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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-551

No. COA20-678

Filed 5 October 2021

Union County, No. 19 CRS 50151

STATE OF NORTH CAROLINA

v.

GORDON LAWRENCE COX, JR.

Appeal by defendant from judgment entered 11 March 2020 by Judge Claire V. Hill in Union County Superior Court. Heard in the Court of Appeals 10 August 2021.

*Attorney General Joshua H. Stein, by Associate Attorney General Robert J. Pickett, for the State.*

*Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant.*

DIETZ, Judge.

¶ 1 Defendant Gordon Cox appeals his conviction for heroin trafficking. On appeal, he argues that the trial court erred by denying his motion to suppress and his motion to dismiss.

¶ 2 As explained below, we reject Cox's arguments. With respect to the motion to suppress, the arguments Cox asserts on appeal are newly raised and were not

presented to the trial court. Those arguments are therefore waived on appeal.

¶ 3 With respect to the motion to dismiss, the State presented substantial evidence that Cox had sufficient dominion and control over the heroin to support a finding of possession. We therefore find no error in the trial court's judgment.

### **Facts and Procedural History**

¶ 4 In 2019, an anonymous informant told law enforcement officers that Gordon Cox and Justin Carter would be traveling on roads near the South Carolina border in a gray Jeep at a specific date and time. The informant told the officers that Cox and Carter would go to a home just over the border in South Carolina to pick up narcotics and then return to Union County to distribute them.

¶ 5 The Union County Narcotics Task Force set up a number of cars along the route. Lieutenant Baker and Sergeant Cathey began following the Jeep when they saw it traveling along the predicted route. Detective Little pulled in behind the Jeep when it passed by, following it to the state line, where he stopped. Lieutenant Baker and Sergeant Cathey continued into South Carolina, where they saw an unspecified individual go into a residence for a brief time before returning to the Jeep. The Jeep retraced its route to North Carolina. Detective Little saw the Jeep speeding as it returned along the same route once it reentered North Carolina. At the same time, Detective Gross, another narcotics agent stationed along the road, paced the Jeep going 75 mph in a 55 mph zone and initiated a traffic stop.

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¶ 6 At the time of the stop, Cox was in the back passenger seat. Detective Little approached the passenger side of the car. He noted that Cox appeared unusually nervous. Detective Little gave Cox instructions to place his hands on the back of the headrest. He told Cox to stop kicking his feet and reaching down to the floorboard. Cox refused to comply.

¶ 7 Concerned that Cox was concealing or reaching for a weapon, Detective Little ordered Cox and Carter out of the car. Cox placed his boot heel on top of a small black reinforced box. After ordering them out of the car, Detective Little searched Carter and found a bag that appeared to contain heroin. Detective Little also searched the box because Cox had been reaching for it, and because a police dog alerted to the presence of additional drugs in the front and rear passenger areas. Detective Little found what appeared to be heroin in the box. The State Crime Laboratory later tested the seized substance and concluded that it was 9.3 grams of heroin. Cox stipulated to the admission of the laboratory report. The officers arrested Cox.

¶ 8 Later that day, while in jail, Cox made a number of monitored phone calls. In one call with his girlfriend, he described how he wished that he had put the heroin under the car. In a call with his mother, he stated that the drugs were on the floor. On cross-examination, he admitted to a third call in which he told a bondsman that he was in jail for having eight or nine grams of heroin.

¶ 9 Cox moved to suppress the evidence seized during the traffic stop. The trial

court held a hearing on the motion and denied it in a written order with findings of fact and conclusions of law.

¶ 10 The jury convicted Cox of trafficking heroin by possession of more than four grams but less than fourteen grams. The trial court sentenced him to 70 to 93 months in prison. Cox appealed.

### **Analysis**

#### **I. Motion to suppress**

¶ 11 Cox first challenges the trial court's denial of his motion to suppress, arguing that the search of the vehicle and his arrest were not supported by probable cause. As explained below, this issue was not preserved for appellate review on direct appeal.

¶ 12 “[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 304 (2019). This Court has held that when a criminal defendant moves to suppress evidence, the defendant “is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below.” *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013).

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¶ 13 Our Supreme Court has emphasized that this rule is particularly critical when dealing with a motion to suppress because, if the defendant does not assert the argument in the trial court, “the State does not get the opportunity to develop a record pertaining to the defendant’s Fourth Amendment claims.” *State v. Miller*, 371 N.C. 266, 270, 814 S.E.2d 81, 84 (2018). Thus, a defendant cannot assert suppression arguments for the first time on appeal; a defendant who fails to raise the issue in the trial court has “completely waived appellate review of his Fourth Amendment claims.” *Id.* at 273, 814 S.E.2d at 85.

¶ 14 Here, Cox moved to suppress on the ground that law enforcement lacked reasonable suspicion to conduct the stop. The affidavit accompanying the motion states that law enforcement’s purported reason for initiating the traffic stop “was both inaccurate and a pretext to conduct a search.” The affidavit further asserts that “a good faith basis to challenge the legality of the stop of the motor vehicle is in question in this matter.”

¶ 15 At the hearing on the motion, the only evidence presented concerned the propriety of the traffic stop. Cox’s counsel did not make any legal arguments on the issues raised in this appeal and did not present any evidence on those issues. At the conclusion of that evidence, the trial court announced that it would “do a more detailed order, but based on the testimony of Detective Gross in this matter I’m going to find that he had a reasonable articulable suspicion in which to stop the gray Jeep

on this date, I believe it was the 8th of January of 2019.” The court then explained that the motion to suppress “will be denied.”

¶ 16 Finally, the trial court’s order on the motion to suppress states that the motion “challenges the officer’s legal basis for stopping the vehicle on January 8, 2019, in which the defendant was a passenger.” Likewise, the trial court’s findings of fact dealt exclusively with whether there was reasonable suspicion to initiate the stop. Nowhere in the trial record did Cox inform the trial court that the court’s order did not address all of his arguments or seek a ruling on any other issues.

¶ 17 Now, on appeal, “Cox agrees that after the facts and circumstances have been presented, the investigative stop of the vehicle appears to conform” with the law. But, Cox argues that “the full search of the vehicle and his person and his arrest were not supported by probable cause.”

¶ 18 The record demonstrates that this is a new argument, not presented to the trial court, nor ruled upon by the trial court, and thus not one we can address. *Hernandez*, 227 N.C. App. at 608, 742 S.E.2d at 829. By failing to raise this argument and secure a ruling on it, Cox waived his right to appellate review. *Miller*, 371 N.C. at 273, 814 S.E.2d at 85.

## **II. Motion to dismiss**

¶ 19 Cox next challenges the trial court’s denial of his motion to dismiss, contending that the State did not present substantial evidence that he possessed the heroin. We

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review this issue *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A trial court properly denies a motion to dismiss if there is substantial evidence that the defendant committed each essential element of the charged offense. *Id.* “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* When reviewing for substantial evidence, we “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, 192–93, 451 S.E.2d 211, 223 (1994).

¶ 20 “Possession” in this criminal statute may be actual or constructive. *State v. Loftis*, 185 N.C. App. 190, 197, 649 S.E.2d 1, 6 (2007). A defendant has actual possession if the substance is on his person, he is aware of its presence, and “either by himself or together with others he has the power and intent to control its disposition or use.” *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 805 (2006).

¶ 21 By contrast, constructive possession requires an inference. It exists when the defendant has sufficient “intent and capability to maintain control and dominion” over the substance so that possession can be inferred. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270–71 (2001). When relying on constructive possession, if the defendant does not have exclusive possession of the place where the substance is found, “the State must show other incriminating circumstances before constructive

possession may be inferred.” *Id.* at 552, 556 S.E.2d at 271.

¶ 22 Here, the State presented evidence that they were investigating Cox for possible drug trafficking based on an anonymous tip. At trial, Cox testified that he went to South Carolina to buy heroin and that he knew there was heroin in the box recovered by law enforcement. Cox also admitted that he knew he had been caught with heroin.

¶ 23 When law enforcement officers approached Cox and spoke to him, Cox had his foot on the box containing the heroin and repeatedly reached for it during the traffic stop. Detective Little searched the box because Cox had been reaching for it and because a trained police dog alerted to the presence of drugs in the vehicle.

¶ 24 Once in jail, Cox made a number of monitored phone calls that further support the possession element. In one call with his girlfriend, he described how he wished that he had put the heroin under the car. When calling his mother, Cox stated that the drugs were on the floor during the arrest. On cross-examination, he admitted to a third call in which he told a bondsman that he was in jail for having eight or nine grams of heroin.

¶ 25 In sum, the State’s evidence was sufficient to allow a reasonable juror to find that Cox had sufficient dominion and control over the box, together with knowledge that the box contained the heroin, to support a finding of possession. Accordingly, the trial court did not err by denying the motion to dismiss.



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**Conclusion**

¶ 26

We find no error in the trial court's judgment.

NO ERROR.

Judges COLLINS and GORE concur.

Report per Rule 30(e).