



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



STATE OF ARIZONA V. GARY EDWARD COX
CR-07-0127-PR; 2 CA-CR-2005-0272

PARTIES AND COUNSEL:

Petitioner: Gary Edward Cox, represented by Stephan J. McCaffery, Pima County Legal Defender.

Respondent: The State of Arizona, represented by Kathryn A. Damstra, Assistant Attorney General.

FACTS:

On July 31, 2004, Petitioner Gary Edward Cox drove his girlfriend, Shari Perko, to visit a mutual friend, Barbara Pruett. They drove in a Mustang owned by and registered to Cox; Perko shared payments on the car and had her own set of keys. Perko helped Pruett to pack for an upcoming move. The two women sorted through Pruett's belongings and chose various items which Pruett gave as gifts to Perko. Cox did not participate in the sorting. He allegedly became bored and left to play pool with Herbert Thacker, a friend who showed up unexpectedly.

While Cox was away, Pruett and Perko allegedly discussed returning a shotgun Pruett had borrowed from Perko. Pruett placed it in the trunk of Cox's and Perko's car while the two women were loading various power tools, electronics equipment, and other items Pruett had given to Perko. Pruett also placed in the trunk two loaded pistols which she had borrowed from Perko. Perko and Pruett later testified that Pruett closed the trunk and that Perko did not know the pistols were in the trunk.

Cox allegedly returned at some point after the car had been loaded, and around 4:00 a.m. the morning of August 1, 2004, Cox and Perko drove towards the residence he and Perko shared. Officer Bonds stopped Cox's vehicle for an expired registration. Prompted by his observation of an empty brass shell casing in the center console, Bonds asked if there were any weapons in the car. Cox said no; Perko said nothing. Bonds left to run a records check from his patrol car. Perko later testified that while Bonds was away she told Cox about the shotgun in the trunk.

Officer Lyle arrived to assist Bonds. Bonds spoke with Cox; Lyle spoke with Perko. Perko reluctantly told Lyle about the shotgun. Lyle relayed the information to Bonds outside of Cox's hearing. Bonds then asked Cox if there was a shotgun in the trunk, and Cox admitted that there was. Cox said that they had picked up the gun from Pruett's house and were taking it home, after which Perko planned to get rid of it. Cox opened the trunk and the officers found the shotgun and the two loaded pistols. Cox admitted to officers that he and Perko were transporting all three guns to their shared residence.

Because Cox was a convicted felon, the State charged him with three counts of possession of a deadly weapon by a prohibited possessor. The State argued that Cox could have stopped the car and gotten the guns out of the trunk at any time and that this constituted constructive possession.

Cox argued that he did not know about the guns until Perko told him about the shotgun after the police stop, and that he did not exercise dominion and control or “power and authority” over them. Perko, Pruett, and Thacker testified. Perko produced documents proving that she purchased all three guns. She testified that she did not know that Pruett had placed the two pistols in the trunk, and that Cox did not know about any of the guns until Bonds pulled them over. Perko testified that she had told this to the officers at the time; Officer Lyle testified that she had not told them. The State urged the jury not to believe these witnesses’ testimony because Perko’s testimony conflicted with the officer’s testimony, because Thacker’s recollection of the time events occurred differed from Pruett’s and Perko’s, and because all three witnesses were motivated to lie because of their relationships with Cox.

The trial court denied Cox’s motion for judgment of acquittal because it found that there was substantial evidence to warrant a conviction. The court also rejected Cox’s proposed jury instruction based upon *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986) (quoting jury instructions from *State v. Runnels*, 203 Kan. 513, 456 P.2d 16 (1969)). The trial court distinguished *Tyler* because it involved alleged “momentary innocent handling.” It also determined that the *Tyler* court went too far by “impos[ing] a higher standard than the statute,” and that Cox’s defense, that he did not exercise dominion or control, was covered by other instructions.

The trial court gave the following instructions regarding possession:

“Possess” means to knowingly exercise dominion or control over property.

The Law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing is in actual possession of it. A person who, although not in actual possession, knowingly exercises the right of control over a thing, either directly or through another person, is then in constructive possession of it.

The law also recognizes that one person may have possession alone, or that two or more persons jointly may share actual or constructive possession.

There is a distinction between “possession” and “ownership”; a person may possess something without being the owner of it.

The mere presence of a person at a place where weapons are found is insufficient to establish that the person knowingly possessed or exercised control over the weapons.

The jury convicted Cox on all three counts of prohibited possession. The trial court found that Cox had six prior felony convictions. The court imposed three concurrent, substantially mitigated six-year terms. Cox filed a timely notice of appeal.

ISSUES PRESENTED FOR REVIEW:

1. The court of appeals' holding on Cox's insufficiency of evidence claim contradicts the holding in *State v. Miramon*, 27 Ariz. App. 451, 745 P.2d 991 (1987), that a persons' presence in a car with others together with his knowledge that drugs are under his seat are insufficient to establish constructive possession. Thus, this Court should accept review to clarify the law on constructive possession.

2. The court of appeals held that language in *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986), supporting Cox's jury instructions request was *dicta*. The court's statement is unsupported, and by its holding it has overruled another appellate court decision, which it has no authority to do. Thus, this Court should accept review to decide whether *Tyler* or *Cox* correctly states the law on possession.

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