
This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 43
The People &c.,
Respondent,
v.
Omar A. Smalling,
Appellant.

Jenin Younes, for appellant.
Jill A. Gross-Marks, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed
and a new trial ordered.

Although we reject defendant's contention that the
evidence presented at trial did not support a charge of
constructive possession, we nevertheless conclude that defendant

is entitled to a new trial. The trial court erred in that it agreed to the People's request at the charge conference not to charge the jury on constructive possession, but then ultimately provided a constructive possession charge to the jury, resulting in prejudice to defendant (see CPL 300.10 [4]; People v Greene, 75 NY2d 875, 876-877 [1990]). Under the unique circumstances of this case, the error is not harmless (cf. People v Nevins, 16 AD3d 1046, 1047 [4th Dept 2005], lv denied 4 NY3d 889 [2005], cert denied 548 US 911 [2006]).

* * * * *

Order reversed and a new trial ordered, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Wilson concur.

Decided May 2, 2017