

# TULANE LAW REVIEW ONLINE

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VOL. 92

APRIL 2018

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## The Blurred Line Between Possession and Possession with Intent to Distribute in Louisiana Jurisprudence

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### I. OVERVIEW

Gary Howard was in bed at his girlfriend’s apartment when police officers knocked on the front door seeking to arrest him pursuant to a warrant for violating his probation and parole.<sup>1</sup> The officers entered the bedroom after briefly speaking with Howard’s girlfriend at the apartment’s entrance.<sup>2</sup> During the conversation, she informed them that Howard was in the bedroom.<sup>3</sup> They then asked if they could retrieve him, and according to an officer’s testimony, she responded by silently stepping aside.<sup>4</sup> During the arrest, officers found eighteen grams of marijuana, eleven of which were found “in four separate bags inside a larger bag tied around the waistband of his boxer shorts” on the floor, with the remaining seven grams found in a bag inside the bedroom closet.<sup>5</sup> In addition to the bags containing the marijuana, the officers’ search of the bedroom and closet yielded a box of sandwich baggies, one-inch by one-inch jeweler bags, a

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1. State v. Howard, 2015-1404, pp. 1-2 (La. 5/3/17); 226 So. 3d 419, 421.  
2. *Id.* at p. 1; 226 So. 3d at 421.  
3. *Id.*  
4. *Id.*  
5. *Id.* at p. 2; 226 So. 3d at 421.

prescription bottle with a bag containing marijuana residue inside it, and a gun.<sup>6</sup>

Howard was subsequently charged with possession of marijuana with intent to distribute and with illegal possession of a weapon while in possession of a controlled dangerous substance.<sup>7</sup> After the trial court denied his motion to suppress the evidence obtained from the search, the matter proceeded to trial, where a jury cleared Howard of the weapons charge but found him guilty of possession with intent to distribute.<sup>8</sup> The Louisiana Second Circuit Court of Appeal affirmed Howard's conviction, finding that the evidence was sufficient to support his conviction based upon (1) the way the marijuana was packaged, which expert testimony identified as consistent with distribution; (2) the presence of additional empty bags; and (3) the lack of any paraphernalia indicative of personal use.<sup>9</sup> The Louisiana Supreme Court *held* that the evidence in the record, when viewed in the light most favorable to the prosecution, was sufficient to exclude every reasonable hypothesis of innocence advanced by the defendant. *State v. Howard*, 2015-1404, pp. 2-3 (La. 5/3/17); 226 So. 3d 419, 422.

## II. BACKGROUND

In *Jackson v. Virginia*, the United States Supreme Court held that “the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>10</sup> The Louisiana Supreme Court has recognized that Louisiana appellate courts are controlled by this standard.<sup>11</sup> Thus, to reverse a conviction for possession with intent to distribute marijuana, an appellate court in Louisiana must find that the evidence, when viewed in the light most favorable to the prosecution, was insufficient to convince any rational juror that the defendant had the intent to distribute the marijuana found in his possession.<sup>12</sup>

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; 226 So. 3d at 422.

10. 443 U.S. 307, 318-19 (1979).

11. *State v. Captville*, 448 So. 2d 676, 678 (La. 1984).

12. *See id.*

Because it concerns an individual's state of mind, intent can be—and often is—proven with circumstantial evidence in Louisiana.<sup>13</sup> However, for the purposes of proving intent to distribute, possession alone cannot provide a basis for conviction unless the amount possessed is inconsistent with personal use.<sup>14</sup> Instead, Louisiana courts consider a variety of factors in determining whether the circumstantial evidence makes an inference of intent to distribute reasonable.<sup>15</sup> These include:

- (1) whether the defendant ever distributed or attempted to distribute the drug;
- (2) whether the drug was in a form usually associated with possession for distribution to others;
- (3) whether the amount of drug created an inference of an intent to distribute;
- (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and
- (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.<sup>16</sup>

Louisiana Revised Statute section 15:438 allows for a conviction based on circumstantial evidence provided that this evidence “exclude[s] every reasonable hypothesis of innocence.”<sup>17</sup> Thus, in order to find a defendant guilty where direct evidence is lacking, the trier of fact must find that the circumstantial evidence excludes any explanation of innocence advanced by the defendant at trial.<sup>18</sup> If such an explanation is reasonably rejected by the trier of fact, then it fails and will not be considered on appeal.<sup>19</sup> Rather, the *Jackson* standard requires an appellate court to consider *alternate* explanations of innocence.<sup>20</sup> If an alternate explanation exists, then the court must

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13. See, e.g., *State v. Hearold*, 603 So. 2d 731, 735 (La. 1992) (acknowledging that “[i]ntent is a condition of mind which is usually proved by evidence of circumstances from which intent may be inferred”); see also *State v. Lilly*, 468 So. 2d 1154, 1158 (La. 1985) (defining circumstantial evidence as “proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience”).

14. See *Hearold*, 603 So. 2d at 735 (noting that mere possession of a drug in a quantity that is consistent with personal use cannot provide a basis for intent because it does not eliminate the reasonable hypothesis of innocence that the drug was purchased solely for personal use).

15. See *State v. House*, 325 So. 2d 222, 225 (La. 1975).

16. *Hearold*, 603 So. 2d at 735 (listing the factors discussed in *House*).

17. LA. REV. STAT. § 15:438 (2017).

18. See, e.g., *State v. Captville*, 448 So. 2d 676, 680 (La. 1984) (explaining that the trier of fact must find that the circumstantial evidence excludes any explanation of innocence advanced by the defendant at trial); see also *Lilly*, 468 So. 2d at 1158 (noting that direct evidence consists of proof of the existence of a fact such as the testimony of a witness who actually saw the defendant selling the drugs).

19. *Captville*, 448 So. 2d at 680.

20. *Id.*

determine whether, when viewing the evidence in the light most favorable to the prosecution, the explanation is sufficient to prevent any rational juror from finding proof of guilt beyond a reasonable doubt.<sup>21</sup> Importantly, a hypothesis of innocence that could explain the defendant's conduct is insufficient to reverse a conviction.<sup>22</sup> To result in a reversal, the hypothesis must be sufficient to convince the appellate court that, had she considered the hypothesis, a rational juror could not have found proof of guilt beyond a reasonable doubt.<sup>23</sup>

Appellate reviews of convictions for possession with intent to distribute often involve this innocence hypothesis analysis. For example, in *State v. Tong*, the Louisiana Supreme Court vacated the defendant's conviction for possession of marijuana with the intent to distribute after finding that there was no rational basis for rejecting the hypothesis that the marijuana found in the defendant's vehicle was intended for personal use.<sup>24</sup> At trial, the jury rejected the defendant's argument that the marijuana found in his vehicle actually belonged to his passenger.<sup>25</sup> Thus, the Louisiana Supreme Court did not consider this hypothesis of innocence and vacated the conviction, finding that the evidence at trial was insufficient to exclude the alternate hypothesis of innocence, namely, that the marijuana was intended for personal use.<sup>26</sup>

### III. COURT'S DECISION

In the noted case, the Louisiana Supreme Court applied the framework provided in *Jackson* in the context of a conviction for possession with intent to distribute that was based on circumstantial evidence.<sup>27</sup> The court determined that the circumstantial evidence, when viewed in the light most favorable to the prosecution, excluded both alternate hypotheses of innocence raised by the defendant on appeal.<sup>28</sup>

The court first considered the hypothesis that the defendant arranged the marijuana in multiple baggies in his waistband to prevent it from being discovered during a pat-down search.<sup>29</sup> As previously

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21. *Id.*

22. *Id.*

23. *Id.*

24. *State v. Tong*, 609 So. 2d 822, 825 (La. 1992). For further discussion of the facts in *Tong*, see *infra* notes 46-50 and accompanying text.

25. *Tong*, 609 So. 2d at 825.

26. *Id.*

27. *State v. Howard*, 2015-1404, pp. 2-3 (La. 5/3/17); 226 So. 3d 419, 422.

28. *Id.* at pp. 5-7; 226 So. 3d at 423-24.

29. *Id.* at p. 5; 226 So. 3d at 423.

noted, eleven of the eighteen grams of marijuana found in the bedroom where the defendant was sleeping were divided into four separate bags within a larger bag that was tied into the defendant's boxer shorts.<sup>30</sup> The other seven grams were found in a plastic bag inside the bedroom closet.<sup>31</sup> The court quickly rejected this hypothesis of innocence.<sup>32</sup> Based on the testimony of the arresting officer at trial, the court could not find any evidence that concealing the marijuana in this way would make it less likely to be discovered in a pat-down search.<sup>33</sup> As a result, the court found this hypothesis insufficient to prevent any rational juror from finding guilt beyond a reasonable doubt.<sup>34</sup>

The court next considered the hypothesis that the defendant purchased the marijuana for personal use and that he simply received it in the same packaging in which it was eventually discovered by the police officers.<sup>35</sup> To determine the sufficiency of this hypothesis, the court analyzed all of the circumstantial evidence that led to the defendant's conviction at trial.<sup>36</sup> It found that this hypothesis could not account for evidence found near the defendant's person at the time of his arrest that indicated an intent to distribute.<sup>37</sup> This evidence included the manner in which the marijuana was packaged, the presence of additional bags that were similar to those in which the marijuana was packaged, the gun discovered in the bedroom closet, and the lack of any personal smoking paraphernalia that might indicate that the marijuana was purchased for personal use.<sup>38</sup> The court also gave deference to the State's expert's testimony that all of the aforementioned evidence is more consistent with distribution than with personal use.<sup>39</sup> After considering all of this evidence in the light most favorable to the prosecution, the court found that a rational juror could have reasonably rejected this hypothesis of innocence.<sup>40</sup> As the court stated, "[This hypothesis] is not so reasonable that a rational juror could not have found proof beyond a reasonable doubt that

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30. *Id.* at p. 2; 226 So. 3d at 421.

31. *Id.*

32. *Id.* at p. 5; 226 So. 3d at 423.

33. *Id.* at pp. 5-6; 226 So. 3d at 423-24.

34. *Id.*

35. *Id.* at p. 6; 226 So. 3d at 424.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at pp. 6-7; 226 So. 3d at 424.

defendant possessed the marijuana with the intent to distribute it rather than use it.”<sup>41</sup>

The court also made a point of distinguishing the present case from *Tong*.<sup>42</sup> In *Tong*, the defendant was pulled over after officers spotted him driving with a broken headlight.<sup>43</sup> The officers smelled a strong odor of marijuana coming from the defendant’s vehicle, and after searching it they discovered two plastic bags, each containing approximately one-tenth of an ounce of marijuana, three additional empty plastic bags, and a dietetic scale.<sup>44</sup> The Louisiana Supreme Court reversed *Tong*’s conviction for possession with intent to distribute, finding that there was no rational basis for the conclusion that the marijuana in his possession was intended for distribution rather than for personal use.<sup>45</sup> In reaching this conclusion, the court relied on the fact that the State’s expert conceded that the strong smell of marijuana coming from the vehicle and the small quantity of marijuana discovered both indicated personal use.<sup>46</sup> Moreover, the dietetic scale, which may have indicated an intent to distribute, was of no importance to the court because the State’s expert admitted that it was too crude to measure the quantities of marijuana in the bags.<sup>47</sup>

According to the court in *Howard*, the only similarity between *Howard* and *Tong* was the small amount of marijuana discovered.<sup>48</sup> The court noted that, unlike in *Tong* where the strong odor of marijuana coming from the defendant’s vehicle was indicative of personal use, there was no similar indicia of personal use at the time of *Howard*’s arrest.<sup>49</sup> Additionally, the court refused to entertain *Howard*’s argument that there might have been smoking paraphernalia in the residence that the arresting officers did not find.<sup>50</sup> The court reasoned that doing so would impermissibly allow the jury to base its verdict on speculation.<sup>51</sup> Thus, unlike in *Tong*, the court in *Howard* found insufficient evidence to support the hypothesis that the marijuana in the defendant’s possession was intended for personal use.<sup>52</sup>

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41. *Id.*

42. *Id.* at pp. 3-4; 226 So. 3d at 422-23.

43. *State v. Tong*, 609 So. 2d 822, 823 (La. 1992).

44. *Id.* at 823-24.

45. *Id.* at 825.

46. *Id.*

47. *Id.*

48. *State v. Howard*, 2015-1404, p. 4 (La. 5/3/17); 226 So. 3d 419, 422-23.

49. *Id.*; 226 So. 3d at 423.

50. *Id.*

51. *Id.*

52. *Id.* at pp. 6-7; 226 So. 3d at 424.

The court also briefly discussed whether the district court acted properly in denying Howard's motion to suppress the evidence discovered in the bedroom.<sup>53</sup> Howard alleged that the search was unlawful because the officers did not have a search warrant to enter his girlfriend's apartment to look for him.<sup>54</sup> Agreeing with the appellate court, the Louisiana Supreme Court found that the officers did not need a warrant because, by stepping aside in response to their request to retrieve Howard, his girlfriend freely indicated her consent for them to enter.<sup>55</sup>

Though the court's decision was issued *per curiam*, Chief Justice Johnson wrote a dissent in which she vehemently disagreed with the majority's decision to uphold Howard's conviction for possession with intent to distribute.<sup>56</sup> Johnson argued that the small quantity of marijuana discovered in Howard's possession was inconsistent with the much larger quantities that the Louisiana Supreme Court had previously found indicative of an intent to distribute.<sup>57</sup> Having found that the quantity of marijuana in his possession was consistent with personal use, Johnson was unable to find an intent to distribute where indicia of such an intent, like cash or scales, were also lacking.<sup>58</sup> Finally, Johnson argued that the majority's opinion was inappropriately influenced by the officer's discovery of a gun in the closet adjacent to where the defendant slept because, as she pointed out, the defendant was acquitted of the gun charge, "thereby eliminating any evidentiary value of the gun with regard to proving his intent to distribute the marijuana."<sup>59</sup> Thus, Johnson would have vacated Howard's conviction for possession with intent to distribute in favor of simple possession.<sup>60</sup>

#### IV. ANALYSIS

In upholding Howard's conviction for possession of marijuana with intent to distribute, the Louisiana Supreme Court adds another reference point to Louisiana's often muddled jurisprudential line between simple possession and possession with intent to distribute.

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53. *Id.* at p. 7; 226 So. 3d at 424.

54. *Id.*

55. *Id.* at pp. 7-8; 226 So. 3d at 424-25.

56. *Id.* at p. 1; 226 So. 3d at 426 (Johnson, C.J., dissenting).

57. *Id.* at pp. 1-2; 226 So. 3d at 426-27.

58. *Id.* at p. 3; 226 So. 3d at 428.

59. *Id.*

60. *Id.*

The court had not addressed this issue since 1992 in *Tong*.<sup>61</sup> Prior to *Howard*, several Louisiana appellate courts had reversed convictions for possession with intent to distribute in cases where defendants possessed more than double the amount of marijuana than the defendant in *Howard*.<sup>62</sup> In fact, in *State v. Green*, the Louisiana Second Circuit Court of Appeal described the 1.62 ounces (45.93 grams) of marijuana found on the defendant as a “small quantity” that was “certainly not a sufficient amount to create a presumption of intent to distribute.”<sup>63</sup> In this regard, the court in *Howard* seems to downplay the importance of the quantity of drugs possessed by the defendant and imply that, if other indicia of distribution are met, a defendant who is found with a relatively small quantity of a controlled substance may still be guilty of intent to distribute.

On the one hand, a compelling argument can be made for moving the focus in possession with intent to distribute cases away from a simple quantity analysis. When other indicia such as scales, bags, and large amounts of cash are present, a small quantity should not necessarily provide grounds for an acquittal. In such a situation, it is very possible that the defendant was dealing the drugs and had simply sold most of his product at the time of his arrest. Thus, a small quantity alone should not preclude a reasonable juror from finding a defendant guilty of possession with intent to distribute.

On the other hand, the problem with relying on circumstantial evidence other than the amount of marijuana found on the defendant to prove that he possessed with the intent to distribute is that this evidence can often be molded to suit the reviewing court’s point of view. For example, in *Howard*, the majority distinguished the case from *Tong* by reasoning that there were indicia of personal use in *Tong* that were not present during Howard’s arrest.<sup>64</sup> Specifically, the arresting officers in *Tong* noticed a strong odor of marijuana emanating from the defendant and his vehicle that seemed to indicate that he was a user of the substance.<sup>65</sup> The majority in *Howard*

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61. *Id.* at p. 3; 226 So. 3d at 422 (majority opinion).

62. *See, e.g.*, *State v. Taylor*, 99-1154, pp. 14, 18 (La. App. 5 Cir. 2/29/00); 757 So. 2d 63, 72, 74 (reversing a defendant’s conviction for possession with intent to distribute where he possessed eighty-three grams of marijuana); *State v. Green*, 508 So. 2d 602, 606 (La. App. 2 Cir. 1987) (reversing a defendant’s conviction for possession with intent to distribute where he possessed 1.62 ounces (45.93 grams) of marijuana). In contrast, the defendant in *Howard* possessed eighteen grams (.63 ounces) of marijuana. 2015-1404 at p. 1; 226 So. 3d at 421.

63. *Green*, 508 So. 2d at 606.

64. *Howard*, 2015-1404 at p. 4; 226 So. 3d at 423.

65. *State v. Tong*, 609 So. 2d 822, 823 (La. 1992).



distinguished *Howard*'s facts by stating that the “[o]fficers here detected no smell of burnt marijuana and no means of using the marijuana was found.”<sup>66</sup> However, this statement overlooks the fact that the officers in *Tong* also did not find any smoking paraphernalia during their arrest.<sup>67</sup> Thus, the issue of whether the facts in *Tong* presented convincing indicia of personal use while the facts in *Howard* did not is far less clear than the majority in *Howard* implies. More broadly, this issue demonstrates that the decision in *Howard* is not likely to eliminate future disputes regarding whether a conviction for simple possession or a conviction for possession with intent to distribute is appropriate in borderline cases.

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66. *Howard*, 2015-1404 at p. 4; 226 So. 3d at 423.

67. *Tong*, 609 So. 2d at 824.

\* © 2018 Gabriel J. Winsberg. J.D. candidate 2019, Tulane University Law School; B.A. 2015, University of Southern California. Thank you to the members and staff of the *Tulane Law Review* for their help in preparing this Recent Development for publication. This Recent Development is dedicated to my personal and legal role models: my father, Marc Winsberg, and my grandfather, the Honorable Jerome Winsberg.