

Farmer v. State, 112 Ga.App. 438 (1965)

Syllabus by the Court

***438** One who carries a deadly weapon under the seat of an automobile to a public gathering and after arriving takes the weapon from under the seat of the car and thus has it about his person at the gathering, is guilty of the offense defined in Code § 26-5102.

Sammy D. Farmer was convicted of the offense of carrying a sawed off shotgun, a deadly weapon, to a public gathering, viz., a dance at the V.F.W. Club in Athens, Clarke County, Ga.

Teddy Brown, a witness for the State, testified that he and two other boys rode with Farmer in his car from Monroe to ***439** Athens to attend a dance, and that when they arrived and parked on the V.F.W. Club grounds a group of boys began to holler 'Monroe' at them. Another boy in a Volkswagen nearby, who appeared to be near drunk, also hollered 'Monroe' and tried to start a fight. Timothy Armstead, one of the boys in Farmer's car, got out and went to fight with him and two others came up, one holding Timothy while the other struck him across the nose with a blackjack. Farmer had gotten out of his car and the boy with the blackjack ran inside the club, brought five others out who had knives and they all started toward Farmer. When that happened Farmer returned to his car and got a sawed-off shotgun from under the front seat on the right side, took a shell from his pocket, loaded it and stood the boys off.

Brown identified the gun as belonging to Farmer. He had seen it at Farmer's house where it was used for shooting birds and rats, and had shot it himself. It was under the front seat of Farmer's car, and Farmer had driven the car from Monroe to Athens. Brown had not gotten out of the car at any time after arriving and at no time did he see anybody either place the gun in the car or hand it to Farmer. He had not known that the gun was in the car until Farmer came to get it out, and did not know when it got in the car or who placed it there.

Officer Seagraves testified that this affair occurred on the grounds of the Veterans of Foreign Wars, Post No. 2872, of which he had served as Post Commander, and that it was generally called the V.F.W. Club, where dances were held in its auditorium on Wednesday, Friday and Saturday nights. Usually crowds of 600 to 700 gathered at the Saturday night club dances and this occurrence was on Saturday, September 5, 1964. The grounds of the club consist of about 15 acres of land, a part of which was leased to the Little League, Inc. for use as a baseball field for a ten-year term ending in 1965.

Officer Taylor testified that the affair occurred in the club grounds within about 75 feet of the club building and that a crowd was gathering in the yard when he came up. It did not occur on the Little League ball field, which was enclosed by a fence, but to the left of it. The gun, which he took from Farmer, was a 12 gauge sawed-off shotgun, more effective than a regular gun at close range, and was a deadly weapon.

***440** Teddy Brown testified, on cross examination, that the affair happened on the Little League baseball field.

The defendant offered no evidence and made no statement. To the overruling of an amended motion for new trial he excepts.

Guy B. Scott, Jr., Athens, for plaintiff in error.

Preston M. Almand, Solicitor, Athens, for defendant in error.

****596** EBERHARDT, Judge.

1. (a) In urging the general grounds defendant asserts that there was failure of the proof to meet the allegation in the indictment that the place of the gathering was the 'V.F.W. Club No. 2872,' Foreign Wars, Post No. 2872. 'Identitate owning the property was the Veterans of Foreign Wars, Post No. 2872. 'Identitate personae, and not indentitate nominis, is and should always have been the true and only issue.' Chapman v. State, 18 Ga. 736, 738; Gresham v. State, 216 Ga. 106(5), 109, 115 S.E.2d 191; Chapman v. State, 33 Ga.App. 570, 571, 126 S.E. 895; Wilson v. State, 67 Ga.App. 404, 405, 20 S.E.2d 433. See 86 A.L.R.2d 757n. This contention is without merit.

(b) Another contention is that the proof showed the occurrence happened on the grounds leased to Little League, Inc., while it was alleged in the indictment that it took place on the V.F.W. Club No. 2872 grounds. There was some conflict as to just where the occurrence took place, in that Teddy Brown testified it happened on the Little League field and Officer Taylor testified 'the first time I saw Mr. Farmer he was standing just outside the parking lot in the baseball field, just over the line where they have stobs to keep cars from going where they play ball, with a gun in his hand,' but also testified that he saw him on the grounds of the V.F.W. Club about 75 feet from the club house, and on cross examination testified: 'Q. Lt. Taylor, did you say that he was standing on the Athens Little League Baseball Field? A. No, sir, not the Little League, it was not out that far. It was back up from the Little

League. Q. Across those stakes where they play ball? A. They don't play ball there but it goes on out to the ball field. Q. It is the side of the left field isn't it? A. You come out of the VFW door, it would be just come out of the VFW Club. Q. You know where *441 the fence is out there? A. Yes, sir. Q. That encloses the playing field? A. Yes, sir. Q. Was it left of that field? A. It would be on the left field side.' It was uncontradicted that the V.F.W. Club owned all of the grounds, including the baseball field leased to Little League. It this was material in the proof the jury resolved the matter against the defendant and was authorized to do so.

(c) The case of *Modesette v. State*, 115 Ga. 582, 41 S.E. 992 does not require a reversal. There it was held that where one goes to a public gathering with no pistol upon him at the time he arrives but afterward becomes possessed of one, whether innocently or designedly, he is not guilty of an offense under Penal Code § 342 (now Code § 26-5102). Rather, the facts here are controlled by [Wynne v. State](#), 123 Ga. 566(3), 51 S.E. 636, holding that if a person carries a deadly weapon to a place near a public gathering so that it will be accessible, and while the gathering is in progress goes to the place of deposit and obtains actual possession of the weapon and carries it to the gathering he is guilty of the offense.

This statute (Code § 26-5102) is very similar to Code § 58-603 by which it is made unlawful to carry any liquor or intoxicating drink to a church or other place where people may have assemblies for divine worship. In *Bice v. State*, 109 Ga. 117, 34 S.E. 202 it appeared that the defendant carried a bottle of whiskey to a church, where people were assembled for worship, in his buggy and the buggy was left standing from 100 to 200 yards from the church. His conviction was affirmed, and in doing so the court observed that 'a fair and even strict construction requires us to hold that, when it forbids carrying intoxicating liquor to a church, it means also to forbid its introduction to a place in such immediate proximity to the church building as to make it readily accessible to those who may desire to use it.'

It there be any difference in the *carrying* of a bottle of liquor in a buggy to a church gathering and the *carrying* of a sawed-off shotgun in an automobile to a V.F.W. dance, **597 we are unable to discern it. This is particularly true when it appears that the defendant, after arriving at the V.F.W. Club grounds, *442 went to his car and got the gun from under the seat, thus having it 'about his person' at the gathering.

2. Error is assigned upon a portion of the charge in which the court informed the jury that while it is an essential element of the offense that it be shown that the defendant did carry the weapon to a public gathering, in doing so the 'possession may be actual or constructive.' We find no error in this charge. This the sawed-off shotgun was under the seat of his automobile rather than in his hands in the carrying of it from Monroe to Athens can make no difference. The gun was nevertheless in his possession. It was gun, his automobile and he was driving it. It cannot be doubted that he knew that the gun was in the car, for it is undisputed that when trouble appeared to be arising he went to the car and got the gun from under the seat.

3. Error is assigned upon the giving of an illustration of constructive possession in defining that term to the jury when the judge asserted: 'I might illustrate it by saying my old automobile setting out here is in my constructive possession, but this pipe is in my actual possession. I happen to own both. Does that illustration adequately assist you?' This illustration is in conformity with the law appertaining to chattels. 'As applied to personalty the term [constructive possession] may be used to designate the relationship between the owner of property and the property when the owner is not in actual possession thereof, and the general rule seems to be that if the owner knows where the property is, so that he would be able to recover the actual possession when he desired, then he is in constructive possession * * *.' 73 C.J.S. Property § 14c, p. 203. Cf. *Henley v. State*, 59 Ga.App. 595(2), 2 S.E.2d 139. It is true that the defendant would be guilty under this statute if he carried the gun to a public gathering, whether he owned it or not, and that ownership was not an essential ingredient of the offense. But it did appear from the evidence that the defendant owned the gun. Moreover, the definition of constructive possession and the illustration would still hold even if the defendant's rights in the gun were no more than a special property accruing from a bailment of the gun, or even from a possession wrongfully obtained.

Judgment affirmed.

NICHOLS, P. J., and PANNELL, J., concur.