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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

No. 91

J.L.,
Appellant.

20 Eagle Street
Albany, New York
November 19, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 91, The People of the
3 State of New York v. J.L.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Okay. I will remind
6 counsel to try to keep your voice up and stay close to the
7 microphone so we can all hear you.

8 Counsel?

9 MS. COLT: Good morning, Your Honors. Cynthia
10 Colt of Appellate Advocates, on behalf of J.L., appellant.

11 Your Honor, I would also like Your Honor to
12 reserve two minutes of rebuttal time.

13 CHIEF JUDGE DIFIORE: Of course.

14 MS. COLT: Thank you. Your Honors, this case
15 stands for the very basic proposition that a trial court
16 must instruct the jury on all material legal principles
17 applicable to the case. In this case, voluntariness of
18 constructive possession was a material legal principle,
19 whether appellant was aware of the existence of the
20 recovered weapon long enough to have been able to terminate
21 that possession.

22 JUDGE STEIN: Did you raise that issue in terms
23 of how you presented your defense? There seems to be some,
24 you know, question about whether the defendant ever argued
25 that he was aware, at any time, of - - - of the gun being



1 there.

2 MS. COLT: Your Honor, the appellant testified
3 during direct - - - his direct testimony that he was a
4 recent arrival to the apartment, that he had never been in
5 the back room where the weapon was recovered. But he - - -
6 so it wasn't his main defense, but he also testified, after
7 he was shot, he ran to the back room, he saw the weapon, he
8 drew a picture of it. He said - - - he called it
9 "something like the weapon". He drew a picture of it for a
10 questioning detective. And then obviously, the police were
11 on their way. And he didn't testify to this, but he
12 couldn't terminate his possession.

13 Defense counsel specifically requested the charge
14 applicable to those facts that if appellant was aware of
15 this weapon for long enough to have been able to terminate
16 it, that's not voluntary. The trial court actually
17 understood the point and said, oh, I understand what you're
18 saying, and you can argue in your summation that his
19 awareness was so fleeting that it didn't constitute
20 voluntary constructive possession. But he did not argue
21 that because that would have been an incredibly dangerous
22 argument.

23 JUDGE RIVERA: But the judge thought that the
24 charge, overall, was enough, and was concerned that the
25 requested charge would be confusing. Why wouldn't it be



1 confusing?

2 MS. COLT: Well, first of all, it's a very
3 specific short charge saying just this, that a voluntary
4 act includes the "possession of property, if the actor was
5 aware of his physical possession or control" - - - in this
6 case we're talking about control - - - "thereof for a
7 sufficient period of time to have been able to terminate
8 it".

9 There doesn't seem to be anything, on the face of
10 it, confusing. And it certainly wasn't confusing in
11 conjunct - - - in conjunction with the rest of the charge
12 which instructed the jury that constructive possession was
13 being aware of your possession and being able to have
14 control over the area where the property is discovered. So
15 I don't think it conflicted or confused any issues. And
16 the jury was also charged - - -

17 JUDGE RIVERA: Did the judge ever explain why it
18 might be viewed as confusing?

19 MS. COLT: He didn't explain it to me. It seemed
20 as though he thought it was confusing because the DA was
21 confused about the charge. But he didn't further - - - he
22 never said there's a rea - - - I mean, he did say there is
23 a view of the evidence that supports this charge, but it's
24 too confusing. But - - -

25 JUDGE RIVERA: But the DA's confusion was based



1 on - - - I could be wrong - - -

2 MS. COLT: I think his - - -

3 JUDGE RIVERA: You can - - - you can clarify
4 here.

5 MS. COLT: I think his - - -

6 JUDGE RIVERA: It appeared to me, when I read
7 this record, that the DA was confused because the DA
8 thought that the defense position was, I didn't see a gun,
9 I don't know anything about a gun, I ran in to get this
10 towel, and I ran out, and this is not my apartment; I just
11 was there for a few hours.

12 MS. COLT: I think that's true. That was how the
13 DA interpreted defendant's testimony - - - appellant's
14 testimony. But - - -

15 JUDGE RIVERA: Is that the way counsel argued it
16 to the jury? Putting aside this testimony, is that the way
17 counsel argued it to the jury, my client never saw
18 anything?

19 MS. COLT: He - - - I mean, he argued it that he
20 didn't possess the weapon, because that's what the jury was
21 charged with - - - he had to be very careful because if he
22 argued that, okay, he saw the gun but it was so short that
23 he wasn't able to terminate that possession, the jurors had
24 no legal instructions on which they could consider that
25 argument.



1 So he - - - I think he sort of rode the fence,
2 saying that there was no constructive possession. This was
3 a kid who had just arrived there that night. It's not his
4 guns, you know, which obviously isn't the standard. But
5 the DA also seemed to agree. We're not saying that these
6 are his guns, Your Honor. But he was the one in the
7 apartment, so the DA has thoroughly prosecuted him on a
8 constructive possession - - -

9 JUDGE RIVERA: So you're saying that the
10 defense's argument was he doesn't have the kind of control
11 over the space that gets it elevated to constructive
12 possession - - -

13 MS. COLT: Yes.

14 JUDGE RIVERA: - - - under the law?

15 MS. COLT: Yes. I think - - -

16 JUDGE RIVERA: Under the law - - -

17 MS. COLT: - - - that's correct.

18 JUDGE RIVERA: So he may - - - which I take it
19 then the position is - - - and I'll ask your opposition
20 here - - - is not - - - it's not in conflict with the
21 position that says he saw it, he knew it was there.

22 MS. COLT: That's correct because, one,
23 constructive possession is that you have control over the
24 area in which the object is found. He clearly did have
25 control over this area. He ran back to the area - - -



1 area, saw it, was able to pick up a towel in the same area,
2 so he obviously was able to either use or dispose of it in
3 that short period of time. But - - -

4 JUDGE RIVERA: As he would the towel?

5 MS. COLT: Yes, as with the towel. But it was so
6 fleeting, as the trial court understood, actually said, but
7 you're arguing that his awareness of the weapon was so
8 fleeting that it did not constitute constructive
9 possession.

10 JUDGE FEINMAN: What about the effect of the mail
11 with his name on it that's in the drawer with the gun? How
12 does that suggest that it's fleeting?

13 MS. COLT: Well, first of all, we have no idea
14 when the gun or the mail was placed in the drawer. The - -
15 - the gun was on top of the mail, so based on his
16 testimony, he said that he didn't - - - had no idea that
17 the gun was there before he was shot, and it was only once
18 he ran to get the towel, to help himself, when he saw the
19 gun at that point. So I don't think the presence of the
20 mail really adds much either way to - - -

21 CHIEF JUDGE DIFIORE: Does the DNA add anything?

22 MS. COLT: I don't think so because the DNA
23 expert testified - - - well, three officers, three police
24 officers testified, first of all, that they saw blood on
25 the gun, which supports appellant's testimony that he saw



1 it when he ran back to get a towel. The DNA expert,
2 although it seems she didn't believe it was blood, she said
3 she could not rule that out. She couldn't say when the DNA
4 was placed on the gun, how it was placed on the gun,
5 whether he touched the gun, or secondary transference, or
6 if blood dripped on the gun. So I don't think the DNA
7 either explains much or adds much to the case because it
8 could have happened when appellant said he momentarily saw
9 the gun.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.
11 Counsel?

12 MS. COLT: You're welcome.

13 MR. POVAZHUK: May it please the Court. Dmitriy
14 Povazhuk for the respondent.

15 The Court's instructions adequately conveyed the
16 proper legal principles to the jury.

17 JUDGE STEIN: Counsel, can I give you a
18 hypothetical?

19 MR. POVAZHUK: Yes.

20 JUDGE STEIN: Okay. So I have constructive
21 possession over my bedroom in my house, right? And I go to
22 work in the morning, and I come back and - - - and while
23 I'm away, somebody plants a gun in my dresser. And I come
24 home, and I go to change my clothes, and I open the
25 dresser, and I see this gun. And the same time that

1 happens, the doorbell rings, and it's the police. In that
2 case, would I not be entitled to a voluntariness charge?
3 Because I'm clearly in constructive possession, and I - - -
4 I see the gun, I know it's there, but I don't have
5 sufficient time to dispose of it properly.

6 MR. POVAZHUK: Your Honor, I would push back a
7 little bit on the assumption that there's constructive
8 possession in that case. If you read the specific
9 instruction that the court gave, or at least constructive
10 possession in the way that the court instructed it to this
11 jury, was that a - - - that, "A person has tangible
12 property in his or her constructive possession when that
13 person has exercised a level of control over the area in
14 which the property is found, sufficient to give him or her
15 the ability to use or dispose of that property."

16 So this "use or dispose of" language essentially
17 indicates that there has to be an exercise of constructive
18 - - - constructive possession. It's not simply control
19 over area, but it's the ability to dispose of the property
20 that - - - that's within that area. For instance, if
21 someone had soldered a firearm to your radiator, perhaps
22 you were in constructive control of that space, but in no
23 way do you have constructive possession of the gun itself.

24 JUDGE WILSON: But doesn't the instruction that
25 you just read talk about the ability to exercise a level of



1 control over the space not over the objects in the space?
2 My worry is that the instruction that was given would allow
3 the jury to conclude the following: The defendant
4 testified that he paid a hundred dollars to rent that room.
5 That, in and of itself, gives him constructive possession
6 of the room. And the payment, which is undisputed
7 testimony, plus finding a gun there, without the
8 voluntariness instruction, would let - - - would allow the
9 jury to convict simply because the gun was there and he
10 paid a hundred dollars for the room.

11 MR. POVAZHUK: I would say that that conflicts a
12 little bit with the - - - with the wording of the
13 instruction that was given in this case which specifically
14 talks about the ability to use or dispose of the property.
15 While I agree with Your Honor, and your point is well taken
16 that the beginning of that instruction talks about the
17 space, it - - - the - - - the literal - - - the qualifying
18 issue there is the ability to dispose of the property. And
19 I think that the way that the court instructed the - - -

20 JUDGE WILSON: But that qualifies the level of
21 control, not the actual disposition of the property. That
22 is, in Judge Stein's example, if it's her bedroom, she has
23 complete control over the property and to dispose of
24 whatever's in it, as regards to her control of the space.
25 And that's the way the instruction is framed.



1 JUDGE STEIN: But the question is, is what the
2 voluntariness charge adds is sufficient time, awareness for
3 a sufficient period of time to be able to dispose of it,
4 not whether you have the control over it to do so but
5 whether you have the time to do so, the opportunity.

6 MR. POVAZHUK: Right. I take the court's point.
7 I would just say one more thing on this issue which is that
8 the instruction with regards to constructive possession is
9 not exclusive of time. If you read it literally, it says
10 the ability to use or dispose of property, which
11 contemplates whether or not you have the time to use or
12 dispose of that property. So I would argue that that
13 constructive possession is inclusive of the voluntariness
14 charge. And - - -

15 JUDGE RIVERA: No, but that, as has already been
16 said, that could be understood by a rational juror as I've
17 got possession of the area, which means of course I could
18 have gotten rid of that gun, as opposed to, as the law
19 points out, a temporal aspect of possession.

20 MR. POVAZHUK: Right, I agree with you, Your
21 Honor, but I would also note that another way of looking at
22 this case is I'm not sure that this is really a case of
23 figuring out whether there's a possibility of an
24 involuntary constructive possession, as the defendant
25 suggests, which is kind of a tenuous grasp because



1 constructive possession suggests that you exercise some
2 control over property. But the question here - - -

3 JUDGE RIVERA: Well, of the area. That's the
4 distinction that I think you're hearing members of the
5 bench ask about.

6 MR. POVAZHUK: Right, I understand, and what I
7 would suggest is that the question here is whether that
8 constructive possession is based off a voluntary act,
9 because that's really what the statute that talks about
10 voluntariness - - -

11 JUDGE RIVERA: Let me try it a different way. So
12 the judge says it will be confusing to give this charge.
13 What makes it confusing to address the temporal element?

14 MR. POVAZHUK: No, I agree, Your Honor. I don't
15 think it necessarily would have been confusing in this
16 case.

17 JUDGE RIVERA: So then why isn't it abuse?

18 MR. POVAZHUK: Because - - -

19 JUDGE RIVERA: Why isn't it error if it's not
20 confusing, if that's an error by the court to think it's
21 confusing, as opposed to addressing an element that's not
22 properly addressed by the remainder of the charge, if we
23 look at the charge in totality?

24 MR. POVAZHUK: Right, so if the court is not
25 buying the argument that this - - - that the constructive



1 possession charge is already inclusive of the voluntariness
2 charge, the other argument - - - or one of the other two
3 arguments is that there is really no reasonable view of the
4 evidence here. The - - - if the jury credits the
5 defendant's testimony in this case, then the jury will
6 acquit, under this court's instruction, because it would
7 find that the defendant had never had any kind of a
8 relationship to this gun in - - - in such a way that he had
9 exercised control over it.

10 JUDGE STEIN: Well, it seems that this jury did
11 find him credible on some matters because they found him
12 not guilty of some of the other charges, and you know,
13 couldn't it have made the difference if they were aware of
14 this temporal thing, then they say, okay, well, maybe then
15 - - - I mean, they heard testimony in the trial about his
16 drawing the picture of the gun and - - - and so on and so
17 forth. So they certainly could have said, well, you know,
18 maybe he did - - - he did see the gun but he didn't have
19 control over it long enough.

20 MR. POVAZHUK: Well, I would argue that with
21 respect to this particular gun, insofar as there is a
22 substantive distinction between those two charges, there is
23 no significant probability that the jury - - - that the
24 outcome would have been different had they heard this
25 voluntariness charge because the evidence was overwhelming



1 here.

2 JUDGE WILSON: But they did ask for the
3 instructions on possession knowingly and intent to be read
4 back, right? So - - -

5 MR. POVAZHUK: They did, Your Honor, but I would
6 note that, you know, sometimes jurors ask for instructions
7 to be clarified, and sometimes they ask for the
8 instructions to be read back or given to them. And in this
9 case, they just want - - - they wanted the instructions
10 themselves. And I think that that's slightly of a lower
11 level of significance than had the jury come back and ask
12 can you please explain this to us.

13 And - - - and once again, I just would like to
14 point out, as just the corpus of evidence - - -

15 JUDGE STEIN: So what - - -

16 MR. POVAZHUK: Yes.

17 JUDGE STEIN: Yeah, what do you say is
18 overwhelming? Because the DNA is - - - is questionable,
19 right? Nobody saw anything. There was some corroboration
20 to this testimony that he had been at his aunt's and he got
21 this piece of mail in his aunt - - - at his aunt's house,
22 and there was some corroboration of his testimony about
23 this guy Paul who, by the way, nobody bothered to seem - -
24 - seemingly bothered to look for. So what makes - - - what
25 do you say makes the evidence so overwhelming here?



1 MR. POVAZHUK: Well, first of all, the gun itself
2 was, to begin with, in - - - in the room that the defendant
3 was staying in. The gun was surrounded by pieces of mail
4 that was - - - that were addressed to the defendant.

5 JUDGE STEIN: Surrounded, or on top of a piece of
6 mail?

7 MR. POVAZHUK: It was on top, but there was other
8 pieces of mail, if you look at the exhibit that is a photo
9 of the gun. There is - - - there are other pieces of mail
10 that are addressed to defendant and - - -

11 JUDGE RIVERA: In the drawer? In the dresser
12 drawer?

13 MR. POVAZHUK: Yes, I believe so, in the photo -
14 - - in the photograph. There isn't - - - there isn't a
15 clear photo. And for - - - forgive me if I'm mis - - -
16 misstating the record.

17 JUDGE RIVERA: Okay. This I do want to make
18 clear, so you're going to have to find your way on that
19 record. Are you saying that - - -

20 MR. POVAZHUK: I will say - - -

21 JUDGE RIVERA: - - - the photo displays more than
22 one piece of correspondence addressed to him, under the
23 gun, that there's several pieces? I don't know how that -
24 - -

25 MR. POVAZHUK: Your Honor, I stand corrected - -



1 -

2 JUDGE RIVERA: - - - makes a difference for the
3 argument, but - - -

4 MR. POVAZHUK: Your Honor, I stand corrected.
5 From what I remember of the photograph, there is one piece
6 of mail that clearly depicts the defendant's address.
7 There are other pieces of mail, but I can't remember if
8 there was any - - -

9 JUDGE RIVERA: Okay.

10 MR. POVAZHUK: - - - testimony about what
11 addresses are on that - - - are on that mail. But that
12 would tend to suggest that the defendant had interacted
13 with that drawer and that, you know, unless somebody had
14 put the gun there after he had put the mail in, and you
15 know, the defendant's testimony was that he hadn't walked
16 in there - - -

17 JUDGE RIVERA: But aren't these factual issues
18 that go to the jury, and that's not the law when it comes
19 to deciding whether or not a charge should have been given?

20 MR. POVAZHUK: Well, I think this court can still
21 look at whether or not to give the charge was harmless.
22 And once again, this is the lower significant probability
23 standard, it - - -

24 JUDGE RIVERA: But that's my point. There are
25 different inferences to be drawn from that gun placed in



1 that way on the mail.

2 MR. POVAZHUK: So there's the gun, there's the
3 DNA, which I would argue isn't as weak as this court
4 suggests because the - - - the officer who had taken the
5 DNA from the gun testified that he would have seen blood on
6 - - - on the swab that - - - that he was using. So,
7 whether or not there may have been blood on the gun, there
8 was not blood on the particular pieces from where the
9 defend - - - from where the officer was taking DNA from.
10 As well as, you know, the defendants - - - the defendant
11 was - - - he prevaricated about whether or not he saw a
12 gun. He lied about his name. He lied about where he - - -

13 JUDGE RIVERA: Well, those are credibility
14 questions, are they not, because he says he didn't do that.

15 MR. POVAZHUK: Well, yes, certainly, but - - -

16 JUDGE RIVERA: And again, are we looking at this
17 in the light most favorable to him?

18 MR. POVAZHUK: In terms of the charge, yes, but
19 in - - - but then in terms of the reasonable or the
20 significant possibility - - -

21 JUDGE RIVERA: Well, we've said conflicting
22 evidence is not necessarily a basis for deciding that a
23 charge cannot be given.

24 MR. POVAZHUK: I agree with you, Your Honor,
25 although I would note that there's some conflicting



1 evidence and there's some evidence that's - - - that's not.
2 I mean, when you take the conflicting evidence - - -

3 JUDGE RIVERA: Okay.

4 MR. POVAZHUK: - - - in tandem with the evidence
5 that's a little bit more objective, you have what we have
6 here, which is, I would argue, overwhelming evidence.

7 I see that my time is up.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. POVAZHUK: Thank you, Your Honor.

10 CHIEF JUDGE DIFIORE: Counsel?

11 MS. COLT: Just briefly. I would just like to
12 pick up on the factual issues. Just because - - - and in
13 many cases this court has held this - - - People v. Zona,
14 for one of them - - - just because the People now see
15 factual issues in the case did not relieve the court from
16 its responsibility to give the material legal instructions
17 in this case.

18 And to add to the argument about harmless error,
19 the jury was - - - I think this absolutely made a
20 difference. The jury was very concerned about what
21 "possession" meant, what "knowing" meant, what "intent"
22 was. They - - - and despite the prosecutor's arguments at
23 trial, in summation, that appellant went back to the room
24 precisely to pick the gun up and use it, the jury acquitted
25 appellant of the intent to use this recovered gun. They



1 also acquitted him of possessing the gun that was in the
2 drawer in the kitchen. So they definitely had issues with
3 this case, and a properly-charged jury, I believe, would
4 have acquitted Mr. J.L. of this charge.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MS. COLT: Thank you, Your Honors.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. J.L., No. 91, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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