Affirmed and Opinion filed March 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00395-CR

HAIKER WILLIAMS A/K/A
HEISHALL EUGENE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 85th District Court
Brazos County, Texas
Trial Court Cause No. 28,203-85

O P I N I O N

A jury convicted appellant Haiker Williams, also known as Heishall Eugene Williams, of cocaine possession with intent to deliver. The trial court assessed punishment at forty-five years' imprisonment. Williams contends in two issues that there is factually insufficient evidence of his intent to deliver and that he received ineffective assistance of counsel at trial. We affirm.

BACKGROUND

Two police officers observed Williams driving without wearing his seatbelt. They pulled behind Williams at a stoplight and saw him drop two plastic baggies out of his car window. The baggies, which were retrieved a short time later, contained "cookies" of crack cocaine. After the officers stopped Williams, they discovered he had an outstanding arrest warrant for a traffic violation. He was arrested. Subsequent to the arrest, a search of his car revealed one additional crack rock and cocaine residue on a small piece of plastic wrap. The aggregate weight of the crack cocaine was 18.9 grams.

FACTUAL SUFFICIENCY

In his first issue, Williams appeals based on factual sufficiency of the evidence. When reviewing factual sufficiency of the evidence, we view all evidence without the prism of "in the light most favorable to the prosecution." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We examine the evidence that tends to prove an elemental fact in dispute and compare it with the evidence that tends to disprove that fact. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Although we may disagree with the verdict, our factual sufficiency review must be appropriately deferential to avoid substituting our judgment for that of the fact finder. *Clewis*, 922 S.W.2d at 133; *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). We will reverse for factual insufficiency if the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or if the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson*, 23 S.W.3d at 11.

Williams specifically attacks sufficiency of the evidence that he intended to deliver the crack cocaine in his possession. However, intent to deliver narcotics can be inferred from circumstantial evidence. *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Factors considered in proving intent to deliver include (1) the nature of the location where police arrested a defendant; (2) the quantity of the controlled substance in defendant's possession; (3) the manner of packaging; (4) the presence of drug

paraphernalia (either for drug use or drug sale); (5) the defendant's possession of large amounts of cash; and (6) the defendant's status as a drug user. *Id.*

In this case, the evidence reveals that two police officers observed Williams throwing two plastic baggies out of his car window. Inside one baggie was a large cookie of crack cocaine, not yet broken into individual crack rocks. Inside the other baggie was one-third to one-half of another cookie of crack cocaine. Additionally, in Williams's car, police found an individual crack rock and a smaller piece of plastic wrap with cocaine residue on it.

At trial, a narcotics police officer testified that Williams's possession of cookies of crack cocaine indicated he was a drug dealer, not just a drug user. According to the officer, a quantity of crack cocaine for a user would be one or two rocks only. He further testified that the cookies in Williams's possession had a street value of $2,500 to $3,000. This evidence is significant, especially in light of the fact that Williams was unemployed at the time of his arrest. Although Williams did not have money on his person when arrested, the narcotics officer testified that drug dealers often keep drugs and money separated to avoid police confiscation of both if arrested. Finally, Williams did not have any drug paraphernalia with which to smoke the crack cocaine, and there was no evidence that he was a drug user.

We find that the evidence of Williams's intent to deliver is not so obviously weak as to undermine confidence in the jury's determination. Because the evidence is factually sufficient, we overrule issue one.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second issue, Williams claims that he received ineffective assistance of counsel because of his attorney's "untimely" discovery of the state's intent to use Williams's unrecorded statements to a narcotics officer. After his arrest, Williams asked to speak with a narcotics officer. When the officer, Waylon Ryals, arrived, Williams offered information about drug dealers in town in exchange for his release from jail. In part, Williams told Officer Ryals that Williams's crack cocaine had been given to him by a woman named Von. This information was revealed to Williams's attorney the day before trial began. Officer

Ryals's testimony was admitted two days later in the State's rebuttal after Williams, who testified on his own behalf, denied making the statement.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Rodriguez v. State*, 899 S.W.2d 658, 664 (Tex. Crim. App. 1995).

When reviewing a claim of ineffective assistance of counsel, we must be highly deferential to trial counsel and avoid the deleterious effects of hindsight, presuming that counsel made all significant decisions in the exercise of reasonable professional judgment. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant bears the burden of showing counsel's ineffectiveness by a preponderance of the evidence, and allegations of ineffectiveness must be firmly founded in the record. *Thompson*, 9 S.W.3d at 813; *Dewberry v. State*, 4 S.W.3d 735, 757 (Tex. Crim. App. 1999). Without record evidence, we cannot conclude counsel was ineffective. *See Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000) (holding that "without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic design"), *cert. denied*, 532 U.S. 1053 (2001). Except in rare cases, a claim of ineffective assistance must be brought by application for writ of habeas corpus rather than direct appeal, in order to develop the facts and allow trial counsel to explain. *See Robinson v. State*, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000). Finally, the fact that another attorney might have pursued a different course of action will not support a finding of ineffectiveness. *Hawkins v. State*, 660 S.W.2d 65, 75 (Tex. Crim. App. 1983); *Edwards v. State*, 37 S.W.3d 511, 513 (Tex. App.—Texarkana 2001, pet. ref'd).

Williams contends that his attorney should have discovered his statement to the narcotics officer days, if not weeks, earlier in order to adequately prepare a defense and be

prepared for cross-examination. We find, however, that Williams has failed to meet the first prong of the *Strickland* test; he has not shown that his attorney's performance was deficient. First, "a defendant does not have a general right to discovery of evidence in the possession of the State, even if the evidence is the appellant's own statement." *May v. State*, 738 S.W.2d 261, 274 (Tex. Crim. App. 1987). Second, the record reveals that Williams did not decide to testify until the second day of trial. The State advised that it would seek to impeach Williams with his statement to Officer Ryals if Williams took the witness stand. The trial court then explained to Williams that he could not be forced to testify and that the jury could not hold such a decision against him. Despite the admonishment, the record reflects that Williams chose to testify and the decision to do so was entirely his own. His statement to Officer Ryals would not have been admissible had Williams not chosen to testify. Lastly, Williams's attorney objected to Officer Ryals's testimony and questioned him on voir dire, but his objections were overruled. Nothing in the record reveals that counsel's performance was deficient. We overrule issue two.

Having overruled both issues, we affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed March 14, 2002.

Panel consists of Justices Yates, Seymore, and Guzman.

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