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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-580

No. COA21-603

Filed 16 August 2022

Randolph County, Nos. 18 CRS 51503, 18 CRS 51505

STATE OF NORTH CAROLINA

v.

AVIS DEVON HARDY, Defendant.

Appeal by Defendant from judgment entered 17 March 2021 by Judge James P. Hill, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 5 April 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Law Office of Caryn Strickland, by Caryn D. Strickland, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Avis Devon Hardy appeals from a judgment entered upon a jury's verdict finding him guilty of possession of a firearm by a felon and trafficking in opiates. Defendant argues that the trial court erred by denying Defendant's motion to dismiss and entering judgment against him because the State failed to establish that Defendant had actual or constructive possession of the gun and drugs. We find no error.

I. Factual and Procedural History

¶ 2 On 28 March 2018, a Randolph County probation officer received a complaint about possible drug activity at Defendant's mother's apartment, where Defendant was temporarily residing. When officers arrived, Defendant was standing by a vehicle with other individuals who quickly fled the scene.

¶ 3 Defendant consented to a search of the apartment and officers found nothing. When asked about the vehicle, Defendant claimed he was not the owner. A K-9 officer searched the vehicle and their dog indicated the presence of "marijuana, cocaine, methamphetamine [or] heroin." Within the car, the officers found a gun; pills later identified as oxycodone; a bottle labeled "Dexilant" containing pills later identified as oxycodone; an oil service receipt with the name "Hardy" and Defendant's mother's address under the "customer information" block; a hotel room key; and a piece of paper containing Defendant's name from the probation office in the glove box. Additionally, Defendant's phone was connected to the vehicle's Bluetooth system.

¶ 4 Based on their findings within the vehicle, the officers conducted a more comprehensive search of the apartment. During the second search, officers found a hotel key inside of Defendant's jeans which matched the one found in the vehicle, the stock vehicle radio inside of his room, and a ledger in his mother's purse along with a pill bottle containing "two half pills." Defendant claimed that everything in the purse was his.

¶ 5 On 10 September 2018, a grand jury indicted Defendant on charges of possession of a firearm by a felon, trafficking opium or heroin, and possession with intent to manufacture, sell, or deliver cocaine. On 7 December 2020, Defendant was brought to trial. During trial, Defendant moved to dismiss each charge for insufficiency of the evidence and fatal variances in the indictments. The trial court denied Defendant's motions regarding the trafficking opium or heroin and possession of a firearm by a felon charges. The jury found Defendant guilty of trafficking opiates and possession of a firearm by a felon. Defendant was sentenced to a minimum of 70 months, and a maximum of 93 months imprisonment. Defendant appeals.

II. Analysis

¶ 6 Defendant contends that the trial court erred by denying his motion to dismiss and entering a judgment against him because the State failed to prove Defendant's actual or constructive possession of the gun and drugs.

¶ 7 "[T]he denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed *de novo* by the appellate court." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). In criminal trials upon a defendant's motion to dismiss, the question for the court is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser element of the offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117

(1980) (citations omitted). However, the motion should be allowed "[i]f 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 of it[.]" *Id.* Evidence must be considered "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Rogers*, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018) (citations omitted).

¶ 8 If substantial evidence is found by the trial court, direct or circumstantial, "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. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826 (2015) (citations omitted). Substantial evidence is evidence that a reasonable person might accept to adequately support a conclusion. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (citations omitted). Circumstantial evidence may be used to overpower a motion to dismiss "even when the evidence does not rule out every hypothesis of innocence." *Winkler*, 368 N.C. at 575, 780 S.E.2d at 826 (citations omitted).

¶ 9 Possession can be either actual or constructive. *State v. Malachi*, 371 N.C. 719, 730, 821 S.E.2d 407, 416 (2018) (citations omitted). Actual possession must involve "physical or personal custody" of an object. *Id.* (citations omitted). Constructive possession involves "the intent and capability to maintain control and dominion" of an item, without having actual possession. *Id.* at 731, 821 S.E.2d at 416 (citations

omitted). "When the defendant does not have exclusive possession of the location where the firearm [or drugs are] found, the State is required to show other incriminating circumstances in order to establish constructive possession." *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citations omitted). The totality of circumstances must be considered in each case of constructive possession. *Id.* "The requirements of power and intent" suggest that a defendant must know of the presence of a firearm or drugs to be convicted of possessing it. *State v. McNeil*, 209 N.C. App. 654, 663, 707 S.E.2d 674, 681 (2011) (citations omitted). "[T]here must be more than mere association or presence linking the person to the item in order to establish constructive possession." *Id.* at 663, 707 S.E.2d at 682 (citations omitted). "This inquiry is necessarily fact specific; each case will 'turn on the specific facts presented,' and no two cases will be exactly alike." *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012) (citation omitted).

¶ 10 "'[T]his Court [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." *Id.* (citation omitted). "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.'" *Id.* (citation omitted).

¶ 11 North Carolina law provides that it is "unlawful for any person who has been

convicted of a felony to . . . possess . . . any firearm[.]" N.C. Gen. Stat. §14-415.1(a) (2019). To prove this crime, the State must demonstrate that "(1) [the] defendant was previously convicted of a felony and (2) subsequently possessed a firearm." *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347–48. Constructive possession has been shown in prior cases such as *Bradshaw*. In *Bradshaw*, the defendant was convicted of trafficking in cocaine by possession and possession of a firearm by a felon after his motion to dismiss for insufficient evidence was denied. *Id.* at 91, 728 S.E.2d at 347. The State introduced as evidence a bill including the defendant's name and address, recent photographs of the defendant, and other evidence to infer that the defendant constructively possessed the items because "(1) they were found in a bedroom in his mother's house, and (2) while his control of the bedroom was nonexclusive, and he was not present for the search, substantial evidence showed he lived there and exercised dominion and control over the contraband." *Id.* at 90, 728 S.E.2d at 345.

¶ 12 Additionally, in North Carolina, anyone who possesses four grams or more, but less than fourteen grams, of "opium, opiate, or opioid" will be sentenced and fined. N.C. Gen. Stat. § 90-95(h)(4)(a) (2019). For evidence of constructive possession of contraband to be adequate, "(1) [a defendant] must also have exclusive possession of the premises on which the contraband is found; or (2) the State of North Carolina must show additional incriminating circumstances demonstrating the defendant has dominion or control over the contraband." *State v. Chekanow*, 370 N.C. 488, 494–95,

809 S.E.2d 546, 551 (2018). Prior cases have similarly analyzed constructive possession. For example, in *State v. Baxter*, the defendant was charged with possession of intent to distribute marijuana. *State v. Baxter*, 285 N.C. 735, 737, 208 S.E.2d 696, 607 (1974). Our Supreme Court found no error in the trial court's denial of the defendant's motion for judgment of nonsuit because, based on the location of the marijuana within the defendant's apartment and its packaging, the jury could "reasonably infer an intent to distribute." *Id.* at 738, 208 S.E.2d at 698. Additionally, in *State v. Allen*, our Supreme Court found there was substantial evidence to support a jury finding that narcotics were in the defendant's "dominion and control" after heroin was found in the home of a known narcotics dealer, later identified as the defendant, along with other items. *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 685 (1971).

¶ 13 Defendant argues that the State failed to present sufficient evidence to prove Defendant possessed the gun and drugs. Defendant contends that there was no evidence of actual possession, so the State had to rely solely on the theory of constructive possession. Here, there is substantial evidence showing that Defendant had constructive possession of the firearm and drugs. Like in *Bradshaw,* where the evidence found in the mother's house was enough for a reasonable jury to infer a link between the defendant and the contraband, here, Defendant had items linking him to the gun and drugs. *Bradshaw*, 366 N.C. at 90, 728 S.E.2d at 346 (holding that

there was no error where "cocaine and rifle [were] found in a bedroom—which also contained photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub, all linking [the] defendant to the contraband"). Defendant had personal items within the car and apartment that linked him to the gun and drugs. Those items included oxycodone pills; an oil service receipt with the name "Hardy" and Defendant's mother's address under the "customer information" block; matching hotel room keys; a piece of paper containing Defendant's name from the probation office in the glove box; and a ledger. Additionally, Defendant's phone was connected to the car's Bluetooth. Defendant had dominion and control over the space where the items were found. The location of the items could lead a reasonable person to conclude that Defendant had constructive possession of the gun and drugs, as he was in such close proximity to the items and exerted dominion and control over them. There exists more than a mere association linking Defendant to the gun and drugs as Defendant displayed "the intent and capability to maintain control and dominion" of the items. *Malachi,* 371 N.C. at 731, 821 S.E.2d at 416 (citations omitted).

¶ 14 Viewing this evidence in the light most favorable to the State "supports a reasonable inference that [D]efendant exercised dominion and control over the" vehicle where the gun and drugs were found. *Bradshaw*, 366 N.C. at 97, 728 S.E.2d at 350. "Rather than merely raising a suspicion that [D]efendant could have possessed the [gun and drugs], the State's evidence allowed the jury to reasonably

infer a link between [D]efendant and the [gun and drugs]." *Id.* Accordingly, we hold that there was substantial evidence to support a finding that the gun and drugs were constructively possessed by Defendant.

III. Conclusion

¶ 15 We hold that the trial court did not err in denying Defendant's motion to dismiss and entering judgment against him.

NO ERROR.

Judges MURPHY and GORE concur.

Report per Rule 30(e).