NO. COA05-1576

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Haywood County
No. 05 CRS 50085

GILBERT ZAMORA,
Defendant.

Appeal by defendant from judgment entered 21 September 2005 by Judge Charles P. Ginn in the Superior Court in Haywood County. Heard in the Court of Appeals 8 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

William D. Auman, for defendant-appellant.

HUDSON, Judge.

At the 19 September 2005 criminal session of superior court, a jury found defendant Gilbert Zamora guilty of felonious trafficking more than fifty, but less than 2,000, pounds of marijuana. The court sentenced defendant to 35 to 45 months in prison. Defendant appeals. For the reasons discussed below, we find no error.

The evidence tended to show the following: Trooper Ray Herndon of the North Carolina Highway Patrol stopped the car in which defendant was a passenger for traveling sixty-nine miles per hour in a fifty-five mile-an-hour zone on Interstate 40. After

obtaining a driver's license and insurance documents from the driver, Rafael Trajillo, Trooper Herndon searched Trajillo for weapons and found none. After getting contradictory replies from defendant and Trajillo about their destination and noticing several cardboard boxes in the vehicle, Trooper Herndon asked for and received permission to search the car. Another trooper arrived with a dog which alerted on the boxes; a subsequent search revealed 256 individual packets of marijuana with a gross weight of 294 pounds. On cross-examination, Trooper Herndon admitted that Tarjillo had obtained the boxes from someone in Milwaukee or Chicago alone and that defendant played no role in that transaction. Defendant offered no evidence. Defendant moved to dismiss for insufficiency of the evidence which motion the court denied. Defendant also requested the jury be instructed on the lesser-included offense of trafficking less than fifty pounds of marijuana, but the court declined to do so.

Defendant first argues that the trial court erred in failing to instruct the jury as requested by defendant on the lesser included offense of trafficking more than 10 but less than 50 pounds of marijuana. We do not agree.

N.C. Gen. Stat. § 90-95(h) (2004) provides in pertinent part that:

> (1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
>
> a. Is in excess of 10 pounds, but less than 50

> pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($ 5,000);
>
> b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($ 25,000).

Id. Weight is an essential element under this statute. *State v. Anderson*, 57 N.C. App. 602, 608, 292 S.E.2d 163, 167 (1982). Defendant contends that the evidence regarding the weight of the marijuana could have permitted the jury to convict him of a lesser level of trafficking, in that not all of the material seized was shown actually to be marijuana. In *State v. Wilson*, this Court considered a similar assignment of error. 155 N.C. App. 89, 574 S.E.2d 93 (2002), *disc. review denied*, 356 N.C. 693, 579 S.E.2d 98. We held that

> [a] defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. When the offense is for trafficking in cocaine, the only difference between the greater and lesser levels of the offense relate to the amount of cocaine found. N.C. Gen. Stat. § 90-95(h)(3)(a-c) (2001). In the present case, it is undisputed that the amount of cocaine discovered by the officers weighed 1,995 grams. Since the weight of the cocaine was clear, the jury could not have convicted Defendant Calvert of a lesser level of trafficking in cocaine in the absence of evidence supporting a lesser offense. Thus, the court did not err by failing to instruct the jury as to the different levels by which Defendant Calvert could have been found guilty

> of this offense.

Id. at 99-100, 574 S.E.2d at 100-101 (internal citations and quotation marks omitted). Where the State has presented evidence of the weight of marijuana, this Court held that "[t]he burden would be upon the defendants to show that . . . part of the matter or material seized did not qualify as 'marijuana.'" *Anderson*, 57 N.C. App. at 608, 292 S.E.2d at 167.

Here, Trooper Herndon testified that he opened several packets and each contained marijuana. He weighed the packets in groups on a balance scale to obtain the total weight of 294 pounds. Although Trooper Herndon testified that he did not open every packet, he did testify that he was certain they all contained marijuana. Thus, the State presented evidence of the weight of the marijuana and defendant made no showing that any of the seized material was not marijuana. We overrule this assignment of error.

Defendant also argues that the trial court erred in failing to dismiss the charge against him on the basis of insufficiency of the evidence. We disagree.

In ruling on a motion to dismiss,

> the trial court must consider all the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom, and it must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it,

> then it is proper to submit the case to the jury.

State v. Mitchell, 336 N.C. 22, 27, 442 S.E.2d 24, 27 (1994)(internal citations and quotation marks omitted).

> In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (internal citations and quotation marks omitted; ellipses in original). "[C]onstructive possession depends on the totality of the circumstances in each case. *No single factor controls, but ordinarily the questions will be for the jury*." *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *affirmed*, 331 N.C. 113, 413 S.E.2d 798 (1992) (emphasis in original). Where a defendant "did not have exclusive possession of the car in which the [contraband] was found, the critical issue is whether the evidence discloses other incriminating circumstances sufficient for the jury to find defendant had constructive possession of the [contraband]." *Matias*, 354 N.C. at 552, 556 S.E.2d at 271.

Here, the evidence showed that defendant was the passenger in a vehicle carrying 296 pounds of marijuana. Defendant did not look at Trooper Herndon when he approached after the traffic stop. Defendant gave a story about his destination that was different from Trajillo's and gave conflicting versions of his own account. Defendant and Trajillo also gave conflicting stories about the contents and ownership of the boxes which contained the marijuana. Taken in the light most favorable to the State, these additional incriminating circumstances support the jury's finding that defendant had constructive possession of the marijuana. This assignment of error is without merit.

No error.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).