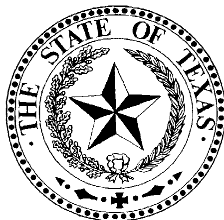
Affirmed and Opinion filed January 3, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00147-CR

MERLE LEE BANKS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 185th District Court
Harris County, Texas
Trial Court Cause No. 847,517

O P I N I O N

Merle Lee Banks appeals a conviction for possession with the intent to deliver between 4 and 200 grams of cocaine[1] on the grounds of: (1) insufficient evidence; (2) inadmissible evidence; (3) jury misconduct; and (4) improper change of courtrooms. We affirm.

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[1] A jury found appellant guilty, found the enhancement allegation to be true, and assessed punishment of 30 years confinement and a $10,000 fine.

Sufficiency

Appellant's first issue challenges the legal sufficiency of the evidence to prove that he placed the drugs in the vehicle he was driving because: (1) there was no scientific or physical evidence of appellant's finger prints on the bag of cocaine or near the area where the cocaine was found; (2) there is no evidence directly showing that appellant placed the cocaine in the compartment; and (3) evidence showed that other individuals besides appellant drove the car. Appellant's sixth issue similarly asserts that there is legally insufficient evidence to prove that appellant intended to deliver a controlled substance.

In conducting a legal sufficiency review, we examine all the evidence in the light most favorable to the verdict in order to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Burden v. State*, 55 S.W.3d 608, 612 (Tex. Crim. App. 2001). This standard is the same in both direct and circumstantial evidence cases. *Id*. at 613.

To establish the unlawful possession of a controlled substance, the State must prove that the accused: (1) exercised care, control, or custody over the substance, and (2) knew that the matter possessed was contraband. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Evidence that the accused possessed the contraband knowingly can be either direct or circumstantial but must establish that the accused's connection with the drugs was more than just fortuitous. *Id*.

A defendant's knowledge of the presence of contraband concealed in a vehicle can be inferred from the defendant driving alone in the vehicle, particularly where the amount of the contraband is large. *Menchaca v. State*, 901 S.W.2d 640, 652 (Tex. App.—El Paso 1995, pet. ref'd). However, when contraband is found in a hidden compartment of the vehicle, evidence beyond mere control of the vehicle should be relied upon to show knowledge. *See id*.

Intent to deliver may also be proved by circumstantial evidence. *Bryant v. State*, 997 S.W.2d 673, 675 (Tex. App.—Texarkana 1999, no pet.); *Moss v. State*, 850 S.W.2d 788, 797

(Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). As evidence of intent, courts have considered such factors as the quantity of the drugs in the defendant's possession and the manner of packaging it. *Bryant*, 997 S.W.2d at 675; *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

According to the trial evidence in this case, Officer Bartlett pulled appellant over for a traffic violation while appellant was driving alone in a car which belonged to Diana Richard, his long- time girlfriend. Bartlett had seen appellant drive this vehicle on a regular basis over the previous two years while he was patrolling the neighborhood in which appellant and Diana lived. During the traffic stop, Bartlett inquired whether appellant had anything illegal in the car, and appellant replied in the negative. Then, although Bartlett did not ask for appellant's consent to search the car, appellant volunteered "you're welcome to look in the vehicle all you want." However, when appellant saw Officer Doyle and his drug detection dog soon arrive at the scene, appellant said to Bartlett: "you got me now."

After the dog alerted on appellant's vehicle, Officer Condon found a brown bag containing 81 grams of cocaine, hidden behind an upholstered panel in the air bag compartment. The cocaine was packaged in separate bags containing powder, wafers, and crack cocaine rocks. According to Bartlett's and Doyle's expert testimony, the amount and packaging of the cocaine indicated that it was intended for delivery rather than for personal use. Viewing this evidence in the light most favorable to the verdict, the jury could have rationally found beyond a reasonable doubt that appellant knowingly possessed the cocaine and did so with an intent to deliver. Accordingly, appellant's first and sixth issues are overruled.

Illegal Search

Appellant's second issue contends that the trial court erred in failing to grant his motion to suppress because the challenged evidence was illegally obtained from a search for

which the police had neither a search warrant[2] nor appellant's consent. Although appellant acknowledges that Bartlett testified that appellant gave him permission to search his vehicle, appellant denies doing so.

In reviewing a ruling on a motion to suppress, an appellate court affords almost total deference to the trial court's determination of historical facts which are supported by the record and based on an evaluation of the witnesses' credibility and demeanor. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000). Such deference is also afforded to a trial court's ruling on an application of law to fact question which turns on an evaluation of credibility and demeanor. *Id*. Mixed questions of law and fact not falling within those categories are reviewed *de novo*. *Id*. When the trial court makes no findings of fact, we view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. *Id*. at 855.

In this case, Bartlett had testified at the motion to suppress hearing to the same facts regarding appellant's consent to the search of his vehicle as Bartlett testified to at trial, as reflected in the preceding section. Viewing this evidence in support of the trial court's implicit finding of consent, and affording that finding the prescribed deference, there is no basis to conclude that the trial court erred by denying appellant's motion to suppress. Accordingly, appellant's second issue is overruled.

Jury Misconduct

Appellant's third issue asserts that he should have been granted a new trial because four jurors fell asleep during parts of the trial. A defendant generally must present a motion for new trial to the trial court within 10 days of filing it. TEX. R. APP. P. 21.6. Mere filing of a motion for new trial does not satisfy the presentment requirement. *Carranza v. State*, 960 S.W.2d 76, 78 (Tex. Crim. App. 1998). Rather, the record must show that the movant

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[2] Appellant affirmatively proved the lack of a warrant.

actually brought the motion for new trial to the trial court's attention. *Id.* at 79. Such presentment may be evidenced by a ruling on the motion, the judge's signature or notation on a proposed order, or a hearing date set on the docket. *Id.*

In the present case, the motion for new trial and proposed order that appellant filed reflect no signatures or notations by the trial court, and the trial court's docket sheet does not indicate that the trial court ever considered or ruled on the motion. Because the record thus fails to indicate that appellant ever presented his motion for new trial to the trial court, appellant's third issue demonstrates no error in failing to grant that motion and is accordingly overruled.

Chain of Custody

Appellant's fourth issue argues that evidence of the cocaine found in the car he was driving should not have been admitted because the State failed to establish the chain of custody for the cocaine. Absent evidence of tampering, most questions concerning the care and custody of a substance go to the weight of the evidence, not its admissibility. *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997). Chain of custody is conclusively proven if an officer is able to identify that he or she seized the item of physical evidence, put an identification mark on it, placed it in the property room, and then retrieved the item being offered on the day of trial. *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989).

In this case, Officer Condon retrieved a paper bag of cocaine from the air bag compartment of the car appellant was driving and handed it to Officer Bartlett. Officer Bartlett placed the cocaine in an envelope, sealed the envelope, and wrote on it the date, case number, defendant's name, address of the location at which the evidence was seized, and his name. Finally, he placed the evidence envelope in the narcotics lockbox. The forensic chemist further identified the exhibits as the cocaine that he had received and sealed in an evidence envelope for testing. Because the State thereby sufficiently proved the chain of custody for the cocaine admitted into evidence, appellant's fourth issue is overruled.

Change of Courtroom

Appellant's fifth issue claims that the verdict should be reversed because moving the punishment phase of trial from the courtroom of the 185th District Court to that of the 209th District Court caused the jury to be displaced and its decision to be affected. However, because appellant offers no authority or arguments explaining whether and how the trial court's action was improper or actually affected the jury, this issue provides no grounds upon which it can be sustained. Accordingly, appellant's fifth issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 3, 2002.

Panel consists of Justices Yates, Edelman, and Draughn.[3]

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

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[3] Senior Justice Joe L. Draughn sitting by assignment.