Theories of Possession: Actual, Constructive, Presumptive, Recent and Exclusive and (Sometimes) Temporary and Innocent

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THEORIES OF POSSESSION: ACTUAL, CONSTRUCTIVE, PRESUMPTIVE, RECENT AND EXCLUSIVE AND (SOMETIMES) TEMPORARY AND INNOCENT.

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INTRODUCTION:

When it comes to prosecuting defendants for possessory offenses, the law provides the People with many different weapons to prove that the defendant knowingly and unlawfully possessed stolen property, drugs, firearms, and other contraband.

For starters, Penal Law section 10.00(8) states that "'possess' means to have PHYSICAL POSSESSION or otherwise to exercise DOMINION AND CONTROL over tangible property." In plain English, physical possession means to have and to hold (or carry) on one's person. Constructive possession signifies a level of control over the place where the property is found (e.g., a gun found in one's bedside table), or over the person (e.g., drug mule) from whom the property is seized, sufficient to give him/her the ability to use or dispose of the property (*see* People v Manini 79 NY2d 561[1992], decided in conjunction with People v Fuente).

In *Manini*, the Court of Appeals affirmed the Appellate Division (AD'S) determination that the trial court properly dismissed the indictment charging the defendant (as an accomplice and on the theory of constructive possession) with Criminal Possession of a Controlled Substance (CPCS) 2d and 3d degrees, based on legal insufficiency of the evidence presented to the Grand Jury under either theory.

In *Fuente*, the Court reversed the AD's affirmance of the lower court's dismissal of the indictment (charging CPCS 1st and 3rd degrees), finding that the evidence in that case was legally sufficient to support the defendant's constructive possession of a kilo of cocaine seized from a van that was occupied by his co-defendants.

PEOPLE v MANINI:

The defendant and others were the subject of a large-scale state Organized Crim Task Force (OCTF) investigation into drugs (cocaine) being transported from California (where the defendant was operating) to New York State in Onondaga and Cayuga counties. The defendant also reportedly sold a kilo of cocaine in Buffalo to a co-defendant (Paige) and then sold him another nine ounces on credit from California.

After getting off a flight from the west coast at the Rochester airport, Paige and a cohort were arrested while in possession of four ounces of cocaine. The defendant was indicted on two counts (CPCS 2d and 3d degrees) of a 38-count indictment based on the drugs found on Paige.

The trial court granted the defendant's motion to dismiss the indictment and the AD affirmed, holding that the evidence was legally insufficient to establish the defendant's liability for CPCS

for drugs actually possessed by Paige in New York State under PL Article 20.00 (Accomplice Liability) or on the theory of constructive possession.

(Note: PL 20.00 states that when one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the MENTAL CULPABILITY required for the commission thereof, he/she: SOLICITS, REQUESTS, COMMANDS, IMPORTUNES, OR INTENTIONALLY AIDS such person to engage in such conduct).

On appeal to the Court of Appeals, the People argued that high-level drug dealers like the defendant who use others (like Paige) to move their product to various locations should not be shielded from liability for possession of drugs (by others) when they, themselves, caused and directed such possession.

In the People's view, the defendant was responsible both as an accomplice to Paige (by enabling his possession and for selling him drugs on credit), and as a constructive possessor of the cocaine found on him because the defendant maintained a "continuing possessory interest" until he actually got paid for the drugs he provided to Paige.(citing US v Burroughs 830 F2d 1574 [11th circ. 1984]).

NO ACCOMPLICE LIABILITY:

The Court rejected the People's arguments on both fronts. As to the accomplice claim, the Court cited PL 20.10 which states that a person is NOT criminally liable for an offense committed by another when his/her own conduct, though causing or aiding in the commission of such offense, is of a kind that is NECESSARILY INCIDENTAL to the commission of the offense. If such conduct constitutes a RELATED BUT SEPARATE OFFENSE on the part of the actor, he/she is LIABLE FOR THAT OFFENSE ONLY and NOT for the conduct or offense committed by the other person.

In the Court's estimation, while a seller's conduct is necessarily incidental to the buyer's possession, the act of selling (a separate prosecutable crime in its own right), does not, perforce, impose accessorial liability on the former for the latter's own act of possession. As the Court observed, "section 20.10 should not be…construed to conclude that one who sells drugs to another thereby becomes an accomplice to the other's resulting possession" (citing, as a case in contrast, People v Feliciano 32 NY2d 140 [1973]).

In *Feliciano*, accomplice liability was held to properly apply where the defendant provided assistance (vehicular rescue) to a codefendant who was disembarking from a boat with cocaine only to realize that he was being pursued by border patrol agents.

NO CONSTRUCTIVE POSSESSION:

The Court also held that the evidence was insufficient to establish Manini's constructive possession of the drugs found on Paige across the country from him. Noting that New York State courts have never adopted so broad a view of possession as the federal courts, the Court stated that to sustain a claim of constructive possession, "the People must show that the defendant exercised DOMINION AND CONTROL over the property by a SUFFICIENT LEVEL of control over the AREA in which the contraband is found or over the PERSON from whom it is seized" (citing People v Pearson 75 NY2d 1001 [1990]): evidence insufficient where cocaine

was found in back room of grocery store with no indication that defendant owned, rented or had control of or a possessory interest in the store or room).

In the Court's view, there was no evidence that the defendant exercised any authority over Paige while he was in New York State with the cocaine. If anything, he relinquished control by selling it to Paige on credit and there was no evidence that he was involved in Paige's activities once he arrived in Rochester. Consequently, the order of dismissal was affirmed.

PEOPLE V FUENTE:

In this case, by contrast, the defendant's conduct vis-a-vis his co-defendants demonstrated a sufficient level of authority and control over their drug-possessing conduct to justify charging the defendant based on the cocaine found in their van.

Like Manini, Fuente was the target of an on-going, large-scale drug investigation. Based on intercepted phone calls among the defendant and his cohorts (Caraballo and his girlfriend Martinez), the police learned that the defendant was planning a trip to Florida to pick up a large amount of cocaine to resell locally.

On 11/15, Caraballo was observed arriving at the defendant's apartment in a blue van (registered to Martinez' mother). An hour later, Caraballo and another individual (believed to be the defendant), were observed leaving in the same vehicle, whereupon they drove to the apartment of Martinez' mother. A witness testified in the Grand Jury that Martinez advised that Fuente was going on a trip to obtain cocaine and would be back later in the week.

Four days later, police observed the blue van pull into the driveway of Martinez' mother's apartment. Less than a minute later, the defendant (Fuente) pulled up in his own vehicle. Ten minutes later, both vehicles (with Caraballo and Martinez in the van and the defendant driving his own vehicle) left and drove down the street until the van pulled into a nearby driveway. The police blocked it from behind and executed a search warrant which resulted in the seizure of a kilogram of cocaine (in four separate labeled packages). The police also observed a recent Florida newspaper and sales receipt in the van. The defendant was arrested separately a short distance away.

EVIDENCE OF CONSTRUCTIVE POSSESSED DEEMED LEGALLY SUFFICIENT:

Although the Court of Appeals agreed with the trial court and the AD that the evidence was legally insufficient to support the possession charges against Fuente on an ACCOMPLICE LIABILITY theory (citing PL 20.10), the Court did find the evidence to be sufficient on the theory of CONSTRUCTIVE POSSESSION and, accordingly, reversed the AD'S decision.

As the Court saw it, the evidence from the intercepted phone calls showed that the cocaine seized from the van had been obtained for resale to Fuente's local customers and was being transported (by Caraballo and Martinez) ON HIS BEHALF and AT HIS DIRECTION. And, unlike Manini, this defendant maintained a LEVEL OF CONTROL over the drugs sufficient to support the conclusion that he still possessed them.

Minutes before the drugs were seized, the defendant was observed following the van from close behind in his own vehicle, both vehicles stopped at the same time and waited for several minutes in the parking area of Martinez' mother's driveway before leaving together for another

destination. Taken together, all the evidence presented was enough to support the defendant's construction possession of the cocaine seized from the van occupied by his co-defendants.

RECENT AND EXCLUSIVE POSSESSION OF THE FRUITS OF CRIME: 🍇🍉💎

The Criminal Jury Instructions (CJI) state that if the People have proven beyond a reasonable doubt that the defendant was found to be in exclusive possession of property that was recently stolen (e.g., in a burglary), and there is NO INNOCENT EXPLANATION for such possession, the jury MAY (but need not) INFER that such possession was guilty in nature. The jury may then also decide (if the defendant is also charged with the underlying crime) whether such possession supports the conclusion that the defendant's possession was the result of his participation in the crime during which the property was taken.

Possession is considered EXCLUSIVE when it is exercised by one person alone or by two or more persons who JOINTLY POSSESS THE PROPERTY to the exclusion of all others. (People v Baskerville 60 NY2d 374 [1983]; see also People v Tirado 38 NY2d 955 [1976]): two or more people can jointly have property in their constructive possession when they each exercise dominion and control over the area where the property is found or over the person from whom it is seized sufficient to give each of them the ability to use or dispose of the property).

Some factors that may determine whether such possession is RECENT include the NATURE of the property, whether it was stolen for keeps or quick disposal and the TIME between the theft and discovery of the property (in the defendant's possession.

PEOPLE V GALBO 218 NY 283 (1916): 🦾🔨🔪💧🛢

The concept of recent and exclusive possession of the fruits of crime (as circumstantial evidence of a defendant's participation in an underlying crime), was discussed at length by the Court of Appeals (Cardozo, J.), (to the defendant's favor) in People v Galbo, 218 NY 283 (1916), a murder case out of Monroe County.

The defendant, a legless person who operated a banana-selling business with his able-bodied brother, was indicted along with the brother for the murder of a local ex-convict/blackmailer who had allegedly shaken them (and the co-defendant's father-in-law) down for money.

Three days later, before dawn, witnesses observed the defendant driving his horse cart on Webster Road with a canvas covered wine barrel in the back. About an hour later, the defendant was seen by others driving the cart back in the opposite direction on the same road without the barrel on board.

At about 8:00am, the victim's decapitated and dismembered body was found in the barrel in a ravine below Webster Road. His body (or what was left of it), revealed multiple bruises, indicative of a violent struggle before his death).

CIRCUMSTANTIAL EVIDENCE:

The barrel came from a wine company that had recently delivered five such barrels to the defendant's shop. (Police found four such barrels in the shop shortly after the homicide). Near

the barrel and a bloody canvas sack at the crime scene was rope made of the same material of rope used to hang bananas at the defendant's store. (Two hanging hooks were also missing from the store). Discolored wood pieces found in the barrel at the scene was determined by a chemist to match wood found in the defendant's barn. There were also white paint traces found on the defendant's horse cart which matched paint on the fence just above the ravine.

A police detective who placed himself in an adjacent cell to the defendant and his brother's cell (long before People v Samuels 49 NY2d 218 [1980] indelible right to counsel rule), overheard the defendant say, "they're looking for the driver of the wagon." The brother replied, "You drove the wagon," to which the defendant said, "I know I did."

At trial, however, the defendant denied driving the wagon on Webster Road, claiming instead that he had driven it the opposite direction toward Fairport NY. He also claimed that he had not left his barn before six a.m. (even though a prosecution witness testified that he and the horse were gone by then). The defendant also testified that he did not take the gray horse (that he said was ill) even though witnesses described a gray horse pulling the cart.

DEFENDANT FOUND GUILTY OF MURDER BUT COURT OF APPEALS REVERSES:

The defendant was convicted of Murder and was facing the death penalty. The Court noted that in appropriate cases, recent and exclusive possession of the fruits (or circumstantial evidence) of crime may, if unexplained or falsely explained, justify the INFERENCE that the possessor is guilty of the underlying crime (citing Knickerbocker v People 43 NY177 [1870].) In this case the facts (and common sense) the] were sufficient only to support the conclusion that the defendant disposed of the body after the fact of the homicide (citing People v Farmer 196 NY 65 [1909]).

The Court took note of the facts, including that the victim was apparently strong and athletic while the defendant was without legs. The likelihood that he would prevail in a vigorous, drawn out physical battle between them was highly unlikely. Although the victim was deemed to have been repeatedly beaten before he was killed, neither the defendant (nor his brother for that matter) showed any signs of physical injury. The victim was also known to have no shortage of enemies.

Noting that a guilty verdict upon circumstantial evidence must be INCONSISTENT WITH INNOCENCE (citing People v Harris 136 NY 423 [1893]), the court concluded that the People failed to prove that the defendant had any involvement in the homicide and, at most, notwithstanding his physical limitations, somehow managed to dispose of the victim's dismembered body. In this case, the recent and exclusive possession of the victim's remains was not enough, in the court's view, to send him to his death for murder.

PEOPLE V CINTRON 95 NY2d 329 (2000)

EVIDENCE SUFFICIENT WITHOUT JURY INSTRUCTION ON RECENT AND EXCLUSIVE POSSESSION OF STOLEN VEHICLE: 🚓🚓🚨

In this stolen car/police chase case, the Court of Appeals agreed with the AD's affirmance of the judgment convicting the defendant of conviction of Criminal Possession of Stolen Property

(CPSP) 3rd and 4th degrees, UUV and Reckless Endangerment 2d degree even though the trial court did not instruct the jury on recent exclusive possession. Not had the court instructed on the inference under PL 160.05 that a person who takes, operates, exercise control over, rides in or otherwise uses a vehicle knowing that he does not have the owner's consent is presumed to know that he lacks such consent).

Police in an unmarked car observed the defendant drive by in an Acura while honking the horn. They ran the plate and learned that the insurance on the vehicle had been suspended. The police pursued the defendant who drove through a red light and led them on a high-speed chase which put pedestrians in harm's way. The defendant hit a guard rail, bailed out and took off running. The officers gave chase and apprehended him. The later learned that the car had been stolen three days earlier.

The defendant testified that that a friend had let him drive the car and he explained that he drove at a high speed because he was being chased by a man with a gun. He said he did not hear the police siren or seen any flashing lights.

On appeal, the defendant argued, citing People v Edwards 104 AD2d 448 (2d Dep't 1984), that since the People did not request the above-referenced jury instructions, the circumstantial evidence of flight was insufficient, as a matter of law, to establish that he KNEW the vehicle was stolen and that he lacked the owner's consent to operate it.

Acknowledging the People's burden to prove that: a) the defendant knowingly possessed stolen property and b) the defendant knew that he lacked the owner's permission, there was enough evidence on this record (with or without the instructions) to enable the jury to reasonably conclude that all the essential elements of the crime had been proven beyond a reasonable doubt.

The Court noted that knowledge that property is stolen can be established circumstantially (e.g., by RECENT AND EXCLUSIVE possession), by the defendant's conduct, or by contradictory statements from which guilt may be inferred (citing People v Zorcik, 67 NY2d 670 [1986]).

Here, the defendant was caught dead-to-rights in exclusive possession of a car that had been stolen three days earlier. The Court noted that flight is generally considered to be of limited probative value with respect to consciousness of guilt (People v Bennett 79 NY2d 464 [1992].) However, in light of the defendant's dubious explanation for taking off, and claimed obliviousness to lights and sirens, that flight provided a basis from which guilty knowledge could fairly be inferred (citing People v Yazum, 13 NY2d 302 [1963]).

Taken together, the Court found that all of the facts supported the inference that the defendant knew that the vehicle was stolen and that he did not have the owner's consent to have it. The absence of specific jury instructions regarding recent and exclusive possession and of guilty knowledge arising from non-consensual use of a vehicle did not, in the Court's view, change the legal sufficiency analysis. And, to the extent that People v Edwards, *supra*, suggests otherwise, the Court cautioned that it should not be followed.

REBUTTABLE PRESUMPTION:

See also People v Simmons, 32 NY2d 250 (1973): the presumption under PL 1650.05(1) of knowledge of no consent is REBUTTABLE and NOT CONCLUSIVE. The failure to give that instruction to the jury constitutes reversible error (*see* Matter of Raquel M. 99 NY2d 92 [2003]).

(*But see* Matter of Katrina W. 277 AD2d 949 [4th Dep't 2000]): defendant's presence in a car that she did not own, which had been stolen two days earlier, together with evidence that she knew she did not have the owner's consent was sufficient to establish elements of UUV 3d degree).

PURPOSE OF PRESUMPTIONS:

Recognizing that it is not always easy for police to know (and prosecutors to prove) who is the guilty party in possessory offenses (whether involving stolen vehicles, stolen property drugs, guns, the law provides certain rebuttable presumptions (based on probabilities and common assumptions about human behavior) that a jury may draw under appropriate circumstances.

For example, CPL 165.55 states that:

1. a person who knowingly possesses stolen property is presumed to possess it with intent to benefit him/herself or someone other than the owner (or to impede recovery by the owner);

2. a collateral loan broker (or buyer, seller or dealer in property) who possesses stolen property is presumed to know it is stolen if he/she obtained it without making reasonable inquiry of the person from whom it was obtained to make sure that he/she had a legal right to possess it;

3. a person who possesses two or more stolen credit cards, debit cards or public benefit cards is presumed to know that they are stolen;

4. a person who possesses three or more airline tickets which were obtained from an issuer/ agent by forged or stolen credit cards is presumed to know that they are stolen;

As noted above, guilty knowledge can be proven by circumstantial evidence (People v Von Werne, 41 NY2d 584 [2011]), and inferences cannot be construed to require the accused to testify in order to rebut them, for to do so would constitute improper burden shifting (People v Moro, 23 NY2d 496 [1969]). Under the law, an inference continues unless and until some evidence is presented (whether through cross examination or affirmative proof), to explain the (innocent) nature of the possession.

GUNS: 

Penal Law 265.15 instructs that:

1. The presence in any ROOM, DWELLING, STRUCTURE OR VEHICLE of a MACHINE GUN is presumptive evidence of its unlawful possession by ALL PERSONS occupying the place where the machine gun is found;

2. The presence in any STOLEN VEHICLE of any weapon, instrument, appliance or substance specified in PL 265.01, 265.02, 265.03, 265.04 or 265.05 is presumptive evidence of its possession by ALL PERSONS occupying such vehicle at the time such item was found;

AUTOMOBILE PRESUMPTION: 🚙🚗

3. The presence in an AUTOMOBILE (other than a stolen one or public bus) of ANY FIREARM, large capacity ammunition-feeding device, defaced firearm, rifle or shotgun, defaced large capacity ammunition-feeding device, firearm silencer, explosive or incendiary bomb, bomb shell, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, dirk, stiletto, billy, blackjack, plastic or metal knuckles, chuka stick, sandbag, sandclub or slingshot is PRESUMPTIVE EVIDENCE of its possession BY ALL PERSONS occupying such automobile at the time such item, weapon, or appliance is found EXCEPT under the following circumstances:

a. if such weapon, instrument or appliance is FOUND UPON THE PERSON OF ONE OF THE OCCUPANTS THEREIN;

b. if such item is found in an automobile that is being OPERATED FOR HIRE by a DULY LICENSED DRIVER in the lawful and proper pursuit of his/her trade (🚖); then such presumption SHALL NOT APPLY TO THE DRIVER; or

c. if the weapon found is a pistol or revolver and one of the occupants, not present under duress, has in his/her possession A VALID LICENSE to have and carry concealed the same;

4. The possession by any person of any substance specified in PL 265.04 (e.g. 🧨💣)), is presumptive evidence of possession of such substance with intent to use the same unlawfully against the person or property of another if such person is not licensed or otherwise authorized to possess such substance. The possession by any person of any dagger, dirk, stiletto, dangerous knife or any other weapon, instrument or appliance or substance designed, made or adapted for use primarily as a weapon is presumptive evidence of intent to use it unlawfully against another.

5. The possession by any person of a defaced machine-gun, firearm, rifle, or shotgun is presumptive evidence that such person defaced the same.

6. The possession of five or more firearms by any person is presumptive evidence that such person possessed the firearms with the INTENT TO SELL same (🔫🔫🔫🔫🔫💰).

SOME CASES:

People v McCann, 30 NY3d 1121 (2018): reasonable cause existed to support factual allegations in misdemeanor complaint (charging CPW 4th degree) that defendant possessed a dangerous knife which triggered the statutory presumption of unlawful intent.

People v Galindo, 23 NY3d 719 (2014): statutory presumption properly applied even though there was no direct evidence of intent to use weapon and defendant claimed it was accidental.

People v Ware, 25 AD3d 1124 (4th Dep't 2006): evidence legally sufficient to support conviction for CPW 3d degree where police found gun in car after the defendant (driver) left the vehicle and left the passenger behind.

People v Carter, 60 AD3d 1103 (2d Dep't 2009): conviction for CPW3d degree affirmed where evidence established that gun was found in center console between driver and passenger seat. Jury was free to accept or reject the inference that the defendant possessed it.

People v Hunter, 82 AD2d 893 (2d Dep't 1981): evidence sufficient where defendant/passenger fled from car and gun was found in center console immediately afterward with no opportunity for anyone else (i.e., non-occupant) to place it there.

BUT SEE PEOPLE V ROBINSON, 17 NY3D 868 (2011): "POSSESSION IS 9/10'S OF THE LAW:"

In this "loaded gun found under the driver's seat" case, the Court of Appeals said it was REVERSIBLE ERROR for the trial court to deny the defendant the opportunity to explain on the stand what he meant when he told the arresting officer that "possession is nine-tenths of the law." If allowed, he would have said, "I wasn't armed with anything. I don't know what games you playing here. Then I asked him, who is going to be my lawyer because I know for a fact that nine-tenths of the law is possession."

The arresting officer testified that the defendant told him "it wasn't armed but that's okay, possession is nine-tenths of the law."

The officer had pulled the defendant over for turning without signaling. As he approached the vehicle, he saw the defendant get out and run toward a nearby store. He yelled at the defendant to come back, and after a scuffle between them, the officer said he was arresting him for obstructing and resisting. A search of the vehicle (which was registered to someone else), revealed a gun under the driver's seat.

The trial court instructed the jury on the automobile presumption, the defendant was convicted and his conviction was affirmed by the AD (69 AD3d 973). The appellate court held that while it was error to decline the defendant's attempt to explain his own statement to the officer, such error was harmless because of the overwhelming evidence of guilt.

COURT OF APPEALS REVERSES:

The Court of Appeals disagreed and reversed, finding that the proof was far from overwhelming inasmuch as: it was not the defendant's vehicle, he had it only long enough to drive a friend to the train station and other family members had access to it. (There was also no mention of any inculpatory DNA evidence).

In the Court's view, not allowing the defendant to explain his version of what he told the officer left the jury with only the officer's version through which to analyze the presumption of possession charge given by the trial court. And, inasmuch as the defendant's explanation may have created doubt sufficient to rebut the presumption, it cannot be said that the error was harmless.

It is not entirely clear why the trial judge would not allow a defendant, who was subject to cross examination, to explain his statement which was somewhat different from that of arresting officer. Underscoring the objectives of the Rules of Evidence, the Court observed that "the PRIMARY PURPOSE OF ALL RULES OF EVIDENCE IS TO ENSURE THAT THE JURY WILL

HEAR ALL PERTINENT, RELIABLE AND PROBATIVE EVIDENCE WHICH BEARS ON DISPUTED ISSUES" (citing People v Miller 39 NY2d 543 [1976]).

Clearly, the defendant's own testimony was relevant to the central issue in the case, and not allowing him to explain his own statements unfairly deprived him of the opportunity to refute the officer's version and rebut the presumption of possession.

HISTORICAL REFERENCE:

Parenthetically, the often-used but less-often understood phrase "possession is nine-tenths of the law" reportedly traces its origin to Scotland in the form of "possession is eleven points in the law and they say there are but twelve." See 4/20/20 article, "Is Possession Really Nine-Tenths of the Law?" by Mark W. Vyvyan of Fredrikson and Byron P.A., https://www.fredlaw.com/news__media/is-possession-really-nine-tenths-of-the-law/ .

According to the article, this principle which, loosely translated, means that ownership is generally easier to establish when one is in possession rather than not, was relied upon by a justice of the peace (Preacher Anderson Hatfield) to resolve a dispute between members of the McCoy and Hatfield families over some hogs that had allegedly wandered from McCoy property onto Hatfield land. The judge ruled in favor of the party in possession (no doubt setting off the ire if not the "shoot'n irons" of the McCoys).

TEMPORARY AND INNOCENT POSSESSION:

Under certain circumstances (e.g., happenstance discovery, disarming an assailant, preventing imminent serious injury or death), the otherwise unlawful possession of a weapon may be excused under the law.

The CJI states that "a person has innocent possession of a weapon when he comes into possession in an excusable manner and maintains possession (or intends to do so) only long enough to dispose of it safely.

Temporary Innocent Possession (TIP) is a DEFENSE which the People must DISPROVE beyond a reasonable double (in addition to having to prove all the elements of unlawful possession). (People v Holes 118 AD3d 1466 [4th Dep't 2014]).

To warrant a jury instruction on TIP, there must be proof demonstrating a legal excuse for possession as well as facts tending to establish that, once possession has been obtained, the weapon was NOT USED IN A DANGEROUS (or reckless) MANNER. Also, the individual should maintain (or intend to maintain) possession only long enough to DISPOSE OF IT SAFELY (*see* People v Williams, 36 NY3d 156 [2020]).

The innocent nature of the possession removes the "'criminal" or "'unlawful" element, and the purpose of the defense is to encourage those who come into such possession to perform their civic duty by turning the weapon in to police as soon as possible (or, at the very least, promptly disposing of the weapon in such a manner as to remove the possibility that someone else could get a hold of it and/or use it to the detriment of others. [36 NY3d at 160]).

SOME CASES:

People v Snyder 73 NY2d 900 (1989): defendant wrested a loaded pistol from another person during a fight but made no attempt to safely dispose of it thereafter, even though there was a State Police barracks right around the corner. Court agreed with the AD (138 AD2d 115) that the right of possession following an act of disarming another terminates when the weapon is secured and defendant has the opportunity to turn it in to authorities.

People v Banks 76 NY2d 799 (1990): while disarming a third party during a fight could be excused, the defendant was not justified in concealing the weapon and taking it by subway across town, supposedly to toss it in a sewer.

People v Pereira 220 AD2d 696 (2d Dep't 1995): after disarming assailant of a loaded pistol, defendant wandered the streets in a drunken state, waving the gun around in a threatening manner. Such conduct, in the court's view, was "utterly at odds" with temporary and innocent possession.

People v Peterson 233 AD2d 533 (2d Dep't 1996): AD said that TIP should have been instructed where defendant testified that he was confronted by the victim who had a gun, and believing he was about to be robbed, he grabbed the gun and fired three times in self defense. He said he walked away in a state of shock and was arrested minutes later after a brief chase.

But see People v Griggs 108 AD3d 1062 (4th Dep't 2013): in this Erie County case, the defendant argued on appeal that the DA improperly failed to charge the Grand Jury on TIP and also improperly cross examined him about prior acts of misconduct.

The Fourth Department held that even if the jury accepted the defendant's seemingly implausible story about wresting a gun from an alleged robber, a TIP charge was unwarranted inasmuch as the defendant MADE NO EFFORT TO TURN THE GUN OVER to police after obtaining possession of it. Instead, he hid the gun under a fence in a vacant lot and said nothing when the police searched that area for the gun. such conduct, in the court's estimation, was entirely inconsistent with TIP.

The court also found no error in the cross examination of the defendant with prior bad acts relevant to his credibility, and it was not error to permit his girlfriend to testify about seeing the defendant with the gun the night before his arrest (since it was relevant to the TIP issue). The court, did however, find error, albeit harmless, in the prosecutor eliciting testimony (from the girlfriend) about prior drug sales and domestic violence as they were irrelevant and more prejudicial than probative of any material issue in the case.

See also People v Craig 117 AD3d 1485 (4th ept 2014): No TIP where the defendant found the gun in the park and took it with him and left it in a bag of clothing in his father's car (where police found it in a bag of clothing) after a V&T stop. The defendant's claim that he was going to turn the gun in to his church as part of a buy-back program was not consistent, in the court's view, with TIP.

PEOPLE V WILLIAMS 36 NY3D 156 (2020):

In this attempted murder, assault and weapon's possession case, the Court of Appeals affirmed the AD's decision affirming the judgment of conviction, holding that there was no reasonable view of the evidence warranting a TIP charge even though the defendant was found by the jury

to have been legally justified (under PL Article 35) in shooting his rival (with whom he had a violent history) in the lobby of a building.

FRIEND OR FOE?

The defendant testified that when he left the building (where he was visiting a friend named "Foe"), he observed his rival (Carson) who was standing outside (with another person in a blue coat), pull a gun from his pocket. The defendant returned to Foe's upper-level apartment and asked him to call the police but Foe refused. Instead, he produced his own gun and said, "I'll walk you out to your car." As they descended the stairs toward the lobby, Foe said that he saw the guy in the blue jacket in the lobby. Foe then gave his gun to the defendant and said, "walk behind me."

Once in the lobby, the defendant now saw Carson in the hallway with his hand in his pocket. It was at this point that the defendant "'blacked out" and started firing multiple times across the lobby, hitting Carson three times along with an innocent bystander.

NOT GUILTY OF MURDER BUT GUILTY OF WEAPON POSSESSION:

At trial, the defendant sought jury instructions on justification (which was granted) and on TIP which was denied. He was acquitted on Attempted Murder and Assault charges but convicted of CPW 2d degree.

AD AFFIRMS:

The AD (72 AD3d 627) affirmed holding that whether or not the defendant came into possession of the gun in an excusable manner, he used it dangerously by firing it indiscriminately in a small lobby, striking an innocent person. Consequently. There was no reasonable view of the evidence that supported that instruction.

COURT OF APPEALS AGREES:

The Court of Appeals affirmed, first noting some of the ways that unlawful possession of a weapon can be excused as temporary and innocent (e.g., finding it and intending to turn it over to police or disarming an assailant in the course of a fight and no indication of any intent to maintain unlawful possession (citing, *inter alia*, People v Almodovar 62 NY2d 126 [1984]).

The Court (citing Almodovar, *supra*) stated that JUSTIFICATION, which applies to unlawful USE OF FORCE, does NOT also apply to POSSESSION OF A WEAPON which is illegal in its own right. As the court observed, "the essence of criminal possession is the act of possessing a weapon unlawfully. So, once (that) is established, the possessory crime is complete and any UNLAWFUL USE of the weapon is punishable as a separate crime." (62 NY2d at 130).

According to the Court in *Williams*, the defendant's possession of the gun did not result temporarily and incidentally from the performance of some lawful act such as disarming a wrongful possessor or unexpected discovery. Instead, his claim was essentially that he was entitled to possess the gun for his protection even though Carson was nowhere to be seen when he took the loaded weapon from Foe.

The Court noted that there was no evidence that Carson had chased the defendant back into the building or had any idea where he might be inside. Critically, in the Court's view, there was

no indication that the defendant was in IMMINENT DANGER when he took the gun from Foe. Rather, he waltzed into the lobby with gun in hand in anticipation of a potential confrontation. As the court noted, however, “the law is clear that a defendant may not avoid a (CPW) charge by claiming he (had) the weapon for protection” (citing People v Almodovar, *supra*, at 130).

Accordingly, since the act of possession was complete when the defendant took the gun (and before there was any imminent threat of danger), there was no basis for an instruction on TIP.

The concurring justice (Rivera, J.), agreed with the majority insofar as its ultimate ruling was concerned, but concluded that the majority’s reasons for rejecting the TIP defense, could also have been used as a basis to reject the defendant’s claim of self-defense for the shooting.

Noting prior case law (e.g., People v Pons 68 NY2d 264 [1986]), which points out that justification can provide a defense to the use of deadly physical force (e.g., shooting at someone with a loaded weapon), but not the act of possession, its application in a given case (such as Williams), should not necessarily preclude a TIP defense to the possession charge.

(In Almodovar, according to this justice, the defendant sought a TIP instruction based on a claim of self-defense but in Williams, the majority determined that the defendant’s possession of the weapon was too soon to avail him of that instruction based on the claim that he needed it to defend himself against the imminent use of deadly physical force).

Nevertheless, the concurring justice agreed that since there was “not quite enough imminence” to the threat, denial of the TIP instruction was not reversible error, because under the law, a person cannot arm him/herself in anticipation of a future confrontation. (One wonders if the outcome would have been different if an innocent bystander had not been shot).

DRUGS:

PRESUMPTIONS: (AUTOMOBILE)🚐🚗

PL 220.25 states that:

1. the presence of a controlled substance in an AUTOMOBILE, other than a public omnibus, is presumptive evidence of KNOWING POSSESSION thereof by EACH AND EVERY PERSON in the automobile at the time such controlled substances is found; EXCEPT that such presumption does NOT APPLY to:

a. a duly licensed operator of an automobile who is then operating it for hire in the lawful performance of his/her trade; or
b. to any person in the automobile if one of them having obtained the controlled substance, not being under duress, is authorized to possess it and such controlled substance is in the same container as when he [or she] received possession thereof; or
c. when the controlled substance is concealed upon the person of one of the occupants.

A COUPLE OF CASES:

People v Cheatham, 54 AD3d 297 (1st Dep't 2008): defendants' mere presence in vehicle provided a basis for charging them with possession under automobile presumption.

People v Kinchern, 278 AD2d 874 (4th Dep't 2000): presumption of possession properly applied to defendant who was front seat passenger in a car driven by co-defendant and 178 baggies of cocaine were found in a grocery bag located at defendant's feet.

DRUG FACTORY 🏭💊💉💨💷

PL 220.25 continues:

2. the presence of a narcotic drug, narcotic preparation, or phencyclidine in OPEN VIEW in a ROOM, other than a public place, under circumstances evincing an INTENT TO UNLAWFULLY MIX, COMPOUND, PACKAGE OR OTHERWISE PREPARE FOR SALE SUCH CONTROLLED SUBSTANCES IS PRESUMPTIVE EVIDENCE OF KNOWING POSSESSION THEREOF BY EACH AND EVERY PERSON IN CLOSE PROXIMITY TO SUCH CONTROLLED SUBSTANCE AT THE TIME IT WAS FOUND, except, that such presumption does NOT apply to any such persons if:

a. if one of them, having such controlled substance and not being under duress, is AUTHORIZED to possess it and such controlled substance is in the same container as when he [or she] received possession thereof, or
b. one of them has such controlled substance UPON HIS[/HER] PERSON.

SOME CASES:

People v Bundy, 90 NY2d 918 (1997): defendant's presence in apartment containing large amounts of drugs, money and weapons in plain view supported presumption of possession.

But *see* People v Edwards 23 AD3d 1140 (4th Dep't 2005): trial court's error in charging presumption of possession was NOT HARMLESS where the drugs were NOT IN PLAIN VIEW in a room in which the defendant was neither in or in close proximity. (Baggie of cocaine was found on the first step of a stairway leading to defendant's apartment and the defendant and three children were in rear of the dwelling.

But *see* People v Jimenez 292 AD2d 196 (1st Dep't 2002): evidence was deemed sufficient to support claim of possession where crack cocaine was being packaged for sale in open view in bedroom and the defendant was observed walking in hallway leading to the bedroom placing him in CLOSE PROXIMITY thereto and justifying the drug factory presumption. Therefore, the jury was permitted to draw the inference that the defendant KNOWINGLY POSSESSED THE DRUGS (citing, *inter alia*, People v Daniels 37 NY2d 624 [1975]).

In People v Hogan, 26 NY3d 779 (2016): the Court held that the drug factory presumption was properly charged where the police, upon executing a search warrant at apartment of the defendant's ex-girlfriend, observed him running into the bathroom from the kitchen where packaged and loose cocaine, baggies and a razor blade were found in open view a few feet from the counter. (One of the officers testified that he first saw the defendant standing within a couple feet of the cocaine on the counter).

The defendant's ex-girlfriend (who pled guilty to Attempted CSCS 3rd degree) testified that she had purchased the cocaine and was in the process of "moving it" when the police arrived and startled her, (causing some of the cocaine to fall onto the carpet). She admitted that it was all in plain view and said that she was "probably going to sell it."

For his part, the defendant was convicted of CPCS 3rd and 5th degrees and sentenced to an aggregate 9- year determinate term of imprisonment plus 3 years of post-release supervision (PRS).

The AD (118 AD3d 1263 [4th Dep't 2014]), affirmed the convictions, rejecting the defendant's argument that there was insufficient evidence of intent to package drugs for sale, and therefore no basis to charge the presumption.

The Court of Appeals, citing, *inter alia*, People v Kims 24 NY3d 422 (2014), followed suit, finding the evidence legally sufficient to support the inference that the defendant possessed the drugs based on his proximity to drugs and packing material found in plain view under circumstances indicative of a drug sale operation.

The Court noted that the goal of PL 220.25(2) is enable police to identify potentially culpable individuals involved in a drug business under circumstances that demonstrate (their) participation in the (operation). (24 NY3d at 432-433). It recognizes the difficulty of proving KNOWING POSSESSION of the drugs on the part of those management-level dealers who supervise the activity but delegate the dirty work (e.g., preparing and packaging) to others who may be caught in the act when police enter the premises.

The Court also noted that a "dealership quantity" of drugs may not be necessary to support the drug factory presumption (William C. Donnino Practice Commentary to PL 220.25, McKinney's Consolidated Laws of NY Book 39), and a specific intent to unlawfully mix, package, etc., need not be shown. All that is required is that the circumstances reflect such an intent. (People v Nelson 147 AD2d 774 [3d Dep't 1989]).

But see People v Martinez 83 NY2d 426 (1993) where evidence of a tinfoil packet of cocaine found in a small space behind the couch (shortly after an undercover officer had made a controlled buy), was insufficient to support the drug factory presumption.

In Hogan, by contrast, the Court determined that the defendant's evasive conduct in the midst of the drugs, materials and activity described by the ex-girlfriend were enough to justify the presumption. In particular, the Court noted, "the evidence of packaged and loose drugs, paraphernalia and a razor blade in plain view was sufficient to establish that drugs were being packaged or otherwise prepared for sale in the apartment, permitting the conclusion that the defendant, who was in close proximity to the drugs, knowingly possessed them (citing People v Elhadi, 304 AD2d 982 [3d Dep't 2002]).

The dissenting justice faulted the majority for taking too expansive a view of the drug factory presumption and applying it to a scenario lacking in the usual, tell-tale indicators of a drug operation (e.g., mixing agents, scales, weapons, money), and activity implicating the ex-girlfriend who appeared to be doing her own thing inside her own apartment.

The dissenter was also underwhelmed by what was found including six dime bags of crack cocaine, 50 unused Ziplock bags, a razor blade and loose cocaine (that the ex-girlfriend dropped on the carpet when the police stormed in.) The ex's ambivalence with respect to her

intentions also suggested to the dissenter that the drugs were just as likely for personal consumption as for distribution.

HOW CLOSE IS CLOSE ENOUGH?

In People v Kims, *supra*, the Court of Appeals agreed with the AD's determination that the trial court erred in charging the jury with knowing possession based on the drug factory presumption where the defendant was apprehended by parole officers in his vehicle in his driveway (along with his cousin who had some cocaine on his person) after exiting his (defendant's) apartment.

When the defendant repeatedly yelled out to a forming neighborhood crowd, "Call Chino", the police (who had been separately surveilling the defendant based on an informant's tip), conducted a "protective sweep" search of the apartment where they discovered another individual asleep on the living room couch. They proceeded to the kitchen (in the rear of the dwelling) where they found several ounces of cocaine in a bowl on the counter. They also observed scales, a heat sealer, a blender covered in cocaine residue, glassine bags and Inositol powder (for drug production).

The police then obtained and executed a search warrant which led to the discovery of three and a half pounds of marijuana in the closet of a bedroom that contained various documents (lease, fuel bill) with the defendant's name on them, and $2,100 cash on the nightstand.

At trial (following denial of the defendant's motion to suppress) witnesses (including the defendant's cousin and the upstairs tenant) testified to drug sales by the defendant out of that apartment and the defendant's offer (to the landlord to buy the place with a 50% down payment). Evidence was also presented with respect to the defendant's membership in the Crips gang.

DEFENDANT FOUND GUILTY:

The trial court instructed the jury on both the drug factory presumption and on the concept of constructive possession. The defendant was found guilty of CPCS 1st and 3rd degrees, CP Marijuana 2d degree and was sentenced concurrently to an aggregate 16 years in prison followed by five years PRS.

AD REVERSES:

The AD (96 AD3d 1595), in a 4-1 decision, reversed the defendant's convictions, holding that it was error on these facts on the drug factory presumption and there was no way to tell whether the jury convicted the defendant on that basis or on the theory of constructive possession (which was deemed to have been properly charged).

COURT OF APPEALS AFFIRMS:

The Court of Appeals affirmed, holding that in light of the language and purpose of PL 220.25(2), the defendant was physically NOT in sufficiently close proximity to the drugs and paraphernalia inside the apartment (e.g., in the room where the drugs were found or next to it) to be chargeable under the presumption (citing, *inter alia*, People v Coleman 26 AD3d 773 [4th Dep't 2006]).

In the Court's view, while each case requires a fact-specific analysis, once the defendant has left the premises, the justification for presuming KNOWING POSSESSION becomes "less tenable," and statutory presumptions are without validity unless the probabilities based on (common) experience and proof justify them (citing People v Reisman, 29 NY2d 278 [1971]).

While the court declined to fix a particular distance from the premises (where drugs are found) at which point the presumption will no longer apply, the Court was satisfied that the defendant, who was inside his car in the driveway, was not sufficiently close enough to the drugs found in his kitchen (in the rear of the apartment) to fall within the reach of PL 220.25(2).

The court also took note of the fact that the defendant walked out of the apartment (rather than fled) but, of course at that point, he had no reason to know that his parole officer (who was checking on his new residence) and police detectives were poised to descend upon him. (How he could not be considered to have been close enough to the drugs in his own apartment by the fortuitous act of walking out the front door is an interesting question.)

Final Thought:

While the inapplicability of the presumption of possession in People v Kims may be a little harder to comprehend than the idea of not inferring guilt for a homicide from the act of disposing of the body, (as in People v Galbo, *supra*), it is important to be aware of all the situations in which the People may seek to avail themselves of a presumption of possession.

In appropriate cases, counsel should, sooner than later, seek to have the People articulate their theory of possession (and what, if any presumption they intend to rely on), so that an any standing issues can be resolved, a sound defense can be asserted, and any opposing evidence (to rebut the presumption) can be assembled.