

**IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS**

JOHNNY C. WILLIAMS,)	
)	
Appellant,)	
vs.)	No. 94-MCA-2296
)	
STATE OF TEXAS,)	
)	
Appellee.)	

OPINION

Appellant appeals his conviction in Municipal Court for unlawfully possessing an alcoholic beverage in a city park.

Section 13.24.130A of the Municipal Code of the City of El Paso makes it unlawful to possess an alcoholic beverage in a city park. However, the term "possess" is not defined in the City Code, and therefore, the controlling definition of possession is found in the Texas Health and Safety Code, Section 481.002(38). Possession, as therein defined, means the actual care, custody, control or management of the contraband. This is the sole and controlling definition of possession used in possessory crimes. Humason v. State, 728 SW2d 363 (Tex.Crim.App. 1987).

Therefore, by providing that a defendant must, at a minimum, be aware that his conduct or the circumstances surrounding his conduct constitute possession of a prohibited substance, it is not enough for the State to show that a defendant was merely present in the vicinity of a prohibited substance. It is incumbent on the State to provide proof that a defendant intentionally or knowingly exercised actual care, custody, control or management over a prohibited substance,

and must provide evidence of "**affirmative links**" between a defendant and a prohibited substance in order to sustain a conviction. Humason, supra, McGoldrick v. State, 682 SW2d 573 (Tex.Crim.App.1985).

Mere presence in the vicinity of a prohibited substance has never been sufficient to establish either joint or sole possession. Humason, supra, Waldon v. State, 579 SW2d 499 (Tex.Crim.App.1979).

In this case, Appellant's principal contention is that he was only in close proximity to the bottle of beer, and that he never touched nor drank from it, but that another person had possessed the beer who temporarily left the scene to relieve himself when the officer approached Appellant. Unfortunately, there is no Statement of Facts contained in the record before this Court that would show this Court what evidence was introduced before the Trial Court to establish the "affirmative links" between Appellant and the prohibited substance. Although mindful that questions relating to the sufficiency of the evidence cannot be addressed without a Statement of Facts, this Court has in the past, when the interest of justice requires, remanded the case to the Trial Court to give Appellant the opportunity to request a Statement of Facts, as well as for the prosecution to determine whether they have sufficient evidence to proceed with the prosecution. This Court believes that this case presents such a situation, and therefore, remands this case to the Trial Court for further proceedings consistent with this Opinion.

Appellant also contends that he was also charged with having a glass container in a park, an offense for which he was found "not guilty" and that such finding bars his trial on the possession charge. That point is without merit because the offenses are separate and require proof of different elements, and therefore, present no bar to the prosecution of the possession charge because of the acquittal on the other charge.

Having determined that the interest of justice require a retrial, this cause is hereby remanded to the Trial Court.

SIGNED this 13 day of Dec., 1994.


JUDGE

JUDGMENT

The Judgment of the Trial Court is hereby reversed and the case is remanded for new trial.

SIGNED this 13 day of Dec., 1994.


JUDGE