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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-33

Filed: 18 September 2018

New Hanover County, Nos. 16 CRS 2, 1904

STATE OF NORTH CAROLINA

v.

DAMIEN TATRON MCGILL

Appeal by defendant from judgment entered 9 August 2017 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 4 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

ARROWOOD, Judge.

Damien Tatron McGill ("defendant") appeals from judgments entered on his convictions of possession of a firearm by felon and attaining the status of a habitual felon. For the reasons stated herein, we reverse.

I. Background

On 4 January 2016, a New Hanover County Grand Jury indicted defendant for possession of a firearm by a felon. On 4 April 2016, the Grand Jury indicted defendant for being a habitual felon. The matter came on for trial on 8 August 2017, the Honorable Jay D. Hockenbury presiding. The State's evidence at trial tended to show as follows.

At approximately 6:00 p.m. on 10 November 2015, Wilmington Police Officers Engeldrum and Galluppi responded to a dispatcher's call of an armed robbery in progress at 925 South 3rd Street. The dispatcher reported that "there were three to four males and two of them were waving a gun around." It was already dark outside at the time the officers responded to the call.

The building at 925 South 3rd Street housed a barbershop and two other businesses. It was located at the corner of South 3rd and Wright Streets one block south of Dawson Street, which runs parallel to Wright Street. Paralleling South 3rd Street to the east is South 4th Street, which also intersects with Dawson and Wright Streets.

As Officers Engeldrum and Galluppi pulled their marked patrol car into the parking lot at 925 South 3rd Street, Officer Galluppi observed a group of "four males standing right . . . on the corner," who immediately dispersed and "started going in separate directions." Defendant, who was one of the four men, "started walking very rapidly up Wright Street towards 4th Street." Before Officer Engeldrum stopped the

car, Officer Galluppi "jumped out of the car to try to stop [defendant]" and called out, "Hey, buddy, need to talk to you, hold on[.]" Defendant "instantly . . . took off" running, proceeding northward up 4th Street at "a dead sprint[.]"

Equipped with a flashlight, Officer Galluppi ran after defendant. As he approached South 4th Street, Officer Galluppi saw "something black in [defendant's] right hand about six to eight inches long" but could not "make out exactly what it was." Although his first impression of the object "was maybe [a] remote control," Officer Galluppi recalled the dispatcher's report and realized the object might be a gun. He slowed his pursuit of defendant, taking "a wide turn" from Wright Street onto South 4th Street, in case defendant was armed.

Rounding the corner onto South 4th Street, Officer Galluppi saw defendant approximately fifteen yards ahead of him and noticed defendant's hands were now empty. He continued his pursuit up South 4th Street until defendant "ducked down [a] driveway" between two houses at 916 and 914 South 4th Street. Officer Galluppi lost sight of defendant briefly but heard "a chain link fence . . . jiggling" in the backyard at 916 and saw defendant climb over the fence.

Before scaling the fence, Officer Galluppi radioed defendant's position to his fellow officers and remained at his location until they established a perimeter to intercept defendant. Officer Galluppi proceeded over the fence and into the backyard of a residence at 919 South 3rd Street. In front of this residence was a black fence

bordered by shrubs. Officer Galluppi was soon joined by Officers Murphy and Pelligrino. As they attempted to track defendant's path from the chain link fence, they spotted him "under some of the shrubs right up against that black fence in the front." The officers extracted defendant from his location and placed him in handcuffs. A search of defendant's person yielded cigarettes, a bandana, $1,129.00 in cash, and a cellphone.

After detaining defendant, the officers re-walked his path of flight from Officer Galluppi. At the corner of South 4th and Wright Streets, they noticed a pair of trash cans. Officer Galluppi then spotted an FNH S40 handgun on the ground at the foot of the trash cans. The area around the gun appeared undisturbed except for a six-inch patch of loose dirt directly in front of it. Loose dirt was also "sitting on top" of the gun. A check of the gun's serial number revealed it had been reported stolen in Pender County.

The parties stipulated to the jury that the North Carolina State Crime Lab found three latent fingerprints on the gun which "could not be compared definitively to this defendant or anyone else." They further stipulated that defendant "was a convicted felon and could not lawfully possess a firearm" on 10 November 2015.

A jury found defendant guilty of possession of a firearm by a convicted felon, whereupon he pleaded guilty to attaining habitual felon status. The trial court

entered judgment sentencing defendant to an active prison term of 100 to 132 months. He gave notice of appeal in open court.

II. Discussion

In his lone argument on appeal, defendant claims the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon, absent substantial evidence that he was in possession of the handgun found by Officer Galluppi. " 'We review the trial court's denial of a motion to dismiss *de novo*.' " *State v. Battle*, __ N.C. App. __, __, 799 S.E.2d 434, 436 (quoting *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010)), *disc. review denied*, 369 N.C. 756, 799 S.E.2d 872 (2017). We must "consider whether, in the light most favorable to the State and with all reasonable inferences drawn in the State's favor, there is enough evidence of each essential element of the crime charged to persuade a rational juror that the defendant was the perpetrator." *State v. Childress*, 367 N.C. 693, 694-95, 766 S.E.2d 328, 330 (2014) (citation omitted). As our Supreme Court has explained,

> [c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury . . . . However, a motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.

State v. Stone, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citations 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*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561, *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 397 (2011) (citation omitted). Here, defendant challenges the sufficiency of the evidence that he possessed a firearm.

As an initial matter, we note the trial court instructed the jury only on actual, rather than constructive, possession. " 'A person has actual possession of a firearm if it is on his person, he is aware of its presence, and . . . has the power and intent to control its disposition or use.' " *Battle*, __ N.C. App. at __, 799 S.E.2d at 437 (quoting *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011)). It appears the court found substantial circumstantial evidence that defendant was in physical possession of a handgun but discarded it while running from Officer Galluppi. Many of our decisions have characterized similar factual scenarios as involving constructive possession.[1] *See, e.g.*, *State v. Lindsey*, 219 N.C. App. 249, 725 S.E.2d 350, *reversed in part for reasons stated in dissenting opinion*, 366 N.C. 325, 734 S.E.2d 570 (2012) (per curiam); *State v. Sinclair*, 191 N.C. App. 485, 492, 663 S.E.2d 866, 872 (2008)

[1] " '[A] person has constructive possession of a firearm when, although not having actual possession, the person has the intent and capability to maintain control and dominion over the firearm.' " *Battle*, __ N.C. App. at __, 799 S.E.2d at 437 (quoting *Billinger*, 213 N.C. App. at 253-54, 714 S.E.2d at 205). Constructive possession thus applies when a person stores an object at a location other than his or her person but still within his capacity to control. *See, e.g.*, *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972). When a fleeing suspect is in physical possession of contraband but effectively abandons it in a random location in order to avoid liability, the case may properly be viewed as one of actual possession–albeit actual possession that occurred prior to the suspect discarding the item.

("Because the cocaine was not *found in Defendant's actual possession*, we evaluate Defendant's argument in the context of constructive possession." (emphasis added)). While we do not disagree with the trial court's framing of the facts *sub judice* as an actual possession case, we base our analysis on the most factually analogous precedent, regardless of nomenclature.

In *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), officers observed the defendant walking down Hillsboro Street wearing a gray felt hat. *Id.* at 307, 154 S.E.2d at 341. After stopping to talk to a second man, the defendant walked with the man across a vacant lot, onto Walter Street, and past two houses. *Id.* at 307, 154 S.E.2d at 341-42. Officers maintained visual surveillance of the defendant "continuously except for 'two or three seconds' when the headlights of an eastbound car . . . caused the officers 'to step back out of the glare of the headlights' . . . ." *Id.* at 307-08, 154 S.E.2d at 342. Defendant was arrested while heading back toward Hillsboro Street but was no longer wearing the hat. *Id.* at 308, 154 S.E.2d at 342. Thirty minutes later, officers found "the identical hat [the] defendant was wearing" on the ground "four or five feet from where" he was seen standing with his companion on Walter Street. *Id.* at 308-309, 154 S.E.2d at 342-43. In the crown of the hat were eleven envelopes containing marijuana. *Id.* at 308, 154 S.E.2d at 342. Our Supreme Court held these facts insufficient to support a conviction for possession of marijuana:

> [T]he evidence, in our opinion, falls short of being sufficient to support a finding that the marijuana found by the

> officers in and on a hat in the high grass was in the possession of defendant when he was first observed and followed by the officers. Although the evidence raises a strong suspicion as to defendant's guilt, we are constrained to hold the motion for judgment as in case of nonsuit should have been allowed.

Id. at 311, 154 S.E.2d at 344.

In *State v. Acolatse*, 158 N.C. App. 485, 581 S.E.2d 807 (2003), officers approached a defendant while he was standing by a car talking on his cellphone. *Id.* at 486, 581 S.E.2d at 808-809. He ran, and a detective chased him around a house. *Id.* at 486, 581 S.E.2d at 809. The detective "lost sight of defendant for approximately ten seconds" as the defendant went around the house and into the backyard toward a fence fronted by bushes. *Id.* at 486-87, 581 S.E.2d at 809. A second officer saw defendant make "a throwing motion towards the bushes" before being caught in the backyard. *Id.* at 487, 581 S.E.2d at 809. Although no contraband was found in the bushes, officers found five bags of cocaine on the roof of a detached garage. *Id.* "The bushes were either directly across from the roof or off to a ninety degree angle. None of the detectives saw the defendant throw anything on the roof and no fingerprints were found on the bags of cocaine." *Id.* at 490, 581 S.E.2d at 811. "Defendant had $830.00 in cash on his person." *Id.* at 487, 581 S.E.2d at 809. The cellphone the defendant had been using was found in the front yard of the house; a second cellphone was found in his car. *Id.* Officer detected "the odor of cocaine" in the car but found no drugs inside. *Id.* at 490, 581 S.E.2d at 811. "Following *Chavis*," we held that

"substantial evidence of possession was not presented in this case." *Id.* at 489, 581 S.E.2d at 810.

In the case *sub judice*, the trial court cited *Sinclair* in denying defendant's motion to dismiss. In *Sinclair*, we relied on the following "[i]ncriminating circumstantial evidence of Defendant's possession of the cocaine" to uphold the trial court's denial of his motion to dismiss a possession charge:

> Defendant fled upon learning that [Officer] Davis wanted to search him; Defendant kept his hands in front of him during the chase; the bag [of cocaine] was found on the precise route Defendant took while being chased by the officers; the bag was found on top of the grass that was bent during the chase; and the bag was "clean and undisturbed."

Sinclair, 191 N.C. App. at 492-93, 663 S.E.2d at 872. We concluded "these circumstances create a reasonable inference that the crack cocaine found on the ground shortly after Defendant was apprehended came from Defendant." *Id.* at 493, 663 S.E.2d at 872.

After careful review, we find the State failed to adduce substantial evidence of defendant's possession of the FNH S40 handgun. The State adduced no evidence to confirm the dispatcher's report of an armed robbery at 925 South 3rd Street, much less of defendant's involvement in an armed robbery. Although Officer Galluppi observed a black object resembling a remote control in defendant's hand, no witness saw defendant holding a gun. We note Officer Galluppi made this observation while using a flashlight in the dark. When defendant was detained, officers found wads of

currency and a cellphone on his person, any of which could have been in his hand at the start of the chase.

The handgun was found near two trash cans located along defendant's general path of flight from Officer Galluppi. No witness placed defendant in particular proximity to the trash cans or saw him make any motions suggestive of depositing an item there. *See State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996). Unlike the "clean" bag of cocaine found in *Sinclair*—which was both "on the precise route Defendant took while being chased" and "*on top of the grass that was bent during the chase*"—the gun in this case had loose dirt in front of it and on top of it, giving no indication of how long it had been on the ground. *Sinclair*, 191 N.C. App. at 493, 663 S.E.2d at 872 (emphasis added). Finally, neither the gun's serial number nor any physical evidence such as defendant's fingerprints or DNA linked him to the weapon. *See Battle*, __ N.C. App. at __, 799 S.E.2d at 437; *Acolatse*, 158 N.C. App. at 490, 581 S.E.2d at 811.

In the absence of additional circumstances tending to connect defendant to the firearm, we hold the trial court erred in denying his motion to dismiss. *Compare Lindsey*, 219 N.C. App. at 260, 725 S.E.2d at 357 (finding evidence insufficient to show defendant's possession of the bag of cocaine found near his van in a parking lot) *with id.* at 265, 725 S.E.2d at 360 (Steelman, J., dissenting in part, adopted by Supreme Court in 366 N.C. 325, 734 S.E.2d 570) (finding additional circumstantial

evidence sufficient to link the defendant to the bag of marijuana found near his van in the parking lot). The judgment is hereby reversed.

REVERSED.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).