reasons for my request for a formal written opinion.

Thus, you seek advice "concerning the confiscation of alcoholic beverages when in the presence of underage persons and juveniles when Law Enforcement officers observe this at house parties." You also request an opinion concerning "the use of constructive possession as probable cause for confiscation and criminal charges [are] to be made when underage persons and juveniles are in the immediate area and are in reach of alcoholic beverages whether in a motor vehicle, house or bar."

LAW / ANALYSIS

S.C. Code Ann. Sec. 20-7-380 provides in pertinent part as follows:

> [i]t is unlawful for any person under the age of twenty-one years to purchase, or knowingly have in his possession, any alcoholic liquors. Any purchase is prima facie evidence that it was knowingly possessed.[1]

It is my opinion that the doctrine of constructive possession would be applicable to the situation you have referenced, depending, of course, upon the particular circumstances. 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 that he was in possession of the shotgun. Rejecting this argument, the Court's analysis bears repetition here:

> [t]his 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.

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[1]Section 20-7-370 also prohibits the possession of beer and wine by a person under twenty-one.

> Such possession may be established by circumstantial as well as direct evidence. More than one person may possess the same personal 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 in regard 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.Rptr. 801, 264 Cal.App.2d 420 (1968); Kennedy v. State, 136 Ga.App. [274 SC 401] 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.E.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 of drugs is 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, 780 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 of the gun by the defendant. Other cases are in accord. People v. Wellington, 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).

Cases in other jurisdictions are instructive with respect to their analysis of whether a minor in a given situation is in constructive possession of alcohol. In City of Mandan v. Thompson, 453 N.W.2d 827 (W.D. 1990) the Court upheld a finding of defendant's guilt of possession of alcohol. A car containing several juveniles was observed being driven erratically. The officer stopped the vehicle, smelled the odor of alcohol and observed a two-liter plastic Coke bottle between the defendant's legs. The bottle was determined later to contain alcohol. The defendant claimed he had not consumed alcohol and had no knowledge the bottle contained alcoholic beverages. The officer detected the odor of alcohol on defendant's breath, however. The defendant and other passengers told the officer they had all been drinking alcohol out of the bottle. The Court held the defendant was in possession even though the officer had not observed the defendant drinking the alcohol.

Likewise, in S.W. v. State, 431 So.2d 342 (Fla. 1983), a minor was deemed in possession of an unopened six-pack of beer laying beneath her feet in an automobile in view of the fact the there were no adults in the car. The facts, concluded the Court, constituted sufficient evidence of knowledge and the ability to support a conviction upon constructive possession." And in State v. Preston, 832 P.2d 513 (Wash. 1992), the Court concluded an officer had probable cause that a juvenile was in possession of alcohol even though he did not observe him drinking where he saw the juvenile place a bag containing beer bottles into the trash can and after stopping him detected the odor of alcohol on his breath.

On the other hand courts have concluded that juveniles are not in constructive possession of alcohol merely by mere proximity to those drinking or by acquiescing thereto. In BS v. State, 638 So.2d 154 (1994), the Court held that a minor found in a grocery store bathroom watching another juvenile drinking from a wine cooler was not in constructive possession of the alcohol. The Court concluded that the minor did not have "exclusive control of the area" and without other evidence of dominion and control, stating that "mere proximity to contraband, standing alone, is insufficient to establish constructive possession of the substance ...". Id. at 155.

Furthermore, in City of Wahpeton v. Wilkie, 477 N.W.2d 215 (N.D. 1991), a minor was deemed not in constructive possession of alcohol merely because he was in the same house where the party was being held. The juvenile had objected to the party being held in the apartment more than once and had finally gone into the living room to watch T.V. Noting that the theory of constructive possession indicates "that more than mere presence is needed ...", the Court analyzed the facts as follows:

> [i]n the case at hand, there was evidence that Wilkie was present in his apartment when the police arrived. There was also testimony that he was sitting among underage persons who were consuming alcohol, and that such alcohol was either in plain view or known by Wilkie to exist in the apartment. However, there was direct testimony indicating that Wilkie did not consume any alcohol and that he objected to the party twice to his roommate. The law cannot be that Wilkie would have to leave his apartment at 2:30 a.m. or risk being charged for minor in possession when he had not had possession of any intent to possess alcohol ... . In this case, not only was there no additional link between Wilkie and the alcohol, but there was testimony that Wilkie never exercised control over or possessed any alcohol. (emphasis added).

Id. at 217-218.

Our own Supreme Court had adopted this same analysis with respect to the unlawful possession of alcoholic beverages. In State v. Kinard, 229 S.C. 209, 92 S.E.2d 483 (1956), the Court held that

> [i]t was not necessary for the State to show that appellant had the liquor on his person to sustain a conviction of having in possession such illegal liquors. It is necessary to show only that he had control and management theory.

229 S.C. at 213.

In summary, it is my opinion that the law and theory of constructive possession may be properly applied in a given situation to determine that a juvenile is in possession of alcoholic beverages. Each situation will obviously turn on the particular facts. For your benefit, the law of constructive possession is set forth extensively in State v. Halyard and the cases cited therein and is quoted extensively herein. In summary, the State must

show that the defendant had "dominion and control" of the alcoholic beverage as well as knowledge of its presence. Such possession may be shown by direct or circumstantial evidence, more than one person may possess the alcohol in question at the same time and the question is ultimately one for the trier of fact. There must have been the exercise of dominion and control by the defendant over the alcohol and the mere presence in proximity to the alcohol in and of itself will not typically be sufficient for the doctrine of constructive possession to apply. If the facts are sufficient, however, our courts will apply the doctrine constructive possession to this type of situation.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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 am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph