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NO. COA10-338

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v.

Pitt County
No. 08 CRS 59385

WILLIE JAMES BROWN, III,
Defendant.

Appeal by defendant from judgments entered 22 September 2009 by Judge Walter Godwin in Pitt County Superior Court. Heard in the Court of Appeals 11 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Tawanda N. Foster-Williams, for the State.

Paul Y.K. Castle for defendant-appellant.

ELMORE, Judge.

Willie James Brown, III (defendant), appeals from the judgments entered after a jury found him guilty of possession with intent to sell or deliver cocaine and possession of drug paraphernalia. Defendant contends that the trial court erred by denying his motion to dismiss the charges because the State provided insufficient evidence that he constructively possessed cocaine or drug paraphernalia. We find no error.

Shortly after midnight on 11 September 2008, Officer Mark Dentel and Detective Steven Cottingham were patrolling a high crime area in Greenville. Detective Cottingham had made previous

narcotics arrests in the area. Officers saw defendant standing alone in the front yard of a house on the street they were patrolling. Defendant immediately began to run away from the officers, and around to the backyard of the house. The officers drove around the block in order to intercept defendant. Officers then saw defendant walking quickly down the street behind the house where they had initially encountered him.

Officers caught up with defendant a short distance down the street, and defendant agreed to speak to them. Officer Dentel patted defendant down to make sure he had no weapons, then started tracing defendant's path back to the front yard where the officers had initially made contact with him. At a broken section of fence along the path, Officer Dentel found a sandwich bag containing 69 smaller bags of cocaine. Although it had been raining during the evening, Officer Dentel noticed that the bag was dry. In the meantime, Detective Cottingham obtained defendant's consent to search his person and found \$260.00 in cash. Officers then arrested defendant. S.B.I. forensic chemist Irvin Allcox analyzed the substance in the bag seized by officers and determined that the bag contained a total of ten grams of cocaine.

The trial court denied defendant's motion to dismiss the charges, and defendant did not present any evidence. The jury found defendant guilty of possession of cocaine with intent to sell or deliver and possession of drug paraphernalia. The trial court imposed a term of 8 to 10 months' imprisonment for the cocaine possession conviction and a concurrent term of 45 days'

imprisonment for the drug paraphernalia conviction. Defendant gave oral notice of appeal.

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to dismiss the charges, because the State failed to offer sufficient evidence that he constructively possessed cocaine or drug paraphernalia. We disagree.

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003).

The offense of possession with intent to sell or deliver a controlled substance has three elements: "One, there must be possession of a substance. . . . Two, the substance must be a controlled substance. Three, there must be intent to distribute or sell the controlled substance." *State v. Casey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483-84 (1982) (internal citation omitted).

Similarly, "[i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess." *State*

v. Hedgecoe, 106 N.C. App. 157, 163-64, 415 S.E.2d 777, 781 (1992) (quoting N.C. Gen. Stat. § 90-113.22 (1990)). Drug paraphernalia "means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act. . . ." N.C. Gen. Stat. § 90-113.21(a) (2009).

For either offense, possession may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987).

"A person has actual possession of a controlled substance if it is on his person, he is aware of its presence, and, either by himself or together with others, he has the power and intent to control its disposition or use." *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

"Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance.'" *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 810 (2003) (quoting *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996)). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.'" *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002) (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

In this case, although there is no evidence of actual possession or that defendant had exclusive control of the area where the cocaine was found, we conclude that the State introduced sufficient evidence of incriminating circumstances from which a jury might infer constructive possession. The officers first observed defendant standing outside alone, after midnight, in a high crime area. When defendant saw the officers, he immediately fled around the side of a house and continued to quickly walk away down the street on the opposite side of the house. When Officer Dentel retraced defendant's route, he found the bag containing ten grams of cocaine, some of it subdivided into sixty-nine smaller bags. Although it had been raining, the bag was dry, indicating that it had recently been left in that spot. Detective Cottingham found \$260.00 in cash on defendant's person.

Considered together, and in the light most favorable to the State, all of these circumstances support the conclusion that defendant possessed the bag of cocaine and dropped it as he fled from officers. Accordingly, we hold that the trial court properly denied defendant's motion to dismiss.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).