

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00087-CR

LYNN RAINWATER, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 20795

MEMORANDUM OPINION

A jury convicted appellant Lynn Rainwater, Jr. of possession of a controlled substance, and the trial court assessed punishment at eighteen months of confinement in a state jail facility. Rainwater then filed this appeal, in which he contends in seven issues that the trial court erred by denying his motion to suppress, the trial court erred in finding that the search and seizure was lawful, he received ineffective assistance of counsel, and the evidence was legally and factually insufficient to establish his guilt. We affirm the trial court's judgment.

THE MOTION TO SUPPRESS

Before trial, Rainwater filed a motion to suppress. In the motion, Rainwater argued, among other things, that “[a]ny tangible evidence seized in connection with this case was seized without warrant, probable cause[,] or other lawful authority in violation of the rights of Lynn Rainwater, Jr. pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, [and] Article I, Sections 9, 10[,] and 19 of the Constitution of the State of Texas.” Rainwater sought suppression of any tangible evidence seized in connection with his detention and arrest.

At the hearing on the motion to suppress, Detective Randy Turner of the Polk County Sheriff’s Office testified that he was involved in the search of a house in Corrigan on April 5, 2009. According to Turner, officers “had received complaints from concerned citizens that marijuana and crack cocaine had been being sold and used at that residence.” Based upon the information in those anonymous complaints, officers proceeded to the residence. When Turner arrived, Rainwater was at the doorway of the residence, and Turner explained to Rainwater that the officers were there to investigate the sale of marijuana. Turner testified that he did not see any contraband at that time. According to Turner, Rainwater told him that “there was no marijuana inside or around the residence[,] but he did possess crack cocaine pipes inside the residence.” Turner explained that he asked for consent to search the residence, but consent was denied, so Turner told Rainwater that he was going to obtain a search warrant. Turner testified that

he then secured a search warrant based upon Rainwater's statement concerning the crack pipes.

According to Turner, Rainwater was placed in hand restraints and detained while Turner was obtaining the warrant. Turner explained that while he went to obtain the warrant, Deputy Chris Lima remained at the residence. Turner testified that prior to leaving to obtain the search warrant, he entered the residence to secure the residence and ensure that no other individuals were present, to secure against the destruction of evidence, and for officer safety reasons. According to Turner, the suspects were detained while he obtained the warrant because otherwise, Lima would have been left alone with the four individuals present at the residence. Turner explained, "I was not searching the residence for contraband. I was searching the residence for officer safety reasons." Turner testified that he did not see any contraband during his initial walk-through of the residence.

After obtaining the search warrant, Turner returned and searched the residence. Upon searching the residence, the officers found, among other things, a silver-colored pipe with a black substance inside, a yellow cloth bag that contained "several pipes and other objects used to ingest crack cocaine[,]" two cylindrical pipes that contained a black substance, a screwdriver with a black substance on the end, a torque head wrench with a black substance on it, a plastic bag that contained a white substance, five pieces of Brillo pad that contained a black substance, a pocketknife, a large piece of unused Brillo, a clear

container that contained a white substance, four oblong white tablets inscribed with an “L,” and five pieces of used Brillo pad.

Turner explained that Deputy Lima searched the southwest bedroom, which was identified as Rainwater’s room, and Lima found a makeup-style bag inside a drawer beside the bed. Turner testified that the bag contained three “silver-colored, cylindrical pipes containing a black substance and pieces of Brillo pad that were also black. Also inside the bag there was a small, bluish-colored, plastic Baggie that contained a white substance.” According to Turner, Lima also found a screwdriver with a black substance on the end, a torque head wrench with a black substance on the end, and “five pieces of black Brillo pad [that had] already been used to ingest crack cocaine.” At the conclusion of the hearing, the trial court denied Rainwater’s motion to suppress. The record does not reflect that Rainwater requested findings of fact and conclusions of law, and the trial court did not sign any.

THE EVIDENCE

At trial, Detective Turner testified that he had received a tip from concerned citizens regarding the possible sale of narcotics at a particular residence. When Turner arrived at the subject residence in Corrigan, he saw two females and two males standing on the front porch. Turner identified the two males, one of whom was Rainwater. Turner testified that he advised the men that the authorities had received information indicating that narcotics and marijuana were being sold in the residence. The men denied having

marijuana inside the residence, but Rainwater told Turner that “he did have stems inside the residence.” Turner explained that he asked Rainwater if the stems were marijuana stems or stems used to ingest crack cocaine (*i.e.* a crack cocaine pipe), and Rainwater “advised that they were crack cocaine pipes.” Turner also testified that Rainwater indicated that the stems belonged to him.

Turner explained that he asked Rainwater and the other man to consent to a search of the residence, and both men denied consent. Turner testified, “I advised Mr. Rainwater and [the other man] that I was going to attempt to gain a search warrant and placed them in mechanical hand restraints.” According to Turner, Rainwater was detained outside the residence. Turner explained that he “secured the residence, made sure no one else was in the residence . . . to prevent the destruction of any evidence[,]” and he prepared an affidavit for a search warrant and obtained a judge’s signature on a search warrant. Turner testified that he did not observe any drug paraphernalia or contraband during his initial walk-through of the residence.

Turner then returned to the residence, and while Deputy Lima began searching a bedroom identified as Rainwater’s, Turner began searching a bedroom that belonged to two other individuals. According to Turner, Rainwater stated that the bedroom Lima was searching belonged to him, and although Rainwater stated that one of the females lived there with him, there was no indication that Rainwater shared the bedroom with anyone else. According to Turner, Lima located three silver cylindrical pipes “that were black on

the outside and contained a black substance believed to be crack cocaine.” Turner testified that Lima also found several pieces of used Brillo pad, a crack pipe, and push rods. Turner explained that Lima found all of these items in a “makeup-style bag that did not contain any makeup. The bag actually contained several pieces of paraphernalia and crack cocaine.”

In the other bedroom, Turner located “several baggies that contained a white, powdery substance and, also, another cylindrical pipe that was black on the outside and had a black substance inside with [a] Brillo pad, as well.” The officers charged three of the individuals, including Rainwater, with possession of a controlled substance. One of the females, C.S., was not charged because the officers determined that she had moved away from the residence two months earlier. Turner testified that he packaged all of the evidence and sent the items to the DPS Crime Lab for analysis.

Minh Nguyen, a chemist with the DPS Crime Lab in Houston, testified that his job entails identifying unknown substances by performing various chemical tests and confirming the results with instruments. Nguyen testified that the lab received evidence from Turner on April 13, 2009. Nguyen explained that Turner’s request for analysis contained the names of four suspects, one of whom was Rainwater. Nguyen tested several pieces of evidence, and in each item, he found a trace amount of cocaine. After analyzing the evidence, Nguyen prepared a report regarding his findings.

Rainwater testified that he lived at the residence in Corrigan, and on April 5, 2009, three other individuals were present at the residence. According to Rainwater, the police came to the residence and informed him that they had reason to believe marijuana was being sold there. Rainwater testified that Detective Turner did not ask him about cocaine, but he did ask him about marijuana, and Rainwater explained that he told Turner that there might be stems (which he testified meant pipes) in the residence. Rainwater explained that he did not tell Turner that the stems were his. According to Rainwater, he consented when Turner asked if he could search the house. Rainwater testified that he and another individual were handcuffed, put into the back of a police car, and Turner entered the house “to make sure there was [sic] no other people there.” Rainwater explained that he was not permitted to accompany the officers through the residence after Turner returned with the search warrant. According to Rainwater, C.S. had lived with him in his bedroom ever since he had moved to the residence. Rainwater testified that he had never touched the items found in the makeup bag. Rainwater testified that he has previously been convicted of burglary of a habitation and driving while intoxicated, but that he has never been charged with possession of any illegal drugs or drug paraphernalia.

ISSUES ONE, TWO, THREE, AND FOUR

In issue one, Rainwater contends the trial court erred in denying his motion to suppress the physical evidence found during the search of Rainwater’s residence. In issue two, Rainwater argues that the trial court erred by finding that the search of his

residence was lawful. In issue three, Rainwater argues that the trial court abused its discretion by denying his motion to suppress the physical evidence “found during the illegal search” of his residence. In issue four, Rainwater asserts that the trial court “abused its discretion in finding that the search of [Rainwater]’s residence was the result of a lawful search and seizure.” We address these issues together.

We review the trial court’s ruling on a motion to suppress for abuse of discretion. *Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App. 1991). If the trial court’s ruling is supported by the record, we will not overturn it on appeal. *Brooks v. State*, 76 S.W.3d 426, 430 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The trial court is the sole judge of the weight and credibility of the evidence at a suppression hearing. *Wood v. State*, 18 S.W.3d 642, 646 (Tex. Crim. App. 2000). We afford almost total deference to the trial court’s determination of the historical facts that depend on credibility and demeanor, but we review de novo the trial court’s application of the law to the facts if resolution of those ultimate questions does not turn on evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

As previously discussed, at the hearing on the motion to suppress, Detective Turner testified that when he arrived at the residence, Rainwater informed him that there were “stems,” which Turner explained referred to crack cocaine pipes, inside the residence. Turner also testified that he asked for permission to search the residence, but after consent was denied, Rainwater was placed in restraints and detained. Turner

walked through the residence for Officer Lima's safety and to secure against the destruction of any evidence, and then Turner left to obtain a search warrant. Turner explained that he was not searching for contraband during this initial walk-through, and he did not find any contraband until he returned with the search warrant.

The United States Supreme Court has held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Segura v. United States*, 468 U.S. 796, 810, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). The trial court was the sole judge of the weight and credibility of the evidence at the suppression hearing. *See Wood*, 18 S.W.3d at 646. Therefore, the trial court could have found Detective Turner's testimony concerning the circumstances of the original walk-through for the purpose of officer safety and prevention of destruction of evidence, as well as the post-warrant search in which drugs and drug paraphernalia were found, to be credible. *See id.*; *Guzman*, 955 S.W.2d at 89; *see also Segura*, 468 U.S. at 810. The drugs and drug paraphernalia were discovered at the residence after Rainwater had informed Turner that "stems" were inside and Turner had obtained a search warrant. For all of these reasons, we conclude that the trial court did not err by denying Rainwater's motion to suppress. Accordingly, we overrule issues one, two, three, and four.

ISSUE FIVE

In his fifth issue, Rainwater argues that he received ineffective assistance of counsel. Specifically, Rainwater complains that trial counsel failed to object to the State's cross-examination concerning his post-arrest silence because "[t]he central issue in the case was whether or not [C.S.] was living with [Rainwater] and thus the makeup bag was hers" rather than Rainwater's, and the jury's verdict showed that the jury did not believe Rainwater's testimony that C.S. lived with him at the time of the offense.

To prevail on a claim of ineffective assistance of counsel, an appellant must satisfy a two-pronged test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). An appellant must demonstrate a reasonable probability that but for his counsel's errors, the outcome would have been different. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Id.*

Rainwater must prove that there was no professional reason for specific acts or omissions of his counsel. *See id.* at 836. Furthermore, “[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.” *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). The bare record on direct appeal is usually insufficient to demonstrate that “counsel’s representation was so deficient . . . as to overcome the presumption that counsel’s conduct was reasonable and professional.” *Bone*, 77 S.W.3d at 833 (footnote omitted).

As discussed above, Rainwater complains that his attorney did not object to portions of the State’s cross-examination that Rainwater asserts were comments on his post-arrest silence. No testimony was elicited at trial, either from Rainwater or Detective Turner, concerning any invocation by Rainwater of his right to remain silent. Furthermore, Rainwater did not file a motion for new trial or otherwise create a record elucidating the tactical reasons behind counsel’s conduct during the trial. Therefore, the State’s questioning may not have been objectionable. Regardless, the record is silent as to why counsel may have chosen not to object to the questioning of which Rainwater complains, and we cannot presume that counsel’s decision not to object to the questioning constituted ineffective assistance. *See Thompson*, 9 S.W.3d at 813; *see also Bone*, 77 S.W.3d at 833. Accordingly, we overrule Rainwater’s fifth issue.

ISSUES SIX AND SEVEN

In his sixth issue, Rainwater argues that the evidence was legally insufficient to establish his guilt. In his seventh issue, Rainwater contends the evidence was factually insufficient to support his guilt. We address these issues together.

In a legal sufficiency review, an appellate court considers all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The jury is the ultimate authority on the credibility of witnesses and the weight to be given their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). We give deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. The Court of Criminal Appeals recently concluded that there is no meaningful distinction between a legal-sufficiency review and a factual-sufficiency review, and held that

the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis [v. State]*, 922 S.W.2d 126 (Tex. Crim. App. 1996), are overruled.

Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010).

“To prove unlawful possession of a controlled substance, the State must first prove appellant exercised actual care, control and management over the contraband and second, that appellant had knowledge the substance in his possession was contraband.” *Nixon v. State*, 928 S.W.2d 212, 215 (Tex. App.—Beaumont 1996, no pet.) (citing *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995)). The State need not prove exclusive possession of the contraband, since control over contraband may be jointly exercised by more than one person. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *State v. Derrow*, 981 S.W.2d 776, 779 (Tex. App.—Houston [1st Dist.] 1998, pet. ref’d). However, “mere presence at a place where contraband is being used or possessed by others does not justify finding that a person is in joint possession or is a party to an offense.” *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d).

When an accused is not in exclusive possession of the location where contraband is found, additional independent facts and circumstances may affirmatively link him to the contraband. *Nixon*, 928 S.W.2d at 215. An affirmative link may be established through either direct or circumstantial evidence, and it must show that the accused’s connection to the contraband was more than fortuitous. *Poindexter v. State*, 153 S.W.3d 402, 405-06 (Tex. Crim. App. 2005). Factors which tend to establish affirmative links include:

- (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.

Nixon, 928 S.W.2d at 215. “It is . . . not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial.” *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006).

Turner testified that when he arrived at Rainwater’s residence, Rainwater told him that he had stems inside the residence, and when questioned by Turner concerning the meaning of “stems,” Rainwater stated that he was referring to crack cocaine pipes, and that the stems belonged to him. According to Turner, when he obtained a search warrant and Lima then searched the bedroom that Rainwater said belonged to Rainwater and C.S., Lima found three crack cocaine pipes, pieces of used Brillo pad, and push rods inside a “makeup-style bag that did not contain any makeup.” Turner testified that no charges were filed against C.S. because the officers determined that she had moved away from the residence two months earlier. Nguyen testified that the items recovered from the

residence all contained a trace amount of cocaine. Rainwater testified that he did not tell Turner that the stems belonged to him. In addition, Rainwater testified that C.S. had lived with him in the bedroom ever since he moved to the residence, and he denied touching the items found in the makeup bag.

It was within the province of the jury to weigh the testimony and to resolve any conflicts in the testimony. *See Hooper*, 214 S.W.3d at 13. We conclude that sufficient affirmative links exist in this case. *See Nixon*, 928 S.W.2d at 215. The evidence is sufficient to support the verdict. *See Hooper*, 214 S.W.3d at 13. Accordingly, we overrule issues six and seven and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on February 16, 2011
Opinion Delivered March 9, 2011
Do Not Publish

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