

## EXAMINERS' ANALYSIS OF QUESTION NO. 14

### 1. Elements of Charged Offense:

The elements of the charged offense of Possession with Intent to Deliver less than 50 grams of Cocaine are (1) the defendant knowingly possessed a controlled substance, (2) the defendant intended to deliver this substance to someone else, (3) the substance possessed was cocaine and the defendant knew it was cocaine, (4) the weight of the substance was less than 50 grams, and (5) the defendant was not legally authorized to possess this substance. MCL 333.7401(2)(a)(iv).

### 2. Sellers' Arguments Regarding Possession:

While it is true from the facts that Sellers was not arrested while in actual possession of the cocaine, the salient element is not limited to actual possession. Under Michigan law, the term "possession" connotes dominion or the right to control over the drug with knowledge of its presence or character. *People v Germaine*, 234 Mich 623, 627 (1926). The term "possession" is to be construed in its commonly understood sense and may encompass both actual and constructive possession. *People v Harper*, 365 Mich 494, 506-507 (1962). Possession may be proved by circumstantial evidence and reasonable inferences therefrom. *People v Allen*, 390 Mich 383 (1973). See also *People v Konrad*, 449 Mich 263, 271 (1995).

As stated in *People v Wolfe*, 440 Mich 508, 519-520 (1992), "A person need not have actual physical possession of a controlled substance to be guilty of physically possessing it. Possession may be either actual or constructive." In *Wolfe*, the Court observed "there was no direct evidence that defendant Wolfe actually possessed the cocaine." *Id.* at 520. Instead, the Court focused on whether he "had the right to exercise control of the cocaine and knew it was present." *Id.* citing *People v Germaine*, 234 Mich 623, 627 (1926).

Sellers' argument that the charge is unwarranted due to the lack of proof of his actual possession of the cocaine ignores the concept of constructive possession discussed above. Moreover, the stated facts easily lead to the conclusion that

the cocaine found in the bedroom was under Sellers' control, for many reasons. First, the mail on the coffee table inferentially established that Sellers lived at the address. Second, of the two men living in the home, each seemed to have their own bedroom. Third, in addition to the cocaine found in the back bedroom, also found was a prescription bottle in Sellers' name and clothing associated with his size - the latter in contrast to the clothing found in Harvey's room. It is not unreasonable to assume one would place their own clothes in a closet in one's own bedroom. Fourth, the ledger book was found in the nightstand by the bed and the notations suggest an awareness of the drug. In sum, the facts demonstrate Sellers was in control of the bedroom and its contents.

Therefore, based on application of the law to the facts presented, Sellers' argument must be rejected that proof of the possession element of the charge is lacking.

### 3. Lack of Intent:

As previously stated, the elements of the charge can be established by circumstantial evidence and inferences thereon. For the more serious offense involving the intent to deliver, that intention distinguishes the crime from the lesser offense of simple possession. For the offense of possession with intent to deliver, the possession must be coupled with a specific intent to deliver. See *People v Johnson*, 68 Mich App 697 (1976).

The stated facts easily establish an intent to deliver the cocaine and, therefore, prompt rejection of Sellers' argument. First, the large amount of the drug, 32 grams, suggests an intention for possession beyond mere usage. Second, to the extent that the first point is debatable, the cocaine being packaged in one large bag and in four "individual" bags, buttresses the point about quantity. Third, the individual bags being separate and apart from each other bespeak a purpose other than mere possession. Fourth, the names, dollar amounts, and weights contained in the ledger suggest the cocaine was destined for conveyance. Finally, the presence of a scale in the bedroom closet in close proximity to the drugs and packing material is clearly suggestive of something more involved than simple possession.

Given the foregoing, Sellers' claim of lack of the requisite intent is without merit.