In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00473-CR

DERRICK MYRON NICKERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D-080258-R

MEMORANDUM OPINION

In a single appellate issue, Derrick Myron Nickerson challenges the legal and factual sufficiency of the evidence supporting his conviction and the seventeen-year sentence for possession of marijuana in an amount more than five pounds, but less than fifty pounds. TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(4) (Vernon 2010). We hold the State established sufficient affirmative links for the jury to rationally find that Nickerson knowingly or intentionally exercised actual care, custody, control, or management of the marijuana contained in the trunk of the vehicle he was driving. TEX.

HEALTH & SAFETY CODE ANN. § 481.002(38) (Vernon 2010). Accordingly, we affirm the judgment of the trial court.

In an appellate review of the legal sufficiency of the evidence supporting a conviction, we must assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The State must prove at trial that the accused exercised actual care, control, or management, over a controlled substance that he knew was contraband. *Poindexter v. State,* 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). When the defendant is not found in exclusive possession of the place where the contraband is found, the evidence must establish "to the requisite level of confidence" that the defendant's connection with the controlled substance was more than just "fortuitous." *Id.* at 406. On appeal, the many non-exclusive factors we consider in determining whether sufficient evidence links the appellant to the controlled substance include: (1) the contraband is in plain view; (2) the defendant owns the premises where the contraband is located; (3) the contraband is conveniently accessible to the defendant; (4) the contraband is found in close proximity to the defendant; (5) a strong residual odor of the contraband is present; (6) drug paraphernalia is in view or is found near the defendant; (7) the defendant is found in a physical condition that indicates consumption of the contraband; (8) the defendant engages in conduct that indicates consciousness of guilt; (9) the

defendant has a special connection to the contraband; (10) contraband is found in an enclosed place; (11) the occupants of the premises provide conflicting statements about relevant matters; and (12) affirmative statements connect the defendant to the contraband. *Gregory v. State*, 159 S.W.3d 254, 260 (Tex. App.--Beaumont 2005, pet. ref'd). The evidence is sufficient when the logical force of all of the evidence and the reasonable inferences from the evidence support the jury's finding that the appellant exercised actual care, custody, control or management of the contraband. *See Evans v. State*, 202 S.W.3d 158, 166 (Tex. Crim. App. 2006).

Officer Jimmy Mooney testified that he stopped Nickerson for striking the center line several times and for speeding in a construction zone at 3:30 a.m. As Mooney approached the vehicle, he noticed the overwhelming odor of air freshener. Many times in the past he had discovered contraband in vehicles that smelled strongly of air freshener. Nickerson was shaking and breathing deeply and rapidly and appeared to be extremely nervous. Nickerson told Mooney that the vehicle was Nickerson's.[1] The occupants had evidently traveled to Houston from Mississippi. Nickerson told Mooney that he had come from Houston to pick up tickets for a concert. Nickerson provided Mooney with incorrect names for Nickerson's passengers. Mooney spoke separately to the passengers. One claimed they had visited family for the day, while the other claimed they had been in Houston visiting friends.

[1] The actual registered owner was not present.

When Mooney asked Nickerson for consent to search the vehicle, Nickerson looked back at the passengers, then gave his consent. Mooney found approximately six pounds of marijuana wrapped in Saran Wrap in three Ziploc bags. Mooney could smell the marijuana as soon as he opened the trunk. He also found many air freshener sheets. Photographs admitted into evidence depict air freshener hanging from the rear-view mirror, a sheet of Bounce stuffed into the air conditioner vent, a bottle of Febreze, an air freshener sheet tucked between the seat and the armrest, an open box of Bounce on the seat, and a container of Wonder Wafers Auto Air Fresheners. Mooney also found a can of Lysol in the car. According to Mooney, the odor of fabric softener and strawberry was "[v]ery overwhelming" and was necessary only to hide the odor of marijuana. After finding the marijuana, Mooney asked Nickerson, "Level with me. You just down on your luck? Is that why you're doing this?" Nickerson replied, "Yeah, I'm down on my luck." Mooney asked if Nickerson knew it was there, and Nickerson nodded. At one point, Nickerson asked if Mooney could just dispose of the marijuana and let him go.

In this case, Nickerson was in control of the vehicle. The marijuana was in the trunk, but, as the driver, Nickerson had the keys to the vehicle. Nickerson did not provide a coherent reason for traveling, and the passengers' responses differed from his. Nickerson must have been aware of the fabric softener and air freshener, as they were in plain sight throughout the vehicle and created an overwhelming odor. Finally, Nickerson admitted he knew the marijuana was there. The combined logical force of all of the

circumstances was sufficient for the jury to find that Nickerson knew there was marijuana in the trunk of the vehicle he was driving. Thus, a rational jury could find all of the elements of the offense beyond a reasonable doubt.

Nickerson argues the evidence is factually insufficient to establish intentional or knowing possession of marijuana, because all of the contraband was in the trunk and the vehicle did not belong to Nickerson. "In a factual sufficiency review, the appellate court views the evidence in a neutral light and asks whether the evidence supporting the verdict is so weak or so against the great weight and preponderance of the evidence as to render the verdict manifestly unjust." *Steadman v. State*, 280 S.W.3d 242, 246 (Tex. Crim. App. 2009). As the reviewing court, we cannot find the evidence to be factually insufficient "merely because there are 'reasonably equal competing theories of causation.'" *Id.* at 247 (quoting *Goodman v. State*, 66 S.W.3d 283, 287 (Tex. Crim. App. 2001)). "And a factual sufficiency reversal certainly may not occur when the evidence actually preponderates in favor of conviction." *Id.* (citing *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006)).

Although the vehicle was not registered to Nickerson, Nickerson asserted ownership of the vehicle when he spoke to the officer. The air freshener and fabric softener could have been in the car to make the car smell better, but Mooney indicated the smell was overwhelming and six pounds of marijuana were in the trunk. Evidence of obvious attempts to mask odors allows the jury to infer that the vehicle's occupants are

aware that the vehicle contains a substance with a particularly strong odor. Since marijuana in large quantities has a strong odor, and because marijuana was found in the trunk, the jury could reasonably infer that the people in the vehicle were aware they were carrying contraband. Viewing this evidence in a neutral light, the jury could still have found beyond a reasonable doubt that Nickerson's presence was not merely fortuitous, that he exercised actual control over the controlled substance, and that he knew he was transporting marijuana. We overrule the issue and affirm the judgment of the trial court.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on July 16, 2010
Opinion Delivered August 18, 2010
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.