

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT DILLINGHAM

STATE OF ALASKA,)

Plaintiff,)

v.)

MELVIN JOHN SCHROEDER, Jr.,)

Defendant.)

Case No. 3DI-08-491 CR

Order Dismissing Indictment

The motion to dismiss the indictment in this case¹ raises difficult issues of constructive possession, since there was no evidence presented to the Grand Jury that the defendant physically possessed or was even in close proximity to the cocaine that forms the basis for the charge.² Accordingly, when the State failed to respond to the motion, I entered an order *sua sponte* extending the time within which it might file an opposition.³ No opposition was filed, nor was a request for additional time.

Rhonda Nicazio testified to the Grand Jury that Mr. Schroeder asked her to pick up some dairy products at his Anchorage apartment and deliver them to his wife's coffee shop in Dillingham,⁴ Bay Moka. There were two coolers, a box and a vacuum cleaner sitting outside his apartment. While she couldn't fit the vacuum

¹ Motion to Dismiss Indictment, filed 1/30/09.

² Indictment returned 11/10/08, citing AS 11.71.040(3)(a).

³ Order of 2/23/09.

⁴ Ex. A to defendant's motion; Grand Jury transcript at 8-9.

cleaner, Ms. Nicazio took the coolers and box to Dillingham, and left them at the airport. The coolers were not sealed or labeled.⁵ Acting on a tip, the police obtained permission from Mr. Schroeder's wife to conduct a search, and found cocaine hidden in one of the coolers, as well as a grocery receipt in the name of Bay Moca.⁶ Ms. Schroeder was evasive when asked who shipped the products,⁷ and it is unknown whether either of the Schroeders were physically present in Anchorage during the relevant time period.⁸ The Grand Jury then proceeded to indict Melvin but not Leona Schroeder.⁹

It does not appear that the prosecutor read AS 11.81.900(b)(48) to the Grand Jury, which defines possession, saying instead that it was a "standard definition."¹⁰ The statutory definition includes both physical possession and the exercise of dominion or control. The problem here is that there was no evidence Mr. Schroeder was in Anchorage, or that he was ever in physical possession of the coolers either here or in Anchorage. They were unsealed and unguarded, both outside his apartment and at the Dillingham airport, and his name wasn't on them. What we have is Ms. Nicazio's statement that he was the one who directed her to pick up the coolers, and the question is whether this constitutes "the exercise of dominion or control" over the cocaine sufficient to sustain the indictment.¹¹

⁵ Tr. 12, 29-30.

⁶ Tr. 19-23, 28.

⁷ Tr. 23-28.

⁸ Tr. 26, 31.

⁹ Indictment and No True Bill, filed 11/10/08.


¹⁰ See tr. 4.

¹¹ See W. LaFare *Substantive Criminal Law* § 6.1(e) at 432-33 (2d ed. 2003).

It has become common for the prosecutor in Dillingham to fail to respond to motions or seek additional time, even when, as here, the court on its own grants an extension. This practice puts additional work on the court and often prompts defendants to file requests for a ruling or to renew a previously-filed motion, and of course further delay is also inevitable. While the prosecutor's office is very busy, it has the responsibility to prioritize and to comply with the rules, and a court faced with an unopposed motion is forced to choose among several alternatives, none of which are best practice. In a close case such as this one, in which 30 days has passed since service of the motion, and where the State declined to file within the extension that was granted, I conclude that the best course is to grant the motion.¹²

Accordingly, the indictment is dismissed.

Dated: 3/4/09

 Fred Torrisi
Fred Torrisi, Judge

I certify that on 3/4/09
a copy of this document was sent/faxed to
the attorneys of record or other

[Signature]
Clerk

DA-Mitchell (at box)
Atty-widmer (543-3394)
DPD
DPS

¹² See motion at 3.