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NO. COA09-75

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Brunswick County
Nos. 06 CRS 55356-57
07 CRS 6015

GUS LEE KERLIN

Appeal by defendant from judgments entered 30 July 2008 by Judge Gary L. Locklear in Brunswick County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer M. Jones, for the State.

Ramos and Lewis, LLP, by Michael R. Ramos, for defendant-appellant.

STEELMAN, Judge.

Where the State presented sufficient evidence of incriminating circumstances tending to establish defendant's constructive possession of the controlled substances found in a black bag near a beach access ramp, the trial court properly denied defendant's motions to dismiss his drug-related charges.

I. Factual and Procedural Background

In the light most favorable to the State, the evidence at trial tended to show that on 20 August 2006, Officer Brian Higgins (Officer Higgins) of the Ocean Isle Beach Police Department was on

road patrol. At approximately 3:03 a.m., while driving on East First Street in Ocean Isle Beach, Officer Higgins came upon a vehicle that was parked with two-thirds of the vehicle in the roadway. The vehicle was not occupied and the lights were turned off. Officer Higgins ran the registration through his "mobile data terminal" and discovered that the owner of the vehicle was Gus Lee Kerlin (defendant). Officer Higgins activated his blue lights and started searching for the vehicle's owner. Shortly thereafter, Sergeant Jeffrey Gaskins (Sergeant Gaskins) arrived on the scene.

Officer Higgins then encountered defendant who was walking down the wooden beach access ramp. Officer Higgins asked defendant if the vehicle belonged to him, to which defendant responded "No." Officer Higgins noted that defendant appeared to be "in a nervous state." Officer Higgins asked defendant for his name, and defendant responded "Robert Fostrum." Defendant stated that the vehicle might belong to the people he was with, who were out on the beach. Defendant, Officer Higgins, and Sergeant Gaskins then walked out onto the beach and approached two individuals, a male and a female. Officer Higgins asked the individuals whose vehicle was on the street, and neither responded. Defendant then correctly identified himself and admitted that he was the owner of the vehicle. Defendant, Officer Higgins, and Sergeant Gaskins walked off the beach, back to their patrol cars.

Defendant was handcuffed and placed into the back of Officer Higgins's patrol car. At that time, Sergeant Gaskins called Officer Higgins over to a public trash can next to the beach access

ramp. Sergeant Gaskins had found a black bag in between the trash can and the ramp's hand railing. Officer Higgins had first seen defendant walking down the ramp, "[r]ight next to the trash can[.]" The contents of the black bag included, *inter alia*, a tinted piece of glass, one clear plastic bag with a tan-colored granular powder, and three clear plastic bags containing a white granular powder. The plastic bags were sent to the State Bureau of Investigation (SBI) laboratory. The SBI laboratory report identified the white powder as cocaine and the tan-colored powder as Methylenedioxymethamphetamine, otherwise known as ecstasy.

The black bag was seized and put into Sergeant Gaskins's vehicle. Sergeant Gaskins returned to the beach, located the male and female subjects, and searched their persons. No controlled substances were found. Sergeant Gaskins noticed that the blanket the subjects had been sitting on was folded and was laying on a bench under a gazebo. Officer Higgins testified that he observed a "black cloth bag" on top of the blanket, next to "a clear piece of baggie, which contained a white powdery substance." Officer Higgins also testified that he found other items inside the blanket, including a glass smoking pipe and a container filled with approximately a half of an ounce of what appeared to be marijuana. The female subject was then placed into the back of Sergeant Gaskins's patrol car and the other male subject was placed into the back of Officer Higgins's patrol car.

Officer Higgins then performed a visual inspection of defendant's vehicle and noticed a clear plastic bag located on the

driver's side floorboard. Sergeant Gaskins requested that a canine unit respond and Deputy Rich Roman (Deputy Roman) arrived on the scene. Deputy Roman and the canine performed a "walk-around" of defendant's vehicle. The canine jumped on the driver's side door to indicate the presence of a controlled substance. However, a complete search of the vehicle was performed and no narcotics were found.

Defendant was charged with felony possession of a schedule I and a schedule II controlled substance, misdemeanor possession of drug paraphernalia, and resisting a public officer. At the close of the State's evidence, defendant moved to dismiss the charges of possession of a schedule I and a schedule II controlled substance, and misdemeanor possession of drug paraphernalia. Defendant did not move to dismiss the charge of resisting a public officer. Defendant's motions were denied. On 30 July 2008, a jury found defendant guilty on all four charges. The trial court determined defendant to be a prior record level II for felony sentencing purposes and entered three separate judgments against defendant. The first judgment consolidated defendant's felony possession of a schedule II controlled substance and possession of drug paraphernalia convictions, and imposed a sentence of six to eight months imprisonment. In the second and third judgments, the trial court imposed consecutive sentences of forty-five days imprisonment for resisting a public officer and six to eight months imprisonment for possession of a schedule I controlled substance. All three sentences were suspended and defendant was placed on supervised

probation for a period of twelve months with several special conditions. Defendant appeals.

II. Motions to Dismiss

In his only argument, defendant contends the trial court erred by denying his motion to dismiss his drug-related charges because insufficient evidence was presented tending to show defendant possessed the controlled substances or drug paraphernalia. We disagree.

A. Standard of Review

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each 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) (citations omitted). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. We view the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citation and quotation omitted).

B. Analysis

Possession of a controlled substance may be actual or constructive. *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003). It is undisputed that defendant did not have actual possession of the controlled substances found in the black bag when he was detained and placed in the back of Officer Higgins's patrol car. Therefore, our analysis centers upon whether defendant constructively possessed the controlled substances.

A defendant constructively possesses contraband when he or she has "the intent and capability to maintain control and dominion over" it. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). The defendant may have the power to control either alone or jointly with others. *State v. Fuqua*, 234 N.C. 168, 170-71, 66 S.E.2d 667, 668 (1951). 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. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

State v. Miller, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). Whether there was sufficient evidence of other incriminating circumstances to establish constructive possession turns on the specific facts presented. *Id.* "[C]onstructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted); see also *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433 ("In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury") (quoting *State v. Jackson*, 103 N.C. App. 239, 244,

405 S.E.2d 354, 357 (1991)), *aff'd per curiam*, 359 N.C. 423, 611 S.E.2d 833 (2005).

In the instant case, defendant was not in exclusive control of the area where the controlled substances were found. The black bag containing the controlled substances was discovered in between a trash can and hand railing located on a beach access ramp. It was the State's burden to show other incriminating circumstances before constructive possession may be inferred.

Our appellate courts have held that the following are examples of other incriminating circumstances: (1) being in close proximity to the controlled substance at issue, *Miller*, 363 N.C. at 100, 678 S.E.2d at 595; (2) acting nervous in the presence of law enforcement, *State v. Butler*, 356 N.C. 141, 147, 567 S.E.2d 137, 141 (2002); (3) drug paraphernalia found in various areas occupied by a defendant, *State v. Harrington*, 171 N.C. App. 17, 25, 614 S.E.2d 337, 345 (2005); and (4) giving the arresting officer a fictitious name, *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996). Each of these incriminating circumstances is present in this case.

At approximately 3:03 a.m., Officer Higgins discovered an illegally parked vehicle approximately twenty to twenty-five feet from the beach access ramp. Officer Higgins activated his blue lights and exited his patrol car in an effort to locate the vehicle's owner. Defendant walked off the beach access ramp and was first seen "[r]ight next to the trash can" where the black bag was found. Any person standing on the beach or walking on the

access ramp would have been able to see the blue lights. When Officer Higgins inquired into whether defendant was the owner of the illegally parked vehicle, defendant lied, responding "No, it was not" his vehicle. Defendant lied a second time when he stated that his name was "Robert Fostrum" and that the vehicle may belong to "a group of people that . . . he was with, out on the beach." Officer Higgins testified that defendant appeared to be "in a nervous state." The officers and defendant walked back to the beach, and once they reached the sand, defendant started walking quickly. Two other individuals were on the beach underneath a cabana sitting on a blanket. Neither individual responded when asked if they were the owner of the vehicle. Only then did defendant admit he had lied to the officers.

Once defendant was detained and the black bag containing the controlled substances was discovered, Officer Higgins and Sergeant Gaskins searched the two other individuals and the blanket on which they had been previously sitting. Officer Higgins observed a black cloth bag on top of the blanket next to a "clear piece of baggie, which contained a white powdery substance." A second clear plastic bag was recovered from the driver's side floorboard of defendant's vehicle. At trial, Officer Higgins testified that these plastic bags were "identical" to those found in the black bag based upon "the shape, the consistency and how they're twisted and the consistency in how they're cut." Sergeant Gaskins also testified that a tinted piece of glass found in the rear of defendant's vehicle was similar in size, shape, and color to the piece of glass

found in the black bag. In the light most favorable to the State, the evidence presented at trial linked defendant to the controlled substances. Based upon the totality of the specific facts present in this case, we hold the State presented sufficient other incriminating circumstances to establish an inference of constructive possession. *James*, 81 N.C. App. at 93, 344 S.E.2d at 79.

As to the paraphernalia charge, this was based upon the plastic bag that was located in defendant's vehicle. Defendant's argument on appeal is that the plastic bag did not contain controlled substances and was not fingerprinted. Defendant acknowledges that there was evidence presented that the plastic bag was similar to those found in the black bag, containing controlled substances. As noted above, Officer Higgins in fact testified that the plastic bags were "identical" and had several distinguishing characteristics. Since this plastic bag was found in defendant's vehicle, this fact taken together with the other evidence recited above, constituted sufficient evidence of defendant's constructive possession of the plastic bag. Officer Higgins' testimony was sufficient to submit the question of whether the plastic bag was drug paraphernalia to the jury.

The trial court properly denied defendant's motions to dismiss his drug-related charges and submitted these charges to the jury for their determination. *Jenkins*, 167 N.C. App. at 701, 606 S.E.2d at 433.

NO ERROR.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).