

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1436

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

STATE OF NORTH CAROLINA

v.

ALVIN HALL

Jackson County  
Nos. 04 CRS 52614-16;  
04 CRS 52618-21;  
04 CRS 52624-25;  
05 CRS 3352  
05 CRS 922

# Court of Appeals

Appeal by defendant from judgments entered 12 February 2006 by Judge Zoro J. Guice, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 23 May 2007.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Scott T. Slusser, for the State*  
*J. Clark Lincher, for defendant appellant*

# Slip Opinion

JACKSON, Judge.

On 29 September 2004, the Jackson County Sheriff's Department executed a search warrant at 710 Sutton Branch Road, Sylva, North Carolina, as part of an investigation of an alleged assault. An entry team of officers knocked on the back door of the residence, announced their presence, and entered the home. As the entry team entered the back door, officers stationed at the front of the home encountered four individuals running out of the front door. The first two individuals to run out of the home were males and included Alvin Hall ("defendant"). Defendant and the other male

ran to the left. One of the individuals had a bag in his hand and threw the bag to the right, opposite the direction in which he was running. The officers who secured the individuals were unable to determine which of the two men had thrown the bag. Two more individuals emerged from the house and ran in the opposite direction of the first two men. All four individuals were secured on the front lawn. Defendant was handcuffed and searched, and two crack pipes were found in his pocket. The bag recovered from the front yard contained various amounts of marijuana, methamphetamine, and other controlled substances, as well as drug paraphernalia.

While the officers stationed at the front of the home secured the individuals on the lawn, the entry team made a cursory search of the house for remaining individuals. The entry team then proceeded to the front yard to assist in securing the individuals. Once the individuals were secured, the officers searched the home and found a brown paper bag behind a couch in the living room. The bag contained various amounts of marijuana, cocaine, methamphetamine, other controlled substances, digital scales, and drug paraphernalia. During the search, officers also found a spiral notebook which they believed to be a drug ledger. A letter addressed to defendant at 710 Sutton Branch Road, Sylva, North Carolina was found in the storage building also on the property.

On 31 October 2005 a Jackson County Grand Jury indicted defendant for the following offenses: possession with the intent to manufacture, sell and deliver marijuana; manufacturing marijuana; possession of drug paraphernalia; possession of cocaine; possession

with the intent to manufacture, sell and deliver methamphetamine; manufacturing methamphetamine; two counts of misdemeanor simple possession of Schedule IV controlled substances; possession of methamphetamine; and keeping and maintaining a dwelling house used for the keeping and selling of a controlled substance. Defendant also was indicted for being an habitual felon. At trial, defendant's motion to dismiss was denied, and the jury convicted defendant of all charges. Defendant subsequently pled guilty to the habitual felon charge, and was sentenced to four consecutive terms of 116 to 149 months of imprisonment. Defendant appeals from his convictions.

We begin by noting that defendant has failed to include a copy of the warrant and indictment for the charge of keeping and maintaining a dwelling for the purpose of keeping and selling a controlled substance. Rule 9(a)(3)(c) of our Appellate Rules provides that "[t]he record on appeal in criminal actions shall contain: . . . copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court[.]" N.C. R. App. P. 9(a)(3)(c) (2006). As the appellant, defendant has the duty to see that the record on appeal is compiled properly. *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 89, 539 S.E.2d 356, 361 (2000). A violation of our Appellate Rules may subject an appeal to various sanctions, including dismissal. However, in light of the fact that defendant's appeal does not specifically concern the validity of the warrant or indictment, we choose to address defendant's appeal. We also note that defendant

initially appealed from his habitual felon judgment, however, he did not assign error to any aspects of his being found to be an habitual felon or his habitual felon judgment, thus his appeal on this matter is deemed abandoned. N.C. R. App. P. 28(a) (2006) ("Review is limited to questions so presented in the several briefs. . . . Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned.").

On appeal, defendant argues that the trial court erred in denying his motion to dismiss because the State failed to produce substantial evidence of each element for the charges of possession and maintaining a dwelling.

"In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006) (citing *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, cert. denied, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). Additionally, the trial court must view the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339

N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"If there is substantial evidence -- whether direct, circumstantial, or both -- to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied[.]'" *State v. Grooms*, 353 N.C. 50, 79, 540 S.E.2d 713, 731 (2000) (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). "[H]owever, if the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.'" *Id.* (quoting *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983)).

North Carolina General Statutes, section 90-95 provides that "it is unlawful for any person: (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance; . . . [or] (3) To possess a controlled substance." N.C. Gen. Stat. § 90-95(a) (2005). Section 90-95(d) (2) makes it unlawful for an individual to possess substances classified as Schedule IV substances, such as Alprazolam, or Xanax, and Clonazepam, such as defendant was convicted of possessing. N.C. Gen. Stat. § 90-95(d) (2) (2005). Section 90-113.22 provides that

It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert,

produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

N.C. Gen. Stat. § 90-113.22(a) (2005). Finally, section 90-108(a)(7) provides that it is unlawful for a person "[t]o knowingly keep or maintain any . . . dwelling house, building, . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2005).

In the case *sub judice*, the State presented substantial evidence of defendant's constructive possession of all of the contraband seized. Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession when [he] has 'both the power and the intent to control . . . disposition or use.'" *Id.* (citations omitted). Actual possession exists if a person has the substance on his person, is aware of the substance's presence, and either by himself or together with others has the power and intent to control the substance's disposition or use. *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). Alternatively, "[c]onstructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the

narcotics." *Matias*, 354 N.C. at 552, 556 S.E.2d at 270 (citation omitted). If the defendant does not have exclusive possession of the location where drugs were found, the State must demonstrate the existence of "'other incriminating circumstances' in order to establish constructive possession." *Boyd*, 177 N.C. App. at 175, 628 S.E.2d at 805.

Taken in the light most favorable to the State, the State's evidence at trial tended to show that defendant was found at the home in which various controlled substances and drug paraphernalia were found. Defendant had in his possession two crack pipes, which are used to inhale the types of drugs found in the home and in the green canvas bag thrown either by defendant or the other individual fleeing from the house with defendant. Further, a letter addressed to defendant at the address searched also was found. The notebook found in the home, which appeared to be a drug ledger, along with the various scales and other drug paraphernalia indicates that the home was being used for the manufacture and sale of controlled substances.

While simply being found in a home containing controlled substances is not ordinarily sufficient to support a finding of constructive possession, the totality of the circumstances will control, and "[n]o 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) (emphasis in original), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002). "'In "borderline" or close cases, our courts have consistently expressed a preference for submitting

issues to the jury.'" *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (quoting *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985)). Based upon the evidence presented by the State, we hold there was substantial evidence presented that defendant constructively possessed the seized controlled substances and paraphernalia, such that the trial court acted properly in denying his motion to dismiss the charges.

Moreover, there was sufficient evidence presented to sustain defendant's charge of keeping and maintaining a dwelling for the purpose of keeping and selling a controlled substance. Ordinarily the determination of whether a dwelling is used for the "keeping or selling" of a controlled substance "will depend on the totality of the circumstances.'" *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001) (quoting *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994)). In the instant case, not only was defendant present in the home when officers executed the search warrant and announced their presence, but a letter addressed to defendant at that address also was found on the premises. The officers found large amounts of a variety of controlled substances in the home, along with digital scales which are used for weighing drugs. They also found a variety of drug paraphernalia, along with several small bags of drugs packaged in a way that indicates they were to be sold. In addition, the officers found the notebook which appeared to be a drug ledger used to track drug transactions. Thus, the State presented substantial evidence that the home was used for the keeping and selling of controlled substances, and that



defendant was in constructive possession of the home at the time. Therefore, the trial court properly denied defendant's motion to dismiss the charge of keeping and maintaining a dwelling for the purpose of keeping and selling a controlled substance.

No error.

Judges McGEE and LEVINSON concur.

Report per Rule 30(e).