

## July 2008 Resource Alert Legal Case

### Issues on Appeal

1. Whether actual physical possession is required to sustain a conviction under Wis. Stat. § 125.07(4) (b)?
2. Whether there was sufficient evidence presented by the State to sustain the conviction?

### Background Information

The following facts were undisputed. On June 15, 2006, Andrew Arendt called the police to have his ex-girlfriend removed from his apartment. Columbia County Deputy Cory Otto arrived at Arendt's apartment and spoke with Arendt. When Otto entered Arendt's apartment, he saw a tapped barrel of beer on ice in the living room and verified that it was partially full. Arendt was under twenty-one years of age at the time of the incident. Arendt's name was on the lease to the apartment.

Otto issued a citation to Arendt for possession of alcohol as an underage person. The trial court found that Arendt was under the age of twenty-one and was the possessor of the residence in which "there was a partial barrel of beer in a tub with ice that was tapped." It concluded that Arendt was guilty of possession of alcohol as an underage person. Arendt appeals from his judgment of conviction.

### The Court's Standard of Review

The Court restated the law as it applied to the case. Under Wis. Stat. § 125.07(4)(b), a person is guilty of underage possession of alcohol if he or she is under twenty-one years of age and **knowingly** (*emphasis added*) possesses alcoholic beverages while unaccompanied by his or her parent, guardian, or spouse of legal drinking age. The standard of proof for conviction of any person charged with violating this statute is clear, satisfactory, and convincing evidence. *See City of Madison v. Geier*, 27 Wis. 2d 687, 692, 135 N.W.2d 761 (1965). "The test for determining sufficiency of the evidence is whether a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as true." *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). "We will reverse only if the evidence, viewed most favorably to the finding of guilt, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the evidence of guilt to be clear, satisfactory, and convincing." *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

### The Court's Analysis

Arendt argued that the trial court erred in finding possession because it relied solely on alcohol being present in Arendt's residence. He further argued that the mere presence of

alcohol in his apartment is not enough to prove possession. His assertion was that the County needed to show his intent to exercise control over the alcohol.

The County argued that Arendt's name on the lease supports a finding of possession because it added an additional element of control that Arendt had over the premises and thus the objects within those premises. "While being a lessee alone is insufficient to support a finding of possession, being a lessee and knowing that alcohol was in the apartment is sufficient."

The Court disagreed with Arendt's assertion that the trial court based its decision on the common location of the alcohol and Arendt, to be found guilty of possessing a controlled substance, physical possession is not necessary. *State v. R.B.*, 108 Wis. 2d 494, 496, 322 N.W.2d 502 (Ct. App. 1982). "Possession may be imputed when a substance is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the substance." *Schmidt v. State*, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977) (discussing possession of illicit drugs).

"[T]he dominion and control necessary to permit conviction based on constructive rather than actual possession requires that the facts permit the inference of an intent to possess." *R.B.*, 108 Wis. 2d at 497. The dominion and control element is met when the defendant, as resident owner of his home, has control over the common area in which the contraband is found. *State v. Allbaugh*, 148 Wis. 2d 807, 815, 436 N.W.2d 898 (Ct. App. 1989) (citation omitted); *see also Schmidt*, 77 Wis. 2d at 379, 380-381 (using language implying that dominion and control over the area where the controlled substance was found satisfies the dominion and control element). When there is joint occupancy of premises, evidence that would support an inference of knowledge that alcohol was in the premises includes the defendant having access to the area where alcohol was found and the alcohol being in plain view. *See Allbaugh*, 148 Wis. 2d at 813.

"In this case, Arendt called the police to have his ex-girlfriend removed from his apartment. Otto arrived and found a tapped barrel of beer on ice in Arendt's living room. Based on these facts, a reasonable person could infer that Arendt was aware of the presence of alcohol in his apartment and that he had immediate access to it. In addition, Arendt had dominion and control over the living room, a common area in the apartment he leased."

We conclude that there was sufficient evidence to support a finding that Arendt possessed alcohol. Accordingly, we affirm.

Judgment and order affirmed.