In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00236-CR

MICHAEL ANTHONY PENA, AKA
MIKE ANTHONY PENA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CR-14D-047; Honorable Roland Saul, Presiding

May 4, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, Michael Anthony Pena, was convicted following a jury trial of knowingly possessing, with intent to deliver, a controlled substance (methamphetamine) in an amount of four grams or more but less than 200 grams, enhanced[1] and was

[1] TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2010); TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2016). As enhanced, the offense was punishable by imprisonment for life, or for any term of not more than 99 years or less than 15 years. In addition to imprisonment, the offense was also punishable by a fine not to exceed $10,000.

sentenced to sixty years confinement. In a single issue, Appellant asserts the evidence that he possessed methamphetamine was insufficient to support his conviction because the State failed to establish any affirmative links between him and the methamphetamine found on the ground when he was apprehended. Because there is direct and circumstantial evidence that he was in possession of the methamphetamine before he was apprehended, we affirm.

BACKGROUND

In 2014, an indictment issued alleging that, on August 11, 2013, Appellant knowingly possessed, with intent to deliver, a controlled substance (methamphetamine) in an amount of four grams or more but less than 200 grams. The indictment also alleged a prior felony conviction. Following a two-day jury trial, Appellant was convicted and, after pleading true to the enhancement, was sentenced to sixty years confinement. This appeal followed.

STANDARD OF REVIEW

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 33 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under that standard, in assessing the sufficiency of the evidence to support a criminal conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S.

at 319; *Brooks*, 323 S.W.3d at 912. This standard gives full play to the responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319. *See Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

Further, the trier of fact is the sole judge of the weight of the evidence and credibility of the witnesses; TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010), and we may not re-evaluate the weight and credibility determinations made by the fact finder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). This standard applies equally to circumstantial and direct evidence. *Laster v. State*, 275 S.W.3d 512, 517-18 (Tex. Crim. App. 2009). Thus, we must resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

APPLICABLE LAW

To support the verdict rendered in this case, the State was required to prove that Appellant knowingly possessed, with intent to deliver, a controlled substance, to-wit: methamphetamine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (West 2010). To prove *possession*, the State was required to show that Appellant (1) exercised "actual care, custody, control, or management" of the substance and (2) knew the matter possessed was contraband. *See id. See also* TEX. PENAL CODE ANN. § 1.07(39) (West Supp. 2016); *Poindexter v. State*, 153 S.W.3d 402, 405-06 (Tex. Crim. App. 2005).

There are numerous nonexclusive factors that, under the unique circumstances of each case, have been recognized as contributing to an evaluation of whether an

accused "possesses" or is linked to the contraband. *See Triplett v. State*, 292 S.W.3d 205, 208 (Tex. App.—Amarillo 2009, pet. ref'd).[2] Those links include, but are not limited to: (1) the defendant's presence when a search is conducted; (2) whether the contraband is in plain view; (3) the defendant's proximity to and accessibility of the contraband; (4) whether the defendant was under the influence of contraband when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made any incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made any 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*, 202 S.W.3d at 162 n.12. *See Triplett*, 292 S.W.3d at 208; *Figueroa v. State*, 250 S.W.3d 490, 500 (Tex. App.—Austin 2008, pet. ref'd) (citing *Brown v. State*, 911 S.W.2d 744, 745 (Tex. Crim. App. 1995)), *cert. denied*, 555 U.S. 1185, 129 S. Ct. 1340, 173 L. Ed. 2d 609 (2009).

These factors, however, are simply that—factors which may circumstantially establish the sufficiency of evidence offered to prove a knowing "possession." *Evans*, 202 S.W.3d at 162 n.12 ("They are not a litmus test."). Furthermore, there is no set

[2] The Court of Criminal Appeals has recognized that the term "affirmative" adds nothing to the plain meaning of "link" and now uses only the word "link" to evaluate evidence of possession. *Evans v. State*, 202 S.W.3d 158, 161 n.9 (Tex. Crim. App. 2006). A link is a fact or circumstance which generates a reasonable inference that the defendant knew of the contraband's existence and exercised control over it. *Lair v. State*, 265 S.W.3d 580, 600 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). The evidence demonstrating such links may be direct or circumstantial. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

formula that an appellate court can use to determine if there are sufficient links to support an inference of knowing possession of drugs. *Taylor v. State*, 106 S.W.3d 827, 831 (Tex. App.—Dallas 2003, no pet.). Each case must be examined according to its own facts on a case-by-case basis; *Roberson v. State*, 80 S.W.3d 730, 736 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd), and the number of links is not as important as the combined logical force of all the evidence tending to link the accused to the contraband. *Evans,* 202 S.W.3d at 162, 166.

ANALYSIS

Appellant asserts the State failed to establish that he "possessed" the methamphetamine found on the ground when he was apprehended because (1) methamphetamine was not found on Appellant's person, (2) although one officer testified he found a glass pipe and methamphetamine near to where Appellant was apprehended, the officer was not present when Appellant was apprehended, (3) only one officer testified Appellant threw the pipe and methamphetamine to the ground prior to his apprehension, (4) there was no evidence Appellant attempted to sell drugs to anyone, and (5) there was no evidence Appellant was under the influence of drugs when he was apprehended.

Here, the State offered both direct and circumstantial evidence that Appellant possessed methamphetamine with the intent to deliver. Officer Juan Bravo testified Appellant fled from a traffic stop. Officer Bravo chased Appellant to a residential backyard where he observed Appellant remove two objects from his pocket and throw them nearby on the ground. One item was later identified as a glass pipe used to ingest drugs and the other, a large plastic baggie containing multiple smaller baggies that were

"cornered."[3] Both the pipe and the large plastic baggie were in the presence of law enforcement officers from the moment they were dropped until they were booked into evidence. Although Officer Matthew Garza did not observe Appellant drop the items, he corroborated their presence on the ground from the moment he arrived in the backyard only minutes after receiving a call over his radio. Officer Bravo also testified the two or three people in the adjacent yard were merely observers and were not having a party. A forensic scientist testified that four of the smaller baggies weighed 4.57 grams and the substance was methamphetamine. Appellant admitted to the presence of a baggie containing marijuana found in another pocket of his jeans by Officer Garza. Thus, at least six of fourteen indicia indicating Appellant was linked to the methamphetamine and glass pipe found on the ground when he was apprehended were established by the State—(2), (3), (5), (7), (10), and (14). *See Evans*, 202 S.W.3d at 162 n.12; *Triplett*, 292 S.W.3d at 208.

In his defense, Appellant testified he did not have any methamphetamine on him when he fled the traffic stop, did not know the methamphetamine was in the backyard, and did not have any knowledge of the glass pipe. He further speculated that the contraband may have come from a party in the adjacent backyard that was ongoing when he was apprehended. Appellant also testified that he did not dispute that the substance in the small plastic baggies was methamphetamine and admitted that he had seen methamphetamine packaged in the little corner baggies and that the

[3] Chief Deputy Damon Parkhurst testified he was involved in approximately 300 drug cases over a period of thirteen years. He also testified that this type of packaging was used by drug dealers who break a larger portion of methamphetamine down into smaller portions to sell. By using the "cornering" method, the dealer gets to use a single plastic baggie twice by tearing it in half and then tying off the methamphetamine in a corner of the bag. The single larger baggie is also easier to dispose of than multiple smaller baggies. He opined that the presence of the smaller baggies were indicative that the methamphetamine recovered in the backyard was not for personal use but for resale.

methamphetamine recovered by the officers in the backyard was packaged for resale. Appellant simply claimed that the methamphetamine in question was not his.

The trier of fact is the sole judge of the weight of the evidence and credibility of the witnesses; *Isassi*, 330 S.W.3d at 638, and we may not re-evaluate the weight and credibility determinations made by the fact finder. *Dewberry*, 4 S.W.3d at 740. We must also resolve all inconsistencies between the officers' testimonies and Appellant's in favor of the verdict. *Curry*, 30 S.W.3d at 406. In doing so, we conclude that a rational trier of fact could have found sufficient links between Appellant and the methamphetamine found at the time of his apprehension to support the conviction. *See Floyd v. State*, 494 S.W.2d at 828, 829-30 (Tex. Crim. App. 1973). Appellant's sole issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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