**Affirmed and Opinion filed February 1, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-01358-CR**

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**LENNY LUKE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 338th District Court**
**Harris County, Texas**
**Trial Court Cause No. 807,451**

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## O P I N I O N

Over his plea of not guilty, a jury found Lenny Luke, appellant, guilty of possession of cocaine with intent to distribute the same. At the sentencing phase of this bifurcated trial, two enhancement paragraphs alleged that appellant previously committed the felonies of robbery and delivery of cocaine. Without any findings on appellant's enhancements, the trial court assessed punishment at thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant now appeals his conviction on six points of error. We affirm the trial court's judgment for the following reasons: (1) legally and factually sufficient evidence supports appellant's conviction; (2) appellant suffered no harm as a result of the court's

failure to arraign him on the enhancement paragraphs in the punishment phase; and (3) appellant failed to demonstrate that he received ineffective assistance of counsel at trial.

## FACTUAL BACKGROUND

In an effort to execute a felony arrest warrant for Luke, Officers John Brooks, R.B. Johnson, and Ed Payne set out to conduct an undercover surveillance of him. The surveillance led them to a school where Luke was often seen taking and picking up his girlfriend who worked there. Officer Brooks positively identified Luke driving his girlfriend's Ford Explorer to the school. Once Luke arrived at the school, Officer Johnson witnessed him get out of the car from the driver's side and move over to the passenger's side of the vehicle. Luke's girlfriend then exited the school, sat in the driver's seat, and drove off. A marked unit pulled over the Explorer. As Officer Johnson approached the Explorer, he saw Luke "looking right and then left and moving something with his left hand." Johnson immediately informed the other officers that Luke had his left hand down by the seat. While the other officers removed Luke from the vehicle and handcuffed him, Officer Johnson looked into the car, where Luke's hand had been, and saw a small piece of clear plastic containing a white substance. Johnson suspected this substance to be crack cocaine. Officer Payne field tested the substance, and Rosa Rodriguez lab tested the substance, both results confirming that the substance was, in fact, 5.5 grams of crack cocaine, in the form of a "cookie."[1]

Officer Payne testified that a 5.5 gram cookie of crack cocaine is too much for personal consumption, would have sold for about $550.00, and would instantly kill any individual trying to smoke it all at one time. Officer Payne noted that an individual could conceivably buy that much crack for personal consumption if they were going to smoke it over a couple of months, but further stated that holding on to narcotics for that long is unusual, as is buying over $500.00 worth of crack for personal consumption.

## PROCEDURAL HISTORY

In this bifurcated trial, a jury convicted Luke of possession with intent to distribute a controlled

[1]A crack cookie is a larger amount of crack than a rock, can be broken into rocks, is thin, and looks similar to a sugar cookie.

substance, namely crack cocaine. In the sentencing phase, the trial court, rather than the jury, assessed punishment. At the beginning of the punishment phase, the State introduced two enhancement paragraphs to the trial court. These enhancement paragraphs were based on Luke's two prior convictions – one for robbery and the other for distribution of cocaine. The trial court did not give Luke a chance to plead true to the enhancements. The range of punishment for Luke's conviction without the enhancements was 5 to 99 years. With the enhancement, the range was 25 to 99 years or life. Without making any findings as to the enhancement paragraphs, the trial court assessed Luke's punishment at 30 years' confinement in the Texas Department of Criminal Justice, Institutional Division. This appeal followed.

## D I S C U S S I O N A N D H O L D I N G S

### LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his first and second points of error, Luke contends that the evidence is legally and factually insufficient to support his conviction for possession of cocaine. In his third and fourth points of error, Luke contends that the evidence is legally and factually insufficient to support his conviction for intent to distribute cocaine. We find that the record contains sufficient evidence to support Luke's conviction.

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2780, 61 L.Ed.2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, and we 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 0126, 129 (Tex. Crim.

App. 1996). To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id*. at 11. We are mindful, however, that we must give appropriate, but not absolute, deference to the judgment of the fact finder so as to not supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *Id*. at 7.

A. POSSESSION OF COCAINE

A person commits an unlawful offense if that person knowingly or intentionally manufactures, delivers, or possesses cocaine. TEX. HEALTH & SAFETY CODE ANN. § 481.116(a) (Vernon Supp. 2000). When an accused is charged with unlawful possession of cocaine, the State must prove two things. First, the State must show that the defendant exercised actual care, custody, control, or management over the contraband. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.–Houston [14th Dist.] 1999, no pet.). Secondly, the State must show that the accused knew the object he possessed was contraband. *Grant*, 989 S.W.2d at 433. Without an admission by the accused, the knowledge element of the crime may be inferred due to its subjective nature. *McGoldrick*, 682 S.W.2d at 578; *Grant*, 989 S.W.2d at 433. The elements of possession may be proved by circumstantial evidence. *Williams v. State*, 859 S.W.2d 99, 101 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd). The Texas Penal Code defines possession as a voluntary act if the possessor had knowledge or control over an object long enough to enable him to terminate control over it. TEX. PEN. CODE ANN. § 6.01(b) (Vernon 1994).

"[W]hen the contraband is not found on the accused's person, or it is not in the exclusive possession of the accused, additional facts must affirmatively link the accused to the contraband" so that one may reasonably infer that the defendant knew of the contraband's existence and exercised control over it. *Jones v. State*, 963 S.W.2d 826, 830 (Tex. App.–Texarkana 1998, pet. ref'd). Affirmative links may

be established by facts and circumstances that indicate the accused's knowledge of and control over the contraband. *Grant*, 989 S.W.2d at 433. Included among these factors are (1) whether the contraband was in open or plain view; (2) whether it was in close proximity to the accused; (3) whether the amount of the substance was large enough to indicate appellant knew of its presence; (4) whether the accused owned or was closely related to the owner of the vehicle in which the substance was found; and (5) whether the accused made furtive gestures. *Jones*, 963 S.W.2d at 830. All facts do not necessarily need to point directly or indirectly to the defendant's guilt; the evidence is legally sufficient if the combined and cumulative effect of all the incriminating circumstances point to the defendant's guilt. *Russell v. State*, 665 S.W.2d 771, 776 (Tex. Crim. App. 1983).

Luke argues that his mere proximity to the crack cocaine is the only evidence linking him to the possession of it, and that such evidence is legally and factually insufficient to support this conviction. Luke, however, overlooks the fact that mere proximity is not the only evidence linking him to the possession of the substance. In fact, Luke exercised sole possession over the vehicle where the crack cocaine was found until just minutes before the traffic stop, not to mention the fact that he is "closely related" to the owner of the vehicle. At the time of the traffic stop, Luke sat in the passenger side of the vehicle, which is where Officer Johnson found the 5.5 gram crack cocaine cookie. Moreover, once the officers pulled over the vehicle, Johnson observed Luke making a furtive gesture in an apparent attempt to hide the crack cocaine. Johnson found the crack cocaine in the vehicle partly because of this furtive gesture and partly because when he looked in the car he saw a bit of a plastic bag and a corner of the cookie. Both elements of the crime of possession, control and knowledge of the presence of the cocaine, may be inferred from this evidence. *Grant*, 989 S.W.2d at 433.

After viewing this evidence in the light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of the offense of possession of cocaine. Accordingly, we overrule appellant's first point of error.

Furthermore, we do not find evidence in the record that greatly outweighs the evidence supporting the trial court's judgment. In conducting a factual sufficiency review, we only exercise our fact jurisdiction

to prevent a manifestly unjust result. *Clewis*, 922 S.W.2d at 135. No such result obtains under this evidence. We conclude that the evidence is factually sufficient to support Luke's conviction for possession of cocaine and overrule his second point of error.

B. INTENT TO DISTRIBUTE COCAINE

Likewise, Luke argues that the State's evidence against him on possession of cocaine with intent to distribute it, if any, was legally and factually insufficient to support the conviction. Specifically, Luke urges this court to find that the evidence against him demonstrated possession for personal use, rather than possession with the intent to distribute.

"An intent to deliver a controlled substance may be prove[n] by circumstantial evidence." *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). Factors considered by courts to determine whether an accused had an intent to deliver crack cocaine include the quantity of drugs possessed, the manner of packaging and whether the rock or cookie possessed was sufficiently large to be split up and sold. *Id*.

Here, Luke possessed a cookie of cocaine. Officer Payne testified that, typically, a cookie is broken up into several rocks, usually about .02 grams per rock, and then distributed for sale. Payne stated that this 5.5 gram cookie would have sold for $550.00. Payne further testified that a person would not have purchased a cookie of crack cocaine for personal consumption, because smoking it all at once would be lethal and keeping it for a period of months for personal consumption would be highly unlikely.

After viewing this evidence in the light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of the offense of an intent to distribute cocaine. We, therefore, overrule Luke's third point of error.

Furthermore, we do not find evidence in the record that greatly outweighs the evidence supporting the trial court's judgment, nor is the jury's decision so contrary to the weight of the evidence to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 135. We conclude that the evidence is factually sufficient to support Luke's conviction for an intent to distribute cocaine and overrule his fourth point of error.

## FAILURE TO ARRAIGN LUKE ON THE ENHANCEMENT PARAGRAPHS

In his fifth point of error, Luke contends that the trial court erred in failing to arraign him on the two enhancement paragraphs in the punishment phase of this trial. Under section 12.42(d) of the Penal Code, a defendant's punishment for a felony offense may be enhanced. TEX. PEN. CODE ANN. § 12.42(d) (Vernon Supp. 2000). In this case, instead of appellant's punishment range being from 5 to 99 years, the punishment range would be 25 to 99 years or life. *Id*. On the face of the record, however, it appears that the judge did not enhance Luke's punishment. The judge assessed punishment at 30 years; well within the 5 to 99 year range of punishment Luke would have been subject to without the enhancements. In fact, 30 years is in the lower end of the punishment range for the offense. *Caraway v. State*, 911 S.W.2d 400, 402 (Tex. App.—Texarkana 1995, no pet.). Furthermore, the record shows that the judge never marked the enhancements. The above facts are consistent with the judge merely considering the prior felonies to determine where, within the 5 to 99 year range, he would assess punishment, rather than the judge punishing Luke within the enhanced punishment range. As such, Luke suffered no error. Accordingly, point of error five is overruled.

## INEFFECTIVE ASSISTANCE OF COUNSEL

In his sixth point of error, appellant contends that he was denied effective assistance of counsel at trial. He argues that counsel was ineffective for failing to file a written motion to suppress physical evidence because the officers had no arrest warrant. Again, we disagree. For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hernandez*, 726 S.W.2d at 55.

Appellant carries the burden to prove the ineffectiveness of his trial counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). The failure to file a motion to suppress does not, in itself, constitute ineffective assistance of counsel. *Kimmelman v.*

*Morrison*, 477 U.S. 365, 380-82, 91 L.E.d.2d 305, 106 S.Ct. 2574 (1986). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 688-89; *Thompson*, 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in the record. *Thompson*, 9 S.W.3d at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). As we explain below, appellant has not met his burden.

Luke contends that the contraband admitted into evidence and used against him at trial should have been suppressed because no evidence in the record reflected that the officers had a warrant for his arrest. The record, however, shows that the sole purpose of the officers' surveillance of Luke was to execute the arrest warrant. Officer Brooks testified that he had a warrant for Luke's arrest. Furthermore, appellant's counsel at trial filed a pretrial motion in limine as to "any mention of the basis of the arrest warrant of the defendant."

As the Court of Criminal Appeals has noted, it is almost impossible to obtain reversal for actions taken by trial counsel, or for counsel's failure to act, without some reflection in the record of the reasons for the action. *Jackson*, 973 S.W.2d at 957; *see Kemp*, 892 S.W.2d at 115 (holding that a record is best developed in the context of a hearing on application for writ of habeas corpus or motion for new trial). Nothing in this record reflects that counsel should have filed a motion to suppress based on a failure to obtain an arrest warrant. In fact, the record supports the decision not to file one. Thus, appellant failed to rebut the strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *Thompson*, 9 S.W.3d at 813.

A reviewing court must examine the adequacy of counsel's assistance based upon a totality of the representation. *Johnson v. State*, 614 S.W.2d 148, 149 (Tex. Crim. App. [Panel Op.] 1981). After reviewing the record and appellant's arguments, we hold that appellant has not met his burden to show that

he received ineffective assistance of counsel. Accordingly, his sixth point of error is overruled.

Having overruled appellant's six points of error, the judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed February 1, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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