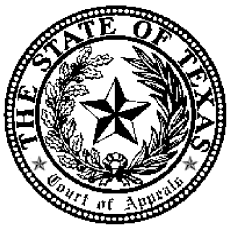
Affirmed as Reformed and Opinion filed October 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00809-CR

JOHN E. SCOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 828,878

O P I N I O N

Appellant was charged by indictment with the offense of possession with intent to deliver more than 200 but less than 400 grams of cocaine. A jury convicted appellant of the lesser offense of possession of cocaine weighing more than 200 grams and less than 400 grams. The trial court assessed punishment at 50 years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises two points of error. We affirm the trial court's judgment as reformed.

I. Sufficiency Challenges

Appellant's two points of error contend the evidence is legally and factually insufficient.

A. Standards of Appellate Review

We will begin by outlining the appropriate standards of appellate review for these sufficiency challenges. 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). The standard is applicable to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App.1991).

When we determine whether the evidence is *factually* sufficient, we employ one of the two factual sufficiency formulations recognized in *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000). In cases such as this, where the appellant attacks the factual sufficiency of an adverse finding on an issue on which he did not bear the burden of proof, the appellant must demonstrate there is insufficient evidence to support the adverse finding. *Id.* at 11. Under a factual sufficiency challenge, the evidence is viewed without the prism of "in the light most favorable to the prosecution" but rather "in a neutral light, favoring neither party." *Id.* at 6. A reversal is necessary only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *Id*. at 8. The *Johnson* Court reaffirmed the requirement that in conducting a factual sufficiency review the appellate court must employ appropriate deference to avoid substituting its judgment for that of the fact finder. *Id.* at 7.

B. Factual Summary

On the date alleged in the indictment, R. G. Chaison and Larry Allen, two undercover officers of the Houston Police Department narcotics division, were conducting surveillance of a location suspected of housing narcotics. As a part of their investigation, the officers were taking down the license numbers of several vehicles at the location. One of the vehicles passed the officers at a speed in excess of 80 miles per hour. The officers requested that a patrol vehicle be dispatched to stop the speeding vehicle. Chaison and Allen followed in separate vehicles.

A marked police vehicle responded, and got in front of the undercover officers and behind the speeding vehicle. The patrol officer turned on his emergency lights to initiate the traffic stop, and shone a spotlight on the vehicle. As the vehicle began pulling to the side of the roadway, the patrol officer saw an object that appeared to be a beige grocery bag go out of the passenger window. The patrol officer immediately radioed the undercover officers and reported that something had been thrown from the speeding vehicle. Approximately 50 yards later, the vehicle stopped; it was driven by appellant and had three children, ages six, five and one years of age, as passengers. Appellant was arrested for driving without a license, without insurance, and for littering.[1]

Officer Allen pulled behind the patrol officer and retrieved the bag the patrol officer had seen leave appellant's vehicle. The bag contained 114.5 grams of cocaine in a chunk or "crack" form, and 244 grams of cocaine in powder form. Chaison testified that a gram of crack cocaine had a street value of $100.[2]

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[1] The arresting officer was asked if appellant had only $1.12 when arrested. The officer did not recall. During its closing argument, the State conceded appellant had only $1.12 in his pocket when arrested. However, this fact was not in evidence. The assertions of an attorney are not evidence unless, of course, the witness confirms those assertions. *See Hoffpauir v. State*, 596 S.W.2d 139, 142 n. 2 (Tex. Crim. App. 1980).

[2] Appellant rested immediately after the State concluded the presentation of its case-in-chief.

C. The Affirmative Links Doctrine.

In possession of controlled substance cases, two evidentiary requirements must be met: first, the State must prove that appellant exercised actual care, control and management over the contraband; and second, that he had knowledge that the substance in his possession 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)). The affirmative links doctrine is invoked to determine whether the State has met its burden of proof. The Court of Criminal Appeals explained this doctrine in *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995):

> [U]nder our law, an accused must not only have exercised actual care, control, or custody of the substance, but must also have been conscious of his connection with it and have known what it was, evidence which affirmatively links him to it suffices for proof that he possessed it knowingly. Under our precedents, it does not really matter whether this evidence is direct or circumstantial. In either case it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous. This is the whole of the so-called "affirmative links" rule.

In *Brown*, the State invited the court to overrule the affirmative links doctrine. In declining that invitation, the court declared the current state of the law as follows: "[E]ach defendant must still be affirmatively linked with the drugs he allegedly possessed, but this link need no longer be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt." *Id.* at 748.

Whether the theory of prosecution is sole or joint possession, the evidence must affirmatively link the accused to the contraband in such a manner and to such an extent that a reasonable inference may arise that the accused knew of the contraband's existence and that he exercised control over it. *See Travis v. State*, 638 S.W.2d 502, 503 (Tex. Crim. App. 1982). The mere presence of the accused at a place where contraband is located does not make him a party to joint possession, even if he knows of the contraband's existence. *See*

Oaks v. State, 642 S.W.2d 174, 177 (Tex. Crim. App. 1982). When an accused is not in exclusive possession of the place where contraband is found, it cannot be concluded he had knowledge or control over the contraband unless there are additional independent facts and circumstances that affirmatively link him to the contraband. *See Brown*, 911 S.W.2d at 748; *Cude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986).

The following factors have been considered when determining whether the evidence is sufficient to affirmatively link an accused with the controlled substance:

1. The contraband was in plain view;

2. The accused was the owner of the premises in which the contraband was found;

3. The contraband was conveniently accessible to the accused;

4. The contraband was found in close proximity to the accused;

5. A strong residual odor of the contraband was present;

6. Paraphernalia to use the contraband was in view or found near the accused;

7. The physical condition of the accused indicated recent consumption of the contraband in question;

8. Conduct by the accused indicated a consciousness of guilt;

9. The accused had a special connection to the contraband;

10. The place where the contraband was found was enclosed;

11. The occupants of the premises gave conflicting statements about relevant matters; and

12. Affirmative statements connect the accused to the contraband.

See Dixon v. State, 918 S.W.2d 678, 681 (Tex. App.—Beaumont 1996, no pet.); *Watson v. State*, 861 S.W.2d 410, 414-415 (Tex. App.—Beaumont 1993, pet. ref'd), *cert. denied*, 511 U.S. 1076 (1994). Additionally, some cases consider the quantity of the contraband as an affirmative link. *See Carvajal v. State*, 529 S.W.2d 517, 520 (Tex. Crim. App. 1975), *cert. denied*, 424 U.S. 926 (1976); *Ortiz v. State*, 930 S.W.2d 849, 853 (Tex. App.—Tyler 1996, no pet.); *Washington v. State*, 902 S.W.2d 649, 652 (Tex. App.—Houston [14th Dist] 1995, pet. ref'd). The number of the factors is not as important as the logical force the factors have in establishing the elements of the offense. *See Jones v. State*, 963 S.W.2d 826, 830 (Tex. App.—Texarkana 1998, pet. ref'd); *Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

D. Analysis

We will consider each factor in the context of the instant case. The contraband was found within a grocery bag on the side of the roadway. While the contraband was not in plain view, the bag was. The bag had been discarded from a moving automobile that was driven by appellant. Three young children were passengers in the vehicle. The vehicle was not registered in appellant's name, but appellant was the sole adult in the vehicle. Immediately prior to its discovery, the contraband was accessible to those inside the vehicle and was discarded through the vehicle's passenger window when the patrol officer turned on his emergency equipment and shone his spotlight. The contraband was found approximately fifty yards from where appellant stopped the vehicle. There was no strong residual odor of the contraband. No paraphernalia was in view or found near the appellant. Appellant's physical condition did not indicate recent consumption of the contraband. The conduct of discarding the contraband indicated a consciousness of guilt. Appellant had a special connection to the contraband in that it was discarded from the vehicle he was driving. The contraband was found in an enclosed grocery bag. The occupants of the vehicle did not give conflicting statements, nor affirmative statements connecting appellant to the contraband. The amount of the cocaine may be considered large.

The question is whether these factors are sufficient to affirmatively link appellant to the contraband in such a way as to prove he exercised actual care, control, and management over the substance with knowledge that the substance was cocaine. *King v. State*, 895 S.W.2d at 703. For the following reasons, we answer that question in the affirmative. First, appellant was the sole adult occupant and driver of the vehicle; its passengers were three children under the age of seven. Second, the contraband was discarded from a moving vehicle after the patrol officer utilized his emergency equipment and spotlight. The amount of the crack cocaine was large and had a street value of $11,450.00. We hold the logical force of these factors establishes that appellant knowingly possessed the cocaine. *Jones*, 963 S.W.2d at 830; *Gilbert*, 874 S.W.2d at 298. Consequently, we find that when the evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319. Furthermore, we find that when the evidence is viewed in a neutral light, it is not so weak to sustain a conviction that is clearly wrong or manifestly unjust. *Johnson*, 23 S.W.3d at 7. Points of error one and two are overruled.

II. Reformation.

Upon review of the record, we have determined that the judgment incorrectly reflects the jury's verdict. The jury verdict reflects that appellant was found guilty of possession of a controlled substance. The judgment, however, reflects that appellant was convicted of possession with intent to manufacture or deliver a controlled substance. The trial court was authorized to assess punishment at between five and ninety-nine years confinement for possession of a controlled substance. TEX. HEALTH & SAFETY CODE § 481.115(e); TEX. PENAL CODE § 12.32. Therefore, appellant's sentence of fifty years confinement was within the authorized punishment range despite the misstated judgment. An appellate court has the authority to correct and reform the judgment when it has the necessary data and information to do so. *Campbell v. State*, 900 S.W.2d 763, 773 (Tex. App.—Waco 1995, no pet.).

Therefore, we reform the judgment of the trial court to reflect appellant's conviction for possession of a controlled substance.

As reformed, the judgment of the trial court is affirmed.

/s/ Charles F. Baird[3]
Justice

Judgment rendered and Opinion filed October 4, 2001.

Panel consists of Justices Hudson, Frost and Baird.

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[3] Former Court of Criminal Appeals Judge Charles F. Baird sitting by assignment.