In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-16-00137-CR
07-16-00138-CR

DAVID FRANKLIN WEST, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 69th District Court
Dallam County, Texas
Trial Court No. 4471-Counts I & II, Honorable Ron Enns, Presiding

April 18, 2018

MEMORANDUM OPINION

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

This appeal involves David Franklin West's two convictions for possessing controlled substances.[1] The substances were tetrahydrocannabinol (THC) and methamphetamine. Though both were the subject of independent notices of appeal and assigned separate appellate cause numbers, appellant's issues involve only his conviction for possessing the THC. The three issues raised which attack that conviction

[1] Evidence indicates that appellant also went by the name David "Purple" West.

are 1) "[t]he evidence is insufficient to find that Appellant intentionally and knowingly possessed" THC; 2) "Appellant's possession of THC was not a violation of the statute cited"; and 3) "Appellant's possession of THC was not in an usable amount or pharmacologically active state." We affirm the judgments.

The first issue we address is number three. Through it, appellant posits that the THC he possessed had to be of a usable amount or of a "pharmacologically active state" before he could be convicted of possessing it. His argument is based upon the wording of § 481.121(a) of the Texas Health and Safety Code and the federal government's purported treatment of THC possession. Under § 481.121(a), the Texas legislature criminalized the possession of "a usable quantity of marijuana." TEX. HEALTH & SAFETY CODE ANN. § 481.121(a) (West 2017) (stating that "a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana"). However, the statute under which appellant was convicted states that "a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 2." *Id.* § 481.116(a). As appellant did in his brief, we too note the absence in § 481.116(a) of any reference to "usable quantity." And, rather than violate the constitutional ideal of separation of powers by attempting to *sua sponte* rewrite legislation, we opt not to include the phrase of "usable quantity" into § 481.116(a). *See Bond Restoration, Inc. v. Ready Cable, Inc.* 462 S.W.3d 597, 601 (Tex. App.—Amarillo 2015, pet. denied) (stating that we lack the authority to rewrite a statute to include matter omitted by the legislature).

As for how the federal government may treat the possession of THC, we know of no authority requiring either the Texas legislature to enact or the Texas judiciary to

interpret Texas criminal statutes in a manner agreeable to the federal government. Nor did appellant cite us to such authority. Moreover, appellant was prosecuted for violating the criminal laws of Texas, not of the United States of America. So, until directed otherwise by higher authority, we opt to maintain our independence from the Washington D.C. establishment and again forgo the invitation to rewrite Texas statute.

Issue three is overruled.

The next issue under consideration is two. As previously said, appellant used it to contend that his "possession of THC was not a violation of the statute cited." Why it was not a violation of the statute cited is rather unclear, though. He provided us with no independent argument developing that particular point. Neither did he separate it from nor identify it within the general, single narrative encompassing all his issues. As we have said before, an appellant has the obligation to provide us with a clear and concise argument for the contentions made with appropriate citations to authorities and the record. *Lummus v. State*, No. 07-15-00120-CR, 2015 Tex. App. LEXIS 10741, at *9 (Tex. App.—Amarillo Oct. 19, 2015, no pet.) (mem. op., not designated for publication). Encompassed within that obligation "is the task of placing flesh on" skeletal propositions by explaining or discussing why his argument has substance. *Id.* Failing to do that permits us to overrule the argument due to inadequate briefing. *Id.* Yet, it may be that through the issue he again suggests that we adopt the federal approach to hemp and/or THC possession here. If so, then we reiterate what we said earlier. Appellant was tried and convicted for violating the laws of Texas, not the United States. And, we lack the prerogative to change our State's laws *sua sponte*.

Issue two is overruled on both of the foregoing grounds.

The final issue lays before us the question of whether appellant intentionally or knowingly possessed the THC in question. The controlled substance was found within bottles of lotion or skin oils he had. Furthermore, their labels mentioned that the contents included "hemp" in some form or another. But because they said nothing of THC, he believes that he did not knowingly possess the contraband.

The pertinent standard of review is explained in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010). We refer the parties to that opinion for its discussion and forgo reiterating it here. Instead, we reiterate the substance of § 481.116 of the Health and Safety Code. It provides that "a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 2, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice." TEX. HEALTH & SAFETY CODE ANN. § 481.116(a). THC is named within Penalty Group 2. *Id.* § 481.103(1) (specifying "Tetrahydrocannabinols, other than marihuana, and synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity").

To obtain a conviction for possessing a controlled substance, the State must prove that the accused not only exercised control, management, or care over the substance but also knew the substance he possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). And, irrespective of whether the evidence proffered by the State to satisfy its burden is direct or circumstantial, that evidence must nonetheless "establish, to the requisite level of confidence, that the accused's connection with the drug

was more than just fortuitous." *Id*. at 405-06 (quoting *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995)).

The record contains evidence that appellant ran at least three marijuana dispensaries before leaving Washington State for Texas. Apparently, he closed the dispensaries and packed his U-haul with miscellaneous items before heading to Texas. Those miscellaneous items included both dried marijuana and potted marijuana plants,[2] drug paraphernalia such as bongs, numerous bottles of lotion or oils, and methamphetamine.

The record also illustrates the following. Appellant viewed himself as an "expert" on the subject of cannabis and its many medicinal uses. Furthermore, the bottles of lotions or oils he possessed carried pictures or outlines of marijuana leaves on them, and he knew their contents included hemp. Hemp is part of the marijuana plant, while THC is an active ingredient of marijuana, according to other testimony including that from the chemist who analyzed the substances at issue here. Despite the presence of hemp within the lotions, appellant discounted the "THC value" found in hemp. Nevertheless, he admitted that the "medicinal value of the oils itself[,] from the cannabinoids[,] is still there."

While a jury is charged with considering all the facts and any reasonable inferences from them, it "need not leave its common sense at the door when determining whether a person is guilty." *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014). Much like how a picture of a skull and crossbones on a bottle's label would warn an individual that the contents contained a poison, it is reasonable to infer that the presence of a marijuana leaf on a bottle would alert the possessor of the potential for marijuana and its

[2] Excuse the pun.

compounds to be contained therein. This coupled with appellant's avowed expertise on marijuana and the chemist's testimony provide some evidence permitting a rational jury to reasonably infer, beyond reasonable doubt, that appellant intentionally and knowingly possessed THC. In other words, a jury had sufficient basis to conclude that appellant's encounter with THC was more than fortuitous.

Issue one is overruled.

Having overruled each issue, we affirm the final judgments.

Per Curiam

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Campbell, J., concurs in the result.