Affirmed and Opinion filed January 6, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-00966-CR

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CHRIS ALLISON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th Judicial District Court
Harris County, Texas
Cause No. 728023

O P I N I O N

Over his plea of not guilty, a jury found appellant, Chris Allison, guilty of possession of cocaine, with the intent to deliver as charged in the indictment. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon Supp. 1999). This indictment was enhanced by two prior felony convictions. The jury then sentenced him to forty years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant appeals his conviction on five points of error. We affirm the trial court judgment.

THE CONTROVERSY

On July 18, 1996, K. L. Flowers, an undercover narcotics officer, obtained a search warrant for a residence at 6750 Peerless. This warrant also authorized the arrest of a man named "Chris" whose description was contained in the warrant.

To obtain a warrant in order to search the residence at 6750 Peerless for controlled substances and to arrest appellant, Flowers submitted an affidavit. Flowers based this affidavit on his participation in a controlled buy that day from the appellant. In this controlled buy, Flowers used Donald Wright, as an unwitting informant to procure the cocaine from appellant.

The affidavit to the warrant stated the following:

The undersigned affiant, K. L. Flowers, being a peace officer under the laws of the State of Texas and being duly sworn, on oath makes the following statements and accusations.

I.

> There is in the City of Houston, Harris County, Texas, a suspected place and premise described and located as follows: at 6750 Peerless more fully described as an apartment building which is a two story, wood frame structure located on the west side of 6700 block of Peerless. The structure is painted as such; [sic] white with gray trim. The numbers 6750 are located on the front door frame in white block numbers. The apartment in question is located on the second floor of the building carrying the address 6750 Peerless;[sic] with the apartment being located on the south side of the stair case. The most common address of the residence is 6750 Peerless Houston, Harris County, Texas.

II.

> There is at said suspected place and premise, property concealed and kept in violation of the laws of the State of Texas and described as follows: a controlled substance, namely crack cocaine.

III.

> Said suspected place and premise are in charge of and controlled by the following person or person: a black male, whose [sic] known only by the first name of Chris, and more fully described as a 28-32 years of age, [sic] 5'08"—5'10" tall, weighing approximately 170-200 pounds, short black hair, brown eyes and a tatoo on the left side of his neck.

IV.

It is the belief of your Affiant, and your Affiant hereby charges and accuses that: A black male, who is more fully described above, and other persons unknown, are at this time in possession of a quantity of controlled substance, namely crack cocaine, for the purpose of sale and/or personal use.

V.

My belief of the aforesaid statement is based on the following facts: I, K.L. Flowers, am a Houston Police Officer currently assigned to the Narcotics Division of that Agency.

Within the last 48 hours, your affiant met with a black male, later identified as Donald Ray Wright, for the purpose of purchasing crack cocaine. Donald Wright along with your affiant drove to the mentioned location, where $20.00 dollars of recorded U.S. Currency was given to Donald Wright to purchase crack cocaine.

Your affiant and Donald Wright proceeded to the said residence in order to make a controlled purchase of crack cocaine. While your affiant maintained surveillance, Donald Wright proceeded to the above described location. Donald Wright met with the above black male inside the residence. Donald Wright stated that the above described black male exchanged the U.S. currency for the crack cocaine. Donald Wright, returned directly to officers and relinquished the crack cocaine purchased from the above described black male to your affiant. Donald Wright advised your affiant, that he purchases crack cocaine from the mention [sic] location and above black male on a regular basis.

Your affiant filed tested the purchase [sic] crack cocaine, which tested positive for cocaine.

Wherefore your affiant asks for issuance of a warrant that will authorize him to search the said suspected place and premises for said property and seize the same, and to arrest each said described and accused persons.

The record reflects that on July 18, 1996, the issuing magistrate found that sufficient probable cause existed to issue the search and arrest warrant: "I find that the verified facts stated by the Affiant in said affidavit show that Affiant has probable cause for the belief he expresses therein and establishes the existence of proper grounds for the issuance of this warrant . . ."

This warrant was issued and executed on the same day by a raid team, who found seven grams of cocaine in a pair of shoes in the closet and 5.3 grams of cocaine hidden in a cigar box behind a couch in the bedroom. Appellant and a woman were discovered in the bedroom. The woman was detained and informed the police that the appellant lived in the apartment. Police arrested the appellant and charged him with possession of more than four grams and less than 200 grams of cocaine.

Appellant filed a pre-trial motion to suppress all evidence obtained as a result of the search of his apartment conducted pursuant to the warrant. In the motion, appellant attacked the sufficiency of the supporting affidavit to establish probable cause for the search warrant. However, the trial court denied appellant's motion to suppress the cocaine. Appellant now appeals this ruling and contends that the trial court erred in denying his motion to suppress because the affidavit did not establish probable cause under both federal and Texas constitutional standards and Texas statutory law. Appellant also challenges the legal and factual sufficiency of the evidence.

STANDARD OF REVIEW

In reviewing a trial court's ruling, an appellate court must determine the applicable standard of review. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). "The amount of deference a reviewing court affords to a trial court's ruling on a 'mixed question of law and fact' (such as the issue of probable cause) often is determined by which judicial actor is in a better position to decide the issue." *Id*. If the issue involves a witness' credibility and demeanor, compelling reasons exist for allowing the trial court to apply the law to the facts. *See id*. However, if the issue is whether an officer had probable cause, under the totality of the circumstances, the trial judge is not in an appreciably better position than the reviewing court to make that determination. *See id*. "In a recent decision, the United States Supreme Court held that, although great weight should be given to the inferences drawn by the trial judges and law enforcement officers, determinations of reasonable suspicion and probable

cause should be reviewed *de novo* on appeal." *Id*. (citing *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). The reason for this rule is that "'probable cause and reasonable suspicion acquire content only through application.'" *Id*.

DISCUSSION AND HOLDINGS

In his first point of error, appellant appeals his conviction of possession of cocaine complaining the trial court erred in overruling his motion to suppress evidence found by police in a search of his apartment. In searching his apartment the police executed a warrant issued upon the affidavit of a police officer who had relied upon information from an unwitting informant involved in a "controlled buy". Appellant contends the affidavit lacked sufficient facts to establish probable cause to support the magistrate's issuance of the warrant.

No search warrant may issue unless supported by an affidavit setting forth substantial facts establishing probable cause for its issuance. *See* TEX.CODE CRIM. PROC. ANN. arts. 1.06 (Vernon 1977), 18.01(b) (Vernon Supp. 1998). Probable cause to support the issuance of a search warrant exists when the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises at the time the warrant is issued. *See Cassias v. State*, 719 S.W.2d 585, 587 (Tex. Crim. App. 1986); *Hackleman v. State*, 919 S.W.2d 440, 447 (Tex. App.—Austin 1996, pet. ref'd, untimely filed). The magistrate, not the officer, is the one responsible for determining whether probable cause exists based upon the facts the officer presents to him. *See* TEX. CODE CRIM. PROC. ANN. art. 18.01 (b) (Vernon Supp. 1998). Only the facts found within the four corners of the affidavit may be considered. *See Jones v. State*, 833 S.W.2d 118, 123 (Tex. Crim. App. 1992). Reasonable inferences may be drawn from the affidavit, however, and the affidavit must be interpreted in a common sense and realistic manner. *See Lagrone v. State*, 742 S.W.2d 659, 661 (Tex. Crim. App. 1987); *Carroll v. State*, 911 S.W.2d 210, 216 (Tex. App.—Austin 1995, no pet.). However, an informant's tip combined with independent police investigation may

provide a substantial basis for a finding of probable cause. *See Lowery v. State,* 843 S.W.2d 136, 141 (Tex. App.—Dallas 1992, pet. ref'd).

In this case, we are presented with a warrant supported by a tip from an unwitting informant that appellant sells crack cocaine to this same informant "on a regular basis". The informant described in detail to Flowers how the transaction was to occur. The police observed and participated in the controlled buy and thus were able to verify each portion of the informant's information except the exact location within the apartment of where the crack cocaine was being stored. From his training and experience, Flowers knew that drug dealers often conceal their unlawful merchandise in their residences. The affidavit, when read in a common-sense and realistic manner, gave the issuing magistrate a substantial basis for concluding that appellant, the occupant of the suspect premises, was then engaged in the business of selling cocaine. In fact, any information given by the unwitting informant - i.e., the person who did not know he was being used for a controlled buy and did not know that the person he was helping was a peace officer - is stronger than information given by a typical informant. The. unwitting informant has no interests at stake and no reason to misrepresent anything. In a case such as this, the magistrate could reasonably conclude that contraband, like that previously seen and purchased by the informant, could be found in the suspected residence at the time the warrant issued. *See Cassias,* 719 S.W.2d at 587.

In a similar case, this court has held that an affidavit was based on probable cause even though it did not ever say that the informant saw methamphetamine in the accused's apartment beyond that which he purchased. *See Bodin v. State,* 782 S.W.2d 258, 259-60 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds,* 807 S.W.2d 313 (Tex. Crim. App. 1991) An informant told an officer that he had purchased a half of a gram of methamphetamine in the apartment. *See id.* at 259. Other officers verified the informant's statement with a controlled buy in the apartment. *See id.* We held the information in the affidavit was sufficient to infer that methamphetamines were located in the apartment. *See id.* at 259-60.

Appellant's case is similar. The police observed the unwitting informant's purchase from appellant during a controlled buy. The controlled buy transpired exactly as described by the informant. The informant stated that appellant was selling cocaine out of his apartment. Flowers observed Wright talking to the appellant on the top ledge of the stairs before Wright went into appellant's apartment and returned with the cocaine. This controlled buy observed by Flowers was consistent with his belief stated in the affidavit that the appellant was selling drugs from his apartment. So, this affidavit, when coupled with the events observed by the officers, created facts and circumstances that would raise a reasonable inference that cocaine was being stored in and sold from the apartment. *See Cassias,* 719 S.W.2d at 587. Thus, the affidavit links appellant, the apartment, and the crack cocaine found inside the apartment. We find the affidavit supports a finding of probable cause to search the residence at 6750 Peerless.

Appellant also argues that the police lacked probable cause because they could not be certain that more drugs were in the apartment after Wright made his buy. We disagree with this argument.

> Where facts and circumstances within the knowledge of a police officer, arising from a reasonably trustworthy source, would warrant a man of reasonable caution in the belief that items of contraband or evidence of a crime may presently be found in a specified place, there is probable cause to issue a warrant to search that place.

Cassias, 719 S.W.2d at 587. First, Flowers's personal observations of Wright purchasing crack cocaine from the 6750 Peerless location after observing Wright talking to the described black male support the probable cause of the affidavit. Second and even stronger, is the fact that Wright, the unwitting informant, purchased cocaine on a "regular basis" from this location.

For these reasons, we find that the affidavit contained enough reliable information to support the magistrate's determination of probable cause. We, therefore, overrule appellant's first point of error and affirm the trial court's ruling on the motion to suppress.

In his remaining four points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction for possession of cocaine with the intent to deliver because the State failed to establish that (1) he was aware of the cocaine in his room and that (2) he exercised care, custody or control over the cocaine. We disagree.

When reviewing the legal sufficiency of the evidence, this court must decide "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). This same standard of review applies to cases involving both direct and circumstantial evidence. *See 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 we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). But, in conducting a factual sufficiency review, this court must view all the evidence without the prism of in the light most favorable to the prosecution and must set aside the verdict only if it is so contrary to the weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

To support a conviction for unlawful possession of a controlled substance, the state must prove two elements. The State must prove (1) that the accused exercised care, control, and management over the contraband and (2) that the accused knew the substance was contraband. *See Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988); *Brochu v. State*, 927 S.W.2d 745, 750 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *Menchaca v. State*, 901 S.W.2d 640, 651 (Tex. App.—El Paso 1995, pet. ref'd); *Musick v. State*, 862 S.W.2d 794, 804 (Tex. App.—El Paso 1993, pet. ref'd). The offered evidence must show more than that the defendant was merely in the vicinity of the controlled substance. *See Williams v. State*, 906 S.W.2d 58, 65 (Tex. App.—Tyler 1995, pet. ref'd).

An affirmative link must be established between the accused and the contraband demonstrating both that the accused had control over it and that the accused had knowledge of its existence and character. *See Brown v. State,* 911 S.W.2d 744, 747 (Tex. Crim. App. 1995); *Menchaca,* 901 S.W.2d at 651. This "affirmative link" may be shown by either direct or circumstantial evidence, and "it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous." *Brown,* 911 S.W.2d at 747. When the contraband is not found on the accused's person or it is not in the exclusive possession of the accused, additional facts and circumstances must link the accused to the contraband. *See Menchaca,* 901 S.W.2d at 651; *Musick,* 862 S.W.2d at 804. This may include any statements made by the accused, the proximity of the accused to the contraband and its accessibility or visibility to the accused, other people in the vicinity of the scene, any indications of drug use by the accused such as the existence of drug paraphernalia, and the presence of track marks on the accused. *See Davila v. State,* 930 S.W.2d 641, 645 (Tex. App.—El Paso 1996, pet. ref'd). Other factors to consider are: (1) whether the defendant was at the place searched at the time of the search; (2) whether there were other persons present at the time of the search; (3) whether the contraband was found in a closet that contained clothing for the defendant; (4) whether the amount of contraband found was large enough to indicate the defendant knew of its existence; and (5) whether there is evidence establishing the defendant's occupancy of the premises. *See Villegas v. State,* 871 S.W.2d 894, 897 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd), *citing Classe v. State,* 840 S.W.2d 10, 12 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

In this cause, appellant was lying on the bed with a woman in the bedroom when the officers entered the bedroom. In this small bedroom was a closet, in which cocaine was visibly placed inside of a man's pair of shoes, and a couch, behind which a cigar box containing cocaine was found. Thus, all of the contraband found was either visible to or accessible by appellant. In fact, to sustain this conviction, we could even ignore the cocaine found in the cigar box behind the couch and rely only on the cocaine found in the shoes. Also, the woman

found with appellant told police that appellant lived in the apartment. The shoes in the closet contained seven grams of cocaine. Appellant was charged with possessing over four grams and less than 200 grams of cocaine. Thus, to convict appellant, the state could have relied solely on the cocaine found in the shoes.

According to *Levario v. State*, 964 S.W.2d 290, 294-95 (Tex. App.—El Paso 1997, no pet.), appellant meets all the important factors to consider when linking the accused to contraband when the contraband is not found on accused's person. In addition, appellant also meets other factors: appellant was at the place searched at the time of search; there was another person present at time of search, but she was not arrested; contraband was found in the closet that contained clothing for appellant; the amount of contraband found was large enough to indicate defendant knew of its existence; and the woman questioned provided evidence establishing defendant's occupancy of premises. *See id*. at 294.

We thus overrule appellant's remaining four points or error and find that the evidence is legally and factually sufficient to establish that (1) he was aware of the cocaine in his room and that (2) he exercised care, custody or control over the cocaine present. We affirm the trial court judgment.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 6, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Fowler.
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