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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-631

Filed: 6 February 2018

Watauga County, No. 15CRS541, 50683

STATE OF NORTH CAROLINA

v.

AVERY TYREZ FORNEY, Defendant.

Appeal by Defendant from judgments entered 2 December 2016 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 27 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

William D. Spence, for Defendant-Appellant.

MURPHY, Judge.

In this case, Avery Tyrez Forney ("Defendant") asks us to consider whether certain evidence was admissible and whether the entirety of the evidence was sufficient to survive Defendant's motions to dismiss. At the outset, we note that Defendant was not subjected to a "custodial interrogation" requiring the safeguards of *Miranda* when he initiated an interview with law enforcement. "*Miranda*

warnings and waiver of counsel are required when, and only when, [a] defendant is being subjected to custodial interrogation." *State v. Sykes*, 285 N.C. 202, 205, 203 S.E.2d 849, 851 (1974) (citation omitted). "[F]reely and voluntarily" given statements remain "admissible in evidence." *Miranda v. Arizona*, 384 U.S. 436, 478, 16 L. Ed. 2d 694, 726 (1966).

In determining whether the evidence presented by the State was sufficient to survive Defendant's motions to dismiss, we will "consider all evidence admitted . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor" to determine whether substantial evidence exists. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant appeals from his judgments for trafficking in heroin by possession of 28 grams or more, trafficking in heroin by transporting 28 grams or more, and conspiracy to traffic in heroin by possession of 28 grams or more. On appeal, Defendant contends the trial court erred by: (1) denying his motion to suppress; (2) denying his motion to dismiss the charge of conspiracy to traffic in heroin by possession of 28 grams or more; (3) denying his motion to dismiss the charge of trafficking in heroin by possession of 28 grams or more; and (4) denying his motion to dismiss the charge of trafficking in heroin by transporting 28 grams or more. After

careful review, we reject Defendant's arguments and conclude he received a fair trial, free from error.

Background

On 20 May 2015, the Watauga County Sheriff's Department used a confidential informant to arrange the purchase of two ounces of heroin from the informant's supplier in Charlotte, who identified himself as "Zeus." The informant began the transaction by calling Zeus from the Sheriff's Department. Zeus agreed to drive from Charlotte to deliver two ounces of heroin to a unit located in "The Cottages" apartment complex in Boone, and indicated he would be delayed because he had to pick up the heroin from South Carolina before traveling to Boone. Defendant and a female also spoke to the confidential informant on the phone about the transaction. Defendant expressed concern that the deal was a "set up" or that they would be "ripped off." The female expressed concern about getting ripped off or robbed.

At the previously arranged time and location, the officers awaited the delivery, on the lookout for the suspected delivery vehicle, a white Dodge Avenger. When the white Dodge Avenger arrived, the vehicle drove up to the location, but did not stop. An officer testified that the driver appeared to recognize one of the officers, and panicked, driving away quickly. Three individuals were in the vehicle; two males were in the front, and a female sat behind the driver in the rear passenger area.

The officers began pursuit, attempting to prevent the vehicle from leaving the scene. An officer in the vehicle leading the pursuit testified that he observed a hand come out of the back rear passenger side of the vehicle, which "looked like they were trying to throw something out." He also testified that he saw a "white, light colored baggie and powder came out of the passenger side front of the vehicle." The chase continued, with the suspects driving erratically at high speeds. Boone police officers eventually stopped the vehicle. Defendant was identified as the front seat passenger. The driver was identified as Tristan Gilmore, and the female passenger was identified as Morgan Newsome.

The officers searched the vehicle, and found "what looked like torn cellophane or plastic wrapping[,]" that "looked like it had a knot in the top of it" and "might have been ripped[,]" and "small pieces of a white substance" that the officers "suspected to be heroin" on the floorboard of the front passenger side of the vehicle. A white powder residue also covered the dashboard of the vehicle. The officer that conducted the search testified that the torn cellophane or plastic wrapping was consistent with drug packaging.

Defendant was arrested and charged with trafficking in heroin by possession, trafficking in heroin by transportation, conspiracy to traffic heroin by possession, and conspiracy to traffic heroin by transportation. The State dismissed the conspiracy to traffic in heroin by transportation charge prior to trial.

The vehicle's occupants were taken to the Sheriff's Department and interviewed. Detective John Hollar advised Defendant of his *Miranda* rights, and Defendant filled out and signed an adult rights warning waiver form. Defendant then informed Detective Hollar that Gilmore and Newsome picked him up to go to Boone "to make a play[,]" which meant to "sell dope." Defendant also stated "that once [Gilmore] began running he heard someone say, 'throw the gun.' " Detective Hollar then asked Defendant "about the dope[,]" and about hearing Defendant's voice over the phone. Defendant did not answer these questions, and quit talking to Detective Hollar. The interview ended thereafter. On 21 May 2015, Defendant received his initial appearance and was appointed an attorney.

Subsequently, Defendant sent Detective Hollar a note stating that Defendant wished to speak with him. Per Defendant's request, Detective Hollar arranged a second interview with Defendant. This interview took place on 26 May 2015, six days after the offense date. Before Defendant gave a statement, Defendant confirmed that he had written the note. Detective Hollar also went over Defendant's Sixth Amendment rights with Defendant, using the Watauga County Sherriff's Department's standard form for informing a defendant of his rights under the Sixth Amendment of the United States Constitution.

Once Defendant signed the waiver, Detective Hollar asked Defendant what Defendant wanted to discuss. Defendant told Detective Holler where the driver "got

the dope from" and inquired why his "bond was so high because there was only seven grams of heroin and the rest was cut." Detective Hollar testified at trial that "cut" refers to when dealers or distributors dilute a product with other substances "to make it heavier, to make a better profit[.]"

The case came on for trial on 28 November 2016. Prior to trial, Defendant moved to suppress his 26 May 2015 statement to Detective Hollar. Following the hearing, the trial court denied the motion, and made findings and conclusions of law. The trial court concluded that Defendant freely, voluntarily, and knowingly of his own initiative changed his decision to remain silent on 26 May 2015; that he did so with full knowledge of his legal rights, knowingly and intentionally relinquishing them prior to making the statement; that no additional *Miranda* warnings were required on 26 May 2015; that Defendant's constitutional rights were not violated 26 May 2015; that the statement is admissible in evidence; and that Detective Hollar did not have an obligation to contact Defendant's counsel prior to speaking with Defendant.

At the close of the State's evidence, Defendant moved to dismiss all charges against him. The trial court denied the motion. Defendant did not offer evidence. At the end of all evidence, Defendant renewed his motion to dismiss, which the trial court again denied. The jury returned a guilty verdict on all three charges: trafficking in heroin by possessing 28 grams or more, trafficking in heroin by

transporting 28 grams or more, and conspiracy to traffic heroin by possession of 28 grams or more.

The trial court sentenced Defendant to an active term of 225 to 282 months for the class C felony of trafficking in heroin by possessing 28 grams or more conviction; a consecutive active term of 225 to 282 months for the trafficking heroin by transporting 28 grams or more conviction; and a concurrent active term of 225 to 282 months for the conspiracy to traffic heroin by possession of 28 grams or more conviction. The trial court also imposed the statutory minimum fines. Defendant gave notice of appeal in open court.

Analysis

On appeal, Defendant argues the trial court erred by: (1) denying his motion to suppress; (2) denying his motion to dismiss the charge of conspiracy to traffic in heroin by possessing 28 grams or more; (3) denying his motion to dismiss the charge of trafficking in heroin by possession of 28 grams or more; and (4) denying his motion to dismiss the charge of trafficking in heroin by transporting 28 grams or more. We disagree.

I. Motion to Suppress

Defendant argues that Detective Hollar violated his constitutional rights because he did not advise Defendant of Defendant's Fifth Amendment *Miranda* rights prior to questioning him on 26 May 2015, and, because of this violation, it was error

for the trial court to deny Defendant's motion to suppress the May 26 statement. We disagree.

Our review of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation and quotation marks omitted). "Conclusions of law are reviewed de novo and are subject to full review." *Id.* at 560, 749 S.E.2d at 916 (citations and quotation marks omitted).

Defendant's argument challenges conclusion of law 7: "That no additional [*Miranda*] warnings were required on May 26[,] 2015[;]" and mixed finding of fact 7, which states:

> [a]lthough the better practice would have been to again advise [Defendant] of his [*Miranda*] warnings, [Defendant] voluntarily changed his decision to remain silent on his own initiative, indicated he wanted to talk with Detective Hollar, formally waived his Sixth Amendment right to counsel and no additional [*Miranda*] warnings were required.

Defendant also challenges conclusion of law 8: "That [Defendant's constitutional rights were not violated on May 26, 2015[,]" and conclusion of law 9: "That

[Defendant's] statement of May 26, 2015 is admissible in evidence." As Defendant argues that his constitutional rights were violated on 26 May 2015 and that the statement given that day is inadmissible because additional *Miranda* warnings were required prior to Defendant giving the 26 May 2015 statement, whether the trial court erred in determining that no additional Fifth Amendment *Miranda* warnings were required on 26 May 2015 is determinative to our analysis.

"*Miranda* warnings and waiver of counsel are required when, and only when, the defendant is being subjected to custodial interrogation." *Sykes*, 285 N.C. at 205, 203 S.E.2d at 851 (citation omitted). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 205, 203 S.E.2d at 851 (emphasis added) (quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706). "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478, 16 L. Ed. 2d at 726.

Defendant does not dispute that, although Defendant was in custody at the time he sent the note, Defendant initiated the 26 May 2015 statement that he gave to Detective Hollar. He sent the detective a note stating he had "further information" about his case and needed to speak with the detective as soon as possible.

Our Supreme Court has defined a custodial interrogation as "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom." *See State v. Holcomb*, 295 N.C. 608, 612, 247 S.E.2d 888, 890-91 (1978) (citations omitted). Thus, the conversation between Defendant and Detective Hollar did not constitute a custodial interrogation. As Defendant did not make incriminating statements in the context of a custodial interrogation, no additional *Miranda* warnings were required. *See id.* at 612, 247 S.E.2d at 890-91. The trial court did not err in its determination that no additional *Miranda* warnings were required.

II. Motions to Dismiss

We review the denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). When a defendant makes a motion to dismiss, the trial court considers "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 (2000) (quotation omitted). "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). When determining whether substantial evidence exists, 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." *Rose*, 339 N.C. at 192, 451 S.E.2d at 223 (citation omitted).

A. Conspiracy to Traffic in Heroin by Possession of 28 Grams or More

Defendant argues there was insufficient evidence to support a charge of conspiracy to traffic in heroin by possession of 28 grams or more. Specifically, he argues the State failed to offer sufficient substantial evidence that, on or about 20 May 2015, Defendant agreed with the other occupants of the vehicle to commit the crime of trafficking in heroin by possession of 28 grams or more. We disagree.

"A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000) (quotation omitted). As "[d]irect proof of conspiracy is rarely available," criminal conspiracies are generally "proved by circumstantial evidence." *Id.* at 95, 527 S.E.2d at 322 (quotation omitted). However, "[m]ere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy. The conspirator must share the purpose of committing [the] felony." *State v. Merrill*, 138 N.C. App. 215, 221, 530 S.E.2d 608, 612 (2000) (citations and quotation marks omitted). "[F]or a defendant to be found guilty of the substantive crime of conspiracy, the State must prove that there was an agreement to perform every element of the underlying offense." *State*

v. Torres-Gonzalez, 227 N.C. App. 188, 194, 741 S.E.2d 502, 508 (2013). Thus, the relevant inquiry here is whether there was substantial evidence that Defendant entered into an agreement to traffic heroin by possessing at least 28 grams or more.

Here, in the light most favorable to the State, the evidence tended to show: Defendant knew the other occupants of the vehicle were going to Boone to sell drugs; Defendant questioned the confidential informant whether the arrangement was a "set up[;]" and Defendant knew the actual amount of heroin to be sold, and where it originated from. This evidence implies an agreement between Defendant and the other occupants of the vehicle to traffic heroin by possessing at least 28 grams or more. The trial court did not err by denying the motion to dismiss the conspiracy charge.

B. Trafficking in Heroin by Possession of 28 Grams or More

Defendant argues the trial court erred by failing to grant his motion to dismiss the trafficking in heroin by possession charge for insufficiency of evidence because the State did not put forth sufficient proof of possession. We disagree. There was sufficient evidence to give rise to a reasonable inference that Defendant knew of the heroin's presence.

"Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be 'knowingly' possessed." *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). A controlled

substance may be constructively possessed "when a person without *actual* physical possession of a controlled substance has the *intent and capability* to maintain control and dominion over it. As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted).

"Mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs[,]" however, "evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession." *State v. Robledo,* 193 N.C. App. 521, 527-28, 668 S.E.2d 91, 95-96 (2008) (citations omitted).

Defendant next argues that there was also insufficient incriminating circumstances to establish constructive possession of the drugs at issue because his presence was the only factor to consider in determining whether he possessed the heroin. He then alternatively argues that the incriminating circumstances were also insufficient if the trial court had considered the evidence indicating Defendant threw drugs out the window in conjunction with his presence. Both of Defendant's arguments are misplaced as the totality of the evidence at trial permitted a reasonable inference that Defendant had constructive possession of the heroin.

Defendant was in the front passenger seat, and heroin was found on the passenger side of the vehicle's dashboard and floorboard. This evidence, in addition to the evidence already discussed *supra* that Defendant knew the vehicle's occupants were going to Boone to sell drugs; Defendant questioned the confidential informant whether the arrangement was a "set up[;]" and Defendant knew the actual amount of heroin to be sold, and where it originated from, establishes substantial evidence of knowing possession. The totality of this evidence permitted a reasonable inference that Defendant had constructive possession of the heroin, and the trial court did not err by denying the motion to dismiss the charge of trafficking in heroin by possession of 28 grams or more.

C. Trafficking in Heroin by Transporting 28 Grams or More

Defendant argues the trial court erred in failing to dismiss the trafficking in heroin by transporting charge because there was no evidence Defendant drove the white Dodge Avenger or that Defendant knew the drugs were in the vehicle. We disagree.

To establish the offense of trafficking in heroin by transporting 28 grams or more, the State must prove Defendant: (1) knowingly; (2) transported heroin; and (3) the weight was 28 grams or more, the required weight. *See* N.C.G.S. § 90-95 (h)(4) (2017); *State v. Zamora-Ramos*, 190 N.C. App. 420, 425, 660 S.E.2d 151, 155 (2008) (internal citation omitted) (listing the elements for N.C.G.S. § 90-95 (h)(3)). The

transportation element may be met by demonstrating a defendant acted in concert with another to move drugs from one place to another. *Id.* at 425, 660 S.E.2d at 155 (citation omitted).

Defendant's contention that he did not know the heroin was in the vehicle is belied by the State's evidence: Defendant was in the front passenger seat of the vehicle, and heroin was found on the passenger side of the vehicle's dashboard and floorboard; Defendant knew the other occupants of the vehicle were going to Boone to sell drugs; Defendant questioned the confidential informant whether the arrangement was a "set up[;]" and Defendant knew the actual amount of heroin to be sold, and where it originated from. The State also produced evidence that the weight of the drugs was 28 grams or more.

This evidence was sufficient to allow the jury to consider whether Defendant knowingly transported heroin of a sufficient weight from one location to another. Thus, the trial court did not err by denying Defendant's motion to dismiss this charge.

Conclusion

For the reasons stated above, the trial court did not err by denying Defendant's motion to suppress or motions to dismiss. Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge MCGEE and Judge ELMORE concur.

Report per Rule 30(e).