

**Affirmed and Opinion filed September 9, 1999.**



**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-98-00098-CR**  
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**EMMANUEL DEAN GREENWOOD, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182<sup>nd</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 765187**

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**OPINION**

The state charged the appellant, Emmanuel Dean Greenwood, by indictment for possession of a controlled substance, cocaine, weighing less than one gram. The indictment also included enhancement paragraphs. The appellant pleaded not guilty to the offense and not true to the enhancement paragraph. A jury found the appellant guilty of the offense, and after finding the enhancement paragraph true, sentenced him to twenty five years' confinement. The appellant raises a variety of issues on appeal in which he challenges the

legal sufficiency of the evidence, the jury charge, and the trial court's evidentiary rulings. We affirm.

### **FACTUAL BACKGROUND**

On the evening of October 6, 1997, two Houston Police officers working undercover narcotics detail, sat in an unmarked car parked near downtown Houston. The appellant approached the officers' car and asked what they wanted. One undercover officer told the appellant they were looking for twenty dollars' worth of crack cocaine. The appellant told the undercover officers that he did not have any cocaine but could take them to a nearby park to get some. Because the undercover officers had earlier arrested other individuals at that park, they told the appellant that they could not do that because people at that park did not like them. One of the undercover officers then asked the appellant if he had a "stem," which is street jargon for a crack pipe. When the appellant indicated that he did, the undercover officer offered to buy it for five dollars. The appellant joined the undercover officers in their unmarked car and the three drove to a nearby convenience store. When they arrived, one of the undercover officers went into the store to get change while the appellant walked to a garbage container at the rear of the store. The appellant picked up a coffee cup beside the container, returned to the car, and handed the officers the coffee cup containing the crack pipe. The appellant took five dollars from the undercover officers and walked away. Shortly thereafter, two uniformed officers arrested the appellant.

Both undercover officers testified that the crack pipe contained white residue that appeared to be cocaine. One of the officers also testified that he had conducted a field test on a sample of the residue, and that it tested positive for cocaine. A forensic chemist, who also conducted tests on the residue, testified that it was cocaine and that the pipe contained 2.1 milligrams of cocaine.

The appellant presented no evidence in his defense. At the charge conference, the appellant requested a lesser included offense instruction on delivery of drug paraphernalia. The trial court denied the requested charge. The jury found the appellant guilty of possession of cocaine weighing less than one gram.

### **ISSUES PRESENTED ON APPEAL**

The appellant presents four broad issues for review, alleging that (1) the evidence is legally insufficient to support the jury's verdict, (2) the trial court erred in denying the requested jury charge, (3) the trial court erred in allowing the undercover police officer to testify concerning the results of his field test of the residue in the crack pipe; and (4) the trial court erred in admitting evidence concerning the appellant's prior conviction.

#### **Issue One: Legal Sufficiency of the Evidence**

In his first issue for review, the appellant asserts that the evidence is legally insufficient to support the jury's verdict. To prove its case, the state was required to establish that the appellant exercised actual care, control and management over the contraband and that appellant had knowledge that the substance in his possession was contraband. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). The appellant complains that there was no evidence that he knowingly possessed the residue in the crack pipe.

When reviewing the legal sufficiency of the evidence, we must decide "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King*, 895 S.W.2d at 703. On appeal, we do not re-evaluate the weight and credibility of the evidence, but consider only whether the jury

reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

At trial, the jury heard the testimony of the two undercover police officers and the chemist. Both undercover officers testified that white residue was visible inside the crack pipe, and that there was enough residue to conduct a field test. The chemist also testified that the pipe contained a sufficient amount of residue to be measured, an amount she determined to be 2.1 milligrams. In addition, the undercover officers testified that the appellant knew the precise location of the crack pipe, despite the fact that it was hidden in a coffee cup.

The appellant asserts that this evidence is not sufficient to prove that he knowingly possessed the contraband in the crack pipe. He correctly points out that some of the factors that are usually present in similar cases involving trace amounts of cocaine are not present in this case. These factors include evidence that (1) the defendant was intoxicated from the cocaine at the time of the arrest;<sup>1</sup> (2) the crack pipe had been used recently;<sup>2</sup> and (3) the pipe was found on the defendant's person.<sup>3</sup> While we agree that none of these factors are present in this case, we do not agree that the evidence is legally insufficient to support the jury's verdict. The fact that the appellant knew the precise location of the concealed crack pipe creates a strong inference that it belonged to the appellant. This fact, coupled with the fact that the residue was visible in the pipe, supports the jury's finding that the appellant knowingly possessed the cocaine. Issue one is overruled.

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<sup>1</sup> *See King v. State*, 857 S.W.2d 718 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993), *aff'd*, 895 S.W.2d 701 (Tex. Crim. App. 1995).

<sup>2</sup> *See id.*

<sup>3</sup> *See Jenkins v. State*, 870 S.W.2d 626 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1994, pet. ref'd).

## **Issue Two: Jury Instruction on Purported Lesser-Included Offense**

In his second issue for review, the appellant asserts the trial court erred when it refused to submit a jury instruction on delivery of drug paraphernalia as a lesser-included offense to possession of a controlled substance. A jury charge on a lesser-included offense is required only if (1) the lesser-included offense is within the proof necessary to establish the offense charged; and (2) there is some evidence in the record that if the defendant is guilty, he is guilty only of the lesser-included offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981). In *Simms v. State*, 833 S.W.2d 281, 285 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1992, pet. ref'd), this court, addressing this exact issue, held that possession of drug paraphernalia is not a lesser-included offense of possession of a controlled substance because the offense of possession of narcotics paraphernalia is not within the proof necessary to establish the offense of possession of a controlled substance. The appellant urges us to revisit our decision in *Simms* based on the particular facts presented by his appeal. The facts in this case do not compel us to deviate from the *Simms* holding. We overrule the appellant's second issue for review.

## **Issue Three: Admission of Police Officer's Testimony as to Results of Field Test**

In issue three, the appellant contends that the trial court erred in allowing the undercover police officer to testify that the residue in the pipe was cocaine based on the field test the officer conducted at the scene. According to the appellant, because the evidence showed that the testifying officer had handled cocaine in two other transactions earlier that night, and no evidence showed that he took precautions to prevent the inadvertent transfer of cocaine residue to the crack pipe, the trial court erred in allowing the testimony.

The record demonstrates that the officer testified only about the results of the field test that he conducted on the residue, and that the trial court instructed the jury that the field test alone could not be the basis of a conviction. Moreover, in addition to presenting the officer's testimony, the state also presented the expert testimony from a chemist who conducted a separate test and determined that the residue was cocaine. Finally, the issue of whether the officer, transferred cocaine to the pipe goes to the weight of the testimony and not to its admissibility. The appellant cross-examined the police officer and elicited testimony concerning his handling of cocaine earlier that day. The jury was free to disregard the officer's testimony if it so desired. We find no error by the trial court in allowing the officer to testify as to the results of his field test.

#### **Issue Four: Admissibility of Penitentiary Packet**

In his final issue for review, the appellant complains that the trial court erred in admitting a penitentiary packet into evidence that was not properly authenticated. In the indictment, the state alleged in an enhancement paragraph that the appellant had previously been convicted of felony aggravated robbery with a deadly weapon in Denton County, Texas. The appellant argues that because the judgment and sentence from the Denton County conviction did not contain his fingerprints, the state failed to prove that he is "the same Emmanuel Greenwood who was convicted in [the Denton County offense]." We disagree.

Penitentiary packets alone are not sufficient to prove the prior convictions. *See Beck v. State*, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986). The state must also offer additional evidence, usually in the form of expert testimony, that the person previously convicted is indeed the same person at trial. *Id.* Here, the state did exactly that. During the punishment phase of the trial, the state introduced a penitentiary packet which contained the judgment and sentence from the Denton County conviction, as well as a Texas

Department of Corrections fingerprint card containing the appellant's name, fingerprints, the date of the conviction, and a description of the offense. Additionally, the state introduced the testimony of a fingerprint expert who testified that the fingerprints on the fingerprint card were those of the appellant. Contrary to the appellant's assertions, the fingerprint card, along with the expert testimony, provided the necessary link between the earlier conviction and the appellant. We overrule the appellant's fourth issue.

The judgment is affirmed.

/s/     Kem Thompson Frost  
          Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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