In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00490-CR

BILLY JACK COBBS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 09-03-02701-CR

MEMORANDUM OPINION

Appellant, Billy Jack Cobbs, Jr., appeals his convictions for possession of a controlled substance and possession with intent to deliver/manufacture. On appeal, Cobbs argues that the trial court erred in denying his motion to suppress evidence seized pursuant to a search warrant, the evidence is insufficient to support his convictions, and he received ineffective assistance of counsel. We affirm the judgment of the trial court.

BACKGROUND

In 2008, the Montgomery County Sheriff's Department was investigating a series of burglaries in the Crystal Springs/Serenity Woods area. Thomas Dillard became a suspect in the investigation when a victim who had been burglarized on two different occasions installed a surveillance camera and captured images of the individual breaking into his home. The Montgomery County Sheriff's Department identified the perpetrator caught on camera as Dillard and arrested him pursuant to an outstanding warrant. During a police interview, after waiving his rights, Dillard confessed to four burglaries. Officer Alan Hunter with the Montgomery County Sheriff's Department testified that Dillard stated that he traded the stolen items to Cobbs for crack cocaine. Hunter explained that Dillard showed the officers the location where he traded the stolen items for cocaine. Officers obtained a search warrant to search the house at the location provided by Dillard.

Officer Hunter was present when the search warrant was executed. No one was found in the residence when the search was conducted. Officers found items reported stolen in the burglaries, together with cocaine and evidence that cocaine was being cooked in the home. Cobbs was indicted for possession of a controlled substance and possession with intent to deliver/manufacture. The jury convicted Cobbs on both counts as charged in the indictment. After hearing additional evidence, the trial court found the enhancement paragraphs to be true and sentenced Cobbs to life imprisonment for Count I and two years of imprisonment for Count II. This appeal followed.

MOTION TO SUPPRESS

In issue one, Cobbs argues the trial court erred in denying his motion to suppress because the facts stated in the search warrant affidavit were insufficient to establish probable cause. A search warrant may not legally issue unless it is based on probable cause. U.S. Const. amend. IV; Tex. Const. art. I, § 9; Tex. Code Crim. Proc. Ann. art. 1.06 (West 2005). When reviewing a magistrate's probable cause determination to issue a warrant, we apply a "highly deferential" standard of review. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). The Texas Court of Criminal Appeals characterized the standard of review as "flexible and non-demanding[.]" *Id*. at 272. The Court explained:

> We are instructed not to analyze the [probable cause] affidavit in a hyper-technical manner. When "reviewing a magistrate's decision to issue a warrant, trial and appellate courts apply a highly deferential standard in keeping with the constitutional preference for a warrant. Thus, when an appellate court reviews an issuing magistrate's determination, that court should interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. When in doubt, we defer to all reasonable inferences that the magistrate could have made."
>
> Since the Fourth Amendment strongly prefers searches to be conducted pursuant to search warrants, the United States Supreme Court has provided incentives for law-enforcement officials to obtain warrants instead of conducting warrantless searches. One incentive is a less-strict standard for reviewing the propriety of a search conducted pursuant to a warrant. In this situation, courts must give great deference to the magistrate's probable-cause determination. Both appellate courts and trial courts alike must give great deference to a magistrate's implicit finding of probable cause.

Id. at 271-72 (quoting *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007)) (footnotes omitted).

An affidavit is sufficient to establish probable cause when the totality of the circumstances, as set forth in the affidavit, provides the magistrate with a substantial basis for concluding that probable cause exists. *Barton*, 962 S.W.2d at 135. In reviewing a magistrate's probable cause determination, the trial court is limited to the facts set forth in the four corners of the probable cause affidavit. *Id*.; *see also McLain*, 337 S.W.3d at 271. The facts set forth in the affidavit, and the reasonable inferences drawn therefrom, must justify the magistrate's determination that the object of the search is probably on the premises at the time of the warrant's issuance. *Barton*, 962 S.W.2d at 135 (citing *Cassias v. State*, 719 S.W.2d 585, 587-88 (Tex. Crim. App. 1986)); *see also McLain*, 337 S.W.3d at 272.

The search warrant in this case was based on an affidavit prepared by one of the Montgomery County Sheriff's officers who interviewed Dillard following his arrest. Cobbs filed a motion to suppress the evidence seized as a result of the search warrant's execution. The trial court did not rule on the motion prior to trial. However, at trial, Cobbs re-urged his motion to suppress the evidence secured as a result of the search warrant. The trial court overruled the motion and admitted the evidence. The paragraph of the affidavit setting forth probable cause to search the residence for cocaine stated as follows:

> During the course of investigating four burglaries in the Serenity Woods Subdivision, a location within Montgomery County, Texas[,] Defendant Thomas Dillard, Jr. was identified as a suspect. During an interview with Dillard on November 3, 2008, he confessed to burglarizing the four residences in Serenity Woods and trading property for narcotics, specifically cocaine. Defendant told Affiant that he traded an "Xbox 360" that he stole from a residence located at 341 Crystal Park Circle, Willis, Montgomery County, Texas on 11/2/2008 to a black male he identified a[s] Billy Jack Cobbs for narcotics. Dillard further stated that after each burglary, all property stolen was traded to Cobbs. According to Dillard, Cobbs lives at a residence located at 48 Golden Street in Willis, Texas. Dillard explained the most recent transaction, taking place on 11/2/2008, as follows: Dillard walked to Cobbs[']s residence with the stolen Xbox. Dillard was met in the front yard by Cobbs. Dillard showed Cobbs the stolen X-box and Cobbs agreed to trade crack cocaine for the X-box. Cobbs entered his residence and returned with the crack cocaine which he gave to Dillard for the X-box. Dillard told Affiant that he has previously traded other items for cocaine, including firearms and a computer. Affiant is aware that firearms were taken in two of the four burglaries that Dillard confessed to. Affiant is aware that Cobbs is a convicted felon.

Cobbs argues that the affidavit fails to establish the reliability or credibility of Dillard and Dillard's allegations against Cobbs were not otherwise corroborated. "The reliability of an informant is important when the information is used to justify a search warrant." *State v. Hill*, 299 S.W.3d 240, 244 (Tex. App.—Texarkana 2009, no pet.). Reliability, veracity, and the basis of an informant's knowledge are all relevant considerations in the totality of the circumstances approach to analyzing whether probable cause existed; however, independent facts to support all three factors are not required. *See id*. (citing *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); *see also Dixon v. State*, 206 S.W.3d 613, 616 (Tex. Crim. App. 2006); *Barton*, 962 S.W.2d at 135, 137-38 (concluding that informant's "basis of knowledge"

was more than sufficient to make up for any "veracity" deficiency in the probable cause affidavit). "Hearsay from [a confidential informant] may be credited by showing the informant has given reliable, credible information in the past." *Hill*, 299 S.W.3d at 244. When an affidavit contains information from a named informant, the affidavit will be sufficient if the information given is sufficiently detailed so as to suggest direct knowledge on the informant's part. *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex. Crim. App. 1995); *see also Mejia v. State*, 761 S.W.2d 35, 38 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (citing *Wilkerson v. State*, 726 S.W.2d 542, 545 (Tex. Crim. App. 1986)).

Dillard provided information based on his personal knowledge, not rumor or hearsay. Dillard told officers he traded Cobbs stolen items for cocaine on numerous occasions, including the day before the affidavit was executed. Dillard provided details of the drug transaction that occurred on November 2, 2008, and provided the address of the residence at which he obtained the cocaine. Dillard stated that he watched Cobbs enter the residence and return with cocaine, which Cobbs gave to Dillard in return for a stolen Xbox. The information provided by Dillard is sufficiently detailed to suggest direct knowledge on his part, and his credibility is reinforced by the fact that he admitted to trading the stolen items for cocaine. "An admission against penal interest, even by a first-time informant, is a factor indicating reliability." *Mejia*, 761 S.W.2d at 38; *Hackleman v. State*, 919 S.W.2d 440, 447 (Tex. App.—Austin 1996, pet. ref'd).

Moreover, Dillard told the officers he had previously traded Cobbs stolen firearms and a computer for cocaine. The affiant verified that firearms were among the items stolen in two of the four burglaries to which Dillard confessed.

In support of his argument that the trial court erred in denying his motion to suppress, Cobbs argues that the present case is similar to *State v. Wester*, 109 S.W.3d 824 (Tex. App.—Dallas 2003, no pet.). In *Wester*, the State appealed the trial court's order granting Wester's motion to suppress, in which Wester argued that the allegations contained in the affidavit were insufficient to establish probable cause. *Id.* at 825. The Court affirmed the trial court's ruling. *Id.* In that case, the police stopped Christopher Elliott for a traffic violation and found marijuana in his vehicle. *Id*. While undergoing questioning at the police station, Elliott told police that he purchased the marijuana from Wester at Wester's residence. *Id*. The police obtained a warrant for Wester's arrest and to search his residence. *Id*. In the affidavit in support of the search warrant, the affiant stated the following:

> . . . ELLIOT gave a written voluntary statement against his own penal interest admitting to being in possession of the Marijuana and other controlled substances. ELLIOTT further provided written information related [sic] that just prior to be [sic] stopped by the Patrol Officers that he had purchased the Marijuana from LANCE JEROME WESTER at WESTER'S residence described in item #1 above. ELLIOTT further related that WESTER was still in possession of a large amount of Marijuana.

Id. at 826. Because the police had already found the marijuana when Elliott made the statement acknowledging the drugs were his, the Dallas Court of Appeals questioned the

extent to which this admission lent credibility to Elliott. *Id*. at 827. Additionally, the Court found that the information contained in the affidavit was not detailed. *Id*. The Court noted that the only fact that specifically related to Wester was Elliott's statement that he had just purchased drugs from Wester. *Id*. "No other independently verifiable facts related to Wester, such as previous drug transactions, the location of the marijuana in the house, or the layout of the house, were alleged." *Id*. The court concluded that it was "not even reasonable to conclude that the detailed information [set forth in the affidavit] on the location of Wester's residence and his vehicle . . . was provided by Elliott[.]" *Id*.

The present case is distinguishable from *Wester*. Dillard provided details regarding the drug transaction that took place at Cobbs's residence. Dillard stated that he watched Cobbs enter his residence and return with cocaine. Dillard also stated that he had previously traded Cobbs stolen items, including firearms, for cocaine. The affiant stated that firearms were among the items reported stolen in two of the four burglaries to which Dillard confessed. Additionally, it is reasonable here to conclude that the address of Cobbs's residence, as set forth in the probable cause affidavit, was provided by Dillard. Dillard provided the affiant with more reliable details than the informant in *Wester*. Moreover, Dillard was not under arrest for possession of cocaine when he admitted to trading the stolen items for cocaine. In addition, he provided officers with

information regarding the stolen items that, if true, would further incriminate him in the burglaries.

Cobbs further argues that there is no nexus between the cocaine Dillard purchased and the residence that was searched. An affidavit that states that an informant purchased contraband at a stated residence gives rise to an inference that contraband was inside the residence and may establish probable cause to support a warrant. *See, e.g., Bodin v. State*, 782 S.W.2d 258, 259-60 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 807 S.W.2d 313 (Tex. Crim. App. 1991) (holding that search warrant based on informant's controlled buy provided reasonable basis to infer that additional drugs would be found on the premises).

When in doubt, we defer to all reasonable inferences the magistrate could have made. *McLain*, 337 S.W.3d at 271. Because Dillard observed Cobbs go inside the residence and come out of the residence with the cocaine, it is reasonable to infer that the cocaine came from inside the residence. It is also reasonable to infer that each of the other transactions in which Dillard traded stolen items for cocaine occurred at Cobbs's residence, and that more cocaine would be found at his residence. Considering the totality of the circumstances and permitting all reasonable inferences, we hold the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant to search Cobbs's residence. *See Gates*, 462 U.S. at 238-39. Based on the

applicable standard of review, we find the trial court did not abuse its discretion in denying Cobbs's motion to suppress. We overrule issue one.

SUFFICIENCY OF EVIDENCE

In issue two, Cobbs argues the evidence was insufficient to support his convictions. In determining whether there is sufficient evidence to support the jury's verdict, we must review all the evidence in the light most favorable to the jury's verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010).

Cobbs was convicted of possession of a controlled substance and possession with intent to deliver/manufacture. A person commits the offense of possession of a controlled substance "if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1[.]" Tex. Health & Safety Code Ann. § 481.115(a) (West 2010). A person commits the offense of possession of a controlled substance with intent to deliver or manufacture if the person "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1." *Id.* § 481.112(a). "To prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband." *Poindexter v. State*, 153

S.W.3d 402, 405 (Tex. Crim. App. 2005); *see also* Tex. Health & Safety Code Ann. § 481.002(38) (West 2010) (defining "possession" as "actual care, custody, control, or management"). "It is not enough that [a] defendant is present at the scene of an offense or even that he has knowledge of [an] offense; he must exercise, either solely or jointly, some dominion or control over the contraband." *Stubblefield v. State*, 79 S.W.3d 171, 173 (Tex. App.—Texarkana 2002, pet. ref'd).

Whether evidence of possession is direct or circumstantial, the evidence "'must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous.'" *Poindexter*, 153 S.W.3d at 406 (quoting *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995)). This is referred to as the "'affirmative links' rule." *Id.* Under the affirmative links rule, "'[w]hen 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.'" *Id.* (quoting *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981)). The facts and circumstances linking the defendant to the contraband must be such that "it can be concluded that the accused had knowledge of the contraband and exercised control over it." *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *see also Johnson v. State*, 658 S.W.2d 623, 627 (Tex. Crim.

App. 1983), *overruled on other grounds by Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997).

It is undisputed that Cobbs was not at the house when the search warrant was executed. Additionally, no evidence was presented regarding when and where he was arrested. Cobbs argues that the State's evidence of affirmative links was insufficient to connect him with the contraband found in the house so that a rational trier of fact could find the element of possession beyond a reasonable doubt. In his brief, Cobbs analyzes a list of non-exhaustive factors courts have relied on in determining whether the evidence is sufficient to affirmatively link the defendant to contraband. Among the factors courts have relied on in linking contraband to a defendant are:

> (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 narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or 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 were 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 v. State, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006); *see also Roberson*, 80 S.W.3d at 735 n.2; *Stubblefield*, 79 S.W.3d at 174. "However, the *affirmative link* terminology does not constitute a unique legal rule, but is only a shorthand way of

expressing what must be proven to establish that drugs were possessed knowingly or intentionally." *Roberson*, 80 S.W.3d at 735. Whether sufficient facts and circumstances exist to affirmatively link a defendant to illegal contraband must be determined on a case-by-case basis. *Id*. at 736. A factor that contributes to sufficiency in one case may be of little or no value in determining sufficiency in another case. *Id*. Therefore, we must examine all factors possibly linking a defendant to the illegal contraband. *See id*.

Evidence was presented at trial that Dillard told arresting officers that he traded the items he stole in the burglaries to Cobbs for cocaine. Officer Hunter testified that Dillard physically pointed out the residence at which the transactions took place. Dillard testified that he had never been inside Cobbs's house, but he had purchased drugs from Cobbs on the property on more than one occasion. Dillard further testified that he did not remember talking to detectives about Cobbs while being investigated for the burglaries because he was high on crack cocaine during the interview. However, he acknowledged that he had previously testified in court that he traded the items he stole in the burglaries to Cobbs for cocaine.

Officer Hunter testified that while the search was being conducted, officers spoke with Cobbs's mother outside the residence. According to Hunter, a lady came out of an adjacent house, stated that her son lived at the house that was being searched, and asked the police officers what they were doing. Hunter told her they were executing a search warrant and were looking for Billy Jack Cobbs. The woman responded, "'[h]e is not

there.'" There was a car located in front of the house but Hunter could not recall if it was registered to Cobbs. Officer Don Likens, with the Montgomery County Sheriff's Office, testified that he was involved in the execution of the search warrant. Likens stated the officers found, at the front entrance of the house, a vanilla extract bottle containing traces of Phencyclidine or PCP. The officers also recovered "38.68" grams of cocaine from inside a wall of the residence. Likens testified that they were unable to obtain fingerprints from any of the other items collected during the search. However, evidence was presented that the following documents were found inside the residence: (1) an undated letter from the Texas Department of Public Safety addressed to Billy Jack Cobbs, Jr., at 48 Golden Street, Willis, Texas, (2) a letter dated October 30, 2007, from the Social Security Administration addressed to Billy Jack Cobbs at 48 Golden Street, Willis, Texas, and (3) a receipt dated March 2, 2005, "Received from Billy Cobbs[.]"

Cobbs's mother, Dianna Cobbs, also testified at trial. She testified that she lives at 48 Golden Street,[1] and that she had lived there for thirty years. According to Diana, the house detectives searched was actually 50 Golden Street, not 48 Golden Street. Diana testified that Cobbs was not living there when the search warrant was executed. According to Diana, Cobbs was living with his grandmother. Diana explained that the house that was searched had been her mother's house, her mother had passed away in 2000, and nobody was living there on November 3, 2008, when the search warrant was

[1] Diana testified that 48 Golden Street is now 414 Golden Street, and the City changed the address.

executed. Diana stated that the house was used for storage. Diana testified that her sister was storing things in the house and that her daughter had lived there for a while. According to Diana, Cobbs did not have any property in the house. Diana acknowledged, however, that the letters and receipt found in the house were addressed to Cobbs. Diana explained that the back door of the house was not kept locked so "anybody who wanted to go in there could[.]" She admitted she was not aware of what particular items were stored in the house.

We note that the list of factors generally relied upon to link a defendant to contraband is nonexclusive. Here the jury heard evidence of additional facts and circumstances that linked Cobbs to the contraband. It is undisputed that Cobbs had access to the residence. Officers who were present when the warrant was executed testified that Cobbs's mother stated that her son lived at the residence, and when told that officers were looking for Cobbs, she stated he was not there. Cobbs's mother further testified at trial that the house was ordinarily not kept locked and that anyone could enter. Two pieces of mail and one receipt addressed to Cobbs were located in the residence. Finally, testimony was presented that Dillard had engaged in multiple cocaine transactions on the property with Cobbs, some of which occurred shortly before the execution of the search warrant. In determining whether the evidence is sufficient to link the defendant to the contraband, the jury is the exclusive judge of the credibility of the

witnesses and the weight to be given their testimony. *Poindexter*, 153 S.W.3d at 406. We conclude these facts are sufficient to affirmatively link Cobbs to the contraband.

INEFFECTIVE ASSISTANCE

In his third issue, Cobbs argues that he received ineffective assistance of counsel because his trial counsel admitted the affidavit for search warrant into evidence. Cobbs contends this amounts to ineffective assistance because the search warrant contained damaging information about him that the jury was allowed to consider, specifically that he was a convicted felon.

To prevail on a claim for ineffective assistance of counsel, Cobbs must show (1) counsel's representation fell below an objective standard of reasonableness, and (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, 688, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). "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." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, Cobbs must prove there was no plausible professional reason for admitting the search warrant affidavit into evidence. *See id*. at 836.

"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). "Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategical decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone*, 77 S.W.3d at 833. "[R]arely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation: '[i]n the majority of cases, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.'" *Id*. (quoting *Thompson*, 9 S.W.3d at 813-14).

Defense counsel questioned one of the State's witnesses regarding the items listed on the return attached to the search warrant. The return listed a wage and earning check payable to Elsick Cobbs and an inmate trust fund check to Desmond Cobbs among the items found in the residence. Since the witness was being asked to read from the return, defense counsel stated he would like to admit the document into evidence. The return was attached to the search warrant, and the entire document was admitted as Defense Exhibit No. 1. Cobbs did not develop a record explaining trial counsel's conduct in offering the search warrant into evidence. *See Thompson*, 9 S.W.3d at 813-14. We conclude it was reasonable trial strategy to discredit the State's evidence linking Cobbs to the contraband by showing that other people resided at the residence. In the absence of a record that affirmatively demonstrates counsel's alleged ineffectiveness, we cannot find

counsel rendered ineffective assistance. *See id*. We overrule Cobbs's third issue. Having overruled all of Cobbs's issues on appeal, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on July 8, 2011
Opinion Delivered August 24, 2011
Do not publish

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