

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-939

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 00 CRS 50763

KAREEM ANDRE DUDLEY,
Defendant.

Appeal by defendant from judgment entered 27 February 2001 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General M. Janette Soles, for the State.

Amy S. Davis, for defendant-appellant.

HUDSON, Judge.

Defendant was convicted by a jury of possession of a firearm by a convicted felon and carrying a concealed weapon. The trial court sentenced defendant to a consolidated term of fifteen to eighteen months imprisonment. Defendant asserts the trial court erred in denying his motion to dismiss at the conclusion of the evidence. We reverse.

On 31 May 2000, Concord Police Officer Keith Childers stopped defendant for running a red traffic light at the intersection of Cabarrus Avenue and White Street. Defendant was alone and was

driving a rental car registered to a third person. After learning of an outstanding warrant for defendant's arrest in Mecklenburg County, Childers took defendant into custody. During a search of the rental car, police found a loaded forty caliber handgun in a console next to the driver's seat. The console was closed but unlocked. No fingerprints were taken from the gun. Defendant stipulated to a prior felony conviction.

On appeal, defendant claims the State failed to prove that he possessed the handgun found in the console of the rental car. He asserts that his mere proximity to the gun is insufficient to create an inference that he knew the gun was in the car or placed it there. Absent additional evidence linking him to the weapon, defendant claims the trial court erred in denying his motion to dismiss. He has cited no cases or other authority in support of this portion of his argument.

In reviewing the denial of defendant's motion to dismiss, this Court must determine whether the evidence, taken in the light most favorable to the State, is sufficient to allow a reasonable juror to find defendant guilty of the offense beyond a reasonable doubt. See *State v. Jones*, __ N.C. App. __, __, 556 S.E.2d 644, 655 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). The State is entitled to all favorable inferences reasonably drawn from the evidence. *State v. Tucker*, 347 N.C. 235, 243, 490 S.E.2d 559, 563 (1997), *cert. denied*, 523 U.S. 1061, 140 L. Ed. 2d 649 (1998). Our Supreme Court has stated that "[t]he defendant's evidence is not considered unless favorable

to the State," *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001), or unless "it explains or clarifies evidence offered by the State or is not inconsistent with the State's evidence," *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994).

It is well established that possession of an object "may be either actual or constructive." *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) (citing *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 452 (1999), *disc. review denied*, 351 N.C. 362, 543 S.E.2d 136 (2000)). "Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband." *State v. Earhart*, 134 N.C. App. 130, 136, 516 S.E.2d 883, 888 (citing *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986)), *appeal dismissed*, 351 N.C. 112, 540 S.E.2d 372 (1999).

In addition, "[p]ossession of an item may be either sole or joint; however, joint or shared possession exists only upon a showing of some independent and incriminating circumstance, beyond mere association or presence, linking the person(s) to the item." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citation omitted). Here, the defendant's evidence, which was not inconsistent with the State's, consisted of testimony from Patrick Jerrod Harrington. Harrington testified that, at the time of defendant's arrest, defendant was driving a vehicle which had been rented for him (Harrington). On the evening of defendant's arrest, Harrington had asked defendant to drive the car to retrieve some

fast food for them. Harrington further testified that he owned the hand gun and cell phone found in the closed console of the car, and he produced a receipt for the purchase of the gun. He explained further that after he picked up defendant, Harrington did not open the console or tell defendant there was a gun inside and that defendant did not know it was there.

In *Alston*, this Court held that the evidence did not support constructive possession of a gun where defendant was a passenger in a car driven by his wife, and a handgun owned by her was in plain view on the console between them. We reversed the conviction for possession of a firearm by a felon noting that these circumstances did not provide sufficient independent and incriminating evidence connecting defendant and the gun. See *id.*, 508 S.E.2d at 319.

We do not believe that the evidence here supports a reasonable inference that defendant had the knowledge of or intent to control the handgun found in the console of the rental car. Childers testified that defendant was the driver and lone occupant of the car in which the gun was found. This Court has previously stated:

An inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the "driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Dow, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984)

(defendant had sole custody of the vehicle, which belonged to his daughter, for three days prior to offenses) (quoting *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974)); see also *Earhart*, 134 N.C. App. at 137, 516 S.E.2d at 888 (vehicle belonged to defendant and cocaine was hidden in same location as gun, which he admitted placing there); *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 711 (1993), overruled on other grounds by *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994). However, the cases cited above all involve considerably more incriminating circumstances than here, and are thus not controlling. Rather, we believe *Alston* compels the conclusion that the evidence of constructive possession here is insufficient.

Because possession, actual or constructive, denotes a present intent and ability to control the object, and there was no evidence here that defendant knew of the handgun found in the console, we hold that the evidence was insufficient to support his conviction for either possession of a handgun by a felon or for carrying a concealed weapon under N.C. Gen. Stat. § 14-269 (2001). Cf. *State v. Jordan*, 75 N.C. App. 637, 640, 331 S.E.2d 232, 234 (gun under driver's seat of car), disc. review denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

Reversed.

Judges GREENE and TYSON concur.

Report per Rule 30(e).