

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

No. _____

MICHAEL GARCIA,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Counsel for Respondent

Justin Herdman, United States Attorney
801 West Superior Avenue
Carl B. Stokes Building
Cleveland, Ohio 44113
Phone: (216) 622-3600

Counsel for Petitioner

David L. Doughten, Counsel of Record
Ohio Registration No. 0002847
4403 St. Clair Avenue
Cleveland, OH 44103
Phone: (216) 361-1112

QUESTIONS PRESENTED FOR REVIEW

- I. May counsel for a criminal defendant waive his client's right to testify where the record fails to establish that the defendant was present in the courtroom?
- II. Is defense counsel's waiver of a defendant's right to testify an adequate waiver of that right where the record reflects a severe breakdown of the attorney-client relationship and the defendant had previous occasions during trial affirmatively stated that he wanted to testify?

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Garcia, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals, No. 17-3602, filed March 22, 2018, appears at Appendix A-1 to the Petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on March 22, 2018.

RELEVANT CONSTITUTIONAL PROVISION

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On May 26, 2016 a grand jury for the Northern District of Ohio indicted the defendant-appellant Michael Garcia for one count of Possessing a Firearm and/or Ammunition in or affecting commerce after the defendant had been convicted of a felony punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §922(g)(1) and 924(e).

The charges stemmed from the discovery of firearms in Garcia's residence which he shared with his girlfriend. Garcia denied having knowledge of their presence in the house. His girlfriend admitted the weapons belonged to her. She, in fact, testified to that fact at Garcia's trial. She testified that it was her and not Garcia that had complete control of the weapons in question.

A jury trial began on February 2, 2017. On February 9, 2017, the jury returned a verdict of guilty of all counts of the indictment.

The trial court conducted a sentencing hearing on June 7, 2017. The court sentenced Garcia to serve a term of 300 months.

Garcia appealed his conviction and sentence to the Sixth Circuit Court of Appeals. Both the conviction and his sentence were affirmed by the circuit court on March 22, 2018.

A defendant's presence in a residence where firearms and ammunition are found do not constitute the element of possession in a charge of 18 U.S.C 922(g)(1). The Government may establish the element by establishing constructive possession. But dominion and control of an item is not proven beyond a reasonable doubt by the fact that a defendant had access to the items or often co-habited in an apartment with another who possessed the weapons. Proof of a defendant's knowledge of the location of the items and that he had control of those items is

minimally required to sustain a conviction.

The definition of constructive possession has become a rather amorphous concept. It seems to change as needed to establish “possession” and sustain a conviction for weapons found in the proximity of the person charged with that possession. The present case is a perfect example.

Law enforcement arrested Garcia in the residence of his fiancée. While it is accurate that he stayed there often, possessed a key and left personal items at the residence, that alone cannot establish constructive possession of the weapons. His fiancée, Brittany Hopkins, testified that she did own the weapons, that she did not believe Garcia knew where the guns were kept, and that only she had access to the key of a lockbox where one of the weapons was kept. As there was no evidence of actual possession, Garcia’s presence in the apartment, even on a semi-regular basis, does not establish possession.

The evidence, viewed in a light most favorably to the Government, established only that Garcia often stayed with his fiancée, Brittany Hopkins, but did not permanently reside there. Ms. Hopkins, who had signed the lease for the apartment, testified that she was the owner of the guns, one of which was kept in a locked box with her being the only one who possessed a key. The other three guns were found in a secret compartment in a dresser. There was no direct evidence that Garcia knew of that compartment or that she had the firearms in the dresser.

This Court has not defined “constructive possession” for the purposes of a §922 case. The Sixth Circuit’s definition is in line with other circuits. “A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.” United States v. Frederick, 406 F.3d 754, 765 (6th Cir.2005). Garcia did not have a gun on his person when the

police arrested him. *See United States v. Pugh*, 405 F.3d 390, 394, 404 (6th Cir.2005) (holding that defendant who “was pulled out of bed and had a shotgun beneath his body”, therefore, “actually possessed the gun when he was apprehended”). Nor did the police see Garcia holding a gun prior to his arrest. *See United States v. Caraway*, 411 F.3d 679, 680, 683 (6th Cir.2005) (finding sufficient evidence to establish actual possession when officer saw defendant holding gun and then drop the gun while fleeing).

Because there is no evidence to establish that Garcia had direct physical control over the firearm; accordingly, it must be must concluded that Garcia did not actually possess the firearm. *United States v. Bailey*, 553 F.3d 940 (6th 2007). However, the Sixth Circuit did not arrive at this conclusion. The Court found that circumstantial evidence sufficiently supported the conviction. This was based upon evidence that he lived at the apartment, he possessed a key to the apartment, ammunition was found in his bedroom and that three weapons were found in the dresser of the room where his clothes were found. (Sixth Cir. Opinion at p.3). There was no evidence here that Garcia had direct knowledge of the presence of those weapons.

Because of the high number of cases with verdicts resulting from a jury’s understanding of the concept of “constructive possession” of not only guns or ammunition, but also all offenses including drugs or other contraband, it is requested that this Court accept jurisdiction to address the issue and avoid confusion and the risk of unsupported convictions such as here.

REASONS FOR GRANTING THE WRIT

- I. When charging Possession of a Firearm pursuant to 18 U.S.C §922(g)(1), to establish constructive possession of the firearm, the government must establish proof of the defendant's knowledge of the location of the items and that he had control of those items beyond a reasonable doubt to sustain a conviction.**

The evidence is insufficient to prove beyond a reasonable doubt that Garcia possessed a firearm or ammunition establishing his guilt under 18 U.S.C. §922(g)(1). As there was no evidence of actual possession, Garcia's presence in the shared apartment, even on a semi-regular basis, does not establish possession, even on a constructive possession basis.

Sufficiency Review Standard

Under the Due Process Clause of the Fifth Amendment, a defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970); Davis v. United States, 160 U.S. 469, 487-88 (1895). The United States Supreme Court set forth the standard for sufficiency review in Jackson v. Virginia, 443 U.S. 307 (1979). The reviewing court is to view all the evidence in the light most favorable to the prosecution. In doing so, the court must then determine whether any reasonable trier of fact could find the essential elements of the crime proven beyond a reasonable doubt.

For the jury to have properly convicted Garcia of being a felon in possession of a firearm, the jury must have concluded, beyond a reasonable doubt, that (1) Garcia had a previous felony conviction punishable by a sentence greater than one year; (2) Garcia possessed the firearm/ammunition specified in the relevant indictment; and (3) the firearm/ammunition traveled

in or affected interstate commerce. United States v. Morrison, 594 F.3d 543, 544 (6th Cir. 2010).

Present Case

Here, Garcia challenges the sufficiency of the evidence only with respect to the element that he possessed the firearms and/or ammunition specified in the indictment. He entered a stipulation as to the qualifying conviction. The Government did introduce a witness to establish that the weapons in question traveled in interstate commerce.

Nonetheless, the evidence did not establish beyond a reasonable doubt that he possessed the guns. It established only that Garcia often stayed with his fiancée, Brittany Hopkins, but did not permanently reside there. Ms. Hopkins, who had signed the lease for the apartment, testified that she was the owner of the guns, one of which was kept in a locked box with her being the only one who possessed a key. The other three guns were found in a secret compartment in a dresser. There was no direct evidence that Garcia knew that she had the firearms in the dresser. The circumstantial evidence consisted of his sleeping in the room in which the dresser was located.

Garcia was not seen holding any of the weapons. There was no evidence presented establishing Garcia's DNA or fingerprints on the guns. Although the Government introduced a number of photographs taken from cell phones and social media, none of them depicted Garcia holding a firearm, let alone one of the four guns or ammunition found in Hopkin's apartment.

Along the same line of argument, none of the texts to or from Garcia contained an admission that he had access to the guns. The text revealed that Garcia knew that he could not be around guns and that he faced a considerable prison sentence if he were convicted of such, but the texting stopped short of any acknowledgment that he had constructive possession of any of

the guns or ammunition found in the apartment.

Constructive Possession

The Sixth Circuit definitions regarding constructive construction are not in and of themselves unfair. It is the application of the law to the facts of the case that is problematical. “Both actual possession and constructive possession may be proved by direct or circumstantial evidence.” United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866 (1973). “A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.” United States v. Frederick, 406 F.3d 754, 765 (6th Cir.2005).

Garcia did not have a gun on his person when the police arrested him. *See* United States v. Pugh, 405 F.3d 390, 394, 404 (6th Cir.2005) (holding that defendant who “was pulled out of bed and had a shotgun beneath his body”, therefore, “actually possessed the gun when he was apprehended”). Nor did the police see Garcia holding a gun prior to his arrest. *See* United States v. Caraway, 411 F.3d 679, 680, 683 (6th Cir.2005) (finding sufficient evidence to establish actual possession when the officer saw defendant holding gun and then drop the gun while fleeing). Because there is no evidence to establish that Garcia had direct physical control over the firearm; accordingly, it must be concluded that Garcia did not actually possess the firearm. United States v. Bailey, 553 F.3d 940 (6th 2007).

As addressed above, although there was no actual possession, one might argue that Garcia constructively possessed the guns. The jury was instructed appropriately “[c]onstructive possession exists when a person does not have possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.” United States v. Gardner, 488 F.3d 700, 713 (6th Cir. 2007). In contrast,

actual possession exists “where the defendant has physical contact with a firearm-e.g., he holds it, holsters it, or keeps it in a place where it is immediately accessible.” Id.

As addressed previously, the evidence fails to establish constructive possession. There is insufficient circumstantial evidence that Garcia was able to exercise dominion and control over any of the charged items. At best, in a light most favorable to the Government, Garcia was seen in the hallway, perhaps after exiting a room in which a gun, not in plain view, was found pursuant to a search warrant.

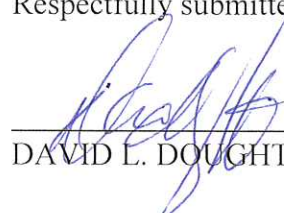
“Presence alone near a gun . . . does not show the requisite knowledge, power, or intention to exercise control over the gun to prove constructive possession.” United States v. Arnold, 486 F.3d 177, 183 (6th Cir. 2007) (en banc) (citation and internal quotation marks omitted). “Other incriminating evidence must supplement a defendant's proximity to a firearm in order to tip the scale in favor of constructive possession.” United States v. Campbell, 549 F.3d 364, 374 (6th Cir. 2008). “Consequently, evidence of some other factor --including connection with a gun, proof of motive, . . . or a statement indicating involvement in an enterprise -- coupled with proximity may suffice.” Id. (citation and internal quotation marks omitted).

Here, it is evidence of the “connection with the gun, or a statement or proof of motive” that is missing. His mere proximity to the gun is insufficient. This Court is urged to address the constructive possession question so that all the circuits will have guidance on how to apply the definitions when reviewing its applications to actual facts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



DAVID L. DOUGHTEN

Counsel for Petitioner Minor