IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKEEM MILES	:	
	:	No. 558, 2017
Defendant Below-Appellant,	:	
	:	ON APPEAL FROM
	:	THE SUPERIOR COURT OF THE
v.	:	STATE OF DELAWARE
	:	IN AND FOR NEW CASTLE
	:	COUNTY
STATE OF DELAWARE,	:	I.D. No. 1703001283
	:	
Plaintiff Below-Appellee.	:	

APPELLANT'S REPLY BRIEF

FILING ID: 62176851

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A. Argument

The State contends that Connections used the apartment "for most purposes" and therefore they possessed the actual authority to consent to the search. The State also claims that Mr. Miles did not expressly object and thus, the police were not required to obtain a warrant. Finally, the State argues that Mr. Miles did not have standing to object to the search because he was not an over-night guest, but rather an unwanted intruder. These arguments fail for several reasons.

First, the State argues that Connections could give valid consent because the company and Chad Sturgis "had joint access to and control of the apartment for most purposes."[1] This is not true. In *Matlock* the Court proclaimed that common authority is determined through "mutual use of the property by persons generally having joint access or control for most purposes."[2] It is true that *Matlock* does not use the language "customary use" to describe how each tenant may use the property. However, from the Court's description one could infer that mutual use for most purposes is that co-tenants use the property in the same manner as the other in the traditional or customary ways an average tenant would. If co-tenants

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[1] Answ. Br. 11.

[2] *United States v. Matlock,* 415 U.S. 164, 171 (1974).

had joint access to the property for most purposes, then their uses would be in alignment signaling to the police that each tenant possessed the authority to consent to the police search. Here, Connections' and Chad Sturgis' uses did not align.

Connections as a company was listed on the lease as a tenant, accessed the property to deliver medicine and checked on the condition of the property sporadically. Chad Strugis on the other hand lived in the apartment as a typical tenant: eating, sleeping, cooking, cleaning, and inviting his friends over to spend time with him and even stay with him if they needed. Connections certainly did not use the property for "most purposes" as Chad Sturgis did.

Under the State's theory, any patient of Connections who receives medical deliveries at their home has no expectation of privacy and that the patient has assumed the risk that Connections will invite the police in to their apartment as the company deems fit. Connections is a mental health and substance abuse treatment provider who serve tens of thousands of Delaware residents some of whom are also within the correctional system as probationers.[3] Under the State's novel theory, a probationer officer who supervises a patient of Connections who receives medical deliveries does not need to apply for an administrative warrant to search the probationers home. They can merely call Connections and request their

[3] Connections Community Support Programs, http://www.connectionscsp.org/about-connections/history/ (last visited June 26, 2018).

consent to enter the home because Connections has joint access to the property for "most purposes." If the State's theory is accepted, then a Connections patient has no expectation of privacy and no recourse should that situation occur.

In this situation, Connections is more like a landlord or a hotel manager than an actual tenant. "[A] landlord or hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant."[4] Like a landlord and a hotel manager, a medical provider's use of a patient's apartment is limited to themselves or their agents who deliver services to the patient who only allowed them access in order to receive treatment, not to invite outside, third parties into the apartment without the consent of the actual inhabiting tenant.[5] Connections delivered medicine, therapeutic services, and could check on the condition of the apartment. They could not invite third parties who were not acting as agents of the company into Mr. Sturgis' apartment without his consent. This same expectation of privacy is extended to any of Mr. Strugis' over-night guests. Because Connections did not use the apartment for most purposes as Chad Sturgis did, they did not possess the actual authority to invite the police into the apartment.

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[4] *Georgia. v. Randolph,* 547 U.S. 103, 112 (2006) (citing *Chapman v. United States,* 365 U.S. 610 (1961); *Stoner v. California,* 376 U.S. 483 (1964)).
[5] *Id*.

Second, the State contends that Connections' consent controls because Mr. Miles did not expressly object and he complied to the police search through inaction.[6] The State is incorrect in both aspects.

The police knocked on the door for several minutes and Mr. Miles refused to open the door.[7] This was an affirmative action on Mr. Miles' part to not open the door and to not consent to the entry of the police. Further, the police stated to the occupants in the apartment to open the door because the police wanted to talk with them. In response to their requests, Mr. Miles responded by saying, "No, Thank you."[8] By stating "No, Thank you" Mr. Miles expressly objected to the police entry and further displayed through an affirmative action of not opening the door that he did not want the police to enter the apartment. Therefore, under *Georgia v. Randolph,*[9] the police were required to obtain a valid warrant since they could no longer rely on consent as an exception to the warrant requirement.

Finally, the State argues that Mr. Miles did not possess standing to challenge the police entry and search of the apartment. The State contends that Chad Sturgis did not want Mr. Miles there which made Mr. Miles an unwanted guest who does

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[6] Answ. Br. 12.

[7] A56, A70-71.

[8] A70-71. This response can also be heard on the body camera footage that was submitted into evidence. Mr. Miles says, "No, Thank you," and the officer confirms by repeating that he said, "No, Thank you."

[9] *Georgia. v. Randolph,* 547 U.S. 103, 120 (2006)

not have an expectation of privacy in his hosts' home.[10] The State's argument fails for a few reasons.

First, there is no evidence that Mr. Sturgis ever told Mr. Miles or the other two individuals in the apartment that they were not permitted to stay at the apartment any longer. In fact, the opposite is true as both Ms. Deshields-Cunningham and Mr. Tyrone Miles told the police that Hakeem and Tyrone had been staying there for a couple of weeks with Mr. Sturgis' permission.[11] Further, even the Connections' housing agent told the police that she knew Mr. Strugis was allowing friends to stay there but she didn't know who.[12] Finally, neither the police nor the State's witness from Connections actually spoke to Mr. Sturgis that day about who was allowed in the apartment.[13] The State is relying on multiple layers of hearsay to show that Mr. Miles was unwanted in the apartment by Mr. Sturgis.

However, accepting *arguendo* the hearsay evidence that Chad Sturgis communicated to Connections that he wanted people to leave, there is no evidence to suggest that Chad Sturgis ever directly told his guests to leave. None of the individuals in the apartment, including Mr. Hakeem Miles, were ever charged with trespass or burglary as Mr. Sturgis' alleged revoked invitation could not be

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[10] Answ. Br. 13.
[11] A68-69.
[12] A69.
[13] A46, A69-70.

confirmed. If the request to leave was never communicated from the host to the house guest, it was reasonable for the house guest to continue staying at the house and enjoying an expectation of privacy in the home. Mr. Miles not only was an overnight guest for a few weeks, but he maintained his expectation of privacy in the face of the allegations that he was unwanted because Mr. Sturgis' never told Mr.Miles to leave prior to the police arriving at the apartment. Therefore, Mr. Miles maintained an expectation of privacy in the apartment and had standing to challenge the subsequent illegal entry and search.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS MR. MILES' UNREASONABLE FELONY INDICTMENT THAT WAS BASED ON HIS LEGAL POSSESSION OF A FIREARM AND HIS POSSESSION OF LESS THAN ONE GRAM OF MARIJUANA.

A. Argument

The State argues that 11 Del. C. § 1448(a)(9) is neither facially ambiguous or ambiguous in its application. Reasoning from *Murray,* the State argues that if the legislature wanted to exclude civil violations of marijuana from triggering PFBPP under subsection (a)(9), then they could have done so, but they did not. However, the State failed to fully address the subsequent news article and the post-*Murray* bills that rebutted the presumption that our legislators were aware of the felony consequence of possessing a civil violation amount of marijuana and legal firearm.

Not only have legislators been quoted as being unaware of this serious consequence for legally carrying a firearm and a civil amount of marijuana, but since being notified, lawmakers have introduced bills that would make 11 Del. C. § 1448(a)(9) inapplicable as either the statute would not exist for civil amounts of marijuana or the possession of an ounce or less of marijuana would be legal for a person over 21.[14] Both bills have received support, and specifically House Bill 110 was voted out of committee and is currently on the House of Representatives'

[14] Del. H.B. 234 syn., 149th Gen. Assem. (2017); Del. H.B. 110 syn., 149th Gen. Assem. (2017).

"Ready List."[15] Through these bills legislators are attempting to codify that possession of small amounts of marijuana should not create criminal convictions even when paired with legal firearm possession.

It should be noted for comparison that other substance violations when couple with legal firearm possession do not trigger a felony offense. Both Wilmington and Newark have city ordinances that prevent individuals from carrying open containers of alcohol on public streets.[16] Both Wilmington and Newark treat such an offense as a violation.[17] However, if a person were to commit one of these alcohol violations and legally carry a firearm, they would still only be charged with an alcohol violation, not a felony firearms offense.[18] The same should be true for a person committing a civil marijuana violation and legally possessing a firearm, they should only be charged with the marijuana violation and not with a felony.

While the Court should not sit as an "überlegislature," when the statute is ambiguous in its application and the General Assembly's intent can not be ascertained, the court should harmonize the ambiguous statute with the other

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[15] This was voted out of committee on May 10, 2018, less than a day before Appellant submitted his Opening Brief.

[16] Newark, Del., C. § 22-113; Wilm. C. § 36-66.

[17] *Id.*

[18] It is a misdemeanor offense to carry a firearm while intoxicated (11 *Del. C.* § 1460). For purposes of argument, Appellant assumes that the person with the open container of alcohol is not under the influence at the time they also legally possess a firearm.

statutes within the code.[19] Further, because lawmakers have championed bills that would make 11 Del. C. § 1448(a)(9) obsolete as it is applied to less than one ounce of marijuana, the Court should consider eliminating the ambiguity through an opinion. The General Assembly could have never intended to combine a fineable offense and a legal action into a felony consequence. To reach a felony result from the legal possession of a firearm and a civil violation amount of marijuana is absurd and unreasonable. Therefore, the statute should be deemed ambiguous and Mr. Miles' conviction should be vacated.

[19] *Coastal Barge Corp. v. Coastal Zone Indus. Control,* 492 A.2d 1242, 1246 (Del. 1985) (*citing Carper v. New Castle County Bd. of Ed.,* 432 A.2d 1202, 1205 (Del. 1981)).

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INSTRUCT THE JURY TO APPLY A NARROWER DEFINITION OF POSSESSION BECAUSE THE STATUTE CONTAINS A TEMPORAL REQUIREMENT.

A. Argument

The State argues that the definition of possession which was stated in *Lecates* for a charge of PFBPP was correctly and accurately given in the instant jury instructions. They cite to *Lecates,*[20] *Elmore,*[21] and *Grayson*[22] in support of their argument, but the State's argument fails to address the critical issue that *Lecates* was decided before 11 Del. C. § 1448(a)(9) was enacted and therefore, the instructions given in this case were not a correct statement of the law. Further, *Elmore* and *Grayson* are wholly inapplicable and unpersuasive as the defendants in those cases were charged with PFBPP not under subsection (a)(9), but under the more commonly charged subsection (a)(1), which existed when *Lecates* was decided.

While *Lecates* is well-settled case law, the reasoning in *Lecates* was never applied to PFBPP when a temporal element was included in subsection (a)(9).[23] The State argues that the inclusion of "at the same time" in the instructions was sufficient to account for the temporal element and thus, the narrower definition of

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[20] *Lecates v. State,* 987 A.2d 413 (Del. 2009).
[21] *Elmore v. State,* 2015 WL 3613557 (Del. June 9, 2015).
[22] *State v. Grayson,* 2017 WL 1093939 (Del. Super. Ct. Mar. 22, 2017).
[23] *Lecates v. State,* 987 A.2d 413, 418 (Del. 2009).

possession used in PFDCF charges would not have been correct or necessary. The State's argument is flawed.

If simply reading the element of "at the same time" was enough for the jury instructions, then why did the Court in *Lecates* define possession narrowly for PFDCF when under the State's theory the jury instructions could have just included the term "during" and that would have been enough to limit the scope of the possession. The Court in *Lecates* gave the definition of possession a narrower meaning because simply using the word "during" to limit the scope of the possession was not enough. The Court gave the narrower definition of possession in PFDCF to emphasize the temporal requirement that the firearm must be available and accessible to the defendant who is also in either actual or constructive possession of the firearm while the felony is being committed. The Court chose to not simply assume that the word "during" would be enough for the jury to limit the scope of the possession.

Here, the use of "at the same time" in the jury instructions was also not enough to limit the scope of the possession. Because § 1448(a)(9) includes a temporal element similar to the statute of PFDCF, the Court should have given the narrower definition of possession which requires that the firearm be available and accessible in addition to actual or constructive possession while the defendant possessed the controlled substance at the same time. If the jury had been instructed

on the narrower possession definition, then the outcome may have been different as the firearm was located in a different room from Mr. Miles.

CONCLUSION

Based on the facts and legal authorities set forth above, Appellant Hakeem Miles respectfully requests that this Honorable Court either reverse his conviction and remand for a new trial where appropriate or vacate his conviction where appropriate.

Respectfully Submitted,

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