Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00022-CR

ORLANDO PAUL CALLOWAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 778,310

O P I N I O N

Orlando Paul Calloway was convicted of possession of a controlled substance with intent to deliver. The trial court sentenced him to twenty years in the Texas Department of Corrections. On appeal, appellant asserts that his conviction was based on legally insufficient evidence and that his trial counsel was ineffective in his representation. Finding the evidence legally sufficient to support appellant's conviction and no ineffective assistance of counsel, we affirm appellant's conviction.

Since appellant claims legal insufficiency, a review of the facts of the case is in order. One evening around 9:00 PM, Houston Police Officers Merrill and Ford were patrolling the southeast side of Houston.

They became suspicious of appellant when they noticed the car appellant was driving coming at them in the wrong lane of traffic. The officers followed the vehicle, determined that it was rented, and eventually stopped it. Officer Ford began questioning appellant while Officer Merrill stood watch over the three other passengers in the vehicle, two of whom he arrested for possession of cocaine while Officer Ford questioned appellant about the rental vehicle.

Upon questioning by Officer Ford about his use of the rental car, appellant explained that a friend had rented the car for him and appellant's name was not on the rental papers. Believing the car might be stolen, Officer Ford asked appellant where the paperwork might be. Appellant stated that the paperwork was located in the console between the driver and passenger seats in the front of the vehicle. Officer Merrill went to the car, opened the console, and found the paperwork exactly where appellant stated it would be. Underneath the paperwork, however, Officer Merrill also found a clear plastic bag containing 25.9 grams of crack cocaine. Appellant was arrested and charged with possessing the cocaine. At the time of his arrest, appellant was carrying $1,274.00 in cash.

Appellant challenges the legal sufficiency of the evidence adduced at trial. The basis of his claim is that the State failed to prove sufficient affirmative links to establish that his possession was knowing.

In reviewing legal sufficiency challenges, we view the evidence in the light most favorable to the verdict. *See Clewis v. State*, 922 S.W.2d 126, 132 n.10 (Tex. Crim. App. 1996). Utilizing this approach, we review the record to see whether the evidence, when viewed in a light most favorable to the verdict, would lead any rational trier of fact to conclude beyond a reasonable doubt that the substantive elements of a criminal offense are true. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.C.2d 2781, 61 L.Ed.2d 560 (1979).

To establish knowing possession of a controlled substance, the State must prove not only that the defendant exercised actual care, control, or custody of the controlled substance, but also that he was conscious of his connection with it and knew what it was. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App.1995). This can be accomplished by using either direct or circumstantial evidence. *See Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Though mere presence at the scene is

not enough to prove conscious possession of the controlled substance, any evidence that affirmatively links the appellant to the contraband suffices as proof that he possessed it knowingly. *See Harris v. State*, 994 S.W.2d 927, 933 (Tex. App.—Waco 1999, no pet.). The logical force of the links is more important than the number of links that are present. *See id.*

A review of the record establishes sufficient affirmative links to support appellant's conviction. Appellant was in a rental car, a practice common to drug dealers according to Officer Merrill's testimony. *See Mohmed v. State*, 977 S.W.2d 624, 627 (Tex. App.—Fort Worth 1998, pet. ref'd) (finding defendant's presence in a rental car an affirmative link under similar circumstances). Neither appellant's name nor those of his passengers were listed on the rental papers of the car. *See Menchaca v. State*, 901 S.W.2d 640, 652 (Tex. App.—El Paso 1995, pet. ref'd) (using this as an affirmative link in upholding appellant's conviction). The contraband was found in an enclosed area. *See Pettigrew v. State*, 908 S.W.2d 563, 571-2 (Tex. App.—Fort Worth 1995, pet ref'd) (using this fact as an affirmative link). Appellant was last person to drive the car. *See Mohmed*, 977 S.W.2d at 627; *see also Pettigrew*, 908 S.W.2d at 571-2. The contraband was located in the console of the car, a place easily accessible to appellant. *See Menchaca*, 901 S.W.2d at 652 (holding appellant's control over vehicle raised inference he knew of marijuana in car's compartment). Appellant knew the rental papers were inside the console, a fact providing an inference that he knew the cocaine was inside the console as well. Appellant carried a large amount of cash. *See id.* (using large amounts of cash as a link in establishing knowing possession). Appellant also failed to deny ownership of the drugs prior to the time he was arrested.

Viewing this evidence in the light most favorable to the prosecution, we find sufficient evidence to support appellant's conviction. Appellant's first point of error is overruled.

In his second point of error, appellant claims that he was deprived of effective assistance of counsel because his attorney failed to subpoena and call as a witness Tesha Jones, the person who rented the car for appellant. Because the decision to call a witness is trial strategy and appellant has failed to show how failure to call this witness was ineffective, we overrule appellant's point of error.

We apply the two-pronged test elucidated in *Strickland v. Washington* to claims of ineffective

assistance of counsel. *See* 466 U.S. 668 (1984); *see also McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). To prevail on such claims, the appellant must first demonstrate his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *See McFarland*, 928 S.W.2d at 500. Under this analysis, trial counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged to be ineffective. *See id.* at 500. The appellant must also affirmatively prove that these acts fell below the norm of professional reasonableness. *See id.* Appellate courts will not speculate about counsel's effectiveness. *See Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist.] 1992, no pet.). Rather, such a claim must be firmly supported by the record. *See McFarland*, 928 S.W.2d at 500.

The decision to call a witness is generally a matter of trial strategy. *See Rodd v. State*, 886 S.W.2d 381, 384 (Tex. App.—Houston[1st Dist.] 1994, pet. ref'd). A defendant complaining about his trial counsel's failure to call a witness is required to show that the witness was available and that he would have benefitted from the testimony. *See id.*

Jones testified at the hearing on the motion for new trial and filed an affidavit in support of the motion. She testified that she was available and willing to testify on behalf on appellant during the dates of appellant's trial. Further, she testified that appellant's trial counsel told her that he would call her as a witness "when needed" and she should be available during the trial. While appellant has shown that Jones was willing to testify, he has not shown that she was available during trial. Her affidavit reveals that she was away from her phone for at least an hour on the date appellant's attorney was supposed to contact her.

Further, though Jones' testimony might conceivably have helped appellant, appellant has failed to rebut the presumption that his trial counsel's failure to call Jones as a witness was not trial strategy. We can envision several scenarios which would justify appellant's trial counsel's decision not to call Jones without falling below the norm of professional reasonableness. Appellant's decision not to call his trial counsel to testify at the motion for new trial leaves us to speculate about whether appellant's trial counsel

had one of those reasons in mind when he failed to call or subpoena Jones as a witness. Because we refuse to speculate about trial counsel's effectiveness, and appellant has not provided us a record which removes such speculation from our deliberations, we overrule his second point of error.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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