Affirmed and Majority and Dissenting Opinions filed April 5, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00200-CV

$165,524.78, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 96-06444

M A J O R I T Y O P I N I O N

Samuel Mares appeals a judgment forfeiting $163,000 to the State on the grounds that there is no evidence or insufficient evidence to support the jury's finding that the money seized from Mares's home and automobile was contraband. We affirm.

Background

In early 1996, Harris County Sheriff's Deputy William Tipps received information from his father, James Godfrey, a Houston Police Officer, that narcotics activity was being conducted at 6841 Malibu. Tipps watched the house at that address on and off for six months looking for suspicious activity. On January 9, 1996, approximately six months

after receiving the information from Godfrey, Tipps saw Mares leave the house carrying a Crown Royal bag and followed him. Mares was thereafter stopped and arrested for a traffic violation, and a search of his vehicle revealed the Crown Royal bag containing $18,000.00 in cash and two additional bags containing $1,220.78 and $1,304.00. A narcotics dog was called to the scene and made a positive alert for cocaine on all three bags. Officers also requested and obtained permission from Jody French, a resident of the house at 6841 Malibu, to search that residence. In the search, the police found containers of vitamin B powder, a television connected to an outdoor video monitor, small plastic bags, trash bags containing an odor of marijuana and some seeds, and a safe containing $145,000.00 in cash and $14,000.00 in savings bonds.

The State brought an action to obtain a forfeiture of $165,524.78 of the money seized by the police. At trial, the jury found that the money was "contraband," and the trial court ordered forfeiture of $163,000.00 of it.[1]

Requisites for Forfeiture

Property, including money, is subject to seizure and forfeiture if it is shown to be "contraband." *See* TEX. CODE CRIM. PROC. ANN. art. 59.02(a) (Vernon Supp. 2000). "Contraband" is property used or intended to be used in the commission of certain felonies, or proceeds derived from those felonies, including drug-related offenses described in section 481.112 of the Health and Safety Code. *See* TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(A)-(C) (Vernon Supp. 2000); TEX. HEALTH & SAFETY CODE ANN. §§ 481.102, 481.112 (Vernon 1992). The character of seized money as contraband, subject to forfeiture, must be proved by the State by a preponderance of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 59.05(b) (Vernon Supp. 2000). The proof may consist of circumstantial evidence. *State v. $11,014.00*, 820 S.W.2d 783, 785 (Tex. 1991).

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[1] The $163,000.00 consisted of the $18,000.00 found in the vehicle and the $145,000.00 found in the house. It thus did not include the remainder of the cash from the vehicle or the savings bonds.

Legal Sufficiency

Mares's first and third points of error challenge the legal sufficiency of the evidence to prove that the money seized from his house and vehicle was contraband.

Standard of Review

The two most recent and relevant civil forfeiture decisions from the Texas Supreme Court appear to apply different standards to review legal sufficiency. In *$56,700.00*, police discovered money in Harry Farah's home, along with less than an ounce of cocaine, slightly more than an ounce of marijuana, and an array of drug paraphernalia, such as powdered vitamin B, scales, numerous vials, and two white "diamond folds" of paper with a cocaine residue. *$56,700.00 v. State*, 730 S.W.2d 659, 661-62 (Tex. 1987). To explain the presence of the cash, Farah provided evidence of large cash transactions conducted by his business. *Id*. at 662. Despite reciting that the legal sufficiency standard considers only evidence and inferences tending to support the forfeiture and disregards all evidence and inferences to the contrary, the five to four decision held that the State's evidence was legally insufficient because *when considered with the contrary evidence*, it was equally consistent with an inference of illegal drug activity as with no such activity. *Id*. *see also id*. at 662-63 (Campbell, J., dissenting).

By contrast, in *$11,014.00*, officers found, in a passenger's suitcase, money wrapped in bed sheets, which a drug dog's positive alert indicated had also been in recent close proximity to a controlled substance. *State v. $11,014.00*, 820 S.W.2d 783, 785 (Tex. 1991). Although officers claimed the passenger appeared very nervous, stood off from the other passengers, continuously scanned the area looking back and forth in a suspicious manner, and was carrying only a single suitcase, which appeared to be very light, they did not find any drugs in his possession, nor did they see any exchange of narcotics. *Id*. at 784. The passenger in possession of the money testified that he had borrowed it from relatives in order to purchase a van. *$11,014.00 v. State*, 808 S.W.2d 288, 289-90 (Tex. App.—Houston [1st Dist.] 1991), *rev'd*, 820 S.W.2d 783 (Tex. 1991). The Court of Appeals held

that the evidence raised no more than a surmise or suspicion concerning the likely source or use of the money and reversed the forfeiture. *Id*. at 291. Reversing the Court of Appeals, the Texas Supreme Court considered only the circumstantial evidence supporting the forfeiture and held, per curiam, that it was legally sufficient to support an inference that the money was derived from the sale and/or distribution of a controlled substance. *$11,014.00*, 820 S.W.2d at 783, 785. Given the apparent disparity in approach between *$56,700.00* and *$11,014.00*, we will follow the latter because it is the more recent and more unanimous Texas Supreme Court decision on point.

Legal Sufficiency Review

According to Mares, the State did not present any direct evidence of a delivery or intent to deliver cocaine by Mares or anyone else at 6841 Malibu, and the State's circumstantial evidence failed to provide a sufficient nexus between the money and a drug-related felony. He contends that the State's evidence merely showed that items present at the house were consistent with drug activity, but not that the money seized was actually connected to any drug activity.

When evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). The "equal inference rule" similarly provides that meager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and thus legally insufficient to support a finding. *See, e.g., Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998).

Although the equal inference rule is well recognized, its application in determining the extent to which inferences can validly be drawn from circumstantial evidence in order to support a particular judgment has been a subject of considerable disagreement. *See, e.g., Lozano v. Lozano*, 44 Tex. Sup. Ct. J. 499, 503-04 (March 8, 2001) (Phillips, C.J., concurring and dissenting); *id*. at 509-14 (Hecht, J., concurring and dissenting); William

V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1507-11 (2000). One view focuses on the meagerness of the circumstantial evidence rather than whether it supports conflicting inferences equally or unequally:

> Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.
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> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.

Lozano, 44 Tex. Sup. Ct. J. at 503-04 (Phillips, C.J., concurring and dissenting)(citations omitted). The contrary view asserts that, to support an inference, not only must the circumstantial evidence be more than slight, but the inference to be drawn must be more probable than other reasonable inferences:

> It is true: that circumstantial evidence so slight that any plausible inference is purely a guess is no evidence; that circumstantial evidence is not legally insufficient merely because it supports more than one reasonable inference; that a fact finder may be required, and is entitled, to choose between competing reasonable inferences; and that this choice may require assessments of credibility. But these propositions do not resolve the issue here, which is: if circumstantial evidence supports two reasonable inferences, neither of which is any more likely than the other, can a jury pick one? The "equal inference" rule says no. It is not enough that one inference is as reasonable as another; to be given weight, an inference must be more probable than others. . . .
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> The passage quoted above from CHIEF JUSTICE PHILLIPS' opinion, distilled to its essence, says: . . . 'If more than one reasonable inference can be drawn from a fact or circumstance, and neither is more probable than the

> other, then a jury can pick whichever one it wants, and it may choose the inference urged by a party who is otherwise more credible.'

Id. at 511 (Hecht, J., concurring and dissenting)(citations omitted).

In this case, the record reflects that small plastic bags, an outdoor video monitor, vitamin B powder, and trash bags with marijuana seeds were found in the residence in which a large amount of cash was also located in a safe. According to the testimony, small plastic bags are commonly used to package cocaine, and vitamin B powder is commonly used to "cut" cocaine. Additionally, the inside walls of the safe contained 1.8 milligrams of cocaine, and the money from both the safe and Crown Royal bag tested positive for the presence of cocaine.

We believe that, taken together, this circumstantial evidence is adequate not only: (1) to support more than a mere surmise or suspicion that the confiscated money was used in, intended to be used in, or proceeds from, the commission of a drug-related felony; but also (2) to establish, even under the more restrictive version of the equal inference rule, above, that that inference is more probable than any inference therefrom that the money was not so used. Therefore, the evidence is legally sufficient to support the judgment, and points of error one and three are overruled.

Factual Sufficiency

Mares's second and fourth points of error challenge the factual sufficiency of the evidence to prove that the money seized from his house and vehicle was contraband. Mares contends that his explanation for the source of the money rebutted the evidence that the money was used or intended to be used in the sale of illicit drugs.

Standard of Review

When considering a factual sufficiency challenge, we consider all of the evidence, not just that which supports the verdict. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998). 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. *Id.* at 407. However, we may not

assess the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence would clearly support a different result. *Id*.

Factual Sufficiency Review

Mares's factual sufficiency challenge relies on the following evidence. Tipps admitted he watched Mares's residence for six months without observing any type of drug activity there. Tipps also admitted he did not have any reason to believe that there was a drug business going on at the house other than the information he received from Godfrey. In addition, Mares produced evidence of funds he received from his father's estate and the sale of rental property. He also presented evidence that his jewelry business, car repair business, and rental properties all were cash businesses. Additionally, evidence was presented that the surveillance camera was at the house because it had been burglarized, that Mares and his son used vitamin B when they worked out, and that the small plastic bags were used in Mares's jewelry store to hold jewelry.

Although there was conflicting evidence, the jury's finding that the money was contraband is not so contrary to the overwhelming weight of the evidence as to be manifestly wrong and unjust. Accordingly, Mares's second and fourth points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Anderson, Edelman, and Wittig.

Publish — TEX. R. APP. P. 47.3(b).