Affirmed as Reformed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01234-CR

WILLIE ROY WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 777,831

O P I N I O N

Appellant, Willie Roy Williams, was convicted of possession of a controlled substance, namely codeine, and sentenced to four years imprisonment. On appeal, he contends (1) the evidence is legally and factually insufficient to support the conviction, and (2) he cannot be convicted of both possession and attempted possession of codeine.[1]

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[1] Appellant also complains that we have erred by denying his motion to supplement the record with either an original exhibit or photographs of the exhibit. This complaint is both misplaced and moot. First, we do not review ourselves; and second, the trial judge ordered a series of 27 color photographs of the exhibit to be placed into the record.

Houston Police officers Steven Guerra and Douglas Griffith were on patrol in an area known for its narcotics traffic. They saw a truck stopped in the street, blocking a lane of traffic. Appellant was standing next to the driver's window. When appellant saw the patrol car, he pulled a small shiny object from his pocket and handed it to the driver of the truck. The driver placed the object in the center console of the truck's cab. The officers approached and separated the individuals. When the vehicle was secure, the officers retrieved the object and found it to be a glass pimento jar containing 58.8 grams of codeine.

Legal Sufficiency of the Evidence

In his first point of error, appellant argues the evidence is legally insufficient to support a finding that he knowingly possessed the codeine. To prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, and care over the substance; and (2) the accused knew the matter possessed was contraband. *See Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995) (citing *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App.1988)). Appellant contends both that there is insufficient evidence that he exercised control, management, and care over the codeine and, in the alternative, that there is insufficient evidence that he knew that the jar contained codeine.

The test for legally sufficient evidence is 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." *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994); *Geesa v. State*, 820 S.W.2d 154, 156 (Tex. Crim. App. 1991). This is a high burden. The Court of Criminal Appeals described the analysis we should utilize in *Ex parte Elizondo*:

> When we conduct a legal sufficiency-of-the-evidence review . . . we do not weigh the evidence tending to establish guilt against the evidence tending to establish innocence. Nor do we assess the credibility of witnesses on each side. We view the evidence in a manner favorable to the verdict of guilty. . . [Regardless of] how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear. If the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant, we simply do not care how much credible evidence is on the other side.

947 S.W.2d 202, 206 (Tex. Crim. App. 1996).

When an individual is not in exclusive control of the place where the contraband is found, there must be independent facts and circumstances linking the accused to the contraband in such a manner that a reasonable inference may arise that the accused knew of its existence and exercised control over it. *See Ortiz v. State*, 999 S.W.2d 600, 603 (Tex. App.–Houston [14th Dist.] 1999, no pet. history). The State presented testimony that appellant pulled the jar of codeine from his left front jacket pocket and handed it to the driver of the truck. This clearly links appellant to the contraband, and is sufficient to show he exercised control, management, and care over the codeine.

In the alternative, however, appellant argues that there is insufficient evidence that he knew that the jar contained codeine. He contends that, since the codeine was not "readily recognizable as a controlled substance," the state should have put forth additional evidence of his knowledge of the contents of the jar.

In the absence of a confession, the State's evidence of a defendant's knowledge or intent must necessarily rest upon circumstantial evidence. *See Gardner v. State*, 736 S.W.2d 179, 182 (Tex. App.–Dallas 1987), *aff'd*, 780 S.W.2d 259 (Tex. Crim. App. 1989). Here, the police observed a truck stopped in a lane of traffic. Appellant was standing in the street next to the driver's window. When he saw the police, he immediately reached into his pocket and gave the driver the bottle of cocaine. The driver, in turn, hid the bottle inside the console. We find a rational jury could, from the combined circumstances and actions of both men, conclude beyond a reasonable doubt that appellant was engaged in a narcotics transaction, that he knew the substance was contraband, and that he attempted to hide it when he saw the police. Appellant's first point of error is overruled.

Factual Sufficiency of the Evidence

In his second point of error, appellant contends the evidence is factually insufficient. Factual sufficiency review must be deferential to the trier of fact to avoid substituting our judgment for theirs. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). The appellate court maintains this deference by reversing only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

Appellant's argument is primarily hypothetical. He points out that the State could have, but did not, proffer testimony of how the transaction looked like a drug deal or how codeine dealers normally use small glass jars to transport the drug. However, speculation regarding how the State might have presented a more compelling case is not evidence; neither does it weigh against a verdict.

Appellant next argues that it would be illogical for him to be involved in a codeine transaction since he had a prescription for the drug. However, the prescriptions for codeine found by police were in the driver's name, Herman Whitfield. The only prescription in appellant's name was for penicillin.

Appellant also argues that there is "no evidence to discredit or controvert the inference that the object in appellant's hand was either coins or keys." Again, this contention is not supported by the record. The officers testified that the object appellant passed to the driver was the jar of codeine.

Finally, appellant argues that the jar of codeine must have been in the truck the entire time. Appellant, however, directs us to no evidence to support this contention.

After assessing the eyewitness testimony of the police against the hypothetical scenarios and inferences raised by appellant, we find the verdict is not so against the great weight of the evidence presented at trial as to be clearly wrong and unjust. Appellant's second point of error is overruled.

Double Jeopardy

The judgment recites that appellant was convicted of "intentionally and knowingly possess[ing] and attempt[ing] to possess a controlled substance." However, a review of the record shows the trial judge found appellant guilty only of the offense of possession of a controlled substance. The proper remedy for such error is reformation of the judgment. *See Hardin v. State*, 951 S.W.2d 208, 212 (Tex. App.–Houston[14 Dist.] 1997, no pet.); *Weaver v. State*, 855 S.W.2d 116, 123 (Tex. App.–Houston[14 Dist.] 1993, no pet.) Appellant's point of error is sustained. Thus, the judgment of the trial court is reformed to show that appellant was convicted of possession of a controlled substance.

Accordingly, the judgment, as reformed, is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 25, 2000.

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

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