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NO. COA09-408

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

RONALD WAYNE McMAHAN

Buncombe County
Nos. 07 CRS 63711; 63714
08 CRS 288

Appeal by Defendant from judgments entered 23 September 2008 by Judge J. Marlene Hyatt in Superior Court, Buncombe County. Heard in the Court of Appeals 30 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Scott T. Slusser, for the State.

James N. Freeman, Jr. for Defendant.

McGEE, Judge.

On the night of 6 November 2007, Corporal Jason Summey (Corporal Summey) of the Buncombe County Sheriff's Department witnessed Defendant, who was driving a motorcycle, proceed through an intersection without stopping at the posted stop sign. Corporal Summey pulled behind Defendant with the intention of stopping Defendant, when Corporal Summey witnessed Defendant fail to stop at a second stop sign. According to Corporal Summey, Defendant's motorcycle was experiencing mechanical difficulties, and Defendant was traveling at a very low rate of speed. Defendant failed to stop when Corporal Summey activated his blue lights. Defendant was

subdued and taken into custody only after Corporal Summey chased Defendant's motorcycle on foot, and used his Taser on Defendant multiple times. The Taser functions by firing barbed electrodes into the clothing of the person, and then delivering a strong electrical current to the person through wires connecting the electrodes to the Taser "gun" itself. The officer using the Taser can repeatedly send short bursts of electricity to the suspect by reactivating the Taser as needed.

After apprehending Defendant, Corporal Summey found a knife sheath that contained methamphetamine on the ground where Defendant was apprehended. Defendant was indicted on 2 June 2008 for possession of schedule II drugs, possession of drug paraphernalia, and felony fleeing to elude arrest. Defendant was tried before a jury on 23 September 2008, and he was found guilty on all charges. Defendant was sentenced to fifteen to eighteen months in prison for the possession convictions, which were consolidated for judgment, and was sentenced to a consecutive active term of fifteen to eighteen months for the felony fleeing to elude arrest conviction. Defendant appeals. Additional relevant facts will be discussed in the body of this opinion.

In Defendant's sole argument on appeal, he contends that the trial court erred in failing to dismiss the charges of felony fleeing to elude arrest, possession with intent to sell or distribute a schedule II controlled substance (methamphetamine), and possession of drug paraphernalia. We disagree.

When ruling on a motion to dismiss for insufficient evidence, the trial court must

consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered[.] The trial court must decide "'only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also "permits a reasonable inference of the defendant's innocence."

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (internal citations omitted).

Defendant first argues that the trial court erred in failing to dismiss the charge of felony fleeing to elude arrest. The State's theory concerning this charge was that Defendant, at the time of his arrest, was driving while his license was revoked and was driving recklessly. N.C. Gen. Stat. § 20-141.5 (2007) states in relevant part:

(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

. . . .

(3) Reckless driving as proscribed by G.S. 20-140.

. . . .

(5) Driving when the person's drivers license is revoked.

Defendant does not argue that the State failed to present substantial evidence that Defendant was driving while his license was revoked. Therefore, that issue is not before us on appeal. N.C.R. App. P. 28(b)(6). Defendant does argue that the State's evidence was insufficient to submit to the jury the aggravating factor of reckless driving. N.C. Gen. Stat. § 20-140 (2007) states:

(a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

Concerning N.C. Gen. Stat. § 20-140(b), our Court has determined that where a defendant's actions demonstrated a lack of "due caution and circumspection and . . . his speed, or his manner of driving, endangered or was likely to endanger any person or property including himself, his passenger, his property, or the person or property of others" in the defendant's vicinity, the evidence is sufficient to submit the issue of reckless driving to the jury. *State v. Floyd*, 15 N.C. App. 438, 440, 190 S.E.2d 353,

354 (1972).

The State's evidence in this case includes the following: Corporal Summey observed Defendant run two stop signs. Corporal Summey activated his blue lights in an attempt to stop Defendant. Corporal Summey followed closely behind Defendant with his blue lights activated for approximately a half mile, in which time Defendant failed to pull off the road as he passed a well-lighted campground. After passing the campground, Defendant made an abrupt turn into the parking lot of a business that sold stone. Corporal Summey could not make the turn into the parking lot without "striking a pile of stone[,] " so he parked his vehicle and chased Defendant on foot, which he was able to do because Defendant's motorcycle was having mechanical troubles and was traveling at a low rate of speed. Defendant continued to flee from Corporal Summey, driving between "piles of rock." As Corporal Summey drew closer to Defendant, Corporal Summey shouted commands for Defendant to stop, which Defendant failed to heed. Corporal Summey then shouted to Defendant that if Defendant did not stop, Corporal Summey would use his Taser, but Defendant still refused to stop. Corporal Summey then used his Taser, hitting Defendant in the back and causing Defendant to fall from his motorcycle.

We hold this evidence, when viewed in the light most favorable to the State, was sufficient for the trial court to submit the charge to the jury for a determination of whether Defendant's driving lacked "due caution and circumspection and [that] . . . his manner of driving, endangered or was likely to endanger any

person or property including himself, . . . his property, or the person or property of others" in Defendant's vicinity. *Floyd*, 15 N.C. App. at 440, 190 S.E.2d at 354. This argument is without merit.

Defendant next contends that the trial court erred in failing to dismiss the charges of possession of drugs and drug paraphernalia. Because the contraband was not recovered from Defendant's person, the State proceeded on a theory of constructive possession. Defendant contends that the State failed to present sufficient evidence that Defendant constructively possessed the contraband.

The evidence for the State tends to show that after Defendant was initially Tasered and fell from his motorcycle, Corporal Summey demanded to see Defendant's hands in order to insure Defendant was not holding a weapon. Defendant was lying prone at this time. Instead of showing his hands, Defendant immediately placed his hands "right into his midsection[.]" At that point, Corporal Summey was concerned for his safety, and he again activated the Taser that was still connected to Defendant. Corporal Summey continued to order Defendant to show his hands, but Defendant did not comply and Corporal Summey activated the Taser again. "[W]hen that cycle of the Taser activation was over, [Defendant's] hands momentarily popped out, and then [Defendant] immediately reached back into his midsection after [Corporal Summey's] continued attempts to take [Defendant] into custody by telling [Defendant] to let [Corporal Summey] see [Defendant's] hands." Corporal Summey

again activated the Taser, and continued his commands for Defendant to show his hands. Corporal Summey moved toward Defendant as the Taser was activated. When the shock from the Taser ceased, Defendant's hands came out again. Corporal Summey had a brief struggle with Defendant on the ground, and was finally able "to get [Defendant] into custody and handcuffed on the ground." Corporal Summey then rolled Defendant over onto his left side, "where I noticed a . . . black knife sheath that you would put a knife in if you were wearing it under your belt[.]" This sheath was "located on the ground directly where I rolled [Defendant] onto his side after he was in custody." The sheath "would have been in the immediate area of where [Defendant's] hands were underneath him as he was on the ground rolling over on his stomach position." Corporal Summey found two plastic bags inside the sheath "that contained a whitish, crystalline substance." This substance was later determined to be methamphetamine. Corporal Summey also found \$290.00 in cash inside Defendant's coveralls.

"A defendant constructively possesses contraband when he or she has 'the intent and capability to maintain control and dominion over' it. The defendant may have the power to control either alone or jointly with others." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.*

Our cases addressing constructive possession have tended to turn on the specific facts presented. See e.g., *Butler*, 356 N.C. at 143-44, 147-48, 567 S.E.2d at 138-39, 141 (finding constructive possession when the defendant acted suspiciously upon alighting from a bus; hurried to a taxicab and yelled "let's go" three times; fidgeted and ducked down in the taxicab once in the back seat, then exited the taxicab at the instruction of police officers and walked back to the bus terminal without being told to do so, drawing officers away from the taxicab; and drugs were recovered from under the driver's seat of the taxicab approximately ten minutes later when the cab returned from giving another customer a ride); *Matias*, 354 N.C. at 550-52, 556 S.E.2d at 270-71 (finding constructive possession when officers, after smelling marijuana emanating from a passing automobile occupied by the defendant and three others, recovered marijuana and cocaine stuffed between the seat pad and back pad where the defendant had been seated, and an officer testified the defendant was the only occupant who could have placed the package there) [.]

Id. at 99-100, 678 S.E.2d at 594; see also *State v. Mewborn*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (filed 3 November 2009). Assuming *arguendo* that Defendant did not have exclusive control of the area immediately beneath him where the contraband was recovered, we hold that Defendant's actions in fleeing from Corporal Summey, Defendant's repeated refusal to heed Corporal Summey's commands to show his hands, Defendant's repeated reaching underneath himself towards his midsection, and the large amount of cash found on Defendant are all incriminating circumstances tending to support the charge of constructive possession. Most compelling, however, is the fact that the sheath containing the methamphetamine was found directly under where Defendant had been lying and in the place where Defendant's hands had repeatedly returned even after

Corporal Summey commanded Defendant to show his hands and had Tasered Defendant multiple times. We hold this evidence was sufficient to survive Defendant's motion to dismiss. This argument is without merit.

No error.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).