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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-442

Filed: 17 November 2015

Iredell County, No. 13 CRS 53209

STATE OF NORTH CAROLINA,

v.

JAMES EDWARD JOYNER

Appeal by defendant from Judgment entered 16 December 2014 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Matthew Tulchin, for the State.

Meghan A. Jones for defendant.

ELMORE, Judge.

On 16 December 2014, a jury found James Edward Joyner (defendant) guilty of possession of a firearm by a felon. Based on defendant's prior record level VI, the trial court sentenced him to fifteen to twenty-seven months' imprisonment. On appeal, defendant argues that the trial court erred in failing *sua sponte* to exclude evidence of the firearm at trial, and in denying his motion to dismiss the charge of

possession of a firearm by a felon. We conclude that defendant's trial was without error.

I. Background

On the evening of 10 June 2013, Sergeant Michael Mitchell was patrolling the south side of Statesville in a marked patrol car when he observed a Honda Civic parked in front of a house that had been involved in prior narcotics investigations. As soon as the vehicle left the house, Sergeant Mitchell noticed that its tag lights were out. He followed the vehicle for several miles, initiated his lights and siren, and pulled the vehicle over.

Sergeant Mitchell approached the driver's side of the Honda and instructed the driver, William Elam, to step out and accompany him to the rear of the vehicle. Defendant, sitting in the passenger's seat, remained in the car. Sergeant Mitchell explained to Mr. Elam that he had been stopped for a tag light violation and asked Mr. Elam for his license and registration. Sergeant Mitchell noted that Mr. Elam appeared nervous: Mr. Elam had trouble getting his license out of his wallet and his hands were shaking. Sergeant Mitchell began asking Mr. Elam a few routine questions, including how he knew defendant. At that point, defendant opened the passenger door and stepped out. Sergeant Mitchell immediately ordered defendant to get back inside the vehicle and called for backup before he resumed questioning.

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Sergeant Mitchell asked Mr. Elam, the registered owner of the Honda, if there was anything illegal inside of the vehicle that he should know about or that should concern him. Mr. Elam responded, “No.” Sergeant Mitchell then asked for permission to search his vehicle. Mr. Elam consented. Sergeant Mitchell proceeded toward the front passenger side of the Honda, asked defendant to step out of the vehicle, and informed defendant that Mr. Elam had consented to a search of the vehicle. After defendant exited the car, Sergeant Mitchell asked defendant if there was anything illegal in the car that he should know about. Defendant replied, “There was a firearm, a pistol on the seat between his leg and the front passenger’s door of the vehicle.”

Sergeant Mitchell immediately instructed defendant and Mr. Elam to move to the rear of the Honda, away from the firearm, and detained them in handcuffs until backup arrived. Sergeant Mitchell then walked back to the Honda, opened the passenger door, and saw a black, snub-nosed .32 revolver laying on the rocker panel between the front passenger seat and the passenger door. He testified that the revolver was a “couple of inches” from where defendant had been seated, “right beside where his leg was” and “within hand’s length.” Sergeant Mitchell picked up the revolver, determined it was not loaded, and locked it in his patrol car.

Soon thereafter, three other police officers arrived to assist Sergeant Mitchell. Two of the officers remained with defendant and Mr. Elam while Sergeant Mitchell

and the other officer searched the Honda. The officers found no other contraband in the vehicle. Sergeant Mitchell had dispatch run a background check on Mr. Elam and defendant, which revealed that defendant was a convicted felon. As a result, Sergeant Mitchell placed defendant under arrest for possession of a firearm by a felon.

The case came to trial on 15 December 2014 in Iredell County Superior Court, the Honorable Joseph N. Crosswhite presiding. The jury announced its verdict the following day, 16 December 2014, finding defendant guilty of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. Defendant filed a petition for writ of *certiorari* on 29 April 2015, which we allowed.

II. Analysis

First, defendant challenges the admissibility of the revolver on constitutional grounds. Specifically, defendant avers that (1) Sergeant Mitchell lacked reasonable suspicion to extend the stop, (2) the encounter did not become consensual, (3) Sergeant Mitchell's questioning was unrelated to the original purpose of the stop, measurably extended the detention, and rendered the detention unconstitutional, (4) and the revolver was the result of an unconstitutional detention. According to defendant, therefore, the revolver is fruit of the poisonous tree, and the trial court committed plain error by failing *sua sponte* to exclude the revolver from evidence at trial.

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Defendant raises this constitutional challenge for the first time on appeal. Pursuant to N.C. Gen. Stat. § 15A-974, “a motion to suppress is ‘the exclusive method of challenging the admissibility of evidence on constitutional or statutory grounds.’” *State v. Howie*, 153 N.C. App. 801, 804, 571 S.E.2d 245, 247 (2002) (quoting *State v. Drakeford*, 37 N.C. App. 340, 345, 246 S.E.2d 55, 59 (1978)). Our appellate courts have held that the “failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds.” *State v. Detter*, 298 N.C. 604, 616, 260 S.E.2d 567, 577 (1979) (citing *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978)). The record reveals that defendant never challenged the admissibility of the firearm through a pretrial motion to suppress; nor did defendant object to the introduction of the firearm into evidence at trial. Therefore, defendant has failed to preserve this issue for appellate review.

Next, defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon. Defendant does not dispute his status as a felon; he argues only that the State failed to present sufficient evidence that he was in constructive possession of the revolver.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “ ‘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

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included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as 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). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

It is “unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm” N.C. Gen. Stat. § 14-415.1(a) (2013). There are only two elements to the offense: “(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Perry*, 222 N.C. App. 813, 818, 731 S.E.2d 714, 718 (2012) (citation omitted), *disc. review denied*, 366 N.C. 431, 736 S.E.2d 188 (2013).

“Possession” may be either actual or constructive, exclusive or nonexclusive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). Actual possession means that a person has “physical or personal custody of the item.” *Id.* (citation

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omitted). Constructive possession, on the other hand, requires only that a person have “the power and intent to control its disposition.” *Id.* (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). “Proof of nonexclusive, constructive possession is sufficient” to satisfy the possession element of N.C. Gen. Stat. § 14-415.1(a). *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (citing *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). However, “[u]nless 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. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *Matias*, 354 N.C. at 552, 556 S.E.2d at 271).

“‘Constructive possession depends on the totality of the circumstances in each case.’” *State v. Ferguson*, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477 (2010) (quoting *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)). Although no single factor is dispositive, *id.*, in determining whether a defendant has “power and intent to control” an item’s disposition, our courts have considered, *inter alia*, a defendant’s control over the place where the item is found, his proximity to the item, and his awareness of the item’s presence.

In *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011), for example, this Court concluded that evidence of constructive possession was “more than sufficient” where the defendant was driving the van, “the firearm was found on the

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floor next to the driver's seat, which was in close proximity to the defendant," and the defendant admitted that he owned the gun. Also, in *State v. Mitchell*, 224 N.C. App. 171, 178, 735 S.E.2d 438, 443–44 (2012), *disc. review denied*, 366 N.C. 578, 740 S.E.2d 466–67 (2013), evidence that the defendant was driving the vehicle and that he told the officer there was a gun in the glovebox, we determined, was "sufficient incriminating evidence . . . to reasonably infer constructive possession."

In contrast, we found in *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318, that the evidence of constructive possession was insufficient to be presented to the jury where the defendant was merely a passenger in the vehicle and a firearm was found on the center console, equally accessible by both the defendant and the driver. We reached a similar conclusion in *State v. Bailey*, ___ N.C. App. ___, ___, 757 S.E.2d 491, 494, *disc. review denied*, 367 N.C. 789, 766 S.E.2d 678 (2014). A rifle, which was registered to the driver, was found on the floor in the back of the vehicle, which was owned by the defendant. *Id.* Although the defendant allegedly admitted to the deputy that he knew the rifle was in the car, on these facts we held that the evidence of constructive possession was insufficient to present the issue to the jury. *Id.* ("[D]efendant's knowledge or awareness of the rifle in and of itself did not constitute sufficient incriminating evidence . . .").

In the present case, it is undisputed that defendant did not have actual possession of the revolver and was not the only occupant in the Honda. Nevertheless,

other incriminating circumstances show that defendant was in constructive possession of the revolver. Sergeant Mitchell testified that he found the gun in the passenger side of the vehicle “between the seat and the front passenger door where [defendant] was seated,” a part of the vehicle to which the driver did not have equal access. In addition, the revolver was found in close proximity to defendant, “a couple of inches” from where he was seated in the car, “right beside where his leg was” and “within hand’s length.” Defendant also told Sergeant Mitchell “that there was a firearm, a pistol on the seat between his leg and the front passenger’s door of the vehicle.” We conclude, therefore, that when viewed in the light most favorable to the State, there was sufficient evidence of incriminating circumstances for the jury to link the revolver to defendant.

III. Conclusion

Defendant received a trial free from error. He waived the right to challenge the admissibility of the firearm on constitutional grounds by failing to make a pretrial motion to suppress. In addition, the trial court did not err in denying defendant’s motion to dismiss the charge of possession of a firearm by a felon because there was sufficient evidence that defendant was in constructive possession of the revolver.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).