Affirmed and Opinion filed March 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00167-CR

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JAMES ALBERT BELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 208th District Court
Harris County, Texas
Trial Court Cause No. 796,235

O P I N I O N

James Albert Bell appeals a conviction for possession of a controlled substance on the grounds that: (1) he was denied effective assistance of counsel by trial counsel's failure to: (a) file a motion to suppress evidence seized during an illegal search of his front yard; (b) object to the introduction of this evidence at trial; and (c) to request a jury instruction to disregard the evidence; and (2) the evidence is factually insufficient to prove he committed the offense. We affirm.

Background

While patrolling in a marked police car late one evening, two Houston police officers observed appellant standing in the middle of a residential street. After appellant noticed the patrol car approaching, he briskly walked towards a yard. Because of numerous complaints concerning drug trafficking in the neighborhood, the officer driving the car, Perser, shined a spotlight on appellant and began questioning him. Perser then observed appellant pull his hand from his pocket and toss something behind him. Perser advised his partner, Hundley, of this, and Hundley exited the patrol car, calling appellant over to detain him, while Perser searched the front yard. Perser recovered a small, aluminum package which contained five marijuana cigarettes laced with phencyclidine, or "PCP." Appellant was charged with possession of a controlled substance, and, after a jury trial, was convicted and sentenced to six years imprisonment.

Ineffective Assistance

Appellant's first three points of error argue that he was denied effective assistance of counsel by his trial lawyer's failure to file a motion to suppress, object, or request a jury instruction with regard to the evidence seized in the search of his front yard, which he contends was seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, section 9 of the Texas Constitution. Appellant argues that the failure to challenge this evidence prejudiced him because it was the only evidence offered against him.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that: (1) counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense, *i.e.*, a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Thompson v. State*, No. 1532-98, slip. op. at 8, 1999 WL 812394, at *4 (Tex. Crim. App. Oct. 13, 1999).

Judicial scrutiny of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689; *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999). A defendant must overcome the strong presumption that an attorney's actions might be considered sound trial strategy.*See Strickland*, 466 U.S. at 689; *Busby*, 990 S.W.2d at 268-69. Ordinarily, that presumption cannot be overcome

absent evidence in the record of the attorney's reasons for his conduct. *See Busby v. State*, 990 S.W.2d at 296. Appellant must establish his claims of ineffective assistance by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In this case, the record is silent as to why appellant's trial counsel failed to challenge the evidence as being illegally obtained. Therefore, appellant has failed to rebut the presumption of sound trial strategy and, accordingly, to establish a claim of ineffective assistance of counsel.[1]

In addition, to prevail on ineffective assistance based on trial counsel's failure to file a motion to suppress, an appellant must demonstrate that the motion to suppress would have been granted. *See Jackson*, 973 S.W.2d at 957. Similarly, to successfully argue that counsel's failure to object amounted to ineffective assistance, an appellant must show that the trial court would have erred in overruling such an objection. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). Appellant thus had the burden to establish that the search was illegal. *See id*.

Appellant contends that the search was illegal because his yard, as the curtilage of his home, was protected against unreasonable searches and seizures. Whether a particular area is included within the curtilage of a home is determined by whether appellant had a reasonable expectation of privacy in the area. *See Oliver v. United States*, 466 U.S. 170, 180 (1984); *Bower v. State*, 769 S.W.2d 887, 897 (Tex. Crim. App. 1989), *overruled on other grounds*, *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991). Factors considered are: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the use to which the area is put; and (4) the steps taken to protect the area from observation by any passerby. *See United States v. Dunn*,

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[1] Appellant also argues that his counsel was deficient in failing to: (1) confer with appellant; (2) formulate any trial strategy; and (3) to request the names and addresses of witnesses that appellant claimed he had. Appellant argues that counsel's inadequacies in this regard are evidenced in the record by appellant's request, on the day of trial, for a new attorney and by the comments he made regarding his displeasure with trial counsel. However, there is no indication in the record as to who the alleged witnesses were, the substance of their testimony, or how it would have been beneficial to appellant's defense. Two witnesses testified on appellant's behalf and counsel questioned each. Similarly, appellant's comments in the record are not alone sufficient to establish deficient performance or prejudice with regard to the alleged failure to confer with appellant or formulate trial strategy.

480 U.S. 294, 301 (1987). Thus, there is no reasonable expectation of privacy if the activity viewed by an officer is visible from the street or the curtilage is open to the public. *See Bower*, 769 S.W.2d at 897.

In this case, the evidence indicates that appellant was standing close to the street and was within plain view of the officer when he allegedly tossed the foil package containing the marijuana cigarettes. His yard was not enclosed in any manner and was visible from the street to any passerby. Under these circumstances, appellant has failed to establish that he had a reasonable expectation of privacy in his yard, that the area of his yard searched by the officer was constitutionally protected curtilage, or that the search or seizure was illegal. Therefore, appellant has not demonstrated that his counsel was ineffective for failing to challenge the evidence obtained in the search of his yard.

Regarding the failure to request a jury instruction, where there is a question as to whether or not evidence was illegally obtained, the jury must be instructed that if it believes, or has a reasonable doubt, that the evidence was so obtained then the jury must disregard that evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979). A defendant is entitled to a jury instruction under Article 38.23 only where the evidence presents a dispute regarding the facts surrounding the search or seizure. *See Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996). Because appellant's brief does not contend that any such dispute existed in this case, it does not establish that he was entitled to such an instruction or that his attorney was deficient in failing to request it. Accordingly, appellant's first, second, and third points of error are overruled.

Factual Sufficiency

In his fourth point of error, appellant claims that the evidence is factually insufficient to affirmatively link him to the marijuana cigarettes. Appellant argues that the only evidence linking him to the controlled substance was Perser's testimony that he saw appellant throw the aluminum foil package, whereas the testimony of the defense witnesses disproves that appellant possessed any object, much less a controlled substance.

A factual sufficiency review takes into consideration all of the evidence related to the challenge, and weighs that which tends to prove the existence of the fact in dispute against the contradictory evidence. *See Medina v. State*, 7 S.W.3d 633, 637 (Tex. Crim. App. 1999). That a different verdict would be

more reasonable is insufficient to justify reversal; the verdict will be upheld unless it is so against the great weight of the evidence that it is clearly wrong and unjust, *i.e.*, manifestly unjust, shocking to the conscience or clearly biased. *See id*.

In order to establish the unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised care, control, and custody over the substance, and (2) the accused knew that the matter possessed was contraband. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon Supp. 1999); *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. *See Brown*, 911 S.W.2d at 747. This evidence can be either direct or circumstantial. *See id*.

In this case, the evidence presented by the State reflected that: (1) when appellant initially observed the patrol car, he immediately and briskly walked towards an unfenced front yard; (2) the police shined a spotlight on appellant and while questioning him, one officer observed appellant remove his right hand from his pocket and toss something behind him; (3) while one officer placed appellant in the patrol car, the other officer went into the unfenced yard and retrieved an aluminum foil package, which smelled heavily of PCP, about ten feet from where appellant had been standing and in the area where appellant had tossed the object; and (4) upon opening the foil package, the officer found five marijuana cigarettes which later tested positive for PCP. This was evidence that appellant exercised care, custody, and control of the package and possessed it knowingly.

Two witnesses testified on appellant's behalf: a neighbor, Andre Drake, and appellant's sister, Sanjose Bell. Drake testified that as appellant was leaving his home, which was situated diagonally to appellant's home, the patrol car "roared" up to where appellant was standing, which was approximately one or two feet in the yard, and both officers exited the car. While one officer held appellant on the hood of the patrol car, the other officer frisked him. The officers placed appellant in the car and Perser then walked about eighteen feet into the yard, shining a light along the side of the house. Perser walked back out to his patrol car and exchanged words, inaudible to Drake, with Hundley. The officer then made a second search of the property and "found something." After speaking with appellant's family, Perser took whatever he had found to the trunk of the patrol car. Perser then again approached appellant's family, and

Drake went back into his house. On cross-examination, Drake stated that appellant was in his plain view and that it was "like, almost, they were waiting for [appellant] to leave my house." He also admitted he and appellant were good friends and that he'd been convicted of two felonies.

Sanjose Bell testified that her brother was already in the patrol car when she began observing the arrest. While one officer worked on the computer in the car, the other officer, Perser, searched the entire yard with a flashlight. Perser went back to the patrol car, then made a second search of the property, took his "hand out of his pocket," and found something by the base of the house. Appellant's sister admitted that she observed the events only after the appellant had been placed in the patrol car and that she could not testify as to whether the appellant had tossed something into the yard or not.

Although the testimony of appellant's witnesses differed somewhat from that of the police officers, appellant's witnesses did not controvert that appellant had removed an object from his pocket and had thrown it to the ground when he saw the police. Nor did they otherwise rebut that appellant had been in possession of the foil package the police found in his yard. Under these circumstances, appellant has not demonstrated that the verdict was so against the great weight of evidence as to be clearly wrong and unjust. Therefore, appellant's fourth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March16, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
Do not publish — TEX. R. APP. P. 47.3(b).