NO. COA07-972

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 06 CRS 223144-46

REGINALD JERMAINE OLIVER

Appeal by defendant from judgment entered 7 February 2007 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 February 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Gilda C. Rodriguez for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals judgments entered after a jury verdict of guilty of trafficking in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling to keep controlled substances. We determine there was no error.

FACTS

On 16 May 2006, Officer Robert Hartley of the Charlotte-Mecklenburg Police Department was contacted by a colleague, Officer Jason Ross, and informed of a tip Officer Ross had received from a confidential informant ("CI"). The CI had alerted Mr. Ross of a possible drug sale that was to take place in Room 107 of the Howard

Johnson hotel at 4419 Tuckaseegee Road in Charlotte, North Carolina. Responding to this tip, Officer Hartley and Officer Bradley Edwards arrived at the Howard Johnson and knocked on the door to Room 107, which was opened by Reginald Jermaine Oliver ("defendant"). Once the door was opened, Officer Hartley detected the smell of marijuana coming from the room and inquired as to whether defendant had any marijuana. Defendant responded that he did not have any marijuana but he indicated that he had been smoking marijuana in the room.

Officer Hartley then received permission from defendant to enter the room and search it. In addition to defendant, Gary Mackus Boyce, Veronica Louise Brown, and defendant's son were present in the room. While searching the room for marijuana, Officer Hartley found a white laundry bag. Officer Hartley asked defendant if the bag belonged to him, and defendant responded in the affirmative. Officer Hartley subsequently asked defendant if he could search the bag, and again defendant gave the officer permission. Inside of the bag Officer Hartley found 192.6 grams of marijuana and 48.24 grams of crack cocaine.

After discovering these controlled substances, Officer Harley arrested defendant and informed defendant of his *Miranda* rights. Defendant waived his rights and Officer Harley conducted a short interview of defendant. Following the interview, defendant signed a written statement admitting: (1) defendant had been renting the room with his wife for the past month and a half; (2) his brother-in-law, Gary Boyce, brought the drugs to the room; (3) Mr. Boyce

hid the drugs in the laundry bag; (4) defendant knew the drugs were in his laundry bag; (5) defendant intended to buy two grams of crack cocaine from Mr. Boyce and then sell these drugs for a profit; (6) defendant had previously purchased about five grams of crack cocaine from Mr. Boyce; and (7) defendant had been selling crack cocaine since 2001.

On 30 May 2006, defendant was indicted on charges of trafficking in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling to keep controlled substances. On 5 February 2007, defendant was tried before a jury in Mecklenburg County Superior Court, Judge David S. Cayer presiding. Defendant was found guilty on all charges, and a Judgment and Commitment Order was entered on 7 February 2007 sentencing defendant to a minimum of 35 months and a maximum of 42 months of imprisonment. On 16 March 2007, defendant filed notice of appeal.

I.

Defendant first argues the trial court erred when it denied defendant's motion to dismiss the charges against him. We disagree.

"Upon a motion to dismiss criminal charges for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of defendant's guilt of each essential element of the crime." *State v. Shine*, 173 N.C. App. 699, 706, 619 S.E.2d 895, 899 (2005). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion.'" *State v. Holland*, 161 N.C. App. 326, 328, 588 S.E.2d 32, 34-35 (2003) (citation omitted). "When reviewing the evidence, the trial court must consider all evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference." *Id.* at 328, 588 S.E.2d at 35 (2003). On review, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine the credibility of witnesses. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005). Rather, the trial court's only concern is that the evidence be sufficient to carry the case to the jury. *Shine*, 173 N.C. App. at 706, 619 S.E.2d at 900.

A.

Defendant's first contention is that the trial court was presented with insufficient evidence to support convictions for trafficking in cocaine by possession and possession with the intent to sell or deliver marijuana. Specifically, defendant argues that the State's evidence was insufficient to show defendant possessed the cocaine and marijuana recovered by the police. We find this contention to be without merit.

According to N.C. Gen. Stat. § 90-95(h)(3) (2007): "Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as 'trafficking in cocaine[.]'" "To establish trafficking by possession, the State must show that a defendant (1) knowingly possessed a given controlled substance; and (2) that the amount possessed was greater than 28 grams." *State v. Wiggins*, ___ N.C.

App. ___, ___, 648 S.E.2d 865, 872, *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007). Similarly, to prove defendant possessed marijuana with the intent to sell or deliver in violation of N.C. Gen. Stat. § 90-95(a)(1), the State must show: "(1) [d]efendant possessed the controlled substance, and (2) with the intent to sell or [deliver] it." *State v. Bowens*, 140 N.C. App. 217, 222, 535 S.E.2d 870, 873 (2000) (citation omitted), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001). "Intent to sell or deliver can be inferred by the amount of the controlled substance, the manner of its packaging, along with the activities of a defendant, but no one factor is determinative." *State v. Alderson*, 173 N.C. App. 344, 348, 618 S.E.2d 844, 847 (2005). Here, defendant does not challenge the intent or quantity elements of the aforementioned felonies. Therefore, we will focus our inquiry on the element of possession.

"It is well established in North Carolina that possession of a controlled substance may be either actual or constructive." *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992). "A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it." *Id.* "Where such materials 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. Harvey, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If the premises are not under the exclusive control of the defendant, a showing of other incriminating circumstances may be sufficient to prove the defendant maintained constructive possession over the materials. *Shine*, 173 N.C. App. at 706-07, 619 S.E.2d at 900.

In the instant case, at the close of the State's evidence, and again at the close of all the evidence, defendant moved for a dismissal of the possession and trafficking charges. These motions were denied by the trial court. On appeal, defendant argues the State presented insufficient evidence that defendant had possession of the controlled substances in question. A review of the record reveals that the State's evidence tended to show: Officer Hartley asked defendant for permission to search his hotel room after detecting the odor of marijuana. Defendant admitted to smoking marijuana, and gave the officer permission to search the hotel room he was renting with his wife. At the time the officer searched the room, Mr. Boyce, Ms. Brown, defendant, and defendant's son were all present. During the search, Officer Hartley found a laundry bag, which belonged to defendant, containing 192.6 grams of marijuana and 48.24 grams of crack cocaine. When questioned about these drugs, defendant stated that he knew they were in the laundry bag and that he was in the process of purchasing a portion of them. Defendant further admitted that he intended to resell the drugs after completing his purchase. We therefore conclude that the trial court was presented with sufficient evidence of defendant's possession of the premises and other incriminating circumstances to

allow the jury to determine whether defendant constructively possessed the controlled substances found in his laundry bag. *See Shine*, 173 N.C. App. at 706-07, 619 S.E.2d at 900. As the record indicates the trial court was presented with sufficient evidence to satisfy all of the elements for each of the convictions, we hold defendant's argument is without merit.

B.

Defendant also contends the trial court was presented with insufficient evidence to support his conviction for maintaining a dwelling for the keeping or selling of controlled substances. We disagree.

> To obtain a conviction for knowingly and intentionally maintaining a place used for keeping and/or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7) [(2007)], the State has the burden of proving the 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 making the determination of whether a person has kept or maintained a place, in accordance with N.C. Gen. Stat. § 90-108(a)(7), we will consider factors such as: "'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.'" *Shine*, 173 N.C. App. at 707, 619 S.E.2d at 900 (citation omitted).

In the case at bar, although defendant moved to dismiss the possession and trafficking charges, defendant failed to address the

charge for maintaining a dwelling for the keeping or selling of controlled substances in his motion. Thus, this argument was not preserved for appeal. *See* N.C. R. App. P. 10(b)(3) (2008). However, even had he preserved this issue, we find defendant's argument lacks merit. The evidence presented at trial indicated: defendant had been renting the hotel room with his wife for over a month; defendant was present in the hotel room at the time the police arrived; defendant was in the process of buying drugs from Mr. Boyce at that time; and defendant had just finished smoking marijuana. Viewed in the light most favorable to the State, this evidence was sufficient to allow a jury to find defendant maintained the dwelling for the purpose of keeping or selling a controlled substance. Defendant's assignment of error is therefore overruled.

II.

In his next argument on appeal, defendant contends the trial court violated his right to present evidence in his own defense, protected under both the North Carolina Constitution and the United States Constitution, by denying his motion for a continuance. We disagree.

"[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). "'[A] postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts.'" *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362

(1976) (citation omitted). Generally, "a motion for a continuance is . . . addressed to the discretion of the trial judge and is reviewable only upon a showing of an abuse of discretion[.]" *State v. Maher*, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982). However, when the motion is based on a constitutional right, the ruling of the trial judge will be reviewed *de novo* as a question of law. *Id.*

Here, defendant made an oral motion for a continuance to provide him with more time to locate Mr. Boyce, a potential witness for the defense. In support of this motion, defendant argued that because Mr. Boyce had pled guilty to possession of the same drugs that defendant was charged with possessing, Mr. Boyce could testify that the drugs in question belonged to him and that defendant was unaware of their existence. On appeal, defendant argues the trial court's denial of his motion for a continuance violated his constitutional right to present evidence in his own defense.

As our Supreme Court has noted:

> The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. As noted by the United States Supreme Court[,] "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."

State v. Fair, 354 N.C. 131, 149, 557 S.E.2d 500, 515 (2001) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 308 (1973)), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162

(2002); U.S. Const. amend. V, XIV. "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). Factors to be considered by this Court include:

> (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663, *disc. review denied*, 357 N.C. 462, 586 S.E.2d 100 (2003). "If the error amounts to a violation of defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt." *Barlowe*, 157 N.C. App. at 253, 578 S.E.2d at 662-63.

In the case *sub judice*, defendant presented insufficient grounds to support a belief that defendant would be able to produce material evidence had the motion for a continuance been granted. At trial, defendant petitioned the court for a continuance so that he might have more time to locate Mr. Boyce. The problem confronting defendant, he asserted, was that Mr. Boyce, who was incarcerated at the time the trial was originally scheduled, had been released. Indeed, defendant claimed that defense counsel had

spoken with Mr. Boyce while he was incarcerated about testifying during the trial. Yet in the time period between Mr. Boyce's release and the start of trial, defendant stated that he had been unable to locate Mr. Boyce and that he needed more time to do so. However, defendant put forward no affidavit in support of this motion, nor did he provide any evidence as to the content of Mr. Boyce's testimony. Defense counsel merely asserted that because Mr. Boyce had pled guilty to possession of the same drugs for which defendant was charged, the possibility existed that Mr. Boyce would testify that defendant had no knowledge of the drugs. The record indicates that although defense counsel had access to Mr. Boyce prior to trial, and that during this period defense counsel spoke with Mr. Boyce about testifying, defendant failed to either subpoena Mr. Boyce as a potential witness or to determine the content of Mr. Boyce's potential testimony. Further, assuming *arguendo* that Mr. Boyce would have testified that defendant was ignorant of the drugs as defense counsel supposed, defendant's own testimony contradicts such an assertion. Therefore, given that the record reflects that defendant did not diligently seek to secure Mr. Boyce as a witness prior to trial, and that the content of such testimony is speculative, we hold the trial court did not err in denying defendant's motion for a continuance.

III.

Lastly, defendant argues the trial court erred by denying defendant's motion to compel the State to produce the identity of the confidential informant. We disagree.

Ordinarily, law enforcement officers are not compelled to disclose the name of an informant where "the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers." *State v. Grainger*, 60 N.C. App. 188, 190, 298 S.E.2d 203, 204 (1982), *disc. review denied*, 307 N.C. 579, 299 S.E.2d 648 (1983). "[A] defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981). Once defendant has made a sufficient showing, the trial court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U.S. 53, 62, 1 L. Ed. 2d 639, 646 (1957). In balancing these interests, we have previously recognized that "[t]wo factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify[.]" *State v. Newkirk*, 73 N.C. App. 83, 86, 325 S.E.2d 518, 520 (citations omitted), *disc. review denied,* 313 N.C. 608, 332 S.E.2d 81 (1985). Several factors that, if present, weigh against disclosure include (1) the defendant admits culpability, (2) the defendant offers no defense on the merits, and (3) evidence independent of the informer's testimony establishes the accused's guilt. *Id.* at 86, 325 S.E.2d at 520-21.

In the case *sub judice*, defendant has presented no evidence, nor has he asserted, that the informer was a participant in the crime charged. Defendant instead asserts that if he were able to question the CI, defendant could produce evidence that the drugs found in the hotel room were delivered and owned by Mr. Boyce. We note that even if defendant were able to produce this testimony, it does not contradict any material facts presented at trial. In his statement to the police, defendant acknowledged that although Mr. Boyce brought the drugs into defendant's hotel room, defendant knew the drugs were in his laundry bag. Further, defendant stated that he was in the process of buying some of these drugs at the time the police searched his room. Thus, the trial court was presented with sufficient evidence, independent of the information provided by the CI, to support each of defendant's convictions. After reviewing the record, we hold defendant failed to show why his case mandated that the CI's identity be revealed. Accordingly, we hold the trial court did not err in denying defendant's motion.

No error.

Judges ELMORE and ARROWWOOD concur.

Report per Rule 30(e).