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NO. COA07-740

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v.

Randolph County
No. 05 CRS 90

TALANA GLADDEN TWEED

Appeal by Defendant from judgment entered 22 February 2007 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 4 February 2008.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State,

Robert W. Ewing for Defendant.

Court of Appeals Slip Opinion

STEPHENS, Judge.

On 18 April 2005, Defendant Talana Gladden Tweed was indicted on the charge of Possession with Intent to Manufacture, Sell, and Deliver Cocaine. On 22 February 2007, a jury convicted Defendant of the lesser included offense of Possession of Cocaine, and the trial court sentenced Defendant to a term of six to eight months in prison, suspended the sentence, and placed her on eighteen months of supervised probation. Defendant gave oral notice of appeal after entry of judgment.

I. Facts

In executing a search warrant for the residence and person of co-defendant Tony Elroy Johnson ("Johnson"), officers with the Randolph County Sheriff's Department used a "forced" entry into Johnson's mobile home at 3167 Cassady Road in Seagrove, North Carolina around 8:30 a.m. on 11 March 2004. Sergeant David Joyce and another officer entered the residence through the front door and made their way to the master bedroom where Defendant, Johnson, and two small children were located. When the officers entered the master bedroom, Defendant "was either in the bed or on the bed" and was in "some kind of nightclothes." Johnson was heading toward the closet with his hand reached out going into the closet. As he was reaching into the closet, Johnson stated that he was "just putting this gun up, it belongs to my girl." Sergeant Joyce saw a revolver in the closet and a bag of crack cocaine on the floor of the closet. He also noted female clothing in the residence.

After Johnson, Defendant, and the two children were "secured" in the living room, a search of the master bedroom revealed a playing card box underneath the bottom drawer of the dresser containing a little over three thousand dollars, a sewing box with sewing needles, scissors, and tape measures, and a jewelry box with hand-held scales. A bag containing two scales and forceps used for smoking "dope" was also found on the bedroom floor.

The officers searched other areas of the residence and found a pistol and several rounds of ammunition and magazines for weapons in a closed cabinet above the washer and dryer located in the hall. A rifle magazine was also found in an outbuilding of the residence.

Officers collected papers from the residence "for proof of who was at the residence or who belong[ed] at the residence." Papers collected showed that the trailer was titled and registered to Johnson, and Johnson's driver's license listed 3167 Cassady Road in Seagrove as his address. No documents connecting Defendant to the address were found.

In addition to the charge of possession of cocaine, Defendant was charged with possession of drug paraphernalia and possession of marijuana. Prior to trial on the cocaine charge, Defendant was tried on the other two possession charges, and acquitted on both counts.

II. Motion to Dismiss

Defendant first argues that the trial court erred in denying her motion to dismiss the charge of possession of cocaine for insufficiency of the evidence.

When a defendant moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each element of the crime charged and (2) that the defendant is the perpetrator. *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866 (2002). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quotation marks and citations omitted). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence." *State v. King*, 343 N.C. 29, 36,

468 S.E.2d 232, 237 (1996) (citation omitted). If the evidence, when considered in light of the foregoing principles, is sufficient only to raise a suspicion, even though the suspicion may be strong, as to either the commission of the crime or that the defendant on trial committed it, the motion to dismiss must be allowed. *Scott, supra*.

Felonious possession of a controlled substance has two essential elements: (1) the substance must be possessed, and (2) the substance must be knowingly possessed. *State v. Rogers*, 32 N.C. App. 274, 231 S.E.2d 919 (1977). An accused's possession of a controlled substance may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972). The doctrine of constructive possession applies when a person without actual physical possession of a controlled substance has the intent and capability to maintain control and dominion over it. *State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983). In this case, as Defendant was not in actual possession of the cocaine seized, we must determine whether he was in constructive possession of the substance.

"When [controlled substances] 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." *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. However, where the accused does not have exclusive control of the premises, the fact that she is present in a room where drugs are located, nothing else

appearing, does not mean she has constructive possession of the drugs, *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986), and "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (quotation marks and citation omitted).

In *James*, the defendant was not in exclusive control of the premises where the controlled substances were found. However, the evidence presented showed that

[the defendant] admitted to police officers that his clothes were on a mattress in one room of the house, where the officers also found a pay stub bearing his name. The house was rented by [the defendant's] sister, Mary. He admitted staying over at the house occasionally to babysit for Mary's child. [The defendant] had been seen there the day before, and was standing on the porch nearest the heroin when police arrived. He admitted keeping the cocaine at the house though without his sister's permission.

James, 81 N.C. App. at 95, 344 S.E.2d at 80. This Court concluded these were sufficient "other incriminating circumstances" to allow the jury to consider the defendant's constructive possession of the drugs.

Likewise, the defendant in *State v. Autry*, 101 N.C. App. 245, 399 S.E.2d 357 (1991), did not have exclusive control of the premises where the controlled substances were discovered. However,

[the] defendant [] was found standing with two other persons in a kitchen measuring approximately six feet by eight feet. On one wall of the kitchen there was a table surrounded by several chairs. One chair was turned sideways from the table, and tilted toward [the defendant]. A leather jacket was

hanging on the back of the chair. [The defendant] was standing within arm's reach of the chair, and told a police officer that the jacket was his. On the table were a .25-caliber semi-automatic pistol, four packages of powder containing cocaine, and \$47[] in cash. [The defendant] informed the police that the \$47[] belonged to him as well. Thus, of the four items on or near the table, those being the jacket, the cash, the pistol and the cocaine, [the defendant] claimed ownership of two items.

Id. at 252, 399 S.E.2d at 362. This Court determined the evidence was sufficient for a reasonable mind to infer and conclude from the circumstances that the defendant constructively possessed the cocaine found on the kitchen table.

As in both *James* and *Autry*, Defendant in this case was not the owner of the residence where the cocaine was found. Accordingly, Defendant's presence in the master bedroom where the cocaine was discovered was insufficient, in and of itself, to give rise to an inference of constructive possession. Thus, the State was required to show other incriminating circumstances from which constructive possession could be inferred. The evidence presented at trial showed Defendant "was either in the bed or on the bed" and was in "some kind of nightclothes" when the police officers entered the bedroom. Johnson was heading toward the closet with his hand reached out going into the closet when he said he was "just putting this gun up, it belongs to my girl." A revolver and a bag of crack cocaine were found in the closet. A further search of the bedroom revealed a playing card box underneath the bottom drawer of the

dresser containing a little over three thousand dollars,¹ a sewing box, a jewelry box containing hand-held scales, and a bag on the floor containing scales and forceps. Female clothing was seen at the residence.

Unlike in *James*, no papers were found connecting Defendant to the residence and no evidence was presented that Defendant had been in the residence at any time before 11 March 2004. Furthermore, unlike the defendant in *James* who admitted to owning clothes found in one of the rooms and to keeping cocaine at the residence, no evidence was presented in this case to show that Defendant owned any of any items found in the residence or kept any items at the residence.

Similarly, whereas the defendant in *Autry* admitted to owning two of the four items found on or immediately next to the cocaine discovered on the kitchen table, here, no evidence was presented that Defendant owned anything in the bedroom or anywhere else in the residence where the cocaine was discovered.

The State argues that *Autry* supports a conclusion of constructive possession in this case because in *Autry*, this Court found sufficient evidence of constructive possession even though there was no evidence that the defendant lived at the house where the cocaine was found; whereas here, the State argues that the evidence presented was "sufficient evidence that [] [D]efendant lived in the house" where the cocaine was discovered. However,

¹ The State incorrectly asserts that the playing card box was found "on the dresser" in the master bedroom.

"[a]s the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case." *James*, 81 N.C. App. at 93, 344 S.E.2d at 79. Proof of exclusive control or joint custody and access to the premises where controlled substances are found is only one circumstance to be considered in determining the sufficiency of the evidence to support constructive possession. Furthermore, to reach its conclusion "that [D]efendant lived in the house" where the cocaine was found, the State relies on the following inferences: the State infers from Defendant's being in her pajamas on the bed that she had slept overnight in the house and that "it was not an emergency overnight stay." The State also infers that the sewing box and the jewelry box belonged to a woman and that those items, along with the female clothing, must have belonged to Defendant as "[D]efendant was the only woman there." The State additionally infers that "Defendant maintained enough of a relationship with the residence to maintain . . . her firearm in the home."² It is from these inferences that the State makes its ultimate tenuous inference that Defendant had constructive possession of the cocaine.

This evidence, when viewed in the light most favorable to the State, is sufficient only to raise a suspicion that Defendant

² Defendant assigns error to the trial court's admission of the statement "it belongs to my girl" on the ground that it is inadmissible hearsay. We need not reach this issue as we conclude that the evidence of constructive possession was insufficient even considering this statement.

"lived in the house" and thus, constructively possessed the cocaine. The most the State has shown here is that Defendant was in the room where the cocaine was located. "Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976). Accordingly, as the State has failed to offer sufficient evidence of all the elements of possession of cocaine, the trial court erred in denying Defendant's motion to dismiss.

Although Defendant raises additional arguments on appeal, in light of our conclusion that the trial court erred in denying Defendant's motion to dismiss, we need not reach Defendant's remaining assignments of error.

REVERSED.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).