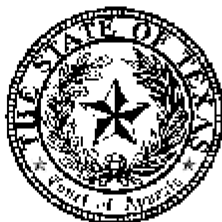
Affirmed and Opinion filed January 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00887-CR

LARRY D. MCCONNELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 790,921

O P I N I O N

The jury found appellant, Larry D. McConnell, guilty of possession of cocaine and sentenced him to forty years' imprisonment in the Texas Department of Criminal Justice, Institutional Division. He presents four points of error regarding legal and factual sufficiency of the evidence and denial of his motion to suppress. We affirm.

FACTUAL BACKGROUND

In the late evening hours of August 20, 1998, Houston police officers Diane Arnold and Kelly Berg were patrolling the parking lot of a Houston apartment complex, an area known for heavy drug activity.

Standing behind a wooden fence on the outskirts of the parking lot, the officers viewed the area through holes in the fence. Their attention was drawn to a group of individuals known for narcotics trafficking, standing in the parking lot. As the officers watched, appellant McConnell drove up to the group and got out of his car. He spoke with one of the individuals, known by Berg and Arnold to be a drug dealer, and briefly clasped hands with him. Officer Berg testified that he saw what appeared to be money pass between the two during the gesture. The individual left to go inside the building, returning a few moments later. He and appellant clasped hands again, in a manner suggestive of transferring an object, and the officers watched appellant immediately move his hand into his pocket or waistband, as if putting something away. Appellant then walked away towards the corner of a vacant building, where the officers saw him reach for his front pants zipper and apparently urinate on the side of the building. He returned to his car and drove away.

Believing they had just witnessed a drug transaction, the officers stopped appellant. After placing him under arrest for urinating in public, they shined a flashlight into his vehicle and saw a shiny object on the rear floorboard. The officers searched the car for weapons, and discovered that the shiny object was a plastic baggie containing a white substance. The substance tested positive for cocaine. At trial, McConnell moved to suppress the cocaine, arguing that there was no probable cause for his arrest. The motion was denied, and appellant was convicted for possession of cocaine.

MOTION TO SUPPRESS

Under his first two points of error, McConnell argues the trial court erred in denying his motion to suppress, as the officers lacked probable cause to arrest him without a warrant. As the arrest was unlawful, he contends, the search and seizure was unlawful.

A trial court's ruling on a motion to suppress is generally reviewed for abuse of discretion. *Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). The trial court is the sole trier of fact and judge of the weight and credibility of the evidence, and the reviewing court may not disturb supported findings of fact absent an abuse of discretion. *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). We must afford almost total deference to the trial court's determination of facts supported by the record

and its rulings on application of law to fact, or "mixed" questions of law, when those fact findings involve an evaluation of the credibility and demeanor of witnesses. *Maestas v. State*, 987 S.W.2d 59, 62 (Tex. Crim. App. 1999); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). However, we review de novo mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor. *Oles*, 993 S.W.2d at 106; *Maestas*, 987 S.W.2d at 62; *Guzman*, 955 S.W.2d at 89. On the other hand, if the issue is whether an officer had probable cause to seize a suspect, a "totality of the circumstances" standard applies, and the trial judge is not in an appreciably better position than the reviewing court to make that determination. *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). Therefore, we will review appellant's points of error concerning the suppression of the evidence as the fruit of an unlawful search and seizure by looking at the totality of the circumstances of the search and seizure.

A peace officer must have a warrant for an arrest unless a statutory exception applies. *Josey v. State*, 981 S.W.2d 831, 841 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Therefore, to justify appellant's warrantless arrest, the State must show probable cause and an exception to the warrant requirement. *Cornejo v. State*, 917 S.W.2d 480, 481 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). Probable cause exists when "the facts and circumstances within the officer's knowledge, and of which the officer has reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Cornejo*, 917 S.W.2d at 482-83. A peace officer may have an exception to the warrant requirement when he views an offender committing an offense. TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon Supp. 2000). An exception also exists when a peace officer finds a person in a suspicious place and under circumstances reasonably showing the person has been guilty of some felony or is about to commit some offense against the law. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon Supp. 2000). A place may become suspicious from a police officer's perspective due to facts and circumstances known to the officer and any reasonable inferences he can draw from those facts. *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993).

We apply a "totality of the circumstances" test to determine probable cause based on a warrantless

search and seizure. *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991). The burden is on the State to prove the existence of probable cause to justify a warrantless arrest or search. *Brown v. State*, 481 S.W.2d 106, 109 (Tex. Crim. App. 1972). Article 14.03(a)(1) requires the legal equivalent of probable cause. *Amores*, 816 S.W.2d at 411. If an arrest is justified under article 14.03(a)(1), an officer is entitled to conduct a search incident to the arrest. *Flores v. State*, 895 S.W.2d 435, 444 (Tex. App.—San Antonio 1995, no pet.). The officer can search the appellant's person and the area within his immediate control. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969).

Applying these standards, we find that appellant's warrantless arrest was lawful. The officers had probable cause and established an exception to the warrant requirement because appellant committed an offense within their view. Officers Berg and Arnold observed appellant in a suspicious place under circumstances which reasonably showed that he was guilty of a felony offense involving contraband. The officers observed appellant drive into an area well known for narcotics trafficking. He drove up to an individual known to be a drug dealer, talked with him briefly, and passed money to him via a hand clasp. The individual momentarily disappeared then returned and again clasped hands with appellant in a manner suggestive of transferring an object to appellant. Appellant then immediately moved his hand into his pocket or waistband. Based on their knowledge and experience and the surrounding circumstances, the officers could reasonably determine that appellant's actions were consistent with a drug purchase and conclude that he had committed a felony offense. Moreover, the officers could arrest appellant without a warrant as he committed an offense within their view by urinating in public, a violation of a city ordinance. *See* HOUSTON, TEX., CODE OF ORDINANCES, § 28-19 (Supp. 2000). Although the State did not present evidence that public urination is a violation of a city ordinance, or that the outside wall of an apartment building is a public place, a trial court is authorized to take judicial notice, *sua sponte*, of city ordinances under TEX. R. EVID. 204. At the suppression hearing, the State argued that there was, at a minimum, sufficient probable cause for the misdemeanor stop based on public urination. The trial court was authorized to take judicial notice that urinating in a public place violated Houston city ordinance section 28-19, and that such offense was punishable by a fine not in excess of $500.00 under sec. 1-6, making it a class C misdemeanor. Under TEX. PEN. CODE ANN. § 1.07(a)(40) (Vernon 1994), "public place" is

defined as any place to which the public or a substantial group of the public has access, including, but not limited to, the common areas of apartment houses. Here, Officer Berg saw appellant walk to the side of the apartment building, reach for his pants zipper, and stand in a position that reasonably led Berg to conclude that appellant had urinated alongside the outside of the building, a public place.

As the cocaine and other evidence produced during the search was found within the scope of a search incident to an arrest under art. 14.03(a)(1), the trial court did not err in denying appellant's motion to suppress the evidence, and appellant's first two points of error are overruled.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third and fourth points of error, appellant challenges the legal and factual sufficiency of the evidence to support his conviction. When reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *King. v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not re-evaluate the weight and credibility of the evidence, but considers only whether the jury reached a rational decision. *Muniz*, 851 S.W.2d at 246.

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. Instead, we consider all the evidence equally, in a neutral light. *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

Appellant contends that the State failed to show that he knowingly or intentionally possessed a controlled substance, namely, the cocaine which was found in the vehicle he was driving. He argues that the evidence is not legally sufficient to prove he had care, custody or control of the cocaine. A person commits an offense if he knowingly or intentionally manufactures, delivers or possesses cocaine. TEX.

HEALTH & SAFETY CODE ANN. § 481.116(a) (Vernon Supp. 2000). To prove possession of cocaine, the State must show that the defendant exercised actual care, custody, control or management over the contraband, and that he had knowledge of the contraband. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.–Houston [14th Dist.] 1999, no pet.). Absent an admission of knowledge by the defendant, knowledge of the crime may be inferred, as it is subjective. *McGoldrick* at 578; *Grant* at 433. The element of possession may be established through circumstantial evidence. *Williams v. State*, 859 S.W.2d 99, 101 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

The evidence must affirmatively link the defendant to the offense, such that one may reasonably infer that the defendant knew of the contraband and exercised control over it; relevant factors include whether the contraband was in open or plain view, and whether it was in close proximity to the defendant. *Grant* at 433. All facts do not necessarily need to point directly or indirectly to the defendant's guilt; the evidence is legally sufficient if the combined and cumulative effect of all the incriminating circumstances point to his guilt. *Russell v. State*, 665 S.W.2d 771, 776 (Tex. Crim. App. 1983).

The evidence affirmatively links appellant to possession of the cocaine. Appellant was the sole occupant of the vehicle he was driving, and the cocaine was found on the rear floorboard near the passenger seat, in close proximity to him. The fact that a defendant was the sole occupant of a vehicle in which contraband was found serves as evidence that he exercised control over the vehicle. *Grant* at 433. Although appellant argues that "control" was negated as the vehicle was leased to his girlfriend, his contention is not supported by the evidence. Where a defendant merely presents possible alternative events, without evidence supporting his hypothesis of innocence, the evidence is not rendered insufficient. As appellant was the driver and sole occupant of the vehicle, we find that control and possession of the contraband was sufficiently established.

We further find that the State sufficiently established appellant's knowledge of the cocaine. Appellant was the driver and sole occupant of the vehicle, and the cocaine was on the floorboard, visible and out in the open, and not hidden somewhere in the vehicle. *Grant* at 433. After reviewing the

evidence in the light most favorable to the State, we believe that any rational trier of fact could have found the essential elements of the offense of possession of cocaine, and we overrule the third point of error.

Under his fourth and final point of error, appellant contends that the evidence is factually insufficient to support the conviction. After reviewing the evidence, we do not find that the verdict was so contrary to the weight of the evidence as to be clearly wrong and unjust. *See Clewis* at 135. The evidence, based on the facts as we have set out, is factually sufficient to support the conviction, and appellant's fourth point of error is overruled.

The judgment is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 4, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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