COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1383-CR **Cir. Ct. No. 2003CF68**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VALERIE L. KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Valerie Kennedy appeals a judgment of conviction for possession of tetrahydrocannabinol (THC), contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

§ 961.41(3g)(e). Kennedy claims the trial court should have instructed the jury that the act of handling a controlled substance for the purposes of disposal does not constitute possession.

¶2 We conclude the trial court properly instructed the jury according to Wisconsin law. Any changes to the law must come from the legislature or the supreme court. In addition, even if the requested instruction were an accurate statement of the law, the facts of this case do not support giving the instruction. Therefore, we affirm the judgment.

BACKGROUND

¶3 On March 24, 2003, police searched Kennedy's home pursuant to a search warrant and found several controlled substances and drug paraphernalia. Among the drugs found was a small amount of THC in a locked cabinet in Kennedy's bedroom. On July 18, 2003, the State filed an amended criminal complaint charging Kennedy with several drug possession charges, including possession of THC. Kennedy claimed she confiscated the THC from her niece and intended to destroy it. Kennedy therefore requested the court to instruct the jury that "the act of handling a controlled substance for the purpose of disposal does not constitute possession." The trial court declined to do so and issued the standard instructions to the jury. The jury returned a guilty verdict for one count of possession of THC and acquitted Kennedy on all other counts.

STANDARD OF REVIEW

¶4 "A trial court has broad discretion in deciding whether to give a particular jury instruction …." ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶9, 280 Wis. 2d 193, 694 N.W.2d 467. However, this court "will independently review

whether a jury instruction is appropriate under the specific facts of a given case." ***Id.***

DISCUSSION

¶5 In this case, Kennedy asked the trial court to modify WIS JI—CRIMINAL 6030 (2001), the possession of a controlled substance jury instruction. WISCONSIN JI—CRIMINAL 6030 provides:

> "Possessed" means that the defendant knowingly had actual physical control of a substance.
>
> A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.
>
> It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.
>
> Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control. (Footnotes omitted).

Kennedy asked the court to include the following language: "The act of handling a controlled substance for the purpose of disposal does not constitute possession." Kennedy based her request on a California Supreme Court decision holding that possession does not include the brief handling of a narcotic for the purposes of disposal. *See* ***People v. Mijares***, 491 P.2d 1115, 1119 (Cal. 1971).

¶6 In essence, Kennedy asks this court to change current Wisconsin law to narrow the definition of possession. *See* ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977) ("Possession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused

has knowledge of the presence of the drug."). Kennedy's request is contrary to the role of the court of appeals. The court of appeals is primarily an error correcting court. ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). Any change to the current law must be made by the legislature or the supreme court. *See* ***id.***

¶7 Further, even if this court were to accept Kennedy's proposed instruction, the facts do not support giving the instruction. The cases Kennedy relies upon hold that physical control for a brief, transitory period of time in order to dispose of a controlled substance does not constitute possession. *See* ***Mijares***, 491 P.2d at 1119; *see also* ***Garland v. State***, 146 So. 637, 638 (Miss. 1933) (defendant discovered husband's contraband whiskey and immediately destroyed it).[2] Kennedy's possession was not brief or transitory. According to her own testimony, she discovered the THC and then placed the THC in a locked cabinet in her bedroom. She did not destroy the THC immediately upon discovering it.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[2] Further California decisions clarify that possession must be for a brief time in order to justify the affirmative defense of transitory possession. *See* ***People v. Martin***, 25 P.3d 1081, 1087-88 (Cal. 2001) (holding physical control of contraband during the "brief moment involved in abandoning the narcotic" was not possession).