IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-380

Filed: 6 December 2016

Forsyth County, Nos. 14 CRS 1642, 51004, 51233

STATE OF NORTH CAROLINA

v.

RYAN SAMUEL ROUSSEAU, Defendant.

Appeal by defendant from judgment entered 1 April 2015 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Phillip T. Reynolds, for the State.

Michael E. Casterline for defendant-appellant.

ENOCHS, Judge.

Defendant Ryan Samuel Rousseau ("Defendant") appeals from judgment entered on his conviction of keeping or maintaining a vehicle for the purpose of keeping a controlled substance. He argues that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. We conclude, however, that the State presented sufficient evidence to sustain a conviction for this charge, and, therefore, find no error in the trial court's judgment.

Factual Background

On 31 January 2014, the victim of a larceny following a breaking and entering reported that the three men who had broken into his house were leaving his driveway in a "grayish green" Jeep Cherokee. Shortly after the victim called 911, Sergeant R.D. Shinault of the Forsyth County Sheriff's Office was given the description of a gray Jeep Cherokee with a 30-day temporary registration tag. Sergeant Shinault responded to an address where the suspects might be located and observed a "gray-in-color Jeep Cherokee" with a 30-day tag leaving the residence. He followed the vehicle and observed it pull behind a different residence in such a way as "to avoid" police. Sergeant Shinault pulled into the driveway and ordered the occupants out of the vehicle.

As Sergeant Shinault and the other officers with him ordered the men out of the car and handcuffed them, they could smell a "very strong odor of marijuana coming from the vehicle[,]" while they were "approximately 15 to 20 feet away." The officers searched the inside of the vehicle and found "shake marijuana" or "crumbs of marijuana, all throughout the floorboard and seat area of the vehicle."

Because of the "very, very strong" smell of marijuana, the officers continued searching the Jeep. The officers opened the hood of the vehicle and observed an "even stronger [smell] in the engine compartment." After opening the vehicle's hood, the officers found a sock containing a plastic bag with 29.927 grams of marijuana, located

in a vent inside the engine compartment near the windshield area, but separated from the interior of the vehicle by the engine firewall. In the interior of the vehicle, the officers also found loan documents and a driver's license, both containing Defendant's name and identifying information, as well as pawn shop receipts, $576.00 in cash, jewelry, and electronics.

Even though the vehicle was registered to someone other than Defendant, the vehicle owner shared a residence with Defendant. The State presented evidence that Defendant regularly drove the vehicle, including evidence that he had been stopped as part of a routine traffic stop while driving the vehicle a week prior to his arrest in this case.

Defendant was indicted on 12 November 2014 on two counts of felony breaking and entering, and two counts of larceny after breaking and entering. He was also indicted on 3 March 2015 for felony possession of marijuana, and felony maintaining a vehicle for using, keeping, or selling a controlled substance. All of these charges arose from his conduct on 31 January 2014.

At his 25 March 2015 trial in Forsyth County Superior Court, Defendant made a motion to dismiss, both at the close of the State's evidence and at the close of all of the evidence, the charge of knowingly keeping or maintaining a vehicle for the purpose of keeping or selling a controlled substance, *see* N.C. Gen. Stat. § 90-108(a)(7) (2015), based on insufficient evidence. On 1 April 2015, Defendant was found guilty

of knowingly keeping a vehicle for the purpose of unlawfully keeping controlled substances, among other charges. Defendant timely appealed.

Analysis

"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 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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"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).

> "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court

> decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty."

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation omitted) (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919).

To survive a motion to dismiss in this case, the State must have presented substantial evidence that Defendant "(1) knowingly (2) ke[pt] or maintain[ed] (3) a vehicle (4) which is used for the keeping or selling (5) of controlled substances." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). In his appeal, Defendant has only challenged whether the State introduced sufficient evidence that the vehicle was "kept" for the use of keeping or selling a controlled substance, and has, thus, waived any argument as to the sufficiency of the evidence for the remaining elements. "The determination of whether a vehicle . . . is used for keeping or selling controlled substances will depend on the totality of the circumstances." *Id*. at 34, 442 S.E.2d at 30.

Defendant argues that for the State to prove the "keeping" element, it must show that the vehicle was used over time for the selling or keeping of a controlled substance. However, the cases that he cites to support this contention are distinguishable because of the additional evidence about the vehicle introduced in this case. In this case, there was evidence that a controlled substance was hidden in

a storage space in the engine compartment, and that remnants of this controlled substance were found throughout the interior.

First, in *Mitchell*, the defendant had two bags of marijuana in his immediate possession, and the only evidence relating to the vehicle was that he arrived in it to the place where he was arrested. *Id.* at 31-32, 442 S.E.2d at 29. Because there was no evidence that a controlled substance was "kept" specifically in the vehicle, only that it was possessed by a person in a vehicle, this is unlike the situation in the case *sub judice*.

The defendant in *State v. Lane*, 163 N.C. App. 495, 498, 594 S.E.2d 107, 109-110 (2004), had several plastic baggies of cocaine in an envelope tucked between the driver and passenger seats in a vehicle. This Court found that this was insufficient evidence of "keeping" because the evidence "does not indicate possession of cocaine in the vehicle [ ] occurred over a duration of time[.]" *Id.* at 500, 594 S.E.2d at 111. Having an envelope tucked between the seats of a car may not give rise to an inference that the "keeping" occurred over a duration of time. However, in this case, a jury may infer "keeping" from the remnants of the controlled substance throughout the interior space of the vehicle and a storage space for the keeping of controlled substances in the engine compartment of the vehicle.

Finally, the defendant in *State v. Dickerson*, 152 N.C. App. 714, 568 S.E.2d 281 (2002), was selling crack cocaine from the passenger seat of a vehicle. While the

vehicle in question was registered to the defendant, there was no other evidence about the use of the vehicle, such as use for other controlled substance transactions. *Id.* at 715, 716-17, 568 S.E.2d at 281, 282. Evidence of only one sale was found by this Court to be insufficient evidence of "keeping." *Id*. at 716, 568 S.E.2d at 282. This, like *Lane*, is distinguishable because the evidence introduced at trial about the vehicle used to prove "keeping" is different in kind and in degree from this case. There was no evidence that either of the vehicles in *Lane* or *Dickerson* had storage space, outside of the passenger compartment, being used to "keep" a controlled substance, and neither had remnants of a controlled substance throughout their interior.

In this case, the State presented substantial and uncontroverted evidence that the vehicle was used to "keep" the marijuana. The State introduced evidence that the 29.927 grams of marijuana recovered was found in a plastic bag, tucked in a sock, and placed in a vent inside the vehicle's engine compartment outside of the passenger area. The State introduced further evidence that the vehicle's interior had "shake" throughout the floorboard which tended to show that the marijuana had been handled within the vehicle. Furthermore, the evidence tended to show that the vehicle was most recently used to facilitate a breaking and entering, not anything related to the controlled substance. From this evidence, the jury could infer that the vehicle was being used for the "keeping" of a controlled substance. Therefore, the trial court was correct in denying Defendant's motion to dismiss.

Conclusion

The State presented sufficient evidence that Defendant was keeping or maintaining a vehicle for the keeping of a controlled substance. The trial court did not err in denying the motions to dismiss.

NO ERROR.

Judge ZACHARY concurs.

Judge ELMORE dissents in a separate opinion.

Report per Rule 30(e).

ELMORE, Judge, dissenting.

Because the State failed to present substantial evidence that defendant maintained the vehicle for the purpose of keeping marijuana, I respectfully dissent.

Our Supreme Court explained in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), that the word "keep" "denotes not just possession, but possession that occurs over a duration of time," and possession on a single occasion "cannot establish that the vehicle is 'used for keeping marijuana.' " *Id.* at 32–33, 442 S.E.2d at 29–30. That the vehicle in this case was used to facilitate a breaking and entering makes it no more likely that defendant used it to keep marijuana. The only evidence otherwise offered to elevate the offense beyond mere possession was the location in the air vent where the marijuana was found and the presence of "shake" throughout the vehicle. While this may arouse suspicion that defendant had been using the vehicle over a duration of time to store marijuana, it is not adequate to accept a conclusion of the same. *See State v. Miller*, 363 N.C. 96, 104, 678 S.E.2d 592, 597 (2009) ("[S]ubstantial evidence requires more than 'a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it.' " (citations omitted)). Because the State failed to meet its burden, defendant's motion to dismiss should have been granted.