In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00172-CR

JERMAINE HENDRIX, APPELLANT

V.

THE STATE OF TEXAS

On Appeal from the 110th District Court
Motley County, Texas,
Trial Court No. 2159, Honorable Cecil Puryear, Presiding

August 29, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant, Jermaine Hendrix, was convicted by a jury of possession with intent to deliver a controlled substance, methamphetamine, in an amount of four grams or more but less than two hundred grams.[1] He was sentenced to sixty years of confinement and fined $10,000. On appeal, he asserts (1) the trial court abused its discretion by denying his motion to suppress a search warrant and (2) the State's evidence was insufficient to support the conviction. We affirm the trial court's judgment.

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (a first-degree felony).

Background

In August 2019, a Motley County, Texas, grand jury returned an indictment alleging that on or about May 13, 2019, Appellant possessed with intent to deliver a controlled substance, methamphetamine, in an amount of four grams or more but less than 200 grams. Appellant filed a motion to suppress evidence obtained pursuant to a search warrant that was executed at a residence at 821 Hackberry Street in Motley, County. After a hearing, the trial court denied Appellant's motion.

Testimony about the May 12, 2019 search warrant reveals the following: Motley County Sheriff Robert Fisk averred by affidavit that he received a telephone call from a "concerned citizen" that a person named Matthew Mount used a messenger app on Facebook to contact Appellant to purchase one or more controlled substances. The caller claimed to know Mount and Appellant. The caller allegedly told Fisk that Mount had gone to Appellant's residence to obtain methamphetamine on numerous occasions. The caller claimed to have taken photos of the text message exchange between Mount and Appellant. Fisk's affidavit states that Appellant "allegedly holds his supply of illegal drugs at his residence for distribution and storage," and opines that the message exchange and information supplied by the caller "indicate[s] an ongoing, continuing narcotics operation." Chief Deputy Christopher Gist was directed to photograph the caller's images of the alleged text exchange; the photos were attached to Fisk's affidavit in support of the search warrant.

At trial, Deputy Gist testified that on May 13, 2019, he and other officers executed a search warrant at a residence at 821 Hackberry Street in Matador, which is in Motley County. After determining no one was home, Deputy Gist placed multiple, unanswered calls to Appellant and left messages intended to entice him to come to his residence.

When Appellant did not respond, the officers entered the residence by force. The home had working utilities and appeared to be occupied. Next to a recliner in the living room Deputy Gist discovered a black zipper bag containing a plastic baggie. The baggie contained a white crystalline substance that appeared to be methamphetamine. When the State moved for admission of Exhibit 1, a photo of the black zipper bag that partially revealed the baggie and crystalline substance, Appellant's counsel replied, "No objection, Your Honor."[2] Gist further testified that a field test revealed this substance to be positive for narcotics.

Sheriff Fisk testified that although Appellant would occasionally stay with his girlfriend, Appellant was the sole occupant of the residence; Appellant's car was parked outside when the warrant was executed. According to Fisk, officers executing the search warrant discovered a package addressed to Appellant and Appellant's driver's license. Photographs of these items were admitted into evidence without objection. Sheriff Fisk also testified that during the search, they discovered marijuana, three glass pipes used to ingest methamphetamine, a number of small plastic baggies commonly used to distribute drugs, a digital scale commonly used to measure a drug's weight in grams, and the black zipper bag suspected of containing methamphetamine. Photographs of the glass pipes, characterized as "meth pipes," were admitted into evidence with no objection from Appellant's counsel. The State also moved for admission into evidence Exhibit 15, containing the suspected narcotics found at Appellant's residence (also contained in the photo admitted as Exhibit 1); Appellant's counsel again replied he had "No objection" to its admission into evidence.

[2] As described further by DPS Special Agent Adam Moseley, the photograph also showed a brillo pad, small torch, and mail directed to the Appellant.

Nina Salazar, a forensic chemist with NMS Labs, testified she performed a gas spectrometry test on the substance that had been admitted into evidence as Exhibit 15. She testified without objection that the substance contained methamphetamine. Ms. Salazar testified that the substance weighed 71.25 grams.

DPS Special Agent Adam Moseley also testified that he participated in the search of Appellant's residence. Agent Moseley testified without objection that Exhibit 1 was a photograph of a small baggie containing methamphetamine, a small torch commonly used to heat methamphetamine, and a piece of mail with the Appellant's name. He also identified and photographed a Brillo pad commonly used to evenly distribute heat for a glass pipe. Moseley opined that possession of a few ounces of drugs, less than two ounces, could be consistent with personal use, but possession of 70+ grams of methamphetamine generally would be packaged for sale. During cross-examination, Agent Moseley agreed with Appellant's counsel's characterization that "what you had here is 70 grams of methamphetamine anywhere from your estimate, you know, [$]30 to $70; is that fair to say?"

After being admonished, Appellant took the stand in his own defense. Appellant testified he was not living at the house on Hackberry Street months before or on the day the search warrant was executed.[3] Appellant denied possessing the methamphetamine recovered at the residence and denied an intent to deliver the substance. Appellant also denied possessing the digital scale.

[3] He later acknowledged he had last been in the home four or five days before the search warrant was executed. Appellant maintained that another person had lived at the residence a portion of the time.

Appellant acknowledged receiving ten calls from the deputies the morning of the search but did not listen to the messages until after he awakened. After receiving the messages, he remained in Matador for a week before leaving to stay at a hotel in Amarillo. Appellant admitted he "did run," but says it was because "[s]omebody set me up," not because the methamphetamine had been discovered. When asked about the text message exchange that led to the origination of the search warrant, Appellant said he was exchanging marijuana, not methamphetamine.

During cross-examination of Appellant, two recordings of telephone conversations occurring near the time the search warrant was being executed were admitted into evidence without objection. In a conversation between Appellant and his girlfriend, the two discussed that law enforcement was still at Appellant's residence and looking for him. They discussed Appellant's need to "get out of here," and being gone for three years: "it disappears in three years."[4]

During another recorded call during this same period, Appellant learns from another person that "they found the meth and the . . . weed." Appellant said he thought he had everything put up and repeats the need to get away. Appellant acknowledged he was talking about hiding from the police.

Two other recorded telephone conversations were also admitted into evidence without objection. Appellant recognizes his voice during both conversations and admits one conversation involved Appellant "selling somebody illegal narcotics."

The jury found Appellant guilty of possession with intent to deliver a controlled substance, methamphetamine, in an amount of four grams or more but less than two

[4] All felonies other than those listed in article 12.01 carry a three-year limitations period. TEX. CODE CRIM. PROC. ANN. art. 12.01(8).

hundred grams and sentenced Appellant to sixty years of confinement, with a fine of $10,000.

Issue One

Appellant asserts the State lacked probable cause for its search warrant because by the time the search was conducted, its information was stale. The State asserts that Appellant waived this issue because the proceeds of the search were admitted into evidence without objection. We agree with the State. *See Stairhime v. State*, 463 S.W.3d 902 (Tex. Crim. App. 2015); *Kershaw v. State*, No. 07-17-00282-CR, 2018 Tex. App. LEXIS 5819, at *3–6 (Tex. App.—Amarillo July 26, 2018, no pet.) (mem. op., not designated for publication).

Though a trial court's denial of a motion to suppress ordinarily preserves a complaint for review, the situation may change when the complainant states, at trial, that he has no objection to the evidence. *Kershaw*, 2018 Tex. App. LEXIS 5819 at *2–3. "The utterance may result in the abandonment of any complaint regarding the propriety of the evidence." *Id.* at *3. A test articulated by the Texas Court of Criminal Appeals in *Stairhime v. State*, 463 S.W.3d 902 (Tex. Crim. App. 2015) shows how this Court should assess whether objection was waived: we first ask whether "the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his 'no objection' statement to constitute abandonment of a claim of error that he had earlier preserved for appeal." *Stairhime,* 463 S.W.3d at 906. If, after applying the test, it remains ambiguous whether abandonment was intended, then we must resolve the ambiguity in favor of finding waiver. *Id.*

Here, the trial record reflects that Appellant, through his counsel, indicated he had "no objection" to the admission of the fruits of the search, including the bag containing the substance itself and photographs of the narcotics recovered at his residence. Appellant never qualifies his prior objections to the search or his pretrial motion to suppress. *Kershaw*, 2018 Tex. App. LEXIS 5819, at *3–4. Appellant also withheld a request per article 38.23 of the Texas Code of Criminal Procedure, for an instruction potentially allowing the jury to determine whether to consider the evidence obtained in execution of the search warrant. *Id*. at *4–5 (collected cases cited therein). Finally, Appellant's testimony indicates he was not contesting the legality of the search but asserting that the drugs were placed in the residence by some third party to set him up.

Under these circumstances, we hold that Appellant unambiguously communicated his intent to abandon the complaint about the search warrant. *See Id.* at *5. We therefore overrule his first issue.

Issue Two

Appellant next asserts the State's evidence at trial was insufficient for the jury to convict him of possession of methamphetamine with an intent to deliver. In support, he relies primarily on his testimony that (1) at the time of the search, a third party was living on the property and had access to the residence; (2) he was living at his girlfriend's house; (3) denies knowledge of methamphetamine in his home; (4) denies possessing the drugs found in his residence and had no intent to deliver; (5) denies putting the methamphetamine in his residence; and (6) denies owning the glass pipes, plastic baggies, and digital scales recovered from the residence.

In assessing the legal sufficiency of the evidence to support a criminal conviction, reviewing courts must consider the evidence in a light most favorable to the jury's verdict. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Courts must determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 244 (Tex. Crim. App. 2019). Each fact need not point directly and independently to the guilt of a defendant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*,443 U.S. at 318–19). Reviewing courts must give deference to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 318–19. Moreover, a sufficiency review does not rest on how the jury was instructed, but on whether the evidence supports the elements of the charged crime. *Ramjattansingh v. State*, 548 S.W.3d 540, 546–47 (Tex. Crim. App. 2018).

To establish possession of a controlled substance with intent to deliver, the State had to prove Appellant knowingly possessed, with intent to deliver, a controlled substance in an amount greater than four grams but less than 200 grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d). Possession of a controlled substance is defined as having actual care, custody, control, or management over the controlled substance. *Id.* at § 481.002(38). "[P]resence of proximity, when combined with other evidence, either direct or circumstantial . . . may well be sufficient to establish the element beyond a reasonable doubt." *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006). The ultimate inquiry, however, is whether, "[b]ased on the combined and cumulative force of

the evidence and any reasonable inference therefrom," a jury was rationally justified in finding guilt beyond a reasonable doubt." *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016).

Possession with intent to deliver contraband may be proven by circumstantial evidence including evidence that the accused possessed the contraband and the quantity of the drugs possessed. *Moreno v. State*, 195 S.W.3d 321, 325 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). An oral expression of intent by the defendant is not required. *Id.* at 326. Instead, intent to deliver contraband can be inferred from the acts, words, and conduct of the defendant. *Id.* Factors a reviewing court may consider in determining intent to deliver include: (1) the nature of the location at which the defendant was arrested; (2) the quantity of the contraband in the defendant's possession; (3) the manner of the packaging of the contraband; (4) the presence of or lack of narcotics paraphernalia for either use or sale; (5) large amounts of cash; or (6) the defendant's status as a narcotics user. *Id*. at 325.

Here, the State produced evidence that law enforcement officers obtained a search warrant for Appellant's residence based on text messages between Appellant and a third-party describing drug sales occurring at the residence. Appellant agreed at trial to having at least two conversations in which he was exchanging or selling illegal narcotics. Officers executing the search warrant found a black, zipper bag in Appellant's living room confirmed to contain more than 70 grams of methamphetamine—a quantity generally packaged for sale to others. Marijuana was also found. The jury also heard without objection of digital scales, methamphetamine pipes, and plastic baggies at Appellant's residence. A package addressed to Appellant was found at his residence, and his vehicle was parked outside. Appellant admitted that while officers were executing the search

warrant, he was contemplating fleeing from Matador for three years; he eventually fled to Amarillo. He acknowledged saying he needed to hide from the police after he learned officers had found methamphetamine at his home.

The jury was free to find that Appellant's denials lacked credibility in light of this evidence. We therefore conclude a rational trier of fact could have found beyond a reasonable doubt that Appellant possessed methamphetamine with the intent to deliver it to others. Accordingly, we overrule Appellant's second issue.

Conclusion

The trial court's judgment is affirmed.

Lawrence M. Doss
Justice

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