NO. COA06-621

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Greene County
No. 04 CRS 51282

RONALD A. HAITH

Appeal by defendant from judgment entered 8 November 2005 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 26 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Brian C. Wilks, for the State.

Jeffrey Evan Noecker for defendant-appellant.

ELMORE, Judge.

On 8 November 2005, defendant was found guilty of possessing a controlled substance in a penal institution, and was sentenced to a presumptive range sentence of ten to twelve months' imprisonment. Defendant appeals.

The State's evidence at trial tended to show the following: On 5 February 2004, Sergeant John Bradford Hendricks was working at Eastern Correctional Institution, where defendant was an inmate. Sergeant Hendricks testified that as he was going down a stairwell at the institution, he observed defendant standing on the

stairwell's landing talking to another inmate. Sergeant Hendricks also observed defendant pass an item to the other inmate. The other inmate then continued down the stairs and left the area.

Sergeant Hendricks proceeded down the stairs, approached defendant, and asked him what was in his hand. Defendant's right hand was closed and he put an object in his mouth. Sergeant Hendricks ordered defendant to give him what defendant had put in his mouth and defendant refused. Sergeant Hendricks then noticed a piece of plastic hanging out of defendant's right hand and he took the item from defendant. The item was a green, leafy substance wrapped in cellophane. Sergeant Hendricks sealed the substance in an envelope, placed a chain of evidence form on the envelope, and turned it in to the contraband locker. At trial, Sergeant Hendricks identified the substance contained in State's Exhibit 2A1 as the green, leafy substance he took from defendant's hand.

Chris Stark, a forensic chemist with the North Carolina State Bureau of Investigation, testified that he analyzed the substance contained in State's Exhibit 2A1 and determined it was 0.1 grams of marijuana.

Defendant testified that on 5 February 2004 as another inmate came down a stairwell, he saw something fall out of that inmate's pocket. When defendant picked up the item, Sergeant Hendricks approached him and asked him what was in his hand. Defendant raised his hand to his mouth to swallow it, but decided not to do so. Sergeant Hendricks then took the item from him.

Tony Joines testified that he was incarcerated at Eastern Correctional Institution on 5 February 2004. On that day, he was in the stairwell with defendant and observed defendant pick up marijuana that was dropped by another inmate.

Defendant moved to dismiss the charge, both at the close of the State's evidence and at the close of all the evidence, based on insufficiency of the evidence. The trial court denied defendant's motion and the jury found defendant guilty of possessing a controlled substance in a penal institution.

Defendant presents two arguments on appeal. First, defendant argues that the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. Second, defendant argues that the trial court erred by considering improper factors in sentencing defendant. We conclude that the trial court did not err.

Defendant first contends the trial court erred by denying his motions to dismiss based on insufficiency of the evidence. A motion to dismiss should be denied if there is substantial evidence "(1) of each essential element of the offense charged . . ., and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)(citation omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must:

> view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. . . . Once the court decides that a reasonable

> inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Id. at 75-76, 430 S.E.2d at 918-19 (internal citations and quotations omitted)(emphasis and alteration in original). The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. *Id.* at 75, 430 S.E.2d at 918-19.

Section 90-95(e)(9) of the North Carolina General Statutes provides that "any person who [possesses a controlled substance] on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C. Gen. Stat. § 90-95(e)(9) (2006). "[A]n accused has possession of marijuana within the meaning of the Controlled Subtances [sic] Act, G.S. Chapter 90, Art. V, when he has both the power and the intent to control its disposition or use[.]" *State v. Baxter*, 285 N.C. 735, 737-38, 208 S.E.2d 696, 698 (1974).

Here, defendant contends that the State failed to present substantial evidence that he possessed marijuana because he did not knowingly possess marijuana for a sufficient amount of time such that he had the power and intent to control its disposition or use. In particular, defendant asserts that he did not have the marijuana in his hand for any longer than one minute before Sergeant Hendricks took it from him. Citing *State v. Wheeler*, 138 N.C. App. 163, 530 S.E.2d 311 (2000), defendant further argues that he was handling the marijuana for inspection purposes only when it was either handed to him or he picked it up. *See id.* at 165, 530

S.E.2d at 313 (holding that the "handling of [drugs] for inspection purposes does not constitute possession within the meaning of section 90-95(h)(3)"). Accordingly, defendant contends his possession of the marijuana was for the sole purpose of inspection and, thus, was insufficient to support his conviction. We disagree.

Wheeler is not controlling here because the facts in *Wheeler* are distinguishable from those in the present case. In *Wheeler*, an undercover officer sat next to the defendant in the back seat of an informant's vehicle and handed the defendant a package containing cocaine. *Id.* at 165, 530 S.E.2d at 312. The defendant in *Wheeler* then gave the package to another passenger who was sitting in the front seat. *Id.* After the front seat passenger tested the cocaine by tasting it, he handed the package back to the undercover officer and stated that they did not want to purchase the cocaine because the quality was not good. *Id.* On appeal from defendant's conviction of possession of cocaine, this Court held that the defendant's handling of the cocaine for inspection purposes did not constitute possession within the meaning of N.C. Gen. Stat. § 90-95 because he did not have the power and intent to control its disposition or use. *Id.* at 165, 530 S.E.2d at 313.

Considered in the light most favorable to the State, and giving the State the benefit of every reasonable inference, the evidence here shows defendant gave another inmate an item when they passed in the stairwell. Thereafter, the other inmate left the area and Sergeant Hendricks detained defendant. When Sergeant

Hendricks asked to see what was in defendant's closed hand, defendant refused and instead raised his hand to his mouth. Defendant also refused to remove the item he placed in his mouth when ordered to do so. Sergeant Hendricks then noticed a piece of plastic hanging out of defendant's hand and took it from defendant. The item was subsequently determined to be marijuana. We conclude that there was substantial evidence to show that defendant knowingly possessed marijuana on the premises of a penal institution.

The testimony of the defense witnesses, to the extent that it contradicts that of Sergeant Hendricks, goes to the weight of the evidence, and to not the sufficiency of the evidence on a motion to dismiss. *See State v. Haynesworth*, 146 N.C. App. 523, 527, 553 S.E.2d 103, 107 (2001)("When considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal." (internal quotations omitted)) As such, we conclude that the trial court did not err by denying defendant's motion to dismiss.

Next, defendant contends that the trial court erred by sentencing him to an active term of imprisonment based on the consideration of improper matters. A sentence within the statutory limit is presumed regular and valid. *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). This presumption, however, is not conclusive. Indeed, "[i]f the record discloses that the court

considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Id.* (citing *State v. Swinney*, 271 N.C. 130, 155 S.E.2d 545 (1967)).

Here, the trial court was permitted to impose either an active sentence or an intermediate sentence. *See* N.C. Gen. Stat. § 15A-1340.17 (2005). The trial court, in its discretion, sentenced defendant to an active prison term in the presumptive range. Defendant contends, however, that the trial court impermissibly considered improper matters in making its determination. Defendant cites to the following statement made by the trial court to support this contention:

> The Court: Okay. Mr. Haith, anything you want to say on your own behalf? You don't have to say anything. **But convince me that you should not go back to prison since you were in prison for a violent felony, armed robbery, plus assault with a deadly weapon with intent to kill inflicting serious injury, which evidently happened during the robbery.**

(Emphasis added). Defendant argues thatthe trial court made two errors in making the above statement. First, defendant asserts that the trial court improperly shifted the burden to defendant to "convince" the trial court not to send him to prison. Second, defendant asserts the trial court erred by using defendant's prior conviction to justify imposing an active sentence rather than a probationary sentence. We disagree.

There is no indication that the trial court shifted the burden to defendant to convince the trial court not to send him to prison.

Rather, after hearing the arguments of counsel, it appears that the trial court was inclined to impose an active sentence and simply gave defendant the opportunity to make a statement on his own behalf as to why he should not receive an active sentence. Further, defendant has failed to cite to any authority supporting his position that it is impermissible for the trial court to consider a defendant's criminal history and the nature of the defendant's prior crimes in determining a defendant's sentence. Thus, we conclude that these arguments are without merit.

Defendant further contends that the trial court "appeared to be perturbed by [defendant's] decision to exercise his right to a jury trial" when the trial court denied defendant's motion for a continuance. Citing *State v. Peterson*, 154 N.C. App. 515, 571 S.E.2d 883 (2002), defendant argues that he is entitled to a new sentencing hearing. *Id.* at 518, 571 S.E.2d at 885 (holding that the defendant was entitled to a new sentencing hearing where it could reasonably be inferred from the record that the trial court based the sentences imposed on the defendant's insistence on a jury trial). Here, unlike in *Peterson*, there is no evidence in the record showing that the trial court based defendant's sentence on defendant's insistence on a jury trial. Therefore, this assignment of error is without merit.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).