

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-654

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 02 CRS 61720

ISIAH DAVIS

Appeal by defendant from judgments entered 23 February 2006 by Judge Anderson Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2007.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Donald W. Laton, for the State.*

*J. Clark Fischer, for defendant-appellant.*

JACKSON, Judge.

On 16 October 2002, the Winston-Salem Police Department executed a search warrant at 1100 Baltimore Street in Winston-Salem, North Carolina. Upon entering the apartment, the police found Isiah Davis ("defendant") in the kitchen hallway directly beside the refrigerator. Defendant immediately laid down on the floor beside the refrigerator and complied with the officers' commands.

Upon searching the apartment, the officers found and seized the following items: \$47.00 in a deep fryer on the kitchen floor; \$225.00 in a measuring cup in the kitchen cabinet; a large quantity

of small plastic bags in a pot on a deep freezer in the kitchen; a paper bag which contained five plastic bags of marijuana, located inside of the deep freezer; a pie box which contained five plastic bags containing ten smaller bags of marijuana, located inside of the deep freezer; paper bags with the names of two individuals and "Paid" written on them and which contained plastic bags of marijuana; and three plastic bags containing crack cocaine located underneath the refrigerator. Defendant was placed under arrest, and subsequently indicted for possession with the intent to sell and deliver marijuana, trafficking by possession of a controlled substance, to wit cocaine, and maintaining a dwelling house that was used for the keeping and selling of cocaine.

The evidence presented at defendant's trial showed that the apartment located at 1100 Baltimore Street was being leased by defendant's girlfriend of nineteen years. While being questioned by officers, defendant stated he did not reside at the Baltimore Street address, and that he lived at an address on Viking Street. Defendant's driver's license showed the Viking Street address as his residence. During the search of the Baltimore Street apartment, several prescription medicine bottles in defendant's name were found, along with a phone message for defendant from a month earlier. Defendant admitted to the officers that he "stayed" at the apartment, but denied living there. He also denied having any knowledge of the narcotics found during the search. The officers who executed the search warrant testified that they did

not see defendant touch or handle any of the seized items, and that defendant's fingerprints were not found on any of the items.

On 23 February 2006, a jury found defendant guilty of possession with the intent to sell and deliver marijuana, and trafficking by possession of a controlled substance, to wit cocaine. Defendant then was sentenced for the trafficking conviction to a term of thirty-five to forty-two months imprisonment with the North Carolina Department of Correction. For the possession of marijuana conviction, defendant received a suspended sentence of thirty-six months of supervised probation which was ordered to begin at the conclusion of his prison term for the trafficking conviction. Defendant appeals from his convictions.

On appeal, defendant contends the trial court erred in denying his motion to dismiss the charges of possession with the intent to sell and deliver marijuana, and trafficking by possession of a controlled substance, to wit cocaine, in that the State failed to present evidence sufficient to support his convictions for either offense. Specifically, defendant contends the State failed to present substantial evidence that he was in possession of the controlled substances at issue.

"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*, \_\_ N.C. App. \_\_, \_\_, 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.” *Id.* (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). “When considering a motion to dismiss, the trial court must view all of 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.’” *Id.* (quoting *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)). “[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[.]’” *State v. Grooms*, 353 N.C. 50, 79, 540 S.E.2d 713, 731 (2000) (citation omitted), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

In the instant case, defendant was charged with possession with the intent to sell and deliver marijuana, and trafficking cocaine by means of possession. Both offenses require the State to prove beyond a reasonable doubt that defendant was in possession of the controlled substances. See N.C. Gen. Stat. § 90-95(a)(1) (2001) (possession with the intent to sell and deliver a controlled substance, namely marijuana); N.C. Gen. Stat. § 90-95(h)(3)(a) (2001) (trafficking by possessing more than 28 grams, but less than 200 grams, of cocaine).

Possession of a controlled substance may be actual or constructive. “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." Constructive possession, on the other hand, exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." When the defendant does not have exclusive possession of the location where the drugs were found, the State must make a showing of "other incriminating circumstances" in order to establish constructive possession.

*Boyd*, \_\_ N.C. App. at \_\_, 628 S.E.2d at 805 (internal citations omitted).

In the instant case, the State presented evidence that defendant was found in the kitchen of the apartment, just inches from the refrigerator. The testimony presented showed that defendant denied knowledge of the narcotics, but stated that "drug boys" had been at the apartment earlier that day. Defendant was not listed on the lease for the apartment, nor was he listed as the account holder for any of the utilities for the apartment. Defendant admitted to the arresting officer that he had maintained a nineteen year relationship with the woman listed as the leaseholder of the apartment, but stated that his primary residence was on Viking Drive. Defendant told the officer that he "stayed" at the apartment, but denied living there.

At the time of the execution of the search warrant, the officers found not only defendant in the apartment, but also two other adults and a child asleep in an upstairs room. As defendant did not have exclusive control over the premises in which the controlled substances were found, the State therefore was required

to present evidence of other incriminating circumstances from which constructive possession could be shown. *Id.* at \_\_\_, 628 S.E.2d at 805. While defendant's fingerprints were not found on any of the seized items, items belonging to defendant were found in the apartment. Prescription medicine bottles found in the kitchen had defendant's name on them; however, the address listed for defendant on the medication bottles listed an address on Viking Drive. Defendant's driver's license also listed an address on Viking Drive as his residence, not Baltimore Street. A phone message for defendant dated one month earlier also was found in the apartment. However, there was no evidence indicating that defendant stayed at the apartment on a regular basis or that he had used the apartment as his residence at any time. Nor was there any evidence otherwise tying defendant to the money, drugs, or packaging materials found.

Without more, we hold the State's evidence failed to do more than create suspicion or conjecture that defendant committed the charged offenses. No evidence was presented indicating that defendant had any knowledge of the presence of the narcotics or that he had any control over the premises. Also, there was no evidence presented showing that defendant ever had touched any of the seized items, moved towards the seized items, or that he had been seen attempting to throw the bags of cocaine under the refrigerator. The officers only saw defendant standing in the kitchen prior to his lying down once the officers entered with their guns drawn. Therefore, we hold the State failed to present sufficient evidence that defendant actually or constructively

possessed either the marijuana or cocaine. As such, defendant's motion to dismiss the charges of possession with the intent to sell and deliver marijuana, and trafficking by possession of a controlled substance, to wit cocaine, should have been granted, as the State failed to present substantial evidence of each element of the offenses. Therefore defendant's convictions are reversed and dismissed.

As we have reversed defendant's convictions, we need not address defendant's additional assignments of error and issues on appeal.

Reversed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).