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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-140

Filed: 19 September 2017

Caldwell County, Nos. 13 CRS 1110-11

STATE OF NORTH CAROLINA

v.

TRAVIS XAVIER THOMAS

Appeal by defendant from judgment entered 13 July 2016 by Judge Hugh B. Lewis in Caldwell County Superior Court. Heard in the Court of Appeals 24 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant.

ARROWOOD, Judge.

Travis Xavier Thomas (“defendant”) appeals from judgment entered upon his convictions for possession of a firearm by a felon and attaining habitual felon status. For the following reasons, we affirm.

I. Background

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On 10 June 2013, a Caldwell County Grand Jury indicted defendant on charges of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1 and attaining habitual felon status in violation of N.C. Gen. Stat. § 14-7.1.¹

The case was called for trial in Caldwell County Superior Court before the Honorable Hugh B. Lewis on 11 July 2016. Defendant first moved to dismiss the charges based on an alleged discovery violation. The motion and case were then continued until the following morning in order to allow the State to call a witness in defense of defendant's motion. When the matter resumed, the trial judge heard arguments on defendant's motion to dismiss and denied the motion. Defendant then waived a jury trial and a bench trial commenced.

The State presented evidence tending to show that defendant was in an argument with Derrick Perkins ("Derrick")² at the Ross & Company Convenience Store in Lenoir on 11 June 2011. As they exchanged words, Derrick's cousin Michael I. D. Perkins ("Little Mike"), Derrick's uncle Michael D. I. Perkins ("Big Mike"), and Little Mike's two-year-old son pulled in to the parking lot in Little Mike's Cadillac. Big Mike jumped out of the car and approached defendant because Big Mike thought defendant said something to him. Big Mike testified that he approached defendant as defendant was opening the driver's side door to an Altima parked at the gas pumps. There was another man in the passenger seat of the Altima. Big Mike testified that

¹ It appears from the trial transcript that defendant was also indicted for discharging a weapon into an occupied vehicle. The indictment for that offense, however, is not included in the record.

² The individuals are referred to by the names used in the parties' briefs.

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he met defendant “face to face” and the two exchanged words, but that was the end of it. Big Mike, however, recalled seeing two firearms in the Altima, one in the passenger’s lap and the second in the driver’s side door.

Big Mike then left the convenience store with Derrick in Derrick’s van. Little Mike followed behind them with his son in the Cadillac. They were both headed to Little Mike’s grandmother’s house a short distance away. Moments later, as the Cadillac was nearing an intersection, Little Mike noticed the Altima coming up fast behind him. Defendant was driving the Altima. Little Mike also recalled seeing defendant get into the driver’s side of the Altima at the convenience store as they were leaving. After the van crossed through the intersection and as the Cadillac was crossing the intersection, Little Mike heard gunshots. Little Mike testified that when he turned around to look, he saw defendant with his left arm out the Altima’s driver’s side window. Little Mike did not see a gun in defendant’s hand. The Altima then made a right turn and sped away. Big Mike also testified that he saw the Altima from the convenience store behind Little Mike and heard the gunshots. Big Mike did not see who was shooting, but testified there was no one else in the area.

At the conclusion of the State’s evidence, and again after defendant decided not to put on any of his own evidence, the trial judge denied defendant’s motions to dismiss for insufficient evidence.

On 13 July 2016, the trial judge returned verdicts finding defendant not guilty of firing a weapon into an occupied vehicle and guilty of possession of a firearm by a

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felon. Upon the State's presentation of further evidence of defendant's criminal record, the trial judge additionally found that defendant had attained habitual felon status. Judgment was entered on the possession of a firearm by a felon and habitual felon convictions sentencing defendant to a term of 96 to 125 months imprisonment, with the term to begin at the expiration of a sentence already being served. Defendant gave notice of appeal in open court.

II. Discussion

The sole issue raised by defendant on appeal is whether the trial court erred in denying his motion to dismiss the possession of a firearm by a felon charge.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " '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.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is 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 making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State,

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giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation and quotation marks omitted).

N.C. Gen. Stat. § 14-415.1(a) provides that “[i]t shall be unlawful for any person who has been convicted of a felony to . . . possess, or have in his custody, care, or control any firearm” N.C. Gen. Stat. § 14-415.1(a) (2015). It is clear from the statute that “[t]here are two elements to possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Mitchell*, 224 N.C. App. 171, 176, 735 S.E.2d 438, 442-43 (2012) (quotation marks and citation omitted).

In this case, defendant concedes the State presented sufficient evidence of his status as a convicted felon, but argues “the State failed to present substantial evidence that he ever possessed a firearm on 11 June 2011.”

This Court has explained that “[p]ossession of any item may be actual or constructive. . . . A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its

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disposition.” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 102, 587 S.E.2d 505, 510 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). “The defendant may have the power to control either alone or jointly with others.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). “In car cases, . . . [a]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [firearm] was found.” *State v. Best*, 214 N.C. App. 39, 46-47, 713 S.E.2d 556, 562 (quotation marks and citations omitted), *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). But, “[w]hen . . . the defendant [does] not have exclusive control of the location where the [firearm] is found, ‘constructive possession of the [firearm] may not be inferred without other incriminating circumstances.’” *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003). “[C]onstructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.” *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001), *affirmed*, 356 N.C. 141, 567 S.E.2d 137 (2002) (quotation marks, citation, and emphasis omitted).

Defendant acknowledges that testimony was presented that there were two guns in the vehicle. Yet, relying on *Alston*, defendant contends that because there was a passenger in the vehicle and he did not have exclusive possession of the vehicle, the State must show independent incriminating circumstances, beyond mere

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association or presence, to establish constructive possession. Defendant claims “the State’s evidence—even when viewed in the light most favorable to the State, as is required on a motion to dismiss—fails to reveal any ‘independent and incriminating circumstance, beyond mere association or presence,’ linking [defendant] to any firearm.” In addition to relying on this Court’s decision in *Alston*, defendant compares the facts in his case to those in *State v. Bailey*, 233 N.C. App. 688, 757 S.E.2d 491 (2014). Upon review of those cases, we find the present case is distinguishable.

In *Alston*, the defendant was convicted of possession of a firearm by a felon and appealed the conviction on the basis that the trial court erred in denying his motion to dismiss because there was insufficient evidence that he possessed a firearm. 131 N.C. App. at 518, 508 S.E.2d at 318. The relevant facts in *Alston* were summarized as follows: “In this case, the handgun was found lying on the console (between the passenger and driver’s seats) of Defendant’s brother’s automobile being driven by Defendant’s wife. The handgun was purchased and owned by Defendant’s wife and Defendant was a passenger in the front seat of the automobile.” *Id.* at 519, 508 S.E.2d at 319. Based on those fact, this Court reversed the defendant’s conviction, holding the trial court erred in denying the defendant’s motion to dismiss because “there [was] not substantial evidence in th[e] record that Defendant had the possession, control, or custody of the handgun.” *Id.* In reaching its conclusion, this Court acknowledged that “[p]ossession of an item may be either sole or joint; however, joint or shared possession exists only upon a showing of some independent and

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incriminating circumstance, beyond mere association or presence, linking the person(s) to the item.” *Id.* at 519, 508 S.E.2d at 318 (internal citation omitted). This Court reasoned that “[b]oth Defendant and his wife had equal access to the handgun, but there is no evidence otherwise linking the handgun to Defendant. Furthermore, [the Court was] not persuaded that the purchase and ownership of the handgun by Defendant’s wife [was] sufficient other incriminating evidence linking Defendant to the handgun.” *Id.* at 519, 508 S.E.2d at 319 (citation and footnote omitted).

Similar to *Alston*, in *Bailey*, this Court reversed the defendant’s conviction for possession of a firearm by a felon because “the only evidence linking [the] defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat.” 233 N.C. App. at 693, 757 S.E.2d at 494. Specifically, this Court held the trial court erred in denying the defendant’s motion to dismiss because there was insufficient evidence of “‘other incriminating circumstances[]’ from which the jury could infer constructive possession.” *Id.* (internal citation omitted). In so holding, this Court distinguished the case from *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262 (2003) (trial court’s denial of a motion to dismiss was proper where, besides presence, the evidence “tended to show that [the] defendant had discharged a gun[]”), and *State v. Mitchell*, 224 N.C. App. 171, 177-78, 735 S.E.2d 438, 443-44 (2012) (no ineffective assistance of counsel where trial counsel failed to move to dismiss a possession of a firearm by a felon charge for insufficient evidence of possession where the defendant was driving the vehicle and the defendant’s

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interactions with police during a traffic stop showed that he was aware of the contents of the vehicle, including a gun in the glovebox), stating that the evidence in those cases definitively linked the defendants to the firearms. *Id.* at 691-92, 757 S.E.2d at 493. This Court instead found the facts in *Bailey* closer to those in *Alston*, explaining as follows:

Like *Alston*, the rifle was registered to Ms. Torrain, defendant's girlfriend, who was driving the car when the rifle was found. Defendant was a passenger in the vehicle, not the driver. Moreover, the rifle was found in a place where Ms. Torrain and defendant had equal access. In addition, unlike *Glasco*, there was no physical evidence tying defendant to the rifle. Specifically, defendant's fingerprints were not found on the rifle, the magazine on the console, or the spent casing on the road which may have come from an AK firearm. Although the gun was warm and appeared to have been recently fired, there was no evidence that defendant had actually discharged the rifle because the gunshot residue test was inconclusive. Although it is undisputed that the sedan was registered to defendant, he was not driving it at the time. Therefore, despite having legal ownership of the vehicle, defendant exercised no control over the car at the time the rifle was found.

Finally, although defendant allegedly admitted he knew that the rifle was in the car to Deputy Harris, awareness of the weapon is not enough to establish constructive possession. In *Mitchell*, awareness was one of the factors the Court noted; however, its conclusion that there was sufficient incriminating evidence to submit the issue to the jury was predicated on both the defendant's awareness of the gun and the fact that he was driving the vehicle, noting that because "[a] driver generally has power to control the vehicle he is driving[.]" the defendant had the "power to control" the vehicle. Unlike *Mitchell*, defendant was not driving and, thus, not "controlling" the vehicle where the

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rifle was found. Therefore, defendant's knowledge or awareness of the rifle in and of itself did not constitute sufficient incriminating evidence to submit the issue to the jury.

Id. at 692-93, 757 S.E.2d at 494 (citation omitted).

The evidence in the present case was that defendant was standing nearby a vehicle with the driver's side door open. There was a passenger in the passenger seat. A witness saw two guns in the vehicle, one in the passenger's lap and the second in the driver's side door. A witness then saw defendant get into the driver's side of the vehicle and multiple witnesses saw defendant driving the vehicle just moments later when gunshots were fired from the direction of defendant's vehicle towards another vehicle. These facts are distinguishable from the critical facts in *Alston* and *Bailey*.

First, defendant was the driver of the vehicle in the present case. In both *Alston* and *Bailey*, this Court emphasized that the defendants were passengers and not the drivers. That is because,

[a]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

Best, 214 N.C. App. at 47, 713 S.E.2d at 562 (quotation marks and citation omitted).

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Second, the firearm in the driver's side door was not readily accessible to the passenger in the vehicle like the firearm on the center console in *Alston*, or the firearm in the backseat in *Bailey*. In fact, our Supreme Court has stated that it has "considered a broad range of other incriminating circumstances to determine whether an inference of constructive possession was appropriate when a defendant exercised nonexclusive control of contraband. Two of the most common factors are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012) (quotation marks and citations omitted). It is reasonable to infer that a firearm in the driver's side door is in the control of the driver of a vehicle, who is closest to the firearm, has easy access to the firearm, and who sits between the firearm and any passenger on the passenger's side of the vehicle.

The facts in this case are more similar to those in *Mitchell*, in which this Court found constructive possession based on evidence that the defendant was the driver of the vehicle and aware of a firearm in the glovebox. 224 N.C. App. at 177, 735 S.E.2d at 443.

Defendant also contends the evidence presented "fails to support a reasonable inference that [he] was aware of the presence of the gun inside the [vehicle] or that he had the intent and capability to control its use." Yet, it is clear from the witness' testimony that the gun was in plain view from someone standing outside the vehicle

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when the driver's side door was open. Thus, defendant cannot reasonably claim that he was unaware of the firearm.

Viewing the evidence in this case in the light most favorable to the State, we hold there was sufficient evidence to infer constructive possession of the firearm to support a charge of possession of a firearm by a felon. Therefore, the trial court did not err in denying the motion.

III. Conclusion

For the reasons discussed, we affirm the trial court's denial of defendant's motion to dismiss the possession of a firearm by a felon charge.

AFFIRMED.

Judges HUNTER, Jr., and DILLON concur.

Report per Rule 30(e).