NO. COA09-521

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Brunswick County
Nos. 07 CRS 896, 50726

JAMES A. GAUSE

Appeal by defendant from judgment entered 20 November 2008 by Judge Gary L. Locklear in Brunswick County Superior Court. Heard in the Court of Appeals 14 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Phillip K. Woods, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to object at trial to the admission of his statements to law enforcement, this assignment of error is dismissed. Finding cocaine in the passenger seat of an automobile just vacated by defendant, together with defendant's own statements made after discovery of the cocaine constitute incriminating circumstances supporting a finding that defendant had constructive

possession of the cocaine. The Habitual Felon Act does not violate Article I, section 6 of the North Carolina Constitution.

I. Factual and Procedural Background

On 4 February 2007, Brunswick County Sheriff's deputies Richard Roman ("Deputy Roman") and Jeremy Wall ("Deputy Wall") conducted surveillance on Hale Swamp Road in Brunswick County in order to deter drug trafficking and sales in the area. The deputies observed James Alfonso Gause ("defendant") talking on a cell phone and pacing in a yard. Deputy Roman identified defendant and determined that there were outstanding warrants for his arrest. Before the deputies could arrest defendant, he entered the front passenger seat of a vehicle operated by Ray Bland, defendant's cousin. The deputies stopped the vehicle and arrested defendant.

Upon removing defendant from the vehicle, Deputy Roman observed a rock of crack cocaine in the seat where defendant had been sitting. Deputy Roman stated "there's the dope," picked up the cocaine, and displayed it to Deputy Wall and defendant. Defendant then stated that they "would never make that stick[.] What are you going to do with that grain of salt? I'll get out of it." Defendant continued making similar statements. The deputies also found $1,267.00 in cash located in defendant's pocket.

Defendant was charged with felony possession of cocaine and being an habitual felon. He was convicted of both offenses by a

jury on 19 November 2008. The trial court found defendant to be a prior record level of IV for felony sentencing purposes. Defendant was sentenced to an active term of 125 to 159 months in prison. Defendant appeals.

II. Motion to Suppress

In his first argument, defendant contends that the trial court erred in denying his motion to suppress the statement made at the time of arrest because the statement was obtained in violation of defendant's *Miranda* rights. Defendant failed to preserve this issue for appellate review and it is dismissed.

North Carolina Rule of Evidence 103(a) provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C.R. Evid. 103(a) (2007). However,

> [t]here is a direct conflict between this evidentiary rule and North Carolina Rule of Appellate Procedure 10(b)(1), which [our Supreme Court] has consistently interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.

State v. Oglesby, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted). In *Oglesby*, the Supreme Court held that "to

the extent it conflicts with Rule of Appellate Procedure 10(b)(1), Rule of Evidence 103(a)(2) must fail." *Id.* (citations omitted).

In the instant case, defendant made a pretrial motion to suppress his statements to law enforcement at the time of his arrest. This motion was denied. Defendant failed to renew his objection when the statements were first admitted at trial during the testimony of Deputy Roman. Although defendant did make a timely objection to the introduction of the statements during Deputy Wall's subsequent testimony, that objection was not sufficient to preserve the issue because the same evidence had previously been admitted without objection. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Defendant has failed to preserve for appellate review the admissibility of his statements to law enforcement.

Even assuming *arguendo* that defendant properly preserved this issue for review, the trial court did not err in denying defendant's motion to suppress. The trial court's findings of fact regarding a motion to suppress are conclusive on appeal if they are supported by competent evidence. *State v. Campbell*, 359 N.C. 644, 661, 617 S.E.2d 1, 12-13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). However, the question of whether the trial court's findings of fact support its conclusions of law is fully reviewable on appeal. *Id.* at 662, 617 S.E.2d at 13.

Confronting a person in custody with evidence of guilt of a crime does not constitute an "interrogation" within the meaning of *Miranda*. *State v. Williams*, 308 N.C. 47, 61, 301 S.E.2d 335, 344, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). The term "interrogation" includes "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). However, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* (quoting *Innis*, 446 U.S. at 301-02, 64 L. Ed .2d at 308). Factors relevant to whether police should have known their conduct was likely to elicit an incriminating response include: "(1)'the intent of the police'; (2) whether the 'practice is designed to elicit an incriminating response from the accused'; and (3) '[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . .'" *State v. Fisher*, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (quoting *Innis*, 446 U.S. at 301-02 nn.7-8, 64 L. Ed. 2d at 308 nn.7-8),

disc. review denied, 357 N.C. 464, 586 S.E.2d 273 (2003), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004).

On appeal, defendant assigns as error the trial court's denial of his motion to suppress, but does not challenge any of the trial court's findings of fact. These findings are thus binding on appeal. *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13.

In the instant case, Deputy Roman discovered the rock of crack cocaine and simply stated "there's the dope." The trial court found: "I don't find that the officer taunted the defendant in any way, form or fashion. That these statements were unsolicited statements. That he never was Mirandized, but was never asked any question about the source of ownership. That the defendant voluntarily made statements." Under *Williams*, the display of the evidence to defendant without more is not an interrogation under *Miranda*. *See Williams*, 308 N.C. at 61, 301 S.E.2d at 344. The trial court did not err in dismissing defendant's motion to suppress.

III. Motion to Dismiss

In his second argument, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of felonious possession of cocaine. We disagree.

The standard of review on a motion to dismiss is "whether the State has offered substantial evidence of each required element of

the offense charged." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005) (citation omitted). The trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in favor of the State. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). "Evidence is substantial if it is relevant and is sufficient to persuade a rational juror to accept a particular conclusion." *Goblet*, 173 N.C. App. at 118, 618 S.E.2d at 262 (citation omitted). Even if the evidence "'permits a reasonable inference of the defendant's innocence,'" the motion to dismiss is properly denied so long as the evidence supports a reasonable inference of the defendant's guilt. *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002)).

In order to establish possession of an item, the State is not required to prove that defendant had actual physical possession of the item. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001). Proof of constructive possession is sufficient. *Id.* A person has constructive possession of a controlled substance when he has the "intent and power to maintain control over the disposition and use of the [controlled] substance." *State v. Alston*, ___ N.C. App. ___, ___, 668 S.E.2d 383, 386 (2008) (quoting *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397

(1996)), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009). If the person does not have exclusive control over the area where the contraband is found, "the State must show other incriminating circumstances before constructive possession may be inferred." *Matias*, 354 N.C. at 552, 556 S.E.2d at 271 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)). Cases addressing constructive possession turn on the specific facts presented. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594. Incriminating circumstances relevant to constructive possession

> include evidence that defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.

Alston, ___ N.C. App. at ___, 668 S.E.2d at 386 (quoting *State v. Miller*, 191 N.C. App. 124, 127, 661 S.E.2d 770, 773 (2008), *rev'd on other grounds*, 363 N.C. 96, 678 S.E.2d 592 (2009)).

In the instant case, police found "an off-white, pebble-like substance," which was determined to be crack cocaine, lying in plain view beneath defendant as they removed him from the car. Police also discovered $1267.00 in cash in defendant's pocket. Defendant made statements to police which could reasonably be

inferred to show that defendant was aware of the cocaine and that he thought the police could not "make it stick." Defendant continued to make such statements for the duration of the stop without denying ownership of the substance or knowledge of its presence.

Viewing the evidence in the light most favorable to the State and giving it the benefit of all inferences raised, we hold that the State presented sufficient evidence of incriminating circumstances for the jury to infer that defendant had constructive possession of the cocaine found in the car. This assignment is without merit.

IV. North Carolina Habitual Felon Act

In his third argument, defendant contends that the Habitual Felon Act, N.C. Gen. Stat. §14-7.1 *et seq.* (2007), violates the Separation of Powers Clause under Article I, Section 6 of the North Carolina Constitution. We disagree.

The standard of review for constitutional questions is *de novo*. *Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

Defendant appropriately concedes that this Court has held that the Habitual Felon Act does not violate N.C. Const. art. I, § 6. *State v. Wilson*, 139 N.C. App. 544, 549-53, 533 S.E.2d 865, 869-71, *disc. review denied*, 353 N.C. 279, 546 S.E.2d 395 (2000). This

Court is bound by its decision in *Wilson*. This assignment is without merit.

Defendant failed to argue his remaining assignments of error, and they are deemed abandoned. N.C.R. App. P. 28(b)(6) (2009).

NO ERROR.

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

Report per Rule 30(e).