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Police Law Bulletin

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It's Elementary…..

Evidence Insufficient to Establish Constructive Possession

***State v. Lindsey*, No. COA11-612 (6 March 2012).**

Officer Lee of the Lenoir Police Department responded to a call concerning a van that was sitting in the middle of Glendale Road, near Harper Avenue, at approximately 3:00 a.m. When Officer Lee arrived at the scene, he noticed a "bluish" colored van with the letter "W" as the first letter of the license tag, sitting idle. The van's headlights were not on. As Officer Lee approached the van, the van began heading north on Glendale. Officer Lee turned on his blue lights and attempted to make a traffic stop, but the van accelerated and "took off." Officer Lee continued to pursue the van which was going at least 55 to 65 miles per hour in an area where the posted speed limit was 25 miles per hour. Officer Lee eventually lost sight of the vehicle. The officer never saw the driver of the van.

During the pursuit, Officer Lee kept in contact with communications and other officers, relaying the description of the van. Several minutes afterwards, Detective Love stopped a "bluish" van near a Wal-Mart. Detective Love noted that the driver of the van appeared nervous. There were several bumper stickers on the van. When Detective Love asked Officer Lee if there were bumper stickers on the van he had been pursuing, Officer Lee said that he did not believe that there were any. Detective Love determined that the "bluish" van he had stopped was not the same van that Officer Lee had attempted to stop. Afterwards, Sergeant Penley saw a "greenish-bluish" van with a large silver stripe, and as he attempted to stop that vehicle, it crashed into a light pole in the back of a Wendy's parking lot. A black male with a plaid shirt jumped out of the van and scaled a nearby wall. Sergeant Penley called a K-9 officer. While waiting for the k-9 unit to arrive, Sergeant Penley, Officer Lee and other police officers secured the area. Officer Lee recovered a hat and a cell phone in the immediate vicinity of the van. After defendant was apprehended, no weapons or contraband was found on him, and a search of the path he had taken when fleeing the van did not reveal any weapons or contraband. A search of the driver's side seat of the van revealed a "blunt wrapper" and a wallet that contained eight hundred dollars. Officer Lee

discovered a bag containing cocaine, and another officer discovered a bag containing marijuana, near trash receptacles in the Wendy's parking lot. Officer Lee had no idea how long the bags had been there, and though Wendy's was closed at the time of the crash, the parking lot was open and had been accessible by the public before the area was secured.

Defendant was convicted of felonious operation of a motor vehicle to elude arrest, possession of cocaine, and possession of marijuana. Defendant made a motion to dismiss which was denied by the trial court. Defendant appealed arguing that the State failed to present sufficient evidence of each element of the offenses charged and of defendant being the perpetrator.

As previously mentioned, defendant was convicted of felony speeding to elude arrest. The only description of the suspect vehicle provided by Officer Lee was a "bluish" van with a license tag beginning with the letter "W." Officer Lee lost sight of this vehicle for 10-15 minutes before Sergeant Penley attempted to stop defendant's "bluish-greenish" van. Officer Lee could not describe to Sergeant Penley the type of van he had been pursuing, nor could he confirm, when asked by Sergeant Penley, whether the suspect vehicle contained a silver stripe. There was also no identification of the driver of the van that fled from Officer Lee. On these facts, the Court of Appeals held that there was not substantial evidence presented that defendant was driving the van that fled from Officer Lee.

Defendant was also convicted of felony possession of cocaine and marijuana. To obtain a conviction for these offenses, the State bears the burden of proving two elements beyond a reasonable doubt: 1. Defendant possessed the substance, and 2. The substance was a controlled substance. Possession may be either actual or constructive. Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both the power and intent to control its disposition or use, even though he does not have actual possession. If a defendant does not have exclusive control over the premises, other incriminating circumstances must be present before a court can find constructive possession. In the present case: 1. Defendant was not at his residence or in a place where he exercised any control; 2. although Sergeant Penley observed defendant exit the vehicle and scramble over the wall fleeing the Wendy's parking lot, he did not see the defendant take any actions consistent with disposing of the marijuana and cocaine in two separate locations in the parking lot; 3. there was no physical evidence linking the defendant to the drugs recovered; and 4. no drugs were found on or in the defendant's van. The only suspicious circumstances were: 1.the large amount of cash recovered; 2. the drugs found in a public parking lot near defendant's van; 3. the presence of a wrapper in the van that could be used to smoke tobacco or marijuana; and 4. the fact that defendant fled from the police after the crash. While this evidence raises a strong suspicion, the Court of Appeals found that it is insufficient to establish proof beyond a reasonable doubt that defendant constructively possessed the controlled substances.

Insufficient Evidence of Constructive Possession of Controlled Substances and Paraphernalia; Insufficient Evidence to Support Charge of Resist, Delay and Obstruct

***State v. Richardson*, No. COA09-621 (16 February 2010).**

The Greenville police department executed a search warrant at 508-A Contentnea Street. Police approached the front of the residence and yelled, "police, search warrant." Other officers had gone to the back of the residence to prevent people from leaving through the home's back door. As officers entered the residence, they saw a man and woman in the front of the house, and several men running out the back. As one officer exited the back door, he found that four men had been detained by fellow officers. The defendant was one of those men. Defendant was handcuffed and frisked. $1060.00 in cash was found

on his person. A plastic baggy containing 9.4-grams of crack was found on the ground about 2 feet from defendant's feet. The other men who had been detained were the same distance from defendant. In a side room of the house, officers found a set of scales, a small amount of marijuana and an open box of sandwich bags. Officers also found a glassine pipe in one of the kitchen cabinets. There was no evidence that defendant lived at the house although police had seen him in the area at least 5 times before.

A jury found defendant guilty of possession with intent to distribute cocaine, possession of drug paraphernalia, and resisting a public officer. The defendant appealed.

The defendant argued that the trial court erred by denying his motion to suppress the charge of possession with intent to distribute cocaine and possession of drug paraphernalia because the State presented insufficient evidence of possession. The Court of Appeals noted that in a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession. Proof of nonexclusive constructive possession is sufficient. Constructive possession exists when the defendant has the intent and capability to maintain control and dominion over the narcotics. Where contraband is found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred. Here, it is undisputed that defendant did not have actual physical possession of the cocaine or paraphernalia, did not reside at the residence, and did not have exclusive control of the residence. Thus, the State is required to show "other incriminating circumstances." The State put forth defendant's proximity to the baggie of crack and his previous visits to the house. The Court found that these two factors were insufficient. (The Court seemingly ignored the fact that the defendant fled from the residence and had over a thousand dollars in cash in his possession).

The defendant also argued that the trial court erred by denying his motion to suppress the charge of resisting an officer. The State asserted that defendant's flight after the police announced, "police, search warrant," is sufficient evidence of resisting an officer. The Court of Appeals disagreed holding that, unless instructed otherwise, a person may leave the scene of a search warrant being executed. Officers had not ordered the defendant to stop or remain at the scene before his attempts to flee.

Therefore, the Court of Appeals vacated all of defendant's convictions. The State has appealed to the North Carolina Supreme Court for discretionary review of this case.

Sufficient Evidence of Possession of a Controlled Substance by Constructive Possession of Cocaine

State v. Miller, No. 309A08 (20 March 2008).

At trial, the State presented evidence that on December 8, 2005, a Winston-Salem police detective obtained a search warrant for a residence. The Winston-Salem Police Special Enforcement Team entered the residence, commanding everyone to get on the floor. The officers found several individuals in the living room. Defendant, who was sitting on the corner of a bed in an adjoining room, slid to the floor as the officers entered. While on the floor, defendant's head lay between one to four feet from the bedroom door. Another individual in the bedroom remained seated in a chair about eight feet from the door. A detective entered the bedroom and recovered a small white rock-like substance from the end of the bed where defendant had been sitting. In addition, the detective recovered a plastic bag containing several small white rocks from behind the open bedroom door, about two feet from where defendant had been

lying. Defendant's birth certificate and state-issued identification were found on a television stand in the bedroom.

Two of defendant's children lived at the address with their mother, Alicia Johnson. Testifying on behalf of the defendant, Johnson stated that defendant did not live in the house and was there at the time of the search because he was preparing to pick-up the children from school. She further testified that the crack cocaine found in the room was hers. However, she was not at the residence when police executed the warrant.

Defendant was tried for possessing cocaine with intent to sell and deliver, maintaining a place to keep a controlled substance, and attaining the status of habitual felon. At the close of the State's evidence, the trial court granted defendant's motion to dismiss the charge of maintaining a place to keep a controlled substance, but denied his motion to dismiss the possession charge. Defendant was found guilty of simple possession of cocaine and attaining habitual felon status. Defendant appealed. In a divided opinion, the North Carolina Court of Appeals reversed finding the evidence insufficient to support a conclusion that the defendant constructively possessed the cocaine. The State appealed.

A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. The defendant may have the power to control either alone or jointly with others. Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession. Two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found. In the case at hand, police found defendant in a bedroom of the home where two of his children lived with their mother; when first seen, defendant was sitting on the same end of the bed where cocaine was recovered; once defendant slid to the floor, he was within reach of the package of cocaine recovered from behind the bedroom door; defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom; and the only other individual in the room was not near any of the cocaine. The North Carolina Supreme Court concluded that even though defendant did not have exclusive possession of the premises, these incriminating circumstances permit a reasonable inference that defendant had the intent and capability to exercise control and dominion over cocaine in that room.

The court reversed the decision of the Court of Appeals and found the trial court's denial of defendant's motion to suppress proper.

When Two Controlled Substances Are Contained in Same Pill, Defendant May Be Convicted and Sentenced for Possession of Both Substances

***State v. Hall*, No. COA09-1097 (4 May 2010).**

Jasmine Hall was stopped for a traffic violation. After smelling the odor of marijuana emanating from the vehicle, and having a K-9 alert to the vehicle, officers conducted a warrantless search of defendant's vehicle pursuant to the automobile exception. A cigarette believed to contain marijuana, and two ecstasy pills, were found and seized. Defendant was arrested accordingly. The cigarette was inadvertently destroyed by law enforcement. The SBI analysis of the pills revealed that each contained both ecstasy and ketamine.

The State dismissed the charges of possession of marijuana and possession of drug paraphernalia. A jury found Hall guilty of possession of methylenedioxymethamphetamine ("ecstacy'), a Schedule I controlled

substance, and ketamine, a Schedule III controlled substance. Defendant appealed arguing that she could not be convicted of possessing two illegal substances when the two substances were contained in a single pill.

The Court of Appeals ruled that double jeopardy did not bar the defendant's convictions and sentences for both substances. Neither the presence nor the amount of ecstasy contained in each pill had any bearing on defendant's conviction for possession of ketamine, and vice versa.

An Airsoft Gun Which Fires Plastic Pellets Is Not a "Gun" For Purposes of G.S. §14-34, Assault By Pointing A Gun

***In re N.T.*, No. COA10-1281 (2 August 2011).**

A lady and her husband lived with their two children, an 8-year-old girl and an 11-year-old boy, in Holly Ridge, North Carolina. On April 18, 2010, the 8-year-old girl was riding her bike. As she passed N.T. and another child, she noticed that they had a BB gun. As she turned away from them, she noticed that her shoulder was stinging and "blood [was] gushing out of it." N.T. had pulled the trigger while the other child held the gun. The girl's brother witnessed the incident and ran to get their mother. When the mother stepped outside, she saw N.T. running towards his house. She followed him to that location and told his mother about the incident. Subsequently, N.T.'s parents brought N.T. to the girl's home to apologize stating that while the other child had aimed and held the gun, their child, N.T. pulled the trigger. A detective was dispatched to investigate the incident. N.T., in the presence of his father, waived his rights and admitted pulling the trigger of the pellet gun.

A juvenile petition was filed alleging that N.T. should be adjudicated delinquent for having violated G.S. §14-34. The trial court adjudicated N.T. delinquent. In order to reach this conclusion, the trial court specifically determined that the Pump Air Soft Gun fell within the definition of "gun" for purposes of G.S. §14-34, assault by pointing a gun, and that N.T. was a principal to that crime based upon the common law concept of Acting in Concert. N.T. appealed arguing that the device in question is not a "gun" for purposes of N.C.G.S. §14-34, so that the evidence presented at trial was insufficient to support a finding of responsibility.

The term "gun" is not defined in G.S. §14-34. In addition, there is no case law from North Carolina appellate courts construing the meaning of the term. In the absence of such, courts look to dictionaries to determine the ordinary meaning of words within a statute. Black's Law Dictionary as well as the New Oxford American Dictionary seem to equate the term "gun" with a firearm, and emphasize the use of "explosive force." This is consistent with the manner in which the North Carolina Supreme Court has, in different contexts, defined the term. Therefore, the court concluded that the term "gun," for purposes of G.S. §14-34, encompasses devices ordinarily understood to be firearms and not other devices that fall outside of that category. Consequently, the Court of Appeals reversed the trial court's adjudication. However, the court noted though that its decision does not mean that the juvenile may not be subject to being found delinquent for assault with a deadly weapon inflicting serious injury in violation of G.S. §14-32(b), assault with a deadly weapon or assault inflicting serious injury in violation of G.S. §14-33(c)(1), or assault on a child under the age of 12 in violation of G.S. §14-33(c)(3).

Male Juvenile's Entry Into School's "Girl's Locker Room" Was Sufficient Evidence to Support Adjudication of Second-Degree Trespass

***In re S.M.S.*, No. COA08-970 (7 April 2009).**

S.M.S. was a 15-year-old student at a Pitt County high school. At approximately 1:00 p.m., three 14-year-old girls were changing clothes in the girls' locker room when they heard boys' voices. The girls then saw S.M.S. and another boy run through their locker room. A nearby coach heard the girls screaming, and immediately ordered the boys to exit the locker room. The coach then contacted an officer with the Greenville Police Department who was assigned to the high school. After reviewing school surveillance videos, the officer identified S.M.S. as one of the boys who had been in the locker room. At all relevant times, there was a sign on the front of the locker room door marked "Girls' Locker Room."

S.M.S. was adjudicated delinquent for the offense of second-degree trespass. S.M.S. appealed arguing that, although he violated school rules by going into the girls' locker room, his conduct did not support the charge of second-degree trespass. S.M.S. contended that he was lawfully permitted to enter the girls' locker room because it was located on school property, which is open to the public. When premises are open to the public, the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void. S.M.S. argued that his actions could not constitute trespass because he left immediately upon the coach's order to leave.

The Court of Appeals found that the sign marked "Girls' Locker Room" was reasonably likely to give S.M.S. notice that he was not authorized to go into the girl's locker room. Furthermore, his admission that he violated school rules by entering the room supports a reasonable inference that he knew he was not permitted in the locker room. The court therefore affirmed the denial of his motion to dismiss.

Trespass Authorization Forms A Frequently Asked Question

Q: May a business that is open to the public 24 hours a day (for example, an apartment complex or a convenience store) submit an Authority to Remove Trespassers form to the police department so that an officer may act as the owner's agent and remove, on sight, specified individuals from the owner's premises?

A: No. The Authorization to Remove Trespassers form should only be made available to establishments with specified closing hours. It gives officers the authority to remove, as trespassers, any and all persons found on the premises *after* the close of business.

While a business is open to the public, the owner, person in charge of the premises (such as a manager), or authorized agent (which should be some party other than a police officer), must request that the person leave the premises and then, if that person refuses, the officer may charge him or her with trespassing. With a few limited exceptions authorized by the Chief of Police, the Department has opted for this procedure because officers were regularly being asked to determine themselves who should or should not be on the property of another. This led to person being misidentified as trespassers and/or trespass charges being made that were later not supported by the business owners and managers.