Affirmed and Opinion filed April 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00530-CR

JAMES EDISON BENNETT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 792,537

O P I N I O N

Appellant was charged by indictment with the offense of possession with intent to deliver more than four but less than 200 grams of cocaine. A jury convicted appellant of the charged offense and the trial court assessed punishment at fifteen years and one day confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant challenges the sufficiency of the evidence to sustain the jury's verdict. We affirm.

I. Standard of Review

We begin with a determination of the appropriate standard of appellate review for resolving this evidentiary challenge. When we are asked to determine whether the evidence is legally sufficient to sustain

a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This standard is applicable to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991). To establish the offense of possession of a controlled substance, the State must prove the accused exercised actual care, custody, control or management over the contraband, while knowing the substance was contraband. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995)(citing *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988)).

II. Factual Summary

The evidence, when viewed in the light most favorable to the verdict, establishes the following. On September 6, 1997, Department of Public Safety Trooper James Lucky was on patrol when he saw a car driven by Kevin Porter. Lucky pursued Porter because his vehicle had what appeared to be an expired paper tag rather than a license plate. Porter eventually pulled his vehicle over and Lucky observed the three occupants "making all kinds of movements inside the vehicle." Specifically, Lucky saw Porter make some hand movement in the direction of the sun visor. While taking Porter into custody, Lucky saw appellant, who was seated in the front passenger seat, motion to the sun visor and then to the driver's floorboard.

After additional officers arrived, Lucky had appellant and the remaining occupant, De Leon, who was seated in the back seat, exit the vehicle. Lucky then searched the vehicle and found a medicine container with 30 rocks of crack cocaine in the cushion in the rear seat rest near where De Leon had been sitting. Lucky found another medicine container with 23 rocks of crack cocaine partially underneath the driver's seat. The latter container was found in the area where Lucky had seen appellant "lean down and reach after he was reaching for the visor."

The container found in the driver's area was identified as State's exhibit 8. The container was placed in an envelope identified as State's exhibit 7. Lucky explained that 23 rocks of crack cocaine would

be possessed by a "street dealer" rather than someone for personal use. Based on Lucky's training and experience, possession of 23 rocks of crack cocaine would indicate an intent to sell the contraband.

Appellant was taken into custody and subsequently strip searched. During that search, a baggie protruding from appellant's rectum was discovered. The baggie was identified as State's exhibit 5 and was placed in an envelope identified as State's exhibit 4.

Michael Mannes, the laboratory director of the Brazoria County Crime Lab, analyzed the evidence recovered in this case. Mannes examined State's exhibit 5 and determined it to be cocaine weighing 0.91 grams. He examined State's exhibit 8 and determined it to be cocaine weighing 5.01 grams.

III. Appellant's Contentions

Appellant offers three arguments in support of his claim that the evidence is legally insufficient to sustain the jury's verdict. First, he argues the cocaine recovered from the strip search is not sufficient in weight to support the verdict. We agree. That contraband weighed less than one gram while the jury's verdict requires a substance weighing more than four grams.

Second, appellant argues the cocaine recovered from the back seat of the vehicle was not sufficiently linked to appellant to place it in appellant's possession. We agree for two reasons. First, Mannes did not testify that he chemically tested the contents of the container found in the back seat. Therefore, there is not sufficient evidence to establish that the substance in that container was cocaine. Second, the container was discovered in the back seat of the vehicle where DeLeon was seated at the time of the stop. The container was not linked to appellant in any manner other than his presence in the vehicle. This is insufficient to establish appellant knowingly possessed the container. *See Humason v. State*, 728 S.W.2d 363 (Tex. Crim. App. 1987).

We now turn to the third and final argument. Here appellant argues the contents of the container found partially underneath the driver's seat were never tested by Mannes. While the record is confusing on this point, our reading of the record leads us to the conclusion that the evidence was in fact tested and determined to be cocaine. We base this conclusion on several portions of the record.

First, Trooper Lucky testified as follows:

Q. Would the area where you found this pill bottle containing the crack coincide with the area where you saw [appellant] lean down and reach after he was reaching for the visor?

A. Yes, ma'am.

* * * * *

Q. Was that the same area?

A. Yes, ma'am.

* * * * *

Q. Trooper, I am handing you what has been marked as State's Exhibits No 7 and 8 down here. Do you recognize State's Exhibit No. 7?

A. Yes, ma'am.

Q. And how do you recognize it?

A. It is the envelope that I placed the cocaine in.

Q. The same cocaine that we described that was found in the driver's area?

A. Yes, ma'am.

Q. Okay. And does that have your initials anywhere on it?

A. No, ma'am.

Q. All right. Can you identify what has been marked as State's Exhibit No. 8?

A. Yes, ma'am.

Q. And how can you identify that?

A. This is the cocaine that was taken from the vehicle.

Q. Okay. Is the pill bottle contained in State's Exhibit 8 the same pill bottle you described?[1]

A. Yes, ma'am.

Q. And all of the rock-like substances, were they out of or inside that pill bottle?

A. They were inside.

Q. And how many rocks are there?

A. 23 approximately.

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[1] This appears to be a misstatement. Apparently the questions should have been: "Is the pill bottle contained in State's Exhibit 7 the same pill bottle you described?"

The confusion stems from this testimony which, when read alone, could lead one to the conclusion that State's exhibits 7 and 8 were evidence envelopes. *See* n. 1, *supra*. However, these exhibits were later described by Trooper Damon Willis who transported the evidence recovered by Lucky to the lab. Willis testified as follows:

Q. Okay. Now, let me show you State's Exhibit No. 7 and State's Exhibit No. 8. Do you recognize these two pieces of evidence?

A. Yes, ma'am, I do

Q. Okay. Same question: How do you recognize them?

A. Would be the same answer: Trooper James Lucky gave them to me to take them to Brazoria County to get analyzed.

Q. To be tested for what kind of substance they are?

A. Yes, ma'am.

Q. Okay. And again, was State's Exhibit No. 8 inside of State's Exhibit 7?

A. Yes, ma'am.

Q. So, in other words, the pill bottle was inside the yellow envelope?

A. Yes, ma'am, it was.

Finally, Mannes testified as follows:

Q. And did you form an opinion about what the substance was that is contained in State's Exhibits 5 and 8?

A. Yes, ma'am. Based upon all the testing done, I was able to form an opinion as to the identity of those two State's exhibits.

Q. And your opinion was what?

A. It is my opinion that those two exhibits contain cocaine.

* * * * *

Q. All right. Next I'm going to move to State's Exhibit 8 and its contents. Can you tell the jury, if you know, what the weight of the cocaine found in State's Exhibit No. 8 was.

A. Yes, ma'am, I can. The mass or weight which is contained within what is identified as State's Exhibit No. 8 under my laboratory number LN-97-0577, has a mass of 5.01 grams.

After reading these portions of the record, we find the evidence recovered by Trooper Lucky partially underneath the driver's seat was in fact chemically tested and determined to be cocaine weighing

more than four grams. Additionally, we find the evidence is sufficient to affirmatively link appellant to this contraband. *See Warren v. State*, 971 S.W.2d 656, 661-62 (Tex. App.—Dallas 1998, no pet.).

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed April 6, 2000.

Panel consists of Justices Yates, Edelman and Baird.[2]

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

[2] Former Judge Charles F. Baird sitting by assignment.