NO. COA02-289

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

DAVID LEE SANCHEZ

Henderson County
Nos. 00 CRS 4416-17, 55095

Appeal by defendant from judgments entered 27 March 2001 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 28 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

James L. Goldsmith, Jr., for defendant-appellant.

EAGLES, Chief Judge.

David Lee Sanchez ("defendant") appeals from judgments entered on jury verdicts finding him guilty of trafficking by possession of methamphetamine, trafficking by sale of methamphetamine, and conspiracy to commit trafficking of methamphetamine by sale. After careful consideration of the briefs and record, we discern no error.

The State's evidence tended to show that on 15 September 2000, the Henderson County Sheriff's Department was conducting an undercover drug buying operation in the parking lot of a Holiday

Inn Express in Henderson, North Carolina. Officer Chris Denny was working undercover as a "biker" and had arranged to purchase methamphetamines from Frank Flores. Flores and defendant arrived at the parking lot in a green Chevrolet Tahoe. Defendant was in the passenger seat. Officer Denny approached Flores and asked him if he had the methamphetamines. Flores replied "[y]es, I do" and held up approximately one pound of methamphetamines wrapped in green cellophane. Officer Denny then returned to his car and retrieved a McDonald's bag which contained the money for the drug buy. Officer Denny testified that defendant never spoke to him but kept his hand "shoved up under his shirt" and "basically stared me down the entire time the transaction was taking place." Once the transaction was completed, Officer Denny gave the signal for the surveillance team to move in and arrest Flores and defendant.

Officer Fred Westphaul provided backup for Officer Denny during the drug transaction. Officer Westphaul testified that he was positioned so that he was able to look directly down on the Tahoe automobile and watch the transaction. Officer Westphaul testified that he observed the defendant as Officer Denny approached him and that defendant "never turned his head from [Officer Denny] whatsoever." Additionally, Officer Westphaul stated that he could not see defendant's right hand because it was concealed underneath his sweatshirt. Once the transaction was completed and the responding officers arrived for the "takedown," Officer Westphaul stated that he saw defendant "immediately take his hand out of his sweatshirt. I saw what looked like to me a

pistol in his hand." One of the officers yelled for defendant to "[s]how me your hands." Defendant then "immediately went toward the floorboard, and then when he came up with both hands, both hands were empty." Detective Jeff Patterson recovered a .45-caliber handgun from the floorboard on the passenger side of the vehicle. On 18 September 2000, defendant was indicted for trafficking by possession of methamphetamine, trafficking by sale of methamphetamine, and conspiracy to commit trafficking of methamphetamine by sale. Prior to trial, defendant made a motion *in limine* seeking to exclude two conversations between Flores and Officer Denny which took place prior to the undercover operation. In the first conversation, which was not recorded, Flores stated that his nephew, "David," could meet Officer Denny in Georgia and sell him the drugs. However, Officer Denny refused to deal with Flores' nephew in Georgia. In the second conversation, which was recorded, Flores made general references to his nephew. The trial court initially withheld ruling on the motion, pending the State making a showing of a *prima facie* case of conspiracy. The trial court later allowed Officer Denny to testify regarding the statements.

The matter came to trial at the 14 March 2001 criminal session of Henderson County Superior Court before Judge Dennis J. Winner. The jury returned guilty verdicts on all counts. The trial court sentenced defendant to three concurrent terms of 225 months to 279 months imprisonment. Defendant appeals.

On appeal, defendant contends that the trial court erred in admitting the statement of a co-defendant and failing to grant defendant's motion to dismiss for insufficiency of the evidence. After careful consideration, we discern no error.

Defendant first argues that the trial court erred by admitting the statements made by Flores to Officer Denny. Specifically, defendant contends that the State failed to make a *prima facie* showing that a conspiracy existed between Flores and defendant prior to the admission of the statements. We disagree.

"'A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.'" *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (quoting *State v. Lipford*, 81 N.C. App. 464, 465, 344 S.E.2d 307, 308 (1986)), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992). We find this Court's opinion in *Jackson* persuasive. In *Jackson*, this Court determined that the circumstances of a drug transaction, in which the defendant accompanied the seller to the transaction, remained seated in the vehicle and looked around the parking lot, made it reasonable for a jury to infer that defendant was present "merely to ensure the safety of the [drugs]." *Jackson*, 103 N.C. App. at 244, 405 S.E.2d at 357. This evidence, coupled with the fact that firearms were found in the vehicle, provided sufficient evidence of a conspiracy to traffic in drugs. *Id.*

Here, we conclude that a jury could likewise infer from the evidence presented that defendant was present merely to protect the

drugs, thus providing sufficient evidence of a conspiracy. Defendant arrived with Flores, remained seated during the transaction, "stared down" Officer Denny, all the while keeping his hand on a firearm that was concealed under his sweatshirt. Furthermore, a firearm was recovered from the automobile after the transaction was completed and defendant was arrested. Accordingly, based on this evidence, we hold that the State had made a *prima facie* showing of conspiracy to support admission of the statements made by Flores to Officer Denny. The assignment of error is overruled.

We next consider whether the trial court erred in denying defendant's motion to dismiss for insufficiency of the evidence. Specifically, defendant argues that there was no evidence that he ever possessed the methamphetamine, actually or constructively. Defendant asserts that his mere presence in the automobile in which the drugs were present was not sufficient to show possession. Defendant contends that the car and the drugs were under Flores' possession and that he did not have the power or intent to control the drugs. We are not persuaded.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

Here, defendant disputes having ever had possession of the drugs. "A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it." *Jackson,* 103 N.C. App. at 243, 405 S.E.2d at 357. A person's mere presence where the drugs are located, without other incriminating circumstances, is not sufficient to support constructive possession. *Id.* (quoting *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)). Again, however, we find *Jackson* persuasive. As we have previously determined, it was reasonable for the jury to infer that defendant was present to ensure the safety of the drugs. This evidence, in consideration with Flores' statements to Officer Denny regarding his nephew "David," was sufficient evidence of other incriminating circumstances to support constructive possession and withstand a motion to dismiss.

Accordingly, we discern no error.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).