NO. COA11-161
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Cumberland County
No. 08 CRS 068715

SYLVESTER EUGENE HARDING,
Defendant.

Appeal by defendant from judgment entered 13 May 2010 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 22 August 2011.

Roy Cooper, Attorney General, by LeAnn Martin, Special Deputy Attorney General, for the State.

Bryan Gates, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Sylvester Eugene Harding appeals from a judgment entered consistent with jury verdicts finding him guilty of possession with intent to manufacture, sell, or deliver cocaine, felonious maintaining a vehicle used for keeping or selling a controlled substance, misdemeanor driving while license revoked, and displaying a fictitious registration plate, and from his guilty plea to attaining the status of a habitual felon.

The State's evidence tended to show that, at about 1:00 a.m. on 17 December 2008, Fayetteville Police Officer Allison Brown observed defendant, whom she had previously cited for driving while license revoked, driving a Hummer vehicle affixed with a dealer's registration tag. When defendant drove into a McDonald's parking lot, a woman exited her vehicle and entered defendant's vehicle. Shortly thereafter, the officer initiated a traffic stop of defendant's vehicle and subsequently seized a small "baggy" containing a white powdery substance from both defendant and from the woman. After a field test of the contents of the two bags indicated a positive result for cocaine, Officer Brown packaged the white powder found on the person of the woman and of defendant. The officer then brought the two packages to the evidence locker room at the police department and marked, sealed, and initialed each package. The bags were subsequently delivered to the State Bureau of Investigation ("SBI") where an SBI chemist tested the white powder in each of the bags and determined that the powder was cocaine.

Defendant was indicted for possession with intent to manufacture, sell, or deliver cocaine, felonious maintenance of a vehicle to keep or sell a controlled substance, misdemeanor driving while license revoked, and displaying a fictitious

registration plate, and was issued a special indictment for attaining habitual felon status. Defendant moved to suppress the evidence seized by the officers at the scene, which the trial court denied. The case was heard before a jury, which returned guilty verdicts on each of the four charged offenses; defendant pled guilty to attaining habitual felon status. On 12 May 2010, the court entered a judgment sentencing defendant to a minimum term of 93 months and a maximum term of 121 months imprisonment. Upon defendant's motion for reconsideration, the court heard evidence in mitigation of defendant's sentence. As a result, the trial court vacated its judgment and entered a new judgment with the mitigated sentence of 82 months to 108 months imprisonment. Defendant gave written notice of appeal.

Defendant first contends the State failed to establish a chain of custody sufficient to allow the admission of the State's Exhibits 4 and 5 into evidence, which were the two bags containing white powder recovered from the persons of defendant and of the woman who had entered defendant's vehicle. Defendant asserts that there was a two-week gap in the chain of custody between the time when Officer Brown placed the two bags in the evidence section's drop box and when the bags were received and tested by the SBI, and so argues the trial court abused its

discretion by allowing this evidence to be admitted. We disagree.

Our Supreme Court has articulated that a two-prong test must be satisfied before real evidence is properly received into evidence. *See State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). "The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *Id.* "Determining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound discretion." *State v. Fleming*, 350 N.C. 109, 131, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

Here, the evidence shows that Officer Brown packaged the substances seized from defendant and from the woman at the scene, transported the two packages containing the evidence to the police department, sealed and initialed both packages, completed the SBI testing form and Fayetteville Police Department evidence control forms, and, per department policy, placed both bags in the locked drop box to which evidence technicians are the only persons with keys. An officer then delivered the two bags to an SBI evidence technician on

31 December 2008. The SBI technician initially deposited the bags in the SBI vault, then retrieved the bags and delivered them to an SBI drug chemist for testing. Officer Brown testified at trial that the State's Exhibit 4 was the package of cocaine seized from the woman, that the State's Exhibit 5 was the package of cocaine seized from defendant, and further testified that her seal on the packages had not been altered or changed in any way. The SBI drug chemist also testified that the State's Exhibits 4 and 5 were sealed with no openings or alterations to the seal when she received them at the SBI.

Although defendant argues that the chain of custody was insufficient due to the amount of time that elapsed between the gathering and testing of the white powder, we have previously stated that, "[w]here a package of evidence is properly sealed by the officer who gathered it and is still sealed with no evidence of tampering when it arrives at the laboratory for analysis, the fact that unknown persons may have had access to it does not destroy the chain of custody." *State v. Newcomb*, 36 N.C. App. 137, 139, 243 S.E.2d 175, 176 (1978). Further, our Supreme Court has stated that "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392. Accordingly, we conclude that the trial court did not

abuse its discretion by admitting the State's Exhibits 4 and 5 into evidence.

Defendant next contends the trial court erred by denying his motion to dismiss the charged offense of maintaining a vehicle for the keeping or selling of controlled substances, because defendant asserts that there was insufficient evidence presented that "the car was used for keeping controlled substances." Specifically, defendant cites *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), in support of his assertion that the State presented evidence of only a ***single*** incident in which defendant used his car to keep or sell cocaine, and argues that this evidence cannot establish the essential "keeping or selling" element of N.C.G.S. § 90-108(a)(7). *See Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30 (stating that the word "keep," as used in N.C.G.S. § 90-108(a)(7), "denotes not just possession, but possession that occurs over a duration of time"). In *Mitchell*, our Supreme Court stated: "That an individual within a vehicle possesses [a controlled substance] on one occasion cannot establish that the vehicle is 'used for keeping' [that controlled substance] . . . ." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30. In its brief, the State concedes that it cannot distinguish *Mitchell* from the instant case and recommends that this Court reverse defendant's

conviction for maintaining a vehicle for keeping or selling controlled substances. Because the State did not produce sufficient evidence that defendant's vehicle was "used for the keeping or selling" of a controlled substance, we reverse defendant's conviction under N.C.G.S. § 90-108(a)(7).

No Error in part; Reversed in part.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).