

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-709

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

STATE OF NORTH CAROLINA

Forsyth County  
No. 06 CRS 53895  
06 CRS 43083  
06 CRS 53957

v.

DAMON ENRICO THOMAS

# Court of Appeals

Appeal by Defendant from judgment entered 16 March 2007 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 29 November 2007.

## Slip Opinion

*Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley Jr., for the State.*

*Daniel F. Read, for Defendant.*

ARROWOOD, Judge.

\_\_\_\_\_Damon Enrico Thomas (Defendant) appeals from judgments entered 16 March 2007, convicting Defendant of driving while impaired, resisting a public officer, possession of cocaine, and of being an habitual felon. For the reasons discussed herein, we find no error.

\_\_\_\_\_The evidence tends to show, in pertinent part, the following: On 25 March 2006, Officer Kevin Bell (Officer Bell) of the Winston-Salem Police Department observed, at approximately 1:00 A.M., a car with the right front headlight burned out. After he followed the

car for a short distance, Officer Bell signaled the car to pull over for the infraction of driving without two working headlights. Officer Bell approached the car, occupied only by Defendant, and noticed that Defendant was "very nervous." His "hands were noticeably shaking and his lips were trembling" and his eyes were "red and glassy[.]" Officer Bell could smell the "strong odor" of alcohol on Defendant's breath, and Defendant's speech was "slow and slurred[.]"

When Officer Bell asked Defendant how many alcoholic beverages he had consumed, Defendant replied, "one beer." When asked for his license and registration, Defendant "fumbl[ed]" with papers in his passenger seat. He could not locate his registration but offered Officer Bell the same envelope, which did not contain his registration, three different times.

Officer Bell then asked Defendant to get out of the car for a sobriety test, and Defendant "tr[ied] to turn the car off, [but] it was already turned off[.]" Defendant also tried "to put the car in park, again, [but] it was already in park from where he had stopped the first time[.]" At this point, Sergeant Brian Clarke (Sergeant Clarke) arrived at the scene. Both Sergeant Clarke and Officer Bell witnessed Defendant get out of the car and quickly "stuff[] his hands into his pocket," in a manner that Officer Bell considered "aggressive[.]" Sergeant Clarke verified that as Defendant exited the car, "he initially put his hands up on top of the car, and then almost immediately . . . his right hand. . . [went] into his right pants pockets." Officer Bell grabbed

Defendant's arm, fearing that Defendant would obtain a weapon. Defendant "pushed off" the car and ran across the street and Officer Bell ran after him.

When Officer Bell finally caught Defendant, he placed him in custody and transported him to jail. Officer Peter Watkins (Officer Watkins), who was also present at the scene, testified that when policemen took Defendant into custody, "[h]e appeared very sluggish and he was vomiting." Officer Watkins stated that he "could smell an odor of alcohol on him[.]"

Meanwhile, Sergeant Clarke found a bag of five or six pieces of crack cocaine six inches from a driveway in the direct path of Defendant's flight. Sergeant Clarke testified that the area where the drugs were found "was wet, and the grass was . . . probably three to four inches long, so it gave the bag an opportunity to sit on top." Clarke said, "the grass was very wet, but that bag was just, it was dry." The State Bureau of Investigation later confirmed that the bag contained 1.8 grams of cocaine.

\_\_\_\_ Officer Bell also searched Defendant's vehicle, finding "an open bottle [of] Heineken beer[.]" Officer Bell stated that "there was still beer in the bottle, [and] it was still cold and . . . lying in the driver's floorboard." \_\_\_\_\_

\_\_\_\_ When Officer Bell talked to Defendant at the jail, Defendant said that "the room was spinning[.]" "[Defendant] kept swaying in the chair" and refused to answer any questions.

\_\_\_\_ On 5 June 2006, Defendant was indicted for possession with intent to sell and deliver cocaine in violation of N.C. Gen. Stat.

§ 90-95(a)(1), driving while impaired in violation of N.C. Gen. Stat. § 20-138.1, and resisting a public officer in violation of N.C. Gen. Stat. § 14-223. Defendant was also indicted for having attained the status of an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1.

These matters came to trial before a Forsyth County jury on 13 March 2007. The Defendant presented no evidence but made a motion to dismiss at the close of the State's evidence, which the court denied. The court declined to charge the jury on intent to sell and deliver cocaine, but rather, instructed the jury on the lesser offense, possession of cocaine. The jury found Defendant guilty of driving while impaired, resisting a public officer, possession of cocaine, and of having attained the status of an habitual felon.

On 16 March 2007, the trial court entered judgments on the foregoing convictions and sentenced Defendant to 100 to 129 months imprisonment for the convictions of felony possession of cocaine and of attaining the status of an habitual felon. Defendant was sentenced to 120 days incarceration and fined \$500.00 on the impaired driving conviction. Defendant was further sentenced to 60 days incarceration for the conviction of resisting a public officer to be served at the expiration of the sentence for possession of cocaine. From these judgments, Defendant appealed.

#### Jury Instruction

In his first argument, Defendant contends that the trial court erred by instructing the jury that the close proximity of the cocaine to Defendant was a circumstance from which the jury could

infer that Defendant had the power and intent to control its disposition or use. We disagree.

Our standard of review of Defendant's appeal requires us to hold a jury instruction "sufficient if it presents the law of the case in such [a] manner as to leave no reasonable cause to believe the jury was misled or misinformed." *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (internal quotation marks omitted). Moreover, this Court has held that:

[t]he party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

*Id.* (internal quotation marks omitted). To obtain relief, a defendant must not only show error, but prejudice. N.C. Gen. Stat. § 15A-1443 (2005). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a) (2005).

"When reviewed as a whole, 'isolated portions of [a charge] will not be held prejudicial when the charge as a whole is correct. [T]he fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal.'" *State v. Glynn*, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, *disc. review denied*, 360 N.C. 651, 637 S.E.2d 180 (2006) (quoting *State v.*

*McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971)); see also *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000).

In the instant case, the court instructed the jury that:

If you find beyond a reasonable doubt that a substance was found in close physical proximity to the Defendant, that would be a circumstance from which together with other circumstances you may infer that the Defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

Defendant argues that because the drugs were not found "in close proximity to him, but only near where he had [previously] been[,]" the court erred in giving this instruction. After reviewing the whole charge, we find this argument unconvincing.

In addition to the "close proximity" instruction, the court also instructed the jury on constructive possession:

A person has constructive possession of a substance if he does not have it on his person, but is aware of its presence, and has both the power and intent to control its disposition or use. A person's awareness of the presence of the substance and his power and intent to control the disposition or use may be shown by direct evidence or may be inferred from the circumstances.

Furthermore, the court explained that "the Defendant's physical proximity, if any, to the substance does not by itself permit an inference that the Defendant was aware of its presence or had the power or intent to control its disposition or use."

The evidence of Defendant's constructive possession of the cocaine - regardless of the jury's conclusion as to Defendant's physical proximity to the drug - is pronounced. When Officer Bell

stopped Defendant, he acted nervous; his hands were shaking; and his lips trembling. Defendant aggressively shoved his right hand into his pocket when Officer Bell told him to put his hands on the car; then, Defendant ran. Shortly thereafter, the drugs were found in Defendant's direct path of flight. Although it had been raining for the entire evening and the grass upon which the bag sat was wet, the bag of cocaine itself was dry. Significantly, the policeman saw no one besides Defendant in the area where the drugs were found.

After reviewing the trial court's jury instructions as a whole, and in light of the foregoing evidence, we conclude that there was no prejudicial error in the trial court's instructions regarding Defendant's physical proximity to the cocaine. See *State v. Thompson*, 37 N.C. App. 628, 246 S.E.2d 827 (1978), *aff'd*, 296 N.C. 703, 252 S.E.2d 776 (1979) (finding no prejudicial error after considering the instruction in context and in light of the strong evidence tending to show defendant's guilt of drug possession). This assignment of error is overruled.

#### Motion to Dismiss

In his second argument, Defendant contends that the trial court erred in denying Defendant's motions to dismiss and to set aside the verdict as to possession of cocaine because of insufficiency of the evidence to submit the case to the jury. Defendant contends that he did not have actual or constructive possession of the cocaine and that the evidence related to this essential element of possession was insufficient. We disagree.

“‘When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.’” *State v. McNeil*, 359 N.C. 800, 803, 617 S.E.2d 271, 273 (2005) (quoting *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004)) (internal quotation marks omitted). “‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion[.]” *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (quoting *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003)) (citation omitted). “‘If there is substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.’” *State v. Baublitz*, 172 N.C. App. 801, 809, 616 S.E.2d 615, 621 (2005) (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). The reviewing court considers all evidence “in the light most favorable to the State,” and the State receives the benefit of every “reasonable inference” supported by that evidence.” *Baublitz*, 172 N.C. App. at 809, 616 S.E.2d at 621.

“‘The standard of review of a trial court’s denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss[.]’” *State v. Parker*, \_\_ N.C. App. \_\_, \_\_, 651 S.E.2d 377, \_\_ (2007) (quoting



*State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000)).

The possession element of the offense of felony possession of cocaine "can be proven by showing either actual possession or constructive possession." *State v. Siriguanico*, 151 N.C. App. 107, 110, 564 S.E.2d 301, 304 (2002). "'Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics.'" *McNeil*, 359 N.C. at 809, 617 S.E.2d at 276 (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001)) (internal quotation marks omitted). When the person does not have "'exclusive possession of the place where the narcotics are found, the State must show *other incriminating circumstances* before constructive possession may be inferred.'" *McNeil*, 359 N.C. at 810, 617 S.E.2d at 276 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)). "'Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury.'" *Baublitz*, 172 N.C. App. at 810, 616 S.E.2d at 621 (quoting *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)).

The evidence in this case supporting constructive possession is compelling. As previously noted, when the police asked Defendant to put his hands on the car, Defendant aggressively put his right hand into his pocket; then, Defendant ran. The policemen found the cocaine in Defendant's direct path of flight, and although it had been raining and the grass was wet, the bag of

cocaine was still dry. When viewed in the light most favorable to the State, we conclude that there was substantial evidence of Defendant's constructive possession of the cocaine. See *State v. Neal*, 109 N.C. App. 684, 428 S.E.2d 287 (1993). The trial court did not err in denying Defendant's motions to dismiss and to set aside the verdict. This assignment of error is overruled.

#### Sentencing as an Habitual Felon

In his final argument, Defendant contends that the trial court committed constitutional error by sentencing Defendant as an habitual felon to 100 to 129 months imprisonment because the sentence was grossly disproportionate and cruel and unusual. We disagree.

Under North Carolina law, a person who has three previous felony convictions may be sentenced as a habitual felon. N.C. Gen. Stat. § 14-7.1 (2005). "Whether the Habitual Felon Act violates a defendant's Eighth and Fourteenth Amendment rights has been recently reviewed by this Court." *State v. McDonald*, 165 N.C. App. 237, 241, 599 S.E.2d 50, 52, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 60 (2004) (citing *State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417 (2003)). "'Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.'" *Hensley*, 156 N.C. App. at 639, 577 S.E.2d at 421 (quoting *State v. Ysaguirre*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)).

Further, our Supreme Court 'rejected outright the suggestion that our legislature is

constitutionally prohibited from enhancing  
punishment for habitual offenders as  
violations of constitutional strictures  
dealing with . . . cruel and unusual  
punishment[.]'

*Id.* (quoting *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985)).

In the instant case, on 22 March 1990 and 6 June 1990, Defendant was convicted of possession of cocaine, and on 5 August 1991, Defendant was convicted of second degree murder. On 16 March 2007, Defendant was sentenced to 100 to 129 months imprisonment, not solely for possession of cocaine, but also because Defendant committed multiple felonies since 1990 and was an habitual felon. The sentence imposed here under the habitual felon laws is not so grossly disproportionate so as to result in constitutional infirmity. See *McDonald*, 165 N.C. App. 237, 599 S.E.2d 50. This assignment of error is overruled.

For the foregoing reasons, we conclude that Defendant had a fair trial, free from prejudicial error.

No Error

Judges TYSON and JACKSON concur.

Report per Rule 30(e).