

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-371
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

Wake County
No. 12 CRS 5589

DERRAN MAURICE McCLAIN

Appeal by defendant from judgment entered 16 November 2012 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 9 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

Kevin P. Bradley for defendant appellant.

McCULLOUGH, Judge.

A jury found defendant guilty of possession of a firearm by a felon but not guilty of possession of a stolen firearm. The trial court sentenced him to an active prison term of fifteen to twenty-seven months. Defendant gave notice of appeal in open court.

Viewing the evidence in the light most favorable to the State, the evidence tended to show the following: Raleigh

Police Officer Charles Walters stopped a 1999 black Mercedes sport utility vehicle ("SUV") on suspicion of impaired driving at approximately 1:00 a.m. on 14 April 2012. Officer Walters parked his patrol car behind the SUV and kept his headlights and takedown lights on so that the interior of the SUV was "as illuminated as possible[.]" He approached the driver's side window of the SUV and spoke to defendant, who had red, glassy eyes and acknowledged having smoked marijuana. Officer Walters also observed two passengers in the vehicle: Syrance McNeil in the front passenger seat, and Raphael McClain in the backseat. While Officer Walters was standing at defendant's window, Officer Michael Harmon arrived and became "the cover officer just watching the other passengers in the vehicle[.]" Officer Harmon got out of his patrol car and continued to watch the SUV as Officer Walters approached him and explained the situation. Officer Harmon's "focus [was] on the other passengers to make sure there was no furtive movements, things like that that could put mine or Officer Walter's life in danger." He could see the two passengers inside the SUV from his location and observed that "[t]he vehicle didn't move. None of the passengers moved from their spot in the vehicle."

As Officer Walters returned to his patrol car to perform a license check, Officer Harmon positioned himself "in the passenger side kind of towards the back right corner [of the SUV] where I could kind of see in, see into the backseat to watch any passengers there and also the front seat passenger." Officer Shea Martin arrived at the scene and provided additional cover for his fellow officers.

Officer Walters walked back to the SUV and brought the three occupants outside. He administered a field sobriety test to defendant while the two passengers sat on a curb between the SUV and his patrol car. Officer Walters asked defendant, "[D]o you have anything in the car, can we search the car[?]" After obtaining defendant's consent to search the SUV, Officer Walters found a .45 caliber handgun beneath the rear passenger seat on the driver's side. Defendant and the two passengers "looked at each other. And [defendant] told the other two to claim the gun. He was like, 'You know, y'all better claim the gun.'" Officer Walters arrested defendant for driving while impaired and possession of a firearm by a felon. No readable fingerprints were found on the gun, which had been stolen from a residence in Durham in May of 2011.

Defendant initially told Officer Walters that "he was aware of the gun" but had "told [his passengers] not to bring it with them." After he was taken to the police station, however, defendant stated that he did not know the gun was in the car until he was stopped. He claimed that when Officer Walters returned to his patrol car to check his license, the front seat passenger, McNeil, produced the gun from his waistband, "climbed over the console and reached back in the back seat and put the firearm underneath the back seat." Neither Officer Walters nor Officer Harmon had observed any such movement by the front passenger nor any "rocking or any type of movement" of the SUV during the stop.

At trial, defendant testified that McNeil had "like [seven] to [eight] minutes after Officer Walters had walked back to his car" and before Officer Harmon arrived in which to hide the gun. He averred that Officer Harmon "was lying" when he claimed to have arrived while Officer Walters was speaking to defendant at the driver's side window. Asked why he did not alert the officers to the presence of the gun in the vehicle when he consented to the search, defendant replied, "Because [McNeil] was going to tell [them himself]. He was going to tell the officer [himself] that he had a gun." Reminded that he had

professed to witnessing McNeil hide the gun under the backseat, defendant suggested that "you're supposed to speak up for what's yours."

On appeal, defendant assigns error to the trial court's denial of his motion to dismiss at the conclusion of the evidence. In reviewing this ruling, we must determine whether the evidence would permit a rational juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt. *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443 (1998). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (internal quotation marks and citation omitted). "Any evidence of the defendant which is favorable to the State is considered, but his evidence which is in conflict with that of the State is not considered." *State v. Jacobs*, 31 N.C. App. 582, 583, 230 S.E.2d 550, 551 (1976). Furthermore, the State's proffer need not "rule out every hypothesis of innocence" to withstand a motion to dismiss.

State v. Hudson, 206 N.C. App. 482, 491, 696 S.E.2d 577, 584 (internal quotation marks and citation omitted).

The essential elements of possession of a firearm by a felon are as follows: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Best*, ___ N.C. App. ___, ___, 713 S.E.2d 556, 561, *disc. review. denied*, 365 N.C. 361, 718 S.E.2d 397 (2011) (internal quotation marks and citation omitted). Defendant challenges only the evidence of his possession of the gun.

"A defendant has possession of [an object] when he has both the power and intent to control its disposition or use. . . . Constructive possession exists when there is no actual personal dominion over the [object], but there is an intent and capability to maintain control and dominion over it." *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885 (1984). "As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986).

In *State v. Mitchell*, the defendant was stopped by police while driving a rental car with his girlfriend, Ms. Harris. *State v. Mitchell*, ___ N.C. App. ___, ___, 735 S.E.2d 438, 440 (2012), *appeal dismissed*, ___ N.C. ___, 740 S.E.2d 466 (2013). He

informed the officer that there was a gun in the glove compartment. *Id.* at __, 735 S.E.2d at 440. A gun was found in the glove compartment inside Ms. Harris' purse. *Id.* Ms. Harris testified "that defendant had only been driving [the car] a short time and that the gun was hers[.]" *Id.* at __, 735 S.E.2d at 443. Defendant claimed "that he never actually mentioned the gun to [the officer[.]" *Id.* Nonetheless, we found the circumstances sufficient to establish defendant's constructive possession of the gun based on the following:

"[A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury."

Mitchell, __ N.C. App. at __, 735 S.E.2d at 443 (quoting *Best*, __ N.C. App. at __, 713 S.E.2d at 562) (alterations in original). We reasoned "that defendant was driving the rental car . . . and stated to Officer Edwards that there was a gun in the glovebox, indicating he was aware of its presence, despite

the fact that it was found in Ms. Harris' purse." *Mitchell*, ___ N.C. App. at ___, 735 S.E.2d at 443.

In *State v. Dow*, police stopped a car driven by the defendant with two passengers in the backseat. *Dow*, 70 N.C. App. at 83, 318 S.E.2d at 884-85. While speaking to one of the passengers, an officer noticed three small manila envelopes on the rear floor of the passenger compartment. *Id.* at 83, 318 S.E.2d at 885. "As [the passengers] were being removed from the vehicle, one of them lifted the right rear floor mat and revealed nine additional manila envelopes. The substance contained in the twelve envelopes was identified as marijuana." *Id.* at 83-84, 318 S.E.2d at 885. Defendant testified that the car belonged to his daughter and that the marijuana belonged to passenger Harvin. *Id.* at 84, 318 S.E.2d at 885. In finding sufficient evidence to show defendant constructively possessed the marijuana, we reiterated the significance of defendant's status as the driver - and presumptive custodian - of the vehicle:

[T]he courts in this State have held consistently that the "driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." *Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession*

sufficient to go to the jury.

In this case, there was competent evidence that the defendant had custody and possession of the borrowed automobile for three days prior to his arrest. There was evidence that the defendant was, at all times relevant herein, the custodian of the automobile and was present, therein, when the controlled substance was found. *Therefore, the defendant's control of the premises where the controlled substance was found was sufficient to require submission of the issue of possession to the jury.*

Dow, 70 N.C. App. at 85, 318 S.E.2d at 886 (citations omitted) (emphasis added). We further noted, "*Had the defendant, in the instant case, owned the automobile*, an inference that he was in constructive possession of the controlled substance found therein would have been permissible." *Id.* (emphasis added).

As in *Mitchell* and *Dow*, we find the evidence sufficient to support a reasonable inference that defendant was in constructive possession of the handgun. Unlike the driver in *Dow*, defendant was both the driver and the registered co-owner of the SUV. *Dow*, 70 N.C. App. at 85, 318 S.E.2d at 886. The second owner was not in the vehicle when the gun was found. Moreover, although defendant did not tell police about the gun as did the defendant in *Mitchell*, he was equally "aware of its presence" and location in the vehicle when he consented to the search. *Mitchell*, ___ N.C. App. at ___, 735 S.E.2d at 443.

Finally, defendant's account of McNeil climbing over the front seat to hide the gun was directly contradicted by Officer Harmon's observations and testimony, a fact that may be deemed additional evidence of defendant's guilt. *See generally State v. Walker*, 332 N.C. 520, 537-38, 422 S.E.2d 716, 726 (1992) (noting that "evidence of falsehood may be considered with other facts and circumstances in determining guilt"), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993). Accordingly, we find no error by the trial court.

No error.

Judges HUNTER (Robert C.) and BRYANT concur.

Report per Rule 30(e).