

### EXAMINERS' ANALYSIS OF QUESTION NO. 15

Diane can be charged with the crimes of possession of cocaine; possession with intent to deliver less than 50 grams of a controlled substance, cocaine; aiding and abetting possession or possession with intent to deliver, cocaine; or conspiracy to deliver cocaine. All these answers, with the elements, warrant points. The best answer is possession with intent to deliver cocaine, the elements of which are:

1. The defendant possessed a controlled substance, cocaine;
2. The defendant knew she possessed a controlled substance, cocaine;
3. The defendant intended to deliver the controlled substance to someone else;
4. The controlled substance defendant intended to deliver was in a mixture that weighed less than 50 grams. MCL 333.7101.

'Possession' is not defined in MCL 333.7401 but is construed in its common meaning. *People v Harper*, 365 Mich 494, 506-507 (1962); cert den, 37 US 930 (1962). Possession can be actual or constructive, single or joint. *People v Mumford*, 60 Mich App 279, 282-283 (1975).

Actual possession is physical dominion or custody of an item in hand or on the premises of a person. *People v Konrad*, 449 Mich 263, 271 (1995).

Constructive possession is the authority over, or right (not necessarily legal) to, exercise control of the drug coupled with the knowledge of its presence. *People v Wolfe*, 440 Mich 508, 519-520 (1992); *Mumford*, 60 Mich App at 282-283; *Konrad*, 449 Mich at 271. Possession reaches those who own or control the drugs, but don't necessarily physically touch the drug. *Konrad*, 449 Mich at 272; *Harper*, 365 Mich at 506-507.

Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband. It is more than the presence of a person at a location, but some other connection linking the defendant to the controlled substance. *People v Davenport*, 39 Mich App 252, 256-257 (1972); *Wolfe*, 440 Mich at 520.

Sole possession is single, exclusive to only one person. Joint possession occurs when more than one person shares possession, actually or constructively. *Wolfe*, 440 Mich at 520.

Possession may be established by direct or circumstantial evidence. *Peterson v Oceana Circuit Judge*, 243 Mich 215, 217 (1928); *People v Gould*, 61 Mich App 614, 626-627 (1975). Circumstantial evidence includes traces of drugs on clothes; cocaine packs and money in sparsely furnished apartment; strong smell of mixing agent, or the presence of a drug component. *Wolfe*, 440 Mich at 521.

Aiding and abetting exists where a person intentionally assists another in committing a crime. MCL 767.39. The elements are: a crime was committed; defendant assisted before, during or after the commission of the crime; defendant intended the commission of the crime or knew the other person intended it at the time defendant gave assistance. *People v Turner*, 213 Mich App 558, 569 (1995).

Conspiracy is an intentional agreement (express or implied); between two or more persons; to intentionally commit an illegal act or do a legal act in an illegal manner. *People v Ashley*, 392 Mich 298, 310-311 (1974).

In this case there is a strong connection between Diane and the drugs. The drugs are in Diane's home, where she gets her mail. The drugs are both on top of and in a dresser which contains only women's clothes. The denomination and quantity of the money, the mixing agent and packaging are indicative of drug sales. All are connected to women's clothes. The packaging, money and location of the drugs establish a sufficient nexus between Diane and the drugs to establish "possession". The intent to deliver element can be inferred from the quantity (35 rocks); packaging (1"x1" zip lock baggies) and other circumstances, such as actual sales by her live in boyfriend Dave. *Wolfe*, 440 Mich at 524-526. Diane can be charged with possession with intent to deliver less than 50 grams of cocaine.