

IN THE COURT OF APPEALS OF IOWA

No. 9-343 / 88-1497

FILED

NOV 27 1989

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

TAWNIECE KIM RUDD,

Appellant.

480

Appeal from the Iowa District Court for Scott County,
Douglas M. McDonald, District Associate Judge.

Rudd appeals from a district court judgment entered following a jury verdict finding her guilty of two counts of simple possession of controlled substances, heroin and cocaine, in violation of Iowa Code section 204.401(3).
REVERSED AND REMANDED.

John O. Moeller, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Mary Howes Davis, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Sackett and Habhab,
JJ.

PER CURIAM

Defendant, Tawniece Rudd, appeals her conviction of two counts of possession of controlled substances, heroin and cocaine. We reverse.

On March 19, 1988, the police executed a search warrant at a residence believed to be involved in drug trafficking. The police had to force their way into the residence and soon discovered Rudd and a male in the upstairs bedroom. Rudd was sitting on the bed while the male was standing near her. The police discovered cocaine and heroin in the bedroom, along with other drug paraphernalia, in close proximity to Rudd. Rudd was eventually charged with two counts of possession of a controlled substance.

The key issue at trial was whether Rudd was in "possession" of the items. There was no evidence as to whether Rudd rented or lived in the residence. After the State's case, Rudd moved for a directed verdict. The district court denied this motion. Rudd presented no evidence in her defense and the case was presented to the jury.

Our review is on assigned errors. Iowa R. App. P. 4. Defendant contends the jury instruction¹ given by the trial court for possession of a controlled substance was legally erroneous because it permitted the jury to find she had possession of the controlled substance merely by having control over the location where the controlled substance is found.

The Iowa Supreme Court has noted:

constructive possession exists when the accused has control or the right to control the substance. It "may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject

1. Instruction No. 12 provided:

You are instructed that possession of a controlled substance is established by the following:

- a. That the defendant had knowledge of its presence, and
- b. That the defendant had actual possession or exercised dominion or control over the controlled substance.

These facts may be established by either direct or circumstantial evidence or both. Possession may be either actual or constructive.

Actual possession occurs when the substance is found on the person of the defendant or in a place over which she has exclusive use and control.

Constructive possession occurs when the defendant maintains control or a right to control the place where the controlled substance is found, and may be inferred when the substance is found in a place which is accessible to the defendant and subjected to her dominion and control, or to the joint dominion and control of the defendant and other persons.

to his dominion and control, or to the joint dominion and control of the accused and another."

State v. Pierce, 240 N.W.2d 678, 679 (Iowa 1976) (quoting State v. Reeves, 209 N.W.2d 18, 22 (Iowa 1973)).

The tests regarding possession of unlawful drugs on "premises" are set forth in State v. Reeves, 209 N.W.2d at 23, where the supreme court stated:

If the premises on which such substances are found are in the exclusive possession of the accused, knowledge of their presence on such premises coupled with his ability to maintain control over such substances may be inferred. Although no further proof of knowledge by the State is required in cases of exclusive possession by the accused the inference of knowledge is rebuttable and not conclusive. But where the accused has not been in exclusive possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof.

We find instruction twelve's definition of constructive possession erroneous. First, it informed the jury that it could find Rudd to be in constructive possession of the illegal substances merely by maintaining control or a right to control the place where the controlled substances were found. This is erroneous. Under the constructive possession definition in Reeves, "constructive possession exists when the accused has control or the right to control the substance" (not the place as instruction 12 provides). Id. at 22. In addition, instruction 12 states that constructive possession "may be inferred when the substance is found in a place which is accessible to the defendant

and subjected to his dominion and control, or to the joint dominion and control of the defendant and other person." This inference applies only to situations where the accused has been in exclusive possession of the premises. Reeves, 209 N.W.2d at 23. We concur with the trial court that there was sufficient evidence to allow this case to be submitted to the jury. However, the prejudicial effect of that part of instruction 12 to which we have referred requires us to reverse and remand for a new trial.

REVERSED AND REMANDED.