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NO. COA05-1329

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 04 CRS 50113

KIM TYRONE JESSUP

Appeal by defendant from a judgment entered 14 June 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 10 May 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Christine M. Ryan, for the State.

White & Crumpler, by David B. Freedman, for defendant.

BRYANT, Judge.

Kim Tyrone Jessup (defendant) appeals from a judgment entered 14 June 2005 upon a jury verdict convicting him of trafficking in cocaine by possession and possession of up to one-half ounce of marijuana. Defendant was sentenced to thirty-five to forty-two months imprisonment.

The State's evidence showed the following: Detective Tollie of the Winston Salem Police Department began looking for drug suspect Cosmo Wilkes (Wilkes) on 1 January 2004. As part of an ongoing drug investigation, Detective Tollie learned Wilkes would be returning on a flight from Atlanta to his mother's home that evening. Detective Tollie observed Wilkes at his mother's home at

approximately 7:30 p.m. accompanied by a female. Police then observed Wilkes's vehicle parked alongside a second vehicle and saw Wilkes hand the driver of the second vehicle a small object cupped in his hand before he quickly drove off. Recognizing this as a drug transaction, the police surveillance team then followed Wilkes, who drove to 2274 Olivet Church Road. Wilkes exited the vehicle without the female and remained inside for approximately fifteen minutes. Wilkes then traveled to another nearby residence and parked some distance down a long driveway. The surveillance team observed that Wilkes remained there for a few minutes and then left. Wilkes pulled over when he realized the police were following him. Police searched Wilkes' vehicle, and discovered 68.9 grams of cocaine and \$5,121.00 in U.S. currency, including five \$1,000.00 stacks wrapped in a rubber band in the female's purse. Police then traveled to the home of Wilkes' mother. Detective Tollie prepared a search warrant for her home, and the warrant was executed at approximately 4:00 a.m. on 2 January 2004. At the home of Wilkes' mother, police located an additional 14.5 grams of cocaine in a duffle bag. Wilkes' mother identified the bag as belonging to Wilkes and said he had left it there after arriving from Atlanta. Detective Tollie then applied for a search warrant to search 2274 Olivet Church Road and one of the vehicles there.

The warrant to search the residence was issued at 6:10 a.m. on 2 January. In his affidavit in support of the search warrant, Detective Tollie stated a confidential informant identified one of

Wilkes' customers as a large-scale cocaine trafficker who was a black male known to go by "Jay." The confidential informant also provided detailed directions to 2274 Olivet Church Road, where "Jay", also known as defendant, Tyrone Jessup, resided. Detective Tollie advised the search warrant team that he had received reliable information regarding defendant who resided in the home, and who was known to frequently carry a handgun. Detective Tollie indicated that defendant was the owner of the 2274 Olivet Church Road house. While knocking at the front door, the police waited for someone to acknowledge them and heard nothing. Detective Tollie struck the door open with an entry tool. Another detective entered the house first and observed defendant running down the steps and pointing a gun at the detectives. Before Detective Tollie entered, he heard gunfire and upon entering, observed defendant falling down the lower part of the steps with a gunshot wound. There was a gun lying beside defendant, and then a female appeared upstairs on the landing and was taken into custody. Police located another female downstairs.

In the residence, police found documents addressed to defendant, including utility bills, papers with phone numbers and a clear plastic bag with cocaine residue. Police seized a black leather case containing a plate, plastic bags, hand scales, razor blade, ledger, and a small caliber handgun magazine. Police also seized a ledger that contained names and dollar amounts owed, telephone numbers and notations for "hard" (a street term for crack cocaine), "soft" (a street term for powder cocaine), and "green" (a

street term for marijuana). Police found another ledger written on a Federal Express ground receipt bearing defendant's name and address. Also found was U.S. currency and several plastic bags containing crack cocaine, powder cocaine and marijuana with rolling papers. Scales used to weigh various quantities of drugs, criminal investigation textbooks and study guides were also found.

Defendant was indicted by a grand jury in Forsyth County on one count of trafficking cocaine, one count of possession of marijuana, and two counts of assault with a firearm on a law enforcement officer. Defendant filed a pretrial motion to suppress evidence seized pursuant to the search warrant, which motion was denied after a hearing on 25 April 2005. Defendant was tried before a jury during the 9 June 2005 Criminal Session of Forsyth County Superior Court, the Honorable Ronald E. Spivey presiding. The jury found defendant guilty of trafficking cocaine and possessing marijuana. Defendant appeals.

Defendant raises three issues on appeal: whether the trial court erred in (I) denying defendant's motion to suppress evidence seized pursuant to the search warrant; (II) denying defendant's motion for a mistrial based on a juror's statements; and (III) denying defendant's motion to dismiss the drug charges for insufficiency of the evidence.

I

Defendant first argues the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant.

Defendant specifically contends the affidavit supporting the search warrant failed to establish probable cause and therefore violated his constitutional rights. We disagree.

When determining whether a search warrant is supported by probable cause, a reviewing court must apply the totality of the circumstances test which examines "whether the evidence as a whole provides a substantial basis" for probable cause to exist. *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citing *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)). In adhering to this standard of review, "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984). It is well settled that a probable cause determination does not require hard and fast certainty by the officer but involves more of a common-sense determination considering evidence as understood by those versed in the field of law enforcement. *State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000) (citation and emphasis omitted). In order for a search to be valid, it is not required that the affiant or the confidential informant have actually observed drugs on the premises. *State v. Crawford*, 104 N.C. App. 591, 596, 410 S.E.2d 499, 502 (1991). The indicia of reliability of an informant's information "may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently

corroborated by the police." *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003), *aff'd*, 358 N.C. 135, 591 S.E.2d 519 (1994).

The constitutionality of the search in the instant case hinges on whether there was probable cause to issue a search warrant to search defendant's residence and vehicle located at 2274 Olivet Church Road. A confidential informant provided significant information to establish probable cause for the search. The informant provided detailed information regarding the drug dealing pattern of Cosmo Wilkes. The informant also provided information that defendant was a drug dealer supplied by Wilkes, and further provided accurate information regarding defendant's home and vehicles. Although this was the first time police used this confidential informant, the indicia of reliability as to the information provided established probable cause where the police were able to independently observe Wilkes' conduct. See *State v. Trapp*, 110 N.C. App. 584, 589-90, 430 S.E.2d 484, 488 (1993) (anonymous informant's information may provide probable cause if the informant's information can be independently verified); see also *Collins*, 160 N.C. App. at 315, 585 S.E.2d at 485 (informant's tip is more reliable if it contains "a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted") (citation omitted). Police saw Wilkes traveling in the vehicle described by the informant, participate in a drug transaction with someone in a vehicle, and then travel to

defendant's home. Wilkes then made a third stop at a house for a few minutes, and when searched after this stop, he possessed a large amount of cocaine and U.S. currency. After searching the home of Wilkes' mother, police seized more cocaine and electronic scales. The combination of the officers' years of training, knowledge and experience along with the events of 1 January established probable cause to believe that there would be drugs and related paraphernalia at 2274 Olivet Church Road. See *State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (holding that an officer may rely upon information received through an informant "so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge") (citation omitted), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

Based on the totality of the circumstances, the evidence as a whole provided a substantial basis to support the magistrate's determination of probable cause to search defendant's residence and vehicle. See *State v. Fowler*, 89 N.C. App. 10, 15, 365 S.E.2d 301, 304 (1988) ("Applying the practical common sense approach mandated by the 'totality of the circumstances' analysis, this Court finds there was a substantial basis for the [magistrates conclusions based on the affidavits]. Accordingly, we conclude adequate probable cause, based upon the [confidential] informant's tip and the police investigation, existed for issuance of the search warrant."). This assignment of error is overruled.

Defendant next argues the trial court erred in denying defendant's motion for a mistrial based on a juror's response to whether she could be fair and impartial in her deliberations. Our review of the dialogue between the trial court and the juror indicates the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

"The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2005). A trial court's ruling on a motion for mistrial is not reviewable on appeal absent the appearance of a manifest abuse of discretion. *State v. Green*, 95 N.C. App. 558, 564, 383 S.E.2d 419, 422 (1989).

After deliberating, the jury announced that it had reached unanimous guilty verdicts on all counts. Upon polling the jury, the juror was asked:

CLERK: Are these your verdicts?

JUROR: Yes.

CLERK: Do you still assent thereto?

JUROR: No.

THE COURT: Your answer is no?

JUROR: Answer is no.

At that point, the trial court requested that verdict sheets be returned to the jury for further deliberations. A few minutes later, the jury requested a break and the trial court granted a

twenty minute recess. The trial court then received notice that a member of defendant's family had caused a scene in the lobby, possibly in the presence of some of the jurors. Once the jury returned, the trial court individually questioned those jurors who indicated they had seen the disturbance in the lobby. The juror in question was called on by the trial court to clarify her commitment to deliberate.

During the second round of questioning by the trial court, the juror indicated that she did not think she would ever agree with the other jurors. The trial court continued:

THE COURT: [D]o you feel that you could continue to deliberate on these matters and be fair and impartial to both sides?

JUROR: Keeping the same feeling that I have?

THE COURT: If that's your feeling, yes, ma'am.

JUROR: Yes, sir.

The trial court clarified:

THE COURT: Okay but you feel that you could still sit and deliberate with your fellow jurors and be fair and impartial to both sides no matter what your ultimate resolution of the case is?

JUROR: Yes, sir.

THE COURT: Okay, So you feel that you could then continue to be fair and impartial if called upon to deliberate further?

JUROR: Yes, sir.

When asked directly during the second round of questioning from the trial court, the juror asserted three separate times that she could, in fact, continue to deliberate and be fair and impartial to

the defendant. Based on the entire colloquy between the juror and the trial court, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. See *State v. Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (1984) (denial of the defendants' motion for a mistrial pursuant to N.C. Gen. Stat. § 15A-1061 was not error where the victim had a conversation with a juror because the trial court held a *voir dire* hearing to ensure that no prejudice resulted and that the due process requirement of impartiality was maintained). This assignment of error is overruled.

III

Defendant argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence of the drug charges. We disagree.

"The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993) (citation omitted), *cert. denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). "Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citation omitted). In ruling on a motion to dismiss, all evidence admitted must be considered in the light most favorable to the State, giving the State the benefit of all

reasonable inferences which can be drawn therefrom. *State v. Rasor*, 319 N.C. 577, 585, 356 S.E.2d 328, 333 (1987).

To convict defendant of trafficking in cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3), the state must show that defendant sold, manufactured, delivered, transported or possessed more than 28 and less than 200 grams of cocaine or its derivatives. N.C. Gen. Stat. § 90-95(h)(3)(a); see *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). To convict defendant of possession of marijuana in violation of N.C. Gen. Stat. § 90-95(d)(4), the state must show defendant possessed one half ounce or less of marijuana. N.C. Gen. Stat. § 90-95(d)(4); see *State v. Partridge*, 157 N.C. App. 568, 571, 579 S.E.2d 398, 399-400, *disc. rev. improvidently allowed*, 357 N.C. 572, 597 S.E.2d 673 (2003).

In the case at bar, defendant argues the State failed to prove defendant possessed the drugs found in his residence. It is well established that a trafficking charge can be proved by actual or constructive possession of an adequate quantity of drugs. Constructive possession of a substance exists when the defendant "has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If defendant does not have exclusive control over the premises, there must be present other incriminating circumstances before the court can find constructive possession. *State v. Autry*, 101 N.C. App. 245, 253, 399 S.E.2d 357, 362 (1991). Also, the State may overcome a motion to dismiss by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to

justify the jury in concluding that the same was in his possession." *State v. King*, 99 N.C. App. 283, 288, 393 S.E.2d 152, 155 (1990) (internal citations omitted).

The police determined defendant owned the residence at 2274 Olivet Church Road. There were utility bills and a shipping label addressed to defendant found at that address. Defendant came running downstairs with a handgun when the police entered to execute the search warrant. The gun defendant pointed at police matched the handgun magazine found inside a leather case with the drug paraphernalia in the residence. Although two women were apprehended at 2274 Olivet Church Road, direct information gathered during the drug investigation and circumstantial evidence located during the search indicated defendant was the owner of the property. Taken in the light most favorable to the State, there was substantial evidence before the jury to show defendant's possession of the drugs. Therefore the trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

No error.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).