NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA,
Appellant,

v.

Appeal No. CRC 10-00048 APANO
UCN ~~522010MM000660XXXXNO~~
522010AP000048XXXXCR

JOVONI CURTAE WOOTEN,
Appellee.
_____/

Opinion filed _____.

Appeal from an Order Granting
Judgment of Acquittal entered
by the Pinellas County Court,
County Judge John D. Carballo

Elizabeth Hempling Zuroweste, Esquire
Office of the State Attorney
Attorney for Appellant

Joann K. Grages, Esquire
Office of the Public Defender
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on the State of Florida's appeal from an Order Granting a Judgment of Acquittal after a jury verdict of guilty. After review of the record and the briefs, this Court reverses the Order Granting Judgment of Acquittal.

Factual Background and Trial Court Proceedings

On January 10, 2010 at approximately 12:35 a.m., Officer Michael Carter of the St. Petersburg Police Department stopped a vehicle for running a stop sign; Appellee, Jovoni Curtae Wooten, was the front seat passenger of the vehicle. When Officer Carter approached the vehicle, he smelled the odor of marijuana mixed with some type of cologne or spray. Based upon his experience the officer testified that the odor of marijuana does not "stick around for a long time." Where the odor of marijuana is strong, as it was in this case, the marijuana was smoked within thirty (30) minutes to one (1) hour prior to the stop. The strong smell of recently sprayed cologne being present along with freshly burnt marijuana further confirmed Officer Carter's belief marijuana was recently smoked within the vehicle. Based upon this evidence, Officer Michael Carter searched the vehicle. He found a bottle of cologne in the center console, a clear plastic bag containing marijuana atop miscellaneous papers in the door pocket of the front passenger side of the car, where Mr. Wooten had been seated and found a marijuana cigarette by the front of the passenger seat near where the Appellee's foot would have been when the car was stopped. Officer Carter performed a presumptive test at the scene and determined that both the baggie and the cigarette found in the vehicle contained marijuana. A forensic chemist testified at trial that both the baggie and the cigarette contained marijuana. The Appellee was arrested for possession of marijuana and post-*Miranda* admitted that he saw the driver throw the marijuana cigarette that was found on the passenger floor board. Although the Appellee denied any of the marijuana was his, he admitted smoking marijuana prior to the vehicle stop.

At the close of the State's case, counsel for Mr. Wooten moved for a judgment of acquittal, arguing that the State failed to prove a prima facie case of possession. The trial court denied the motion for judgment of acquittal and initially explained that "the defendant admitted being in possession of marijuana within an hour, smoking." After further argument the court corrected its initial comment and stated the testimony was "[h]e said he saw the driver throw it on the floor; he smoked marijuana prior to getting stopped."

Mr. Wooten testified in his case to several points; (1) that the car had a strong odor of marijuana, but that it smelled that way when he entered the vehicle, (2) that the odor of marijuana was masked by cologne because the driver immediately sprayed cologne when they were pulled over by the police, (3) that despite the strong odor of marijuana in the car, he did not know there was marijuana in the car, (4) that he did not tell the police that he saw the driver throw the marijuana on the floor of the car, and (5) that he had smoked marijuana earlier in the day.

At the end of the trial, the jury returned a guilty verdict. The Appellee subsequently moved for a new trial. After a post-trial hearing, the trial court granted a judgment of acquittal at the close of the Appellant's case, despite the jury having returned a verdict of guilty. The court explained that its' ruling rested on the Appellee's statement and reasoned that, although the Appellee admitted seeing the driver throw the marijuana cigarette, the fact that he later denied saying that puts his statement in dispute and "they could not exclude that somebody else who was standing there didn't throw the marijuana cigarette on the floor when they saw the police coming." This appeal was timely filed.

Issue

The issue presented in this appeal is whether the trial court erred in granting a judgment of acquittal after the jury returned a verdict of guilty. Was there sufficient evidence to support a conviction of possession of marijuana at the close of the prosecution's case?

Standard of Review

In reviewing a motion for judgment of acquittal, a de novo standard of review applies. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002), *cert. denied,* 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137 (2003); *State v. Fagan,* 857 So2d 320 (Fla. 2nd DCA 2003).

Judgments of Acquittal

The rule is well established that the prosecution, in order to present a prima facie case, is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the prosecution fails to meet this burden, the case should not be submitted to the jury, and a judgment of acquittal should be granted. *Baugh v. State,* 961 So.2d 198, 203-204 (Fla. 2007). Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. *Pagan,* 830 So.2d at 803. Proof may be by direct or circumstantial evidence. *Direct evidence* is that to which the witness testifies of his or her own knowledge as to the facts at issue. *Circumstantial evidence* is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. *Baugh,* 961 So.2d at 203, n. 5, (emphasis added).

In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party

that the trier of fact might fairly and reasonably infer from the evidence. If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *See Reynolds v. State,* 934 So.2d 1128, 1145 (Fla. 2006).

Judgments of Acquittal in Circumstantial Evidence Cases

In considering a motion for judgment of acquittal in a case where a conviction is based wholly upon circumstantial evidence the court applies a special standard of review. *Jackson v. State,* 25 So.3d 518, 531-532 (Fla. 2009). If the State presents both direct and circumstantial evidence, courts do not apply this special standard of review. *Mosley v. State*, 46 So.3d 510, 526 (Fla. 2009), cert. denied, 131 S.Ct. 219 (2010). However, if a single element of a crime is proven solely through circumstantial evidence the special standard of review may apply to that one element. For example, if there is direct evidence of the crime of murder in the first degree, but the defendant's intent is proven solely through circumstantial evidence, the special standard of review applies only to the state's evidence establishing the element of intent. *See Walker v. State,* 957 So.2d 560, 577 (Fla. 2007); *see also Galavis v. State,* 28 So.3d 176, 178 (Fla. 4th DCA 2010).[1] "Although the State must prove intent just as any other element of a crime, (citation omitted), a defendant's mental intent is hardly ever subject to direct proof." *Brewer v. State,* 413 So.2d 1217, 1219 (Fla. 5th DCA 1982). "[B]ecause direct evidence of intent is rare and must be proven through the surrounding circumstances, 'a trial court should rarely, if ever, grant a motion for judgment of acquittal on the issue of intent.'" *Galavis,* 28 So.3d at 179; *see Washington v. State,* 737 So.2d 1208, 1215 -1216 (Fla. 1st DCA

[1] It should be noted premeditation may be established by circumstantial evidence. *Walker,* 957 So.2d at 577.

1999); *King v. State,* 545 So.2d 375, 378 (Fla. 4th DCA 1989); *Brewer,* 413 So.2d at 1220.

The special standard of review applicable to circumstantial evidence cases is that a motion for judgment of acquittal should be granted if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *Darling v. State,* 808 So.2d 145, 155 (Fla.2002).

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.* Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Darling, 808 So.2d at 156, (emphasis added); *see Walker v. State*, 957 So.2d 560, 577 (Fla. 2007).

The Present Case

1. The State's Burden

In the present case the trial court ruled the prosecution had not established sufficient evidence that Mr. Wooten knew there was marijuana in the car.[2] The difficulty with this ruling is that it assumes or implies that if there is any doubt or conflicting evidence a judgment of acquittal must be granted. If that were true then a judgment of acquittal would be required every time a defendant charged with constructive possession of contraband, testified he or she did not know the contraband was present. In the present

[2] The ruling was based upon the trial court's analysis of case law involving constructive possession of contraband in vehicles. Those cases were Lynch v. State, 293 So2d 44 (Fla. 1974); Hill v. State, 736 So2d 133 (Fla. 1st DCA 1999); Skelton v. State, 609 So2d 716 (Fla. 2nd DCA 1992); Thomas v. State, 743 So2d 1190 (Fla. 4th DCA 1999); In the Interest of E.H., 579 So2d 364 (Fla. 4th DCA 1991); Hively v. State, 336 So2d 127 (Fla. 4th DCA 1976); D.J. v. State, 330 So2d 35 (Fla. 4th DCA 1976).

case, the trial court stated, in part:

> For the record, the judgment of acquittal, I'm granting based upon, at the close of State's evidence, it's very unusual the issue that both of you bring up, the throwing the marijuana cigarette. ... [T]hat was a significant -- the statement that he denies ever making to the police actually benefitted him probably more than anything because this decision's right on point where they could not exclude that somebody else who was standing there didn't throw the marijuana cigarette on the floor when they saw the police coming. As hard as the defendant tried to deny he ever said that, that, quite frankly, weighed significantly in his favor. *That's why I say JOA at the close of the State's case because after he denies saying that, it therefore is in dispute.* (Emphasis added).
>
> But, look it, I've got to do what I think the law requires, and that's what I'm doing. *And to the extent it matters, had the defendant not testified, I don't think we'd be here.* (Emphasis added).

As set forth above, "[t]he state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." *Darling*, 808 So.2d at 156; see *Walker v. State*, 957 So.2d 560, 577 (Fla. 2007). In the present case the testimony and evidence presented in the State's case was sufficient to meet this threshold burden.

"To prove constructive possession of contraband, the state must 'show beyond a reasonable doubt that [1] the defendant knew of the presence of the contraband and [2] that he had the ability to exercise dominion and control over it.'" *Jiles v. State*, 984 So2d 622, 623 (Fla. 2nd DCA 2008).

> Although an inference that a defendant knew of the presence of contraband does not arise from the defendant's "[m]ere proximity to [the] contraband," *Pena v. State*, 465 So.2d 1386, 1388 (Fla. 2d DCA 1985), the location of contraband in plain view of the

> defendant is sufficient to establish the knowledge element of constructive possession, see *Brown v. State*, 428 So.2d 250, 252 (Fla.1983); see also *Martoral v. State*, 946 So.2d 1240, 1243 (Fla. 4th DCA 2007) (holding that knowledge element was established where "marijuana was in a compartment in the dash in plain view" of the defendant who was the driver of the truck). *Here, the plainly visible presence of the marijuana in the vehicle door beside Jiles was sufficient to establish that Jiles knew of the presence of the marijuana.* This is not a case in which the drugs were concealed within a container. See *J.M. v. State*, 839 So.2d 832, 835 (Fla. 4th DCA 2003).

Jiles, 984 So2d at 623, (emphasis added). In the present case the clear plastic bag containing marijuana atop miscellaneous papers in the door pocket of the front passenger side of the car, where Mr. Wooten had been seated, was sufficient to establish that Appellee knew of the presence of the marijuana. This court notes, but does not address, the question of whether the present case involves *constructive possession* or *actual possession.*[3]

2. Proof of Knowledge

The present case illustrates the inherent difficulty in proving someone's knowledge of the presence of contraband. Similar to the issue of intent, whether a person has knowledge of the presence of contraband in is an operation of the mind that is hardly ever subject to direct proof; direct evidence of someone's knowledge of such matters must normally be proven through the surrounding circumstances. Courts should be circumspect in ever granting a motion for judgment of acquittal based solely on the absence of direct evidence of a defendant's knowledge of the presence of contraband. The above cited authority addressing motions for judgment of acquittal on the issue of

[3] Florida Standard Jury Instruction 25.7 provides that Actual Possession means "the controlled substance is so close as to be within ready reach and is under the control of the person." In the present case, Mr. Wooten, who was seated in the front passenger seat, was arguably in actual possession of the marijuana located in the door pocket of the front passenger side of the car.

intent is instructive. *See Galavis,* 28 So.3d at 179; *see Washington v. State,* 737 So.2d 1208, 1215 -1216 (Fla. 1st DCA 1999); *King v. State,* 545 So.2d 375, 378 (Fla. 4th DCA 1989); *Brewer,* 413 So.2d at 1220.

Conclusion

Based upon the foregoing, this court finds the Appellee's convictions were supported by competent, substantial evidence. The trial court erred when it entered the judgment of acquittal after the jury verdict of guilty.

We reverse the Order Granting Judgment of Acquittal.

IT IS THEREFORE ORDERED that the Order Granting Judgment of Acquittal after a jury verdict of guilty is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

ORDERED at Clearwater, Florida this 1st day of ~~February,~~ March 2011.

Original order entered on March 1, 2011 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable John D. Carballo
Office of the State Attorney
Office of the Public Defender