NO. COA06-372

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
03-CRS-249338

CHRISTOPHER ROBERT HEPNER,
Defendant.

Appeal by defendant from a judgment entered 15 December 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathleen M. Waylett, for the State.

Whitesides & Walker, LLP, by H.M. Whitesides, Jr., for defendant.

BRYANT, Judge.

Christopher Robert Hepner (defendant) appeals from a 15 December 2005 judgment entered consistent with a jury verdict finding him guilty of misdemeanor possession of drug paraphernalia. Defendant was sentenced to forty-five days in jail (suspended), twenty-four months supervised probation, and ninety hours of community service to be completed in 120 days.

On 14 October 2003, Detective Catherine Bowles and officers with the Vice and Narcotics Unit of the Mecklenburg County Police Department conducted an investigation at an apartment located at

910 Garden District Drive in Charlotte, North Carolina. When the officers knocked on the door, defendant came out on the balcony. Officer Mike Grimsley identified himself and showed defendant his credentials. Defendant opened the front door to the apartment and allowed the officers to enter. The officers could hear another person walking upstairs and asked defendant if they could go upstairs and he agreed. As Detective Bowles went up the stairs to secure the person they had heard, she observed a bong on the kitchen counter and alerted Officer Grimsley. Officer Grimsley asked defendant if he would allow them to search the apartment; if not, they would obtain a search warrant. When defendant said he did not want them looking around his apartment, the officers left the home to obtain a warrant. One of the officers stayed at the apartment to secure the scene.

When the officers returned with a search warrant, they found $720 in defendant's pocket. Officer Grimsley advised defendant of his *Miranda* rights. When he asked defendant if there were drugs in the apartment, defendant responded that "there might be a little ice and some weed." The officers found two baggies of methamphetamine in a CD case. The officers also found methamphetamine residue on a nightstand on the third floor. In addition to the bong in the kitchen, the officers found a bong in the living room, glass pipes in a drawer in the kitchen and rolling papers. When Officer Grimsley questioned defendant about information needed to complete an arrest form, defendant gave his address as "910 Garden District." In a desk on the third floor of

the apartment, Officer Grimsley found a bill from Banana Republic that was addressed to "Chris R. Hepner" at "910 Garden District Drive."

Defendant was charged with one count of possession of a controlled substance and one count of misdemeanor possession of drug paraphernalia. At trial, defendant moved to dismiss the possession of drug paraphernalia charge based on defendant's contention the State had failed to show the items collected were used for illegal purposes. Defendant presented no evidence. Defendant renewed his motion to dismiss at the close of the evidence, contending the State had failed to show incriminating circumstances to infer defendant's constructive possession of the paraphernalia found in the apartment. The trial court denied defendant's motion. In its charge to the jury, the trial court included the instruction that had been requested by defendant on actual and constructive possession. The jury found defendant guilty of possession of drug paraphernalia, but not guilty of possession of a controlled substance. Defendant appealed.

Defendant raises two issues on appeal whether the trial court erred in: (I) denying defendant's motion to dismiss the charge of possession of drug paraphernalia; and (II) sentencing defendant for constructive possession of drug paraphernalia.

I

Defendant first argues the trial court erred in denying defendant's motion to dismiss the charge of possession of drug

paraphernalia because there was insufficient evidence to prove defendant had constructive possession of the paraphernalia seized from the home. We disagree.

On a motion to dismiss, the trial court must decide if there is substantial evidence to support each element of the offense charged and that the defendant was the perpetrator of the offense. *State v. Shook*, 155 N.C. App. 183, 185, 573 S.E.2d 249, 251 (2002) (citing *State v. Crawford*, 344 N.C. 65, 472 S.E.2d 920 (1996)). The evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn from the evidence admitted. *Id.*, 155 N.C. App. at 186, 573 S.E.2d at 252; *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

To convict a defendant of possession of drug paraphernalia under N.C. Gen. Stat. § 90-113.22(a), the State must show that defendant was in actual or constructive possession of the seized paraphernalia. N.C.G.S. § 90-113.22(a) (2005). A defendant is in possession of paraphernalia when he has both the power and the intent to control its disposition or use. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "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 . . . ." *Id.* (quotation omitted). Where defendant does not have exclusive control over the place where the paraphernalia was found, constructive possession may not be inferred without other

incriminating circumstances linking defendant to the seized paraphernalia. *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

Whether the State has established that defendant was in constructive possession of the paraphernalia will depend 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) (citation omitted), *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), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992) (citation omitted).

The evidence in the instant case tended to show 910 Garden District Drive was under defendant's control at the time of the officers' search. Defendant answered the officers' knock on the door and allowed the officers into the apartment but denied them permission to search the premises without a warrant. A Banana Republic bill, addressed to "Chris R. Hepner" at "910 Garden District Drive" was found in the upstairs office at the residence. After obtaining a search warrant, drug paraphernalia was found on the premises. Defendant stated 910 Garden District Drive was his address after being advised of his *Miranda* rights. While there was another person upstairs, no evidence was presented as to whether the person had any possessory interest in the apartment.

Even assuming *arguendo* defendant did not have exclusive control of the premises, there were other incriminating circumstances linking defendant to the seized items: defendant was at home when the officers first entered the house and saw the bong sitting on the kitchen counter; when the officers returned to the apartment with a search warrant, they found $720 in defendant's pocket; after advising defendant of his *Miranda* rights, Officer Grimsley asked defendant if there were drugs in the home and defendant responded that "there might be a little ice and some weed"; and finally, drug paraphernalia was discovered in the kitchen, living room, and upstairs bedroom.

Based on the totality of the circumstances, and viewing the evidence in the light most favorable to the State, there was sufficient evidence of incriminating circumstances from which the jury could infer defendant knew of the presence of the drug paraphernalia and had the power and intent to control its disposition or use. The trial court properly denied defendant's motion to dismiss the possession of drug paraphernalia charge. This assignment of error is overruled.

II

Defendant next argues the trial court erred in sentencing defendant. For the reasons stated in *Issue I*, this assignment of error is overruled.

No error.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).