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NO. COA08-1006

NORTH CAROLINA COURT OF APPEALS

Filed: 21 April 2009

STATE OF NORTH CAROLINA

v.

Alamance County  
Nos. 07 CRS 53734 and 15379

SAMMY DAVIS WOODS

# Court of Appeals

Appeal by Defendant from judgment entered 20 March 2008 by Judge Paul C. Ridgeway in Alamance County Superior Court. Heard in the Court of Appeals 24 February 2009.

*Attorney General Roy A. Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.*

## Slip Opinion

*Haral E. Carlin, for Defendant.*

BEASLEY, Judge.

Sammy Davis Woods (Defendant) appeals from judgment entered on his convictions of felony possession of cocaine, knowingly maintaining a dwelling/place for use, storage and/or sale of a controlled substance, and misdemeanor possession of drug paraphernalia. Defendant pled guilty to habitual felon status. We find no error.

On 12 May 2007, officers from the Alamance County Sheriff's Special Response Team executed a search warrant at Defendant's home, located at 2964 Corbett Road, Burlington, North Carolina.

Lieutenant Robert Wilborn, leader of the Special Response Team, testified that the officers were searching for drugs and drug paraphernalia. The following is some of the evidence seized during the search: digital scales, glass test tube and plastic zip lock bag containing small amounts of cocaine residue, and a smoking pipe.

Based on the evidence seized, Defendant was arrested two days later. Defendant's indictment included: (1) felony possession of cocaine, (2) manufacturing cocaine, (3) keeping and/or maintaining a place for use storage and/or sale of a controlled substance, and (4) possession of drug paraphernalia.

In March 2008, Defendant's jury trial commenced with Judge Paul Ridgeway presiding. At the end of the State's evidence and again at the close of all evidence, defense counsel made motions to dismiss all the charges, which were denied.

Judge Ridgeway instructed the jury on all charges. Three days later, a jury found Defendant guilty of possession of cocaine, knowingly maintaining a dwelling/place for use, storage and/or sale of a controlled substance, and possession of drug paraphernalia. The jury found Defendant not guilty of manufacturing cocaine. Defendant pled guilty to habitual felon status and was ordered an active sentence for a minimum term of 120 months to a maximum term of 153 months in the North Carolina Department of Corrections.

#### Motion to Dismiss

Defendant argues that the trial court committed reversible error in denying Defendant's motion to dismiss made at the

conclusion of the State's evidence concerning the charge of possession of cocaine. However, Defendant has not assigned error to the trial court's denial of the motion to dismiss at the close of all the evidence. Defendant argues that the evidence was insufficient to convince the trier of fact beyond a reasonable doubt. He argues that this constituted a violation of Defendant's rights under the 6<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution and Article 1, Section 19, 23, and 27 of the North Carolina Constitution. We disagree.

Defendant has not properly preserved this question for review. Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure states that:

[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal . . . made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

N.C.R. App. P. 10(b)(3).

In the present case, Defendant made a motion to dismiss the cocaine possession charge after the State presented all its evidence. The motion was denied by Judge Ridgeway who found that the State had offered evidence that some quantity of cocaine, albeit a very small amount, was found in Defendant's home. Defendant then introduced evidence. "Because defendant offered evidence following denial of his motion to dismiss at the close of

the State's evidence, the denial of that motion is not properly before us for review." *State v. Griffin*, 319 N.C. 429, 432, 355 S.E.2d 474, 476 (1987). This assignment of error is overruled.

#### Jury Instructions

Defendant asserts that the trial court committed plain error on the charge of possession of cocaine by failing to instruct the jury that where actual possession of the premises is non-exclusive, constructive possession of contraband may not be inferred without other incriminating circumstances. Defendant argues that this is a violation of the Defendant's 6<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution and Article I, Section 19, 23 and 27 of the North Carolina Constitution. We disagree.

Because Defendant failed to object to the instructions at trial, the Defendant urges us to evaluate his assignment of error under the "plain error" rule. In *State v. Odom*, the Supreme Court defined the plain error rule as follows:

"[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity, or public reputation of judicial proceedings or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4<sup>th</sup> Cir. 1982)) (internal quotations omitted). Under this analysis, Defendant must show that the deficiency in Judge Ridgeway's instructions was such a fundamental error, that he was prevented from having a fair trial or that the deficiency had an impact on the jury's verdict.

"In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79. At the end of all evidence, Judge Paul Ridgeway instructed the jury on Defendant's possession of cocaine charge as follows:

In this case, the defendant has been charged with possessing cocaine, a controlled substance. For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed cocaine. Cocaine is a controlled substance. A person possesses a controlled substance when he is aware of its presence and has either by himself or together with others the power or intent to control the disposition or use of that substance.

Possession of a substance may be either actual or constructive. . . . A person has actual possession of a substance if he has it on his person, is aware of its presence and either by himself or together with others has both the power and intent to control its disposition and use.

A person has constructive possession of a substance if he does not have it on his person, but is aware of its presence and has either by himself or together with others both

the power and intent to control its disposition and use. A person's awareness of the presence of a substance and his power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.

If you find beyond a reasonable doubt that a substance was found in certain premises, and that the defendant exercised control over those premises, whether or not he owned it, this would be a circumstance from which you may infer the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

This Court cannot conclude, considering the entire record, that the alleged deficiency in the jury instruction amounted to plain error. "Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both 'the power and intent to control its disposition or use[.]'" *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). "In North Carolina, an inference of constructive possession arises against an owner or lessee who occupies the premises where contraband is found, regardless of whether the owner or lessee has exclusive or nonexclusive control of the premises." *State v. Tate*, 105 N.C. App. 175, 179, 412 S.E.2d 368, 370-71 (1992). Defendant did not dispute that he owned and had lived at the house on 2964 Corbett Road since he was eleven years old. Since contraband was discovered during a search of his house, there is an automatic inference that Defendant had constructive possession of the cocaine seized.

Defendant argues that when "possession of the premises is non-exclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Harrington*, 171 N.C. App. 17, 24, 614 S.E.2d 337, 344-45 (2005). Defendant contends that because he was not at home when the search warrant was executed and because others had access to the premises, including Defendant's sister, mistress, and two prostitutes, Defendant did not have exclusive possession. However, even if we consider Defendant's argument, there is still a substantial amount of incriminating evidence showing possession. There was ample evidence that Defendant had the power to control the cocaine found. During the 2007 search, officers found a telephone bill in Defendant's name. They also found a North Carolina citation addressed to the Defendant at 2964 Corbett Road. These two pieces of evidence prove that Defendant had control over these premises.

Defendant even admitted that all but one of the exhibits offered as evidence were left over from a previous search in 2001, showing that he was aware of its presence.

We reject the argument that the trial court's jury instructions amounted to plain error. Therefore, we cannot conclude that the jury would likely have reached a different verdict had the trial court instructed the jury in the manner urged by Defendant. This argument is without merit and the assignment of error is overruled.

For the foregoing reasons, we conclude that Defendant had a fair trial, free from prejudicial error.

No error.

Judges MCGEE and GEER concur.

Report per Rule 30(e).