NO. COA09-146

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 07 CRS 013176, 052511

CHRISTOPHER DENARD JOHNSON

Appeal by defendant from judgment entered 17 September 2008 by Judge Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 15 June 2009.

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

Michael J. Reece, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in bills of indictment with misdemeanor possession of one-half ounce or less of marijuana, felonious possession with intent to sell and deliver cocaine, and having attained the status of a habitual felon. At trial, the State presented evidence tending to show that, on the night of 13 March 2007, officers from the Winston-Salem Police Department conducted an undercover narcotics investigation at the Crystal Towers high rise apartment building in Winston-Salem, North Carolina. The officers observed defendant enter the building and followed him inside to an apartment on the third floor. Defendant entered the

apartment and the officers subsequently stopped two individuals who left the apartment. Both of the individuals consented to a search of their persons and the officers discovered both possessed small "user" quantities of crack cocaine. The officers then knocked on the door to the apartment and obtained consent to search from the tenant, James Galloway. Upon entering the apartment, officers observed that defendant was the only other occupant. Defendant walked briskly towards the officers and placed his hand in his coat pocket. One of the officers stopped and frisked defendant. In the coat pocket in which defendant had placed his hand, the officer discovered a plastic bag containing marijuana, two "larger size rocks of crack cocaine," later determined to weigh a total of 3.7 grams, and $55.00 in cash. The officers placed defendant under arrest. During their further search of the apartment, officers did not find any further narcotics or any drug paraphernalia.

Defendant testified in his own defense that he did not live at the apartment and was there getting high. On cross-examination, defendant testified he was in possession of cocaine and marijuana, that they were using scrap aluminum foil to smoke the cocaine, and that the cocaine he possessed was not a large amount.

On rebuttal, an officer testified that they found no evidence of aluminum foil or any evidence that defendant had been using cocaine prior to the search of the apartment. Another officer testified that the $55.00 found on defendant was composed of five one dollar bills, six five dollar bills and two ten dollar bills

and that the dollar value of the cocaine seized from defendant was $600.00, which is not typically an amount found on users.

At the conclusion of the State's evidence, the close of defendant's evidence, and again at the conclusion of all the evidence, defendant moved to dismiss the charge of possession with intent to sell or deliver cocaine. The trial court denied each of the motions. The jury found defendant guilty of all three charges. The trial court found defendant, as a habitual felon, had nine record points and a prior record level of IV. The trial court consolidated the charges for sentencing and entered judgment sentencing defendant as a habitual felon to a presumptive term of 125 to 159 months imprisonment. Defendant appeals.

Defendant argues the trial court erred in denying his motion to dismiss the charge of felonious possession with intent to sell or deliver cocaine. Defendant contends the State failed to present sufficient evidence that he intended to sell or deliver the cocaine in question. We disagree.

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, 188 N.C. App. 498, 505, 656 S.E.2d 322, 327, *disc. review denied*, ___ N.C. ___, 666 S.E.2d 760 (2008) (citations

and internal quotation marks 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).

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). "While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 175-76. 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." *Id.* at 106, 612 S.E.2d at 176. "Although 'quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver,' it must be a substantial amount." *Id.* at 105, 612 S.E.2d at 176 (quoting *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991)).

In this case, the State presented evidence of several of the factors set forth in *Nettles*, which support the denial of

defendant's motion to dismiss. Officers testified that prior to entering the apartment, they stopped two individuals who exited the apartment and found them in possession of small "user" amounts of crack cocaine. Officers testified that a typical user amount of crack cocaine weighs between 0.2 and 0.5 grams and cost between $5 and $20. Upon searching defendant, officers found crack cocaine valued at $600.00, and weighing a total of 3.7 grams, which would equate to between 7 and 18 individual doses of crack cocaine. Defendant also possessed $55.00 in cash, in denominations consistent with the cost of user amounts of crack cocaine. The officers did not find any drug paraphernalia on defendant or in the apartment, which further supports an inference that defendant was selling and not using the crack cocaine as he testified. Taking the evidence in the light most favorable to the State, we hold the State presented sufficient evidence that defendant intended to sell or deliver the crack cocaine in his possession. Accordingly, the trial court did not err in denying defendant's motion to dismiss and presenting the charge of felonious possession with intent to sell and deliver cocaine to the jury. This assignment of error is overruled.

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).