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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-61

Filed: 2 July 2019

Guilford County, Nos. 18 CRS 24282, 68561-64

STATE OF NORTH CAROLINA

v.

DANIEL JAY SCOTT, JR.

Appeal by defendant from judgment entered 8 August 2018 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 10 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Taylor Hampton Crabtree, for the State.

W. Michael Spivey for defendant-appellant.

ZACHARY, Judge.

Defendant Daniel Jay Scott, Jr., appeals from a judgment entered upon jury verdicts finding him guilty of possession of a firearm by a felon, resisting a public officer, possession of marijuana, and possession of marijuana paraphernalia, and upon his guilty plea to attaining habitual felon status. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

Defendant was arrested during a traffic stop on 18 February 2018, and was later indicted by a Guilford County Grand Jury for carrying a concealed gun, resisting a public officer, possession of a firearm by a felon, possession of marijuana, possession of marijuana paraphernalia, assault on a government official, and attaining habitual felon status.

Defendant's case came on for trial on 7 August 2018 in Guilford County Superior Court before the Honorable L. Todd Burke. The State's evidence tended to show that on 18 February 2018, a Greensboro Police Department officer conducted a traffic stop of a vehicle with an expired registration. Defendant was driving the car when the officer initiated the stop. There was a male passenger sitting in the front seat and a female passenger sitting in the back seat on the driver's side behind Defendant. During the traffic stop, Defendant was unable to produce identification and gave a false name. The officer smelled marijuana and called for assistance.

Once another officer arrived, the first officer told Defendant that he smelled marijuana and asked Defendant to step out of the vehicle. The officer informed Defendant that he was being detained, but was not under arrest at that time. Defendant exited the vehicle and, as the officer reached for handcuffs, Defendant fled on foot. The officer pursued Defendant on foot for a short time before Defendant gave himself up. After detaining Defendant, the officer searched Defendant's person and

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found marijuana in his pocket. Other officers at the scene detained the passengers and searched the vehicle. A loaded handgun was found under the front lip of the driver's seat. A digital scale with what officers believed to be marijuana residue on it was found in the vehicle's center console. Prescription pills belonging to Defendant's girlfriend were also found in a bag in the driver's door.

At the close of the State's evidence, Defendant moved to dismiss all charges due to insufficiency of the evidence. Specifically, Defendant argued that there was insufficient evidence of possession to support the charges of possession of a firearm by a felon and possession of marijuana paraphernalia. The trial court denied Defendant's motion.

Defendant called a single witness, his girlfriend at the time of the incident. The witness testified that the vehicle Defendant was driving was registered to her brother, but the car was hers because she had taken over the payments. According to the witness, Defendant drove the vehicle whenever he needed to go somewhere and had driven it earlier in the day on 18 February 2018, but he was merely moving the car across the street when he was stopped by police. The witness further testified that the prescription pills and the handgun found in the vehicle were hers.

At the close of all of the evidence, Defendant renewed his motion to dismiss all charges due to insufficiency of the evidence. The trial court dismissed the assault on

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an officer charge, but denied Defendant's motion with respect to the remaining charges.

On 8 August 2018, the jury returned verdicts finding Defendant guilty of possession of a firearm by a felon, resisting a public officer, possession of marijuana, and possession of marijuana paraphernalia, but not guilty of carrying a concealed gun. While preserving his right to appeal, Defendant then pleaded guilty to attaining habitual felon status pursuant to an agreement whereby the State stipulated to mitigating factors and agreed that Defendant would receive a mitigated sentence of 66 to 92 months' imprisonment. The trial court accepted the plea, found that a mitigated sentence was justified, consolidated the offenses for judgment, and entered judgment sentencing Defendant in accordance with the agreement. Defendant gave oral notice of appeal in court.

Discussion

Defendant's sole argument on appeal is that the trial court erred by denying his motion to dismiss the charges of possession of a firearm by a felon and possession of marijuana paraphernalia due to insufficiency of the evidence.

"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, *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). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (citation and quotation marks omitted).

When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted).

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Defendant was convicted of possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-415.1(a). “There are two elements to possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Mitchell*, 224 N.C. App. 171, 176, 735 S.E.2d 438, 442-43 (2012) (quotation marks omitted), *appeal dismissed and disc. rev. denied*, 366 N.C. 578, 740 S.E.2d 466 (2013); *see also* N.C. Gen. Stat. § 14-415.1(a) (2017).

At trial, Defendant stipulated that he was previously convicted of a felony. Thus, the only issue is whether there was substantial evidence that Defendant possessed the handgun found in the vehicle.

Defendant was also convicted of possession of marijuana paraphernalia. N.C. Gen. Stat. § 90-113.22A makes it illegal for any person to possess with intent to use drug paraphernalia related to marijuana. *See* N.C. Gen. Stat. § 90-113.22A(a) (2017). Defendant does not dispute that there was sufficient evidence to support that the scale found in the vehicle was marijuana paraphernalia. Instead, Defendant argues that there was insufficient evidence that he possessed the scale.

The same law on possession applies to the offenses of possession of a firearm by a felon and possession of marijuana paraphernalia:

Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

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State v. Alston, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citation omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

Here, Defendant did not have actual possession of either item. The handgun was found under the front lip of the driver's seat, and the scale was found in the vehicle's center console. Consequently, the State was required to present evidence to establish constructive possession.

Generally, “[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.” *Miller*, 363 N.C. at 99, 678 S.E.2d at 594.

Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry. In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of this Court's cases reveals that we have considered the following factors: (1) the defendant's ownership and occupation of the property . . . ; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

State v. Chekanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018) (citation omitted).

However, this Court has explained that in vehicle cases,

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[a]n inference of constructive possession can arise from evidence which tends to show that a defendant was the custodian of the vehicle where the contraband was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where contraband was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury.

Mitchell, 224 N.C. App. at 177, 735 S.E.2d at 443 (quoting *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562, *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011) (original alterations omitted)).

Recently, in *State v. Wirt*, __ N.C. App. __, 822 S.E.2d 668 (2018), this Court affirmed the inference of constructive possession recognized in *Best* and *Mitchell*. In doing so, we rejected an argument based on language in *Chekanow* that evidence of other incriminating circumstances should be required in vehicle cases, explaining that

[o]ur Supreme Court denied review in both *Best* and *Mitchell*. We believe had the Supreme Court intended to overrule this Court's prior holdings that power to control the automobile where the contraband was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession, it would have done so explicitly.

Wirt, __ N.C. App. at __, 822 S.E.2d at 672. Our Court then held that the defendant's dominion and control as driver of the vehicle, combined with "additional incriminating evidence," sufficiently gave rise to an inference that he constructively

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possessed the methamphetamine and firearm found in the truck, even though a passenger was also present. *Id.* at ___, 822 S.E.2d at 671-72.

In the instant case, Defendant argues that there was insufficient evidence of incriminating circumstances to establish that he constructively possessed either the handgun or the scale found in the vehicle. However, Defendant does not address the inference of constructive possession that results from his dominion and control as driver of the vehicle. As it is undisputed that Defendant was the driver of the vehicle, that inference is enough to support the trial court's denial of Defendant's motion to dismiss.

Nevertheless, just as our Court did in *Wirt* and *Best*, we note that the State presented additional evidence of incriminating circumstances, other than Defendant's dominion and control as driver of the vehicle, to establish his constructive possession of the handgun and scale. *See id.* at ___, 822 S.E.2d at 672; *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562.

First, Defendant drove the vehicle on other occasions, including earlier on the same day that he was stopped. Second, the handgun and scale were found in close proximity to where Defendant was sitting when the vehicle was stopped. The handgun was found underneath the front lip of the driver's seat, and the scale was found in the center console next to the driver's seat. Third, Defendant did not produce identification and gave officers a fake name. Fourth, Defendant fled on foot after the

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officer asked him to step out of the vehicle and told him that he was being detained. Fifth, specifically related to the scale, officers found marijuana in Defendant's pocket during a search of his person. *See State v. Sawyers*, __ N.C. App. __, __, 808 S.E.2d 148, 153-54 (2017) (“[D]efendant was driving the Charger immediately before the accident. Sergeant Crane discovered the pipe on the driver’s side floorboard of the vehicle, and he detected an odor of marijuana in the pipe. Furthermore, when Trooper Johnson discovered a small amount of marijuana on defendant’s person, defendant admitted that the contraband belonged to him. The jury could reasonably infer from these circumstances that defendant constructively possessed the pipe and intended to use it to smoke the marijuana that he actually possessed.” (citation omitted)).

Defendant acknowledges this evidence of incriminating circumstances, but downplays its significance and instead directs the Court’s attention to the favorable testimony of his own witness. However, in reviewing a motion to dismiss, the evidence must nevertheless be viewed in the light most favorable to the State. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. Considered in the light most favorable to the State, we conclude that the evidence was sufficient for the jury to find that Defendant constructively possessed both the handgun and the scale. Therefore, the trial court did not err in denying Defendant’s motion to dismiss.

NO ERROR.

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Judges STROUD and BERGER concur.

Report per Rule 30(e).