

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-53

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 04 CRS 221286 and
04 CRS 221287

ERROL LLOYD ALLEN

Appeal by defendant from judgments entered 21 October 2004 by Judge Kimberly S. Taylor in Superior Court, Mecklenburg County. Heard in the Court of Appeals 21 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for the State.

Don Willey for defendant-appellant.

McGEE, Judge.

Errol Lloyd Allen (defendant) was convicted of one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transportation. Evidence at trial tended to show that the Los Angeles Police Department (LAPD) informed the Charlotte-Mecklenburg Police Department (CMPD) on 11 May 2004 that the LAPD had intercepted a United Parcel Service (UPS) package containing drugs. The LAPD informed Officer James Kolbay (Officer Kolbay) of the CMPD that the package was sent from a California address from someone named "Albert Buck" and that the package was intended for delivery to "Beverly Buck" at 640 Bilmark Avenue in

Charlotte, North Carolina. The LAPD agreed to send the package to Officer Kolbay after Officer Kolbay agreed to attempt a controlled delivery of the package to 640 Bilmark Avenue.

CMPD officers intercepted the package at approximately 8:00 a.m. on 12 May 2004 and determined that the package contained more than ten pounds of marijuana. Officer Daniel Thomas Phillips (Officer Phillips) testified that he dressed as a UPS driver and knocked on the door of the residence at 640 Bilmark Avenue at 2:33 p.m. on 12 May 2004. Officer Phillips testified that Delores McAfee opened the door and that he told her he had a package for Beverly Buck. Officer Phillips testified that Ms. McAfee called out "Buck" and defendant came to the door.

Officer Phillips further testified as follows:

I said again I have a package for Beverly Buck, is this the right place. [Defendant] didn't respond. I stated again is this the right place. [Defendant] nodded his head yes -- well, not yes, but [defendant] nodded his head in an up and down manner. . . . He signed the delivery record The name he signed appear[ed] to be . . . Martin James.

Officer Phillips also testified that he did not see what defendant did with the package after defendant signed for the package. However, the following colloquy occurred between the State and Officer Kolbay:

Q. Do you know from your radio transmissions what . . . defendant did with the package once he accepted it?

A. It was taken inside. It was moved a short distance away from the front door approximately ten to fifteen feet from the front door and set on the floor inside the residence.

Delores McAfee also testified that defendant brought the package into the house and set it down on the floor.

Pursuant to a search warrant, CMPD officers entered the residence at 640 Bilmark Avenue at approximately 2:36 p.m., on 12 May 2004. Officer Kolbay testified that he found the unopened UPS package on the floor about ten to fifteen feet from the door. Officer Phillips also testified that he found a pair of defendant's pants in defendant's room in the residence. Officer Phillips testified he found a piece of paper inside one of the pockets of defendant's pants. The name "Albort Buck" was written on the piece of paper.

Defendant was convicted of one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transportation pursuant to N.C. Gen. Stat. § 90-95(h)(1) (2003), which provides:

Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars (\$5,000)[.]

Defendant appeals.

Defendant concedes there "was arguably sufficient evidence to sustain a conviction for trafficking by possession[.]" Defendant

argues "[t]he trial court erred in denying [defendant's] motions to dismiss at the close of the State's case and at the close of all of the evidence on the charge of trafficking by transporting." Defendant moved to dismiss the charge of trafficking in marijuana by transportation at the close of the State's evidence. In support of his motion, defendant argued there was insufficient evidence that defendant knowingly trafficked in marijuana. The trial court denied defendant's motion to dismiss. Defendant renewed his motion to dismiss the charge of trafficking in marijuana by transportation at the close of all the evidence. Defendant again argued the State had presented insufficient evidence on the knowledge element of the crime, and the trial court again denied defendant's motion.

On appeal, defendant argues the trial court erred in denying his motions to dismiss because there was insufficient evidence that defendant transported the marijuana. Pursuant to N.C.R. App. P. 10(b)(1), "[i]n order to preserve a question 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." Defendant moved to dismiss at the close of the evidence based only upon defendant's "knowledge or lack of knowledge" of what was contained in the package. Therefore, defendant did not preserve the issue of whether the State presented sufficient evidence on the transportation element of trafficking in marijuana by transportation by failing to object upon that ground at trial, and we do not address the issue. See,

e.g., *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195, *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995).

Defendant next argues "the trial court lacked subject matter jurisdiction to accept the jury's verdict on the charge of trafficking by transporting marijuana." Although defendant did not object to a lack of subject matter jurisdiction at trial, a challenge to a trial court's exercise of subject matter jurisdiction may properly be raised for the first time on appeal. *State v. Price*, ___ N.C. App. ___, ___, 611 S.E.2d 891, 895 (2005).

Defendant contends that the only act of transportation of the marijuana occurred in California and that no act of transportation took place in North Carolina. However, evidence admitted at trial, and one of the State's theories at trial, showed that defendant transported the marijuana within North Carolina by carrying the package from the doorway of the residence at 640 Bilmark Avenue to between ten and fifteen feet inside the residence. On appeal, the State argues its transportation theory is clearly supported by prior case law, including: *State v. Wilder*, 124 N.C. App. 136, 476 S.E.2d 394 (1996); *State v. McRae*, 110 N.C. App. 643, 430 S.E.2d 434, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 347 (1993); *State v. Greenidge*, 102 N.C. App. 447, 402 S.E.2d 639 (1991); and *State v. Outlaw*, 96 N.C. App. 192, 385 S.E.2d 165 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990). Our Courts have not ruled such a movement insufficient as a matter of law to constitute transportation; therefore, the State's theory and evidence at trial supported the trial court's exercise of subject

matter jurisdiction. Accordingly, we overrule this assignment of error.

Defendant failed to set forth his remaining assignments of error in his brief and we therefore deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges McCULLOUGH and JACKSON concur.

Report per Rule 30(e).