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NO. COA08-791

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

STATE OF NORTH CAROLINA

v.

Pitt County
Nos. 06 CRS 060811-12

KEVIN DONTE CARR

Appeal by Defendant from judgments entered 26 February 2008 by Judge Jerry R. Fillett in Superior Court, Pitt County. Heard in the Court of Appeals 30 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General Bethany A. Burson, for the State.

William D. Spence for Defendant.

Slip Opinion

McGEE, Judge.

Kevin Donte Carr (Defendant) appeals from judgments entered consistent with jury verdicts finding him guilty of possession with intent to sell and deliver cocaine, possession with intent to sell and deliver marijuana, and possession of drug paraphernalia.

Officers of the Greenville Police Department executed a search warrant on a residence at West Third Street, Greenville, North Carolina on 6 November 2006. The officers entered the residence through the back door because the front door was barricaded. The officers took Defendant into custody in the living room of the residence, within arm's reach of a clear plastic bag containing a

smaller blue plastic bag, which held a white powdered substance later identified as cocaine. Officers located three other individuals in the front room of the house, which had been turned into a bedroom. Searching the bedroom, officers discovered a plastic bag containing fourteen "baggies" of marijuana, a plastic bag containing very small "apple baggies," and a plastic bag containing four smaller blue plastic bags, which held an off-white rock substance later identified as crack cocaine.

Defendant was indicted on 24 September 2007 for possession with intent to sell and deliver cocaine, possession with intent to sell and deliver marijuana, possession of drug paraphernalia, maintaining a dwelling for the purpose of keeping and/or selling cocaine, and resisting a public officer. Defendant was tried on these charges on 25 February 2008. At the close of the State's evidence, and again at the close of all evidence, Defendant moved to dismiss all charges for insufficiency of the evidence. The trial court dismissed the charge of maintaining a dwelling for the purpose of keeping and/or selling cocaine, and the jury subsequently found Defendant guilty of all remaining charges. The trial court arrested judgment on the charge of resisting a public officer and entered judgments consistent with the jury verdicts. The trial court sentenced Defendant to a term of eight months to ten months in prison for the conviction of possession with intent to sell and deliver cocaine, a consecutive term of forty-five days for the conviction of possession of drug paraphernalia, and a consecutive term of six months to eight months in prison for the

conviction of possession with intent to sell and deliver marijuana, which the trial court suspended and ordered Defendant to serve forty-eight months on probation.

Defendant argues the trial court erred in denying his motion to dismiss the charges of possession with intent to sell and deliver cocaine, possession with intent to sell and deliver marijuana, and possession of drug paraphernalia. It is well-established that,

[w]hen ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented substantial evidence of each essential element of the crime. Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The trial court must then view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom.

State v. Coltrane, ___ N.C. App. ___, ___, 656 S.E.2d 322, 327 (2008) (internal quotation marks and citations omitted). Further, in considering a motion to dismiss, evidentiary "[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995).

Defendant argues the State failed to present sufficient evidence that he was in constructive possession of the marijuana, powder cocaine, or crack cocaine. Defendant also contends the State failed to present sufficient evidence of any intent to sell or deliver marijuana or cocaine. The elements of the offense of possession with intent to sell or deliver a controlled substance

are "(1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (citations omitted), *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005); see N.C. Gen. Stat. § 90-95(a)(1) (2007). A defendant's intent to sell or distribute a controlled substance "may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176. Possession of a controlled substance may "be proven by showing either actual possession or constructive possession." *State v. Siriguanico*, 151 N.C. App. 107, 110, 564 S.E.2d 301, 304 (2002). "'Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics.'" *State v. McNeil*, 359 N.C. 800, 809, 617 S.E.2d 271, 277 (2005) (quotation marks and citations omitted).

In the case before us, Officer Keith Knox of the Greenville Police Department testified that Defendant made a voluntary statement that all the crack cocaine and marijuana was his and the police should let everyone else go. On cross-examination, Officer Knox further testified that Defendant said all of the drugs were his. The crack cocaine was packaged in four small "apple baggies," and the marijuana was packaged in fourteen small bags inside a single larger plastic bag. Additional empty "apple baggies" were

found with the crack cocaine and marijuana. Officer Knox testified that "apple baggies" are very small plastic Ziploc-type bags that are "commonly used for packaging and re-packaging of controlled substances." Officer Knox's testimony regarding Defendant's statement is evidence of Defendant's actual possession of the drugs. Also, the packaging of the marijuana and crack cocaine and the presence of other packaging material are evidence of an intent to sell or deliver the drugs. Thus, the State presented sufficient evidence for the jury to determine the charges of possession with intent to sell and deliver marijuana and possession with intent to sell and deliver cocaine. We hold the trial court did not err in denying Defendant's motion to dismiss as to these charges and overrule these assignments of error.

Defendant further argues the State failed to present sufficient evidence that he was in constructive possession of the "apple baggies" or that he intended to use the "apple baggies" as drug paraphernalia. Containers and other objects used for storing or concealing controlled substances are drug paraphernalia and the proximity of an object to a controlled substance is evidence that it is drug paraphernalia. N.C. Gen. Stat. § 90-113.21(a)(10), (b)(4) (2007). The "apple baggies" were found under a bed with the packaged marijuana and crack cocaine. Defendant admitted the crack cocaine and marijuana were his and the crack cocaine was packed in identical "apple baggies." The use of the "apple baggies" to package crack cocaine and their proximity to packaged crack cocaine and marijuana indicates they are drug paraphernalia and that

Defendant constructively possessed them. We hold the State presented sufficient evidence that Defendant possessed the "apple baggies" with the intent to use them as containers for storing controlled substances. The trial court did not err in denying Defendant's motion to dismiss the charge of possession of drug paraphernalia. This assignment of error is overruled.

No error.

Judges HUNTER and JACKSON concur.

Report per Rule 30(e).