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NO. COA07-1299

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

STATE OF NORTH CAROLINA

v.

WILLIE J. FLEMING

Wayne County
Nos. 05 CRS 56762-63
05 CRS 09730

Appeal by defendant from judgment dated 2 May 2007 by Judge John E. Nobles, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 28 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Nighthawer, for the State
Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant.

BRYANT, Judge.

Willie J. Fleming (defendant) appeals from a judgment dated 2 May 2007 and entered consistent with a jury verdict finding him guilty of possession with intent to sell and deliver marijuana, maintaining a dwelling for the use of controlled substances, and possession of a firearm by a convicted felon. We find no error in part and reverse in part.

Defendant lived with his wife and cousin at 1401 Courtyard Circle in Goldsboro, North Carolina. On 22 July 2005, an officer from the Wayne County Sheriff's Department entered the apartment

with a warrant to arrest defendant for failure to pay child support. Defendant was asleep on the living room couch, and defendant's wife allowed the officer to enter. Defendant awoke, and out of a desire to smoke a cigarette, he reached for a cigar box located in front of him on the coffee table. When defendant opened the box, the officer observed packets of marijuana contained in the box. The officer confiscated the marijuana and escorted defendant to the magistrate's office for failure to pay child support. On 8 August 2005, officers returned to defendant's apartment in order to investigate the circumstances surrounding the marijuana found on 22 July. Defendant was once again asleep on the living room couch. During a search of the apartment, officers found burnt marijuana cigarettes and "corner baggies" in the living room and two loaded shotguns in two different bedroom closets.

Defendant was indicted for one count of possession with intent to sell and deliver controlled substances, one count of maintaining a dwelling for the use of controlled substances, one count of possession of a firearm by a felon, and one count of attaining the status of an habitual felon. On 2 May 2007, a jury found defendant guilty of possession with intent to sell and deliver, maintaining a dwelling, and possession of a firearm by a felon. Defendant pled guilty to obtaining the status of an habitual felon. Defendant appeals.

Defendant presents three issues on appeal: (I) whether the trial court erred in denying defendant's motion to dismiss the

charge of maintaining a dwelling for the use of controlled substances; (I) whether the trial court erred in denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon; and (III) whether the trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell and deliver marijuana.

Standard of Review

A defendant's motion to dismiss is appropriately denied when 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). In ruling on a motion to dismiss, a trial court must view the evidence "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).

I

Defendant argues the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling due to insufficient evidence. We disagree.

North Carolina General Statute Section 90-108(a)(7) prohibits any person from knowingly maintaining a dwelling house for the purpose of using controlled substances, or which is used for the keeping or selling of the same. N.C.G.S. § 90-108(7)(a) (2007). A conviction for maintaining a dwelling requires the State to prove defendant "(1) knowingly or intentionally kept or maintained; (2)

a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001).

In this case, defendant only challenges whether the State presented sufficient evidence that he "kept or maintained" the apartment. A decision as to whether or not someone has maintained a dwelling in accordance with N.C.G.S. § 90-108(a)(7), "requires consideration of several factors, none of which are dispositive." *Frazier*, 142 N.C. App. at 365, 542 S.E.2d at 686. "Those factors include: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses." *Id.*

The State presented substantial evidence of each element of the offense sufficient to deny defendant's motion to dismiss the charge of maintaining a dwelling. Defendant testified that he and his wife had lived in the 1401 Court Yard Apartment for over eighteen months. On two separate occasions, defendant was sleeping in the apartment when the officers entered. Although no direct evidence shows that defendant contributed to the expenses or rent payments, the fact that defendant and his wife admitted the apartment belonged to both him and his wife, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that defendant maintained the apartment. *See Id.*

The evidence in this case is stronger than other cases in which this Court has ruled that evidence was sufficient to deny a motion to dismiss on a charge of maintaining a dwelling. *See State*

v. Baldwin, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003) (holding that occupancy as the only present factor was enough because "defendant received mail at the address for approximately one year, his driver's license showed the address as his home address, and his car was registered at the address."); *Frazier*, 142 N.C. App. at 366, 542 S.E.2d at 686 (finding that defendant who had only stayed in motel for seven weeks and sometimes paid rent maintained a dwelling).

Defendant relies heavily on *State v. Bowens*, 140 N.C. App. 217, 535 S.E.2d 870 (2000), but the facts in *Bowens* do not control in the present case. In *Bowens*, the defendant only appeared in and out of the house for two to three days. *Id.* at 220, 542 S.E.2d at 872. The mother of defendant's children testified she rented the apartment, the lease and utilities were in her name, and she paid for both the rent and the utilities. *Id.* She also testified that the male clothing items found in the apartment belonged to her and the defendant was only there to see the children when the search occurred. *Id.* Unlike *Bowens*, the present case involves no such testimony by defendant's wife. As previously stated, defendant lived in the apartment for over eighteen months, and his wife testified that she and defendant owned the apartment.

Viewing the evidence in the light most favorable to the State, substantial evidence was presented of each essential element of the crime charged. Therefore, the trial court was correct in denying defendant's motion to dismiss.

II

Defendant also argues the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a convicted felon because the State's evidence was insufficient to show constructive possession of either firearm. We agree.

Pursuant to N.C. Gen. Stat. § 14-415.1(a) (2007), it is unlawful for any person who has been convicted of a felony to possess a firearm. *Id.* "Where [firearms] 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 on a charge of unlawful possession." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). However, if the defendant has nonexclusive control of the premises where the firearms are found, additional evidence of other incriminating circumstances must be shown in order for constructive possession to exist. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871, (1989). One may possess something constructively if one has "the power and intent to control its disposition and use even though he does not have actual possession." *Davis*, 325 N.C. at 697, 386 S.E.2d at 190 (internal citations omitted). "Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband." *Givens*, 95 N.C. App. at 78, 381 S.E.2d at 872.

Here, because defendant had non-exclusive control over the apartment, the State must establish defendant constructively possessed the firearms. After considering the evidence in the light most favorable to the State, we conclude the State failed to present substantial evidence showing defendant was in constructive possession of the firearms. The evidence presented showed that two shotguns were found in two different bedrooms in defendant's apartment. One shotgun was found in the bottom of a closet in one bedroom and the other shotgun was found inside a tote bag in the closet of another bedroom. However, no incriminating evidence was presented linking defendant to either gun. No evidence was presented that any of defendant's personal belongings were found in close proximity to the firearms, *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991) (finding sufficient evidence of intent to control contraband when two out of four items on a table where drugs were found belonged to defendant), nor was any other type of evidence presented indicating defendant had used the guns, *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262-263 (2003) (finding sufficient evidence of constructive possession when evidence showed gunshot residue and possible use of the particular firearm). Without additional incriminating evidence linking defendant to the firearms, the State failed to show defendant had the power and intent to control the firearms.

The present case is distinguishable from *State v. Kraus*, 147 N.C. App. 766, 557 S.E.2d 144 (2001), where this Court found sufficient evidence of constructive possession when drugs and drug

paraphernalia were in plain view, marijuana smoke was present in the room, and defendant appeared "stoned." *Id.* at 770, 557 S.E.2d at 148. See also *Davis*, 325 N.C. at 697, 386 S.E.2d at 190 (finding sufficient incriminating evidence for constructive possession when drugs were found on a coffee table near where defendant was sitting); *State v. Loftis*, ___ N.C. App. ___, ___ 649 S.E.2d 1, 7, (2007) (finding sufficient incriminating evidence when evidence showed defendant was alone in shed where materials used to make methamphetamine were present); *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879-80 (1993) (finding sufficient incriminating evidence when officers found defendant's clothing, wallet, and documents in the same bedroom and bathroom area as the cocaine).

Because the State failed to provide sufficient evidence linking defendant to the firearms, the trial court's denial of defendant's motion to dismiss was in error. Therefore, we reverse defendant's conviction of possession of a firearm by a felon.

III

Defendant also argues the trial court erred by denying his motion to dismiss the charge of possession with intent to sell and deliver marijuana because there was insufficient evidence to show that he possessed the drugs. We disagree.

Pursuant to N.C. Gen. Stat. § 90-95(a)(1) (2007), a conviction for possession with intent to sell and deliver a controlled substance is proper if the State can prove that the defendant (1) possessed (2) with the intent to sell or deliver (3) a controlled

substance. *Id.* Possession may be constructive in nature. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). Again, if defendant has non-exclusive control of the premises where the contraband was found, then an additional finding of other incriminating circumstances must exist for constructive possession to exist. *Givens*, 95 N.C. App. at 76, 381 S.E.2d at 871. "Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband." *Id.* at 78, 381 S.E.2d at 872.

In the present case, there is sufficient evidence showing that defendant constructively possessed the marijuana. Defendant was in close proximity to the box in which the marijuana was kept. The officers found the marijuana in the same room as defendant "which may support an inference of constructive possession." *Givens*, 95 N.C. App. at 78, 381 S.E.2d at 872. Additional incriminating evidence and an inference of intent to control the contraband include the fact that defendant admitted to hiding cigarettes in the box on prior occasions. This evidence constitutes more than a "suspicion or conjecture" that defendant constructively possessed the marijuana in the box. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Viewing the evidence in the light most favorable to the State, the State satisfied its burden of proving the requisite intent and capability to control the contents of the box, and thus the trial court did not err in denying defendant's motion to dismiss.

For the reasons stated herein, we affirm the trial court's decision to deny defendant's motion to dismiss the charges of maintaining a dwelling and possession with intent to sell and deliver marijuana. We reverse defendant's conviction of possession of a firearm by a convicted felon.

No error in part; reversed in part.

Chief Judge MARTIN and Judge ARROWOOD concur.

Report per rule 30(e).