NO. COA06-1181

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

STATE OF NORTH CAROLINA

v. Durham County
No. 05 CRS 50872
GREGORY LEON WRIGHT 05 CRS 50877

Appeal by defendant from judgments entered 30 March 2006 by Judge Howard E. Manning in Durham County Superior Court. Heard in the Court of Appeals 29 March 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, for the State.

Jeffrey Evan Noecker, for defendant-appellant.

LEVINSON, Judge.

Gregory Leon Wright (defendant) appeals judgments entered on his convictions for one count of trafficking in heroin by possession of more than 4 but less than 14 grams; one count of trafficking in heroin by possession of 28 grams or more; and two counts of possession with intent to sell or deliver heroin.[1] We find no error in part and reverse in part.

[1] Defendant was also convicted of trafficking in heroin by transportation. The trial court arrested judgment on this offense, and it is not a subject of this appeal.

The pertinent facts may be summarized as follows: In 2005, arrest warrants were issued for Robert Wilson for numerous offenses. Wilson offered to assist the Durham County Police Department by purchasing five grams of heroin from defendant at 1301 Bacon Street in Durham, North Carolina. Wilson reported buying five grams of heroin from defendant approximately every three or four days.

On 28 July 2005, Wilson was utilized in a controlled purchase operation. Wilson arrived at the police station around 7:30 a.m. and met Investigator Kenneth Gooch to prepare for a controlled drug purchase with defendant at 1301 Bacon Street. A search of Wilson and his vehicle revealed he had no drugs on either his person or in his automobile. Wilson was provided with $700.00 cash to purchase heroin.

Gooch followed Wilson in another vehicle as Wilson drove to 1301 Bacon Street. Wilson pulled his vehicle into the driveway and Gooch parked his vehicle across the street to observe the transaction. Additionally, Corporal Michael Berendsen, also of the Durham County Police Department, set up a video camera across the street to film the narcotics purchase; this film was later played for the jury.

The videotape depicted Wilson's vehicle pulling into the driveway and defendant cautiously approaching the vehicle. Defendant walked into view and down the short driveway to the street, looking up and down the street. Defendant then reached inside the driver’s side window of Wilson’s car. Additional

details concerning what is depicted on the videotape are included below. Berendsen instructed members of his team to take defendant into custody. Officer T.D. Douglass and other law enforcement officers arrested defendant. At this juncture, Sergeant N.S. Parker asked defendant, without providing *Miranda* warnings, whether "there [was] anything else in the residence that we needed to know about." Defendant stated that "there was some stuff still in the house." Parker then asked defendant if he would "mind if we [law enforcement] checked[,]" and defendant replied, "[N]o, I'll show you."

From the ground beside the side of Wilson's car where defendant was arrested, Gooch retrieved cash originally given to Wilson for the heroin purchase as well as a plastic bag containing powder and part of a "pellet."[2] An additional sum of $110.00 was discovered in one of defendant's pockets. No heroin was found either on Wilson's person or in his vehicle.

Patricia Russell met Gooch at the door to the residence. Russell agreed to a search of the home. Russell acknowledged that defendant resided in the home, and showed the officers defendant's bedroom. Defendant was taken to a bedroom in the house. According to Parker, Gooch asked defendant, "where's it at?" In response, defendant "nodded with his forehead - - to the closet door where some clothes were hanging." Defendant then stated, "the last

[2]The shape of the transported heroin was described as a "pellet" that resembled a piece of chalk. According to Corporal Michael Berendsen of the Durham Police Department, pellets are ground into powder; diluted with certain agents; and wrapped with "bindles" for sale.

coat." The officers found eight bindles of heroin in this pocket. Gooch asked defendant, "was that it?" Defendant stated that "there were some scales in a gym bag." Officers discovered a digital scale inside the gym bag. In a separate gym bag, the officers found 2 bags containing heroin. The weight of the heroin found on the driveway was 9.9 grams, and the weight of the heroin (the bindles and the pellets) discovered in the bedroom was 215.2 grams.

Defendant was convicted of one count of trafficking in heroin by possession of more than 4 but less than 14 grams; one count of trafficking in heroin by possession of 28 grams or more; and two counts of possession with intent to sell or deliver heroin. Defendant now appeals.

Defendant first contends that the trial court erred by denying his motion to dismiss the trafficking and possession with intent to sell and deliver charges associated with the contraband located on the ground beside the vehicle because the evidence was insufficient to show defendant actually or constructively possessed the narcotics. We disagree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every

> reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility."

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (quoting *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001)). "'[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both.'" *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)), *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923 (2005).

"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). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). However, the State is not required to prove actual physical possession of the controlled substance; proof of constructive possession by defendant is sufficient to carry the issue to the jury. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). "Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance." *State v. Williams*, 307 N.C. 452, 455, 298

S.E.2d 372, 374 (1983). Where a controlled substance is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and take the case to the jury. *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. Nevertheless, if a defendant does not maintain exclusive control of the premises, "other incriminating circumstances" must be established for constructive possession to be inferred. *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988). Our determination then "'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. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001)(quoting *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991)).

In the instant case, because the heroin was not found in defendant's actual possession, we evaluate defendant's argument in the context of constructive possession. Here, evidence of other incriminating circumstances include the following: defendant approached Wilson's vehicle with a white object in his left hand; law enforcement officers located heroin and cash on the ground in close proximity to defendant; and after being taken into custody, defendant informed the officer that there was "some stuff still in the house[,]" a statement that shows he was aware of heroin on the ground. Moreover, Wilson was searched prior to the drug buy, and had no drugs on his person or in his vehicle. This gives rise to a reasonable inference that the heroin found on the ground at the time of the arrest came from defendant and not from Wilson. Taken

in the light most favorable to the State, we conclude that there was sufficient record evidence to show that defendant had the intent and capability to maintain control and dominion over the heroin on the ground beside Wilson's vehicle. This assignment of error is overruled.

Defendant next contends that the trial court erred by denying his motion to suppress the statements he made to law enforcement in the bedroom of the residence because he had not first been informed of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant does not challenge the admission of his statements made immediately after being placed under arrest, that "there was some stuff still in the house" or that he would "show [them] where it's at."

It is well settled that *Miranda* warnings are only required when a person is subject to custodial interrogation. *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001) (citations omitted). "[I]nterrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980) (citations omitted). Factors that are relevant to the determination of whether police "should have known" their conduct was likely to elicit an incriminating response include: "(1) 'the intent of the police'; (2) whether the 'practice is designed to

elicit an incriminating response from the accused'; and (3) 'any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion. . . .'" *State v. Smith*, 160 N.C. App. 107, 115, 584 S.E.2d 830, 835 (2003)(quoting *State v. Fisher*, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003)).

In the instant case, the State concedes, and we agree, that defendant was in custody before he was taken inside the residence. In addition, it is undisputed that defendant had not been advised of his *Miranda* rights. The central issue, then, is whether defendant's statements to law enforcement officers inside the residence were made as a result of an interrogation. We conclude they were.

After being taken to the bedroom, Officer Gooch asked defendant, "[w]here's it at?" This was at least several minutes after defendant was taken into custody outside the residence. Furthermore, in a clear response to the officers' inquiries inside the residence, defendant directed law enforcement to heroin in a coat pocket in the closet and scales in a gym bag. The questions of law enforcement inside the residence were for the purpose of eliciting an incriminating response in that they sought information from defendant about the whereabouts of additional contraband.

The State nonetheless argues that the officers' inquiries inside the residence did not constitute an interrogation within the meaning of *Miranda*. The State cites *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981), and contends that the inquiries by the

police were constitutionally permissible clarifications of a prior, unchallenged statement by defendant. We disagree.

In *Porter*, defendant was in custody when an officer radioed his supervisor to inform him that the two suspects were taken into custody. *Porter*, 303 N.C. at 691, 281 S.E.2d at 385. Defendant overheard the supervisor ask the officer if he found a bank bag. Defendant, without having been advised of his *Miranda* rights, stated, "The bank bag is in the car." *Id.* The officer immediately asked defendant, "What bank bag?" Defendant replied, "The bag from the robbery." *Id.* On appeal, defendant argued that the trial court erred by denying his motion to suppress the incriminating statements regarding the bank bag because he was under custodial interrogation at the time. *Id.* at 690, 281 S.E.2d at 384. Our Supreme Court disagreed, stating that:

> [t]he principle that emerges from these decisions is that to constitute an 'interrogation' within the meaning of *Miranda*, the conduct of the police must involve a measure of compulsion. "Interrogation" involves a procedure designed to elicit a statement from the individual at whom it is directed. An officer's request in the heat of an emotional situation that the accused explain or clarify a volunteered statement is not a procedure designed to elicit an inculpatory response.

Id. at 692-93, 281 S.E.2d at 385-86. The Court concluded that "What bag?" constituted a request that defendant explain his prior volunteered statement and "was an immediate response in an emotional situation, made before [the officer] had the opportunity to form a design or motivation to elicit incriminating statements

from [defendant]." *Id.* Likewise, in *State v. Earwood*, 155 N.C. App. 698, 574 S.E.2d 707 (2003), defendant sought out law enforcement after he shot himself. *Id.* at 703, 574 S.E.2d at 711. When the officers attempted to discover what happened to defendant, "defendant spontaneously and voluntarily informed them that he killed his mother." *Id.* Consequently, this Court articulated that "[e]ven if defendant had been in custody, it is not an interrogation by police officers to ask an individual to clarify volunteered spontaneous utterances." *Id.*

Porter and *Earwood* differ significantly from the present facts. First, the initial statements by defendant outside the residence – statements not challenged on appeal but nonetheless relevant to consider the State's "clarification" argument – were in response to an officer's inquiry to defendant: "was there anything else in the residence that we needed to know about?" Defendant's responses that there were additional narcotics in the home and that he would show them where they were located were not the type of spontaneous, volunteered statements like those in *Porter* and *Earwood*. The inquiries the officers made of defendant inside the residence transpired at least several minutes after the conversation outside, and cannot be said to have been a "request in the heat of an emotional situation that the accused explain or clarify a volunteered statement[.]" *See Porter*,303 N.C. at 693, 281 S.E.2d at 386. We conclude that the officers' inquiries of defendant inside the residence were not permissible "clarifications" within the meaning of *Porter* or *Earwood*.

Now that we have determined that the admission of defendant's statements inside the residence was error, we must ascertain whether this error was prejudicial to the outcome of the trial. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2005). "[T]he question is 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *State v. Soyars*, 332 N.C. 47, 58, 418 S.E.2d 480, 487 (1992) (quoting *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (1967)).

Here, the evidence connecting defendant to the heroin in the residence consisted largely of defendant's inculpatory statements and acknowledgments by defendant and Patricia Russell that the bedroom where the narcotics were discovered was used by defendant. Defendant's statements inside the residence were significant in that they revealed the precise location of the heroin and suggested his intention to exercise dominion and control over it. As there is a reasonable possibility that the evidence complained of might have contributed to the conviction, the constitutional error was not harmless beyond a reasonable doubt and the defendant is entitled to a new trial on the convictions arising out of the heroin discovered inside the residence.

In defendant's next argument on appeal, he contends that the trial court erred by permitting his trial attorney to make statements conceding his guilt without his express permission to do so, in violation of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). Specifically, defendant challenges the following statements made be defense counsel during closing argument:

> (1) "One of the things that you could find in this case is that Gregory Wright is a small time retail heroin dealer, not a trafficker.";
>
> (2) "Isn't it possible that all the State's case that you can believe with regard to Gregory Wright, he's a small time retailer, and it's a crime?";
>
> (3) "[M]aybe what he's doing outside actually is trying to get $110 of heroin to put in some of these bindles so he has a few more in his closet, so he can sell to the people that he retails to."; and
>
> (4) Maybe Gregory Wright . . . . He went out to make some sort of deal or transaction with Wilson about heroin, maybe $110 worth."

Our Supreme Court has held that *per se* ineffective assistance of counsel "has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08. During closing arguments in *Harbison*, defense counsel stated, without defendant's consent, that "I don't feel that [defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." *Id.* at 178, 337 S.E.2d at 506. This constituted ineffective assistance of counsel. *Id.* at 180-81, 337 S.E.2d at 507; *see also State v. Matthews*, 358

N.C. 102, 591 S.E.2d 535 (2004)(*per se* ineffective assistance of counsel where defense counsel conceded defendant's guilt to second degree murder without defendant's permission).

Our Supreme Court has declined to find a *Harbison* violation where defense counsel did not expressly concede defendant's guilt or where counsel admitted only certain elements of the charged offense. *See State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002) (defense counsel did not admit guilt of murder when he stated, "if he's guilty of anything, he's guilty of accessory after the fact"); *State v. Fisher*, 318 N.C. 512, 532-33, 350 S.E.2d 334, 346 (1986) (defense counsel conceded malice but did not clearly admit guilt, and told the jury it could find defendant not guilty). In addition, we have consistently considered defense counsel's statements in context to ascertain whether they are concessions of guilt under *Harbison*. *See State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) ("defendant [took] the challenged comments out of context").

After a thorough review of the transcript, we conclude that defense counsel's statements during closing arguments, when considered in context, were not concessions of defendant's guilt. Indeed, trial counsel argued that Wilson had the motive to plant the heroin in the driveway, thereby calling into question the strength of the evidence surrounding the prearranged sale of heroin between defendant and Wilson. Defense counsel articulated, in pertinent part, that:

> They got the right guy for this? How much are they relying on Robert Wilson? . . . .

> Doesn't it make you wonder about what really happened here and whether they have the right guy? . . . . So what stops Wilson from driving there on the morning of the 28th before he goes to the police station? He chucks these kind of terms, a minor quantity of heroin onto the ground because he knows he can't get that quantity from Gregory Wright . . . . Is there an opportunity for someone in that house to move that bag into Gregory Wright's bedroom? Absolutely. We don't even know who was in the house.

Defendant's counsel did not concede defendant's guilt to the subject offenses, instead urging the jury to find defendant not guilty. The remarks by counsel that are assigned as *Harbison* error on appeal, considered in their context, do not constitute a *per se* violation of defendant's right to effective assistance of counsel. This assignment of error is overruled.

Based on the foregoing, it is unnecessary for us to reach defendant's remaining arguments that (1) defendant could only be convicted of one count of trafficking by possession and one count of possession with intent to sell and deliver because the evidence showed only one continuing possession; (2) trial counsel was ineffective for failing to move to quash duplicitous indictments; and (3) the admission of Patricia Russell's out-of-court statement violated *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

We grant defendant a new trial as to the convictions associated with the heroin located in the residence: trafficking in heroin by possession of 28 grams or more, and one count of possession with intent to sell or deliver heroin. These were both charged in a two-count indictment contained in file number 05 CRS 50872.

No error in part and reversed in part.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).