

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-470

Filed 06 June 2023

Cleveland County, Nos. 20 CRS 55031; 21 CRS 19

STATE OF NORTH CAROLINA

v.

BRANDON WAYNE MOREFIELD

Appeal by Defendant from judgment entered 14 December 2021 by Judge Alan Z. Thornburg in Cleveland County Superior Court. Heard in the Court of Appeals 2 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candance Washington, for the Defendant.

WOOD, Judge.

Brandon Morefield (“Defendant”) appeals from a judgment finding him guilty of possession of methamphetamine and having attained habitual felon status. For the reasons stated herein, we hold the trial court did not commit error and overrule Defendant’s ineffective assistance of counsel claim.

I. Factual and Procedural Background

STATE V. MOREFIELD

Opinion of the Court

On the morning of 16 December 2020, Officer Joel of the Kings Mountain Police Department responded to a call regarding a domestic dispute occurring at a truck stop between Defendant and Ms. Anthony.

Defendant was a passenger in a gray Kia Soul motor vehicle driven by and registered to Ms. Anthony. When Officer Joel approached the vehicle, she observed Defendant sitting in the passenger seat, while Ms. Anthony sat in the driver's seat. Upon Officer Joel asking "what was going on," Defendant replied that he and Ms. Anthony were arguing over methamphetamine that was inside the vehicle. Ms. Anthony made no response to Defendant's statement.

Ms. Anthony's parents arrived on scene shortly thereafter, and Ms. Anthony's father requested that Defendant be forced out of the vehicle. Defendant exited the vehicle carrying a black duffel bag and proceeded to argue with Ms. Anthony's father. Officer Joel called for backup, and Corporal McKinney of the Kings Mountain Police Department arrived at the scene approximately five minutes later. Corporal McKinney activated his body camera upon arrival on the scene. Shortly after Corporal McKinney's arrival, Ms. Anthony was allowed to collect Defendant's belongings from inside her vehicle and to set them in the parking lot. Defendant did not claim any of the items. Officer Joel searched Defendant's black duffel bag but did not find anything illegal inside it.

When asked, Ms. Anthony gave Officer Joel permission to search her vehicle while she spoke with Corporal McKinney. According to Officer Joel, Ms. Anthony

STATE V. MOREFIELD

Opinion of the Court

stated that if she found anything, it was Defendant's. Ms. Anthony stood by the passenger side of the vehicle and Defendant stood by the back of the vehicle while Officer Joel conducted the search. Both Ms. Anthony's and Defendant's belongings were scattered about the vehicle. Officer Joel did not locate or find any contraband during the initial search of the vehicle and the trunk area.

However, Defendant informed Officer Joel that she had overlooked methamphetamine and a pipe during her search that were concealed by and wrapped in a red shirt and pink sock in the trunk area. Based upon Defendant's statement, Officer Joel searched the trunk area again and found a glass pipe inside a pink sock and methamphetamine wrapped in a red shirt. Defendant then told Officer Joel that Ms. Anthony had a bag of methamphetamine and a glass smoke pipe in her vehicle and "threw the meth in a red shirt to the back of her [vehicle] when she saw your patrol [vehicle] approaching." Officer Joel also found an unidentified pill on the front floor of the driver's side of the vehicle.

Subsequently, both Ms. Anthony and Defendant were arrested for possession of methamphetamine. However, the District Attorney's office later dismissed the charges against Ms. Anthony based on insufficiency of the evidence. On 19 January 2021, Defendant was indicted for: (1) possession of methamphetamine; (2) possession of drug paraphernalia; and (3) attaining habitual felon status.

The matter came on for trial on 13 December 2021. Ms. Anthony appeared in court at the beginning of the first day of the trial but failed to appear for the second

STATE V. MOREFIELD

Opinion of the Court

half of the day nor appear on the second day of the trial. During the trial, Officer Joel gave limited testimony as to what Ms. Anthony had said during the incident, to which defense counsel objected and the trial court sustained. On the second day of trial, outside the presence of the jury, the court again considered Ms. Anthony's out of court statements. The trial court noted:

[i]t has come to the Court's attention that Ms. Anthony has been served with at least one summons. Another summons has not been served on her. She was to be here today. She is not here today. And, again, we have the question of Ms. Anthony's statements coming in at this time through [Corporal] McKinney.

The trial court further contemplated that the State offered Corporal McKinney's body camera footage as evidence and sought to publish it to the jury. The trial court found that the "attorneys have stipulated that the body cam footage should be admitted in total and also that statements of Ms. Anthony may be elicited through [Corporal] McKinney and Officer Joel." The trial court noted that both trial attorneys agree that the statements of Ms. Anthony are

hearsay exceptions in this case, given the unavailability of Ms. Anthony and the fact that the statements are offered as evidence of a material fact, one of which being the awareness of the parties as to the paraphernalia and the drugs and the probative value of such statements which -- and information not being available through other reasonable means and that the interest of justice is served by such admission.

Further, the trial court found that it has "sought the presence of Ms. Anthony, sought her attendance by process and other reasonable means, and her presence is

still not before the Court” and there was no prejudice to either party by admitting Ms. Anthony’s statements into evidence because the defense sought her testimony and the prosecution sought her presence as a State witness. Finally, the trial court found that under Rule 403 of North Carolina Rules of Evidence, the probative value of the evidence is not outweighed by any prejudice. Thereafter, State’s Exhibit 2, the body camera footage, was published to the jury.

In the exhibit, Corporal McKinney asked Ms. Anthony what was going on. Ms. Anthony explained she was going to work when Defendant busted her windshield, prompting her to stop at the truck stop and to call her mother to come meet her. According to Ms. Anthony, when she got off the interstate, Defendant “put the drugs and stuff in that red coat and then he put the bowl in the sock and put it in the trunk,” in an attempt to set her up so that when the police came, she would be taken to jail. Officer McKinney asked Ms. Anthony if the drugs were hers and Ms. Anthony stated, “no it is not mine whatsoever. He hid it and threw it in the back and told me he was going to set me up when I got off the exit.”

On cross-examination, Corporal McKinney testified that Ms. Anthony told him that Defendant had warned her not to call the police during their argument because she would be charged with having methamphetamine in her vehicle. According to Corporal McKinney’s testimony, Ms. Anthony explained to him that neither the methamphetamine nor the smoke pipe belonged to her. Additionally, Officer Joel testified that before searching Ms. Anthony’s vehicle, she stated that if anything was

found, it would be Defendant's. On cross-examination, Officer Joel explained that when she originally conversed with Ms. Anthony and Defendant, Ms. Anthony initially "didn't say any of these things."

At the close of the State's evidence, defense counsel made a motion to dismiss the charges for lack of sufficient evidence, citing to Ms. Anthony wrongfully accusing Defendant, her unavailability as a witness in that "she's made herself unavailable," and that the State's video exhibit and "all of the evidence the State's put in has corroborated the defense side of the story." In turn, the State argued sufficient evidence was admitted to send the case to the jury due to Defendant's accurate description of the precise location of the drug and drug paraphernalia, in addition to "Ms. Anthony's account, which was admitted into evidence, that he himself put it back there." The trial court denied the motion to dismiss.

During Defendant's case in chief, defense counsel called Ms. Anthony as a witness, but she did not respond. The bailiff called out for Ms. Anthony and again, no response was given. Thereafter, the trial court issued an order for her arrest, finding that Ms. Anthony had been subpoenaed, was not present in the courtroom, and was called as a witness by both the State and the defense. Defense counsel renewed the motion to dismiss at the close of all the evidence and again, the trial court denied the motion.

On 14 December 2021, the jury found Defendant guilty of possession of methamphetamine and not guilty of possession of drug paraphernalia. Following the

jury trial, Defendant pleaded guilty to attaining habitual felon status and was sentenced to 35 to 54 months imprisonment. On 15 December 2021, Defendant entered written notice of appeal.

II. Analysis

A. Motion to Dismiss.

On appeal, Defendant argues that the trial court erred in denying the motion to dismiss the charge of possession of methamphetamine because “the State failed to provide sufficient evidence of constructive possession where [he] did not have exclusive possession of the [vehicle] where the drugs were found.” We disagree.

We review 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) (citation omitted). When a motion to dismiss is based on insufficiency of the evidence to support a conviction, it “must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.” *State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (cleaned up).

When considering a motion to dismiss for insufficiency of the evidence, this Court “is concerned only with the legal sufficiency of the evidence to support a verdict,

not its weight, which is a matter for the jury.” *Id.* (citation omitted). The evidence must be considered in the light most favorable to the State, so that “all contradictions and discrepancies therein must be resolved in the [S]tate’s favor” and the State is to be given the “benefit of every reasonable inference to be drawn in its favor from the evidence.” *Id.* (citations omitted).

The essential elements of felonious possession of a controlled substance are: (1) “[t]he substance must be possessed” and (2) “the substance must be knowingly possessed.” *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (citation omitted). Possession may be proven by either actual or constructive possession. *State v. Boyd*, 154 N.C. App. 302, 306, 572 S.E.2d 192, 195 (2002) (citation omitted). Defendant challenges the allegation he had constructive possession of the methamphetamine. “Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance.” *Id.* (citation omitted). Constructive possession depends on the totality of the circumstances in each case. *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262 (2003) (citation omitted). If a 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.” *Boyd*, 154 N.C. App. at 306, 572 S.E.2d at 195 (citation omitted).

Defendant argues that the State failed to present sufficient evidence of “other

incriminating circumstances” to prove he constructively possessed the methamphetamine. Defendant argues that our holding in *State v. Bailey*, 233 N.C. App. 688, 757 S.E.2d 491 (2014) is controlling as to this case. In *Bailey*, this Court found that the State failed to present sufficient evidence of other incriminating circumstances when the evidence showed that 1) the contraband in question, a rifle, was registered to the driver; 2) the defendant was aware of where the contraband was located in the vehicle; 3) he informed an officer of its location at the scene prior to his arrest; 4) this occurred shortly after a report of a shooting in the area; 5) the firearm was still warm at the time of disclosure; and 6) the vehicle in which the defendant and the contraband were located was being driven by a third party at the time. *Id.* at 692-93, 757 S.E.2d at 494. Further, this Court noted that the contraband was located in a place equally accessible to both defendant and the driver. *Id.* at 692, 757 S.E.2d at 494. We found defendant’s knowledge of the location of the contraband was insufficient to show constructive possession. *Id.* at 693, 757 S.E.2d at 494.

Here, although Defendant was a passenger in the vehicle where the methamphetamine was located, the State presented other evidence, when viewed in the light most favorable to the State, tending to support a finding of constructive possession by Defendant. At the hearing, the State presented the video evidence taken by Corporal McKinney’s body camera which recorded Ms. Anthony stating Defendant had wrapped the methamphetamine and pipe in clothing and threw the items into her vehicle’s trunk. The exhibit also showed Ms. Anthony told the Corporal

of Defendant's plans to frame her by using methamphetamine in an attempt to have her arrested once the police arrived.

Further, Corporal McKinney's testimony tended to demonstrate Defendant knew exactly where the methamphetamine was located inside of the vehicle. Ms. Anthony told the officer Defendant warned her not to call the police because she would be charged with having methamphetamine in her vehicle. On cross-examination, Corporal McKinney stated Ms. Anthony told him that neither the methamphetamine nor the smoke pipe belonged to her. Additionally, Officer Joel testified Ms. Anthony informed her if any type of contraband was found during the search of the vehicle, it belonged to Defendant.

It is also notable that during the trial, defense counsel stipulated Ms. Anthony's statements, through the testimonies of Officer Joel and Corporal McKinney and through the admitted State's video exhibit, could be offered into evidence as a hearsay exception. Furthermore, Defendant knew where the methamphetamine was placed despite it being hidden out of sight. Further testimony showed Defendant told the officer exactly where the illegal substance was located; told Officer Joel she had overlooked the contraband during her search; and revealed the items were wrapped in clothing and positioned in the vehicle's trunk area. Officer Joel confirmed at trial that she had found the contraband based upon Defendant's description. Such evidence, when taken in the light most favorable to the State, provides a sufficient link between Defendant and the illegal contraband to allow for

the jury's consideration. *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991) (citation omitted) (explaining issues of constructive possession are properly determined by the jury), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992). Because the evidence establishes sufficient incriminating circumstances to support constructive possession and overcome Defendant's motion to dismiss, we overrule Defendant's argument.

B. Ineffective Assistance of Counsel.

Next, Defendant argues he received ineffective assistance of counsel when his defense counsel elicited inadmissible hearsay testimony, stipulated to the admissibility of Ms. Anthony's out of court testimony under the Rule 804 residual hearsay exception, and failed to request a limiting instruction for the State's video exhibit containing Ms. Anthony's statements.

Defendant further argues because Ms. Anthony does not qualify as an unavailable witness and her statements do not have the required circumstantial guarantee of trustworthiness, defense trial counsel was deficient in stipulating to their admissibility. According to Defendant, he was prejudiced by his trial counsel's performance considering "the remaining substantive evidence before the jury was weak as evidenced by the fact the jury chose to acquit [him] of possession of paraphernalia." We disagree.

Ineffective assistance of counsel claims should generally "be considered through a motion for appropriate relief before the trial court in post-conviction

proceedings and not on direct appeal.” *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018) (citation omitted). However, it is well established that ineffective assistance of counsel claims “brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted).

We review a claim of ineffective assistance of counsel *de novo*. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). In order to establish a claim for ineffective assistance of counsel, Defendant must first show that his trial counsel’s performance fell below an objective standard of reasonableness. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002) (citation omitted). When determining an objective standard of reasonableness, Defendant must overcome a strong presumption that the challenged action “might be considered sound trial strategy.” *State v. Stroud*, 147 N.C. App. 549, 555, 557 S.E.2d 544, 548 (2001) (citation omitted).

If able to overcome this presumption, Defendant must then show that the deficiency in his trial counsel’s performance was so serious that a reasonable probability exists that the result of the trial would have been different. *Gainey*, 355 N.C. at 112, 558 S.E.2d at 488. Our Supreme Court has stated that “[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for defendant to bear.”

State v. Fletcher, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. R. Evid. 801(c). While hearsay is usually inadmissible at trial, our Rules of Evidence offer certain exceptions which permit the admission of hearsay testimony when a declarant is unavailable. N.C. R. Evid. 804(b). A declarant may be deemed unavailable if she is “absent from the hearing and the proponent of [her] statement has been unable to procure [her] attendance . . . by process or other reasonable means.” N.C. R. Evid. 804(a)(5). The out of court statement of an unavailable declarant may be admissible though the residual or “catchall” hearsay exception where various criteria are met, including that the statement has “circumstantial guarantees of trustworthiness.” *State v. Isenberg*, 148 N.C. App. 29, 35, 557 S.E.2d 568, 573 (2001); N.C. R. Evid. 804(b)(5).

Defendant argues Ms. Anthony cannot be considered an unavailable witness because “there was no evidence that [she] was subpoenaed ‘numerous times.’ ” However, the record evidence shows Ms. Anthony was served with at least one subpoena to appear and, in fact, Ms. Anthony did make an appearance in the courtroom on the first day of the trial. Both the State and defense counsel sought the testimony of Ms. Anthony and intended for her to testify. Yet, during the course of the trial, Ms. Anthony chose not to return to court. The trial transcript shows that thereafter both the prosecutor and defense trial attorneys stipulated on the record:

STATE V. MOREFIELD

Opinion of the Court

the statements of Ms. Anthony are hearsay exceptions in this case, given the unavailability of Ms. Anthony and the fact that the statements are offered as evidence of a material fact . . . information not being available through other reasonable means[,] and that the interest of justice is served by such admission.

The decision of defense counsel to stipulate to the admissibility of the body camera footage containing Ms. Anthony's statements was not an unreasonable trial strategy, since there was a legitimate argument that the hearsay statements were indeed admissible.

Furthermore, the State had previously subpoenaed Ms. Anthony, who had appeared earlier during the trial, and if defense counsel had pressed the argument that Ms. Anthony's statements could not be considered under the hearsay exception, the State could have sought a continuance in order to make a further attempt to compel Ms. Anthony's re-appearance. The State argues, "[i]t is possible that defense counsel was concerned that Ms. Anthony's in-person testimony might have been more compelling to the jury then [sic] the statements she made in the video. By avoiding Ms. Anthony's in-person testimony, Defendant's counsel was free to attack Ms. Anthony's credibility without any response from her."

This is a compelling argument and not an unreasonable trial strategy. Because "(i)neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics[,]" we hold that Defendant's trial counsel's performance did not fall below an objective standard of reasonableness.

State v. Taylor, 79 N.C. App. 635, 638, 339 S.E.2d 859, 861 (1986).

We need not address Defendant's substantive argument that Ms. Anthony was not an unavailable witness, because Defendant stipulated to Ms. Anthony's unavailability as a witness and to the admissibility of her statements under a hearsay exception. Thus, Defendant's argument is overruled.

III. Conclusion

Based upon our reasoning above, we affirm the trial court's denial of Defendant's motion to dismiss and overrule Defendant's claim of ineffective assistance of counsel. We hold Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges TYSON and MURPHY concurs.

Report per Rule 30(e).