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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-320

Filed: 19 May 2020

Mecklenburg County, No. 17 CRS 021112-14, 021116-17

STATE OF NORTH CAROLINA

v.

KENNETH BERNARD DOUGLAS, Defendant.

Appeal by Defendant from judgments entered 27 July 2018 by Judge Joseph N. Crosswhite in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

MURPHY, Judge.

Where a person does not have exclusive possession of real property where a controlled substance is found, he may still be found to have constructive possession of the controlled substance. When considering constructive possession, we apply a totality of the circumstances analysis and consider the defendant's (1) ownership and occupation of the premises where the contraband is found, (2) proximity to the

contraband, and (3) suspicious behavior at or near the time of the contraband's discovery, as well as (4) other evidence found in the defendant's possession linking the defendant to the contraband, and (5) indicia of the defendant's control over the place where the contraband is found. When a defendant makes a statement strongly indicating dominion and control over the contraband, even this single factor can be enough to indicate both constructive possession of the contraband, as well as intent regarding disposition of the same.

Defendant, Kenneth Bernard Douglas, argues the trial court erred by denying his motion to dismiss the charges of Class 1 misdemeanor possession of drug paraphernalia (a digital scale and plastic baggies), Class 3 misdemeanor possession of up to one-half ounce of marijuana, and Class H felony possession with intent to sell or deliver methamphetamine. The State presented sufficient evidence to support Defendant's constructive possession of drug paraphernalia, marijuana, and methamphetamine, as well as Defendant's intent to sell or deliver methamphetamine, and the trial court properly denied Defendant's motion to dismiss. Defendant was also convicted of possession with intent to sell or deliver cocaine; the trial court arrested judgment for that conviction.[1]

[1] Defendant also argues we should vacate his conviction for possession with intent to sell or deliver cocaine because the trial court arrested judgment for that charge. We find no error regarding the trial court's denial of Defendant's motion to dismiss, rendering Defendant's argument concerning the arrested judgment moot. *See State v. McLemore*, 343 N.C. 240, 250, 470 S.E.2d 2, 7 (1996); *see also State v. Moore*, 339 N.C. 456, 468, 451 S.E.2d 232, 238 (1994).

BACKGROUND

The Charlotte-Mecklenburg Police Department ("CMPD") received information regarding Defendant's illegal narcotics activity, and Officers Scottie Carson and Marquis Turner visited the apartment identified in the tip in order to conduct a knock-and-talk with Defendant. Officer Carson knocked on the door, no one answered, and both officers could hear individuals moving around inside the apartment. The scent of marijuana emanated from the apartment when the officers knocked on the door. When no one answered the door after multiple knocks, the officers left, while undercover Officer Patrick White remained in the parking lot surveilling the apartment.

Shortly thereafter, Defendant and another individual exited the apartment and left the parking lot in a black Mercury Milan. Officer White gave the following testimony:

> [State:] Did you see anyone go inside that apartment while you were watching?
>
> [White:] While I was on scene, I did not observe anybody go inside.
>
> [State:] Did you see anyone come out of that apartment while you were watching it?
>
> [White:] While I was watching it, I did observe two subjects come out of the apartment and get into the black Mercury sedan.

[State:] And had you been given a description of people to be looking for?

[White:] I had a physical description and I had seen a photograph of the subject that was believed to be involved in illegal activity.

[State:] And who was that subject?

[White:] [Defendant]. . . .

[State:] What did you observe about those two people?

[White:] I didn't pay a lot of attention to the female mainly because I was trying to get an identification on the male subject that I observed come out of the residence. Both subjects *exited the residence out of the primary front door*, walked out of the breezeway and walked to the black Mercury sedan which was parked almost directly in front of the breezeway, and got into the vehicle.

[State:] The male person that you saw leave that residence, did he match the physical description that you had been given?

[White:] Yes, he did.

[State:] Did you see who got into the driver's side of the vehicle?

[White:] The male did.

[State:] And you mentioned a breezeway. Describe the breezeway for the jury.

[White:] When facing the building there -- it's a -- a wide apartment complex and it's got two breezeways because each side has a stairwell

> that goes up, but this building is unique in that most apartment complexes that we come across the breezeway cuts all the way through to both sides of the building; this one does not. So each breezeway has access to the four units on that face of the building. The Defendant's apartment was the downstairs left room. The staircase was on the right-hand side, it leads up to the access on the two which makes it difficult to see the back right-hand door, but *I was able to position my vehicle in the parking lot so that I could see directly into the breezeway past the staircase to the Defendant's door*.

(Emphasis added). After Officer White notified them of Defendant's exit, Officers Carson and Turner spotted the Mercury Milan, confirmed Defendant was the driver, and, knowing Defendant's license to be revoked, stopped the vehicle.

During the traffic stop, the scent of marijuana emanated from the vehicle. After obtaining identification from both Defendant and the passenger, and preparing a citation for driving while license revoked, Officer Carson asked Defendant to step out of the vehicle and conducted a pat down search of Defendant, finding $660.00 in Defendant's right rear jeans pocket and $20.00 in Defendant's right front pocket. Officer Turner also asked the passenger to exit the vehicle and patted her down. While Defendant and the passenger stood with other officers, a search of the vehicle revealed two crack pipes in the passenger's purse. Officer Allison Owen conducted a further search of the female passenger and discovered a contact lens case in her bra that contained suspected crack cocaine.

Officer Carson testified as follows:

> So in -- through my training and my experience, I've arrested individuals who will use a *two-person method*, where one individual will hold the cash and one individual will hold the narcotics. And the reason for that is if they're approached by officers they'll split and you got a 50-50 chance of getting away. . . .
>
> Just from, you know, my -- my experience in arresting individuals who do sell narcotics, that loose [$]20[.00] is change . . . . [Y]ou're not pulling from the main wad to get -- so if I was to sell an individual something, I'm not going to pull out $660[.00] in front of them.[2]

(Emphasis added). Based upon these searches of Defendant, the passenger, and the vehicle, Officer Carson arrested Defendant and his passenger.

Defendant called his aunt to retrieve the vehicle from the scene. Defendant's aunt lived at the apartment officers had surveilled earlier, and she gave written consent to search the apartment. Officers Thompson and Hager met her at the apartment and conducted a search of the premises.

During a search of the apartment's kitchen area, in a cabinet above the stove, officers found approximately 34.5 grams of suspected crack cocaine, approximately 41 suspected Ecstasy pills, and three grams of marijuana. The State's forensic chemist later determined the pills were actually methamphetamine. In another

[2] Although Defendant objected to this evidence at trial, he does not challenge this evidence on appeal, and we do not consider its admissibility. N.C. R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

cabinet, above the sink, officers also found sandwich bags, a digital scale, and white powdery residue consistent with crack cocaine.

On the dining room table, officers located a broken DMV identification card bearing Defendant's name, but a different address than the apartment. In the living room area, officers found multiple jewelry-sized Ziploc bags inside a pair of tennis shoes near an end table.

After the arrest and subsequent search of the apartment, Defendant placed a telephone call from jail on 16 January 2018. During the recorded call, Defendant said "[CMPD] took me to the precinct, click-clack me to the table, went to auntie's house, *got the work*, came back and charged me with it." (Emphasis added). Over defense counsel's objection, the trial court admitted the recording and allowed the State to publish it to the jury.[3]

After the State presented its evidence, Defendant moved the trial court to dismiss all charges for insufficient evidence; the trial court denied Defendant's motion. Defendant presented no evidence and again moved to dismiss all charges; the trial court denied Defendant's renewed motion to dismiss.

ANALYSIS

[3] Although Defendant objected to this evidence at trial, he does not challenge this evidence on appeal, and we do not consider its admissibility. N.C. R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

We review the "trial court's denial of [Defendant's] motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Our review of the trial court's denial of Defendant's motion to dismiss examines whether the State presented sufficient "evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.*; N.C.G.S. § 15A-1227 (2019). To be sufficient, the State must present "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 reviewing the evidence regarding a trial court's denial of a motion to dismiss, "we must view the evidence in the light most favorable to the [S]tate and allow the [S]tate every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980). "Contradictions and discrepancies are for the jury to resolve[.]" *Id.*

Defendant argues the trial court erred in denying his motion to dismiss for two reasons: (1) the State failed to produce sufficient evidence he possessed the controlled substances and paraphernalia, as he had non-exclusive possession of the apartment; and, (2) the State failed to produce sufficient evidence of his intent to sell or deliver methamphetamine. These possession and intent elements are the only elements at issue on appeal.

Defendant correctly notes the State did not prove Defendant's actual possession of controlled substances or paraphernalia. Instead, the State argued Defendant constructively possessed the controlled substances and paraphernalia. To support this argument on appeal, Defendant claims the State failed to produce sufficient evidence of *incriminating circumstances* supporting Defendant's possession of the controlled substances and paraphernalia located in the apartment.

When, as in the present case, a defendant does not have exclusive possession of a premises, we consider the following factors in determining whether sufficient "incriminating circumstances demonstrating the defendant has dominion or control over the contraband . . . exist to support a finding of constructive possession":

> (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, 494-96, 809 S.E.2d 546, 551-52 (2018). Noting that "[n]o one factor controls," we consider the totality of the circumstances and analyze each factor. *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552.

First, we consider whether Defendant owned and occupied the property. *Id.* at 496, 809 S.E.2d at 551. Defendant's aunt lived at the apartment under surveillance before the traffic stop, and she consented to the search of the premises. The State presented no evidence that Defendant owned the property. However, Defendant

exited the apartment a short time before officers searched the apartment, and officers located a DMV identification card bearing Defendant's name in the searched apartment. When viewing the evidence in the light most favorable to the State, Defendant's occupation of the apartment without ownership shows a degree of control of the apartment and supports a finding of constructive possession. *See State v. Miller*, 363 N.C. 96, 99-101, 678 S.E.2d 592, 594-95 (2009).

Second, we analyze Defendant's "proximity to the contraband . . . in terms of space and time." *Chekanow*, 370 N.C. at 497, 809 S.E.2d at 553. Defendant left the apartment containing the controlled substances and paraphernalia earlier the same evening as his arrest; he drove a black Mercury Milan. CMPD officers arrested Defendant after a traffic stop in the same Mercury Milan and searched the apartment that same evening after the resident arrived at the location of Defendant's arrest, gave her written consent, and met the officers at the apartment. Our Supreme Court has held that evidence of a defendant's presence in the location "within two days of the search provides a sufficient link between defendant and the contraband to survive a motion to dismiss" concerning constructive possession. *State v. Bradshaw*, 366 N.C. 90, 97, 728 S.E.2d 345, 350 (2012). Viewing the evidence in the light most favorable to the State, this factor supports a finding of constructive possession, particularly due to the temporal proximity between Defendant's presence in the apartment and the search and seizure of the contraband.

Third, we consider whether Defendant's behavior was suspicious "at or near the time of the contraband's discovery." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552. Despite Defendant's apparent nervousness at the time of the traffic stop, we do not find an individual's nervous behavior at a traffic stop to be sufficient evidence of suspicious behavior. A traffic stop is an occasion for nervousness, even for an individual who has no knowledge of wrongdoing. Evidence of nervous behavior at the time of a traffic stop, even when viewed in the light most favorable to the State, by itself does not support a finding of constructive possession. *See State v. Butler*, 356 N.C. 141, 147, 567 S.E.2d 137, 141 (2002).

Fourth, we consider "other evidence found in [Defendant's] possession that links [Defendant] to the contraband." *Id.* During a pat-down search, Officer Carson recovered $660.00 from Defendant's back pocket and $20.00 from Defendant's front pocket. Officer Carson testified that carrying a larger amount of money in a back pocket, while carrying a smaller amount of money in a front pocket, is common in narcotics sales. Officer Carson also testified that Defendant's possession of cash, while the passenger carried drugs, was a common tactic in narcotics sales called the "two-person method." Drawing reasonable inferences in favor of the State concerning Defendant's participation in the sale of narcotics, this factor supports a finding of constructive possession.

Fifth, and most importantly for our analysis here, we consider "indicia of [Defendant's] control over the place where the contraband is found." *Id.* Our Supreme Court has held the "indicia of the defendant's control" factor is one of the most commonly considered factors in the constructive possession analysis. *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348 (quoting *Miller*, 363 N.C. at 100, 678 S.E.2d at 595). In his telephone call from jail, Defendant stated "[CMPD] took me to the precinct, click-clack me to the table, went to *auntie's house*, *got the work*, came back and charged me with it." (Emphasis added). Defendant's statement indicated knowledge that contraband was at the apartment, or "auntie's house," which he left on the evening in question. A reasonable inference from Defendant's reference to "the work" is that "the work" was slang for the contraband seized in the apartment. A reasonable inference from Defendant's statement, particularly his familiarity with the location and the contraband, or "the work," is that he believed the contraband in the apartment was his to use or sell, prior to the confiscation of the contraband. Defendant's statement and evidence of his presence within the apartment on the night in question also reasonably indicate that Defendant had access to, and the ability to exercise dominion and control over, the contraband, or "the work," in that location. A reasonable inference from Defendant's reference to "the work" is Defendant had dominion and control over the controlled substances and paraphernalia within the apartment, despite the reference to "auntie's house."

A reasonable mind could accept the following conclusion from the relevant evidence presented of Defendant's telephone call and eyewitness testimony that Defendant exited the apartment: Defendant had access to his aunt's apartment on the night in question, he exercised a degree of dominion and control over that apartment on the night in question, and he also exercised dominion and control over the contraband on the night in question. *See Smith*, 300 N.C. at 78-79, 265 at 169. Since the jury resolves contradictions and discrepancies in the evidence, this fifth factor's reasonable inferences, when drawn in favor of the State, strongly support a finding of constructive possession. *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925.

Assuming *arguendo* the State's evidence, sans Defendant's jailhouse telephone call, did not qualify as sufficient evidence of constructive possession, we find Defendant's jailhouse telephone call is itself sufficient evidence that, with all reasonable inferences drawn in favor of the State, supports the trial court's denial of Defendant's motion to dismiss. Defendant's telephone call, even if minimizing our consideration of the other factors of the *Chekanow* totality of the circumstances analysis, and with all reasonable inferences drawn in favor of the State, constituted sufficient evidence of each essential element of the offenses charged and that Defendant was the perpetrator of the offenses. *Chekanow*, 370 N.C. at 492-93, 809

S.E.2d at 549-50. The trial court properly denied Defendant's motion to dismiss the charges of possession of controlled substances and paraphernalia.

Furthermore, Defendant's jailhouse telephone call supports the trial court's denial of Defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. A reasonable inference from Defendant's reference to "the work" located in "auntie's house" was that Defendant constructively possessed the methamphetamine located in Defendant's aunt's apartment, that Defendant considered that methamphetamine to be for sale, and Defendant intended to sell said methamphetamine as his "work." When we view the evidence in the light most favorable to the State, Defendant's jailhouse telephone call is a significant indicator of his control over and intentions for the methamphetamine seized from the apartment. The trial court properly denied Defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine and allowed the jury to consider the evidence.

CONCLUSION

The trial court's denial of Defendant's motion to dismiss was proper, as the State presented sufficient evidence of his constructive possession of the controlled substances and paraphernalia, as well as his intent to sell or deliver the methamphetamine.

NO ERROR.

Judges STROUD and BROOK concur.

Report per Rule 30(e).