Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00351-CR

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GUILLERMO VIVEROS ANGULO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 762,049

O P I N I O N

Appellant was charged by indictment with possession with intent to deliver at least 400 grams of cocaine. In a non-jury trial, appellant was convicted of the charged offense and the trial court assessed punishment at twenty-five years confinement in the Texas Department of Criminal Justice--Institutional Division and a fine of $5,000.00. Appellant raises two points of error. We affirm.

I. Sufficiency of the Evidence

The first point of error contends the evidence is insufficient in two respects: first, appellant argues the evidence fails to establish that the substance in question was cocaine weighing at least 400 grams; second, appellant argues the evidence is insufficient to affirmatively link him to the substance. We will address these contentions seriatim.

A. Stipulated Evidence

At the beginning of trial, a stipulation marked State's exhibit eight was tendered to the trial court. In relation to that stipulation, the trial court stated:

> [S]ir, you have filed and sworn to what's now marked as State Exhibit [8], a stipulation of evidence wherein you state:
>
> That State Exhibit No. 7 was tested by Houston Police Department Chemist Charmista Patel, a qualified chemist. That Ms. Patel determined that State Exhibit No. 7 is cocaine and weighing more than 400 grams by aggregate weight including any adulterants and dilutants.
>
> You have given up your right to confront this witness, to cross-examine this witness, and to agree to the testimony that I read to you by the stipulation.
>
> Has anyone promised you anything, threatened you in any way to sign this agreement?
>
> APPELLANT: No.
>
> THE COURT: You're doing so freely and voluntarily?
>
> APPELLANT: Yes.
>
> THE COURT: Good enough. I'll approve it now.

The Clerk's record contains a document marked as "SX8" and entitled stipulation of evidence. This is the stipulation to which the trial court referred in the foregoing colloquy with appellant. The document contains appellant's signature, as well as the signatures of the clerk of the court, the assistant district attorney, appellant's trial counsel and the trial judge.

Appellant contends the evidence is insufficient to prove the substance in State's exhibit 7 was cocaine weighing at least 400 grams. Specifically, appellant argues that because the stipulation was never offered into evidence by the State, nor treated as if it were in evidence, there was never a time when an objection to the stipulation was appropriate or required. We reject this argument for two reasons. First,

we hold the stipulation was admitted when the trial court stated, "I'll approve it now." Second, the record is clear that the parties and the trial court treated the written stipulation as though it had been formally admitted into evidence. Therefore, it may be considered in support of the judgment as if it had been formally admitted. *See James v. State*, 643 S.W.2d 439, 440 (Tex. App.—Houston [14th Dist] 1982), pet. ref'd) (citing *Killion v. State*, 503 S.W.2d 765 (Tex. Crim. App. 1973)).

B. Affirmative Links

I. Standard of Review

The standard of review to determine the sufficiency of the evidence is whether, viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 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).

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.

ii. Factual Summary

Viewed in the light most favorable to the prosecution, the record evidence reflects the following: Peace officers assigned to the High Intensity Drug Trafficking Area (HIDTA) task force began an investigation of Moises Quinones. Through the use of a pen register, HIDTA traced a telephone number from Quinones' telephone to 9475 Roak Street, apartment 123, in Houston, Harris County. HIDTA followed Quinones to this apartment complex; however, the officer could not determine whether Quinones actually went to apartment 123. Quinones was later arrested.

On August 28, 1997, a week or two after Quinones' arrest, five HIDTA officers approached apartment 123 and knocked on the door. Appellant opened the door. His wife was inside. Appellant stated he and his wife were the occupants of the apartment. Appellant gave the HIDTA officers permission to search the premises. A brick type object wrapped in gray tape and a black plastic bag was discovered behind the air conditioning intake vent. That area was searched because it was a common place to hide narcotics. The brick weighed approximately 1100 grams. Within the plastic bag were three small plastic bags which weighed approximately 360 grams. These items were admitted into evidence as State's exhibit 7. As noted above, these items were the subject of State's exhibit 8, the written stipulation of evidence, which established the substances to be cocaine.

A set of scales was found on the kitchen counter. Officer W. N. Tomlinson described the scales as drug paraphernalia used to weigh cocaine. Tomlinson also searched the trash can and discovered a black rubber inner tube lining that is normally employed to transport cocaine.[1] Neither the scales, nor the tube had residue or traces of cocaine. The closet was filled with men's and women's clothing. Finally, the State offered the lease to apartment 123. This document indicated the apartment was leased to appellant

[1] Tomlinson did not secure this because he "really couldn't tell what it was. ... There was no cocaine traces on it or anything so I did not tag it."

on April 25, 1997. The apartment was described as "not very big; just one bedroom, living room, kitchen, and a small dining area."

Tomlinson testified that contraband in that amount and packaged in that manner indicated that it was intended for delivery, and it is not an amount that would have been left behind by a prior occupant.

iii. Analysis

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); *Travis v. State*, 638 S.W.2d 502, 503 (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). In any event, 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).

We will consider each factor in the context of the instant case:

1. The contraband was not in plain view;
2. Appellant was the occupant of the premises where the contraband was found and the closet was filled with men's and women's clothing;
3. The contraband was found behind an air conditioning vent, which was accessible to appellant, but there is no evidence the contraband was conveniently accessible;
4. The contraband was found in close proximity to the accused because of the small size of the apartment;
5. There is no evidence of a strong residual odor of the contraband;
6. A set of scales was found on the kitchen counter. Tomlinson described the scales as drug paraphernalia used to weigh cocaine. In the trash can, Tomlinson found a black rubber inner tube lining that is normally employed to transport cocaine. The scales were in plain view; the rubber tube was not. Because of the size of the apartment, both were near the accused;
7. The physical condition of appellant did not indicate recent consumption of cocaine;

8. Appellant's conduct did not indicate a consciousness of guilt;
9. There was no special connection between appellant and the contraband;
10. The contraband was found in an enclosed space;
11. Appellant did not give conflicting statements about any relevant matters;
12. There were no affirmative statements that connect appellant to the contraband; and,
13. There was a large amount of contraband some of which was packaged for sale while the remainder remained in bulk. Contraband in that amount would not have been left behind by a prior occupant.

After considering these factors, we find the evidence sufficient to affirmatively link appellant to the contraband for the following reasons. First, appellant was the lessor of the premises where the contraband was found. He and his wife had been the sole occupants of the apartment for four months prior to the search. Second, paraphernalia was present at the premises. The scales were consistent with those used to weigh cocaine and the tubing in the trash was consistent with the transport of cocaine. Third, the cocaine was discovered in an enclosed space, which is a common place for secreting narcotics. Fourth, and we believe most important, the quantity of contraband was 1460 grams. This amount is greater than what someone would possess for personal consumption. Moreover, it was found in two different forms, bulk and packaged for sale. Finally, this was not the amount that would have been left behind by a prior occupant.

Having rejected both challenges to the sufficiency of the evidence, the first point of error is overruled.

II. Consent to Search

The second point of error contends the trial court erred in denying the motion to suppress the evidence recovered in the search of appellant's apartment. Specifically, appellant argues he did not voluntarily consent to the warrantless search of his apartment.

A. Standard of Review

One of the established exceptions to the warrant requirement is a search conducted with consent. *See Byrd v. State*, 835 S.W.2d 223, 226 (Tex. App.—Waco 1992, no pet.). Proscriptions against warrantless searches and seizures do not come into play when a person freely and voluntarily consents to a search. *See Brimage v. State*, 918 S.W.2d 466, 480 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 838 (1996). The State must prove by clear and convincing evidence that consent to search was freely and voluntarily given. *See State v. Ibarra*, 953 S.W.2d 242, 244-45 (Tex. Crim. App. 1997). The consent to search must be positive and unequivocal; it must not be the product of duress or coercion, actual or implied. *See Allridge v. State*, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991), *cert. denied*, 510 U.S. 831 (1993); *Rosalez v. State*, 875 S.W.2d 705, 720 (Tex. App.—Dallas 1993, pet. ref'd). The consent to search must be the result of the defendant's own choice rather than of overborne will. *See Juarez v. State*, 758 S.W.2d 772, 776 (Tex. Crim. App. 1988) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973)). The State's burden is not discharged by showing acquiescence to a claim of lawful authority. *See Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968).

Whether the consent to search was in fact voluntary is to be determined from the totality of the circumstances. *See Byrd*, 835 S.W.2d at 226. Whether the consenting person was in custody or restrained at the time is a factor to be considered in whether consent was voluntarily given. *See Carpenter v. State*, 952 S.W.2d 1, 4 (Tex. App.—San Antonio 1997), *aff'd*, 979 S.W.2d 633 (Tex. Crim. App.1998). If the record supports a finding by clear and convincing evidence that consent to search was freely and voluntarily given, we will not disturb that finding.

B. Factual Summary

As noted above, on August 28, 1997, five HIDTA officers approached apartment 123 and knocked on the door. Appellant came to the door and an officer asked appellant a question in English. When appellant did not seem to understand the question, Officer R. R. Ayers began speaking to appellant

in Spanish.[2] Because Ayers was the only officer who spoke Spanish, he was the only officer to speak with appellant.

Appellant stated he was the occupant of the apartment and that he lived there with his wife. Ayers told appellant HIDTA was investigating a drug trafficking ring and had reason to believe there may be drugs, money, or weapons in the apartment. Ayers asked for permission to enter and to search the apartment. Appellant stepped back from the door and stated he would consent to the search because he had nothing to hide. Appellant invited the officers into the apartment.

Appellant and Ayers went to the bedroom to continue their conversation. Appellant's wife exited the bedroom and sat on the sofa in the living room. Ayers stated the five officers were armed, but their arms were holstered the entire time. While in the bedroom, Ayers again asked for permission to search the premises. Ayers explained that appellant's permission was necessary because the officers did not have a search warrant. Appellant responded, "It doesn't matter. You can look." Ayers told Tomlinson that appellant had consented to the search. Tomlinson handed Ayers a written consent in Spanish and asked appellant to sign it. However, appellant refused to sign the consent form, stating that following a prior unrelated domestic dispute he had been instructed by his attorney to not sign any forms. Appellant, however, did not withdraw his prior oral authorization to search the premises. Although appellant was later arrested, he was not in custody at the time he consented to the search. The officers proceeded with the search and discovered the cocaine alleged in the indictment.

Ayers testified appellant was never threatened, promised anything, or coerced in any way to obtain his consent to search the apartment. Ayers also testified that although the officers were armed, their arms remained holstered during the entire time at the apartment.

Appellant testified, with the aid of an interpreter, and contradicted Ayers testimony in a number of respects. For example, he stated that he had not understood everything Ayers said in Spanish. Appellant said he did not give consent, either orally or in writing, to search the apartment. Appellant stated he

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[2] Ayers testified that he experienced no difficulty understanding appellant and that appellant appeared to understand what Ayers said in Spanish.

attempted to call his attorney, but he was not in his office.

On cross-examination, however, the following colloquy occurred:

> Q. Are you telling the Court that you didn't want the police officers to look around, that you objected to them looking around the apartment?
>
> A. I didn't want to sign anything. I was not against them searching anything. What I didn't want to was to sign anything.

C. Analysis

The trial court is the sole judge of the credibility of witnesses at a hearing on a motion to suppress evidence obtained in a search/seizure, and the trial court may choose to believe or disbelieve any or all of the witnesses' testimony. *See Alvarado v. State*, 853 S.W.2d 17, 23 (Tex. Crim. App.1993); *Allridge*, 850 S.W.2d at 492. In the instant case, because appellant's claim that he did not consent to the search of his apartment turns on credibility and demeanor, we must accord great deference to the trial court's ruling. As the sole judge of witness credibility and demeanor, the trial court was entitled to believe Ayers and disbelieve appellant. Based on Ayers' testimony, appellant freely consented to the search of his apartment. The evidence is both clear and convincing that appellant was not threatened, coerced or promised any benefit to obtain the consent. Although appellant was later arrested, the evidence is clear that he was not in custody when he consented to the search.

Initially, we were given pause because appellant refused to give written consent for the search. While this might normally be a factor tending to indicate the consent was not voluntary, for the following reasons it is not such a factor in this case. First, we recognize that consent need not be in writing so long as there is a valid oral consent to search. *See Jackson v. State*, 968 S.W.2d 495, 499 (Tex. App.—Texarkana 1998, pet. ref'd). Second, appellant explained that he did not give written consent to the search because of a prior domestic dispute. Finally, appellant testified: "I didn't want to sign anything. *I was not against them searching anything*. What I didn't want to was to sign anything."

When viewed from the totality of the circumstances, being appropriately deferential to the trial court, we hold the State proved by clear and convincing evidence that appellant's consent to search was

voluntarily given. The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Edelman, Wittig, and Baird.[3]

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

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