Affirmed and Opinion filed January 25, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01369-CR

JOHNNY COOPER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd Judicial District Court
Brazoria County, Texas
Trial Court Cause No. 34,104

O P I N I O N

The appellant, Johnny Cooper, received a sentence of fourteen years in the Texas Department of Criminal Justice, Institutional Division, for possession of cocaine weighing between four and two hundred grams. In two points of error, he claims the evidence that he possessed the drugs is factually insufficient, and his counsel was ineffective. We overrule his claims, and we affirm the judgment of the trial court.

I. FACTS

Texas Department of Public Safety Trooper James Lucky stopped Cooper for traffic violations. Cooper was driving his motor vehicle, and eighteen year old Stacie Carson was his passenger. As Lucky approached the car, he saw them making furtive movements, as if secreting something. When Lucky spoke to them, they were visibly nervous. The officer suspected drugs, and asked to search the car. Cooper refused. Lucky questioned Carson, and she tearfully indicated she had stuffed cocaine between the car seats. Trooper Lucky searched the area of the vehicle she indicated, and recovered two crack cocaine cookies. She later testified she had physical possession of the drugs when Lucky pulled them over, but the drugs belonged to Cooper, and Cooper knew the drugs were in the vehicle. The appellant was arrested, and when searched, he had $1,284 on his person.

II. ANALYSIS

A. The Substantive Issue

Proof beyond a reasonable doubt that a defendant exercised care, custody and control over contraband he knew was a controlled substance establishes possession. ***Guitierrez v. State***, 533 S.W.2d 14, 15 (Tex. Crim. App. 1976). Joint possession suffices. Joint possession requires an affirmative link between the accused and the substance sufficient to establish a reasonable inference that the accused knew of the drug's existence and location. ***Hineline v. State,*** 502 S.W.2d 703, 705 (Tex. Crim. App. 1973). Mere presence at the location of contraband is insufficient to prove joint possession. Additional, independent facts and circumstances must indicate the accused's knowledge of the drug and his control over it. ***Powell v. State***, 502 S.W.2d 705, 708 (Tex. Crim. App. 1973).

B. Rules for Conducting a Factual Sufficiency Review

The Court of Criminal Appeals elaborated this year upon ***Clewis v. State***, 922 S.W.2d 126 (Tex. Crim. App. 1996) and its progeny in ***Johnson v. State***, 23 S.W.3d 1 (Tex. Crim.

App. 2000). The Texas court explained in ***Johnson*** that ***Clewis*** adopted the complete, dual factual sufficiency formulation from civil law. The court explained the distinction between (1) too little evidence supporting the challenged finding and (2) overwhelming evidence that conflicts with the challenged finding. It also provided explicit instructions for analysis of factual sufficiency claims in the context of criminal cases.

1. <u>limits on scope of factual review</u>

The court reiterated in ***Johnson*** that Article V, section 6 of the Texas Constitution empowers the courts of appeals to review the factual sufficiency of the evidence used to establish the elements of an offense. ***See also Cain v. State***, 958 S.W.2d 404, 408-09 (Tex. Crim. App.1997). ; ***Clewis***, 922 S.W.2d at 129-30. The Court of Criminal Appeals adapted to the criminal context the procedural requisites that guide and limit factual review by the courts of appeals in civil cases. ***Clewis***, 922 S.W.2d at 135-36; ***Meraz***, 785 S.W.2d 146, 154 (Tex. Crim. App. 1990); ***Pool v. Ford Motor Co.,*** 715 S.W.2d 629, 635 (Tex. 1986). The reviewing court must view all the evidence in a neutral light (*i.e.*, without the prism of "in the light most favorable to the prosecution"). ***Johnson***, 23 S.W.2d at 6. The appellate court must defer to the fact-finder's judgment of the weight and credibility of evidence, but may disagree with the fact finder's determination. ***Jones v. State***, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996); ***Clewis***, 922 S.W.2d at 133. The degree of deference to the finder of fact must be proportionate to the facts it can accurately glean from the cold appellate record. ***Clewis***, 922 S.W.2d at 133. This approach occasionally permits some credibility assessment. ***Johnson***, 23 S.W.2d at 8. Disagreement with the fact finder's determination is appropriate only when the record clearly reveals manifest injustice. ***Id.***

2. <u>adaptation based upon burden of proof and whether the complaint is too little evidence, or conflicting evidence</u>

The Court of Criminal Appeals recognized in ***Johnson*** that the ***Clewis*** formulation

expresses only the "great weight and preponderance of the evidence" standard. Nevertheless, the court said, ***Clewis*** authorized adaptation of the entire civil factual sufficiency framework to criminal cases.

If the State had the burden of proof, ***Johnson*** explained, the defendant may demonstrate factual insufficiency by showing the evidence is so weak the State failed to carry that burden. ***Clewis*** directs us to presume the evidence is legally sufficient. 922 S.W.2d at 134. Even so, a neutral, complete, and detailed examination of all the relevant evidence may reveal the State failed to meet its burden of proof. ***Johnson***, 23 S.W.2d at 9.

Alternatively, if a defendant musters evidence controverting the evidence that supports the State's case-in-chief, he may bring a great weight attack upon the sufficiency of the State's case. In other words, he may argue that his evidence weighs so greatly against the State's evidence that a finding guilt beyond a reasonable doubt is clearly wrong and manifestly unjust. ***Johnson***, 23 S.W.2d at 10.

Conversely, if the defendant had the burden of proof for the finding under attack, the analysis focuses upon whether, even if some evidence supports the verdict, the great weight and preponderance of the evidence clearly shows the judgment to be manifestly unjust. ***Clewis v. State***, 922 S.W.2d at 129. The court reviews (1) the evidence the jury weighed that tends to prove the disputed fact against (2) the evidence the jury weighed that tends to disprove the fact. ***Jones v. State***, 944 S.W.2d 642, 647 (Tex. Crim. App.1996), *cert. denied*, 522 U.S. 832, 118 S.Ct. 100, 139 L.Ed.2d 54 (1997).

3. <u>opinion reflecting considerations and reasoning</u>

If the court of appeals finds it improper to defer to the fact finder's decision, then it must provide a clearly detailed explanation of how consideration of all relevant evidence requires that determination. ***Cain v. State***, 958 S.W.2d at 407. The appellate court must detail the relevant evidence and explain why and how (1) there is too little evidence, or (2)

the evidence contrary to the verdict greatly outweighs the supporting evidence. ***Johnson***, 23 S.W.3d at 10-11; ***Clewis***, 922 S.W.2d at 135. The Court of Criminal Appeals may not redetermine factual sufficiency, but it may view the record and explanation to determine whether the court of appeals properly considered all of the relevant evidence and correctly applied the factual sufficiency standard. Requiring a specific explanation allows the high court to determine whether the court of appeals substituted its judgment for that of the jury. ***Clewis***, 922 S.W.2d at 135.

4. specific holding in *Johnson*

Since defendants generally rely upon forcing the State to prove its case beyond a reasonable doubt, the Court of Criminal Appeals specifically held in ***Johnson*** that the complete and correct standard for a ***Clewis*** factual sufficiency review asks "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." ***Johnson***, 23 S.W.3d at 10-11.

C. Ineffective Assistance

In reviewing claims of ineffective counsel, Texas courts utilize the two prong analysis first articulated in ***Strickland***. ***See Thompson v. State***, 9 S.W.3d 808, 812 (Tex. Crim. App.1999) (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984).). Under this test, an appellant must prove: (1) that his counsel's representation was deficient and (2) that the deficient performance was so serious that it prejudiced his defense. ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). To satisfy the first prong, an appellant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms. ***Id.*** To satisfy the second prong, an appellant must prove that there is a reasonable probability that but for counsel's deficient performance the

result of the proceeding would have been different. ***Jackson v. State***, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceeding." ***Id.*** The reviewing court must judge the claim based on the totality of the representation; however, it is possible that a single error by counsel could be so egregious as to constitute ineffective assistance. ***See Thompson***, 9 S.W.3d at 813.

The first prong strongly presumes counsel's conduct falls within the wide range of reasonable assistance. ***Strickland***, 466 U.S. at 689, 104 S.Ct. at 2065; ***Hall v. State***, 766 S.W.2d 903, 906 (Tex. App.—Fort Worth 1989, no pet.). The possibility counsel's actions might be sound trial strategy is part of this range. ***Strickland***, 466 U.S. at 689, 104 S.Ct. at 2065; ***Jackson v. State***, 877 S.W.2d 768, 770 (Tex. Crim. App. 1994).

Counsel's representation will not be viewed through hindsight. Even if an appellant proves one or more deficiencies, counsel's representation will not be judged upon single acts or omissions; the appellate courts will review the "totality of the circumstances" at the time of the representation. ***Butler v. State***, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986).

The second prong defines the level of prejudice that constitutes reversible error. ***Hernandez***, 726 S.W.2d at 55. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceedings. ***Jackson***, 877 S.W.2d at 770.

The appellant has the burden of rebutting this presumption and proving by a preponderance of the evidence that counsel was ineffective. ***See Thompson***, 9 S.W.3d at 813. To meet this burden, the appellant must establish that ineffectiveness is affirmatively demonstrated in the record. ***Id.*** at 814.

III. ANALYSIS

Cooper claims the evidence was factually insufficient to show that he, not Carson, possessed the cocaine. The evidence taken as a whole, however, does not conflict; it

supports joint possession of the cocaine. A large sum of money found on Cooper's person supplemented Carson's testimony the cocaine was Cooper's and he knew it was in his car. Carson testified she had the cocaine in her hands when Lucky stopped the vehicle and stuffed it between the seats. The circumstance of Carson's admission she also possessed the cocaine would justify a jury in concluding she could gain nothing by saying that the appellant owned the cocaine. It would not be a manifest injustice for a jury to conclude Cooper and Carson had joint possession of the cocaine. ***See Hineline,*** 502 S.W.2d at 705.

Regarding ineffective assistance, Cooper claims trial counsel was unprepared for trial, failed to obtain pretrial hearings, and failed to meet face-to-face before trial. He also contends failure to preserve his motion to suppress and ignorance of the deadline for filing an election for the jury to assess punishment demonstrate counsel's ineffectiveness. He also claims trial counsel erred by disclosing Cooper's past drug convictions to the jury.

The record before us is silent as to counsel's reasons for the alleged acts and omissions. ***See Thompson v. State***, 9 S.W.2d 808, 814-15 (Tex. Crim. App. 1999). It would be improper for us to speculate that those reasons, strategic or otherwise, might be poor strategy, or no strategy at all. ***See Gamble v. State***, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). On the other hand, the possibility counsel's actions might be sound trial strategy is part of this range. ***Jackson v. State***, 877 S.W.2d 768, 770 (Tex. Crim. App. 1994). Because the record does not specifically focus on the reasons for the conduct of trial counsel, the appellant cannot meet his burden of rebutting the strong presumption that the decisions of his counsel during trial fell within the wide range of reasonable professional assistance. ***See Osorio v. State***, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); ***Kemp v. State***, 892 S.W.2d 112, 115 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

The appellant also complains there was no personal meeting with his counsel before the day of trial. Counsel had interviewed Cooper on the telephone long before trial. The

case was simple. Nothing indicates counsel's preparation was disproportionate to the disputable issues, and there is no indication trial counsel's decision not to meet Cooper face-to-face had any bearing on the outcome.

Admittedly, in some cases, failure to conduct discovery alone could constitute ineffective assistance. ***See Thompson,*** 9 S.W.3d at 813. However, given the case at hand, foregoing the hearings might have been a strategic decision. Representation involves human elements as well as legal and procedural hoops. A defendant without any tenable defense can lose much by irritating the judge with hearings counsel knows are useless. It appears that attempts to suppress the cocaine would have been futile. Similarly, he can gain much by pointedly pursuing only those courses of action that may have a chance of success. Given the evidence, trial counsel may have decided based upon his telephone interviews with Cooper that there was more to be gained by not burdening the court with hearings on what, in counsel's judgment, were useless discovery motions.

At trial, counsel mentioned Cooper's past drug convictions. This information clearly might prejudice the jury, if the evidence of possession was in any way unclear. On the other hand, the disclosure could be a viable and effective trial tactic. With a large sum of money on his person and drugs in the car, counsel may have wanted to "come clean" about the obvious inference Cooper was involved with drugs. This could change the jury's attitude from thinking he was trying to hide something, and focus their attention upon whether Cooper actually possessed the drugs at issue. Indeed, the appellant contends that, according to their written questions to the judge, this was precisely the issue that "troubled" the jury.

In view of the evidence of his guilt, the record before us does not support appellant's claim trial counsel rendered ineffective assistance. Trial counsel might have been expected to know when to file a pretrial election for a jury to hear punishment, but under the record before us, we have no basis to determine whom the appellant would ultimately have chosen to assess punishment. Judges will commonly be willing to dismiss the jury early and assess

punishment themselves, if requested. Similarly, counsel may have wanted to "come clean" with the additional hope he could negotiated agreement to submit punishment to the jury. Disclosure would diffuse the likelihood of anger for "hiding" Cooper's background. The record does not support Cooper's assumption the jury would have been more lenient than the judge.

Similarly, however, we are unable to conclude in the context of the entire representation that this rendered trial counsel ineffective, or that absent these remarks, the outcome of the proceedings would have changed.

The appellant complains about what pretrial motions were filed, and the failure to obtain pretrial hearings. Reviewing the entire representation presented to us, trial counsel appears well within the broad range of competence required for effective assistance. The record reveals overwhelming evidence of appellant's guilt, and chances are remote that counsel's remarks about past convictions made any difference whatsoever.

Although the record before us generally supports the facts relied on by appellant, it is silent as to the reasons that may have been behind trial counsel's acts or omissions.[1] Trial counsel's acts and omissions during voir dire or regarding the jury charge certainly do not rise to the level of being *per se* ineffective assistance of counsel. ***See Thompson***, 9 S.W.3d at 813 (courts should hesitate to "designate any error as per se ineffective assistance of counsel").

CONCLUSION

The evidence was factually sufficient to support the conviction. Viewed in its entirety, the appellant has not shown trial counsel's representation was outside the required

[1]A defendant wishing to pursue an ineffective assistance of counsel claim based on acts or omissions that may, depending on the reasons therefore, fall within the realm of acceptable conduct, has two options: (1) he or she can file a motion for new trial and request a hearing in order to elicit testimony concerning the reasons for the conduct, or (2) he or she can pursue a writ of habeas corpus to elicit the same type of testimony. ***See Thompson***, 9 S.W.3d at 814-15. The latter option is available even after a direct appeal has addressed the issue. ***Id.***

range of competence. Both of the appellant's points of error are overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed January 25, 2001.
Panel consists of Justices Robertson, Sears, and Dunn.
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