



1994

## Criminal Law - Catch Me with a Can: North Dakota's Minor in Possession of Alcohol Statute Requires Proof of Actual Possession

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### Recommended Citation

Campbell, Donald T. (1994) "Criminal Law - Catch Me with a Can: North Dakota's Minor in Possession of Alcohol Statute Requires Proof of Actual Possession," *North Dakota Law Review*. Vol. 70: No. 4, Article 10. Available at: <https://commons.und.edu/ndlr/vol70/iss4/10>

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CRIMINAL LAW—CATCH ME *WITH A CAN*: NORTH DAKOTA'S  
MINOR IN POSSESSION OF ALCOHOL STATUTE REQUIRES  
PROOF OF "ACTUAL" POSSESSION  
*In re K.S.*, 500 N.W.2d 603 (N.D. 1993)

I. FACTS

On August 25, 1992, K.S., a juvenile, attended a party at a residence in Grand Forks, North Dakota.<sup>1</sup> K.S. went to the party to say good-bye to her friends before she moved out of town the following day.<sup>2</sup> She went to the party despite the fact that she knew alcoholic beverages would be present.<sup>3</sup>

The Grand Forks Police went to the house in response to a "loud party" complaint.<sup>4</sup> After knocking several times on the door and announcing himself, Officer Ellingson was allowed into the house.<sup>5</sup> Once inside, Ellingson discovered one bottle of vodka, nine opened cans of beer, and numerous empty beer cans.<sup>6</sup> The investigating officer also discovered K.S. hiding in an upstairs closet with a male friend who had been drinking.<sup>7</sup>

At the time K.S. was discovered, she had been at the party for approximately thirty minutes, had neither consumed nor intended to consume any alcoholic beverages, and had not exercised any degree of control over any of the alcohol.<sup>8</sup> Nevertheless, K.S. was charged with the "unruly offense" of minor in possession of an alcoholic beverage in violation of section 5-01-08 of the North Dakota Century Code.<sup>9</sup>

Upon a judicial hearing, the referee ruled that K.S. was guilty of the offense. However, pursuant to K.S.'s written request for review, the Northeast Central Judicial District Juvenile Court "set aside" the judicial referee's finding that K.S. had committed the "unruly act" of minor in possession of alcohol.<sup>10</sup> The state appealed the vacation of the judicial

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1. *In re K.S.*, 500 N.W.2d 603, 603 (N.D. 1993).

2. *Id.* K.S. did not purchase or bring any alcoholic beverages to the party. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* Officer Ellingson testified that while he was waiting for an answer at the door, he became aware that "juveniles[] began running upstairs—I could hear them running upstairs and I could also hear them hiding within the house." *Id.* at 603.

6. *In re K.S.*, 500 N.W.2d at 603.

7. *Id.*

8. *Id.*

9. *Id.* at 604. K.S. was also charged with the delinquent act of interfering with a public officer in violation of section 9-0204 of the Ordinances of the City of Grand Forks. *Id.* The judicial referee ruled that K.S. was guilty of the offense, and the juvenile court confirmed the referee's finding. *Id.*

10. *In re K.S.*, 500 N.W.2d at 604. Section 27-05-30 of the North Dakota Century Code provides, in relevant part, that district courts are to "assign a referee to preside in any case or proceeding provided for in title 14, chapter 27-20 [which includes all juvenile proceedings], and chapter 28-25 pursuant to rules of the supreme court." *Id.* at 604 (quoting N.D. CENT. CODE § 27-05-30 (1991)). "The findings and recommendations of the judicial referee are deemed to have the

referee's findings, arguing that by applying the doctrine of constructive possession, enough evidence existed to support a judgment of conviction for the offense.<sup>11</sup> The North Dakota Supreme Court, in a majority opinion written by Justice Meschke, *held* that the strict liability crime of minor in possession of an alcoholic beverage required the state to prove that K.S. was guilty of "actual possession" rather than constructive possession.<sup>12</sup> Thus, the juvenile court's order setting aside the conclusion that K.S. committed the "unruly act" of being a minor in possession of alcohol was affirmed.<sup>13</sup>

## II. LEGAL BACKGROUND

Public policy calling for a more "pragmatic means of facilitating law enforcement" has dictated that mere possession of contraband such as narcotics, or alcohol for a minor, is illegal.<sup>14</sup> Creating a crime of possession in these instances increases the efficiency of law enforcement because possession is easier to prove than "use, distribution, or sale."<sup>15</sup> However, "[a]lthough frequently used in both ordinary speech and at law, [possession] remains one of the most elusive and ambiguous of legal constructs."<sup>16</sup>

Black's Law Dictionary explains the general theory of criminal possession as follows:

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effect of an order of the district court until superseded by a written order of a district court judge." *Id.* (quoting N.D. SUPREME COURT ADMIN. RULES AND ORDERS Rule 13, § 10(a)). However, "[a] review of the findings and recommendations . . . shall be ordered if a party files a written request for a review . . . . The review by a district court judge shall be a review of the record, unless the court orders a hearing of the proceeding." *Id.* (quoting N.D. SUPREME COURT ADMIN. RULES AND ORDERS, Rule 13, § 11 (1994)).

11. *Id.* at 604-06. Section 27-20-56 of the North Dakota Century Code, which controls the review of a juvenile court judgment, states in relevant part, that "[a]n aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court . . . ." *Id.* at 605 (citing N.D. CENT. CODE § 27-20-56 (1991)). "The appeal must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the juvenile court[.]" *Id.* at 605 (citing N.D. CENT. CODE § 27-20-56 (1991)). Furthermore, "[a]ppellate review of the juvenile court is equivalent to the former procedure of trial de novo[.]" and therefore the evidence is reviewed independently. *Id.* (citing *In re B.S.*, 496 N.W.2d 31, 32 (N.D. 1993) and *In re J.D.Z.*, 431 N.W.2d 272, 274 (N.D. 1988)).

12. *In re K.S.*, 500 N.W.2d at 608.

13. *Id.*

14. Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 754 (1972) (regarding the effects of criminalizing possession). See also George H. Singer, Note, *Constructive Possession of Controlled Substances: A North Dakota Look at a Nationwide Problem*, 68 N.D. L. REV. 981, 982 (1992) (discussing modern courts' use of a broader interpretation of possession as a matter of public policy).

15. Whitebread & Stevens, *supra* note 14, at 754 (acknowledging the benefit to law enforcement officials from the criminalization of possession). See also Singer, *supra* note 14, at 982 (discussing the proscription of possession as a more efficient means of law enforcement).

16. Whitebread & Stevens, *supra* note 14, at 751 (discussing the controversial use of the doctrine of constructive possession). See also Singer, *supra* note 14, at 981 (referring to possession as a major source of controversy in criminal law).

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.<sup>17</sup>

Traditionally, criminal liability for possession was limited to instances when actual possession existed.<sup>18</sup> In *Tyler v. Commonwealth*,<sup>19</sup> the Virginia Supreme Court of Appeals opined that it is "well-settled law" that actual or "exclusive" possession, rather than constructive possession, is required for the imposition of criminal liability.<sup>20</sup> The court reasoned:

[C]onstructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed, as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key.<sup>21</sup>

However, despite the early courts' traditional approach requiring proof of actual possession, courts today apply a "more expansive[]" interpretation of the type of possession that is required for imposing criminal liability upon an accused.<sup>22</sup> In an effort to further facilitate law enforcement, modern courts apply the doctrine of constructive possession as a sufficient means for establishing guilt in possession-type crimes.<sup>23</sup> The doctrine of constructive possession broadens the application of possession-type crimes to include situations in which

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17. BLACK'S LAW DICTIONARY 1163 (6th ed. 1990) quoted in *In re K.S.*, 500 N.W.2d 603, 606 (N.D. 1993).

18. See generally *Tyler v. Commonwealth*, 91 S.E. 171, 172 (Va. 1917).

19. 91 S.E. 171 (Va. 1917).

20. *Tyler v. Commonwealth*, 91 S.E. 171, 172 (Va. 1917).

21. *Id.* (citing 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 33, at 34 (13th ed. 1876)).

22. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.2(e), at 281 (1986) (stating that courts apply a broader definition of possession to include instances when actual possession cannot be directly proven).

23. *State v. Connery*, 441 N.W.2d 651, 655 (N.D. 1989) (showing that the possession requirement for a narcotics conviction can be fulfilled by an affirmative showing of either actual or constructive possession). See also *Commonwealth v. Aviles*, 615 A.2d 398, 401 (Pa. Super. Ct. 1992) (stating that constructive possession is "a legal fiction, a pragmatic construct [designed] to deal with the realities of criminal law enforcement").

actual physical control cannot be directly proven, but a strong inference exists that the defendant actually possessed the substance at one time.<sup>24</sup>

Another principle that courts have applied to ease the burden on law enforcement officials is the doctrine of strict liability.<sup>25</sup> The doctrine of strict liability enables guilt to be proven without proof of any criminal intent or culpability.<sup>26</sup> Thus, in possession crimes, defendants could be found guilty of possession whether they knew they possessed the contraband or not.<sup>27</sup> Courts have also applied this doctrine in conjunction with the doctrine of constructive possession, creating a very powerful enforcement tool by which a defendant could be found guilty of possession for merely being in the presence of the contraband.<sup>28</sup>

The North Dakota Supreme Court's first discussion of the constructive possession doctrine was in *Henry S. Grinde Corp. v. Klindworth*.<sup>29</sup> *Klindworth* involved a civil action brought to recover a broker's commission for the sale of realty.<sup>30</sup> In *Klindworth* the supreme court determined that constructive possession and partial performance were insufficient factors to preserve an oral contract from being avoided by the statute of frauds.<sup>31</sup> North Dakota law primarily limited the application of constructive possession to real property issues, such as in *Klindworth* and other related civil actions,<sup>32</sup> until *State v. Larson*.<sup>33</sup>

*Larson* represented the supreme court's first discussion of constructive possession in a criminal proceeding.<sup>34</sup> Supreme Court

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24. *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975) (defining the purpose of the doctrine of constructive possession).

25. LAFAVE & SCOTT, *supra* note 22, § 3.8(c), at 247 (stating that "[t]he reason for having statutes imposing criminal liability without fault are those of expediency: in some areas of conduct it is difficult to obtain convictions if the prosecution must prove fault, so enforcement requires strict liability").

26. *Id.* See, e.g., *State v. Rippley*, 319 N.W.2d 129, 133 (N.D. 1982) (finding that the North Dakota possession statute is a strict liability statute requiring no proof of knowledge or intent).

27. See *id.* See also *State v. Morris*, 331 N.W.2d 48, 56-57 (N.D. 1983) (stating that possession of narcotics is a strict liability offense).

28. *Morris*, 331 N.W.2d 56-57 (finding that constructive possession does not require that the defendant have knowledge of the contraband's presence in order to be found guilty of the strict liability offense).

29. 44 N.W.2d 417, 424 (N.D. 1950) (stating that "constructive possession is that possession which the law annexes to the legal title or ownership of property, when there is a right to the immediate actual possession of such property").

30. *Henry S. Grinde Corp. v. Klindworth*, 44 N.W.2d 417, 424 (N.D. 1950).

31. *Id.*

32. See *State v. Rosenquist*, 51 N.W.2d 767, 786 (N.D. 1952) (regarding an adverse claim to realty and an action to quiet title); *Grandin v. Gardiner*, 63 N.W.2d 128, 133 (N.D. 1954) (regarding an adverse claim to realty); *Tarnovsky v. Sec. State Bank*, 77 N.W.2d 828, 832 (N.D. 1956) (regarding an action to quiet title).

33. 274 N.W.2d 884 (N.D. 1979).

34. *State v. Larson*, 274 N.W.2d 884, 886 (N.D. 1979). In *Larson*, the defendant appealed from a conviction for possession of heroin, because he was convicted despite testimony from his back seat passenger who stated that he, not the defendant, maintained exclusive possession over the narcotic

Commissioner Burdick, in a concurring opinion, stated that possession of controlled substances "may be actual or constructive, joint or exclusive."<sup>35</sup>

Three years later, the doctrine of constructive possession was again before the court in a criminal setting; this time it was in the form of a jury instruction for the offense of conspiracy to distribute a controlled substance.<sup>36</sup> In *State v. Lind*,<sup>37</sup> the supreme court reviewed the trial judge's supplemental jury instruction, which stated that possession as used in the previous instructions could be established by actual or constructive possession.<sup>38</sup> Although these two decisions provide an introduction to constructive possession, neither one concretely established constructive possession as an applicable instrument for proving possession in North Dakota criminal law.

It was *State v. Morris*<sup>39</sup> that established the application of the doctrine of constructive possession in North Dakota criminal law as sufficient proof of possession in controlled substance cases.<sup>40</sup> In *Morris*, the supreme court affirmed a conviction for possession of controlled substances with intent to deliver when the defendants were merely passengers in a vehicle wherein marijuana was discovered by the police.<sup>41</sup> The court ruled that "[p]ossession [of controlled substances] may be actual or constructive, exclusive or joint, and may be shown entirely by circumstantial evidence," and that "[t]o prove constructive possession the State must present evidence which establishes that the accused had the power and capability to exercise dominion and control over the contraband."<sup>42</sup> Also, since the offense is a strict liability crime requiring no *mens rea* "[t]he State . . . does not have to prove either (1) the accused had knowledge of the presence of the drug, or (2) the accused had knowledge of the identity of the substance . . . ."<sup>43</sup>

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until he placed it under the back seat, where it was discovered by the police search. *Id.* at 885. The court reasoned that it had sufficient evidence to affirm the conviction in view of the other drug-related paraphernalia found in the vehicle, under the front seat, and in the pocket of defendant's coat. *Id.*

35. *Id.*

36. *State v. Lind*, 332 N.W.2d 826, 846 (N.D. 1982).

37. 332 N.W. 2d 826 (N.D. 1982).

38. *State v. Lind*, 332 N.W.2d 826, 846 (N.D. 1982) (ruling that if the judge's instruction was in error, it was merely harmless error).

39. 331 N.W.2d 48 (N.D. 1983).

40. *State v. Morris*, 331 N.W.2d 48, 53-54 (N.D. 1983).

41. *Id.* at 54-55.

42. *Id.* at 53 (citing *Larson*, 274 N.W.2d 884). See *infra* note 56 and accompanying text (defining the *Wilkie* standard for a conviction based on constructive possession as "requir[ing] that the facts permit the inference of an intent to possess" and that "[u]nless actual control exists, there must be found from the surrounding facts and circumstances, aided by reasonable inferences, an intent to exercise control over the prohibited item[']").

43. *Morris*, 331 N.W.2d at 54 (citations omitted).

The court's holding in *Morris* remains the North Dakota standard for proving possession in controlled substance cases.<sup>44</sup> However, the *Morris* standard was notably narrowed when it was applied to a minor in possession charge.<sup>45</sup> In *Wahpeton v. Wilkie*,<sup>46</sup> a juvenile defendant was found not to be in violation of the possession ordinance when his co-renter held a party at their residence in which the defendant neither participated nor drank any of the available alcohol, but was present at the location when the police investigated.<sup>47</sup> The City of Wahpeton argued that the defendant should be found guilty of possession based on constructive possession pursuant to *Morris*.<sup>48</sup> However, the court in *Wilkie* relied on the Wisconsin Court of Appeals decision of *In re R.B.*<sup>49</sup>

*In re R.B.*<sup>50</sup> is factually similar to *In re K.S.* in that it involved a juvenile who attended a beer party but "denied obtaining beer, drinking beer, or intending to drink beer," and alleged he was at the party only to "visit."<sup>51</sup> In *In re R.B.*, the Wisconsin Court of Appeals reversed the trial court and found that without proof of actual possession, evidence of an "intent to possess" is required for a conviction.<sup>52</sup> Thus, with insufficient evidence to establish an "intent to possess," R.B. was found innocent.<sup>53</sup>

In accordance with *In re R.B.*, the court in *Wilkie* found that "a conviction based on constructive possession 'requires that the facts permit the inference of an intent to possess . . . [u]nless actual control exists, [then] there must be found from the surrounding facts and circumstances, aided by reasonable inferences, an intent to exercise control over the prohibited item.'"<sup>54</sup> This language narrows the *Morris* standard for constructive possession by adding a requirement to prove an intent to possess or exercise control over the prohibited item.<sup>55</sup> The

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44. See *State v. Dymowski*, 458 N.W.2d 490, 499-500 (N.D. 1990) (applying the *Morris* standard); *State v. Connery*, 441 N.W.2d 651, 655 (N.D. 1989) (applying the *Morris* standard). But see *State v. Michlitsch*, 438 N.W.2d 175 (N.D. 1989) (adding an affirmative defense of unwitting or unknowing possession for charges of possession of a controlled substance, despite the fact that the offense is a strict liability crime in which *mens rea* elements such as "unwitting" and "unknowing" should be irrelevant).

45. *Wahpeton v. Wilkie*, 477 N.W.2d 215, 216-17 (N.D. 1991).

46. 477 N.W.2d 215 (N.D. 1991).

47. *Wahpeton v. Wilkie*, 477 N.W.2d 215, 216 (N.D. 1991).

48. *Id.*

49. *Id.* at 216-17 (quoting *In re R.B.*, 322 N.W.2d 502, 503 (Wis. Ct. App. 1982)).

50. 322 N.W.2d 502 (Wis. Ct. App. 1982).

51. *In re R.B.*, 322 N.W.2d 502, 503 (Wis. Ct. App. 1982).

52. *Id.*

53. *Id.*

54. *Wilkie*, 477 N.W.2d at 216-17 (quoting *In re R.B.*, 322 N.W.2d 502, 503 (Wis. Ct. App. 1982)).

55. *Id.* The *Morris* standard does not require proof of an intent to possess, but only that the accused had the power and culpability to exercise dominion and control over the contraband. *State v. Morris*, 331 N.W.2d 48, 53 (N.D. 1983).

supreme court was unable to find sufficient evidence in *Wilkie* to constitute an "intent to [possess or] exercise control" over an alcoholic beverage; thus, no possession, actual or constructive, existed on the part of the defendant.<sup>56</sup>

The *Wilkie* decision is important because it is the first time the North Dakota Supreme Court applied the *Morris* standard of constructive possession to an offense other than possession of controlled substances.<sup>57</sup> Furthermore, it concludes by showing that although the liberal *Morris* standard of constructive possession is sufficient for controlled substance cases, the standard for minor in possession of alcohol cases will apply a different theory of constructive possession which is more strict and requires proof of an intent to possess the contraband.<sup>58</sup>

### III. ANALYSIS

In *In re K.S.*, the North Dakota Supreme Court examined what constitutes "possession" under North Dakota's minor in possession of an alcoholic beverage statute,<sup>59</sup> and specifically, whether possession should

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56. *Wilkie*, 477 N.W.2d at 218. The court reasoned that being a co-renter with the party's host is not enough evidence to constitute constructive possession absent an "additional link" showing some control or possession of the alcohol by the minor defendant. *Id.*

57. *Id.* Several other states have previously addressed the issue of constructive possession in relation to minor in possession offenses. See *Kastl v. State*, 796 S.W.2d 848, 850 (Ark. App. 1990) (ruling that "evidence that there were beer cans beside the [juvenile's] vehicle, that beer was found in the immediate proximity of the appellant in the vehicle, and that there was the smell of beer on the applicant's person" was insufficient to establish that the juvenile appellant constructively possessed the beer found in the car absent any "additional link" between the juvenile and the beer); *State v. Harris*, 352 N.W.2d 581, 582 (Neb. 1984) (requiring the state to prove that a juvenile had "knowledge and consciousness of possession" in order to support a conviction based on constructive possession for a minor being in possession of alcohol); *State v. Embrey*, 198 N.W.2d 322, 324 (Neb. 1972) (finding sufficient evidence to indicate "knowledge and consciousness of possession" when minors were observed leaving a bar carrying beer, avoiding the patrol car when driving away, and when pulled over open beer was discovered and the juvenile had alcohol on his breath); *State v. Eberhardt*, 125 N.W.2d 1, 4 (Neb. 1963) (involving a juvenile who was using his mother's car in which two bottles of beer were discovered on the front floor; the court found that there was insufficient evidence to prove constructive possession since the juvenile had no knowledge of the alcohol until the search and seizure by the officer); *State v. Hornaday*, 713 P.2d 71, 74 (Wash. 1986) (finding that "constructive possession of liquor denotes control of the substance," and that in order to sustain a conviction for minor in possession of alcohol, the state must prove that the defendant "exercise[d] 'dominion or control' over [the] substance"). See *supra* notes 50-53 and accompanying text (regarding *In re R.B.* and the Wisconsin Court of Appeals opinion on the issue).

58. *Wilkie*, 477 N.W.2d at 217-18. *But cf. supra* note 55 (regarding the *Morris* standard for possession).

59. The North Dakota minor in possession of alcohol statute reads:

Except as permitted in this section and section 5-02-06, any person under twenty-one years of age purchasing or attempting to purchase alcoholic beverages, consuming alcoholic beverages other than during a religious service, being under the influence of alcoholic beverages, or being in possession of alcoholic beverages, or furnishing money to any person for such purchase, or entering any licensed premises where alcoholic beverages are being sold or displayed, except a restaurant when accompanied by a



be actual or constructive.<sup>60</sup> The state argued that since K.S. knowingly attended a party at which K.S. knew alcoholic beverages would be available, K.S. was guilty of possession via *Morris* and the doctrine of constructive possession.<sup>61</sup> Furthermore, the state argued that the offense is a strict liability crime<sup>62</sup> and therefore, according to *State v. Michlitsch*,<sup>63</sup> her only defense is the affirmative defense of being an unwitting or unknowing possessor.<sup>64</sup> Thus, the state contended that since K.S. constructively possessed alcoholic beverages and "did not avail herself of the affirmative defense . . . of unwitting or unknowing possession," "she is strictly liable for the offense of minor in possession of [alcohol]."<sup>65</sup> K.S. maintained that the minor in possession statute does not create a strict liability offense, and that the juvenile court ruled correctly in finding that mere presence, absent any proof of purchase, consumption, control, or intent to control or consume, did not constitute a violation of the statute.<sup>66</sup>

The court began its analysis of the state's argument by agreeing that the minor in possession statute creates a strict liability crime.<sup>67</sup> The court noted that there is no culpable mental state defined within the statute, and

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parent or legal guardian or in accordance with section 5-02-06, or if the person is a law enforcement officer entering the premises in the performance of official duty, is guilty of a class B misdemeanor. The court may, under this section, refer the person to an outpatient addiction facility licensed by the state department of human services for evaluation and appropriate counseling or treatment.

N.D. CENT. CODE § 5-01-08 (1987 & Supp. 1993).

K.S. was also in violation of the Grand Forks minor in possession city ordinance which, in relevant part, states:

It shall be unlawful for any person under the age of 21 years to:

1. Purchase or attempt to purchase alcoholic beverages;
2. Consume alcoholic beverages other than during a religious service;
3. Be under the influence of alcoholic beverages; or
4. Possess alcoholic beverages, except as otherwise permitted in Section 21-0222.

GRAND FORKS, N.D., ORDINANCE NO. 3188 (1992).

However, because the North Dakota Century Code provides that crimes defined by state law shall not be "superseded by any city or county ordinance" K.S. was only prosecuted for the state offense. *In re* K.S. 500 N.W.2d at 605, citing N.D. CENT. CODE § 12.1-01-05 (1985).

60. *In re* K.S., 500 N.W.2d 603, 605-07 (N.D. 1993).

61. *Id.* at 605-06.

62. *Id.*

63. 438 N.W.2d 175 (N.D. 1989).

64. *Id.*; see *State v. Michlitsch*, 438 N.W.2d 175, 178 (N.D. 1989) (creating an affirmative defense of unwitting or unknowing possession for strict liability possession of a controlled substance).

65. *In re* K.S., 500 N.W.2d at 605.

66. *Id.* at 604.

67. *Id.* at 606.

the Century Code does not provide any guidance on the degree of culpability required for crimes outside the scope of Title 12.1.<sup>68</sup>

However, the North Dakota Supreme Court had previously ruled that section 39-08-07,<sup>69</sup> another criminal statute outside the scope of Title 12.1 which does not define a culpability requirement, is a strict liability offense.<sup>70</sup> Thus, in *In re K.S.*, the court reasoned by analogy that the minor in possession statute creates a strict liability offense, which marked the first determination by the North Dakota Supreme Court of the culpability required for proof of the offense.<sup>71</sup>

Having determined that the offense is a strict liability crime, the court turned its attention towards interpreting the word "possession" as used in the statute.<sup>72</sup> Finding the legislative history to be "unrevealing," the court turned to the "manifest purpose and design" of the statute and its "plain language."<sup>73</sup> The court reasoned that the "manifest purpose and design" of the statute was "to dissuade minors from consuming alcohol."<sup>74</sup> However, the court found it "difficult to imagine how this . . . objective would be effectuated by convicting minors of a crime when they have not actually taken alcohol into their control."<sup>75</sup> Furthermore, the court found that limiting the statute's definition of possession to include actual possession, and not constructive possession, would "avoid any implication that a minor may be chargeable when parents or guardians keep alcoholic beverages in the home for their own use."<sup>76</sup> The court found this type of absurd enforcement situation to be outside the scope of the statute because "an ambiguous statute [should be

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68. *Id.* Title 12.1 is the North Dakota Century Code title on crimes. *But see* N.D. CENT. CODE § 12.1-02-02(2) (1985) (stating that "[i]f a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully"). However, the North Dakota Supreme Court has held that this provision applies only to crimes described in title 12.1 of the Century Code, and not to other crimes described outside of title 12.1. *Dickinson v. Mueller*, 261 N.W.2d 787, 789 (N.D. 1977). Thus, section 12.1-02-02(2) was inapplicable in *In re K.S.* *See In re K.S.*, 500 N.W.2d at 606, n. 3.

69. N.D. CENT. CODE § 39-08-07 (1993) (mandating that the offense of striking an unattended vehicle is a class A misdemeanor).

70. *In re K.S.*, 500 N.W.2d at 606 (citing *State v. Nygaard*, 447 N.W.2d 267, 271 (N.D. 1989) (citing *State v. Olson*, 356 N.W.2d 110, 112 (N.D. 1984))).

71. *Id.* Although *Wilkie* involved a dispute concerning the minor in possession of alcohol statute, the court never made a determination of the culpability required to prove a violation of the offense. *Wahpeton v. Wilkie*, 477 N.W.2d 215 (N.D. 1991).

72. *In re K.S.*, 500 N.W.2d at 606-07.

73. *Id.*

74. *Id.* at 606.

75. *Id.*

76. *In re K.S.*, 500 N.W.2d at 607 (reasoning that the doctrine of constructive possession, as applied to the minor in possession of alcohol offense, is overbroad and would create "obvious enforcement difficulty").

construed] to avoid an absurd meaning."<sup>77</sup> Thus, "under [the minor in possession of alcohol statute], 'possession' requires that a minor exercise some degree of actual dominion or control over an alcoholic beverage."<sup>78</sup>

Besides the statutory rules of construction, the court also found support for its definition of possession in prior case law.<sup>79</sup> The court cited its previous decision in *In re J.D.*,<sup>80</sup> which involved a juvenile defendant who was a passenger in a car that was being driven without the owner's consent.<sup>81</sup> In *In re J.D.*, the court found that the juvenile was not "exercis[ing] control" sufficient to establish unauthorized use of a motor vehicle when the juvenile did not exercise any "authority, direction or command over the car."<sup>82</sup> The court in *In re K.S.* found this reasoning to be consistent with the logic applied in this case in that mere presence, absent some command or control over the prohibited item, is insufficient for imposing criminal liability.<sup>83</sup>

Next, the *In re K.S.* court commended the juvenile court's reliance upon *Wilkie*.<sup>84</sup> The court stated that it agreed with the *Wilkie* determination that a minor in possession of alcohol conviction, based on constructive rather than actual possession, requires that the surrounding facts and circumstances "permit the inference of an intent to possess" the alcoholic beverage.<sup>85</sup>

The supreme court's agreement with the juvenile court's application of *Wilkie* provides for some interesting analysis. For example, the court stated that it was "confining [the] strict liability offense to actual possession,"<sup>86</sup> and it held that "possession," under the minor in possession statute, requires proof of "some degree of actual dominion or control over an alcoholic beverage."<sup>87</sup> Thus, the court appears to be limiting the definition of possession, as used in the statute, to actual possession. However, the definition of possession in *Wilkie* includes constructive

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77. *Id.* (citing *Aanenson v. Bastien*, 438 N.W.2d 151, 156 (N.D. 1989)).

78. *Id.* at 608.

79. *Id.* at 607.

80. 494 N.W.2d 160 (N.D. 1992).

81. *In re K.S.*, 500 N.W.2d at 607 (citing *In re J.D.*, 494 N.W.2d 160, 164 (N.D. 1992)).

82. *In re J.D.*, 494 N.W.2d at 164. It must be proven that the actor was "exercis[ing] control" in order to establish the requisite culpability for the offense of unauthorized use of a motor vehicle. N.D. CENT. CODE § 12.1-23-06(1) (1985).

83. *In re K.S.*, 500 N.W.2d at 607; see *Wilkie*, 477 N.W.2d 215, 218 (N.D. 1991) (quoting *City of Carbondale v. Nelson*, 484 N.E.2d 392, 394 (Ill. Ct. App. 1985), which stated that "proximity" alone by the minor defendant is not enough evidence for the state "to prove [an] ordinance violation by a clear preponderance of the evidence").

84. *In re K.S.*, 500 N.W.2d at 607.

85. *Id.* at 608.

86. *Id.* at 607.

87. *Id.* at 608.

possession.<sup>88</sup> Also, the *Wilkie* definition of constructive possession requires proof of an "intent to possess."<sup>89</sup> However, the court in *In re K.S.* ruled that the minor in possession of alcohol offense is a strict liability crime, theoretically making intent irrelevant.<sup>90</sup> Therefore, in order to reconcile the *In re K.S.* court's adoption of *Wilkie* with its holding, one must look at the court's possible reasons for adopting *Wilkie*.

One argument for the *In re K.S.* court's seemingly inconsistent position is that the court was only agreeing with the juvenile court's application of *Wilkie* as support for the premise that mere presence, knowledge, and proximity are insufficient to constitute possession.<sup>91</sup> This argument avoids including constructive possession and intent within the *In re K.S.* definition of possession, and thus, effectively reconciles the court's holding with its statements of agreement. Proponents of this argument assert that the court's definition of possession, requiring actual possession, is an effort to eliminate the interpretation problems which are inherent in the doctrine of constructive possession and which cause many practitioners difficulty.<sup>92</sup>

Another argument can be made that the *In re K.S.* court's requirement of "some degree of actual dominion and control"<sup>93</sup> does not mean actual possession. Rather, it can be argued that the words "some degree"<sup>94</sup> of actual dominion and control only calls for proof of "intent to possess,"<sup>95</sup> thus making the *Wilkie* definition applicable and consistent with the holding. The *In re K.S.* court's adoption of *Wilkie* and its definition of possession strongly support this argument.<sup>96</sup> Further support for this argument can be found in the court's statement that the "circumstances of knowledge and proximity alone are not enough to establish actual possession, without some evidence that K.S. was there to drink alcohol."<sup>97</sup> It can be inferred from this statement that circumstan-

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88. *Wilkie*, 477 N.W.2d at 216-17.

89. *Id.* at 216 (quoting *In re R.B.*, 322 N.W.2d 502, 503 (1982)).

90. See *In re K.S.*, 500 N.W.2d at 606.

91. See *Wilkie*, 477 N.W.2d at 217-18 (stating that mere presence is not sufficient evidence to support a conviction for possession).

92. See *Whitebread & Stevens*, *supra* note 14, at 751 (discussing the interpretation problems that practitioners and courts have with the doctrine of constructive possession). See *Singer*, *supra* note 14, at 982-83 (discussing the confusion surrounding possession due to the many "nuances of meaning" such as actual, constructive, and strict liability possession, and also the fact that the differences between the nuances are not distinct).

93. *In re K.S.*, 500 N.W.2d at 608.

94. *Id.*

95. *Wilkie*, 477 N.W.2d at 216 (citing *In re R.B.*, 322 N.W.2d at 503).

96. *In re K.S.*, 500 N.W.2d at 607 (stating that the juvenile court "properly relied" upon the court's decision in *Wilkie*).

97. *Id.* at 608.

tial evidence plus an intent to possess or drink alcohol will be sufficient for imposing liability despite no actual possession. This inference strongly suggests that the holding in *In re K.S.* does not truly require proof of actual possession for a conviction, but rather possession as it is defined in *Wilkie*. Accordingly, a conviction could be established by proving either actual possession, or constructive possession based on proof of an intention to possess, control, or consume alcoholic beverages.

#### IV. IMPLICATIONS

It is not clear which of the aforementioned arguments are correct; however, it seems likely that the second approach is the interpretation the court was pursuing. Defining possession within the statute as "actual possession" would create enforcement problems for law officers. Inevitably, minors will hide or discard their alcoholic beverages before police can investigate, thus destroying any proof of actual possession. Further, the "manifest purpose and design" of the statute "to dissuade minors from drinking alcohol"<sup>98</sup> would be hindered by this restrictive interpretation of possession. Thus, it seems likely that the court was seeking a definition of possession similar to that of *Wilkie* which includes constructive possession and intent.<sup>99</sup> This definition would ease the burden of proof for law enforcement officials, yet it would only permit the conviction of minors who intended to possess alcoholic beverages rather than those who were merely in the presence of alcoholic beverages. An intent to possess would probably be established if the minor had paid any money toward the purchase of alcohol, if the minor or any witnesses testified that the minor had expressed an intention to possess alcohol, or if the minor is in the presence of large quantities of alcohol and only a few other people are present. None of these situations involve actual possession, but nevertheless, they would indicate a minor's intention to illegally possess alcohol. Therefore, in order to accomplish the goal of convicting only those minors who have an intention of possessing alcohol, it seems necessary that the holding in *In re K.S.* would continue to encompass some vestiges of constructive possession.

Although the precise definition of possession in the context of the minor in possession of alcohol statute remains unclear, it is clear that the *Morris* definition of possession in controlled substances cases is not the

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98. *Id.* at 606.

99. *Wilkie*, 477 N.W.2d at 216.

applicable definition for this offense.<sup>100</sup> This raises the question of why possession should be defined differently in controlled substance cases than in alcohol offenses. Public policy is most likely the driving force behind the distinction since it has advocated stronger regulation of controlled substances compared to alcohol.<sup>101</sup> This is shown by the fact that controlled substances are legal only in limited circumstances, such as medical prescriptions, whereas alcohol is only illegal for a certain age group. Thus, it seems reasonable that the two areas have differing standards of proof for illegal possession.

Another point of interest arises from Justice Neumann's concurring opinion.<sup>102</sup> Justice Neumann wrote separately to "emphasize that the circumstances in this case are significantly different from those in which alcohol is found in an automobile full of minors."<sup>103</sup> This raises the question of why the definition of possession differs for minors in a house than minors in a car. Perhaps Justice Neumann was concerned about minors drinking and driving, and therefore advocated a broader interpretation of possession in those cases; or perhaps he found the two situations factually different because a car is a more confined space than a house, and thus its more difficult for a minor to show a lack of an intent to possess. Justice Neumann did not state any reasons for the distinction; however, he did seem to indicate that possession should be determined according to the factual circumstances of the case. It can be inferred from this distinction that he was attempting to interpret the statute in a case-specific manner, rather than imposing a hard-line rule requiring proof of actual possession.

In conclusion, many North Dakota practitioners may be confused about the precise definition of possession within the minor in possession of alcohol statute. Defense attorneys may argue that actual possession, or direct physical control, must be proven in order to convict, while prosecutors will likely argue that vestiges of constructive possession, such as proof of intent to possess, still remain in the definition. A close analysis of the court's opinion in *In re K.S.* seems to favor the latter argument. Regardless, one method of enforcement should undisputably

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100. The *Morris* standard for possession can be satisfied merely by proving circumstances such as knowledge, proximity, and presence. *State v. Morris*, 331 N.W.2d, 48, 54 (N.D. 1983). Both *Wilkie* and *In re K.S.* reject this standard as a means of establishing sufficient evidence to constitute possession. *In re K.S.*, 500 N.W.2d 603, 608 (N.D. 1993).

101. See Donald B. King, Note, *Possession of Dangerous Drugs in Indiana*, 8 IND. L. REV. 690, 711-14 (1975) (discussing the general risk to the community of narcotic drugs because of their addictive nature).

102. *In re K.S.*, 500 N.W.2d at 608.

103. *Id.*

satisfy the burden of proof under the minor in possession of alcohol statute: simply catch them *with* a can.

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