NO. COA02-152

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 00 CRS 104170-71
00 CRS 104173

THEODORE ANTYON WILSON

Appeal by defendant from judgments entered 17 October 2001 by Judge Melzer A. Morgan, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

William B. Gibson, for defendant-appellant.

WYNN, Judge.

Defendant was found guilty of intentionally keeping or maintaining a dwelling house for the purpose of unlawfully keeping or selling controlled substances; possession of cocaine; and possession of marijuana with intent to sell or deliver. He was sentenced to a minimum of five months and a maximum of six months for the first conviction and to consecutive sentences of six to eight months for the remaining two convictions.

The State presented evidence tending to show that on 29 September 2000, a team of Greensboro Police Department officers executed a warrant to search the premises at 1507 Bluford Street,

Apt. A, in Greensboro. After entering the residence, Detective R.D. Koonce confronted defendant in a bathroom where defendant was attempting to flush a green leafy substance down the toilet. The officers brought defendant and the three other persons present at the premises together and secured them in the living room. Defendant told the officers that the residence was his.

In addition to the green leafy substance, the officers found a bag with seven other smaller bags containing an off-white rocky substance in the toilet; a set of scales sitting on the kitchen bar; two baggies containing a green leafy substance, a Ziploc bag containing other Ziploc baggies, a natural gas bill addressed to defendant at 1507 Bluford Street, seven plastic baggies containing green leafy vegetable matter in the back bedroom closet; a plastic bag containing an off-white rocky substance in a pair of jeans laying on the floor of the back bedroom; a plastic bag containing a leafy green vegetable substance in the same pair of jeans; two cell phones laying on the living room floor; a box of sandwich bags in the living room; a pellet gun and pellet gun clip; and an off-white powder substance in the refrigerator.

Defendant told the officers, "I know the stuff was mine. I'm in school. I'm just trying to make it." He also stated that he did not know anything about the cocaine found with the marijuana in the toilet, that the marijuana found in the back bedroom was his, and that cocaine found in the back bedroom was for his own personal use.

Aaron Joncich, special agent with the State Bureau of

Investigation, testified that testing conducted on the substances showed that the plant material found in the toilet was 540.7 grams of marijuana; the off-white powder in the seven bags was one gram of cocaine; the green plant material in the two plastic baggies was 54 grams of marijuana; the green plant material in another plastic bag was 25.3 grams of marijuana; the off-white powder found in a another plastic bag was 0.4 grams of cocaine; the green plant material contained in another plastic bag was 9.9 grams of marijuana; and the white powder found in the refrigerator was baking soda. Defendant did not present any evidence.

Defendant contends that the trial court erred in allowing Agent Joncich to testify about and offer documentary evidence as to the chain of custody and to identify and introduce into evidence the controlled substances. He argues that Agent Joncich's testimony was inadmissible hearsay because Agent Joncich did not perform the tests. We disagree.

The fact that an expert does not perform tests himself does not render his opinion testimony inadmissible. *State v. Gary*, 78 N.C. App. 29, 38, 337 S.E.2d 70, 76-77 (1985), *disc. review denied*, 316 N.C. 197, 341 S.E.2d 586 (1986). "[T]estimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence." *State v. Huffstetler*, 312 N.C. 92, 107, 322 S.E.2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). No violation of the Sixth Amendment guarantee of the right to confront accusers is presented because the testifying

witness is subject to cross-examination. *Id.* at 108, 322 S.E.2d at 120. Proof of a detailed chain of custody is required only when the evidence is not readily identifiable or is subject to alteration and there is reason to believe the evidence may have been altered. *State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984). When the items in question are identified as the same objects that were seized and in somewhat the same condition, it is not necessary to establish a detailed chain of custody. *State v. Morris*, 102 N.C. App. 541, 546, 402 S.E.2d 845, 848 (1991). Here, the officer who seized the items identified the evidence offered at trial as being the same items and in substantially the same condition.

Defendant next contends that the trial court erred in denying his motion to dismiss the charges of possession of cocaine and possession of marijuana with intent to sell or deliver. He argues that because the evidence identifying the substances was inadmissible for the foregoing reasons, the evidence was insufficient to withstand the motion to dismiss. We disagree.

By making this argument, defendant implicitly admits that Agent Joncich's testimony identifying the substances supplies the piece of the puzzle overcoming his motion to dismiss. In ruling upon a motion to dismiss, all of the evidence that has been admitted, whether competent or incompetent, is considered by the trial court. *State v. Pleasant*, 342 N.C. 366, 373, 464 S.E.2d 284, 288 (1995). The trial court considers the evidence in the light most favorable to the State, giving it the benefit of every

reasonable inference that may be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Therefore, when Agent Joncich's testimony is considered in conjunction with the testimony of the officers, the evidence shows that defendant possessed the controlled substances of cocaine and marijuana and that he possessed the marijuana with the intent to sell or deliver. This evidence is sufficient to withstand the motion to dismiss.

Defendant's remaining contention is that the trial court erred by denying his motion to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances. He argues the evidence is insufficient to establish that he maintained the dwelling for the "keeping" or "selling" of controlled substances.

The determination of whether a building is used for keeping or selling controlled substances is dependent upon the totality of the circumstances. *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). Highly indicative that a dwelling is being used for the keeping or selling of controlled substances is the presence in the dwelling of a quantity of a controlled substance, together with devices and materials used to prepare or package controlled substances for sale. *See State v. Mitchell,* 104 N.C. App. 514, 519, 410 S.E.2d 211, 214 (1991), *reversed in part on other grounds*, 336 N.C. 22, 442 S.E.2d 24 (1994); *State v. Rosario*, 93 N.C. App. 627, 638, 379 S.E.2d 434, 440, *disc. review denied,* 325 N.C. 275, 384 S.E.2d 527 (1989); *State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987). Here, the evidence shows that a total of

629.9 grams of marijuana and 1.4 grams of cocaine were found in defendant's residence, along with scales and materials commonly used in the packaging of controlled substances for sale. Based upon the foregoing evidence, a jury could reasonably find that defendant maintained the residence for the keeping or selling of controlled substances. This assignment of error is overruled.

No error.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).