Affirmed and Majority and Concurring and Dissenting Opinions filed November 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01104-CR

MICHAEL KOOGLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 835,670

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

Appellant, Michael Koogler, was convicted of the felony offense of possession of cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a) (Vernon Supp. 2001). The jury assessed punishment at five years' confinement, enhanced by two prior convictions, in the Texas Department of Criminal Justice, Institutional Division. In three points of error, appellant complains (1) the trial court erred in denying his motion for instructed verdict, (2) the trial court erred in denying his request to instruct the jury on a lesser included offense, and (3) he received ineffective assistance of counsel. We affirm.

Background

Appellant was stopped while driving for having an expired registration tag. Officer James Malinowski testified that as he approached appellant's car, he saw appellant raise his right leg and move his hand as though he was hiding something under his right leg. For safety reasons, Officer Malinowski asked appellant to step out of the car. After appellant got out, the officer noticed what appeared to be a crack pipe in the car seat where appellant's right leg had been. Officer Malinowski tested the pipe for cocaine, which yielded a positive result. Richele Howelton, a forensic chemist, testified that she analyzed the pipe at the Harris County Medical Examiner's Office lab. Those tests revealed that the pipe contained a residual amount of cocaine in the amount of less than 10 milligrams.

At trial, after the State rested, appellant moved for an instructed verdict, which was denied. Appellant then rested. Appellant requested the trial court to charge the jury on the offense of possession of drug paraphernalia. The court denied this request. The jury convicted appellant of possession of cocaine in the amount of less than one gram and assessed punishment at five years' confinement.

Motion for Instructed Verdict

In his first point of error, appellant contends the trial court erred in denying his motion for an instructed verdict at the close of the State's case. A challenge to the court's ruling on a motion for instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the conviction. *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990). Appellant argues the evidence is both legally and factually insufficient to support a finding that appellant knowingly possessed a controlled substance.

In evaluating the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99

S. Ct. 2781, 2788-89 (1979)). We conduct a factual sufficiency review by reviewing all the evidence in a neutral light to determine whether the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We may set aside the jury's verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* at 7.

A person commits an offense if that person knowingly or intentionally possesses cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a). When an accused is charged with unlawful possession of cocaine, the State must prove two things: (1) the defendant exercised actual care, custody, control, or management over the contraband; and (2) the defendant knew the object he possessed was contraband. *Linton v. State*, 15 S.W.3d 615, 618 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Appellant argues the evidence was legally and factually insufficient to establish that he knowingly possessed cocaine. We disagree.

Appellant contends the evidence is insufficient to support his conviction because the cocaine could neither be seen nor measured. The forensic chemist called by the prosecution testified that the residual amount of cocaine found in the pipe could not be weighed on the lab's scale. Neither she nor the arresting officer testified that they saw cocaine, although during the trial, Officer Malinowski identified a "white part" on the crack pipe that in his opinion "looks like cocaine residue." In any event, the fact that a controlled substance is neither visible nor weighable does not require reversal if there exists other evidence affirmatively linking appellant to the offense of knowing possession of contraband. *See King v. State*, 895 S.W.2d 701, 704 (Tex. Crim. App. 1995); *Linton*, 15 S.W.3d at 619. Affirmative links may be established by facts and circumstances that indicate appellant's knowledge of and control over the contraband. *Linton*, 15 S.W.3d at 619.

Officer Malinowski testified the pipe he discovered in appellant's car was one commonly used to smoke crack cocaine. Both the officer's field test and the forensic

chemist's lab analysis revealed the presence of cocaine on that pipe. The pipe was spotted on the driver's side of the car, within close proximity and conveniently accessible to appellant, and there was no evidence of another occupant. These factors establish affirmative links between appellant and the offense of possession. *See Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (cocaine was recovered from the side of the car where the defendant was seated); *Palmer v. State*, 857 S.W.2d 898, 901 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (no evidence of another occupant in the car where crack pipe was discovered). Furthermore, Officer Malinowski testified that as he approached the car, appellant made a "furtive movement" as though he were trying to hide something in the location where the pipe was discovered. This conduct could support an inference that appellant displayed a consciousness of his guilt, another affirmative link to his knowledge of the cocaine.[1] *Gilbert*, 874 S.W.2d at 298-99.

We conclude the evidence was legally and factually sufficient to support appellant's conviction. Accordingly, the trial court did not err in denying appellant's motion for an instructed verdict. Appellant's first point of error is overruled.

Lesser Included Offense

In his second point of error, appellant argues the trial court erred in failing to submit his requested charge on the lesser included offense of possession of drug paraphernalia.[2] Before giving a jury charge on a lesser included offense, a two-prong test must be met: first,

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[1] One might argue that appellant's conduct is equally consistent with consciousness of his guilt of the offense of possession of drug paraphernalia. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.125 (Vernon Supp. 2001). However, our evidentiary review does not require reversal simply because the evidence supports an inference other than guilt of the charged offense. *Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000).

[2] A person commits an offense if the person knowingly or intentionally . . . possesses with intent to use drug paraphernalia . . . to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

TEX. HEALTH & SAFETY CODE ANN. § 481.125(a).

the lesser included offense must be included within the proof necessary to establish the offense charged; and second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). The offense of possession of drug paraphernalia is not within the proof necessary to establish the offense of possession of a controlled substance. *Sims v. State*, 833 S.W.2d 281, 285 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Thus, appellant fails to satisfy the first prong of the *Rousseau* test. The trial court did not err in refusing to instruct the jury on a lesser included offense. We overrule appellant's second point of error.

Ineffective Assistance of Counsel

Appellant argues in this third point of error that he received ineffective assistance of counsel. The standard under which we review a claim of ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under *Strickland*, appellant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. *See id.* at 690, 104 S. Ct. at 2066. If counsel's performance fell below this standard, we must then decide whether appellant has shown that the result of the trial would have been different but for his counsel's deficient performance. *Id.* at 694, 104 S. Ct. at 2068. In conducting this review, we must keep in mind the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Here, appellant contends his trial counsel was ineffective because she did not request a hearing on appellant's motion to suppress. Before trial, appellant filed a motion to suppress the evidence obtained from appellant's car—specifically, the crack pipe. However, the record does not reflect that a hearing was ever held, or that the trial court ever ruled on this motion. Appellant contends that because there was no probable cause for the search of his vehicle, his trial counsel's failure to raise this issue before the court was deficient, and but for this deficiency, appellant would not have been convicted.

The record in this case, however, is silent as to why appellant's trial counsel apparently did not request a hearing or otherwise obtain a ruling on appellant's motion to suppress. Appellant has therefore failed to rebut the presumption that his trial counsel's conduct was reasonable. *See Thompson*, 9 S.W.3d at 814. In the absence of such evidence, we are unable to conclude that the performance of appellant's trial counsel was deficient. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Accordingly, appellant has not satisfied the first prong of *Strickland*.

Furthermore, we find nothing in the record to support appellant's contention that the pipe's seizure was the result of an unreasonable search. Officer Malinowski's initial stop was lawful because appellant was driving with an expired registration sticker. *See Texas Dep't of Pub. Safety v. Perez*, 905 S.W.2d 695, 700 (Tex. App.—Houston [14th Dist.] 1995, writ denied). During a valid traffic stop, an officer may order a driver to get out of his vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 333 (1977). Once appellant exited the car, the crack pipe was in plain view, permitting the officer to seize it. *See Butler v. State*, 825 S.W.2d 727, 728 (Tex. App.—Houston [14th Dist.] 1992, no pet.). Appellant's third point of error is overruled.

We affirm the trial court's judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 8, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[3] (Wittig, J. concurring & dissenting.)
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice Don Wittig sitting by assignment.

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C O N C U R R I N G A N D D I S S E N T I N G O P I N I O N

I concur with the majority on the court charge and ineffective counsel issues. I respectfully dissent on the instructed verdict/sufficiency issue. I incorporate my dissents in *Hyett v. State*, WL 1249318 (Tex. App.–Houston [14th Dist.] 2001) (Wittig dissenting) and *Victor v. State,* 992 S.W.2d 216 (Tex. App.–Houston [14th Dist.] 1999) (Wittig dissenting). Simply stated, the State did not prove knowing possession of contraband that could not be seen, measured, or weighed. Here our intelligence is further disrespected by the traffic

officer's in-court opinion. The State's expert could neither see nor measure any cocaine.[4] After the glass pipe had been in the evidence locker, for the first time, at trial, the officer was allowed to opine that a white spec on the pipe looked like cocaine residue. Thus, once again, we travel further from fact, into the impenetrable forest and whimsical world of legal fiction. Sadly, for Koogler, this fiction results in five years in the penitentiary.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[5] (Yates, J. majority.)

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

[4] As in *Hyett*, the expert testified that there was less than 0.0003 ounces of contraband present. In other words, the limits of science prevented the expert from actually weighing the substance.

[5] Senior Justice Don Wittig sitting by assignment.