IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-650

Filed: 19 January 2016

Wayne County, No. 11 CRS 54848

STATE OF NORTH CAROLINA

v.

DEQUONTA MCKINNON

Appeal by Defendant from judgments entered 17 December 2014 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 18 November 2015.

Attorney General Roy Cooper, by Special Attorney General Hilda Burnett-Baker, for the State.

Richard J. Costanza for Defendant.

STEPHENS, Judge.

In this appeal, we consider whether the State presented sufficient evidence to withstand Defendant Dequonta McKinnon's motions to dismiss charges of maintaining a dwelling to keep or sell a controlled substance ("maintaining a dwelling") and maintaining a vehicle to keep or sell a controlled substance ("maintaining a vehicle"). After careful consideration, we conclude that the State failed to present substantial evidence of an essential element of each of those offenses,

and, thus, the trial court erred in denying McKinnon's motions to dismiss. Accordingly, we vacate the judgments entered upon those convictions. McKinnon also challenges two aspects of the sentences imposed on his conviction for possession with intent to sell or deliver marijuana ("possession") and trafficking in marijuana by possession ("trafficking"). We find McKinnon's contention of error in the trial court's setting of an anticipatory bond as a probationary condition unpersuasive. However, the State concedes and we agree that McKinnon is entitled to a new sentencing hearing on his possession and trafficking convictions because the trial court entered written judgments containing different sentences from those announced in McKinnon's presence.

Factual and Procedural History

The charges on which McKinnon was convicted arose from events which occurred at a home at 102 Woodland Acres Drive ("the home") in Dudley on 24 September 2011. On that date, a confidential informant told Wayne County Sheriff's Department ("WCSD") Sergeant Michael Cox that McKinnon would be transporting marijuana from Raleigh to Goldsboro. Cox and other WCSD officers set up surveillance of the home and observed a vehicle parked out front. The vehicle was owned by Jessica Evers, McKinnon's girlfriend. As the officers watched, McKinnon carried a black plastic garbage bag from the home and placed it in the back of the vehicle. Later, Evers drove the vehicle away from the home with McKinnon following

in a different car. The officers followed Evers and McKinnon and stopped the vehicle driven by Evers and the car driven by McKinnon. Cox smelled marijuana, alcohol, and body spray coming from the vehicle driven by Evers. Upon searching the vehicle, Cox located a black plastic garbage bag containing five one-pound bags of marijuana. Cox directed another officer to arrest McKinnon for possession with intent to sell or deliver marijuana and then told Evers he planned to apply for a search warrant for the home. Evers told Cox that her mother and two children were in the home.

The officers took McKinnon and Evers back to the home. No one responded when the officers knocked on the door and announced themselves. An officer used a key taken from McKinnon's pocket to unlock the door, and Evers deactivated a burglar alarm. Cox smelled the odor of marijuana, and, during a sweep of the home, officers observed digital scales, plastic bags, and rubber bands in plain view. In the closet of a bedroom, two black duffle bags smelling strongly of marijuana were discovered.

At this point, Cox obtained a search warrant for the home and then observed the home for approximately three hours, but saw no one enter or leave it. When the warrant was executed, officers discovered, *inter alia*, marijuana in the black duffle bags, and, in the same bedroom closet, an application to Wayne Community College with McKinnon's name on it. The application listed McKinnon's home address as 416 Miller Avenue in Goldsboro. In the home's kitchen, officers found a W-2 tax form in

McKinnon's name which also listed his address as 416 Miller Avenue in Goldsboro. Some unspecified items of clothing belonging to Evers were also discovered during the search of the home. Officers determined that the home was rented in the name of a third party.

On 3 June 2013, McKinnon was indicted on one count each of possession, trafficking, and maintaining a dwelling, as well as two counts of maintaining a vehicle. The matter came on for trial at the 8 December 2014 criminal session of Wayne County Superior Court. At the close of the State's evidence, the trial court dismissed one count of maintaining a vehicle. The jury returned guilty verdicts on the remaining four charges. The court sentenced McKinnon to an active term of 25 to 30 months in prison on the trafficking conviction and imposed probationary sentences for the remaining convictions. McKinnon gave notice of appeal in open court.

Discussion

On appeal, McKinnon argues that the trial court erred in (1) denying his motion to dismiss the remaining charge of maintaining a vehicle, (2) denying his motion to dismiss the charge of maintaining a dwelling, (3) entering written judgments that imposed sentences different from those announced in his presence, and (4) setting an anticipatory bond as a condition of probation. We vacate McKinnon's convictions for maintaining a vehicle and maintaining a dwelling. We

vacate the judgments entered upon his convictions for trafficking and possession and remand for resentencing thereupon.

I. Denial of the motion to dismiss the remaining charge of maintaining a vehicle

McKinnon first argues that the trial court erred in denying his motion to dismiss the charge of maintaining a vehicle to keep or sell a controlled substance. We agree.

"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) (citation omitted). "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and internal quotation marks omitted), *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) (citations omitted). "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) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Our General Statutes make it illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." N.C. Gen. Stat. § 90-108(a)(7) (2013).

> The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for keeping or selling controlled substances. As stated by our Supreme Court in *State v. Mitchell*, the word "keep denotes not just possession, but possession that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). Thus, the fact "that an individual within a vehicle possesses marijuana on one occasion cannot establish the vehicle is used for keeping marijuana; nor can one marijuana cigarette found within the car establish that element." *Id.* at 33, 442 S.E.2d at 30. Likewise, the fact that [the] defendant [in *Dickerson*] was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.

State v. Dickerson, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) (ellipses and some internal quotation marks omitted). Similarly, where a search of a defendant's car revealed "a white envelope containing eight small Ziploc bags of cocaine[,]" totaling approximately 4½ grams, this Court held that the trial court erred in denying the defendant's motion to dismiss a charge of maintaining a vehicle because the evidence did "not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor . . . that [the] defendant had used the vehicle on a prior occasion

to sell cocaine." *State v. Lane*, 163 N.C. App. 495, 498, 500, 594 S.E.2d 107, 110, 111 (2004) (applying the reasoning of *Mitchell* and *Dickerson*).

The State attempts to distinguish *Mitchell* and *Dickerson* by noting three factual differences between those cases and this case: (1) that officers saw McKinnon place the bag of marijuana in the car where it was discovered during the traffic stop, (2) that the quantity of the controlled substance was large, and (3) that the marijuana was packaged in five one-pound bags. The State further urges that "both the quantity of marijuana and the way in which it was packaged . . . was sufficient to allow the jury to connect the vehicle to the sale of a controlled substance[.]" The State misperceives the element of maintaining a vehicle which McKinnon contends was not supported by sufficient evidence, as well as the reasoning underlying the decisions in *Mitchell* and *Dickerson*.

The quantity and packaging of a controlled substance *is* relevant to prove the element of intent to sell or distribute. *See, e.g.*, *State v. Blakney*, __ N.C. App. __, __, 756 S.E.2d 844, 846 ("The intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.") (citation and internal quotation marks omitted), *disc. review denied*, __ N.C. __, __

S.E.2d __ (2014).[1] However, to show that a vehicle is being used for "keeping or selling," there must be sufficient evidence of either "possession of [a controlled substance] in the vehicle that *occurred over a duration of time* []or . . . that [the] defendant had *used the vehicle on a prior occasion to sell*" a controlled substance. *Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111 (emphasis added).

Here, the evidence tended to show that McKinnon placed a plastic bag in the vehicle and, shortly thereafter, the vehicle was stopped and the bag was discovered to contain marijuana. Even in the light most favorable to the State, this evidence could support only an inference that McKinnon possessed marijuana in the vehicle on a single occasion, a showing which is not enough to establish the element of keeping or maintaining. *See Dickerson*, 152 N.C. App. at 716, 568 S.E.2d at 282. Accordingly, the trial court erred in denying McKinnon's motion to dismiss the remaining charge of maintaining a vehicle. We therefore vacate the judgment entered upon that conviction.

II. Denial of the motion to dismiss the charge of maintaining a dwelling

McKinnon next argues that the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling. We agree.

[1] The State cites *Blakney* in support of its position, but we note that that case addressed the denial of a defendant's motion to dismiss a charge of *possession* with intent to sell or deliver marijuana, not maintaining a vehicle. *See Blakney*, __ N.C. App. at __, 756 S.E.2d at 846.

As discussed *supra*, we review the trial court's denial of McKinnon's motion to dismiss *de novo*. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

> Whether a person keeps or maintains a dwelling, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires the consideration of several factors, none of which are dispositive. Those factors include: ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent.

State v. Bowens, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000) (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001). "General Statute 90-108(a)(7) does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances." *State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988).

In *Bowens*,

> the State's evidence show[ed]: [the d]efendant was seen in and out of the dwelling 8-to-10 times over the course of 2-to-3 days; nobody else was seen entering the premises during this 2-to-3 day period of time; men's clothing was found in one closet in the dwelling; [an officer] testified he believed [the d]efendant lived at [the dwelling], although he offered no basis for that opinion and had not checked to see who the dwelling was rented to or who paid the utilities and telephone bills.

140 N.C. App. at 221-22, 535 S.E.2d at 873. This Court held that evidence was insufficient to support sending the charge of maintaining a dwelling to the jury, and

thus, that the defendant's motion to dismiss should have been granted. *Id.* at 222, 535 S.E.2d at 873. Similarly, we found "the State failed to present sufficient evidence from which a reasonable jury could conclude that [a] defendant maintained [a] motel room" where

> [t]he evidence tended to show that [the] defendant had access to a key, spent the previous night in the motel room, and was present when law enforcement officials discovered the contraband. The State presented no evidence, however, that [the] defendant "bore the expense of" or otherwise maintained the motel room in any way. [The d]efendant did not rent the room or otherwise finance its upkeep. Moreover, [the] defendant had occupied the room for less than twenty-four hours when law enforcement arrived.

State v. Kraus, 147 N.C. App. 766, 769, 557 S.E.2d 144, 147 (2001) (citations and some brackets omitted).

Here, the only evidence presented to the jury to connect McKinnon to the home was: (1) his presence in the home on a single day, 24 September 2011; (2) the presence in the home of a W-2 and a college application belonging to McKinnon, both of which listed his address at another location; (3) McKinnon's possession of a key which unlocked the front door of the home; and (4) the presence in the home of a man's clothing and a laptop computer, neither of which was linked to McKinnon. The evidence at trial tended to show that the home was rented in the name of a third party, and no evidence was offered to establish who was responsible for the payment of utility costs, taxes, repairs, or maintenance of the home. Further, although the

jury was instructed on a theory of acting in concert with Evers, our review of the record reveals the evidence linking her to the home was likewise insufficient to support a charge of maintaining a dwelling. In the light most favorable to the State, the evidence tended to show that Evers (1) was at least briefly inside the home on 24 September 2011, (2) told law enforcement officers that her mother and two children lived in the home on the date of the traffic stop, (3) entered a code to turn off the home's burglar alarm, and (4) that some unspecified "clothes" belonging to Evers were found in a bedroom of the home. No evidence showed Evers resided in, owned, rented, or cared for the home or had any financial responsibility for it.

The State cites *Alston* for the proposition that a defendant's possession of a key to the location where controlled substances are discovered is sufficient to support an inference that the defendant maintained the dwelling. However, in *Alston*, in addition to the defendant having a key to the building where drugs were discovered, the evidence showed the defendant was one of four or five people in the room where drugs were discovered, had given the building's address as his home address approximately five months before the search took place, and "*had paid the rent for the month* [*when the search took place*] *and on four or five previous occasions*." *Alston*, 91 N.C. App. at 708, 373 S.E.2d at 308. The *Alston* Court specifically noted both the "[d]efendant's payment of rent and possession of the key to the padlock support[ed] the inference that he maintained the building." *Id.* at 711, 373 S.E.2d at 310. We

conclude that the defendant's payment of rent in *Alston* was decisive to that Court's holding, and that the defendant's possession of a key to the building would have been insufficient to support a charge of maintaining a dwelling in light of *Kraus*, where this Court held that the defendant's possession of a hotel room key, even in conjunction with his spending the previous night in the room and his presence in the room when illegal drugs were discovered, was insufficient evidence to survive a motion to dismiss. 147 N.C. App. at 769, 557 S.E.2d at 147. We also note that payment of rent is one of the factors explicitly listed for consideration on the question of keeping or maintaining a dwelling. *See, e.g.*, *Bowens*, 140 N.C. App. at 221, 535 S.E.2d at 873.

The evidence here is more analogous to that in *Bowens* and *Kraus* than in *Alston*, and, accordingly, we hold that the trial court erred in denying McKinnon's motion to dismiss the charge of maintaining a dwelling. The judgment entered upon that conviction must be vacated.

III. Modification of the possession and trafficking judgments

McKinnon also argues that the trial court erred in entering written judgments containing sentences different from those announced in his presence. We agree.

McKinnon was present in open court when the trial court imposed sentences for his four convictions. On the trafficking conviction, the court sentenced McKinnon

to 25 to 30 months in prison and further announced, "I am fining you in that case $5[,]000." On the possession conviction, the court sentenced McKinnon

> to a minimum of four and a maximum of five months in the North Carolina Department of . . .[C]orrection[]. That is an intermediate punishment. Being an intermediate punishment, I'm going to suspend that sentence and place you on supervised probation for 36 months, order that you pay the superior court cost[.]

The court entered written judgments on 10 December 2014 which reflected the sentences announced in open court in McKinnon's presence. However, the court then entered amended judgments on McKinnon's convictions. The amended trafficking judgment is stamped "12-17-14/sw/AMENDED" and omits any reference to a civil penalty. The amended possession judgment is stamped "12-17-14/AMENDED COST/SW" and includes a $5,000 fine to be paid on a schedule to be determined by McKinnon's parole officer.

The State concedes that, where "the written judgments reflect a different sentence than that which was imposed in [the] defendant's presence during sentencing, we must vacate [the] defendant's sentence and remand for the entry of a new sentencing judgment." *See State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 800 (citations omitted), *disc. review denied*, __ N.C. __ (2015). Accordingly, we vacate the amended trafficking and possession judgments and remand for entry of new sentencing judgments.

IV. Setting an anticipatory bond in the event of a positive drug test while on probation

In his final argument, McKinnon contends that the trial court erred in setting an anticipatory bond in the event he tested positive for a controlled substance while on probation. We are not persuaded by this argument.

While setting McKinnon's probationary conditions, the court announced:

> I'm going to order random drug tests once he's released from prison. If he tests positive on any single occasion for a controlled substance he will be arrested and placed in jail under a $25,000 secure bond. He is subject to random searches of his home, vehicle or place of business for controlled substances.

McKinnon acknowledges that the court had discretion to impose random drug testing as a probationary condition, but observes that setting an anticipatory bond in the event of a positive result is frowned upon, citing *State v. Hilbert*, 145 N.C. App. 440, 446, 549 S.E.2d 882, 886 (2001). However, in *Hilbert*, this Court did not hold that the setting of an anticipatory bond was error, because the "defendant failed to object at sentencing to the probationary condition at issue and his present challenge thereto ha[d] not been preserved for . . . review." *Id.* at 445, 549 S.E.2d at 885 (citing N.C.R. App. P 10(b)). Likewise, McKinnon did not object to the probationary condition he now challenges. However, we repeat the recommendation of the *Hilbert* Court for the trial court's consideration at McKinnon's new sentencing hearing:

> Should a sentencing court imposing a probationary judgment seek to address the matter of appearance bond in the event of the defendant's arrest for alleged violation of conditions of probation, we perceive the better practice to

> be that the court "recommend" bond in a certain amount upon issuance of a probation violation warrant.

Id. at 446, 549 S.E.2d at 886.

Conclusion

In sum, we vacate the judgments entered upon McKinnon's convictions for trafficking and possession and remand for entry of new sentencing judgments on those convictions. We vacate the judgments entered upon McKinnon's convictions for maintaining a vehicle and maintaining a dwelling.

VACATED AND REMANDED FOR ENTRY OF NEW SENTENCING JUDGMENTS.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).