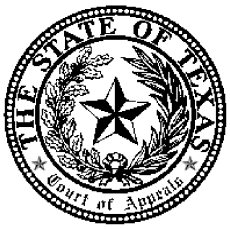
Affirm and Opinion filed October 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00221-CR

JOCELYN ANTRANIQUE HALL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 785,418

O P I N I O N

Appellant, Jocelyn Antranique Hall, challenges her conviction for possession of cocaine, citing as grounds for reversal ineffective assistance of counsel and the legal and factual insufficiency of the evidence. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 11, 1998, Officer Bradley received information from an informant that a male named "Mike D" and a female known as "Pooh" were cooking cocaine at their apartment in Houston. The informant revealed that the suspects intended to use a large vehicle, described

as a limousine or Town Car, with Louisiana license plates, to transport the cocaine to Louisiana for distribution. After receiving this information, Officer Bradley set up surveillance, along with Officer Boyle and Sergeant Raysean, outside the apartment, beginning around six in the evening. After watching the apartment for a little more than two hours, Officer Boyle saw appellant pull into the apartment parking lot driving a car matching the description provided by the informant. Appellant got out of the car and entered the apartment.

The officers approached the apartment to talk with appellant. The officers discovered that appellant's nickname was "Pooh." Officer Bradley explained that they were conducting a narcotics investigation. Appellant told the officers that "the apartment was in her name and that she lived with her boyfriend." The officers requested permission to search the apartment. Appellant willingly complied. The officers found cocaine and other evidence of narcotics in several locations throughout the apartment.

In the kitchen cabinets, the officers found a Pyrex glass bowl containing cooked cocaine that was drying into crack. They also found a large metal bowl, a plastic bowl, and several coffee cups, all of which contained cocaine. Next, they found small amounts of cocaine on a triple-beam scale, a device commonly used to measure cocaine. Adjacent to the scale were several plastic bags, much like those commonly used to package cocaine for distribution.

In the master bedroom closet, the officers found a shoebox containing cocaine and some money, an Igloo cooler containing Pyrex glass measuring cups with cocaine residue on them, and a loaded assault rifle. After finding what appeared to be a woman's bracelet and a pair of earnings on the shelf of the closet, the officers concluded that appellant used this bedroom.

The officers told appellant what they had found, and she appeared to be surprised by what the police search had yielded. The officers then asked her to summon "Mike D" to the

apartment. They waited for an hour for him to arrive, but he never did. The officers then arrested appellant and sent all the items they had seized from her apartment to the laboratory to be tested. The tests confirmed that the substance contained in all of the household items was cocaine.

Appellant was indicted for possession with intent to deliver at least 400 grams of cocaine. She pleaded not guilty and waived her right to a jury trial. After hearing all of the evidence, the trial court found appellant guilty and assessed punishment at fifteen years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant filed a motion for new trial, which was overruled by operation of law.

II. ISSUES AND ANALYSIS

A. Legal Sufficiency of the Evidence

In her first point of error, appellant contends that the evidence is legally insufficient to support a conviction for possession of a controlled substance with intent to distribute. Specifically, appellant alleges that the evidence is legally insufficient to show the "possession" element of the offense.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998); *see also Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992). We must determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

Under Texas law, a person may not be convicted for possession of a controlled substance unless the state shows the individual charged possessed the substance "intentionally or knowingly." *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995) (en banc). This means that an accused must have (1) exercised actual care, control or custody of the substance and (2) known that the substance was contraband. *Id.* at 747; *see also Nunn v. State*, 640 S.W.2d 304, 305 (Tex. Crim. App. 1982); *Edwards v. State*, 807 S.W.2d 338, 339 (Tex. App.–Houston [14th Dist] 1991, pet ref'd). It does not matter whether the evidence is direct or circumstantial, but it must provide "affirmative links" between the accused and the contraband, i.e., facts and circumstances in addition to mere presence that raise a reasonable inference of the accused's knowledge and control of the contraband. *Id.*; *see also Hurtado v. State*, 881 S.W.2d 738, 743 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). Mere presence at a place where drugs are being used or possessed by others does not justify a finding of joint possession, or prove that one is party to an offense. *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988). Moreover, the fact that the accused is the lessee of the real property where narcotics are found is not enough to support a finding of joint possession if the property is also used by others. *See Guiton v. State*, 742 S.W.2d 5, 8 (Tex. Crim. App. 1987).

When the prosecution asserts that the accused and another person jointly possessed a narcotic drug, the evidence must affirmatively link the accused to the contraband. *See Martin*, 753 S.W.2d at 387. The trier of fact must be able to conclude that the accused had knowledge of the contraband as well as control over it. *Id*. In determining whether the state has met its burden, we consider the following factors:

1) Defendant's presence when the search warrant was executed;
2) Contraband in plain view;
3) Defendant's proximity to and the accessibility of the narcotic;
4) Whether the defendant was under the influence of narcotics when arrested;
5) Defendant's possession of other contraband when arrested;

6) Defendant's incriminating statements when arrested;
7) Defendant's attempted flight;
8) Defendant's furtive gestures;
9) Presence of odor of the contraband;
10) Presence of other contraband or drug paraphernalia, not included in the charge;
11) Defendant's ownership or right to possession of the place where the controlled substance was found; and
12) Place drugs found was enclosed.

Brunson v. State, 750 S.W.2d 277, 280 (Tex. App.–Houston [14th Dist.] 1988, pet. ref'd). Affirmative links emerge from the combination of several factors. The number of factors present is less important than the logical force the extant factors have in establishing the elements of the offense. *Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.–Houston [14th Dist.] 1994, pet ref'd).

The evidence in the record reflects multiple affirmative links. The main factor that links appellant to the contraband is that it was found in an apartment she leased and occupied. *See e.g., Moulden v. State*, 576 S.W.2d 817 (Tex. Crim. App. 1978) (holding that evidence was sufficient where accused was the owner of the place where the contraband was found). The cocaine was found in several places accessible to appellant, the only person present at the time of the search. Some of the contraband was found in a bedroom closet which appeared to be used by appellant. There was also an assault rifle outside the bedroom closet in plain view. More importantly, a large quantity of the contraband was found in the kitchen, which appellant admitted she used. Almost every cabinet in the kitchen contained cocaine and/or items which indicate use of contraband, i.e., a large-beam scale and numerous plastic bags. Additionally, the information the informant provided proved to be reliable and correct, right down to the nickname, "Pooh," which appellant admitted she used. *See e.g., Price v. State*, 756 S.W.2d 777, 779-81 (Tex. App.–Corpus Christi 1988, no pet.) (holding that informant's tip was corroborated by discovery of contraband).

The State sufficiently linked appellant to the cocaine located inside the apartment and established her knowing and intentional possession of the narcotics. Viewing the evidence in the light most favorable to the verdict, we find ample evidence from which the trial court could have found, beyond a reasonable doubt, that appellant possessed the cocaine. Accordingly, the evidence is legally sufficient. Appellant's first point of error is overruled.

B. Factual Sufficiency of the Evidence

In her second point of error, appellant contends the evidence was factually insufficient to show that she knowingly and intentionally possessed an illegal substance. When evaluating a challenge to the factual sufficiency of the evidence, we view all 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 to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). We conduct this review by examining the evidence weighed by the fact finder that tends to prove the existence of an elemental fact in dispute and compare that evidence with the evidence tending to disprove that fact. *Johnson*, 23 S.W.3d at 7. Essentially, we weigh the evidence which tends to prove the existence of a fact against the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). We can disagree with the fact finder's determination. *Clewis*, 922 S.W.2d at 133. However, we must employ appropriate deference so that we do not merely substitute our judgment for that of the fact finder. *See Jones*, 944 S.W.2d at 648. Our evaluation should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997).

In reviewing the sufficiency of the evidence to establish appellant's knowledge and control over the contraband found in her apartment, we conclude that the evidence in the record is factually sufficient to establish the affirmative link between appellant and the contraband.

Appellant points to the following factors as demonstrating the factual insufficiency of the evidence: (1) none of the drugs were in plain view and large quantities were in places that were hard for her to reach; (2) appellant had not been involved with "Mike D" for a very long period of time before they moved in together; (3) appellant did not appear to be nervous during the search; (4) appellant did not hesitate to give her consent to the search and even told the officers she had nothing to worry about; and (5) appellant was surprised when the officers informed her of what they had found. However, these factors are not evidence that appellant did not exercise care, custody, control, and management over the cocaine hidden in numerous places throughout her apartment. At most, these factors suggest that she did not have exclusive control or possession of the cocaine in the apartment. The fact that she did not live alone does not foreclose her care, custody, control or management over the contraband. In fact, possession and control of drugs is not necessarily exclusive, and could be shared with one or more persons. *See White v. State*, 890 S.W.2d 131, 138 (Tex. App.–Texarkana 1994, pet ref'd) (citing *Crude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986) (finding that one factor showing that accused had care or control is whether the accused either rented or owned the place where the contraband was found).

At trial, appellant testified in her own defense and stated that she had no idea that there were illegal substances in her apartment. She stated that she worked most of the day and her boyfriend, Michael Dickson, was home during that time and worked at night. She also stated she had been in the apartment for only two weeks, had never cooked, and had not looked in either the Igloo cooler or the shoebox found in the master bedroom closet. However, on cross-examination, appellant acknowledged that she had opened the kitchen cabinets to get a drinking glass. The state presented evidence that when the officers opened those cabinets, they found cocaine in almost every coffee mug. Appellant also acknowledged that it was closer to a month that she had been living in the apartment with Dickson and that she continued to see him even after she was arrested for the cocaine found in their apartment. Although none of the drugs were found directly in plain view, they were all in places easily

accessible to occupants of the dwelling, i.e., the bedroom closet and kitchen cabinets. The assault rifle was in plain view. Neither appellant's calm demeanor in her dealings with the police, nor the fact that she consented to the search and seemed surprised when the officers told her what they had found, manifests a lack of management or control of the premises.

Although appellant testified at trial that she had no idea the apartment contained contraband, the trial judge, as the sole judge of appellant's credibility, was free to believe or disbelieve all or part of her testimony. *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997). We must presume that he weighed the credibility of the witnesses and resolved all conflicts in favor of the prevailing party. *See Grant v. State*, 989 S.W.2d 428, 432 (Tex. App.–Houston [14th Dist.] 1999, no pet. h). Moreover, the evidence is not insufficient merely because the appellant took the stand and offered a different version of the facts. *See Russell v. State*, 665 S.W. 2d 771, 776 (Tex. Crim. App. 1983).

It is not necessary that every fact or circumstance point directly to the appellant, as long as the conclusion is supported by the combined force of all the incriminating evidence. *See Russell* 665 S.W.2d at 776. Appellant has not shown that the verdict is so contrary to the overwhelming weight of evidence as to be manifestly wrong or unjust. Accordingly, we find the evidence is factually sufficient to support appellant's conviction. Appellant's second point of error is overruled.

C. Ineffective Assistance of Counsel

In her final point of error, appellant complains that she was denied effective assistance of counsel during the time to prepare a motion for new trial. Although appellant admits that her attorney filed a motion for new trial, she contends that it merely contained "boilerplate" language and did not present issues which she considered to be meritorious.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to

reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

We will not find ineffectiveness by isolating any portion of the trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). In analyzing a claim alleging ineffective assistance of counsel, we apply a strong presumption that trial counsel was competent. *Id.* at 813. This means that we presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel took the action in question. *See id.* An appellant cannot meet the burden on an ineffectiveness claim if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). When the record is silent as to counsel's reasons for her conduct, the court will not engage in speculation. *McCoy v. State*, 996 S.W.2d 896, 900 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd.) (citing *Jackson*, 877 S.W.2d at 771–72)).

Even though the appellant may file a motion for new trial in an effort to make a record to support an ineffective assistance claim, if appellant fails to request a hearing on a motion for new trial, the record will likely fail to reflect an explanation of trial counsel's conduct. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from

trial counsel becomes almost vital to the success of an ineffective assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.–Beaumont 1995, pet. ref'd). This kind of record is best developed in a hearing on application for writ of habeas corpus or a motion for new trial. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of trial counsel. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Jackson*, 973 S.W at 956. A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove her claims by a preponderance of the evidence. *See id*.

Several intermediate courts of appeals, including this one, have concluded that the statutory time period for filing a motion for new trial is a critical stage of the proceedings during which a criminal defendant is constitutionally entitled to assistance of counsel. *See e.g. Hanson v. State*, 11 S.W.3d 285, 288 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Massingill v. State*, 8 S.W.3d 733, 736 (Tex. App.–Austin 1999, no pet). However, the Texas Court of Criminal Appeals has specifically refused to rule on this point. *Smith v. State*, 17 S.W.3d 660, 663 n.3 (Tex. Crim. App. 2000). Appellant, relying on *Prudhomme v. State*, argues that although there is a presumption that trial counsel continued to effectively represent her during the time limit for filing a motion for new trial, this presumption is effectively rebutted by a failure to present a valid motion. 28 S.W.3d 114 (Tex. App.–Texarkana 2000 pet ref'd.) (holding that where defendant was without counsel to assist him in preparing and filing a motion for new trial violates his right to counsel under the Sixth Amendment).

The record affirmatively shows that trial counsel filed a timely motion for new trial. There is nothing in the record to effectively rebut the presumption that appellant's counsel provided effective assistance during the critical thirty-day period for filing a motion for new

trial. Although appellant contends the motion should have alleged additional facts and grounds for a new trial, there is nothing to indicate that defense counsel was aware of these facts or of the grounds they would have supported. Moreover, none of the grounds asserted in the motion required an evidentiary hearing and, apparently, the trial court did not conduct one. The motion for new trial was overruled by operation of law. Because the record contains nothing to indicate what defense counsel's trial strategy might have been, we cannot "second-guess trial counsel's tactical decisions which do not fall below the objective standard of reasonableness." *Vasquez v. State*, 830 S.W.2d 948, 950 (Tex. Crim. App. 1992). Thus, appellant has failed to overcome the strong presumption that she was effectively represented by counsel during the time for filing a motion for new trial. *See Oldham v. State*, 977 S.W.2d 354 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1181 (1999).

Whatever trial counsel's reasons may have been for pursuing the chosen course, in the absence of a record identifying these reasons, we must presume they were made deliberately as part of sound trial strategy. Because we are unable to conclude that defense counsel's performance fell below an objective standard without evidence in the record, we find that the appellant has failed to meet the first prong of *Strickland*. Based on appellant's failure to establish the first prong in the *Strickland* analysis, we need not address the second, prejudice prong of *Strickland*. Accordingly, we overrule the appellant's third point of error.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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