IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1254

Filed: 17 October 2017

Wake County, No. 13CRS222201

STATE OF NORTH CAROLINA,

v.

RICHARD DUNSTON, Defendant.

Appeal by Defendant from judgment entered 14 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Christina S. Hayes, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

BERGER, Judge.

On April 14, 2016, a Wake County jury convicted Richard Dunston ("Defendant") of trafficking opium or heroin, and maintaining a vehicle for keeping or selling controlled substances. Defendant was sentenced pursuant to N.C. Gen. Stat. § 90-95(h)(4) (2015) and received a mandatory sentence of 90 to 120 months in prison, and ordered to pay a fine of $100,000.00. Defendant does not appeal his conviction or sentence from trafficking opium or heroin, but rather contends the trial

court erred in denying his motion to dismiss the charge of maintaining a vehicle for keeping or selling controlled substances. We disagree.

Factual & Procedural Background

At trial, evidence tended to show that on September 6, 2013, officers with the Raleigh Police Department's Selective Enforcement Unit were conducting surveillance at a business known to have a high volume of illicit drug activity. Defendant was observed walking towards a white Cadillac in the parking lot. An individual, later identified as Defendant's nephew, Darius Davis ("Davis"), was in the driver's seat of the Cadillac. Defendant began speaking with Davis, and opened a package of cigars. Defendant removed the plastic filters from the cigars, and based upon the officer's training and experience, appeared to replace the tobacco in the cigars with marijuana. Defendant then licked the paper, re-rolled, and replaced the plastic filters back on the "cigars."

Davis was observed exchanging cash in a hand-to-hand transaction with an older male he met in the parking lot. Defendant and Davis then began an extended conversation with each other, and Defendant sat in the passenger seat of the Cadillac. Davis drove away from the business, and officers initiated a traffic stop of the vehicle.

Davis consented to a search of his person, which yielded a bag of marijuana. Defendant was then removed from the vehicle and searched. Defendant had no contraband on his person, not even the "cigars" he was observed handling earlier.

Officers then conducted a search of the Cadillac, leading to the discovery of an open container of alcohol under the front passenger's seat and a travel bag containing a 19.29 gram mixture of heroin, codeine, and morphine on the back seat. The travel bag also contained plastic baggies, two sets of digital scales, and three cell phones. Defendant admitted that the Cadillac and travel bag belonged to him. Officers later determined, however, that the Cadillac was owned by Defendant's former girlfriend, Latisha Thompson ("Thompson").

Thompson and Defendant dated for approximately eleven years, but the relationship ended nearly five years before the trial. She acknowledged that the Cadillac was registered in her name, but Defendant purchased, used, and maintained the car. Thompson also testified that she believed associating with Defendant was not in Davis's best interests. Defendant then asked Thompson:

> [DEFENDANT]: So how -- so let me ask you a question: So why would you feel that Mr. Davis was getting himself into something he didn't deserve?
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> [THOMPSON]: Because I knew. I was with you [for] 11 years.
>
> [DEFENDANT]: Exactly what is that supposed to mean?
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> . . . .
>
> [THOMPSON]: I knew the lifestyle. I knew what was going on.

At the close of evidence, Defendant made a general motion to dismiss, which the trial court denied. Defendant timely gave notice of appeal.

Standard of Review

"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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Our Supreme Court has stated:

> In ruling on a motion to dismiss, both the trial court and the reviewing court must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn from the evidence. If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury.

State v. Artis, 325 N.C. 278, 301, 384 S.E.2d 470, 483 (1989) (citations omitted), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

Analysis

Defendant contends the trial court erred in denying his motion to dismiss, arguing that there was insufficient evidence to support his conviction of maintaining a vehicle for keeping or selling controlled substances. A defendant may properly be convicted of maintaining a vehicle for keeping or selling a controlled substance if the State proves beyond a reasonable doubt that the defendant knowingly kept or maintained a vehicle "used for the keeping or selling of" controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2015). Defendant contends that our case law establishes a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance. We disagree.

Our Supreme Court held in *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994), "[t]he determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *See also State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) ("[T]he fact that a defendant 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." (emphasis added)); *State v. Thompson*, 188 N.C. App. 102, 105-06, 654 S.E.2d 814, 817 (this Court must look at the totality of the circumstances, examining such factors as the quantity of drugs, paraphernalia found at the location,

the amount of money recovered, and "the presence of multiple cellular phones or pagers" (citations omitted)), *disc. rev. denied*, ___ N.C. ___, 662 S.E.2d 391 (2008).

When viewed in the light most favorable to the State, there was substantial evidence introduced at trial for each essential element of the offense of maintaining a vehicle for keeping or selling controlled substances, and that Defendant was the perpetrator. Here, Defendant was in the vehicle at a location known to law enforcement for a high level of illicit drug activity. Defendant was observed by law enforcement unwrapping cigars and re-rolling them after manipulating them. Based upon the law enforcement officer's training and experience, Defendant's actions were consistent with those commonly used in distributing marijuana. While in the parking lot, Davis, the driver of the vehicle, was observed in a hand-to-hand exchange of cash with another individual. When later searched by officers, Davis was discovered to have marijuana, and Defendant no longer possessed the "cigars" he was observed with earlier.

Additionally, Defendant possessed a trafficking quantity of heroin, along with plastic baggies, two sets of digital scales, three cell phones, and $155.00 in cash. Thompson, Defendant's ex-girlfriend and registered owner of the vehicle, testified that she was concerned about Defendant's negative influence on his nephew, Davis, because she "knew the lifestyle."

Based upon the totality of the circumstances, there was sufficient evidence for the jury to find Defendant knowingly kept or maintained the white Cadillac for the keeping or selling of controlled substances.

Conclusion

Defendant received a fair trial, and his motion to dismiss was properly denied by the trial court.

NO ERROR.

Judge DILLON concurs with separate opinion.

Judge ZACHARY dissents with separate opinion.

DILLON, Judge, concurring.

I fully concur in the majority opinion. I write separately to expound on portions of our Supreme Court's decision in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), which I believe address the concerns of the dissenting opinion.

The dissenting opinion correctly points out that evidence of a *single* drug transaction from a vehicle, by itself, will not sustain a conviction for keeping a vehicle for the sale of illegal drugs. However, it is not imperative that the State *in every case* put forth evidence of drug activity from the vehicle at two different points in time to get to the jury. Rather, evidence found in a vehicle by police in a single encounter *may* be sufficient to get to the jury where warranted by the totality of the circumstances:

> Although the contents of a vehicle are clearly relevant in determining [the vehicle's] use, its contents are not dispositive when, as here, they do not establish that the use of the vehicle was a prohibited one. The determination of whether a vehicle, or a building, 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.

Our Supreme Court then cites, with approval, a decision from our Court as an example where the evidence found in a vehicle during a single stop was sufficient to establish that the vehicle was being kept for the sale of marijuana. "Where, for example, the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling

marijuana . . . then defendant may be convicted of maintaining a vehicle . . . used for or selling a controlled substance. *Id.* at 34, 442 S.E.2d at 30-31 (citing *State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87-88 (1985)). Our Supreme Court then stated that, by contrast, "where the State has merely shown that the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia, the State has not shown that the vehicle was used for selling or keeping a controlled substance." *Id.* at 34, 442 S.E.2d at 31.

The evidence in the present case is much more like the evidence discovered in the *Bright* case. Here, as noted in the majority opinion, there was evidence of a drug transaction from the vehicle and the discovery of marijuana, a trafficking quantity of heroin, plastic baggies, two sets of digital scales, three cell phones, and $155 in cash.

In conclusion, the State is *not* required to put forth evidence of two separate drug transactions from a vehicle to get to the jury. The evidence found in a vehicle from one encounter *may* be sufficient, as it was in *Bright*. I agree with the conclusion reached in the majority opinion that the evidence in the present case was sufficient to get to the jury.

ZACHARY, Judge, dissenting.

For the reasons that follow, I respectfully dissent and vote to reverse the trial court's denial of defendant's motion to dismiss and to vacate defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7).

In order to prove a violation of N.C. Gen. Stat. § 90-108(a)(7), the State must establish that the defendant kept or maintained a vehicle *with the intent that it be "used for the keeping or selling* of" controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2017) (emphasis added). Our Supreme Court has held that a conviction under N.C. Gen. Stat. § 90-108(a)(7) requires evidence of intentional possession and use of a vehicle for prohibited purposes "that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). Absent an admission, proof of a single incident is not sufficient to establish that one of the *defendant's purposes* in maintaining the vehicle involves the keeping and selling of narcotics. *See Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 ("[O]ur legislature [did not] intend[] to create a separate crime simply because the controlled substance was temporarily in a vehicle.").

As the majority correctly notes, "[t]he determination of whether a . . . place is used for keeping or selling a controlled substance 'will depend on the totality of the circumstances.' " *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001) (quoting *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30). It is evident that "the contents of a vehicle are clearly relevant in determining its use," although "its contents are not

dispositive when . . . they do not establish that the use of the vehicle was a prohibited one." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30. The concurrence cites *State v. Bright* for the principle that one instance of narcotics being sold from or found in a vehicle may indeed satisfy the "totality of the circumstances" test for a felony conviction under N.C. Gen. Stat. § 90-108(a)(7). *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985). However, *Bright* is inapposite to a discussion of the issue at hand.

For one, *Bright* touched only on the elements of the *misdemeanor* charge under N.C. Gen. Stat. § 90-108—which does not require any showing of intent that the vehicle be used for the keeping or sale of controlled substances—and not on the different elements of the *felony* charge, which is the charge at issue here. *Id.* Moreover, this Court in *Bright* did not address the number of incidents required for a conviction under N.C. Gen. Stat. § 90-108(a)(7). Instead, the chief question in *Bright* was whether a misdemeanor crime of " 'maintaining a motor [vehicle] to which persons resorted to for the keeping or sale of marijuana' exists." *Bright*, 78 N.C. App. at 241-42, 337 S.E.2d at 88 (quoting *State v. Church*, 73 N.C. App. 645, 327 S.E.2d 33 (1985)). This Court held that it did. *Id.* at 243, 337 S.E.2d at 89. In sum, *Bright* involved a different offense, and did not speak to whether the *felony* charge, which requires intent, could be established by only one incident.

In addition, our Supreme Court in *Mitchell* did not cite *Bright* for the proposition that one instance of drugs being found in a motor vehicle is enough to

sustain a conviction under N.C. Gen. Stat. § 90-108(a)(7). Instead, *Mitchell* reiterated the principle that "an individual within a vehicle possessed marijuana on one occasion cannot establish that the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30. *Bright* was simply cited as a contrasting example in which the totality of the circumstances test had been met in a misdemeanor case, where "the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling marijuana[.]" *Id.* Notwithstanding the one example from *Bright*, the Supreme Court reversed the defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7).

Despite the precedent that *Mitchell* established, the majority relies on the "totality of the circumstances" test in order to hold that, in appropriate circumstances, a defendant may nonetheless be convicted under N.C. Gen. Stat. § 90-108(a)(7) based upon a single instance of narcotics being sold from the defendant's vehicle. The majority asserts that a contrary view would improperly "establish[] a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance." However, the "bright-line rule" to which the majority refers has, indeed, been previously established by this Court. In *State v. Lane*, we followed exactly that rule, which had been promulgated by an earlier case:

> In *State v. Dickerson*, this Court held that one isolated incident of a defendant having been seated in a motor vehicle while selling a controlled substance is insufficient to warrant a charge to the jury of keeping or maintaining a motor vehicle for the sale and/or delivery of that substance. *State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002). This Court reasoned:
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> Pursuant to N.C. Gen. Stat. § 90-108(a)(7), it is illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." 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." 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." Likewise, *the fact that a defendant 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*.
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> *Id.* (quoting N.C.G.S. § 90-108(a)(7) (2001) and *State v. Mitchell*, 336 N.C. 22, 32-33, 442 S.E.2d 24, 30 (1994)) (alteration in original). The evidence in the case before us does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. We therefore agree with defendant that his motion to dismiss should have been granted.

State v. Lane, 163 N.C. App. 495, 499-500, 594 S.E.2d 107, 110-111 (2004) (emphasis added). It is axiomatic that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound

by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

The present case is functionally indistinguishable not just from *Mitchell*, but from both *Lane* and *Dickerson* as well. The circumstances upon which the majority bases its holding are features of the single incident, with the sole exception of a witness's generalized, undefined reference to defendant's "lifestyle." Absent from the record is any evidence which would indicate that defendant kept or sold controlled substances in the vehicle "over a duration of time[,]" *Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111, or on more than one occasion. Instead, the State's evidence establishes only that narcotics were present in defendant's vehicle for a few hours on 6 September 2013. The officers found no residue or remnants suggesting the prior presence of narcotics in the vehicle, or any storage or hiding compartments suggesting that narcotics had been kept in the vehicle in the past. *See Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111 (A conviction under N.C. Gen. Stat. § 90-108(a)(7) may be sustained where there is evidence "that [the] defendant had used the vehicle on a prior occasion to sell" or keep narcotics.). There is no record of defendant ever having previously been charged with, or convicted of, keeping or selling narcotics in his vehicle. *Id.* Moreover, in the instant case, defendant did not admit to selling drugs. *See Bright*, 78 N.C. App. at 240, 337 S.E.2d at 87. While "[t]he evidence, including defendant's actions [and] the contents of his car . . . are entirely consistent with drug use, or with

the sale of drugs generally," that alone is not enough to "implicate [his] *car* with the sale of drugs." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 (emphasis added).

In this case, the totality of the circumstances—including the ambiguous, unexplained reference to defendant's "lifestyle"—show only that defendant was found with narcotics in his vehicle on one occasion. Thus, all this Court has before us is one isolated incident. Without something else, I do not believe this one instance raises more than a mere "suspicion or conjecture" that defendant's purpose in maintaining the vehicle was for the keeping or selling of narcotics. *State v. Alston*, 310 N.C. 399, 404, 312 S.E.2d 470, 473 (1984). Accordingly, I respectfully dissent.