

***In this issue:***

Defendant Constructively Possessed Methamphetamine in Vehicle – Pgs. 1-3

Defendant Constructively Possessed Firearm in Vehicle– Pgs. 3-5



North Carolina Court of Appeals



Defendant Constructively Possessed Methamphetamine in Vehicle

[State v. King](#), COA23-322, ___ N.C. App. ___ (Nov. 7, 2023).

On April 30, 2021, Haywood County Sheriff's Detectives Phillips and Reagan were called to jail to speak with an inmate, Thomas Clark. Clark agreed to provide information about the drug trade in Haywood County. Based upon Clark's information, the Detectives drove that afternoon to the America's Best Value Inn in Canton. Detective Phillips observed James Welch's vehicle parked in the Inn's parking lot. Welch was known to both Detectives to be involved in drug dealing in Haywood County.

The Detectives observed Welch exit room 213, retrieve a large box from the trunk of a Pontiac sedan, and return to the room. Ten minutes later the Detectives observed Welch, Welch's daughter, Ashley Maggard, and the Defendant leave room 213 and enter the parking lot. Defendant returned to room 213. Welch and Maggard left the property in a red vehicle.

Sergeant Campbell effected a stop of the red vehicle. Maggard told the officers a marijuana pipe was inside her purse. Officers conducted frisks of Welch and Maggard and a search of the vehicle. They located methamphetamine on Maggard, and two bags of methamphetamine on Welch.

Detectives Phillips and Reagan continued to monitor the motel. Defendant and Samantha Rich left room 213 and drove away from the property in the Pontiac. Rich was also known to Detective Phillips due to her involvement in the Haywood County drug trade. The Detectives followed Defendant and conducted a stop of the Pontiac. Detective Phillips had confirmed prior to the surveillance that Defendant's driver's license was revoked. Defendant admitted to possessing marijuana located in the center console of the Pontiac. The Detectives located the marijuana as well as a duffel bag containing \$3,900 in currency, a set of digital scales, and men's clothing. Deputy Green arrived with his canine and conducted a canine sniff around the Pontiac. The canine alerted to the presence of narcotics, but the officers were unable to locate any additional contraband.

Defendant was arrested for conspiracy to traffic methamphetamine and was incarcerated at the jail. Defendant called Rebecca McMahan from the jail's telephone. Defendant asked McMahan about the Pontiac and told her to bring her toolbox. Defendant contacted McMahan again the next day and suggested McMahan go to a carwash or someplace covered because it was raining. Defendant told McMahan "there's two. There's one big and one small." Defendant instructed McMahan to open the trunk and remove the passenger side taillight. Law enforcement monitored these conversations.

McMahan picked up the Pontiac from the impound lot, and drove the car to her friend's house. Once there, she removed the taillight and found a magnetic box. Detective Phillips went to McMahan's house and presented her with the information he knew and asked her to cooperate with the investigation. McMahan agreed. She told Detective Phillips she had located only the magnetic box and gave it to him. The box contained approximately 50 grams of methamphetamine. She took Detective Phillips to the Pontiac and allowed him to search it. Detective Phillips removed both taillights from the Pontiac and was able to see a second package. The package contained a large quantity of methamphetamine and some needles.

Defendant was indicted and tried for conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for unlawfully keeping and/or using controlled substances. Defendant moved to dismiss all charges. The trial court denied Defendant's motion. The jury returned guilty verdicts on all charges. Defendant appealed arguing he did not knowingly possess or traffic methamphetamine.

The Court of Appeals took up each of defendant's convictions in turn, beginning with the trafficking by possession charge. Defendant argued that he did not "knowingly possess" the methamphetamine. At trial, the State offered evidence that defendant constructively possessed the meth to show knowing possession. The court explained that constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the controlled substance. Constructive possession can be shown with evidence tending to show a defendant has exclusive possession of the property in which the drugs are located, or nonexclusive possession of the property where the drugs are located if there is also other incriminating evidence connecting the defendant to the drugs. Other incriminating circumstances to establish constructive possession include: (1) the defendant's ownership and occupation of the property; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; (5) other evidence found in the defendant's possession that links the defendant to the contraband; (6) a large amount of currency; and (7) evidence of conduct by a defendant indicating his knowledge of the presence of a controlled substance. Here, evidence showed defendant regularly operated the car where the methamphetamine was found, he was driving it when he was arrested and it was impounded, and in the trunk officers found a large amount of currency and digital scales. This evidence combined with the instructions provided in the jailhouse phone call supported the conclusion that defendant had constructive possession of the drugs.

The court then turned to the trafficking by transportation charge, and rejected defendant's argument that he did not knowingly transport the methamphetamine. The court noted transportation requires a "substantial movement" of contraband defined as "a real carrying about or movement from one place to another." Even very slight movement may be real or substantial enough. However, merely witnessing a drug transaction in a vehicle stationary in a parking lot is not movement when the officers did not witness the vehicle in motion. Here, detectives observed defendant drive the car with the meth from the hotel to a parking lot where he was arrested and the car was impounded. Although the methamphetamine was not immediately discovered, the fact that all the containers were not discovered until days later does not suggest a lack of knowledge given the hidden location of the packages and the Defendant's knowledge of the location of and extraction method for the packages.

Moving to defendant's argument that the State presented insufficient evidence he kept or maintained a vehicle for controlled substances, the court explained that whether sufficient evidence was presented of the 'keeping or maintaining' element depends upon a totality of the circumstances, and no single factor is determinative. Here, the court pointed to the evidence initially found inside the car along with defendant's knowledge and actions to access and dispose of the methamphetamine later found inside the car as sufficient to support the conviction.

Finally, in addressing the Defendant's argument that the trial court erred by denying his motion to dismiss the conspiracy charge, the court noted that the State does not need to prove an express agreement. Rather, direct or circumstantial evidence tending to show a mutual, implied understanding will suffice. Here, all of the alleged co-conspirators were found with meth after leaving the hotel. That, along with the currency and scales found with defendant's clothing in the vehicle at the time of his arrest, support the conspiracy to commit trafficking charge.

Therefore, the Court of Appeals found no error in the jury's verdicts or in the judgments entered against the Defendant.

Proximity and Indicia of Control Supported Finding That Defendant Constructively Possessed Firearm for Possession of a Firearm by a Felon Conviction

[State v. Livingston](#), COA22-678, ___ N.C. App. ___ (Sept. 19, 2023).

On June 25, 2020, deputies with the Brunswick County Sheriff's Office were conducting surveillance in a neighborhood they characterized as "a known drug area." During this surveillance operation, the deputies noticed a car enter the area for approximately two minutes, which gave them a "hunch" it was involved in illegal activities. Based on this "hunch," the deputies continued to observe the vehicle. After seeing it fail to stop at a stop sign and drive 70 miles per hour in a zone where the speed limit was 55 miles per hour, the deputies stopped the vehicle.

The only two occupants were Defendant, who was in the passenger seat, and another man, who was driving. As deputies approached the vehicle, they smelled marijuana and saw marijuana “shake” on both Defendant and the driver. Based on the marijuana smell and presence of marijuana shake, the deputies searched the car. The search revealed a black bag behind the passenger seat where Defendant was sitting. Inside the black bag, one of the deputies discovered a gun, which was touching a Crown Royal bag. Inside the Crown Royal bag was a wallet that had three identification cards and one credit card, each with Defendant’s name and picture on it. One of the deputies asked Defendant about the bag with the gun and his identification and credit cards. Defendant denied the bag was his and stated he did not know how any of the identification or credit cards could be his, but Defendant admitted he was a convicted felon. Because Defendant admitted he was a convicted felon and a gun was found touching the Crown Royal bag with his cards, the deputies arrested Defendant on a felon-in-possession charge.

On December 7, 2020, Defendant was indicted on the felon-in-possession charge. The jury found Defendant guilty and sentenced him to 108 to 142 months in prison. Defendant appealed arguing there was insufficient evidence to submit the charge to the jury.

North Carolina General Statute § 14-415.1 bars convicted felons from possessing firearms. The elements of the felon-in-possession offense are: (1) the defendant was previously convicted of a felony and (2) subsequently possessed a firearm. Defendant did not dispute the previous felony conviction. As a result, the only issue was whether the State presented sufficient evidence Defendant possessed the gun.

It is well established that possession may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. Alternately, a defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. Here, law enforcement found the gun in a black bag in the car, so Defendant did not have actual possession. Thus, the State had to present sufficient evidence of constructive possession to defeat the motion to dismiss.

A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. 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. In the context of a car, a defendant does not have exclusive possession of a car if the car has other occupants. In the case at hand, Defendant was not the only person in the car when the gun was found, so he did not have exclusive possession of the place the gun was found. Therefore, the State had to show other incriminating circumstances sufficient for the jury to find Defendant had constructive possession. Courts consider a broad range of other incriminating circumstances to determine whether an inference of constructive possession is appropriate. 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.

In this case, the two most common factors indicating other incriminating circumstances – (1) Defendant’s proximity to the contraband and (2) indicia of Defendant’s control over the place

where the contraband is found - were both present. First, as to proximity, the black bag containing the gun was located behind the passenger seat where Defendant was sitting. As a result, Defendant was sitting less than two feet in front of the bag. Second, as to indicia of Defendant's control, the gun was found touching a Crown Royal bag that contained a wallet with three different identification cards and a credit card, which all had Defendant's name and picture on them.

Therefore, the court concluded that there was sufficient evidence that Defendant constructively possessed the gun, and that the trial court did not err in denying the motion to dismiss.