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INSIDE

**Constructive
Possession**

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Constructive Possession

Victoria Avalon, Assistant State Attorney

You're on the road one night working your usual shift when you see a car that looks to you like it's exceeding the speed limit. You clock it with your radar gun and sure enough, he's speeding. You hit your lights and pull the car over. Inside, you find four occupants. As you walk up, you smell the odor of burning cannabis, and you can see it in plain sight on the rear-seat passengers. So you call for backup, get everyone out of the car, and arrest the rear-seat passengers. When your backup gets there, you search the car for more drugs, and in the trunk you find a sawed-off shotgun. You also find papers indicating that the front-seat passenger's father rented the car. You put the driver and passenger in the back of a patrol car while you're searching, and leave a recorder running in the car. The recorder captures a remark made by the driver to the effect that he's worried about the gun, claims that it belongs to one of the rear-seat passengers, and says that it's a good thing they didn't bring more drugs, because they'd have been in the trunk. But you don't find his fingerprints on the gun. Is this enough to charge the driver of the car with possession of the sawed-off shotgun?

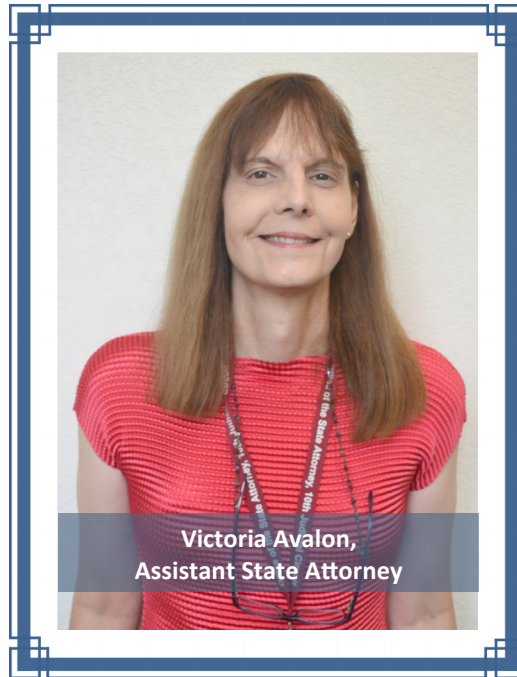
In another case, you're executing a search warrant in a hotel room, right here in Polk County. You've got two suspects, a man and a woman. The room is jointly occupied by the female suspect and her boyfriend. Their clothes are mingled in the closet. In a man's leather jacket hanging in the closet, you find dope in one pocket and syringes in the other. Both your suspects deny ownership, but the female admits to having used the syringes to shoot up a different kind of illegal drugs than what was found. Do you have what it takes to charge the female suspect with possession of the drugs in the jacket?

If you answered "yes" to either scenario, then that is the reason for this article, because in the recent cases of *Hudson v. State*, 41 Fla. L. Weekly D 1804 (Fla. 4th DCA Aug. 3, 2016), and *Tucker v. State*, 41 Fla. L. Weekly D 1875 (Fla. 2d DCA Aug. 12, 2016), appellate judges found that **neither** of these fact patterns rise to the legal level necessary to prove possession of the contraband described. *Tucker* was a Polk County case, also. Both cases were reversed after trial where they each had been convicted of possessing the contraband items alleged, with two different courts holding that the juries should have been ordered to acquit the suspects because of lack of evidence to show that they possessed the contraband.

Both of these scenarios illustrate a legal concept called "**constructive possession**," and it is one of the most misunderstood concepts in the law of

search and seizure. It's frustrating; for you particularly, for us in evaluating your cases, and for the judiciary that reviews our work. These cases clearly illustrate the problem you confront on the street: Just because there is contraband in a place, and two or more suspects right there next to it, that alone doesn't show who owns the contraband and who's guilty of a crime.

To arrest on probable cause, you have to have reasonable facts that would convince the most skeptical person you can think of that your suspect did the crime. Here, you have to show that your suspect possessed contraband, before you can arrest him for that. Two kinds of possession exist at law: Direct, and constructive. Direct possession is easy. The contraband is on the suspect. It's in his hand, or in his pocket, or right next to him in easy reach, assuming that it's in a place he's in control of. Our cases above just don't show direct possession.



Victoria Avalon,
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Constructive possession, which is illustrated above, is a lot harder to prove. One constructively possesses contraband when he or she is aware of it, and can exercise “dominion and control” over it, meaning the suspect can do with it as he or she wishes. We typically don’t have a lot of straight up, hard proof that your suspect constructively possessed whatever contraband you found. We have to show it by a confluence of the surrounding circumstances. There’s got to be solid evidence that the suspect had to know it was there, and could do with it as he wanted.

In the cases above, the investigating officers simply needed more information to tie the contraband to the suspect, to the exclusion of the other suspects. You may be thinking that all the suspects in both cases easily were in joint possession of those items. As you all know, it is

true that an item can be possessed by more than one person. But the law is that mere proximity to an item does not equal constructive possession of it, so joint possession isn’t an easy fix for this. To prove joint possession, we have to show beyond a reasonable doubt that all of the people we say possessed an item both knew or should have known it was there, and that each one of them individually had dominion and control over it.

Now, there is a case I use often to illustrate where the line is in a constructive possession situation. It comes from our own Second District Court of Appeal, the same court that decided the *Tucker* case above, and it shows you just what level of proof you need to make the case that someone constructively possessed a contraband item. In *Jackson v. State*, 995 So. 2d 535 (Fla. 2d DCA 2008), the district court had another search warrant it was looking at, just like in *Tucker*. When the search team entered this house in Lee County, they heard

people running and found Vernon Jackson between the kitchen and living room, in an area not separated by a wall. He was sitting in a wheelchair and didn’t try to run when the officers came in. In the kitchen, five feet away, on the floor in front of the sink, was a woman’s Burberry purse. It was open on the floor as if it had been thrown, with the contents spilling out of it. Next to the purse were a cigarette case and a change purse. In the change purse: Contraband. In the cigarette case: Jackson’s credit card with his name on it. The officers knew that

Jackson routinely carried a purse. Jackson admitted living in one of the bedrooms of the house. Drugs were found in that room, with a different man. No women were on the premises. The DCA held this to be sufficient to establish constructive possession.

Now, *compare Jackson to Tucker and Hudson*. In *Jackson*, you’ve got a guy

known to carry a purse, in a house where no women are; it’s five feet from him in an area he could have thrown it; his ID is in a cigarette case that looks like it just spilled out of it when thrown, and it’s right next to a change purse with contraband in it. In his bedroom, with another guy: More drugs. In *Tucker*, you’ve got a woman charged but the coat with dope is a man’s coat and a man lived in that room. No one’s ID is in the coat, both deny ownership, and she admits to syringes in another pocket that were used for different drugs. See how it’s close, but no change purse? Find her ID in the jacket, or have evidence that she’s the one who wears it, and things probably tip the other way. In *Hudson*, you’ve got a lot of suspicion pointing to the driver of the car. He definitely knew the gun was in the trunk. Where the proof in *Hudson* failed was in the driver’s ability to exercise dominion and control over the gun. He wasn’t the guy who rented the car and he was on the recording as





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claiming that one of the rear-seat passengers owned the gun. His fingerprints weren't on it. Nothing specifically tied him to it, unlike the drugs in *Jackson*, which were found with Jackson's identification. See the difference? Put the driver's fingerprints on the gun and it's a different case.

The moral of this story is that in a constructive possession case you need to tie the suspect directly to the evidence. The Fourth District Court of Appeal actually said that in *Hudson*, and it was citing to *Williams v. State*, 110 So. 3d 59 (Fla. 2d DCA 2013), where our own district court said the same thing. Being in the same room with it isn't enough. Sometimes that is all you have and we get that. We know that this can be difficult to parse and frustrating for you when we refuse cases predicated on constructive possession. We share your concerns and your frustration. But we need as much information possible, to prove clearly that a person both knew your contraband was there and could do with it as he wanted, because the judiciary is uniformly hostile to this concept. As one of my colleagues recently remarked, without solid evidence of knowledge, dominion, and control, all you can do is seize the contraband for destruction, and send the suspects on their way.

This is a difficult time for you out there, and we understand that. We appreciate the hard work each of you does in protecting our community. We hope that this guidance helps you in discerning when we can prove constructive possession, and when we can't, which hopefully will inform you as you go about your daily business. Stay safe.

