

Brian L. CONDON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP93-16290, 2 CTCR 20, 23 ILR 6127

**3 CCAR 48**

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.  
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.  
Trial Court Case Number 93-16290]

Arguments heard March 25, 1994. Decided June 11, 1996.  
Before Presiding Justice Collins, Justice Bonga and Justice Miles.

COLLINS, P.J.

The Appellant, Brian L. Condon, brings this matter before the Appellate Panel consisting of Associate Justices David Bonga, Wanda Miles, and Associate Justice Pro-tem Brian Collins for review of his criminal conviction in the Colville Tribal Court. Condon was convicted at jury trial of Possession of an Alcoholic Beverage by a Person Under 21, CTC 5.5.13.<sup>25</sup>

**FACTUAL AND PROCEDURAL BACKGROUND**

During the late evening hours of June 24, 1994, Condon and his companions gathered to play basketball on an outdoor court located in the Moccasin Flat HUD Housing Area in Omak, Washington, which is located within the Colville Indian Reservation. Condon and his friends were then under age 21. Members of the group were consuming beer while they were playing basketball.

At approximately 2:00 a.m. on June 25, 1994, the Colville Tribal Police were called to the Moccasin Flat Housing Area in response to a reported fight involving a carload of juveniles. The police stopped a car occupied by Condon and his friends. After the occupants exited the vehicle, the police officers discovered that members of the group exhibited telltale signs of consuming alcoholic beverages.

At trial, Sgt. William Evans testified that he detected the odor of alcohol on Condon and that "he appeared to have been drinking." Evans testified that he recognized Condon and knew him to be under 21 from previous contacts. Evans testified that the other members of the group appeared intoxicated. Condon and his companions were arrested and taken to the Omak Police Station where they were individually interviewed. Both Sgt. Evans and Officer Rotter, who interviewed Condon, testified that they smelled alcohol on his breath.

Although Condon denied consuming alcohol, he testified that members of the group drank beer while playing basketball and that containers of beer were in the car at the time of the stop. Both the police and Condon testified that the containers of beer found in the car were unopened. The record does not reflect which member of the group owned the car.

Among the instructions given to the jury, the Court gave the following:

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<sup>25</sup> CTC 5.5.13 provides in relevant part: any person who, being under the age of 21 year old, shall possess, purchase, consume, obtain, or sell any beer, wine, ale, whiskey or other alcoholic beverage or misrepresent his age for the purpose of buying or otherwise obtaining an alcoholic beverage shall be guilty of Possession of an Alcoholic Beverage by a Person Under 21.

You are instructed that possession may be either actual or constructive. Actual possession means possession in person, upon the person, and within his actual physical control, of the substance involved. Constructive possession means such dominion and control over a place where the substance was found so as to give a person in possession of such a place the right to complete access to, or disposition of, the substance found.

Jury Instruction No. 5.

The Panel has repeatedly reviewed the taped record from trial. From our review the Panel concludes that defense counsel did not object on the record to the any of the jury instructions given by the Tribal Court, including Instruction No. 5.

The jury found Condon guilty and he was sentenced to pay a fine of \$600.00, with \$400.00 conditionally suspended upon his compliance with conditions of sentencing.

## I. ISSUES

There are two primary issues raised on this appeal. The first is whether there was sufficient evidence adduced at trial to for the jury to convict Condon of the offense. In his Notice Of Appeal, Condon alleges, based upon the evidence presented at trial, that the Court erred by instructing the jury on the theory of constructive possession.

## II. DISCUSSION

### A. The Offense

The required elements to be support Condon's conviction for Possession of an Alcoholic Beverage by a Person Under 21 are: 1) that Condon was under the age of 21 at the time of the offense; 2) that he possessed, purchased, consumed, obtained or sold an alcoholic beverage; 3) that the offense occurred within the Reservation. CTC 5.5.13. Thus, the prohibited conduct encompassed by the statute includes more than mere possession of alcohol.

### B. Sufficiency of Evidence to Support a Conviction

We have previously had an opportunity to review criminal cases in which reversal was sought on grounds that there was insufficient evidence adduced at trial to support a conviction. In *Cora L. Pakootas v. Colville Confederated Tribes*, AP92-15148, [1 CTCR 67, 1 CCAR 65], we held that the Court will not reverse a conviction, based upon sufficiency of evidence, unless "after reviewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Id.* at 4. All reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted most strongly against the defendant. Simply stated, on appeal the appellant must show that, from the evidence at trial, no reasonable jury would have found that he possessed or consumed an alcoholic beverage in violation of the statute.

It is unchallenged that Condon was under age 21 when the offense occurred. It is also unchallenged that the offense took place within the Reservation. Thus, our inquiry is whether there was sufficient evidence presented that any reasonable jury could have found that Condon "possessed, purchased, consumed or sold an alcoholic beverage."

From the facts of this case, the relevant prohibited conduct under CTC 5.5.13 concerns whether

Condon "possessed" or "consumed" alcohol. Although there was conflicting testimony at trial as to whether Condon consumed alcoholic beverages prior to his arrest, two police officers testified that they detected the odor of alcohol on Condon's breath and body at the time of arrest and during questioning at the Omak Police Station.

The officers testified that they were in a position to detect the odor of alcohol and to observe the defendant, and it appeared to them that Condon had been drinking. The police officers also testified that there was beer in the automobile in which Condon was riding and that Condon's companions were intoxicated. The officers' testimony was partially corroborated by Condon, who testified that there was beer in the car when it was stopped. The officers' testimony was further corroborated by Condon's companions, who testified that they had beer in their possession and had been consuming beer.

While there were certain discrepancies in the officers' testimony, we find that their testimony concerning the material points in this case was consistent. The evidence presented at trial was not such that a reasonable jury should have concluded that the officers' testimony lacked credibility and that it should have been given less weight than needed to support a conviction.

Although defense witnesses came forward with testimony that Condon had consumed no alcohol during the night in question and was not generally known to consume alcohol, there was also testimony presented that Condon had, on at least one occasion, consumed alcohol. In addition, there was no evidence presented to show that Condon was an unwilling participant in the group's activities, which included drinking beer, or that he attempted to leave the group when his friends began consuming alcoholic beverages.

### C. Consumption

Although the defense witnesses denied that they saw Condon consume alcoholic beverages, there was evidence presented that he had done so. In *Colville Confederated Tribes v. Terry Dean Fry*, Case Nos. 80-3351, 80-3352, 80-3353, [1 CTCR 02] (Colv. Tr. Ct. 1981), the Tribal Court determined that "consumption" is a continuing process which begins when alcohol is swallowed and ends when the substance has been fully metabolized. There is record evidence, from the police officers' testimony, that the smell of alcohol was detected on Condon's breath. Thus, a reasonable inference can be drawn, based on the reasoning in *Fry*, that Condon was then in the process of consuming alcohol. There was also evidence presented that beer could have been made available to Condon and that he was present when his friends were consuming alcohol. We therefore conclude that the evidence adduced at trial was such that a reasonable jury could have found, beyond a reasonable doubt, that Condon consumed alcohol, as well as the remaining elements of the offense.

### D. Possession

A conviction for Possession of Alcohol by a Person Under 21 may be supported by proving either one of the Tribe's theories of the case...that Condon either possessed or consumed alcohol. Under the facts of this case, the more complex question presented is whether the jury could have found that Condon possessed alcohol. We have found that Condon's conviction is supported by evidence that he consumed alcohol. Therefore, the inquiry stops there unless other issues are properly preserved for appeal.

In his Notice Of Appeal, Condon contends that the Tribal Court erred by instructing the jury on

the theory that he constructively possessed an alcoholic beverage. Condon contends that there was insufficient evidence presented at trial to instruct the jury on the theory of constructive possession.<sup>26</sup>

As we noted above, defense counsel did not object on the record to the instruction before it was given by the Court. Failing to object to a jury instruction before it is given by the trial court constitutes a waiver of the right to later challenge the instruction, and is fatal to preserving the issue for appeal. Therefore, the Panel will not consider Condon's assertion that the Court erred by instructing the jury on the issue of constructive possession of an alcoholic beverage.

For the reasons stated above, it is Ordered that the judgment of the Tribal Court is Affirmed and the matter is remanded to the Tribal Court.

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<sup>26</sup> The Colville Tribal Court has recognized the doctrine of constructive possession, in that dominion and control over a residence can be used to establish possession of contraband contained within a residence...and gives rise to a duty to keep contraband out. *Colville Confederated Tribes v. Miles*, 89-12666 (Colv. Tr. Ct. 1990). The doctrine was also recognized in *Colville Confederated Tribes v. Clark*, 93-16646; 93-16647 (Colv. Tr. Ct. 1994), as applied to automobiles.