



In The
Court of Appeals
For The
First District of Texas

NO. 01-06-01055-CR
NO. 01-06-01056-CR

KENNETH DEWAYNE HAYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause Nos. 04CR3201 and 04CR3202

CONCURRING AND DISSENTING OPINION

The majority acquits appellant of the conduct leading to his conviction during

the second drug transaction, at the Citgo gas station, concluding that the evidence presented at trial is legally insufficient to convict appellant of constructive transfer of cocaine. It does so by reading *Sims v. State* to mean that constructive transfer *exclusively* contemplates a transfer that does not ultimately vest actual possession in the transferee, and can never include indirect participation in an actual transfer of drugs to a third party. *See Sims v. State*, 117 S.W.3d 267 (Tex. Crim. App. 2003). The majority's interpretation in effect holds that appellant is not guilty of the second drug transaction in this case because the evidence lacks a second intermediary, and the drugs actually were sold to Agent Ramirez, the ultimate transferee. The majority thus concludes that, even if appellant could be guilty of aiding and abetting an actual transfer, his conduct is insufficient to find him guilty as a primary actor on a charge of delivery by constructive transfer. Because *Sims* disavows such a restriction, and instead upholds a conviction for constructive transfer when the defendant had either direct or indirect control of the transferred substance, the evidence supporting the conviction relating to the Citgo transaction is legally sufficient. I therefore respectfully dissent from the judgment of acquittal in Cause No. 01-06-01055-CR, involving the drug transaction at the Citgo gas station. I join the majority opinion in affirming the conviction in Cause No. 01-06-01056-CR, arising out of the drug transaction that took place at the Coastal gas station.

The evidence supporting the jury's verdict

The evidence in this case that appellant participated in the second, Citgo transaction is as follows: (1) appellant worked with Gaines to accomplish the first transaction at the Coastal station, which involved Gaines and Agent Hall; (2) appellant listened in the driver's seat of his car as Agent Hall "talked by [appellant]" to ask Gaines, appellant's passenger, whether Hall could arrange another purchase in the next 30 or 45 minutes; (3) in appellant's presence, Gaines provided a cell phone number for Hall to call to arrange the second transaction; (4) appellant arrived with Gaines at the Citgo gas station, the location that Hall and Gaines had arranged in subsequent phone calls, using the phone number that Gaines had provided when he was in the car with appellant; (5) appellant arrived at the Citgo station with Gaines only after Hall called a second time to inform Gaines that Hall was parked in the Citgo parking lot, ready to do the deal; (6) appellant then separated from Gaines and acted in a "counter-surveillance capacity" during the transaction between Gaines and Agent Ramirez (who was Hall's passenger for the second drug deal); and (7) DEA agents observed appellant driving Gaines away in appellant's car shortly after the transaction.

From this evidence, a reasonable jury could conclude that (1) appellant and Gaines worked together to sell drugs, as evidenced by the first transaction; (2) appellant knew that a second drug transfer was to take place, because the second

meeting was arranged in appellant's car in his presence and involved the same intermediaries (Gaines and Agent Hall) who participated in the first transfer but a different ultimate transferee (Agent Ramirez); and (3) appellant exercised indirect control over the drugs entrusted to Gaines by providing the vehicle in which the transaction was negotiated, arriving with Gaines at the appointed place and time, by acting as a lookout for the transaction, and by driving Gaines away when the transaction was complete. Thus, the State presented legally sufficient evidence that appellant (1) had either direct or indirect control of the transferred substance, and (2) knew that it would be delivered to a transferee because he was present for the conversation Hall had with Gaines. *See Sims*, 117 S.W.3d at 269; *see id.* at 277 (noting that intermediary "not required" for constructive transfer, but that defendant "must have contemplated that there would in fact be a third party transferee").

Thus, I disagree with the majority's opinion that "there is no evidence in the record before us from which the jury could have found that appellant ever had direct or indirect control over the cocaine that Gaines transferred to Agent Ramirez." The majority correctly observes that appellant neither negotiated with Agent Hall nor handled the narcotics, and describes appellant's surveillance duties as "minimal participation." Mere presence at the location of the transaction, perhaps even in a "surveillance capacity," is insufficient evidence of indirect control. But here, other evidence exists: appellant listened as the plan was made by the passenger in his car

with whom he had just conducted a drug deal, he arrived pursuant to the plan at the appointed place, he aided the effort by acting as a lookout, and he drove the get away car. It is true that no one saw appellant handle the drugs, but such is the case in every transfer where the defendant exercises indirect control. And, though appellant did not negotiate the deal with Agent Hall, appellant's actions facilitated its accomplishment—he provided the premises (his car) where the negotiations took place, later acted as lookout, and was the get-away driver. It then became for the jury to decide, whether, given these facts, appellant exercised indirect control over the narcotics.¹ Viewing the totality of the evidence in a light most favorable to the jury's

¹ The court of appeals' decision in *Dawson v. State*, 812 S.W.2d 635, 636 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) does not require an acquittal of appellant's second conviction. In *Dawson*, the court of appeals reversed a conviction based on constructive transfer when the defendant led an undercover officer to a man who then negotiated a drug purchase. 812 S.W.2d at 637. The court held that such evidence was legally insufficient because the defendant did not control the premises, and no evidence showed that he exercised influence over the delivery. *Id.* In contrast, here a jury could reasonably infer that appellant exercised some control, as the negotiations took place in the car he was driving, and influence, as he appeared at the later appointed time to assist as lookout in completing the transaction, and drove Gaines away after it was complete. Similarly, the Court of Criminal Appeals' decision in *Davila v. State*, 664 S.W.2d 722 (Tex. Crim. App. 1984) does not warrant reversal. There, the defendant relayed a "cryptic" offer to purchase drugs, and no other evidence existed that she had any control over the premises or the seller's actions. *Id.* at 725. As discussed, here the negotiations took place in appellant's car, indicating some control, and appellant later appeared to assist in completing the transaction, facts not present in *Davila*. This case instead is similar to *Swinney v. State*, 828 S.W.2d 254, 257 (Tex. App.—Houston [1st Dist.] 1992, no pet.) In *Swinney*, this court held that the evidence was legally sufficient to sustain a conviction for constructive transfer. Like the defendant in *Swinney*, here, the appellant was
(continued...)

verdict, the evidence shows that appellant and Gaines together controlled the cocaine sold in both transactions with Agent Hall.

The aiding and abetting finding

Relying on *Sims*, the majority holds that because Gaines effected an actual transfer, appellant cannot be convicted as a party to a constructive transfer: “Because there is no evidence that Gaines constructively transferred the cocaine to Agent Ramirez, there is necessarily no evidence that appellant was criminally responsible as a party to a constructive transfer by Gaines. . .”

But the fact that the jury was given a charge on the law of the parties is not meaningless, because Gaines’s direct control of the drugs can be imputed to appellant as an aider and abetter. *See Sims*, 117 S.W.3d at 271 (discussing prior decisions, observing that “[D]irect or indirect control over the contraband—[is] a necessary precondition for showing an actual or constructive transfer (*absent the law of parties*).”) (emphasis added). To the extent that the evidence is deficient to show that appellant had direct or indirect control of the drugs as a primary actor, he nevertheless had control sufficient for the jury to convict him of aiding and abetting an actual transfer—he was a party to the Gaines/Hall/Ramirez transaction. This evidence

¹ (...continued)
present both when Hall initiated the transaction, and was present when it took place.
See id., 828 S.W.2d at 258.

supplies the control necessary to prove delivery by constructive transfer if the question is one of direct or indirect control.

The fact that Gaines completed the transfer to Agent Ramirez is not a bar to appellant's prosecution for constructive transfer. Although the Court of Criminal Appeals has held that the transaction need not be completed to sustain a conviction based on constructive transfer, it never has held the converse: that a completed transaction bars such a prosecution—rather, the court has merely held that “the defendant must have contemplated that there would in fact be a third party transferee” (here, Agent Ramirez, as set up in the negotiation with Gaines and Agent Hall). *Simms*, 117 S.W.3d at 277. Plus, the court has expressly held that an intermediary is not required for all types of constructive transfer. *Id.* The evidence of the conversation held between Gaines and Hall in appellant's presence to arrange a drug transaction similar to the one the parties had just completed supports an inference that appellant expressly contemplated a transfer to a third party—the fact that the parties achieved fruition of the transfer does not make it any the less planned and the jury's aiding and abetting finding, even assuming, as the majority contends, that it relates to evidence of an actual transfer, sufficiently supports a finding of “direct or indirect control.” When coupled with evidence of knowledge of a future transferee (provided by the conversation that took place in appellant's presence), the argument that appellant is not guilty of delivery of drugs, as set forth in the statute, falters.

As the Court of Criminal Appeals has observed in discussing the quandary the appellate courts face in casting the facts of any particular delivery of narcotics as either actual or constructive, sometimes the conflict is “more apparent than real.” *See id.* at 270. Here, the evidence presented is legally sufficient to support the jury’s verdict and the trial court’s judgment, and we should so hold.

Conclusion

I join the majority in affirming the judgment of conviction in Cause No. 01-06-1056-CR. The evidence is also legally sufficient to support the verdict and judgment of conviction in Cause No. 01-06-1055-CR, and thus our court should affirm that conviction too. I therefore respectfully dissent from the majority’s opinion and judgment of acquittal in cause number 1-06-1055-CR.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.

Justice Bland, dissenting in Cause No. 01-06-01055-CR.

Publish. TEX. R. APP. P. 47.2(b).