NO. COA02-166

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v. Pitt County
No. 00 CRS 63817

JAMES KORNEGAY

Appeal by defendant from judgment entered 16 October 2001 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lorrin Freeman, for the State.

Michael J. Reece for defendant-appellant.

McGEE, Judge.

Defendant appeals his conviction for trafficking by possession of more than 28 but less than 200 grams of cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3) (1999). He was sentenced to 35 - 42 months in prison. We find no error and affirm the judgment of the trial court.

The facts of this case are not in dispute. Greenville Police Officer Rose Edmonds (Officer Edmonds) received information from a confidential informant on 1 December 2000 that an individual named Jimmy, driving a gray Nissan Stanza, was going to an apartment at 2928 West Hills Drive in Greenville, North Carolina to pick up some

cocaine for delivery to 130 Concord Drive. As a result of this tip, Officer Edmonds stationed herself in the apartment parking lot. Defendant arrived in a gray Stanza, went into the apartment for a few minutes, returned to the vehicle, and drove North on B's Barbecue Road. Officer Edmonds followed defendant but lost sight of him when he turned onto West Fifth Street.

Officer Edmonds contacted Officer Robert Hunt (Officer Hunt), who positioned himself in the Wal-Mart parking lot on Hooker Road. Officer Hunt soon spotted and stopped defendant's vehicle. When Officer Edmonds arrived at the scene, the officers obtained defendant's consent to search the vehicle. Officer Edmonds saw two pieces of aluminum foil on the floorboard on the driver's side. Defendant told Officer Edmonds that the foil contained cocaine. Police found two additional foil packages of cocaine under the driver's seat and $1,309 in cash in defendant's pocket. Officer Hunt arrested defendant and transported him to the police department. After waiving his *Miranda* rights, defendant gave a statement admitting his possession of the cocaine. He further advised police that he had additional cocaine stored in a glass vase on the kitchen counter of the apartment on West Hills Drive. Defendant gave police a key and consented to a search of the apartment. Police found a plastic bag of cocaine in a glass container on the kitchen counter. They also found a set of digital scales in a kitchen drawer, as well as three handguns and an additional $4,285 in cash. The cocaine taken from the Nissan Stanza weighed 4.9 grams. The cocaine found in the kitchen of the

apartment weighed 24.5 grams.

Defendant moved to dismiss the trafficking charge at the conclusion of the State's evidence, arguing that the evidence showed two separate acts of possession of less than twenty-eight grams of cocaine. The trial court denied the motion to dismiss and declined to instruct the jury on the lesser offense of possession of cocaine.

Defendant argues on appeal that the trial court erred in denying his motion to dismiss the trafficking charge and in refusing to instruct the jury on the lesser offense of possession of cocaine. He contends that the two quantities of cocaine were found in different locations and were packaged differently. Absent evidence linking the two quantities of cocaine, defendant argues he was subject to two counts of possession of cocaine under N.C. Gen. Stat. § 90-95(a)(3), but not to the charge of trafficking by possession under N.C. Gen. Stat. § 90-95(h)(3).

In reviewing a trial court's denial of a motion to dismiss, we must determine whether the State adduced substantial evidence of each essential element of the offense. *See State v. Jones*, 147 N.C. App. 527, 544-45, 556 S.E.2d 644, 655 (2001). "To prove the offense of trafficking in cocaine by possession the State must show: 1) possession of cocaine and 2) that the amount possessed was 28 grams or more." *State v. Mebane*, 101 N.C. App. 119, 123, 398 S.E.2d 672, 675 (1990). "There is nothing in the statute which requires the 28 grams to be in one container." *State v. King*, 99 N.C. App. 283, 290, 393 S.E.2d 152, 156 (1990). In the case before

us, at the time defendant admitted his possession of the cocaine found in the car, he further acknowledged possessing additional cocaine in the kitchen of the West Hills Drive apartment. The State's evidence thus established defendant's knowing possession of 29.4 grams of cocaine at one time, albeit in two locations, and was sufficient to show trafficking by possession under N.C. Gen. Stat. § 90-95(h)(3). In arguing that he was liable only for two separate acts of simple possession of cocaine, defendant relies on *State v. Rozier*, 69 N.C. App. 38, 55, 316 S.E.2d 893, 904, *cert. denied*, 312 N.C. 88, 321 S.E.2d 901 (1984). The defendants in *Rozier* were found with small vials of cocaine on their persons soon after they had sold a larger amount of cocaine to an undercover officer. They were convicted of felonious possession of the cocaine sold to the officer and misdemeanor possession of the smaller amount found in the vials. The defendants claimed on appeal that the misdemeanor possession conviction constituted double jeopardy, because their "possession of the two differing amounts of cocaine constituted a single continuing offense." *Id.* at 54, 316 S.E.2d 903. This Court disagreed, citing favorably the rule from other jurisdictions that "possession offenses must be separate in time and space to warrant separate convictions." *Id.* at 54, 316 S.E.2d at 904 (citing *Powell v. State*, 502 S.W.2d 705 (Tex. Crim. App. 1973); *People v. Shea*, 111 Cal. App. 3d 920, 169 Cal. Rptr. 24 (1980)). Under this standard, the evidence supported the defendant's convictions for two distinct acts of possession, because "[t]he transfer of the large amount of cocaine was entirely

complete when the . . . vials were found." *Id.* at 55, 316 S.E.2d at 904.

We find nothing in our Court's reasoning in *Rozier* that would undermine defendant's conviction in this case. As discussed above, defendant's possession of the cocaine in the car and the apartment was simultaneous. Therefore, he was properly charged with a single offense.

We further find that the trial court properly declined to instruct the jury on the lesser offense of possession of cocaine. Such an instruction is required only when there is evidence that would support a finding of guilt for the lesser offense. *See State v. King*, 99 N.C. App. at 290, 393 S.E.2d at 156 (1990) (quoting *State v. Agubata*, 92 N.C. App. 651, 660, 375 S.E.2d 702, 707 (1989)). Defendant admitted his possession of the entire 29.4 grams of cocaine found by police and offered no evidence contradicting this admission. "Since the State's evidence is positive as to the amount of cocaine . . . defendant possessed and there was no evidence that . . . defendant possessed an amount less than 28 grams, the trial court was correct in refusing to submit the lesser-included offense of possession of cocaine to the jury." *State v. Winslow*, 97 N.C. App. 551, 557, 389 S.E.2d 436, 440 (1990).

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).