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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1112

Filed 18 June 2024

Forsyth County, Nos. 22 CRS 366847, 366850

STATE OF NORTH CAROLINA

v.

MATTHEW JAVON POTTER

Appeal by defendant from judgment entered 10 May 2023 by Judge Eric C. Morgan in Superior Court, Forsyth County. Heard in the Court of Appeals 29 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind Kumar Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi E. Reiner, for defendant-appellant.

ARROWOOD, Judge.

Matthew Javon Potter (“defendant”) appeals from the trial court’s judgment entered 10 May 2023. For the following reasons, we find that defendant received a fair trial free from prejudicial error.

I. Background

On 18 December 2022, Officer J.M. Reyes (“Officer Reyes”) of the Winston-Salem Police Department was working the midnight shift. While investigating a hit and run accident near Urban Street and Waughtown Street, Officer Reyes heard gunshots nearby. Officer Reyes began “circulat[ing] the area” in his marked police car. Within about five minutes of hearing the gunshots, he observed a blue Honda and another dark-colored vehicle on Monmouth Street going in the opposite direction from him, about a block from the area where he had been investigating the hit and run. Officer Reyes continued “patrolling” the area and observed the blue Honda again on Sprague Street about five minutes after first seeing it.

Officer Reyes followed the blue Honda, estimated it was traveling about fifteen to eighteen miles per hour above the posted speed limit, and pulled it over. While Officer Reyes walked up to the car’s driver-side door, the driver rolled down his window. Officer Reyes testified that he noticed “[t]he odor of marijuana.” Officer Reyes told the driver he pulled him over for speeding. Three other people, including defendant, were inside the car with the driver, one in the front passenger seat and two in the back passenger area. Defendant was the passenger in the back sitting directly behind the passenger seat. While shining his flashlight inside the car, Officer Reyes saw a handgun with an extended ammunition magazine next to the driver, “wedged in between the driver’s seat and the center console.” Officer Reyes provided

notice of the gun to other officers by stating, “We got a signal eight.”¹ Officer Reyes then asked the driver to step out of the car.

At the time Officer Reyes noticed the gun near the center console, Officer M.A. Parker (“Officer Parker”) approached the Honda’s front passenger-side door and opened it while shining his flashlight inside. While asking the front passenger to keep his hands on his head, Officer Parker shined his flashlight at the front passenger’s floorboard. Officer Parker then requested a third officer, Officer S.T. Simon (“Officer Simon”), to help him. According to police bodycam footage, at 12:47:32 A.M., Officer Parker stated, “Hey, Simon. Come on this side for me. Just watch [the front passenger]. There’s a signal eight. There’s signal eights all in the car.” Officer Simon asked for the gun’s location, and Officer Parker responded, “There’s one right here in the floorboard.” After Officer Parker got the front passenger out of the car and handcuffed him, Officer Parker stated, “There’s an AK right there.” At 12:49:30 A.M., Officer Parker is also heard radioing to police dispatch, “We got a car stopped over here They got gang members in there. There’s guns in the car.” Officer Reyes testified that he learned of the gun on the front passenger-side floorboard from Officer Parker. And at 12:49:47 A.M., after all four occupants were removed from the Honda, Officer Reyes began searching the car.²

Four loaded guns were found inside the car: a Glock with an extended

¹ The officer used the term, “Signal eight” as code for a weapon.

² Defendant concedes in his Reply Brief that the search began at 12:49:47 A.M.

magazine between the driver's seat and the center console; an AK rifle on the front passenger floorboard; a Palmetto State rifle on the rear left floorboard, and a gray 9mm pistol on the rear right floorboard with the barrel inside a fanny pack near the right passenger door. Officer Parker testified at trial that he saw the fanny pack when he opened the door to the rear right passenger seat, and it was directly below defendant's feet.

On 3 April 2023, defendant filed a motion to suppress evidence found during the car search because the officers lacked probable cause to conduct the search. The motion was heard on 9 May 2023. During the hearing, the following exchange occurred between the State and Officer Reyes:

The State: And did you learn from Officer Parker about a concealed rifle in the front passenger floorboard before searching the vehicle?

Officer Reyes: Yes, ma'am.

The State: And were the other occupants removed from the vehicle as well?

Officer Reyes: Yes, ma'am.

The State: And was a search of the vehicle conducted?

Officer Reyes: Yes, ma'am.

On cross-examination, the following exchange occurred:

Defense Counsel: Officer Reyes, [the State] asked you about having been informed there was

a concealed gun in the front seat by Officer Parker, but in your report you said you searched the car based on the odor of marijuana. Correct?

Officer Reyes: Correct.

Defense Counsel: So you didn't mention anything about knowing there was a concealed gun. In fact, in your report, you indicated that all the weapons you found as a result of the search were concealed and found during the search. Isn't that correct?

Officer Reyes: Correct.

Defense Counsel: So you weren't aware of the gun being in the front seat until you started searching the car?

Officer Reyes: Correct.

Then on redirect:

The State: Is it fair to say that one of the reasons that you initiated the search in addition to the odor of marijuana was what you learned from Officer Parker about the firearm that was concealed on the floorboard?

Officer Reyes: Yes, ma'am.

Then on recross:

Defense Counsel: Have you reviewed that portion of Officer Parker's [bodycam footage] where he finds the gun in question under the front passenger seat?

Officer Reyes: I don't recall. This is when I wrote the

report.

Defense Counsel: But now earlier when [the State] asked you, did you perform the search based on having information for Officer Parker, but in answer to my question, you said you didn't have that when you started the search, so clarify for the record. When did Officer Parker tell you about the gun he saw in the front passenger area?

Officer Reyes: I believe it was when all the occupants were out of the vehicle.

Defense Counsel: I'm sorry.

Officer Reyes: I believe it was when all the occupants were out of the vehicle.

Defense Counsel: So you had already taken everybody out of the car and then started the search, and that's when you saw a gun. Right?

Officer Reyes: Officer Parker had mentioned it. I had not seen it with my own eyes.

Defense Counsel: Well, my question actually was: When did he mention it?

Officer Reyes: When occupants were out of the vehicle.

Defense Counsel: So everyone was already out of the car, and then he mentioned there was a gun in the front passenger area?

Officer Reyes: Yes, sir.

Defense Counsel: But he saw that gun, didn't he?

Officer Reyes: Yes, sir.

Defense Counsel: So it was not concealed.

Officer: Reyes: After the occupants were taken out of the vehicle.

In a written order denying defendant's motion to suppress, the trial court found in part the following:

4. As he was assisting with the investigation of the hit and run, Officer Reyes heard the sound of gunshots nearby.
5. Officer Reyes, based on his perception of the sound of the gunshots, believed that they had come from the vicinity of Urban and Waughtown streets.
6. After he heard the shots, Officer Reyes left the scene of the hit and run investigation to search the area in light of the gunshots that he had heard.
7. Officer got into his [marked] Dodge Charger . . . and turned on Monmouth Street, which is about 1 block away, and observed a Blue Honda vehicle driving toward Old Lexington Road.
8. Officer Reyes went down Old Lexington Road and turned onto Sprague street, in an area that was still approximately one block from the area in which he heard the gunshots.
9. Officer Reyes saw the Blue Honda, and turned around and followed it.
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12. Officer Reyes initiated a traffic stop of the Blue Honda [for speeding].

. . . .

17. When the driver rolled the window down, Officer Reyes detected the odor of marijuana.
18. Officer Reyes also noticed, in plain view between the driver's leg and the console, a handgun with an extended magazine, which makes the handgun capable of holding additional rounds of ammunition.
19. After seeing the handgun with the extended magazine, Officer Reyes had Officer safety concerns, and he asked the driver to step out of the car.
20. Officer Parker had approached the passenger side of the car, and he asked the person in the front passenger seat to get out of the vehicle.
21. As he did so, Officer Parker noticed a rifle concealed in the front right passenger side of the Blue Honda.
22. Officer Reyes was unable to see the rifle, but Officer Parker told him about it, and all of the passengers were asked to get out of the vehicle.
23. The Blue Honda was then searched by Officer Reyes and other Officers, and firearms were located.

The trial court concluded in part that “[t]he totality of the facts and circumstances within the knowledge of Officer Reyes . . . were sufficient in themselves to warrant a person of reasonable caution in the belief that an offense had been committed or was being committed” and that “Officer Reyes had probable cause to search the Blue Honda and that the search of [it] was lawful and proper.”

Following the suppression hearing, the matter was called for trial on

9 May 2023. The following day, the jury found defendant guilty of possession of firearm by felon, possession of a firearm with an altered or removed serial number, and carrying a concealed weapon. The trial court consolidated the charges into the Class G felony of possession of firearm by a felon and sentenced defendant to 14 to 26 months of imprisonment, suspended for 36 months of supervised probation. Defendant gave notice of appeal in open court. Following the notice of appeal, the trial court added the following as an additional term to defendant's probation conditions:

[I]f the defendant is found possessing a firearm during this appeal period, [] the appeal bond [should] specifically provide that he be immediately arrested; that a bond of \$50,000 be set in the matter; and then he could be brought forthwith to a Superior Court Judge for review of that matter.

II. Discussion

Defendant contends that the trial court erred by (1) failing to suppress the evidence from the car search for lack of probable cause; (2) denying defendant's motion to dismiss because there was insufficient evidence he constructively possessed the gun; (3) failing to instruct the jury that defendant had to have actual knowledge the serial number had been removed from the gun; and (4) setting an anticipatory bond as a condition of defendant's probation. We take each argument in turn.

A. Motion to Suppress

Defendant contends that the trial court erred by failing to suppress the

evidence from the car search because the only basis for the search was the smell of marijuana. We disagree.

“The standard of review for a motion to suppress is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Wainwright*, 240 N.C. App. 77, 83 (2015) (citation and internal quotation marks omitted). “In evaluating a trial court’s ruling on a motion to suppress, the trial court’s findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Allen*, 197 N.C. App. 208, 210 (2009) (cleaned up). “Conclusions of law are reviewed de novo and are subject to full review.” *State v. Biber*, 365 N.C. 162, 171 (2011) (citation omitted). Lastly, “[i]n reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State” *State v. Moore*, 152 N.C. App. 156, 159 (2002) (citations omitted).

“When seeking to admit evidence discovered by way of a warrantless search in a criminal prosecution, the State bears the burden of establishing that the search falls under an exception to the warrant requirement.” *State v. Terrell*, 372 N.C. 657, 665 (2019) (citations and internal quotation marks omitted). Under the automobile exception, “[a] search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the [F]ourth [A]mendment if it is based on probable cause, even though a warrant has not been obtained.” *State v. Isleib*, 319 N.C. 634, 638 (1987) (citing *United States v. Ross*, 456 U.S. 798, 809 (1982)).

“Probable cause exists where the facts and circumstances within an officer’s knowledge, and of which they had reasonably trustworthy information, are sufficient themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (cleaned up). With respect to probable cause as it relates to the automobile exception, “a police officer in the exercise of their duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials.” *State v. Holmes*, 109 N.C. App. 615, 621 (cleaned up), *disc. rev. denied*, 334 N.C. 166 (1993). “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Ross*, 456 U.S. at 825.

“Officers who lawfully approach a car and look inside with a flashlight do not conduct a ‘search’ within the meaning of the Fourth Amendment.” *State v. Brooks*, 337 N.C. 132, 144 (1994) (citing *Texas v. Brown*, 460 U.S. 730 (1983)). And if “the officers see some evidence of a crime” as a result, probable cause may be established. *Id.* For example, in *Brooks*, a law enforcement officer “approached the defendant’s car and, using his flashlight, looked into the interior.” *Id.* at 145. After seeing an empty gun holster next to the defendant, the officer asked where the gun was, and the defendant told the officer he was sitting on it. *Id.* Our Supreme Court concluded that this gave the officer “probable cause to arrest the defendant for carrying a

concealed weapon.” *Id.*; *see also State v. White*, 18 N.C. App. 31, 33 (1973) (concluding the defendant was properly arrested without a warrant because officers had probable cause to believe defendant was carrying a concealed weapon after lawfully stopping the defendant’s car and seeing the defendant remove a gun from a bag).³

Here, the trial court’s findings that Officer Parker noticed a concealed rifle and told Officer Reyes about it before searching the Honda are supported by competent evidence. Those findings also support the conclusion that probable cause existed and the subsequent search was lawful. Officer Reyes testified during the suppression hearing that he “learn[ed] from Officer Parker about a concealed rifle in the front passenger floorboard before searching the vehicle[.]” Although Officer Reyes’s testimony on cross-examination conflicted with this statement, it was reestablished on redirect “that one of the reasons [he] initiated the search . . . was what [he] learned from Officer Parker about the firearm [] concealed on the floorboard[.]”

Under *Brooks* and *White*, evidence of the concealed weapon was sufficient to constitute probable cause for an arrest. And under the automobile exception, evidence of the concealed rifle was *also sufficient probable cause* to believe other guns were concealed in the Honda. *See State v. Bennett*, 65 N.C. App. 394, 396 (1983) (explaining that under the automobile exception, “[p]resence of [contraband] seen by

³ Although the automobile exception to the warrant requirement was not applied in *Brooks* and *White*, both cases stand for the proposition that the officers’ observation of a concealed weapon constituted probable cause.

the officer is sufficient probable cause to believe other contraband . . . may be concealed within the vehicle.”). Thus, knowledge of the concealed weapon, in addition to Officer Reyes’s plain view of the gun in the center console with an extended ammunition magazine, constituted probable cause to lawfully search the Honda for other guns that could be concealed within it.⁴

Defendant’s contention in his Reply Brief that the bodycam footage supports the fact that the concealed rifle was found during the search is not persuasive. In fact, the bodycam footage supports the opposite. Officer Parker is seen shining his flashlight toward the front passenger’s floorboard and then heard stating, “There’s signal eights all in the car” and that “[t]here’s one right here in the floorboard.” These statements occurred before the front passenger got out of the car and before the search took place. Accordingly, the trial court did not err by failing to suppress the evidence from the search of the Honda because probable cause existed at the time of the search.

B. Constructive Possession

Defendant next argues the trial court erred in denying his motion to dismiss because there was insufficient evidence he constructively possessed the gun found in the rear floorboard of the vehicle at his feet. We disagree.

⁴ We thus need not address whether the odor of marijuana was a factor in the probable cause analysis.

Because defendant did not actually possess the gun found at his feet, the State was required to prove he constructively possessed it. *See State v. Wirt*, 263 N.C. App. 370, 376 (2018) (explaining that the State was required to show constructive possession where a firearm was found under the passenger seat of the truck defendant was driving). “Possession of a firearm may . . . be actual or constructive.” *State v. Young*, 190 N.C. App. 458, 460 (2008) (quoting *State v. Boyd*, 154 N.C. App. 302, 307 (2002)). “Constructive possession of an item exists when a person does not have the item in physical custody, but nonetheless has the power and intent to control its disposition.” *Id.* (cleaned up). Other facts besides “fingerprints, permits, or other proof of ownership” support a finding of constructive possession. *Id.*

Mere proximity to an item is insufficient evidence of constructive possession. *State v. Bailey*, 233 N.C. App. 688, 691 (2014). However, proximity can be sufficient when combined with other factors. *See State v. Best*, 214 N.C. App. 39, 47 (2011). “Two of the most common factors [of incriminating circumstances] 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. Livingston*, 290 N.C. App. 526, 530 (2023) (quoting *State v. Bradshaw*, 366 N.C. 90, 94 (2012)).

In *Livingston*, the Court found proximity to be a contributing factor to the defendant’s constructive possession. *Id.* at 531. The Court noted that “the black bag containing the gun was placed behind the passenger seat where defendant was

sitting. As a result, defendant was sitting less than two feet in front of the bag.” *Id.* (cleaned up).

This Court also has found that contraband located where a person is sitting can indicate their control over the contraband. *See State v. Matais*, 143 N.C. App. 445, 450 (2001). An officer in that case testified that he found a plastic bag in the back right of a vehicle “where the actual person would be sitting[,]” and the defendant was the only occupant of the car who exited from the right rear passenger seat. *Id.* at 449. The Court held that the evidence supported the inference that the defendant placed the bag containing the substance in the seat, and therefore, the defendant had the power and intent to control its disposition or use. *Id.*

Here, considering the evidence in the light most favorable to the State, defendant was in constructive possession of the firearm found in the rear right floorboard. Defendant’s proximity to the gun is even closer than that in *Livingston*, as Officer Parker testified that the fanny pack containing the gun was “directly below” defendant’s feet. Further, like in *Matais*, the location of the gun in the floorboard where defendant was seated supports the inference that defendant placed the fanny pack and gun there and thus had the power and intent to control the gun. In addition, it should be noted that there were four occupants of the vehicle and that four weapons were found—one firearm located where each of the occupants were seated. This circumstance is additional support for the inference that each occupant

possessed the weapon in proximity to them. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

C. Failure to Instruct Jury on Actual Knowledge of Serial Number

Defendant's next assignment of error challenges the trial court's omission of jury instructions regarding defendant's intent as plain error. We disagree.

Unpreserved error requires defendants to bear "the heavier burden of showing that the error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516 (2012) (citation omitted). Under the plain error standard, a defendant must show that a fundamental error occurred at trial—"that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518 (citations and internal quotation marks omitted).

Our statutes make it unlawful

for any person knowingly to sell, buy, or be in possession of any firearm on which the permanent serial number, manufacturer's identification plate, or other permanent distinguishing number or identification mark has been altered, defaced, destroyed, or removed for the purpose of concealing or misrepresenting the identity of the firearm.

N.C.G.S. § 14-160.2(b) (2023). Even assuming *arguendo* it was error to omit an instruction that the jury must find that defendant knew the serial number had been removed, defendant does not show that this error probably impacted the jury's verdict.

Officers heard gunshots approximately ten minutes before pulling the Honda over for speeding after midnight. Officers found defendant and three other individuals in the car, and after conducting a legal search of the vehicle, the officers found a total of four firearms in the car. Each firearm was found within the respective area where each individual sat. The firearm in question was located at Defendant's feet, and the serial number had clearly been removed from the weapon. In the light most favorable to the State, these facts taken together lead to the inference that defendant knew the serial number was removed from the gun in his possession. Thus, defendant has failed to show that the jury probably would have reached a different verdict on the issue if the additional instruction had been given. Therefore, the trial court did not plainly err in the jury instructions.

D. Anticipatory Bond as a Condition of Probation

Finally, Defendant argues the trial court erred by setting an anticipatory bond and requests we vacate and remand to strike the anticipatory bond condition. We decline to do so.

Pursuant to our statutes, a person "arrested for a violation of any of the conditions of probation . . . must be taken without unnecessary delay before a judicial official to have conditions of release pending a revocation hearing set in the same manner as provided in G.S. 15A-534." N.C.G.S. § 15A-1345(b). However, our appellate courts have permitted trial courts to include anticipatory bond conditions.

In *State v. Hilbert*, the trial court included the following term as a condition of probation: “First positive test [for a prohibited drug or alcohol] he is to be immediately arrested and placed under \$100,000.00 cash bond to await the probation violation hearing.” 145 N.C. App. 440, 445 (2001). On appeal, this Court determined that this challenge was not preserved for review because the defendant failed to object to the probationary condition at sentencing. *Id.* (citing N.C.R. App. P. 10(b)). The Court further noted that “other than generalized constitutional references, defendant cites no authority in support of his opposition to inclusion in the judgment of an appearance bond in anticipation of defendant’s violation of a probation condition.” *Id.* (citing N.C.R. App. P. 28(b)(5)).

However, this Court urged trial courts to use caution when considering anticipatory probation violation appearance bonds: “Should a sentencing court imposing a probationary judgment seek to address the matter of appearance bond in the event of the defendant’s arrest for alleged violation of conditions of probation, . . . the better practice [is] to . . . ‘recommend’ bond in a certain amount upon issuance of a probation violation warrant.” *Id.* at 446.

Here, defendant did not raise any objection to the anticipatory bond condition before the trial court and has failed to preserve the issue for review pursuant to Rule 10(b). Although defendant contends that “non-constitutional sentencing issues are

preserved without contemporaneous objection,”⁵ the issue of an anticipatory bond condition does not fall within one of the many categories included in the section. Accordingly, we hold that the issue was unpreserved for review. However, we once again urge trial courts to adopt the “better practice” suggested in *Hilbert* and *State v. McKinnon*, No. COA15-650, 2016 WL 224134, at *6 (N.C. Ct. App. 2016) (unpublished), and “recommend” bond in a certain amount upon issuance of a warrant.

III. Conclusion

For the foregoing reasons, we find that defendant received a fair trial free from prejudicial error.

NO ERROR.

Chief Judge DILLON and Judge HAMPSON concur.

Report per Rule 30(e).

⁵ In support of this contention, defendant cites *State v. Meadows*, 371 N.C. 742, 749 (2018).