Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00899-CR

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BILLY JOE LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 9427071

O P I N I O N

The appellant, Billy Joe Lopez, challenges the trial court's revocation of his probation. In 1995, he pleaded guilty to possession of cocaine and pleaded true to one enhancement paragraph. The trial court assessed punishment at two years confinement, probated for four years, and assessed a $750 fine. In 1997, the trial court granted the state's motion to revoke the appellant's probation and sentenced the appellant to serve his original two years confinement. In two issues presented for our review, the appellant now challenges the legal and factual sufficiency of the evidence to support the trial court's findings. We affirm.

REVOCATION OF PROBATION

In its motion to revoke probation, the state alleged that the appellant violated two conditions of his probation. First, the state alleged that the appellant committed a new offense of possession of cocaine, which violated not only the condition that the appellant not commit an offense "against the laws of this or any other State or the United States," but also violated the condition that he not use, possess, or consume any controlled substance. Second, the state alleged that the appellant had a positive urine test for cocaine, thus violating the condition that the appellant not use, possess, or consume any controlled substance. After conducting an evidentiary hearing, the trial court found that the appellant had violated the terms and conditions of his probation, as alleged by the state, and revoked the appellant's probation.

STANDARD OF REVIEW

An order revoking probation must be supported by a preponderance of the evidence. *See Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974). The greater weight of the credible evidence must create a reasonable belief that the defendant has violated a condition of his probation. *See id.* Where, as here, the appellant challenges the sufficiency of the evidence, we view the evidence in a light most favorable to the trial court's findings. *See Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See Naquin v. State*, 607 S.W.2d 583, 586 (Tex. Crim. App. [Panel Op.] 1980). Our review of an order revoking probation is limited to a determination of whether the trial court abused its discretion. *See Flournoy v. State*, 589 S.W.2d 705, 709 (Tex. Crim. App. [Panel Op.] 1979). Proof by preponderance of the evidence on any one of the alleged violations of the conditions of probation is sufficient to support the order of revocation. *See Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980); *Jones v. State*, 571 S.W.2d 191, 193 (Tex. Crim. App. [Panel Op.] 1978). When the lower court finds

several violations, we will affirm the order revoking probation if the proof of any allegation is sufficient. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *McCollum v. State*, 784 S.W.2d 702, 704-05 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

The appellant's complaints amount to a challenge to the legal and factual sufficiency of the evidence to support the trial court's findings that he committed the acts alleged by the state in its motion to revoke probation. In a legal sufficiency review, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). When reviewing a factual sufficiency claim, we view all of the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. Because we find that the evidence is sufficient to support the trial court's finding that the appellant possessed cocaine, as alleged by the state, we address only that issue, and need not address the sufficiency of the evidence to support the trial court's finding of a positive urine test.

RELEVANT FACTS

On May 15, 1997, a Houston Police officer received a tip from a drug informant that heroin was being sold out of a Harris County residence, where the appellant and his girlfriend lived. The officer observed the house for a short period of time and witnessed a large amount of traffic in and out of the residence. Based on these observations, the officer secured a search warrant, which the police executed later that day.

After announcing their presence, the police officers entered the house by breaking down the front door with a battering ram. One of the officers entered a bedroom in the front

of the house and found the appellant, who was the only adult in the house,[1] standing between the door and the bed. The appellant told the police that he lived in the house and that he stayed in that particular bedroom. During the search, the police found mail addressed to the appellant and clothes belonging to the appellant in the bedroom. The police brought in a narcotics dog to search the house, and the dog alerted on two areas of the appellant's bedroom, one of which was near a television. Responding to the dog's signals, the officers found a small piece of tinfoil folded up and sitting on top of the television. The tinfoil contained a substance later determined to be cocaine. The police did not find any other drugs in the house, nor did they find any other evidence that drugs had been sold from the residence.

SUFFICIENCY OF THE EVIDENCE

The appellant now complains that the evidence was insufficient to prove that he intentionally and knowingly possessed the cocaine found in his bedroom. Essentially, he argues that other than the cocaine itself, the state has failed to establish any independent facts that affirmatively link the appellant to the cocaine. To address this complaint, we must consider whether the facts presented satisfy the state's burden of proof for possession of a controlled substance, keeping in mind that in a probation revocation context, the state can meet that burden by a mere preponderance of the evidence. *See Scamardo*, 517 S.W.2d at 298.

A person may not be convicted of possession of a controlled substance unless there is sufficient evidence to raise a reasonable inference that the person knew of the contraband's existence and exercised actual care, custody, control, or management over it. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(38) (Vernon 1992). The state must affirmatively link a defendant charged with intentionally and knowingly possessing drugs with the drugs he allegedly possessed. *See Brown v. State*, 911 S.W.2d 744, 748 (Tex.

[1] The officers found a two-year old child in the back bedroom of the house.

Crim. App. 1995). Furthermore, "[w]hen an accused is not in exclusive possession of the place where the contraband is found, it cannot be concluded that the accused had knowledge of or control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband." *See Cude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986). Here, the evidence shows that the appellant lived in the house with his girlfriend. Therefore, we must find additional independent facts and circumstances which affirmatively link the appellant to the cocaine before concluding that he had knowledge of its existence and/or control over it. *See Brazier v. State*, 748 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).

Factors to be considered when evaluating affirmative links include: 1) the defendant's presence when the search was executed; 2) whether the contraband was in plain view; 3) the defendant's proximity to, and the accessibility of, the contraband; 4) whether the defendant was under the influence of a controlled substance when arrested; 5) whether the defendant possessed other contraband when arrested; 6) whether the defendant made incriminating statements when arrested; 7) whether the defendant attempted to flee; 8) whether the defendant made furtive gestures; 9) whether there was an odor of the contraband; 10) whether other contraband or drug paraphernalia was present; 11) whether the defendant owned or had the right to possess the place where the drugs were found; and 12) whether the place the drugs were found was enclosed. *See Lewis v. State*, 664 S.W.2d 345, 349 (Tex. Crim. App. 1984).

The following circumstances support an affirmative link between the appellant and the cocaine the police found in the bedroom: (1) the appellant was not only present when the warrant was executed, but he was the only adult in the house at the time; (2) the cocaine was wrapped in tinfoil, which was in plain view on top of the television; (3) the appellant was found in the bedroom with the cocaine just a few feet away; (4) the appellant told the police that he stayed in the bedroom in which the cocaine was found; and finally, (5) the police found mail addressed to the appellant as well as the appellant's clothes in the

bedroom. There are also circumstances which do not support an affirmative link between the appellant and the cocaine, including: (1) the appellant was not “under the influence" when the search was conducted; (2) the appellant had no contraband on his person; (3) the appellant did not attempt to flee, nor does the record suggest that he made any furtive gestures; (4) there is no testimony of any odor of the contraband, other than that picked up by the trained narcotics dog; and finally, (5) the police found no other types of contraband or drug paraphernalia in the house.

When viewed in the light most favorable to the verdict, these affirmative links make the evidence legally sufficient to support the verdict. Furthermore, even when viewed without the prism of "in the light most favorable to the state," the evidence that does not support an affirmative link between the appellant and the cocaine does not rise to such a level as to warrant a finding that the conviction is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Therefore, under the preponderance of the evidence standard, we find the evidence to be legally and factually sufficient to support the revocation of appellant’s probation.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Amidei, Fowler and Frost.

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