

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1004

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

Richmond County
Nos. 04 CRS 50282-3

CHRISTOPHER VALENTINO COX

Appeal by defendant from judgments entered 17 March 2005 by Judge Gary E. Trawick in Richmond County Superior Court. Heard in the Court of Appeals 29 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

Richard G. Roose for defendant appellant.

McCULLOUGH, Judge.

Defendant was found guilty of possession of marijuana with intent to sell or deliver and of trafficking in cocaine by possession. He was sentenced to active terms of six to eight months and thirty-five to forty-two months, to run consecutively. We find no error.

The State presented evidence tending to show that just after noon on 20 January 2004, Lieutenant Mike Patrick of the Richmond County Sheriff's Department, while on patrol, saw defendant sitting in the passenger seat of an abandoned pickup truck parked outside an abandoned house. As Lt. Patrick approached the truck, defendant

looked up, made eye contact with the officer, jumped out of the truck and ran behind the house. Before Lt. Patrick reached the truck, defendant came back from around the house. Defendant walked with Lt. Patrick to the truck. Defendant told Lt. Patrick that the truck was not his. The officer looked inside the glove box of the pickup truck and found packages of what appeared to be crack cocaine, powder cocaine and marijuana individually packaged for sale. Lt. Patrick advised defendant that he was under arrest. Lt. Patrick called other officers for assistance when defendant attempted to run.

Lieutenant Jeff Starling and Deputy Creed Freeman of the Richmond County Sheriff's Department responded to Lt. Patrick's call for assistance. The officers seized the packages and a razor blade from the pickup truck. In a freshly dug hole behind the abandoned house, Deputy Freeman found digital scales and a quantity of what appeared to be cocaine in a plastic bag. With defendant's consent, officers searched defendant's residence and found on the kitchen table green ties, white ties, and red and white stripe ties matching those used to secure the plastic bags found in the abandoned vehicle. The officers also found residue of marijuana on the kitchen table in defendant's residence.

Analysis of the various items by a forensic drug chemist of the State Bureau of Investigation revealed the following results. The bags seized from the pickup truck contained (a) 113.3 grams of cocaine powder, (b) 25.1 grams of crack cocaine, (c) 32.0 grams of crack cocaine, and (d) 7.9 grams of marijuana. The bag seized

behind the house contained 23.1 grams of crack cocaine.

Two witnesses testified for defendant that they saw Lt. Patrick approach the pickup truck; that they saw defendant and the officer together; that they never saw defendant inside the truck; and that defendant's brother told the officers the drugs belonged to him.

By the sole assignment of error brought forward in his brief, defendant contends the court erred by denying his request for submission of the offense of possession of cocaine as a lesser offense of trafficking in cocaine. If there is evidence upon which a jury could find a defendant committed a lesser offense, the trial court must submit the lesser offense to the jury. *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). The trial court need not submit a lesser offense "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972).

The distinguishing factor between the greater offense of trafficking in cocaine by possession and the lesser offense of possession of cocaine is that the greater offense requires possession of 28 grams or more of the substance whereas the lesser

offense requires possession of a lesser quantity. *State v. Winslow*, 97 N.C. App. 551, 557, 389 S.E.2d 436, 440 (1990). Defendant argues a jury could have found that he possessed the 23.1 grams of cocaine found behind the house but not the cocaine found in the glove box of the vehicle. He submits that a jury could have made this finding based upon evidence that he expressly disclaimed ownership or possession of the contraband found in the vehicle but made no such express disclaimer of possession of the contraband found behind the house.

Defendant's argument has no merit. Defendant presented evidence tending to show that all of the drugs belonged to his brother. A defendant is not entitled to submission of a lesser offense when his defense is to deny commission of any crime. *State v. Maness*, 321 N.C. 454, 461-62, 364 S.E.2d 349, 353 (1988).

Defendant's remaining three assignments of error, not having been argued in his brief, are deemed abandoned. N.C.R. App. P. 28(a).

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).