Affirmed and Opinion filed April 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00721-CR

RONALD DUNN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 25,558-272

O P I N I ON

Appellant Ronald Dunn was found guilty of possession of a controlled substance, namely cocaine, and sentenced to twenty years' confinement in the Texas Department of Corrections. He appeals on four points, alleging error by the trial court in overruling his motion to suppress, in denying disclosure of the Crime Stoppers informant's identity and in joining trial of his case with that of his co-defendant. He also raises legal and factual insufficiency of the evidence. We affirm.

On August 22, 1997, a confidential informant told Bryan police officer Dennis Thane that drugs were being sold at a certain residence in Bryan, Texas. The informant was known to be reliable and credible from prior cases with the police department. Two weeks later, on September 5, 1997, a Crime

Stoppers caller also informed Thane that drugs were being sold at that residence, and provided Thane with names of the people involved, including appellant. Police officers went to the residence that evening, and upon their arrival, two individuals standing outside ran back into the house. The officers obtained a search warrant for the house and a storage shed located behind the house. The house was owned by appellant's mother.

During execution of the search warrant, officers found crack cocaine rocks, chips and residue, and several thousand dollars in small bills. They also found a police scanner and three firearms, and a baseball cap with appellant's nickname, "Babyboy," embroidered on it, along with papers traceable to appellant and a key to the outside storage shed. In the storage shed, officers found letters addressed to appellant and a 20.89 gram crack cocaine "cookie."

By his first point of error, appellant complains that the trial court erred in overruling his motion to suppress, as the search warrant affidavit failed to establish probable cause. In determining whether an affidavit establishes probable cause for a search warrant, the totality of the circumstances test is used. *Rojas v. State*, 797 S.W.2d 41, 44 (Tex. Crim. App. 1990). In order to satisfy this test, an affidavit based on an anonymous tip must be coupled with the assertion of personal knowledge by the informant or there must be additional facts showing reason to believe that the contraband sought will probably be where the information furnished indicates it will be. *Id*. An anonymous telephone call can be used to justify a search if the information contains some indicia of reliability or is reasonably corroborated by police. *See Parish v. State*, 939 S.W.2d 201, 203 (Tex. App. – Austin 1997, no writ).

In the present case, Officer Thane's affidavit was partially based on information provided by the Crime Stoppers caller of September 5, 1997. The caller stated that he or she had observed Kevin Perry deliver crack cocaine to appellant at the residence, and that crack cocaine was in the process of being made for distribution, such that as time passed, the greater the chance the cocaine would be gone. The caller provided a list of individuals involved in dealing crack cocaine from the residence, including appellant. Following the call, officers investigated and verified the data through police, public utility and homeowner records. Police records listed appellant as residing at the house, which was in his mother's name along with

the utility services. Appellant and other adults named by the caller were found to have prior narcotics convictions.

The affidavit also partially relied on the confidential informant's call of August 22, 1997, two weeks prior to the actual search warrant. While appellant mentions in conclusory terms that such information was "stale" after two weeks, we disagree. *See Gonzales v. State*, 761 S.W.2d 809 (Tex. App. – Austin 1989, pet. ref'd) (no error under the facts of the case in relying on information provided one year prior to issuance of the search warrant). We agree with the States argument that narcotics trafficking is an on-going criminal activity, and that the Crime Stopper's call indicated a higher probability that narcotics would be found at the residence on September 5, 1997. The trial court did not err in denying the motion to suppress, and appellant's first point of error is overruled.

By his second point of error, appellant argues error by the trial court in refusing to order disclosure of the identities of the confidential informant and Crime Stoppers caller. According to appellant, under TEX. R. EVID. Rule 508(c)(2) and (3), disclosure was necessary for a fair determination of guilt/innocence issues, and because a sufficient "plausible showing" had been made regarding the informers' lack of reliability and credibility. Appellant's argument under Rule 508(c)(3) is misplaced, as the exclusion procedure under that provision is for the *trial court's* use if it is not satisfied with the informer's credibility or reliability. Likewise, we find no merit to appellant's argument under Rule 508(c)(2) that disclosure of the identities would have enabled him to develop the allegations that the informant saw Kevin Perry deliver cocaine to appellant and develop the omissions and errors in the informant's identification of individuals at the residence. These were not necessary issues to a fair determination of appellant's guilt or innocence of the offense as charged, possession with intent to deliver.

Under TEX. GOV'T CODE ANN. § 414.008, the identity of a person who provides information to a Crime Stoppers organization may not be disclosed, except as required under the state or federal constitution. No exceptions were alleged or shown by appellant, nor were any constitutional provisions mandating disclosure set forth. Appellant's second point of error is overruled.

Appellant's third point of error alleges the trial court erred in joining trial of his case with that of his co-defendant, as they had "inconsistent defenses" and "varying degrees of guilt." We note that appellant

did not request severance of his case below, and we find the issue of improper joinder is thereby waived. Regardless, we find no error. Appellant admits in his brief that both co-defendants denied they had possession of the drugs, and neither defendant accused the other of having had possession. This does not show "inconsistent defenses" or conflicting defenses. Moreover, appellant's reliance on *Morales v. State*, 466 S.W.2d 293 (Tex. Crim. App. 1970) is misplaced. *Morales* does not support appellant's argument that "varying degrees of guilt" between himself and his co-defendant precluded joinder below. To the contrary, *Morales* upheld the joinder of three defendants where one defendant had accepted all blame for the crime. In any event, we do not agree with appellant's contention that certain factors point toward making his degree of guilt substantially less than that of his co-defendant. He directs us to the physical location of the money, the common law marriage between his mother and the co-defendant, and crack cocaine cutting marks on a headboard in his mother's room. Appellant's third point of error is overruled.

Under his fourth and last point of error, appellant raises legally and factually insufficient evidence to support the conviction. The standard for reviewing the legal sufficiency of the evidence on appeal is whether, after viewing the evidence in light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). The reviewing court is not to position itself as the "thirteenth juror" in assessing the evidence or credibility of witnesses, but is to consider all of the evidence in the record and reasonable inferences therefrom in the light most favorable to the jury's findings, and resolve any inconsistencies in the evidence in favor of the verdict. *Richardson v. State*, 879 S.W.2d 874, 879 (Tex. Crim. App. 1993), *cert. denied*, 115 S.Ct. 741 (1995); *Moreno* at 867. In reviewing factual sufficiency, the appellate court is to view the evidence without the prism of "in light most favorable" to the verdict. *Clewis v. State*, 923 S.W.2d 126 , 129 (Tex. Crim. App. 1996). The jury's verdict is to be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Applying these standards to the record, we find the evidence to be legally and factually sufficient to support the verdict. Appellant was arrested in his mother's house, where his girlfriend testified he stayed at times during the week when he was not staying with her. Personal items belonging to appellant were found in the house and in the storage shed, along with the crack cocaine. The key to the storage shed,

where the 20.89 gram "cookie" of crack cocaine was found, was located under appellant's baseball cap on a dresser. Appellant's fourth point of error is overruled.

The judgment is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Justices Sears, Draughn and Hutson-Dunn.*

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

* Senior Justices Ross A. Sears, Joe L. Draughn, and D. Camille Hutson-Dunn sitting by assignment.