



On October 23, 2004, at approximately 3:00 PM, Officer Friendly of the United States Park Police was conducting surveillance of the parking lot of the Oxon Hill Children's Farm following recent reports of break-ins into vehicles parked in the lot. At approximately 3:45 PM, a Honda Odyssey van pulled into the parking lot and Officer Friendly observed a white female and four children exit the van and walk into the park. About 10 minutes later, according to the Officer, a tall, black male stood up next to the Odyssey van and peered into its windows. He walked around it, then went over to a silver SUV that was parked beside the Odyssey, opened one of the doors of the SUV and entered it on all fours. Officer Friendly then exited the woods and walked toward Mr. Doe; as he approached Mr. Doe exited the vehicle and spotted the Officer.

At the same time, the officer observed a second black male, dressed in a dark, blue jacket, walking toward Mr. Doe from the direction of a burgundy Mitsubishi Gallant parked nearby. It appeared to Officer Friendly as if the two were communicating, but he could not hear any words. At this point, the man in the blue jacket also spotted Officer Friendly, appeared to be startled, and veered away from the SUV.

As he approached Mr. Doe, Officer Friendly demanded identification, ordered him to place his hands on the SUV, and attempted to place him in handcuffs. Unable to get Mr. Doe arm behind his back, the officer slammed his forearm into Mr. Doe back. Mr. Doe reacted to this by quickly whirling and securing the officer in a headlock. Officer Friendly struggled to escape the headlock, pulled out his baton, and struck Mr. Doe in the forearm and legs. Mr. Doe, according to Officer Friendly's testimony, then either walked or slowly jogged away from him. The officer pursued Mr. Doe at approximately the same pace, neither of them running. As he was leaving the scene Mr.

Doe was briefly re-joined by the man in the blue jacket, but they were separated again when Officer Friendly caught up to them as they hopped over a fence.

Seconds later a police helicopter appeared overhead and Mr. Doe noticed Officer Friendly's parked police car behind a barn. Mr. Doe voluntarily stopped, was placed in handcuffs by the officer, and arrested. Officer Friendly then drove Mr. Doe back to the parking lot in his police car, where he searched the Mitsubishi Galant and spoke with the owner of the Odyssey van. The owner of the silver SUV was never located.

Mr. Doe's District of Columbia non-driver's license I.D. card and Social Security card were found in the Galant by Officer Friendly, along with a credit card belonging to Linda Loe, a purse belonging to Penny Poe and her checkbook, driver's license, and Visa card.

Mr. Doe chose not to testify.

## **B. Argument**

The testimony and evidence offered by the Government was insufficient to support a finding that Mr. Doe was guilty beyond a reasonable doubt of any of the offenses with which he was charged.

### **1. Theft**

The United States Code, 18 U.S.C. §661, provides that anyone who "takes and carries away, with intent to steal or purloin, any personal property of another" is guilty of a crime. The elements of Section 661 are: "(1) within the special maritime and territorial jurisdiction of the United States; (2) taking and carrying away; (3) with intent to steal or purloin; (4) the personal property of another." U.S. v. Spencer, 905 F.2d 1260 (9<sup>th</sup> Cir., 1989)

In this case, there is no evidence whatsoever of Mr. Doe actually “taking” or “carrying away” the property of the victims. Neither Officer Friendly nor either of the victims testified that they witnessed Mr. Doe physically “take” any of their property from their vehicles or “carry” it away. No one witnessed him in “actual possession” of the property. Instead, this case rests upon the theory of “constructive possession,” that is, proving a defendant’s possession of stolen items by showing dominion over them or “over the vehicle in which the item is located.” United States v. Perez, 897 F.2d 751, 754 (5th Cir. 1990). “[T]o establish constructive possession the government must produce evidence showing ownership, dominion, or control over ... the vehicle in which the contraband is concealed.” United States v. Blue, 957 F.2d 106, 107 (4th Cir. 1992), quoting United States v. Ferg, 504 F.2d 914, 916-17 (5th Cir. 1974).

In this case, there is little or no evidence that Mr. Doe exercised any “ownership, dominion, or control” over the Mitsubishi Galant in which the items belonging to the victims was found. Officer Friendly testified that the car was unregistered and there were no other indicia of legal or equitable ownership produced at trial. A close reading of the trial transcript reveals that Mr. Doe never claimed ownership of the car. That the car was “his” was merely assumed by the officer, and the government, based upon statements by Mr. Doe in which he claimed no such thing.

For example, on page 56 Officer Friendly testifies that he asked Mr. Doe “Where’s your ID?” to which Mr. Doe replied, “It’s in the car.” The car, not my car. On page 65, the officer testified, “I asked him which car was his. He pointed to the Galant.” Such an alleged pointing gesture cannot be taken as a statement of ownership by Mr. Doe. It is the officer who uses the word “his,” not Mr. Doe, and he had responded

previously to the officer's request for the location of his I.D. In pointing out the Galant, Mr. Doe was almost certainly merely pointing out the location of his identification, not claiming ownership of the unregistered vehicle.

Additionally, Mr. Doe had a non-driving I.D. card. He had no driver's license. Why would he own a car? The I.D. card was found in the car, along with his Social Security card, but he could have easily left it there as a passenger as a driver or owner of the car.

The American Heritage® Dictionary of the English Language, Fourth Edition, defines control as “to exercise authoritative or dominating influence over” having the “authority or ability to manage or direct.” No evidence of such “authority or ability to manage or direct” was produced at trial. Mr. Doe was never seen driving the car, or even sitting in it. There was no testimony that Mr. Doe' fingerprints were on the steering wheel or even on the keys – which were said to have been left in the ignition. And what does the fact that there were keys in the ignition prove? There was no testimony that Mr. Doe left them there.

There is another obvious possibility for ownership, dominion, or control of the Galant – the man in the blue jacket. We know nothing of him, except that Officer Friendly thought that he and Mr. Doe were together. Perhaps he owned the car, perhaps not.

In a weapons possession case, the Ninth Circuit reversed a conviction for possession of three pistols found in car in which defendant was riding even though two of the pistols were found behind his seat and within his reach, saying “[i]t is well established that mere presence as a passenger in a car from which the police recover weapons does

not establish possession. The mere proximity of a weapon to a passenger in a car goes only to its accessibility, not to the dominion or control which must be proved to establish possession." United States v. Soto, 779 F.2d 558, 560 (9th Cir. 1986). If presence in the car is insufficient to establish "dominion or control," certainly, then, Mr. Doe position outside the car is well short of the mark.

Even the Government understands that Mr. Doe was never in possession of the items. In her closing argument, Ms. Weisman said,

"It is clear that Officer Friendly did not witness the actual taking of the purse. Perhaps it was done surreptitiously. Perhaps it was done while the officer was just engaged in something else. Perhaps it was done by the man in the blue jacket while the officer was engaged with the defendant."

*Exactly*. Perhaps it was done one way, or perhaps the other: we really don't know. Perhaps the man in the blue jacket took the items; perhaps it was his car. Perhaps not. Perhaps the car was abandoned and Mr. Doe was using it for temporary shelter; Officer Friendly testified that it looked like someone was living in it. Perhaps not, but without Mr. Doe exercising dominion and control over the car and the items, there is no evidence whatsoever to put him in actual or constructive possession of them.

Officer Friendly saw him in the silver SUV, from which nothing was taken, not the Honda Odyssey of Linda Loe. When he got out of the SUV, he had nothing that belonged in it. There is no testimony to the contrary. Perhaps he was looking for a place to sleep. Perhaps not.

When the Government itself has to play a guessing game of the sort the Prosecutor engages in her closing argument, a verdict that reaches the burden of "beyond a reasonable doubt" certainly is impossible.

And make no mistake that the Magistrate Judge knew without doubt that he had to find possession on the part of Mr. Doe in order to find him guilty. In explaining his verdict he says, on page 115, that Mr. Doe had a “possessor interest” in the Galant. He concludes that based upon “well, first of all, he directs the officer to it. The keys are in it, his social security card is in it and an I.D., certainly indicating a possessor interest in that vehicle.” (See p. 114.) Speaking of the items belonging to the victims, the Judge says, “[a]gain, these are all found in the car in which the defendant has a possessor interest, and he is, in fact, in close proximity to the Odyssey and at least at one point peering into the Odyssey.” p. 115. But what does it prove that he was in close proximity to the Odyssey? He was never seen in it, or in possession of anything that was in it.

Like the Government, the Magistrate Judge engages in the guessing game: “I think I can draw the reasonable inference that somebody entered that Odyssey while Officer Friendly was there because he saw the Odyssey, and I can only conclude that it was entered somewhat surreptitiously.” (See p. 115.) Yes, somebody entered that Odyssey, we just don’t know who. The one person we know it wasn’t is Mr. Doe; Officer Friendly was watching him the whole time.

Lastly, the Judge bases his verdict, partially, on evidence that is not in the record. On page 13, he cites the officer as testifying, “Whose vehicle is that? The defendant said it was his.” That statement is nowhere in the record.

There is not simply insufficient evidence to find that Mr. Doe was ever in actual or constructive possession of the items belonging to the victims, there is no evidence of possession. On that basis, the Court must overturn the verdict of the Magistrate Judge.

## 2. Assault, Resisting, Impeding

The Statute under which Mr. Doe is charged, 18 U.S.C. §111(a), provides:

(a) In general – whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this Title while engaged in or on account of the performance of official duties...” is guilty of a crime.

This section requires that a defendant use some form of physical force or threat of force or intimidation. The government provided no such testimony from Officer Lindley. In fact, the Officer’s testimony indicates that after being “startled” at his first contact with Mr. Doe, he was the aggressive pursuer of Mr. Doe. He ordered Mr. Doe against the car even though Mr. Doe had made no move against him or to get away from him. Mr. Doe complied. He attempted to handcuff Mr. Doe even though Mr. Doe had complied quietly and immediately with his request. He slammed his forearm into Mr. Doe’ back even though Mr. Doe had made no move against him. It was only after Officer Friendly executed his forearm to the back maneuver that Mr. Doe protected himself by whirling around and putting his attacker in a headlock.

Officer Friendly then began striking Mr. Doe with his baton, or ASP. Even at this point Mr. Doe never strikes or even pushes Officer Friendly to the ground, he merely walks quickly – or jogs slowly – away, trying to avoid further trouble. His retreat is the result of the physically aggressive behavior of Officer Friendly.

WHEREFORE, Michael Doe, through his attorney Mark Roe, prays that this court:

- A. Vacate the guilty verdicts handed down by Magistrate Judge Moe, and
- B. Vacate the sentence handed down by the Magistrate Judge, and
- C. Order such other relief as this Court deems appropriate.

Respectfully submitted,

---

Mark Roe, Esquire  
Attorney for Defendant