Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00980-CR

ERNESTO HULL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 1129132

MEMORANDUM OPINION

A jury found Ernesto Hull guilty of possession of cocaine weighing more than 200 grams and less than 400 grams and assessed punishment at 43 years' confinement in the Texas Department of Criminal Justice Institutional Division.

See TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (e) (West 2010). On appeal, Hull contends (1) the evidence was insufficient to support the verdict; (2) the trial court erred in denying his motion to suppress a search warrant and the products of the search; and (3) he received ineffective assistance of counsel. We affirm the judgment of the trial court.

Background

A confidential informant told Detective Michael Cooper that Hull was holding stolen property and selling drugs out of his home. The informant had provided information to Detective Cooper in the past and identified Hull in exchange for leniency on multiple theft charges. The informant assisted Detective Michael Biggs in buying cocaine from Hull undercover.

After successfully buying cocaine from Hull, Detective Biggs sought and received a search warrant for the home and the surrounding premises and curbage.[1] Approximately twelve officers from various law enforcement agencies were conducting surveillance outside Hull's home at the time. Detective Biggs notified the surveillance team that he had obtained a warrant and took up a position down the street.

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[1] Curbage includes any vehicles, buildings, or structures on the premises.

Detective Cooper sat in an unmarked car in a driveway next door with an unobstructed view of Hull's driveway. A trash pile approximately two to three feet tall and nine to ten feet wide sat on Hull's driveway eight feet from Detective Cooper. Detective Cooper saw Hull walk out of his house and place a brown paper bag on the trash pile. A few minutes later Hull and a woman, later identified as Paula Reed, left the house and drove away. Law enforcement officers conducted a search of Hull's home and premises at approximately 3:30 p.m. Detective Cooper found 203.4 grams of cocaine and 1.2 pounds of marijuana in the brown paper bag Hull left on the trash pile.

Law enforcement officers followed Hull who repeatedly checked his rear view mirror and refused to stop when signaled by a marked police car. Driving 90 miles per hour Hull collided with one of the police cars. He ran from the wreck and pulled out a gun. Officer David Matlock hit Hull with his car, stopping him. Other officers used tasers on Hull when he failed to comply with instructions regarding his hands and gun. After securing Hull, law enforcement officers found a gun underneath Hull's body, a gun on the ground a foot from the open driver's side door, and a clear container of two packets of powder and crack cocaine on the front seat of his car weighing respectively 2.89 grams and 5.3 grams.

Hull was indicted for possession of a controlled substance, cocaine, weighing more than 200 grams and less than 400 grams. Hull filed pretrial motions to disclose the confidential informant and to suppress the search warrant and the products of the search. The trial court denied the motion to disclose the informant after conducting an *in camera* hearing with Detective Cooper.

In his motion to suppress, Hull asserted that, on its face, the warrant indicated it had been issued at 11:47 p.m., after law enforcement performed the search. The "p" in "11:47 p.m." had been crossed out and replaced with an "a" so that the warrant would show that it had been signed at "11:47 a.m." The officer's return indicated the warrant was in hand at 11:47 p.m. At the hearing on the motion to suppress, Detective Biggs testified that the warrant was signed at 11:47 a.m. and executed at approximately 3:30 p.m. He stated he mistakenly wrote "p.m." on the officer's return. He testified the magistrate must have changed "p.m." to "a.m." because only he and the magistrate handled the warrant. He did not, however, see the magistrate make the correction. The trial court denied Hull's motion to suppress.

The jury heard testimony from Detectives Cooper and Biggs regarding the confidential informant, the drugs in the brown paper bag, and the process of obtaining the search warrant. A crime lab technician identified the drugs found as

cocaine and marijuana and testified that the aggregate weight of the drugs was between 200 grams and 400 grams. Several law enforcement officers testified to apprehending Hull and the cocaine found in his car. The magistrate who signed the warrant testified he believed he issued the warrant at 11:47 a.m. and had made the correction to the time. The jury found Hull guilty and assessed punishment at 43 years' confinement. The trial court rendered judgment and Hull timely appealed.

Sufficiency of the Evidence

In his first and second issues, Hull contends the evidence was insufficient to show his knowing possession of the drugs found in the brown paper bag.

I. Elements of Possession

To prove unlawful possession of a controlled substance, the State must prove the defendant exercised control, management, or care over the substance and that he knew the matter possessed was contraband. *See Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). Regardless of whether the evidence is direct or circumstantial, it must establish that a defendant's connection to the contraband was more than fortuitous. *Id.* at 405–06. Mere presence at the location where drugs are found is insufficient, by itself, to establish care, custody, and control. *Lair v. State*, 265 S.W.3d 580, 585 (Tex. App.—[1st Dist.] 2008, pet. ref'd) (citing *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006)). But presence or proximity of

contraband, when combined with other evidence, may be sufficient to establish the element of possession beyond a reasonable doubt. *Evans*, 202 S.W.3d at 162.

If the defendant does not have exclusive possession of the place where the drugs are found, then independent facts and circumstances must link him to the drugs. *Lair*, 265 S.W.3d at 585. Though not an exhaustive list, the Court of Criminal Appeals has recognized the following factors as affirmative links to establish knowing possession: (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the contraband; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia was present; (11) whether the defendant owned or had the right to possess the place where the contraband was found; (12) whether the place where the contraband was found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *Evans*, 202 S.W.3d at

162 n.12. The number of links is not dispositive, but rather the we must consider the logical force of all of the evidence, both direct and circumstantial. *Id.* at 162.

II. Standard of Review

When evaluating the 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. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Williams v. State*, 301 S.W.3d 675, 684–85 (Tex. Crim. App. 2009). The standard of review articulated in *Jackson v. Virginia* applies to both legal and factual sufficiency challenges to the elements of a criminal offense. *See Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). We consider both direct and circumstantial evidence, and all reasonable inferences that may be drawn from the evidence in making our determination. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We do not resolve any conflicts of fact, weigh any evidence, or evaluate the credibility of any witnesses, as these are the functions of the trier of fact. *See Williams*, 301 S.W.3d at 684.

III. Sufficient Evidence of Knowledge

Hull contends the State presented insufficient evidence to establish his connection to the brown paper bag and his knowledge of the cocaine inside. He

observes that no witness testified to seeing Hull load the bag, reach inside the bag, or in any way handle its contents. Also, a third party, Reed, was present in the house and the car, and therefore Hull did not have exclusive possession of the place where the drugs were found.

Cocaine was found in both the bag and Hull's car and the State presented evidence of a number of the affirmative links to demonstrate knowing possession of that cocaine. The cocaine found in the car was in plain view on the front seat. Hull was in close proximity to and had access to both the contraband in the paper bag he put on the trash pile and the cocaine in the car he was driving. The cocaine in the car was found at the time of his arrest. Hull fled from police and repeatedly checked his rearview mirror. Hull owned and had a right to possess the house, trash pile, and car where the cocaine was found. Both the car and the brown paper bag were in enclosed areas, and Hull's high speed chase from law enforcement indicates a consciousness of guilt. *See Evans*, 202 S.W.3d at 162.

Considering the cocaine found in the bag and the car, the logical force of the evidence supports the jury's finding that Hull exercised control over the cocaine and knew he had cocaine in his possession. *See Duvall v. State*, 189 S.W.3d 828, 832 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding evidence sufficient to show knowing possession where defendant carried full duffle bag from hotel

room where marijuana residue found to trunk of car). Viewing the evidence in the light most favorable to the verdict, a rational jury could find Hull knowingly possessed cocaine. *Id.*

We overrule Hull's first and second issues.

Motion to Suppress

In his third issue, Hull contends the trial court erred in denying his motion to suppress because the magistrate signed the search warrant at 11:47 p.m. after law enforcement officers had performed the search.

I. Standard of Review

We review a trial court's ruling on a motion to suppress for abuse of discretion. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). We must view the evidence in the light most favorable to the trial court's ruling. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). When ruling on a motion to suppress, the trial judge is the "sole and exclusive trier of fact and judge of the credibility of the witnesses as well as the weight to be given their testimony." *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App. 1996). As such, we give "almost total deference" to a trial court's determination of historical facts. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We review de novo application of the law of search and seizure. *Carmouche*, 10 S.W.3d at 327.

If the trial court's ruling on a motion to suppress is reasonably supported by the record and correct on any theory of law applicable to the case, we must sustain the ruling. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

II. Validity of the Warrant

Hull contends the magistrate signed the search warrant at 11:47 p.m., after the search of Hull's home and premises had already been executed. Hull asserts that no initial appears next to the "a" added to the warrant and Detective Biggs testified that he did not see the magistrate make the correction. Hull also points to the officer's return on the back of the warrant that lists "11:47 p.m." as the time Detective Biggs received the warrant.

"[P]urely technical discrepancies in dates and times do not automatically vitiate the validity of the search or arrest warrants." *Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990); *Sampson v. State*, No. 01-03-00476-CR, 2004 WL 2415119, at *1 (Tex. App.—Houston [1st Dist.] Oct. 28, 2004, pet. ref'd) (mem. op., not designated for publication). Technical defects in the warrant may be cured by explanatory testimony or other evidence extrinsic to the document in question. *Green*, 799 S.W.2d at 759. In *Torbellin v. State*, No. 05-92-02159-CR, 1995 WL 259244, at *2 (Tex. App.—Dallas Apr. 27, 1995, pet. ref'd) (mem. op., not designated for publication), the receiving officer testified that the magistrate

made a technical error by writing "11:47 p.m." instead of "11:47 a.m." as the time he issued the warrant. The officer's explanatory testimony was sufficient to cure the technical defect even though he testified that he did not notice the magistrate make the mistake. *Torbellin*, 1995 WL 259244, at *2.

The facts here are identical to the facts in *Torbellin*, including the exact same time noted on the warrant. Detective Biggs testified at the motion to suppress hearing that he was present when the magistrate signed the warrant at 11:47 a.m. He also testified that he made a mistake on the officer's return by writing "p.m." The fact that he did not notice the magistrate change the warrant from "p.m." to "a.m." is not dispositive. *See id.* Detective Bigg's testimony was sufficient to cure the technical defect on the face of the warrant, therefore the trial court did not err in denying Hull's motion to suppress. *See Sampson*, 2004 WL 2415119, at *1.

We overrule Hull's third issue.

Ineffective Assistance of Counsel

In his fourth issue, Hull contends he received ineffective assistance of counsel because his counsel failed to get a ruling on his motion to disclose the confidential informant. To show ineffective assistance of counsel, a defendant must demonstrate both that (1) his counsel's performance fell below an objective standard of reasonableness, and that (2) there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). A defendant has the burden to establish both of these prongs by a preponderance of the evidence, and a failure to make either showing defeats his ineffectiveness claim. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). Any 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). When the record is silent as to counsel's strategy, we will not speculate as to the reasons behind counsel's actions. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

Hull's ineffective assistance claim rests on what he perceives as defense counsel's failure to seek an *in camera* hearing or a ruling on his motion to disclose a confidential informant. Our review of the record demonstrated that the trial court conducted an *in camera* hearing on the same day the parties conducted voir dire. The trial court heard testimony from Detective Cooper regarding contact with the informant, the informant's involvement in Hull's arrest, and the informant's credibility. The trial court then denied Hull's motion to disclose. The record

therefore does not support Hull's claim that he received ineffective assistance of counsel.

We overrule his fourth issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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