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SUFFICIENCY OF EVIDENCE OF POSSESSION IN MIP CASES

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Prosecutions for MIP (Alcoholic Beverage Code, section 106.05 - Possession of Alcohol by Minor) are fairly common in the municipal court. The elements of the offense are simple: (1) a minor; (2) possesses; (3) an alcoholic beverage. But an issue that frequently arises is the sufficiency of evidence of possession. A common scenario is that of a minor present at a location or in an automobile where alcohol also is present but there is no direct evidence that the individual ever actually obtained, received or even had physical contact with the alcohol. This scenario presents difficulty because the offense of MIP is not merely being in the presence of alcohol or knowing of its existence, but it is having actual possession of it.

DEFINITION OF POSSESSION

The Alcoholic Beverage Code does not itself provide a definition of "possession." But the Texas Penal Code provides that its definitions "apply to offenses defined by other laws, unless the statute defining the offense provides otherwise." Tex. Penal Code section 1.03(b).

Thus, the Penal Code definition of "possession" should be regarded as part of the Alcoholic Beverage Code offense of MIP. Possession is defined as "actual care, custody, control, or management." Tex. Penal Code section 1.07(a)(39). Possession is "voluntary" if the possessor either "knowingly obtains or receives the thing possessed" or "is aware of his control of the thing for a sufficient time to permit him to terminate his control." Tex. Penal Code section 6.01(b). It is obvious that control is the key element of possession.

INFERRING POSSESSION

The cases in which there is direct evidence that the defendant had actual physical control or dominion over the alcohol, or had exclusive possession of the place where it was found, are not difficult. The difficult cases are those in which there is no direct evidence of contact with, or exclusive control of, the alcohol, thus requiring control to be inferred from circumstantial evidence. In the past, possession that had to be inferred from the circumstances was called "constructive possession," but under the current Penal Code definition, control of a substance is actual possession, even if it must be inferred circumstantially.

The lack of reported cases dealing with possession in the context of alcohol offenses requires us to look elsewhere for authority. The drug possession cases are instructive. In drug possession cases, the Texas courts have employed the "affirmative links" doctrine in deciding whether there is sufficient evidence to establish possession. Under the "affirmative links" doctrine, the State must "affirmatively link the accused with the... substance he is alleged to have possessed." *Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995). The prosecution's evidence must link the defendant to the contraband substance in such a manner and to such an extent that a reasonable inference may arise that the defendant knew of its existence and exercised control over it. M. TEAGUE & B. HELFT, 5 TEXAS CRIMINAL PRACTICE GUIDE, section 129[3][a] (1988). In other words, the evidence must establish a connection with the substance sufficient to amount to actual care, custody, or control of the substance.

This involves identifying and weighing the factors in a case which tend to show either that there was or there was not a knowing connection between the accused and the substance.

SOLE ACCESS

Although neither mere knowledge of the existence of a substance nor mere presence in the vicinity of the substance will be sufficient to establish knowing possession, *Humason v. State*, 728 S.W.2d 363, 367 (Tex. Crim. App. 1987), sole access to the place where the substance was found may be a sufficient affirmative link to establish knowing possession. *Damron v. State*, 570 S.W.2d 933, 936 n.2 (Tex. Crim. App. 1987). For example, if alcohol were found in a school locker to which the student in question had exclusive access, possession by that student could be inferred. But the access must be exclusive. If the substance is found in a container belonging to someone else, for example, there should be evidence of a connection between the container and the defendant to support a knowing possession finding. *Cameron v. State*, 703 S.W.2d 254 (Tex. App. - Corpus Christi 1985, pet. Ref'd). The key issue is ready access or a particular connection to the substance.

NON-EXCLUSIVE ACCESS

Possession may exist when one or more persons other than a defendant are present where contraband is found. But, the defendant must be affirmatively linked to the substance, or, at least the location. *Hoss v. State*, 735 S.W.2d 899 (Tex. App. - Houston [14th Dist.] 1987). For example, if the minor charged with possession was in an automobile with others when alcohol was found in the car, there may be probable cause to believe he or she possessed alcohol but there may not be proof beyond a reasonable doubt. If the minor was the driver of the automobile, control is easier to find. On the other hand, if the defendant was a passenger in the backseat and the alcohol was found in the front seat, control is difficult to find. Presumably, further evidence would be needed, such as alcohol on the defendant's breath. A not uncommon scenario is that of a defendant minor at a party with a group of people where alcohol is present. In such a situation the trier of fact must look at the facts other than mere presence to determine possession. A list of significant factors may be borrowed from the drug possession cases. See, e.g., *Dixon v. State*, 918 S.W.2d 678, 681 (Tex. App. - Beaumont 1996):

- (1) contraband in plain view;
- (2) accused was the owner of the car or house in which the contraband was found;
- (3) accused was the driver of the automobile in which the contraband was found;
- (4) contraband was conveniently accessible to the accused;
- (5) contraband was found in close proximity to where the accused was sitting;
- (6) strong odor of contraband was present;
- (7) paraphernalia to use the contraband was in view of or found on the accused;
- (8) physical condition of the accused indicated recent consumption of the contraband;
- (9) conduct by the accused indicated a consciousness of guilt;
- (10) accused had a special connection with the contraband;
- (11) place where the contraband was found was enclosed;
- (12) conflicting statements were given about the contraband;
- (13) affirmative statements connect the accused to the contraband.

Some factors may be given greater weight than others. For example, evidence that the defendant had actually consumed alcohol would be nearly conclusive evidence of possession. Mere nervousness when confronted by police officers would not be. Suffice it to say, however, the factors must establish a clear enough link of the alcohol to the defendant to support a conclusion beyond a reasonable doubt that the defendant had control of the alcohol at some point.