NO. COA05-1583

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v. Wilson County
No. 04 CRS 51181

JEFFREY JEROME CARMICHAEL

Appeal by defendant from judgment entered 10 February 2005 by Judge W. Russell Duke, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 8 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

Geoffrey W. Hosford for defendant appellant.

McCULLOUGH, Judge.

Jeffrey Jerome Carmichael ("defendant") appeals from conviction and judgment for trafficking in cocaine by possession. We hold that defendant received a fair trial, free from prejudicial error.

Defendant's Petition for Review

Defendant failed to file a notice of appeal from his conviction and judgment for trafficking in cocaine by possession within fourteen days of the entry of judgment as required by Rule 4(a) of the North Carolina Rules of Appellate Procedure. Defendant was convicted on 10 February 2005, and on 17 May 2005 the trial

court prepared an appellate entries form stating defendant had given notice of appeal that day.

However, defendant has filed with this Court a petition for a writ of *certiorari* in which he seeks review of the arguments set forth in his appellate brief. Pursuant to our authority under Rule 21 of the North Carolina Rules of Appellate Procedure, we grant defendant's petition for a writ of *certiorari* and review the judgment and conviction for trafficking in cocaine by possession.

Facts

The State presented evidence that tended to show that on 28 February 2004 Police Sergeant Reggie Branch of the Wilson Police Department, accompanied by Officer Rob Weatherford, went to an apartment at 718 Tarboro Street with outstanding warrants for defendant's arrest. Sergeant Branch testified that he knocked on the door of the apartment and asked to be allowed inside, and that Mrs. Ruby Melton, the woman who answered the door, agreed and let him in. Sergeant Branch observed defendant inside the apartment. He advised that he had a warrant for defendant's arrest. Defendant thereafter "took off quickly, like running, towards the bedroom." Sergeant Branch went to pursue him. Mrs. Melton and another woman, Ms. Farmer, attempted to block Sergeant Branch's path, but he was able to get around them and into the bedroom.

Sergeant Branch testified that as he entered the bedroom he saw the defendant "coming from around the back of the bed, back towards the door." Sergeant Branch placed defendant under arrest, and removed him to the living room. Officer Weatherford watched the

defendant while Sergeant Branch returned to "check that area right inside the bedroom where he had went incident to arrest because [he] didn't know whether [defendant] ran in there and was destroying evidence or had a weapon or anything." On the floor on the far side of the bed, between the bed and the wall, Sergeant Branch observed "in plain view [ ] one bag of – one plastic bag containing a white powder substance and also a handgun that [he] could see[.]" Sergeant Branch questioned Mrs. Melton about the drugs and firearm. Mrs. Melton responded that the gun belonged to her husband but that she had no idea where the drugs came from. Sergeant Branch returned to the bedroom and discovered a baggie of crack cocaine in plain view a few feet away, "further back towards the end of the bed, or the top part of the bed." Sergeant Branch again questioned Mrs. Melton and defendant about the drugs. Sergeant Branch testified that Mrs. Melton denied any knowledge of the drugs, while defendant "advised that the white powder cocaine was his but he didn't know anything about the crack cocaine that was found."

Sergeant Branch took defendant back to the police station, and advised him of his rights. During an interview with defendant, defendant made a statement wherein he acknowledged ownership of the drugs, and signed and initialed the statement in several places.

Defendant produced witnesses, Mrs. Melton and Ms. Farmer, who testified that defendant had never gone into the bedroom. The defense witnesses testified that defendant had been arrested in the living room, and that thereafter Sergeant Branch went into the

bedroom and came out with the drugs. Defendant also testified to this effect on his own behalf.

Defendant made a motion to suppress the admission of evidence on the ground that the search conducted by Sergeant Branch exceeded the lawful scope of a search incident to arrest. The trial court denied this motion. Defendant also moved to have the charges dismissed for insufficiency of evidence. This motion was also denied.

Defendant was convicted of trafficking in cocaine by possession, and was sentenced to 35 to 42 months of imprisonment. Defendant now appeals.

Legal Discussion

I.

Defendant alleges in his first argument on appeal that the trial court erred when it denied his motion to suppress evidence found at the scene of defendant's arrest. Defendant claims that Sergeant Branch's search exceeded the lawful scope of a search incident to arrest, and as such the drugs found at the scene should not have been admissible. We disagree.

"This Court's 'review of a denial of a motion to suppress is limited to determining whether the trial court's findings of facts are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct.'" *State v. McLean*, 120 N.C. App. 838, 840, 463 S.E.2d 826, 828 (1995) (quoting *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993)). The trial court's findings of

fact "'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citation omitted), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

"Unreasonable searches and seizures are prohibited by the [F]ourth [A]mendment to the United States Constitution, and all evidence seized in violation of the Constitution is inadmissible in a State court as a matter of constitutional law." *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 555 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). "[S]eizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982).

"A search without a search warrant may be made incident to a lawful arrest." *State v. Goode,* 350 N.C. 247, 255, 512 S.E.2d 414, 419 (1999). Such a search can include the area from which an arrestee might have obtained a weapon or some item that could have been used as evidence against him. *State v. Williams*, 145 N.C. App. 472, 474, 552 S.E.2d 174, 175 (2001). Whether or not a search incident to arrest is reasonable must be determined upon the facts and circumstances surrounding each individual case. *Id.* at 475, 552 S.E.2d at 176.

In the instant case, the trial court made the following findings of fact concerning the search:

> (1) [Sergeant Branch] had a right to enter the premises to arrest the defendant;
>
> (2) When the defendant ran upon seeing [Sergeant Branch], [Sergeant Branch] had a right to enter the premises to make the arrest;
>
> (3) When [Sergeant Branch] thereafter observed the defendant between the bed and the wall, he had a right to look to determine if any contraband was present; and
>
> (4) The items seized were in plain view and were properly seized pursuant to the motion of the defendant.

These findings of fact were supported by competent record evidence.

Specifically, the evidence tended to show that Sergeant Branch lawfully arrested defendant pursuant to a valid warrant. When defendant ran into the bedroom, Sergeant Branch pursued him there and testified that, when he entered the bedroom, defendant was "coming back from around the backside of the bed, coming back towards the door." Defendant was arrested in the bedroom to where he had fled, which made it reasonable for Sergeant Branch to effect a search incident to arrest behind the bed where he had observed defendant. Sergeant Branch limited his search to the area that had been under defendant's control when the arrest was made, and testified that his limited search of that area turned up a bag of cocaine "in plain view." The findings made by the trial court, supported by competent evidence, support the trial court's ruling to deny the motion to suppress the evidence seized.

Defendant argues that, because Sergeant Branch had no reason to suspect that defendant was armed, and no reason to believe that

defendant was in possession of drugs, Sergeant Branch was not entitled to conduct a search incident to arrest. However, searches incident to arrest need not be prefaced on suspicion that a suspect is armed or will destroy evidence, and are permissible "'whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence.'" *Cherry*, 298 N.C. at 94, 257 S.E.2d at 557 (quoting *United States v. Chadwick*, 433 U.S. 1, 53 L. Ed. 2d 538 (1977). "[T]he defendant in custody need not be physically able to move about in order to justify a search within a limited area once an arrest has been made." *Id.* at 95, 257 S.E.2d at 558. Further, Sergeant Branch testified that the drugs he located were in plain view. "'It is well settled that evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence.'" *State v. Hardy*, 339 N.C. 207, 226, 451 S.E.2d 600, 610 (1994) (quoting *State v. Mitchell*, 300 N.C. 305, 309, 266 S.E.2d 605, 608 (1980)), *cert. denied*, 449 U.S. 1085, 66 L. Ed. 2d 810 (1981). Since Sergeant Branch had a right to conduct a search of the area in which defendant was arrested, he was able to observe the drugs in plain view, and to seize them. This assignment of error is overruled.

II.

Defendant's final argument on appeal is that the trial court erred by failing to dismiss the charges of trafficking in cocaine by possession. Defendant argues that the State failed to present evidence that defendant constructively possessed the cocaine

recovered at the scene of his arrest by Sergeant Branch. This argument is without merit.

In deciding a motion to dismiss for insufficient evidence, a trial court must determine whether there is substantial evidence of each required element of the offense charged, and that the defendant is the perpetrator of such offense. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)), *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). When ruling on a motion to dismiss for insufficient evidence, a trial court must take the evidence in the light most favorable to the State and afford every reasonable inference from the evidence to the State. *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998).

"An accused's possession of narcotics may be actual or constructive." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "[T]he State must present evidence that the defendant had exclusive use of the premises, maintained the premises as a residence, or had some apparent proprietary interest in the premises or the controlled substance." *State v. Hamilton*, 145 N.C. App. 152, 156, 549 S.E.2d 233, 236 (2001).

In the instant case, while defendant did not have exclusive use or proprietary interest in the property, testimony of both Sergeant Branch and Officer Weatherford indicated that defendant

admitted in their presence to owning the powder cocaine. Defendant also signed and initialed a statement admitting ownership of the powder cocaine at the police station. When taken in a light most favorable to the State, this evidence is sufficient to allow a reasonable inference that defendant had a proprietary interest in the powder cocaine. As such, this assignment of error is overruled.

For the forgoing reasons, we find

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).