Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01389-CR
NO. 14-00-01390-CR

ROBERT FITZGERALD AUSTIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 176th District Court
Harris County, Texas
Trial Court Cause Nos. 829,273 and 833,809

O P I N I O N

Robert Fitzgerald Austin appeals his convictions for possession with intent to deliver between 4 and 200 grams of cocaine[1] and for possession of a firearm by a felon[2] on the

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1 A jury found appellant guilty, found both enhancement allegations to be true, and assessed punishment of 25 years confinement.

2 A jury found appellant guilty, found the enhancement allegation to be true, and assessed punishment of 15 years confinement.

grounds that the evidence was legally and factually insufficient to affirmatively link him to the cocaine and weapon. We affirm.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Burden v. State*, 55 S.W.3d 608, 612 (Tex. Crim. App. 2001). Under a factual sufficiency analysis, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *King v. State*, 29 S.W.3d 556, 563 (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. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

Sufficiency of the Evidence

Appellant's four issues challenge the legal and factual sufficiency of the evidence to prove that appellant knew of, or exercised control over, the cocaine or weapons found in the apartment where he was arrested. Appellant claims that there is no evidence linking him to the drugs or weapons such as evidence that: (1) he was under the influence of drugs when arrested; (2) he had drugs or weapons on his person; (3) he made incriminating statements or furtive gestures; (4) he rented or lived in the apartment; or (5) the weapons were in plain view. Appellant further disputes the evidence that he attempted to flee and points to the testimony of Christopher Simien, another individual in the apartment, who testified that appellant was in the bathroom when the police arrived. Simien also testified that appellant brought the mail, which the police found in the closet, with him to the apartment when he came to visit.

To establish the unlawful possession of a controlled substance, the State must prove that the accused: (1) exercised care, control, or custody over the substance, and (2) knew that the matter possessed was contraband. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Evidence which affirmatively links the accused to the contraband suffices for proof that he possessed it knowingly. *Id*. This evidence can be either direct or circumstantial. *Id*. In either case, the evidence must establish that the accused's connection with the drugs was more than just fortuitous. *Id*. However, the evidence need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *Id*. at 748.

When the accused is not in exclusive possession of the place where the substance is found, it cannot be concluded that the accused had knowledge of and control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband. *Guiton v. State*, 742 S.W.2d 5, 8 (Tex. Crim. App. 1987). Mere presence at a place where contraband is being used or possessed does not justify a finding of joint possession. *Nunn v. State*, 640 S.W.2d 304, 305 (Tex. Crim. App. 1982). Among such additional facts which can establish the affirmative link are: (1) the defendant's presence when the contraband was discovered; (2) the contraband being in plain view; (3) the defendant's proximity to and accessibility of the narcotic; (4) the defendant being under the influence of narcotics when arrested; (5) the defendant possessing other contraband when arrested; (6) the defendant making incriminating statements when arrested; (7) an attempt by the defendant to flee; (8) the defendant making furtive gestures; (9) the existence of an odor from the contraband; (10) the presence of other contraband or drug paraphernalia; (11) the place where the drugs were found being enclosed; and (12) the defendant owning or having the right to possess the place where the drugs were found. *Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. filed). The sufficiency of evidence to prove possession of a firearm by a felon is reviewed under the same rules as for possession of a controlled substance. *See Christian v. State*, 686 S.W.2d

930, 932-33 (Tex. Crim. App. 1985); *Corpus v. State*, 30 S.W.3d 35, 37 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

The record in this case reflects that the police were executing a search warrant for the particular apartment and looking for an unnamed individual described in the warrant. Officer Bogaard testified without objection that the search warrant was based on a tip from a confidential informant who had been in the apartment and had seen a large amount of crack cocaine there. Although the informant did not know the name of the individual he described, Bogaard further testified that it is common to base such a search warrant on the "person who is in custody of the drugs as well as you can describe them."

Upon announcing their presence, the officers entered the apartment, and Bogaard saw appellant and another individual running from the living room toward the bedroom.[3] Bogaard testified that the living room smelled like burning marijuana. After securing the scene, the officers found a bag containing 70.3 grams of crack cocaine and two bags of marijuana on the coffee table in the living room. In a bedroom closet, officers found a jacket containing two bags of marijuana and $1,618 in cash, as well as various pieces of mail addressed to appellant at other addresses, a few loaded and unloaded handguns, additional ammunition, and $4,700 in folded cash on the closet shelf. Bogaard further testified that of the four individuals found in the apartment, appellant fit the description in the search warrant very well, and the other three looked nothing like him.

Viewed in the light most favorable to the verdict, the foregoing evidence supports an inference that appellant was the individual described in the warrant and thus that the informant had seen appellant in custody of drugs in the apartment. The fact that appellant attempted to flee from a room of the apartment in which an odor of burning marijuana was present and cocaine was in plain view further supports his association with the drugs there.

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[3] Depending on the circumstances, evidence of flight can be a circumstance from which an inference of guilt may be drawn. *See Bigby v. State*, 892 S.W.2d 864, 883 (Tex. Crim. App. 1994); *Burks v. State*, 876 S.W.2d 877, 903 (Tex. Crim. App. 1994).

Moreover, appellant's mail was found in a closet near visible handguns and boxes of ammunition. The presence of such weapons, particularly those that were loaded, in an apartment in which drugs and thousands of dollars of cash were found, and the presence of the guns in a closet near mail belonging to appellant, supports an inference that the guns were used to facilitate the drug activity in which appellant was involved in the apartment. This evidence was thus legally sufficient to prove that appellant knew of and exercised control over the drugs and guns.

With regard to factual sufficiency, evidence that appellant did not attempt to flee when the officers arrived and that he had brought the mail with him when he came to visit slightly controverts the evidence of guilt, but does not render the verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Because the evidence is therefore both legally and factually sufficient, appellant's four issues are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 7, 2002.
Panel consists of Justices Hudson, Fowler, and Edelman.
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