Affirmed in part, Reversed and Remanded in part and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00590-CR & 14-98-00591-CR

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BOOKER TORRENCE DOTSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 704,293 & 704,296

O P I N I O N

Booker Torrence Dotson appeals his convictions for possession of a controlled substance, namely cocaine, and assault on a public servant. TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon 1992) and TEX. PEN. CODE ANN. § 22.01(b)(1) (Vernon 1994). The trial judge entered a plea of not guilty for appellant and the case was tried before a jury. Upon a finding of guilty in both cases, the trial judge found the enhancement paragraphs true and assessed punishment at twenty years confinement for the possession charge and confinement for life on the assault charge. We have consolidated the cases for disposition.

Appellant has filed a separate brief in each of the numbered causes. In the possession charge (our cause number 14-98-00591), appellant contends in two points of error that the trial court improperly assessed punishment as a second degree felony, rather than a state jail felony. The remaining points of error are identical in both causes. Appellant challenges the legal and factual sufficiency of the evidence and claims that his trial counsel was ineffective during the punishment phase. We affirm the assault on a public servant conviction (our cause number 14-98-00590), and reverse and remand the possession conviction (our cause number 14-98-00591) for a new punishment hearing.

Houston Police Officers Shawn White and Richard Hahn saw a car parked in the middle of the road in a heavily wooded area. The car's engine was running, but its lights were not turned on, although it was dark. This area was known to Officer White as a hot spot where people dumped stolen cars and used drugs. As the officers approached the car, Officer White noticed appellant in the drivers seat, leaning toward the console. When appellant saw the officers, he began to wipe his face, repeatedly wiping his nose and rubbing his upper lip. Officer White believed appellant was using cocaine.

Officer White asked appellant for identification and appellant refused to comply. He was arrested for failure to identify and placed in the back seat of the patrol car. Appellant was not handcuffed. While conducting an inventory search of the car, the police found cocaine and a razor blade on the console. Officer White went back to the patrol car to inform appellant of the new charge. When Officer White opened the back door, appellant jumped out, and began swinging at him. Appellant then ran into the woods. Officer White followed appellant, but could not find him. While Officer White continued to search, appellant jumped up from the grass and hit him in the lip. Appellant fled again, and was later discovered hiding under some bushes by the canine unit.

Appellant contends that the evidence is legally and factually insufficient to support both of his convictions. We disagree.

When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict. *See Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In doing so, we must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989). The trier of fact is the exclusive judge of the credibility of the witnesses, the weight to be given their testimony, and may accept or reject any or all of the evidence for either side. *See Dumas v. State*, 812 S.W.2d 611, 615 (Tex. App.–Dallas 1991, no pet.), *citing Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982).

When reviewing the factual sufficiency of the evidence, we will 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 as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the fact finder. *Id*. at 133.

To prove unlawful possession of a controlled substance, the State must prove: (1) that appellant exercised actual care, control and management over the contraband; and (2) that appellant had knowledge that the substance in his possession was contraband. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). The courts look for evidence that affirmatively links the appellant to the drug for proof that it was possessed knowingly. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

A review of the record shows a number of such affirmative links, including: (1) the cocaine was in plain view; (2) appellant was sitting next to the console; (3) he made furtive gestures toward the console and toward his face when he saw the officers; (4) he ran away from the police after they found the cocaine; (5) Officer White found a razor blade on the console, which is used to cut cocaine. These factors show sufficient links to connect appellant to the cocaine and show his knowing possession. Appellant did not introduce any evidence to the contrary. We hold that the evidence is legally and factually sufficient to support the possession of a controlled substance conviction.

To prove assault on a public servant, the State must prove: (1) appellant intentionally, knowingly, or recklessly (2) caused bodily injury (3) to a public servant, (4) while the public servant was lawfully discharging an official duty. TEX. PEN. CODE ANN. § 22.01(b)(1) (Vernon Supp. 1998). In the indictment, the State defined White's official duty as attempting to arrest appellant. Appellant contends that

the proof at trial showed that the assault took place after appellant was arrested. Therefore, he claims this variance in proof is material, and the evidence is insufficient to support the conviction.

A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant. TEX. CODE CRIM. PROC. ANN. Art. 15.22 (Vernon 1994). If a person escapes from custody or the restraint, he is no longer under arrest, and may be rearrested. *See Austin v. State*, 541 S.W.2d 162, 163 (Tex. Crim. App. 1976) (common law right of a surety to arrest is likened to the rearrest by the sheriff of an escaping prisoner); 5 AM. JUR. 2D Arrest §104 (1995). After appellant left the patrol car, Officer White attempted to arrest appellant for the failure to identify and the possession charge. We hold that the evidence is legally and factually sufficient to support the conviction.

In his first and second points of error in the possession case (our cause number 14-98-00591), appellant argues that the trial court improperly assessed punishment as a second degree felony, rather than a state jail felony. The State concedes error in its brief. We find that the trial court did commit reversible error and improperly assessed punishment.

Appellant committed the offense on September 26, 1995. He was sentenced to twenty years, the maximum period for a second-degree felony. Under TEX. PEN. CODE ANN. § 12.35 (Vernon 1994) which was applicable at the time, a state jail felony could only be enhanced if: (1) a deadly weapon was used or exhibited during the offense or during immediate flight, or (2) the individual had previously been convicted of a felony listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure, or (3) the judgment contained an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure. *State v. Mancuso*, 919 S.W.2d 86 (Tex. Crim. App. 1996).[1] None of these circumstances were present in this case.

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[1] TEX. PEN. CODE ANN. § 12.42(a) (Vernon Supp. 1999) was subsequently amended and took effect on January 1, 1996. The statute now provides: If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

We hold that the trial court committed reversible error and improperly enhanced appellant's conviction under the habitual offender statute. Accordingly, we sustain appellant's points of error, and reverse the judgment of the trial court and remand the case for a new punishment hearing pursuant to Article 44.29(b) of the Texas Code of Criminal Procedure. See TEX. CODE CRIM. PROC. ANN. Art. 44.29(b) (Vernon 1997).

Appellant also contends that the trial court committed reversible error in overruling his motion for new trial based on ineffective assistance of counsel and that his attorney was ineffective because he failed to (1) adequately prepare for the punishment phase of trial, (2) failed to secure the attendance of witnesses favorable to the appellant for the punishment phase, (3) failed to call any punishment witnesses, and (4) failed to request a continuance in order to properly prepare for the punishment phase of trial.

For counsel to be ineffective at either the guilt/innocence or punishment phase of trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App.1999) In looking at these requirements, a court is to keep in mind that the right to counsel does not guarantee an error-free counsel or counsel whose competency is judged by hindsight. *See Hernandez v. State*, 726 S.W.2d 53, 58 (Tex.Crim.App.1986).

Appellant was not present during the guilt/innocence or punishment phase of the trial. During punishment, the State introduced evidence of appellant's prior felony convictions. After the State rested, appellant's attorney did not call any witnesses.

At the motion for new trial, appellant presented affidavits from his sister, wife, and two co-workers. They all claimed that they could have testified at the punishment hearing. Appellant's wife and sister admitted that they had been interviewed by appellant's trial counsel. The affidavit's generally stated that appellant was a caring person, held a steady job, and was a hard worker. His co-workers believed that

appellant was a peaceful and law abiding person. His sister stated that appellant had a drug problem, but never knew him to be violent and aggressive.

Appellant's trial attorney, Mike Coulson, also submitted an affidavit. Coulson claimed to have talked to several people about appellant's trial. He said that he was reluctant to call any of appellant's friends or relatives at the punishment hearing because they may have known appellant's whereabouts during the time appellant was absent. Coulson believed that when they were cross-examined by the State prosecutor, they would be forced to answer questions about appellant's good character. Appellant was a fugitive at the time and had several prior felony convictions.

Generally, an attorney's strategic decision to not call a witness will be reviewed only if there was no plausible basis for not calling the witness. *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd). The decision may also be strategically sound if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant. *Milburn v. State*, 973 S.W.2d 337, 344 (Tex. App.–Houston [14th Dist.] 1998). In our case, Coulson believed that the State's cross-examination of the witnesses would have hurt appellant, because the witnesses would be forced to answer questions about appellant's character. Coulson also feared that the witnesses might perjure themselves.

Moreover, appellant did not show the probability that, but for his counsel's errors, the result of the proceeding would have been different. Even if these witnesses were called, none acknowledged that they were aware of appellant's prior criminal history.[2] Such evidence may have changed their opinion as to appellant being a peaceful, law abiding citizen, or whether appellant was a violent and aggressive person. The record does not support a showing the if these witnesses testified, the results of the proceeding would have been different. We overrule appellant's remaining points of error.

In the assault on a public servant (our case number 14-98-00590), we affirm the judgment of the trial court. In the possession case, (our case number 14-98-00591) the judgment of the trial court is affirmed in part, and reversed and remanded in part for a new punishment hearing.

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[2] Appellant had previously been convicted of burglary of a habitation, attempted burglary of a building, possession of cocaine, burglary of a motor vehicle, and robbery.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Robertson, Cannon, and Lee.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Bill Cannon, and Normal Lee sitting by assignment.