NO. COA06-889

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v

Burke County
No. 04 CRS 05373

FOY ELLIS DEAL, Jr.,
Defendant.

Appeal by defendant from judgments entered 16 February 2006 by Judge W. Robert Bell in Burke County Superior Court. Heard in the Court of Appeals 21 February 2007.

Attorney General Roy Cooper, Special Deputy Attorney General T. Lane Mallonee, for the State.

Mercedes O. Chut for defendant.

BRYANT, Judge.

Foy Ellis Deal, Jr. (defendant) appeals from 16 February 2006 judgments entered consistent with jury verdicts convicting him of possession of Oxycodone and Dihydrocodeinone. Defendant pled guilty to having attained the status of an habitual felon. The trial court sentenced him within the presumptive range to an active prison term of 151 to 191 months.

The State's evidence tended to show: In the early evening hours of 24 June 2004, Sergeant David Cobb of the Burke County Sheriff's Department was passing through a traffic light when he noticed an older model white Oldsmobile in front of him. Sgt. Cobb

recognized the license tag number on the vehicle as one he had been given earlier by Detectives Eric Smith and Dean Lloyd, members of the Narcotics Task Force. The Task Force was looking for defendant who was believed to be in a 1979 Ford station wagon belonging to Isaac Carr and bearing a license tag of that same number. Sgt. Cobb ran a computer check on the tag number and confirmed that it was supposed to be displayed on a Ford station wagon as expected, and not on the white Oldsmobile. (He later ran a check on the vehicle identification number of the Oldsmobile and determined that it was registered to a Thomas Sisk.) Because the tag did not match the vehicle, Sgt. Cobb initiated a stop of the vehicle. The driver was Isaac Carr, whom he knew to be wanted on an outstanding worthless check warrant from Wake County. The only other occupant of the Oldsmobile was defendant who was seated in the right front passenger seat. Sgt. Cobb got Carr out of the vehicle and searched Carr and the area around the driver's seat. Sgt. Cobb did not search defendant and left him in the vehicle initially while he was dealing with Carr, but then got him out to join them at the rear of the vehicle. Carr was then placed under arrest on the worthless check warrant and issued a citation for the fictitious tag. Sgt. Cobb called Detective Smith of the Narcotics Task Force for assistance.

When Detective Smith arrived at the scene, Carr was already under arrest and in the patrol car. Defendant was standing beside the front passenger door of the Oldsmobile. Sgt. Cobb turned defendant and the investigation over to Smith and asked Smith to

conduct a search of the vehicle incident to the arrest of Carr. Detective Dean Lloyd arrived at the scene to assist Detective Smith with the investigation and to take photographs while the vehicle was being searched. Detective Smith conducted the search of the Oldsmobile. He examined the contents of several bags found in the trunk. In the rear seat of the vehicle he found two white garbage-type bags, some clothing, an Igloo-style cooler, a manila envelope, and two empty pill bottles. In the front passenger seat, where defendant had been sitting during the time Sgt. Cobb was dealing with Carr, two additional pill bottles were found tucked in the crease of the passenger seat. Detective Smith seized these bottles and their contents. Defendant was placed under arrest. A search of defendant revealed $1,836 in cash.

Detective Smith did not question defendant, but while he was transporting defendant to the Burke County Sheriff's Office for booking, defendant told Smith "that he was set up and he wanted an attorney, and several other dealers of Oxycontin.[sic]" Joseph Reavis, Chemist and Special Agent in Charge of the S.B.I. Western Regional Laboratory, testified at trial as an expert in Forensic Drug Analysis. Agent Reavis tested the seized pills and identified them as follows: 30 dosage units of Oxycodone, a Schedule II controlled substance, weighing 4.7 grams; 13.5 dosage units of dihydrocodeinone with acetaminophen, a Schedule III preparation weighing 12.7 grams; and, 49 dosage units of dihydrocodeinone with acetaminophen, a Schedule III preparation weighing 31.8 grams. Defendant appeals.

The dispositive issue on appeal is whether the trial court erred by denying defendant's motion to dismiss the charges of possession of controlled substances. Specifically, defendant challenges there was insufficient evidence to establish that he constructively possessed Oxycodone and Dihydrocodeinone. We disagree.

Our Supreme Court has stated:

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. . . . In reviewing challenges to the sufficiency of the evidence, we 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. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of the defendant's guilt may be drawn from the circumstances.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed.2d 150 (2000) (citations and quotations omitted).

Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the

substance must be knowingly possessed. *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985).

> [I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Instead, possession of a controlled substance may be either actual or constructive. As long as the defendant has the intent and capability to maintain control and dominion over the controlled substance, he can be found to have constructive possession of the substance. Incriminating circumstances, such as evidence placing the accused within close proximity to the controlled substance, may support a conclusion that the substance was in the constructive possession of the accused. Thus, where sufficient incriminating circumstances exist, constructive possession of a controlled substance may be inferred even where possession of a premises is nonexclusive.

State v. McNeil, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005) (internal citations and quotation marks omitted).

In this case, defendant did not have exclusive possession of the car in which the pills were found. Therefore, the State is required to provide evidence of other incriminating circumstances. *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). Defendant relies on *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976), in urging that the facts in the instant case are insufficient to constitute constructive possession. Defendant's reliance on *Weems* is misplaced. In *Weems*, the proximity of the defendant to the heroin found tucked in the folds of the seat behind him was held to be insufficient to constitute constructive possession. However, unlike the instant case, in

Weems there were no other incriminating circumstances to suggest the defendant had knowledge of the presence of the drugs. *Id.* at 571, 230 S.E.2d at 195. Nevertheless, the Court in *Weems* did acknowledge that "evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession." *Id.*

Evidence of other incriminating circumstances have been found where the drugs were found nearest to the area of the car occupied by the defendant immediately before he was apprehended. *State v. Matias*, 143 N.C. App. 445, 449, 550 S.E.2d 1, 3-4, *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001); *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996). In the instant case, when defendant was arrested, he had a large amount of cash on his person ($1,836). *See State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (over $1,700 in cash in defendant's pocket considered incriminating); *State v. Martinez*, 150 N.C. App. 364, 371, 562 S.E.2d 914, 918, *appeal dismissed, disc. rev. denied*, 356 N.C. 172, 568 S.E.2d 869 (2002) ($1,780 in cash on the person of defendant was considered incriminating). Moreover, a finding of constructive possession depends on the totality of circumstances in each case. *James*, 81 N.C. App. at 93, 344 S.E.2d at 79. No single factor is controlling and ordinarily the question will be for the jury to decide. *Id.* "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).

Here, the drugs were found in the right front passenger seat where defendant had been sitting when officers asked him to exit the vehicle. After the stop, but prior to being asked to exit, he was left alone in the passenger seat of the vehicle while the driver was being interrogated outside the vehicle by the arresting officer, and was left standing by the right front passenger door as the driver was being placed in the patrol car. This afforded defendant the opportunity to stash the pill bottles in his possession into the crease of the seat where only he had been sitting in an effort to hide them from police. The large amount of cash on his person can be considered an incriminating circumstance. In addition, defendant made a spontaneous statement to the arresting officer, "that he was set up and he wanted an attorney, and several other dealers of Oxycontin.[sic]" This statement supports the reasonable inference that defendant had knowledge of the drugs found in the car and was offering to provide the police with names of other drug dealers he believed set him up, or to possibly obtain more lenient treatment from the police. Viewed in the light most favorable to the State, the evidence was such that the jury could reasonably infer from the totality of circumstances that the defendant had the capability and intent to control the narcotics found in the car. For the foregoing reasons, this assignment of error is overruled.

No error.

Judges MCCULLOUGH and LEVINSON concur.

Report per Rule 30(e).