

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-1264

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v.

WILLIAM BYRD YOUNG

Forsyth County
Nos. 06 CRS 58869
06 CRS 30099

Appeal by defendant from judgment entered 24 June 2008 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 8 April 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Robert D. Croom, for the State.

Christy E. Wilhelm for defendant-appellant.

HUNTER, ROBERT C., Judge.

William B. Young ("defendant") appeals from jury verdicts entered on 24 June 2008 in Forsyth County Superior Court finding him guilty of: 1) one count of felony possession of cocaine; 2) one count of possession of drug paraphernalia; and 3) one count of possession of marijuana up to one-half an ounce. After careful review, we find no error.

Background

On 28 July 2006, Deputy Sheriff Thomas Wilt ("Deputy Wilt") of the Forsyth County Sheriff's Office went with several other officers to what was believed to be the home of Ricky Martin

("Martin") in order to serve a warrant upon Martin. Martin's mother ("Mrs. Martin") answered the door and invited the officers into the house. The officers informed Mrs. Martin that they were there to serve her son with a warrant and she told the officers they could search the house for him. Upon entering the living room, Deputy Wilt saw William Young ("defendant") sitting in a reclining chair. The officers asked defendant his name, which he refused to give. Officer Wilt testified that defendant was "fidgety" and "evasive." The officers decided to pat down everyone in the home for officer safety.

Deputy Wilt began the pat down of defendant and felt what he immediately recognized as a crack pipe in defendant's right pants pocket. (T p. 34). Deputy Wilt asked defendant what was in his pocket, and defendant stated it was his "'crack pipe'" and that "'[he] smoked crack in it earlier [that day].'" Defendant removed the crack pipe from his pocket and gave it to Deputy Wilt. Before Deputy Wilt could finish the pat down, defendant sat back down in the reclining chair, put his hands behind his back, and began to behave as if "he was trying to retrieve something from his pocket." Deputy Wilt then ordered defendant to stand back up as he was under arrest for possession of drug paraphernalia. When defendant stood up, Deputy Wilt "saw a baggie laying in the chair. About half of it was sticking out between the back cushion where his hands were, where the two cushions come together. . . ." Deputy Wilt handcuffed defendant, finished patting him down, retrieved the bag he saw on the chair, and found another bag behind it. The first

bag contained what appeared to be six cocaine "rocks," and the second bag contained a small amount of marijuana. Deputy Wilt testified that the bags were not in the chair when he first began the pat down.

Deputy Wilt asked defendant if there were any other drugs in the house and defendant stated "'not that he knew of.'" Deputy Wilt then asked defendant if he could search the rest of the house for drugs. Defendant responded, "'[y]ou're not going to find any drugs. That's my bedroom. Go look, but you're not going to find anything[,]'" and gestured towards what he held out to be his bedroom. Deputy Wilt went into the bedroom and saw a hole in the wall near the baseboard of the floor, which was about the size of a fist. He shined a flashlight into the hole and found another bag like the ones he had retrieved from the reclining chair. This bag contained what Deputy Wilt believed to be twelve rocks of cocaine. Deputy Wilt also saw a hole in the box springs of the bed and upon investigation he found another bag of marijuana and a pipe with what appeared to be marijuana in it. Deputy Wilt searched the rest of the house and found no other contraband.

At trial, forensic chemist Shirley Brinkley testified that two of the bags found by Deputy Wilt contained 1.7 grams of crack cocaine and .4 grams of an acid-form cocaine respectively. The other two bags retrieved from the house contained marijuana.

Defendant was indicted on one count of felony possession of cocaine, one count of possession of drug paraphernalia, and one count of possession of marijuana up to one-half an ounce. This

case went to trial on 23 June 2008, and defendant was found guilty by a jury of all charges on 24 June 2008. Defendant appeals from these convictions.

Analysis

I.

Defendant first argues that "the trial court erred by entering judgment when the evidence was inconsistent with the jury's verdict and the evidence was insufficient to support entry of the verdict of guilt." Defendant did not make a motion to set aside the verdict for insufficiency of the evidence as required by N.C.R. App. P. 10(b)(1).¹

Furthermore, defendant has failed to cite any case law supporting his position that the trial court erred in entering the judgment. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Due to these rule violations, this assignment of error is deemed abandoned.

II.

Defendant argues that the trial court erred in failing to grant his motion to dismiss due to insufficiency of the evidence.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each

¹Defendant's second argument, discussed *infra*, concerns the trial court's denial of defendant's motion to dismiss for insufficiency of the evidence, which was properly made at the close of evidence.

essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Id. at 99, 261 S.E.2d at 117.

Specifically, defendant claims that the State argued at trial that defendant had constructive possession of the drugs and drug paraphernalia and that there was insufficient evidence to show constructive possession as the contraband was not under defendant's control. This claim is without merit.

[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics. 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. However, unless the person has exclusive possession of the place where the narcotics are found, 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, 270-71 (2001) (quotations and internal citations omitted). “[I]n common speech and in legal terminology, there is no word more ambiguous in its meaning than [p]ossession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins.” *State v. McNeil*, 359 N.C. 800, 807-08, 617 S.E.2d 271, 276 (2005) (quoting *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67, 58 L. Ed. 504, 509-10, 34 S. Ct. 209 (1914)).

Here, viewing the evidence in the light most favorable to the State, while defendant was not in exclusive possession of the house or reclining chair where contraband was found, there were sufficient incriminating circumstances to justify a denial of defendant's motion to dismiss.

First, defendant was charged with possession of drug paraphernalia pursuant to N.C. Gen. Stat. § 90-113.22(a) (2007). The “crack pipe” first discovered by Deputy Wilt was found in defendant's pants pocket during the initial pat down. Defendant admitted that it was his and that he had used it to smoke crack that same day. Accordingly, there was sufficient evidence that defendant had *actual* possession of this drug paraphernalia.²

Second, defendant was charged with possession of crack cocaine pursuant to N.C. Gen. Stat. § 90-95(a)(3) (2007). With regard to the cocaine found in the recliner, the evidence tended to show

²Defendant was only charged with possession of the crack pipe even though an additional pipe was found in a set of box springs in defendant's bedroom.

that: 1) defendant was sitting in the chair when police arrived; 2) the drugs were not visible to Deputy Wilt when defendant first stood up to be patted down; 3) defendant was in possession of drug paraphernalia and admitted to smoking cocaine that day; 4) defendant sat back down before the pat down could be completed and began fidgeting with his hands in his back pockets; and 5) when defendant was asked to stand up again the bag of cocaine was visibly tucked in the chair cushions. All of these circumstances were sufficient to show that defendant had constructive possession of the cocaine in the reclining chair, and it is arguable that defendant had actual possession of the drugs. While the cocaine found in the chair alone would support the felonious possession charge, Deputy Wilt also found cocaine in the wall of the bedroom defendant claimed was his. Not only did defendant assert control over the room, Deputy Wilt testified that men's clothing was in the bedroom closet, and that the bag packaging the cocaine found in the bedroom was the same as the bag found in the reclining chair. According to these undisputed facts, there was sufficient evidence to bring this charge to the jury.

Third, defendant was charged with possession of marijuana pursuant to N.C. Gen. Stat. § 90-95(d)(4). For substantially the same reasons enumerated above, there was sufficient evidence to submit the charge to the jury. Upon initiating the pat down, Deputy Wilt did not see any drugs in the chair cushions. After defendant sat back down and fidgeted with his back pockets, the bag of cocaine became visible and once Deputy Wilt pulled out that bag,

the bag of marijuana was directly behind it. Again, in the bedroom defendant claimed was his, more marijuana was found in similar packaging within the mattress box springs, along with another pipe.

Defendant relies heavily on the case of *State v. Miller*, ___ N.C. App. ___, 661 S.E.2d 770 (2008), *rev'd*, 363 N.C. 96, ___ S.E.2d ___ (2009) where this Court held that there was insufficient evidence of constructive possession where cocaine was found in the sheets of a bed where defendant had been sitting. *Id.* at ___, 661 S.E.2d at 773. The Court noted that: 1) there was no evidence that defendant acted nervously when law enforcement entered the residence or that he made any visible attempt to hide the contraband; 2) there was insufficient evidence to show that defendant resided in the house where the State merely presented defendant's birth certificate found at the scene; 3) none of defendant's belongings were found in close proximity to the drugs and the fact that defendant was in close proximity raised only a suspicion of possession; and 4) the drugs were not in plain view. *Id.* *Miller* has since been overturned by our Supreme Court. *Miller*, 363 N.C. 96, ___ S.E.2d ___ (finding that the facts viewed in the light most favorable to the State were sufficient to establish constructive possession).

Pursuant to the facts and circumstances of this case, and our Supreme Court's recent decision in *Miller*, we hold that the trial court did not err in denying defendant's motion to dismiss the charges.

III.

Defendants two remaining arguments are: 1) his constitutional right to a jury trial was violated because the trial court did not submit evidence of aggravating and mitigating factors to the jury during sentencing³; and 2) the trial court violated his constitutional rights by sentencing him as a habitual felon. Defendant did not raise either issue at trial.

"Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Accordingly, we decline to address these arguments.

Conclusion

The trial court did not err in refusing to grant defendant's motion to dismiss as there was sufficient evidence to support the charges presented to the jury. Defendant's remaining assignments of error are dismissed due to rule violations and failure to raise constitutional issues at the trial court.

No error.

Judges McGEE and BEASLEY concur.

Report per Rule 30(e).

³The State offered no aggravating factors at sentencing and requested that the judge sentence defendant in the upper half of the presumptive range. The trial court found one non-statutory mitigating factor, that defendant admitted to being a habitual felon, and sentenced defendant in the mitigated range.