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Criminal Law—Narcotics—Constructive Possession: Conviction Reversed Where No Positive Showing of Dominion and Control over Drugs or Premises.—State v. Callahan,77 Wash. Dec. 2d 26, 459 P.2d 400 (1969)

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CRIMINAL LAW—NARCOTICS—CONSTRUCTIVE POSSESSION: CONVICTION REVERSED WHERE NO POSITIVE SHOWING OF DOMINION AND CONTROL OVER DRUGS OR PREMISES.—*State v. Callahan*, 77 Wash. Dec. 2d 26, 459 P.2d 400 (1969).

Defendant Hutchinson was arrested after Seattle police discovered narcotics during a search of a houseboat on which he had been a visitor during the previous two days. The only personal effects of the defendant which were found on the houseboat were two books on drugs, a set of broken scales, and two guns. There was no evidence offered to substantiate a claim that the defendant resided on the houseboat, or that he contributed significantly to its maintenance.

No narcotics were found on the defendant's person, although various narcotics were discovered within the defendant's reach on and underneath a desk which he shared with a co-defendant. There were at least three other people in close proximity to the drugs. Although he admitted that he had inspected and handled the drugs earlier in the day, defendant made no claim of ownership, and a co-defendant testified that the drugs belonged to him. In reviewing the defendant's appeal from a conviction of possession of narcotics under the Uniform Narcotic Drug Act,[1] the Washington Supreme Court *held:* insufficient evidence existed for the jury to find that the defendant had dominion and control, a necessary element of constructive possession, of either the contraband narcotics or the premises on which the narcotics were found. *State v. Callahan*, 77 Wash. Dec. 2d 26, 459 P.2d 400 (1969).

In order to obtain a conviction for possession of narcotics, the state must show that the defendant either had actual, personal custody of the drugs,[2] or that he "constructively" possessed them.[3] To prove constructive possession, it must be shown that the defendant exerted

1. WASH. REV. CODE § 69.33.230 (1959). It provides:
It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter.
This statute superseded ch. 47, § 3 [1923] Wash. Sess. Laws, making it unlawful to have possession with intent to sell. The Washington court, in reversing a conviction under the old act stated:
We conclude, therefore, that the mere possession of narcotics, unaccompanied by any intent to sell, furnish, or dispose of the same . . . is not a criminal offense . . . .
State v. Lee, 127 Wash. 377, 380, 220 P. 753, 754 (1923).
2. *Callahan*, 77 Wash. Dec. 2d at 28, 459 P.2d at 401 (1969).
3. *Id.* at 28, 459 P.2d at 402.

dominion and control over the drugs.[4] Once the state has shown either actual or constructive possession, the burden then shifts to the defendant to rebut a presumption that he *knew* he possessed the drugs;[5] he can defend by proving that his possession was "unwitting, lawful, or otherwise excusable."[6] Requiring the defendant to rebut the presumption that his possession was inexcusable has been held not to deny him due process of law.[7]

4. The Washington court first applied the dominion and control test in State v. Walcott, 72 Wn. 2d 959, 968, 435 P.2d 994, 1000 (1967). For examples of unsophisticated application of the dominion and control tests in the federal courts, see Rodella v. United States, 286 F.2d 306 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961) and Quiles v. United States, 344 F.2d 490 (9th Cir. 1965). *See also* Garza v. United States, 385 F.2d 899 (5th Cir. 1967); 31 FORD. L. REV. 821 (1963).

5. The defendant's knowledge of his possession of the narcotics is presumed once possession is proved. *See* note 7, *infra*. In State v. Hall, 41 Wn. 2d 446, 249 P.2d 769 (1952), the defendant was trying to show that the *mens rea* element could be rebutted by his claimed ignorance. The court, although disbelieving him, nevertheless acknowledged the arguability of his position. Nowhere does possession of narcotics exist as a strict liability offense. *Cf.* State v. Boggs, 57 Wn. 2d 484, 358 P.2d 124 (1961). Therein the court explicitly stated that knowledge of the narcotic *character* of the article possessed was not required. For a pointed examination of the federal treatment of the knowledge-presumption issue see Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L.C. & P.S. 7, 10 nn.49-51 (1966).

6. *Callahan*, 77 Wash. Dec. 2d at 30-31, 459 P.2d at 403.

7. Recent scholarship has dealt with the questionable constitutionality of state and federal statutes which place a responsibility upon a possessor of narcotics to rebut the presumption that the possession was illegal. It is now established that the prosecution must show the rationality of a presumption before a defendant can be required to go forward with rebutting evidence. Leary v. United States, 395 U.S. 6, 45 (1969); Turner v. United States, 396 U.S. 398 (1970). The presumed fact, "more likely than not," must flow from the proven fact. *Leary, supra*, at 36; *accord*, United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968). *See* 34 ALBANY L. REV. 684, 687 (1970). *See also* 7 HOUSTON L. REV. (1970).

The holding in *Leary, supra*, constricted a long-standing doctrine which required only a "rational connection" between the presumed and proven elements in a criminal offense. Tot v. United States, 319 U.S. 463, 467-68 (1943). *See* 56 HARV. L. REV. 1324 (1943). For a discussion of the hypothesis that the courts never bothered with the *Tot* requirement, and instead relied upon common sense tests of connection between proven and presumed facts see Comment, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 541-47 (1955); and Comment, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967). *Compare* Ferry v. Ramsey, 277 U.S. 88 (1928), *with* Morrison v. California, 291 U.S. 82 (1934). *Ferry* and *Morrison* uphold federal statutory presumptions in civil and criminal actions respectively. *See generally* Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17 (1930).

The question arises, therefore, whether illegality is an inferential offshoot of possession under the Uniform Narcotic Drug Law. WASH. REV. CODE § 69.33.390 (1959) provides:

> In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this chapter, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this chapter, and the burden of proof of any exception, excuse, proviso, or exemption shall be on the defendant.

This section squarely puts the burden on the defendant to show that the possession was

Constructive possession is a very old concept,[8] having its origins in explanations of absentee-ownership of real and personal property.[9] Within the realm of criminal possession, courts have utilized the notion of "constructive" possession in response to public pressure for more vigorous law enforcement directed against possessors of forbidden chattels.[10] Possession of liquor,[11] burglar's tools,[12] or narcotics[13] need only be constructive in order to raise a presumption of illegality.[14]

The Washington court applied the definitions of constructive possession developed in the contraband liquor cases to the first narcotics cases. The test as adopted placed no emphasis on dominion and control

not illegal. No indication has yet been made by the Washington court that the presumption in question violates established constitutional standards of due process. *See, e.g.*, State v. Morris, 70 Wn. 2d 27, 422 P.2d 27 (1966); *cf.* State v. Garcia, 69 Wn. 2d 546, 419 P.2d 121 (1966). However, Washington's unequivocal pronouncements on the issue all antedated the holding in *Leary, supra.* The suggestion has been made that the next logical test will be that the statutory presumption will be allowed only where there is "no reasonable doubt" that the presumed fact follows from the proved fact. *See* 34 ALBANY L. REV. 684 (1970). It seems persuasive that there could be a reasonable doubt that defendants illegally possess narcotics. A person who had dominion and control over the premises where drugs were found might not know that the narcotics were there. Why should the state not be required to establish beyond a reasonable doubt that the person was cognizant of the presence of the drugs?

8. *See, e.g.*, State v. Johnson, 129 Wash. 62, 224 P. 602 (1924); *cf.* Webb v. State, 38 Tex. Crim. 620, 44 S.W. 498 (1898).

9. To illustrate:

> A dies, never having been in actual physical possession of a certain piece of land, but having therein complete property. B, A's heir, is unaware of both A's ownership and A's death and is not in physical occupation of the land. B has constructive possession of the land.

RESTATEMENT OF PROPERTY § 7, illustration 5 at 21 (1936).

10. Federal and state courts have both recognized a necessity to resurrect legal fictions when policy dictates a need for stricter application and broader definition of criminal sanctions. *See generally* Comment, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967). The prefix "constructive" has been called "the mere trademark of a fiction." Schoedel v. State Bank, 254 Wis. 74, 75, 13 N.W.2d 534, 535 (1944). Elements of crimes were originally established with "actual," and not "constructive" hypothetical situations as references. Hodges v. Eddy, 38 Vt. (12 Veazey) 327 (1865).

When dealing with a criminal violation, proof of which is based on a circumstantially-inferred element, utmost attention must be given in consistently and fairly weighing that element. Due process considerations, the mandate of stare decisis, and the tendency for individuals arbitrarily to apply indefinite guidelines require circumspection when applying the prefix "constructive." Policy, therefore, must be quite strong to allow the state, by means of the adjudicative instead of the legislative process, to establish easier standards of proof. *See* note 7, *supra.*

11. State v. Johnson, 129 Wash, 62, 224 P. 602 (1924).

12. State v. McDonald, 74 Wn. 2d 474, 445 P.2d 345 (1968).

13. *Compare* State v. Callahan, 77 Wash. Dec. 2d 26, 459 P.2d 400 (1969), *with* State v. Henker, 50 Wn. 2d 809, 314 P.2d 645 (1957).

14. *See* note 7, *supra.*

and it was unclear what would inculpate a defendant arrested for his knowing proximity to narcotics.[15]

Elemental in these pre-dominion and control definitions of constructive possession were requirements resurrected from the prohibition era such as "legal title or ownership of the thing and the right to immediate actual possession."[16]

Recently, however, the Washington court has borrowed the dominion and control test from federal jurisdictions[17] and has attempted to delineate two distinct fact situations, either of which, if proved, would establish a presumption of constructive possession. First, a defendant who knew of the presence of the drugs,[18] and who either resided at,[19] exclusively held the keys to,[20] or paid the rent for[21] the premises on which the narcotics were found thereby exercised dominion and control over those *premises*, and constructively possessed the drugs therein. Second, dominion and control over the *drugs themselves* has evolved as a means of proving constructive possession when it has been shown that the defendant's relationship to the narcotics has enabled him alone to control their disposition.[22] As the court noted in *Callahan*:[23]

> It follows from a review of our cases on constructive possession of narcotics and dangerous drugs that in each instance there is

15. In State v. Henker, 50 Wn. 2d 809, 314 P.2d 645 (1957) a cognizant defendant's conviction for possession of marijuana was upheld because he exerted ownership over a patch of gladioli among which the marijuana plants were found growing. In State v. Hall, 41 Wn. 2d 446, 249 P.2d 769 (1952), the "somewhat confused state of the record," *id.* at 451, 249 P.2d at 771, did not prevent the court from affirming the conviction of an erstwhile horticulturalist who claimed naiveté with respect to interloping *cannibas americana*.

16. State v. Johnson, 129 Wash. 62, 66, 224 P. 602, 603 (1924).

17. *See* note 4, *supra*.

18. *See* note 5 and accompanying text, *supra*.

19. State v. Chakos, 74 Wn. 2d 154, 443 P.2d 815 (1968).

20. State v. Mantell, 71 Wn. 2d 768, 430 P.2d 980 (1967); State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1970).

21. State v. Morris, 70 Wn. 2d 27, 422 P.2d 27 (1966).

22. In State v. Mantell, 71 Wn. 2d 768, 430 P.2d 980 (1967), an unwanted guest who held no leasehold interest in the apartment in which the drugs were discovered, was found to have exercised dominion and control over both the drugs and the premises. A better analysis would have been to find that there was dominion and control over the drugs alone; the defendant owned the narcotics, but the permanent resident of the premises wanted nothing to do with him or his contraband, and turned him in to the police.

23. 77 Wash. Dec. 2d at 29, 459 P.2d at 400 (emphasis added). Washington is the only State jurisdiction to have adopted this bifurcated approach to the dominion and control test.

evidence that the defendant was in dominion and control of either the *drugs* or the *premises* on which the drugs were found.

In *Callahan* the defendant had no leasehold interest in the houseboat, did not live there, and was only one of numerous people who circulated in and out of the premises. The court therefore concluded that no inference of dominion and control over the *premises* could be drawn.

The court also concluded that the defendant, at the time of his arrest, was not exercising dominion and control over the drugs themselves. Several factors seem to justify this result. The defendant's "ownership" of the drugs was never established; direct evidence of ownership in another was admitted;[24] and apparently this defendant had no personal dispositive rights in the narcotics.[25]

State v. Callahan has eliminated much of the "gray area" in the Washington definition of constructive possession of narcotics and dangerous drugs. In overturning the defendant's conviction the court spelled out, for the first time, what is *not* dominion and control, and thereby established an opposite pole of reference to that of other cases.[26] Five recent constructive possession cases antedate the decision of the Washington court in *Callahan*.[27] By analyzing these five cases and comparing them with *Callahan*, it should be possible to determine the present scope of the "dominion and control" doctrine and to determine how much "gray area" remains.

24. The court in *Callahan* was cognizant of the ownership factor. It stated:
Consideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control . . . . Evidence pointing to any dominion and control the defendant might have over the drugs was purely circumstantial and it is not within the rule of reasonable hypothesis to hold that proof of possession by the defendant may be established by circumstantial evidence when undisputed direct proof places exclusive possession in some other person. See *State v. Charley*, 48 Wn. 2d 126, 291 P.2d 673 (1955).
77 Wash. Dec. 2d at 30, 459 P.2d at 403.

25. Although it was established that the defendant was seated in close proximity to "various pills and hypodermic syringes," and that "[a] cigar box filled with various drugs was on the floor," nowhere in the opinion is there any evidence establishing the defendant as the probable controller of the drugs. 77 Wash. Dec. 2d at 30, 459 P.2d at 403.

26. See notes 27-34 and accompanying text, *infra*.

27. State v. Chakos, 74 Wn. 2d 156, 443 P.2d 815 (1968); State v. Weiss, 73 Wn. 2d 372, 438 P.2d 610 (1968); State v. Walcott, 72 Wn. 2d 959, 435 P.2d 994 (1967); State v. Mantell, 71 Wn. 2d 768, 430 P.2d 980 (1967); State v. Morris, 70 Wn. 2d 27, 422 P.2d 27 (1966).

I. DOMINION AND CONTROL OF PREMISES

Case by case analysis of the decisions preceding *Callahan* now enables an observer to delineate with some precision the meaning of dominion and control of premises. In *State v. Walcott*,[28] which first established the dominion and control test,[29] and in *State v. Weiss*,[30] the defendants were residents of the premises in a classic, leasehold sense, and were on the premises when the arrests were made. The defendant landlady in *State v. Chakos*[31] also had "dominion." Although not residing in the room where the drugs were found, she had unlimited access to the area, the building's use being communal in nature. And in *State v. Morris*,[32] the defendant's physical residence on the premises was not established, but his conviction was affirmed because he paid the rent for the apartment and was shown to have frequented it.

The *Callahan* fact pattern may be easily distinguished from the above four cases. Not only was the defendant in *Callahan* not a resident, but there was no evidence that he often visited the houseboat, or that he contributed financially or physically to its maintenance.[33]

The fifth case, *State v. Mantell*,[34] cannot be so easily distinguished. There, the defendant was not a resident in any traditional sense, nor is there any indication that he exerted more control over the premises than did the defendant in *Callahan*. Nonetheless, the court found him to have had dominion and control of the premises.[35] Thus, there appears to be a direct conflict between the two cases, which the *Callahan* court either failed to recognize or ignored. *Callahan* should control the conflict, however, not only because it is more recent, but also because the holding as to premises in *Callahan* was necessary to the reversal of the conviction. Affirmance of the conviction in *Mantell* could have stood independently (*i.e.* dominion and control of the drugs

28. 72 Wn. 2d 959, 435 P.2d 994 (1967).
29. In *Walcott*, the defendant contended that the "dwelling was not under his dominion and control." But the court found that "there was substantial evidence on the record, which the jury was entitled to believe, that the defendant was in charge of the entire premises . . . ." 72 Wn. 2d at 966, 435 P.2d at 999-1000.
30. 73 Wn. 2d 372, 438 P.2d 610 (1968).
31. 74 Wn. 2d 154, 443 P.2d 815 (1968).
32. 70 Wn. 2d 27, 422 P.2d 27 (1966).
33. *See* text accompanying note 1, *supra*.
34. 71 Wn. 2d 768, 430 P.2d 980 (1967); *see* note 22, *supra*.
35. *Id.* at 772, 430 P.2d at 982-83.

themselves), and *Mantell's* statement about the premises could be regarded as dictum.

Callahan appears to have outlined the requirements for dominion and control over premises as follows: 1) Actual residence on the premises; 2) Financial (or possibly physical) contribution to the maintenance of the premises; or 3) some other sort of *positive* control, as in *Chakos*.[36] Mere presence or use of premises in conjunction with others, as in *Callahan* and *Mantell* will no longer suffice.

II. DOMINION AND CONTROL OF THE DRUGS

Although the *Callahan* court drew a definite line on the issue of dominion and control of premises, much doubt remains concerning the scope of the holding as to dominion and control of the drugs themselves. The case raises two major problems in connection with this issue. First, the court appears to lean heavily on "ownership" as a primary indication of dominion and control over the drugs, relying on admitted ownership by another to exculpate the defendant.[37] Therefore a question is raised as to the reliance which will be put on "ownership" in future cases. It is submitted that while the court will use ownership (in the sense of legal title) as determinative of the dominion and control question where conclusive evidence appears, neither the prosecution nor the defense will be limited to a conclusive showing of ownership.

Since the dominion and control test adopted in *Walcott* replaced earlier tests which did rely in part on ownership,[38] any attempt to

36. *E.g.*, in the first decision to apply *Callahan*, State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969), the intermediate appellate court recognized the *Callahan* admonition, but upheld a possession conviction. In *Potts*, ownership of the automobile in which the marijuana was found was never established. However, the court pointed out:

> In State v. Callahan, *supra*, the court reviewed cases that have involved constructive possession of narcotics and drugs and concluded that in each instance there was evidence that the defendant had dominion and control of either the drugs or the premises on which the drugs were found. In the instant case, it is clear that the defendant had dominion and control over the "premises." He had the keys to the car and was driving it. He was the sole occupant of the car.

1 Wn. App. at 617, 464 P.2d at 745. In *Potts* the court specifically pointed to the fact that the defendant was alone in an automobile in drawing its inference of dominion and control. Had there been others in the car more evidence would probably have been required to remain within the *Callahan* directive. *See* State v. Cabigas, 3 Wn. App. 740, 477 P.2d 648 (1970).

37. *See* note 24 and accompanying text, *supra*.

38. *See* notes 16-17, and accompanying text, *supra*.

create a tautological relationship between "ownership" and "dominion and control" would destroy any possible reason for having changed the test. Rather, the court's language makes it clear that evidence of "ownership" was controlling only because it was direct, while the conflicting evidence as to dominion and control was circumstantial.[39] While the court did state that ownership was a relevant consideration,[40] thereby explicitly acknowledging a relationship between ownership and dominion and control, the statement simply recognizes that dominion and control is one aspect of ownership, and is necessarily encompassed therein. Thus, while proven ownership will satisfy the dominion and control test, that test may also be satisfied by something less.

Having determined that proof of "ownership" should *not* be necessary to show dominion and control of the narcotics, we are faced with a second major problem: what proof *is* necessary to show dominion and control of narcotics? Would the conviction in *Callahan* have been reversed even if there had been no admitted ownership by another, or would the prosecution's evidence have been sufficient standing alone? While the principal case, by itself, offers no clue, a comparison of *Callahan* with the five previous decisions[41] may shed some light on the question.

Walcott, *Weiss*, and *Chakos* do not confront the issue at all, since all three cases stand on the "premises" issue. *Mantell* dealt with actual possession of the drugs themselves, and evidence of dominion and control was unnecessary to sustain the convictions.[42]

Only the court's statements in *Morris* remain for consideration. In that case, the drugs were in a hollowed-out book, and a witness saw the defendant handle the book on at least four occasions.[43] This evidence was similar to that in *Callahan*, where the defendant admitted having handled the drugs, yet the conviction in *Morris* was affirmed, while that in *Callahan* was reversed.

There appear to be three possible explanations for this apparent inconsistency. First, it is possible that the court intends to affirm all

39. *See* note 24, *supra.*
40. *See* note 24, *supra.*
41. *See* note 27 and accompanying text, *supra.*
42. 71 Wn. 2d at 771, 430 P.2d at 981.
43. 70 Wn. 2d at 30, 422 P.2d at 29.

future convictions in which similar evidence of proximity to, and handling of the drugs indicates dominion and control, and that *Callahan* was reversed only because of the direct evidence of ownership in another. Second, it may be that the court never intended such evidence, standing alone, to be sufficient for conviction, and that the statement in *Morris* that such "possession" of the book was sufficient was mere dictum, because the conviction in *Morris* could have stood on the "premises" ground alone.[44] Finally, it is possible that the court has changed its position on this question without bothering to overrule *Morris*, as it seems to have done on the "premises" issue without overruling *Mantell*.[45]

It is submitted that the final possibility seems to be the most plausible. First, the court's intention in *Callahan* seems to be that it will be less willing in the future to accept evidence of a passive relationship to the drugs as determinative of dominion and control, and second, the final possibility appears more desirable from a policy standpoint. It must be emphasized that *Callahan* is the first case to reverse a possession conviction since adoption of the dominion and control test; that alone should serve as a signal that new guidelines have been adopted. Further, there is no apparent reason why different criteria should be assigned to the "premises" issue than those assigned to determination of dominion and control of the drugs, and, as discussed above, conviction on the "premises" issue now seems to require a showing of *positive* control by the defendant.[46] Moreover, it is clear that the defendant carries a much heavier burden than usual in a criminal case once dominion and control is shown.[47] To require him to carry that burden without the clearest proof of dominion and control in the first instance would be grossly unfair.

When the Washington court is faced with future similar cases but which lack direct evidence of ownership, more "gray area" will be categorized either as sufficient to convict under the language in *Morris*, or as exculpatory under *Callahan*. A functional relationship concerning dominion and control of drugs should then emerge, based on the

44. *Id.* at 29, 422 P.2d at 29.
45. *See* text accompanying notes 34-36, *supra*.
46. *See* note 36 and accompanying text, *supra*.
47. *See* notes 5-7 and accompanying text, *supra*.

amount of positive conduct displayed by the defendant toward the drugs and their disposition.

CONCLUSION

The definition of dominion and control described in *Callahan*, if unclear in part, nonetheless is an effective cushion against potential excesses of the state. With respect to a defendant's relationship to the premises, *Callahan* supports the assertion that *positive* control, not merely presence, must be shown by the prosecution. With respect to the defendant's contact with the drugs themselves, two clarifications seem to emerge from *Callahan*. First, there is the reassertion of the principle that dominion and control cannot be proven by circumstantial evidence when there is admitted ownership by another.[48] Second, "control" is shown to be an individual control which again should be *positive* and not merely presumptive.

The *Callahan* decision is to be applauded both because it inhibits the state's use of a legal fiction to lighten its burden of proof in narcotics possession cases and because it refuses to punish an individual for what may have been only an unfortunate choice of associates.

48. *See* State v. Charley, 48 Wn. 2d 126, 291 P.2d 673 (1955); *see also* note 24, *supra*.