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NO. COA01-1310

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

VICTOR SHEVAY THOMAS

Forsyth County

Nos. 00 CRS 52318

00 CRS 52319

00 CRS 52322

00 CRS 52668

00 CRS 40403

Appeal by defendant from judgment entered 16 May 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 14 August 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.*

*White and Crumpler, by David B. Freedman and Dudley A. Witt, for defendant-appellant.*

CAMPBELL, Judge.

Victor Shevay Thomas ("defendant") appeals from an order entered 8 May 2001 denying his motion to suppress and judgment entered 16 May 2001, resulting from a jury finding defendant guilty of felony possession of cocaine and possession with intent to sell and/or deliver cocaine. We find no error in the trial court's rulings and therefore, we affirm.

On 22 June 2000, an informant called the Forsyth County Sheriff's department and spoke with Officer Debra McClearen

("Officer McClearen"). The informant, Velma Edgerson ("Edgerson"), told Officer McClearen that defendant would be going to 1294 Foster Street in Winston-Salem to deliver cocaine to Takeka. Edgerson called back about ten minutes later and told Officer McClearen that the plans had changed and the defendant would be meeting Takeka at the convenience store at Waughtown and Adler Streets. Officer McClearen verified the registration of the car as defendant's, his recent release from prison and his prior record. Officer McClearen called patrol officers for support, focused her investigation on both the Foster Street and the Waughtown Street store and finally limited the investigation to the convenience store once she saw a car pull in that fit the description given by the informant: black Mazda with gold trim, license plate MZB-6917. Defendant parked next to a truck and sat in his car for a couple of minutes. The officers approached him at the same time that a female was approaching his car. When marked patrol cars approached, the female walked away to the nearby pay phone, which she did not thereafter use. The officers saw defendant leaning over the steering wheel with his hands down near the floor of the vehicle. From the area into which defendant had been leaning, the officers seized a sunglasses case that contained 1.1 grams of cocaine, but not the 16 ounces that informant said would be there.

At that point, Edgerson called Officer McClearen to ask if she had found defendant and told Officer McClearen that the substantial amount of cocaine originally reported was at defendant's mother's house on Cody Drive. Officer McClearen went to Cody Drive and

spoke to defendant's mother, Shirley Smith ("Mrs. Smith"), who signed a consent to search form. Contraband, including marijuana and cocaine were found along with a 9 millimeter pistol.

At trial, Edgerson testified on defendant's behalf. Contrary to what she had originally reported to Officer McClearen, Edgerson testified that her friend, Anthony Frazier, planted the cocaine in defendant's sunglasses case and in his shaving kit at Mrs. Smith's house.

After being indicted on the two felony cocaine charges, defendant was charged with being an habitual felon. Defendant entered a plea to the habitual felon charge and reserved his right to appeal the denial of the motion to suppress and the convictions of the underlying charges relating to the cocaine.

Defendant assigns error to the following: (1) the trial court's denial of his motion to suppress evidence obtained in the search of defendant's car and the introduction of the evidence at trial; (2) the trial court's denial of defendant's motion to suppress the evidence seized at defendant's mother's house; (3) the trial court's denial of defendant's motion to dismiss at the close of all the evidence; and (4) the trial court's entry of a judgment holding defendant to be an habitual felon.

#### Assignment of Error I

Defendant argues that the trial court erred in denying his motion to suppress evidence obtained in the search of his automobile and thereafter allowing the State to introduce the evidence at trial. Defendant bases his argument on there being

insufficient probable cause to conduct a warrantless search of defendant's automobile and the search being in violation of defendant's rights under the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress, is that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001), *opinion after remand*, 355 N.C. 264, 559 S.E.2d 785 (2002), *reconsideration denied*, 355 N.C. 495, 563 S.E.2d 187 (2002) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citation omitted), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)). "Thus, we must not disturb the trial court's conclusions if they are supported by the court's factual findings." *State v. Logner*, 148 N.C. App. 135, 557 S.E.2d 191 (2001).

Here, defendant argues that Edgerson provided an anonymous tip, which is insufficient to establish probable cause. We disagree. In ruling on defendant's motion to suppress, the trial court considered the totality of the circumstances, including "the reliability of the information" provided by a confidential informant. The court found that based on "the information provided by the confidential informant, subsequent verification of many details of the defendant's future movements on this date, the

freshness of the information, the informant's stated basis of knowledge, and other factors . . . there was, in fact, probable cause for the arrest on this occasion." There is ample evidence to support the finding that Edgerson was a confidential and reliable informant. Officer McClearen knew Edgerson from prior instances in which Edgerson attempted to assist the officer in apprehending suspected drug dealers. Edgerson gave Officer McClearen specific information describing the location of defendant's imminent drug transaction, including a description of the car he would be driving and defendant's prior record of drug offenses and recent release from prison. Based on this evidence, the trial court correctly concluded that the officers had probable cause to conduct the search of defendant's automobile. This assignment of error is overruled.

Assignment of Error II

Next, defendant contends that the evidence seized in the search of his mother's house was fruit of the poisonous tree since the officers lacked probable cause to search defendant's automobile.

As stated above, in reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's findings. "Where the evidence presented supports the trial judge's findings of fact, these findings are binding on appeal." *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Defendant argues that the officers would not have had cause to search the defendant's

[mother's] residence, if probable cause did not exist for the first search. Pursuant to the information provided by a reliable informant, Edgeron, we have determined that the officers had probable cause to conduct the search of the automobile. Thus, there was no poisonous tree. Furthermore, "[c]onsent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citation omitted). Because defendant's mother consented to the search of her house, the evidence seized therein is admissible. We find no error in the trial court's ruling.

#### Assignment of Error III

Defendant's third argument is that the trial court erred in denying his motion to dismiss at the close of all the evidence. This assignment of error is based on defendant's contentions that there existed: (1) insufficient evidence to support each element of the crimes charged in relation to the informant's unreliability; and (2) the informant's trial testimony that she planted the drugs on the defendant.

"In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense." *State v. Reid*, \_\_\_ N.C. App. \_\_\_, 565 S.E.2d 747 (2002) (citation omitted). "Whether the evidence presented is substantial is a question of law for the court." *State v. Siriguanico*, \_\_\_ N.C.App. \_\_\_, 564 S.E.2d 301

(2002) (citation omitted). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002), *cert. denied*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 488, \_\_\_ L.Ed.2d \_\_\_ (2002) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). When considering a criminal defendant's motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (citation omitted). The trial court correctly denies a motion to dismiss "[if] there is substantial evidence of every element of the offense charged, or any lesser offense, and of defendant being the perpetrator of the crime." *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (citation omitted).

Here, defendant was convicted of felony possession of cocaine and possession with intent to sell and/or deliver cocaine. In order to convict the defendant of the former, the State had to show that defendant possessed a controlled substance in a manner not authorized by the Controlled Substances Act. See N.C. Gen. Stat. §§ 90-90 and -95 (2001). The three elements of possession with intent to sell and/or deliver cocaine are: "(1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897,

901 (2001) (citations omitted); see also N.C. Gen. Stat. § 90-95(a)(1).

In this case, the cocaine was not found on defendant's person, but inside a sunglasses case in his car and in the room used by him in his mother's house. "Proof of nonexclusive, constructive possession is sufficient" to satisfy the possession element of a violation of the Controlled Substances Act. *State v. Matias*, 354 N.C. 549, 555 S.E.2d 269 (2001). "[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *Id.* (quoting *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). As long as the defendant "has the intent and capability to maintain control and dominion over" the drugs, he can be found to have constructive possession. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986).

In this case, the State's evidence showed that defendant was in exclusive possession of the car and immediately prior to him exiting the vehicle, his hands were seen in the area in which the officers found the sunglasses case containing the cocaine. Thus, the State produced sufficient evidence for a jury to conclude that defendant was in possession of the cocaine seized from his automobile.

Regarding defendant's conviction of possession with intent to sell and/or deliver cocaine, the State presented evidence that defendant had been staying with his mother and the officers found cocaine in her house in the bedroom where defendant had been

staying. Along with the illegal substance, the officers found rolling papers, marijuana seeds, and a film canister containing twenty-one small cocaine baggies (9.3 grams) packaged for sale. "Where sufficient incriminating circumstances exist, constructive possession of the contraband materials may be inferred even where possession of the premises is nonexclusive." *State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 147 (2001). The court considers the totality of the circumstances and allows the jury to decide from the evidence presented whether or not constructive possession exists. *State v. Butler*, 147 N.C. App. 1, 556 S.E.2d 304 (2001), *motion granted*, 560 S.E.2d 794 (2002), *and decision aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002) (citations omitted). Besides the contraband being found in the area of the house where defendant stayed, defendant confirmed to the magistrate that his address was the address at which the drugs were found, Mrs. Smith testified that defendant stayed in that part of the house, a briefcase with defendant's important legal papers and a pistol were found in the same area as the contraband, and the evidence was found between the bunk beds in a brown shaving kit.

Furthermore, the State offered ample evidence to submit the question of defendant's intent to sell to the jury. Quantity is a relevant factor in deducing that a narcotic is being prepared for sale, but it is not the sole factor. *State v. Roseboro*, 55 N.C. App. 205, 210, 284 S.E.2d 725, 728 (1981) (citation omitted). "Evidence of the location of the drugs, the packaging used, and the existence of paraphernalia used to measure and package drugs also

is relevant to the question of intent to sell." *Id.* Here, the packaging of the cocaine in small baggies and containment in a film canister for ease of inconspicuous transportation is evidence ample enough for a jury to infer an intent to sell or deliver the narcotics. Therefore, taken in the light most favorable to the State, the evidence was sufficient enough from which a reasonable jury could conclude that defendant was guilty of intent to sell and/or deliver cocaine.

Finally, defendant bases his argument regarding the denial of his motion to dismiss on the contention that the trial testimony of Edgerson, if false, amounts to perjury. It is well established that the tribunal decides questions of law and questions of fact, including credibility of witnesses, are left for determination by the jury. "Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Bruce*, 315 N.C. 273, 281, 337 S.E.2d 510, 516 (1985) (citations omitted). Here, the jury determined that defendant was guilty of the charges brought against him and in so doing found the discrepancy in Edgerson's testimony "in favor of the State, and this it was entitled to do." *State v. Upright*, 72 N.C. App. 94, 100, 323 S.E.2d 479, 484 (1984). Accordingly, we hold this assignment of error to be without merit.

#### Assignment of Error IV

Defendant's fourth and final argument requests this Court to set aside the trial court's entry of judgment based upon defendant's plea to being an habitual felon. Because defendant's

argument is based on there being insufficient evidence of the underlying crimes with which he was convicted at trial and this Court has found those convictions to withstand constitutional scrutiny, we uphold the lower court's entry of a judgment based upon the indictment charging defendant as being an habitual felon.

No error.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).