

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-887

Filed: 6 June 2017

Rowan County, No. 13 CRS 53795-96

STATE OF NORTH CAROLINA

v.

CLAUDE LEON McCLINTON

Appeal by Defendant from judgment entered 9 March 2016 by Judge Joseph N. Crosswhite in Superior Court, Rowan County. Heard in the Court of Appeals 20 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

Sean P. Vitrano for Defendant.

McGEE, Chief Judge.

Detective Jagger Naves (“Detective Naves”) of the Rowan County Sheriff’s Office, was conducting drug interdiction activities in his police vehicle on the morning of 20 June 2013. Detective Naves was parked on the side of Interstate 85 when he witnessed a Chrysler 200C (“the Chrysler”) pass by him. Detective Naves believed the passenger in the front seat, later identified as Claude Leon McClinton

STATE V. MCCLINTON

Opinion of the Court

(“Defendant”), acted suspicious upon seeing Detective Naves, so Detective Naves decided to pull behind the Chrysler and follow it. Detective Naves testified that the Chrysler drove too close behind a box truck, so he activated his lights to initiate a traffic stop of the Chrysler. The Chrysler slowed and took an exit ramp off the highway, but did not come to a complete stop before the front passenger door opened and Defendant jumped out of the Chrysler. Defendant was carrying a green bag, and ran through some undeveloped land toward a nearby motel. Detective Naves stopped his vehicle and attempted to pursue Defendant, but Defendant escaped. Detective Naves then returned to the Chrysler, which had stopped.

Detective Naves searched the driver of the Chrysler, Peter Jackson (“Jackson”), as well as the Chrysler, but found no weapons or contraband. Detective Naves testified that he did notice a “very, very potent odor of high-grade marijuana” coming from inside the Chrysler. Police continued searching and, at some point, Master Deputy Patrick Jones (“Deputy Jones”), who walked the general path of Defendant’s flight from Detective Naves, found a green bag on top of some brush near the motel. Detective Naves identified the bag as being the same bag Defendant was holding when he jumped from the Chrysler. The bag also smelled strongly of marijuana. A search of the green bag revealed two small bag corners¹ containing crack cocaine — one weighing 5.58 grams and the other 0.11 grams; a single bag

¹ Corners removed from plastic bags are often used to package smaller amounts of illegal drugs.

containing 10.74 grams of marijuana; a digital scale; a package of Swisher Sweet cigarillos; a vacuum-sealed bag;² a pair of gym shorts; a small plastic coat; and two cell phone chargers. Approximately two hours later, Defendant was located behind the motel and was arrested. Defendant was carrying two cell phones that fit the two chargers located in the green bag.³

Defendant was indicted for one count of possession with intent to manufacture, sell, or deliver (“PWISD”)⁴ cocaine, and one count of PWISD marijuana, and was tried on 8 and 9 March 2016. Defendant represented himself at trial. When the trial court first read what were supposed to be unanimous verdicts finding Defendant guilty of both charges, and after asking the jurors if they all agreed with both guilty verdicts, the following exchange occurred between one juror and the trial court: “JUROR []: Well, the second one [PWISD marijuana], I – it was, kind of, iffy.” “THE COURT: Okay. Do – do you agree with that verdict? You’ve got to –” “JUROR []: Not with the second part of the verdict. I agree with the first part of the verdict.” The trial court then sent the jury back to continue deliberation on the PWISD marijuana charge. The jury returned with a unanimous verdict of guilty on that charge as well.

² It is unclear whether this was entered into evidence, and there was no testimony indicating how it may have been used as drug paraphernalia; though the testimony suggested that the bag was already “vacuum-sealed,” there is no indication that it contained anything.

³ There was no testimony that Defendant’s having two cell phones was indicative of drug transaction behavior. There was testimony that the two chargers recovered from the green bag fit the two cell phones recovered from Defendant.

⁴ Though Defendant was charged with possession with intent to manufacture, sell, or deliver controlled substances, there was no evidence presented at trial indicating Defendant had any intent to manufacture the cocaine or marijuana.

The trial court consolidated the convictions for sentencing. Defendant was found to have a prior record level II, and was sentenced to the maximum presumptive range sentence of eight to nineteen months based upon the PWISD cocaine conviction. Defendant appeals.

In Defendant's first argument, he contends "the trial court erred in denying [his] motion to dismiss the PWISD marijuana charge because the evidence was insufficient for the jury to infer intent to manufacture or sell or deliver marijuana." We agree.

First, we note Defendant does not challenge his conviction for PWISD cocaine; thus that conviction stands. Therefore, we conduct our analysis within the context that Defendant essentially admits that he possessed cocaine with the intent to sell or deliver that cocaine. Potentially relevant to our analysis, evidence supporting Defendant's conviction for PWISD *cocaine* was that Defendant fled from Detective Naves in possession of the following: (1) two small bag corners containing crack cocaine — one weighing 5.58 grams and the other 0.11 grams; and (2) a digital scale. Concerning the evidence related to the cocaine found, Detective Naves testified he generally considers

what's going to be personally used compared to what's going to be for possession with intent to sell and deliver. Generally, in – in my 10 years of – of being at the police, one is not going to have 6 or 7 grams of crack cocaine to go smoke in their house later on. You're – you're talking about five, six \$700 worth of crack cocaine.

. . . .

[W]hen you have a good sized amount of crack cocaine and you have the bags that are – that – that you’re familiar with packaging the – the narcotics and you have a tool of the trade with the scales, . . . that’s going to – you know, the totality of the circumstances; that’s going to be possession with intent to sell and deliver.

Our Court’s standard of review for the denial of Defendant’s motion to dismiss is as follows:

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.”

“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 included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.”

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

“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. Marley, 227 N.C. App. 613, 614–15, 742 S.E.2d 634, 635–36 (2013) (citations omitted). N.C. Gen. Stat. § 90-95 states: “(a) Except as authorized by this Article, it is unlawful for any person: (1) To manufacture, sell or deliver, or possess with intent

to manufacture, sell or deliver, a controlled substance[.]” N.C. Gen. Stat. § 90-95(a) (2015). In the present case, there is no evidence that would support a conviction for possession with intent to manufacture marijuana. Therefore, we examine the evidence in the light most favorable to the State to determine if there was sufficient evidence to convict Defendant of possession of marijuana with the intent to distribute it, either by sale or delivery. *State v. Wiggins*, 33 N.C. App. 291, 294–95, 235 S.E.2d 265, 268 (1977). Defendant does not dispute that he possessed the marijuana, nor that the substance recovered was in fact marijuana. Therefore our review is limited to whether Defendant had the intent to sell or deliver the marijuana.

“While intent [to sell or deliver] may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred.” “[T]he intent to sell or [deliver] may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.” “Although ‘quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver,’ it must be a substantial amount.”

State v. Wilkins, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809–10 (2010) (citations omitted); *see also State v. Blakney*, 233 N.C. App. 516, 519–20, 756 S.E.2d 844, 846–47 (2014).

As noted, the amount of the controlled substance recovered can be a factor to be considered in determining whether a defendant possessed that substance with the intent to distribute it: “Although quantity of the controlled substance alone may

suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount.” *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (quotation marks and citation omitted).

In *Morgan*, our Supreme Court suggested that if the amount of the controlled substance meets or exceeds the amount required for a trafficking conviction, the amount alone may suffice to prove intent to sell or deliver:

In discussing what quantity of controlled substance might suffice alone to support the inference that a defendant intended to transfer it to others, this Court has construed N.C.G.S. § 90–98 *in pari materia* with other provisions of the Controlled Substances Act, N.C.G.S. §§ 90–86 through 90–113.8 (1990), particularly those provisions governing trafficking under N.C.G.S. § 90–95 (1990). In *Williams* we noted that the amount of contraband seized “was over two-thirds the amount required to support a conviction of the crime of ‘trafficking in . . . heroin,’” a fact satisfying the Court that the amount seized was “a substantial amount and was more than an individual would possess for his personal consumption.”

State v. Morgan, 329 N.C. 654, 659–60, 406 S.E.2d 833, 836 (1991) (citations omitted).

In North Carolina, the smallest quantity of marijuana required for a charge of “trafficking in marijuana” is ten pounds. N.C. Gen. Stat. § 90-95(h)(1). In the present case, Defendant was found to have been in possession of 10.74 grams of marijuana — approximately 0.379 ounces — or 0.024 pounds. Ten pounds equals approximately 4,536 grams, or approximately 422 times the 10.74 grams recovered from Defendant’s green bag. 10.74 grams of marijuana is an amount common for personal

consumption, but it is a fairly small quantity if the purpose is to sell the marijuana.

This Court has held that an amount of marijuana twenty times over that recovered in the present case was, alone, insufficient to support PWISD:

There was a stipulation that all of the marijuana found consisted of 215.5 grams, less than a half pound. There is nothing in the record which sheds any light on the amount found growing in each of the locations. Even so, this quantity alone, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution.

Wiggins, 33 N.C. App. at 294–95, 235 S.E.2d at 268 (citation omitted).

By contrast, Detective Naves testified the amount of cocaine recovered was more than one would have “to go smoke in their house later on.” He further explained: “I’ve never caught somebody with . . . 6 grams of crack for personal use. Me, never.” Though the 5.69 grams of cocaine recovered in the present case does not meet the 28 gram threshold needed for a charge of trafficking in cocaine, N.C. Gen. Stat. § 90-95(h)(3), it was approximately one-fifth the amount required for trafficking in cocaine, as opposed to the marijuana recovered, which was approximately 1/422 the amount required for trafficking in marijuana. 10.74 grams of marijuana alone, without additional relevant evidence, is clearly not sufficient to sustain a charge of PWISD. *Wiggins*, 33 N.C. App. at 294–95, 235 S.E.2d at 268. Because the quantity of marijuana “alone is insufficient to prove that defendant had the intent to sell or deliver[,] . . . we must examine the other evidence presented in the light most

favorable to the State.” *Wilkins*, 208 N.C. App. at 731–32, 703 S.E.2d at 810 (citation omitted).

The State’s evidence related to the packaging of the marijuana was the following testimony of Detective Naves: “There was a bag of marijuana.” Unlike the evidence related to the charge of PWISD cocaine, where amounts of cocaine larger than that generally associated with personal use were packaged in two separate baggie corners, there is nothing about the evidence of the packaging of the marijuana that differs from packaging associated with personal use. Not only was all of the relatively small amount of marijuana located in a single bag, there were no additional bags or other containers located in the green bag, on Defendant’s person, or in the Cadillac,⁵ into which the marijuana could have been divided for individual distribution. This Court has analyzed the packaging prong of PWISD in a similar situation as follows:

“The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute.” *State v. Williams*, 71 N.C. App. 136, 139, 321 S.E.2d 561, 564 (1984) (holding that the trial court did not err in denying defendant’s motion to dismiss where “[t]he evidence at trial showed that the [27.6 grams of] marijuana . . . was packaged in seventeen separate, small brown envelopes known in street terminology as ‘nickel or dime bags’”); *see also In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129,

⁵ At least none was entered into evidence. Detective Naves testified about a “vacuum-sealed bag” recovered from the green bag, but it does not appear to have been entered into evidence, and the testimony was insufficient to form any opinion as to what, if anything, was in the bag, or what the bag was used for, or could have been used for.

137 (2007) (“Cases in which packaging has been a factor have tended to involve drugs divided into smaller quantities and packaged separately.”); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding an intent to sell or deliver where defendant possessed 5.5 grams of cocaine separated into 22 individually wrapped pieces); *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (holding that there was sufficient evidence of intent to sell or deliver where the defendant was in possession of one large cocaine rock and eight smaller rocks). The State has not pointed to a case, nor have we found one, where the division of such a small amount of a controlled substance constituted sufficient evidence to survive a motion to dismiss. Moreover, the [small amount of marijuana] was divided into only three separate bags. While small bags may typically be used to package marijuana, it is just as likely that defendant was a consumer who purchased the drugs in that particular packaging from a dealer. Consequently, we hold that the separation of 1.89 grams of marijuana into three small packages, worth a total of approximately \$30.00, does not raise an inference that defendant intended to sell or deliver the marijuana.

Wilkins, 208 N.C. App. at 732, 703 S.E.2d at 810; *see also State v. Morgan*, 329 N.C. 654, 659, 406 S.E.2d 833, 835 (1991). In the present case, there was *no* evidence that there was any special “labeling [or] storage of the” marijuana that indicated an intent to distribute it. *See Blakney*, 233 N.C. App. at 519, 756 S.E.2d at 846.

Concerning Defendant’s “activities,” *id.*, Defendant’s flight from Officer Naves certainly suggests consciousness of potential criminal activity. However, Defendant’s flight can easily be attributed to his simple possession of the cocaine and marijuana, and does not involve additional behavior that might suggest an intent to sell or

deliver the controlled substances. *See, e.g., State v. Stokley*, 184 N.C. App. 336, 337, 646 S.E.2d 640, 642 (2007) (fact that police “saw defendant engaging in at least five ‘hand-to-hand transactions’ wherein a person would approach defendant’s house but stay just long enough for a brief conversation and the exchange of items between the two” was relevant factor in supporting conviction for PWISD).

At best, this testimony regarding the normal or general conduct of people, without more, raises only a suspicion . . . that defendant had the necessary intent to sell and deliver. “[W]hen the evidence is . . . sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.”

State v. Turner, 168 N.C. App. 152, 158–59, 607 S.E.2d 19, 24 (2005) (citation omitted).

Finally, we look for “the presence of cash or drug paraphernalia.” *Blakney*, 233 N.C. App. at 519, 756 S.E.2d at 846. In a prior case, this Court held that a substantial amount of cash along with a small amount of marijuana was insufficient to submit a charge of PWISD marijuana to the jury:

In addition to the packaging, we must also consider the fact that defendant was carrying \$1,264.00 in cash. “However, unexplained cash is only one factor that can help support the intent element.” Upon viewing the evidence of the packaging and the cash “cumulatively,” we hold that the evidence is insufficient to support the felony charge. Had defendant possessed more than 1.89 grams of marijuana, or had there been additional circumstances to consider, we may have reached a different conclusion; however, given the fact that neither the amount of marijuana nor the

packaging raises an inference that defendant intended to sell the drugs, the presence of the cash as the only additional factor is insufficient to raise the inference.

Wilkins, 208 N.C. App. at 732–33, 703 S.E.2d at 810 (citations omitted). In this case, there was *no* evidence presented that any cash was recovered from Defendant, Johnson, the Cadillac, or the green bag.

The only relevant drug paraphernalia recovered was the digital scale, and potentially the Swisher Sweet cigarillos. Detective Naves testified concerning the digital scale:

[T]hen we had a digital scale, which is going to be a tool of the trade for any drug deal. Anybody who is going to sell a narcotic, they're going to want to make sure that they're not giving away too much of the product, so they all have digital scales.

Detective Naves also testified that purchasers of illegal drugs might carry scales to ensure they were actually getting the agreed upon amount of the drug. Had the digital scale been found in the green bag with the marijuana, but without any additional controlled substances – such as the cocaine – its relevance in our analysis would be greater. However, Defendant does not contest his conviction for PWISD cocaine, and the cocaine and the digital scale were both found in the green bag. The cocaine was found in two separate baggie corners, and the amount of cocaine was such that Detective Naves testified he had never found that amount on a defendant solely for personal use. There is more evidence to tie the digital scale to the

unchallenged distribution of the cocaine than there is to tie it to the marijuana, and any inferences that the digital scale might have been used to weigh the marijuana for distribution are speculative.

Further, the green bag did not contain only drug-related items. It also contained personal use items such as a pair of gym shorts and a small plastic coat. The green bag also contained some cigarillos, which Detective Naves stated constituted “paraphernalia,” but did not testify as to why they were classified as such. Although different types of cigars known as “blunts” can be modified to smoke marijuana, there was no evidence presented that any of the cigarillos had been so modified, or even that they were useable for that purpose. Our Supreme Court has noted:

When determining whether an element exists, the jury may rely on its common sense and the knowledge it has acquired through everyday experiences. . . . The jury’s ability to determine the existence of a fact in issue based on its in-court observations, however, is not without limitation. The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record.

State v. Mitchell, 336 N.C. 22, 29, 442 S.E.2d 24, 28 (1994) (citations omitted).

Assuming *arguendo* the jurors had the requisite knowledge concerning “blunts,” and that it was appropriate for the jury to apply that knowledge in this case, the presence of the cigarillos was entirely consistent with personal use of the marijuana, and the

State presented no evidence that the cigarillos were being offered for sale or delivery for the use of smoking the marijuana.

The present case is similar to *Nettles* where this Court held that possession of a small amount of crack cocaine along with \$411.00 and a safety pen, which is typically used to clean a crack pipe, was insufficient to support a charge of possession with intent to sell or deliver. This Court held that “[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.”

Wilkins, 208 N.C. App. at 733, 703 S.E.2d at 810-11 (citations omitted).

In the present case, we hold there was not substantial relevant evidence presented of Defendant’s intent to sell or deliver the marijuana such that “a reasonable mind might accept as adequate to support” that Defendant possessed the marijuana with the intent to sell or deliver it to another. *Marley*, 227 N.C. App. at 615, 742 S.E.2d at 636. However, the jury was also instructed on the lesser included offense of possession of marijuana. Defendant did not contest that he possessed the marijuana, the jury necessarily found that Defendant possessed the marijuana by convicting him of PWISD marijuana, and the evidence supports the jury determination on this issue. “Consequently, we vacate defendant’s sentence [of PWISD marijuana] and remand for entry of a judgment ‘as upon a verdict of guilty of

simple possession of marijuana.”⁶ *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811 (citation omitted).

We further note that Defendant is unlikely to benefit from this reduction in one of his two convictions. Defendant was convicted of PWISD cocaine, and the marijuana conviction was consolidated with the cocaine conviction for sentencing.

If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

N.C. Gen. Stat. § 15A-1340.15(b) (2015). Because PWISD cocaine is a Class H felony, and PWISD marijuana is only a Class I felony, Defendant’s sentence was based upon the PWISD cocaine conviction. However, Defendant was sentenced to the maximum presumptive range sentence for a Class H felony at prior record level II. We cannot know if the trial court factored the conviction for PWISD marijuana into its decision to sentence Defendant at the highest presumptive range. Therefore, the trial court may, in its discretion, revisit Defendant’s sentence if it determines that doing so would be appropriate.

⁶ In light of our holding on this issue, we do not address Defendant’s second argument on appeal.

STATE V. MCCLINTON

Opinion of the Court

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Judges DAVIS and DIETZ concur.

Report per Rule 30(e).