

MEMORANDUM

From: Hon. Akai Inu, Presiding Judge in People v. Connie Cutter, 2010 CR 0012

Date: 03.15.2010

Re: What inferences may the fact finder draw from a defendant's possession of recently stolen property, and how should the jury be instructed in the instant case?

In *People v. Taylor*, 25 Marshall 2d 79 (1962), a case involving possession of stolen revolver more than four months after the burglary, the court held that the evidence of "recent, unexplained, exclusive possession of stolen property by an accused may, of itself, raise an inference of guilt sufficient to warrant a conviction of burglary, provided there are no other facts and circumstances which raise a reasonable doubt of guilt." See *People v. Nixon*, 414 Marshall 125 and *People v. Malin*, 372 Marshall 422. In determining the conclusiveness of such inference, the court pointed out that time is one of the elements to be analyzed, in addition to considering the "character of the property stolen, its salability, and the ease with which it may be transported." *Taylor* citing *People v. Litberg*, 413 Marshall 132. However, the court concluded that where the facts and the nature of the goods are such that fair opportunity was afforded the thief to have disposed of the property and the accused to have acquired it innocently, possession is slight, if any, evidence of guilt. *Taylor* citing *People v. Kubulis*, 298

Marshall 523. The *Taylor* court ultimately concluded that possession of stolen revolver by the defendant more than four months after the burglary was not sufficient to raise an inference of guilt.

Referencing the *Taylor* case, the Marshall Statute 720 MLCS 5/19-1 provides the following illustrations when making a distinction between when an inference is permitted in a criminal case versus when it is insufficient to convict:

Inference Permitted: Evidence of recent, unexplained, exclusive possession of stolen property by an accused may, of itself, raise an inference of guilt sufficient to warrant a conviction of burglary, provided there are no other facts and circumstances which raise a reasonable doubt of guilt. *People v. Taylor*, 25 Marshall 2d 79 (1962).

Inference Insufficient to Convict: The defendant's possession of a stolen revolver more than four months after the robbery was not such a recent possession as to satisfactorily raise an inference of guilt. *People v. Taylor*, 25 Marshall 2d 79 (1962).

In *People v. Panus*, a case involving possession of a stolen tiller, the court used the *Taylor* formula by considering the character of the property (the tiller), salability, and the ease with which it was transported before coming to the conclusion that these factors supported the holding that the trial judge did not abuse his discretion in determining that evidence of defendant's possession of the tiller would

be probative of whether defendant committed the burglary. 76
Marshall 2d 263 (1979).

The Marshall Supreme Court assessed the constitutionality of the common law inference that a defendant's recent and exclusive possession of stolen property, without reasonable explanation, gives rise to an inference that the possessor wrongfully took the property. *People v. Housby*, 84 Marshall 2d at 415 (1981). In order for the inference to not violate due process guarantees it had to meet three requirements: 1. a rational connection between the basic fact and the presumed fact; (2) the presumed fact had to be more likely than not to flow from the basic fact; and (3) the inference had to be supported by corroborating evidence of guilt. *Id.* at 415, 420-21. If there was no corroborating evidence, the leap from the basic fact to the presumed element still had to be proved beyond a reasonable doubt. *Id.* The court held that this inference met the constitutional requirements only as they applied to that specific defendant. *Id.* at 424-31.

In a recent decision, the Indiana Supreme Court abandoned the mere possession rule followed in that state since 1970. *Fortson v. State of Indiana*, 919 N.E.2d 1136 (2010). In that case, the defendant was pulled over when driving a pick-up about six hours after it had been stolen, and was charged with receiving stolen property. At his trial in absentia, the defendant was convicted after the state put on

evidence from the owner of the pick-up who indicated that he did not know the defendant and did not lend the car to him.

A divided Court of Appeals reversed the lower court and reasoned, among other things, that “although the unexplained possession of recently stolen property standing alone may be sufficient to support a conviction for theft, it is not sufficient to support a conviction for receiving stolen property.” *Id.* at 1137.

The Indiana Supreme Court reversed the trial court and held that: “[T]he mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, such possession is to be considered along with the other evidence.” *Id.* at 1143. Turning to the facts of the case, the court found them to be insufficient to sustain the knowledge element of receiving stolen property. Among other weaknesses in the state’s case, the court noted that the defendant did not try to conceal the truck from the police, did not attempt to physically resist the arrest or flee, and did not give evasive answers to officers. *Id.* at 1144.

The discussion and the reasoning in *Fortson, supra*, expresses the views of this Court, and accordingly the Court approve the following instruction that was adopted in that case:

“You are permitted but not required to infer from the defendant's possession of the property of another that the defendant is guilty of theft only if in your judgment such an inference is warranted by the evidence as a whole. It is your exclusive province to determine whether

the facts and circumstances shown by the evidence warrant the inference to be drawn by you.

“The possession of the property by the defendant does not shift the burden of proof which is always on the State to prove beyond a reasonable doubt every essential element of the offense with which defendant is charged.

“The defendant's possession of property belonging to another may be satisfactorily explained in the evidence independently of any testimony of the defendant personally. If [the] defendant does take the witness stand to explain his [or her] possession of the property, the weight to be attached to his [or her] explanation is exclusively for you to determine. Even if defendant's possession of the property is unexplained, you cannot find [the defendant] guilty, if after consideration of all the evidence in the case, you have a reasonable doubt as to his [or her] guilt.

“If under the evidence, defendant’s possession of the property of another is consistent with his [or her] innocence, then the jury should acquit the defendant unless [the state proves his or her guilt] beyond a reasonable doubt by other evidence in the case.”

So ordered:

**Akai Inu
Presiding Judge**