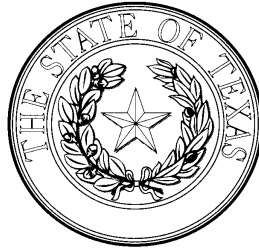


Opinion issued January 9, 2018



In The
Court of Appeals
For The
First District of Texas

NO. 01-17-00313-CR

CODIE ADOLPHUS GAMBOA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case No. 1389108

MEMORANDUM OPINION

Codie Adolphus Gamboa appeals from the trial court's judgment revoking his community supervision, contending that the evidence is legally insufficient to show that he violated a term of his community supervision. We affirm.

BACKGROUND

In March 2017, the State moved to revoke Gamboa's community supervision, alleging that he failed to comply with the following conditions:

- Commit no offense against the laws of this or any other State of the United States;
- Pay a supervision fee of \$60 per month;
- Pay court costs of \$50 per month; and
- Pay laboratory fees of \$5 per month.

With respect to the legal offense, the State alleged that Gamboa knowingly possessed with intent to deliver both phencyclidine weighing more than 200 grams and less than 400 grams and methamphetamine weighing more than 4 grams and less than 200 grams. Gamboa pleaded not true in response to the State's allegations.

At the hearing on the State's motion, the trial court heard testimony from Officer P. Esbrandt, an eight-year veteran of the Houston Police Department. He explained that HPD had received neighborhood complaints about possible drug activity at a home located in northeast Houston. As part of its investigation, HPD used an informant. With an officer's supervision, the informant went into an enclosed patio at the back of the home where he purchased marijuana from a black male. The informant told the officer that he saw a lot of narcotics and firearms in plain view on a table on the patio. On a different day, the informant made a second

buy at the home, this time from a black male of a different description. Based on this information, HPD secured a warrant to search the home.

Officer B. Smith, a sixteen-year veteran of the Houston Police Department with three-and-a-half years' experience in the narcotics division, participated in executing the warrant in late February 2017. Officer Smith testified that he was assigned to perform surveillance near the home approximately half an hour before the rest of the narcotics squad was to arrive. During that time, Officer Smith observed three different vehicles pull up to the house. Each time, a person would exit the vehicle, walk down the side of the house toward a carport area, return to the vehicle a minute or two later, and leave the area. Based on his training and experience, Officer Smith confirmed that this behavior was consistent with buying narcotics. Officer Smith did not see Gamboa until after the narcotics squad executed the warrant. Based on his observations, Officer Smith inferred that Gamboa was inside the home during the time he performed surveillance.

Officer Esbrandt was among the officers who executed the warrant. He testified that as the officers headed toward the enclosed patio, Gamboa and another man were coming out of the back door of the home that opened into the enclosed patio. Officer Esbrandt recounted that Gamboa noticed the officers as he exited the patio, and he dropped to the ground. The other man, later identified as Jeremy

Shelley, ran back into the home and tried to leave through the front door, but was apprehended.

When the officers arrested Gamboa, he was wearing a white muscle shirt and shorts and had \$500 cash in his pocket. In searching the home, the officers found scales and a substantial amount of narcotics, including phencyclidine and methamphetamine, in plain view in the kitchen. In the living room area, the officers found three firearms in plain view. The two bedrooms contained some men's clothing and air mattresses. They did not find narcotics in the enclosed patio.

The trial court's liaison officer, M. Bland-Muzny, testified that Gamboa failed to pay in full the fees and costs required under the terms of his community supervision. Specifically, the liaison officer testified that Gamboa was \$515 in arrears on the supervision fee, \$228 in arrears on the court costs, and \$170 in arrears on the laboratory fee.

The trial court granted the State's motion to revoke community supervision, adjudicating Gamboa guilty of aggravated robbery with a deadly weapon and assessing punishment at seven years' confinement.

DISCUSSION

A. Standard of review and applicable law

To revoke community supervision, the State must prove by a preponderance of the evidence that a defendant violated a condition of the community-supervision

agreement. *Hacker v. State*, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013). In this context, a preponderance of the evidence means “that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of his [community-supervision agreement].” *Id.* at 865. Evidence is legally sufficient when it is “more than a scintilla” but not when “the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence.” *Id.*

In determining whether the State’s allegations in the motion for revocation are true, we defer to the trial court’s findings of fact as well as its determinations of the credibility of the witnesses and the weight to afford their testimony. *See Taylor v. State*, 604 S.W.2d 175, 179 (Tex. Crim. App. [Panel Op.] 1980); *Akbar v. State*, 190 S.W.3d 119, 123 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We examine the evidence in the light most favorable to the trial court’s ruling. *Akbar*, 190 S.W.3d at 123. When several violations are found by the trial court, we affirm the order revoking community supervision if the State proved any single violation by a preponderance of the evidence. *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009) (“We have long held that ‘one sufficient ground for revocation would support the trial court’s order revoking’ community supervision.”).

Gamboa claims that he was merely present when the search warrant was executed and that the evidence is insufficient to show by a preponderance that he

had care, custody, or control of the illegal narcotics. *See* TEX. HEALTH & SAFETY CODE § 481.002(38) (defining possession as “actual care, custody, control, or management”); *id.* § 481.115(a) (defining offense of possession of substance); *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006) (noting that, to prove possession of controlled substance, evidence must show that (1) defendant exercised control, management, or care over substance and (2) defendant knew matter possessed was contraband). Possession of the contraband need not be exclusive and evidence that shows the accused jointly possessed the contraband with another is sufficient. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985). The evidence, however, must establish that the accused’s connection with the drug was more than just fortuitous. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). “When the accused is not in exclusive possession of the place where the substance is found, it cannot be concluded that the accused had knowledge of and control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband.” *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. [Panel Op.] 1981). The Court of Criminal Appeals has recognized the following affirmative links:

- (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 narcotics;
- (4) whether the defendant was under the influence of narcotics 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 drugs were found; (12) whether the place where the drugs were 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; accord *Burrell v. State*, 445 S.W.3d 761, 765 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). It is not the number of links that is dispositive, but the cumulative logical force of the evidence. *Evans*, 202 S.W.3d at 162. Further, the absence of some of the factors is not evidence of innocence that weighs against the factors that are present. *James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

B. Analysis

Because Shelley was in the home with Gamboa, the State had the burden to prove through additional facts and circumstances that Gamboa owned or had the right to possess the place where the narcotics were found. See *Deshong*, 625 S.W.2d at 329. The evidence shows that Gamboa was inside the home for at least the 30-minute period during which Officer Smith conducted surveillance of the property before the narcotics squad executed the warrant. During that period, Officer Smith noticed three different apparent drug buys at the home. When police arrived, Gamboa emerged from the kitchen area inside the home through the back door that

led onto the enclosed patio. In the kitchen, the officers found a substantial quantity of narcotics in plain view. If the amount of narcotics accessible to the defendant is enough to be seen and measured, it is sufficient to show that the defendant knew it was a controlled substance. *See Thomas v. State*, 807 S.W.2d 786, 789 (Tex. App.—Houston [1st Dist.] 1991), *pet. dismiss'd as improvidently granted*, 840 S.W.2d 958 (Tex. Crim. App. 1992); *see also Palmer v. State*, 857 S.W.2d 898, 900–01 (Tex. App.—Houston [1st Dist.] 1993, no *pet.*).

Gamboa also had \$500 in cash in his pocket when he was arrested. He attempts to explain his possession of this large amount of cash through his girlfriend's statement that she believed he received his paycheck two days before. The trial court, however, was entitled to assess the testimony's credibility and weight, and we defer to its implicit findings concerning it in a light favorable to its revocation ruling. *See Akbar*, 190 S.W.3d at 123.

To counter the evidence of affirmative links, Gamboa points to absent links, noting that he did not carry a key to the home, no mail or property showed that he resided there, he made no attempt to flee when he saw the officers, and the State produced no DNA or other evidence linking him to any clothing or other items in the home. These absent links, however, do not weigh against the logical force derived from proof of the affirmative links that were present. *See James*, 264 S.W.3d at 219. The evidence, including that of Gamboa's extended presence in the home,

where narcotics and firearms were in plain view and while narcotic transactions occurred in the open, is legally sufficient to support the trial court's finding that Gamboa possessed the narcotics as alleged by the State.

Because proof of one ground for revocation supports the trial court's ruling, we need not consider Gamboa's challenges to the remaining grounds. We hold that the trial court did not err in revoking Gamboa's community supervision.

CONCLUSION

We affirm the judgment of the trial court.

Jane Bland
Justice

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

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