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NO. COA08-1046

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v.

Guilford County
No. 06CRS096123

BILLY RAY GRAHAM

Appeal by defendant from judgment entered 11 January 2008 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Lisa G. Corbett, for the State.

Irving Joyner for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Billy Ray Graham ("defendant") appeals from an 11 January 2008 judgment entered in accordance with a jury verdict finding defendant guilty of one count of felony possession of cocaine. Defendant was sentenced to an active term of eight to ten months imprisonment. After careful review, we find no error.

I. Background

The State's evidence tended to show that on the night of 22 October 2006, Greensboro Police Officer John Ryan ("Officer Ryan") was on patrol in his capacity as a member of a street level unit assigned to find and deter illegal drug and weapon activities.

Based upon information he received, Officer Ryan drove to Randleman Road shortly before 10:00 p.m.; he wore plain clothes and operated an unmarked vehicle.

As Officer Ryan approached the intersection of Randleman Road and Terrell Street, he observed a vehicle parked in a deserted strip mall parking lot, with its lights on. His attention was drawn to the vehicle because it was late Sunday night, the area businesses were closed, there was a group of four or five young males standing around the driver's side window, and he had previously observed narcotics activity in the same area. Officer Ryan drove past the vehicle and turned around in order to further monitor the parking lot activity; however, he did not observe any illegal narcotics activity.

After approximately three minutes, the vehicle left the parking lot, and Officer Ryan followed it. He called in the vehicle's license plate. The plate came back as belonging to a late model Toyota Camry, and the vehicle Officer Ryan was following was an earlier model Camry. Officer Ryan radioed a request for back-up to help him with initiating a traffic stop. While waiting for back-up to arrive, Officer Ryan continued to follow the Camry. At one point, he pulled up next to the Camry at a red traffic light. Defendant was operating the vehicle and was the only person inside.

When the light turned green, defendant turned left from a straight-only lane. Officer Ryan, who was in a straight-only lane adjacent to defendant's lane, proceeded straight through the light,

turned around, and reacquired sight of the Camry. He proceeded to follow defendant into the parking lot of Carolina Commons, a rehabilitation facility.

Officer Ryan observed defendant park and exit the vehicle and walk towards Carolina Commons. Both Officer Ryan and Officer Justin Blanks ("Officer Blanks"), who had arrived as back-up, remained outside conducting surveillance on the vehicle. Approximately twenty minutes later, the officers observed defendant return to the vehicle. Neither of them saw anyone else approach or enter the vehicle during this time. Shortly after defendant left the Carolina Commons parking lot, the officers initiated a traffic stop.

Officer Ryan asked defendant for his driver's license and registration. Defendant told Officer Ryan that he did not have any registration and that he had borrowed the license plate from a family member because "he had recently acquired" the Camry and did not have time to register it with the Department of Motor Vehicles. Defendant admitted that he did not have a valid driver's license, and the officers verified that defendant's license had been revoked.

Officer Ryan asked defendant to step out of the vehicle and inquired about the earlier activity he had observed on Randleman Road, which he believed was drug activity. Officer Ryan then asked defendant for permission to search the vehicle, and defendant consented. Upon opening the armrest console between the front driver's seat and the front passenger's seat, Officer Ryan

immediately saw a small off-white rock in a plastic bag, which he believed was crack cocaine. Officer Ryan placed the bag inside his shirt pocket and told Officer Blanks to arrest defendant. Officer Ryan then performed a field test on the substance, which indicated it contained cocaine. Officer Ryan continued his search of the armrest and found another off-white rock substance which was "similarly packaged[.]" Subsequent testing performed by the State Bureau of Investigation confirmed that both substances were crack cocaine.

The Camry that defendant was driving was not registered in his name, but had not been reported as stolen. The license plate was registered to Jackie Lynn Weeks (Ms. Weeks), the mother of defendant's son, Justin Weeks (Justin). The vehicle was cluttered with various items; however, none of the items had any identifying information on them.

Defendant testified on his own behalf. He stated that the Camry belonged to his son, Justin, and that Justin had recently acquired the vehicle from a woman named Willa Rowland, who defendant claimed was the registered owner. Defendant also stated that his girlfriend, Valerie Chavis (Ms. Chavis), had recently stolen the Camry and driven it. According to defendant, the vehicle had been gone for two weeks before it was recovered; however, he did not state any specific date for the theft or the recovery. Defendant testified that Donald Garner, a mechanic at AAMCO Transmission, had recently driven the Camry, but once again, defendant gave no time frame as to when this had occurred.

Defendant also stated that his cousin had recently been in the Camry and that a knapsack found inside the vehicle belonged to said cousin.

At trial, defendant: (1) denied telling Officer Ryan that the Camry belonged to him and stated that he told Officer Ryan that it belonged to Justin; (2) denied being in the parking lot on Randleman Road for more than a minute and testified that the men in the parking lot had approached him because one of the men wanted a ride; (3) denied stopping and turning left at the traffic light as Officer Ryan had testified to; and (4) denied exiting the vehicle at Carolina Commons and testified that he remained in the Camry and talked with Ms. Weeks's nurse, who was on break. Defendant stated that he had never used illegal drugs and had no idea how the crack ended up in the vehicle. However, he admitted that he had told law enforcement that Ms. Chavis left the drugs in the vehicle.

The State presented Sergeant Joel Cranford ("Sergeant Cranford") as a rebuttal witness. Sergeant Cranford testified about an interview he conducted with defendant regarding the traffic stop. Sergeant Cranford stated that when he asked defendant who owned the vehicle defendant was driving, defendant told Sergeant Cranford that "he buys and sells a lot of vehicles, and [that] his son, Justin Weeks, uses the car quite frequently." Sergeant Cranford testified that from his discussion with defendant, he believed that defendant was the owner of the vehicle and that defendant did not indicate anything to the contrary. Sergeant Cranford also testified that defendant: did not tell him

defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Dow*, 70 N.C. App. 82, 84, 318 S.E.2d 883, 885 (1984).

A defendant has possession of a controlled substance when he has both the power and intent to control its disposition or use. Possession may be either actual or constructive. Constructive possession exists when there is no actual personal dominion over the controlled substance, but there is an intent and capability to maintain control and dominion over it.

Id. at 85, 318 S.E.2d at 885 (citations omitted). An inference of constructive possession arises where a controlled substance is found in a vehicle owned by the defendant. *Id.*, 318 S.E.2d at 886.

An inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the "driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

Id. (quoting *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974)) (citations omitted).

Viewed in the light most favorable to the State, the evidence here is clearly sufficient to support defendant's constructive possession of crack cocaine. In the instant case, Officer Ryan testified that defendant indicated that the vehicle was his. However, even if the vehicle belonged to defendant's son, at the

very least, ample competent evidence existed to show that defendant was the custodian of the vehicle and the sole occupant of the vehicle at all relevant times herein. Therefore, defendant's control of the vehicle where the crack cocaine was found was sufficient for the trial court to submit the issue of possession to the jury.

B. Admissibility of Drug Test Results

At trial, defendant sought to introduce a written report which purportedly contained the results of a drug test defendant took on 24 October 2006 and which purportedly showed that he did not have any illegal drugs in his system. The State objected on authentication/hearsay and relevancy grounds. The trial court excluded the report and did not allow defendant to testify as to the results of the test. However, the court did permit defendant to testify that he voluntarily took the test two days after his arrest.

On appeal, defendant argues that the trial court committed reversible error by denying his request to introduce the drug test report and by not permitting him to testify as to the results of the test. Specifically, defendant asserts that the trial court's refusal to admit this evidence violated defendant's state and federal constitutional rights to confrontation and to present his own defense. We disagree.

At the outset, we note that defendant did not raise his constitutional argument before the trial court or in his assignments of error. "This Court is not required to pass upon a

constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985); see also N.C.R. App. P. 10. Accordingly, defendant's constitutional arguments are not properly before us, and we review the trial court's ruling for abuse of discretion. *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) ("The standard of review for this Court assessing evidentiary rulings is abuse of discretion.").

"Every writing sought to be admitted [at trial] must be properly authenticated." *Investors Title Insurance Co. v. Herzig*, 330 N.C. 681, 693, 413 S.E.2d 268, 274 (1992). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2007). Even if it constitutes hearsay, a report containing the results of a defendant's drug test, may be admissible under the business records exception to the hearsay rule pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6) (2007). See *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555 (1986) ("The results of [a] defendant's blood test," which indicate his blood alcohol content, "even though hearsay, are nonetheless admissible if they fall within the business records exception to the hearsay rule."). N.C. Gen. Stat. § 8C-1, Rule 803(6) provides that the following records are not excluded by the hearsay rule:

Records of Regularly Conducted Activity. — A
memorandum, report, record, or data

compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Here, the document that defendant sought to introduce and testify about was an unsigned computer print-out purportedly from a Rhode Island laboratory, and the only witness offered by the defense to testify about it was defendant. There was no testimony offered to support the authenticity and validity of the report by a custodian or other qualified witness. In addition, no qualified testimony was offered regarding what the report meant. Even though defendant testified on voir dire that the report showed that he had no illegal drugs in his system, he admitted that he did not know what the report meant. Consequently, the trial court did not abuse its discretion in declining to admit the report and defendant's testimony as to the purported results.

Defendant makes no argument regarding his remaining assignments of error in his brief; therefore, we deem them abandoned. N.C.R. App. P. 28(b)(6).

No error.

Judges CALABRIA and HUNTER, Robert N., Jr. concur.

Report per Rule 30(e).