In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-10-00082-CR

JONATHAN BERNARD MORGAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 4th Judicial District Court
Rusk County, Texas
Trial Court No. CR09-136

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Already a convicted felon, Jonathan Bernard Morgan was driving a rented truck when he was stopped by Tatum police officer David Nix for speeding. The subsequent consensual search of the vehicle turned up a pistol in the glove compartment, Morgan admitted his prior felony conviction, and he was arrested. From his resulting conviction for unlawful possession of a firearm[1] and twelve-year sentence, Morgan appeals on the bases that the evidence is legally and factually insufficient to show he possessed the weapon and that the search was improper because his detention was unduly prolonged. Because (1) the evidence was legally and factually sufficient and (2) the detention was not unduly prolonged, we affirm the judgment of the trial court.

(1) The Evidence Was Legally and Factually Sufficient

In two of his four points of error, Morgan claims the evidence was legally and factually insufficient to prove he intentionally or knowingly possessed the pistol in the truck's glove compartment.

We review the legal and factual sufficiency of the evidence supporting a conviction under well-established standards. In conducting a legal sufficiency review, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003). We must give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable

[1]*See* TEX. PENAL CODE ANN. § 46.04 (Vernon Supp. 2009).

inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). We are not required to determine whether we believe that the evidence at trial established guilt beyond a reasonable doubt; rather, when faced with conflicting evidence, we must presume that the trier of fact resolved any such conflict in favor of the prosecution, and we must defer to that resolution. *State v. Turro*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

In conducting a factual sufficiency review, we consider the evidence in a neutral light. *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006). The verdict will be set aside only if (1) it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust, or (2) it is against the great weight and preponderance of the evidence. *Id*. at 415 (citing *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000)).

Both legal and factual sufficiency are measured by the elements of the offense as defined by a hypothetically-correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997); *see also Grotti v. State*, 273 S.W.3d 273, 280 (Tex. Crim. App. 2008). The State was required to prove that Morgan (1) possessed a firearm (2) within five years of being convicted of a felony. In order to prove unlawful possession of a firearm by a felon, the State must prove the defendant has been previously convicted of a felony and possessed a firearm "after conviction[2] and before the fifth anniversary of the person's release from confinement following conviction of

[2]Morgan never contested his status as a convicted felon. Without objection, the State introduced a stipulation of evidence and judgment establishing Morgan's September 7, 2005, conviction from Dallas County for unlawful delivery of a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon 2010).

the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later." TEX. PENAL CODE ANN. § 46.04(a)(1).[3] "[T]o support a conviction for possession of a firearm, the State must show (1) that the accused exercised actual care, control, or custody of the firearm, (2) that he was conscious of his connection with it, and (3) that he possessed the firearm knowingly or intentionally." *Nguyen v. State*, 54 S.W.3d 49, 52 (Tex. App.—Texarkana 2001, pet. ref'd). When the firearm is not found on the accused's person or in his or her exclusive possession, additional facts must link the accused to the contraband. *Id*. at 53; *Jones v. State*, 963 S.W.2d 826, 830 (Tex. App.—Texarkana 1998, pet. ref'd). One of the factors that may link a defendant to the firearm is whether the contraband was conveniently accessible to the accused. *Nguyen*, 54 S.W.3d at 53; *Jones*, 963 S.W.2d at 830.

The State can meet its burden with circumstantial evidence, but it must establish that the defendant's connection with the firearm was more than fortuitous. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Factors that may serve to link the defendant with the contraband include: (1) the contraband was in a car driven by the accused, (2) the contraband was in a place owned by the accused, (3) the contraband was conveniently accessible to the accused, (4) the contraband was in plain view, (5) the contraband was found in an enclosed space, (6) the contraband was found on the same side of the car as the accused, (7) the conduct of the accused

[3]The State's indictment alleged Morgan possessed a firearm "before the 5th anniversary of the date of the defendant's conviction and/or his release from community supervision or parole." The offense occurred within five years of Morgan's prior felony conviction, September 7, 2005, for which he was sentenced to 300 days' incarceration. Therefore, it is clear that the offense occurred within the relevant statutory time period, and Morgan does not assert otherwise or raise this as an issue.

indicated a consciousness of guilt, (8) the accused had a special relationship to the contraband, (9) occupants of the automobile gave conflicting statements about relevant matters, and (10) affirmative statements connect the accused to the contraband. *Smith v. State*, 118 S.W.3d 838, 842 (Tex. App.—Texarkana 2003, no pet.). The number of links present is not as important as the degree to which they tend to link the defendant to the firearm. *Washington v. State*, 215 S.W.3d 551, 555 (Tex. App.—Texarkana 2007, no pet.); *Taylor v. State*, 106 S.W.3d 827, 831 (Tex. App.—Dallas 2003, no pet.).

When Nix stopped the truck driven by Morgan and Nix made contact with Morgan, Nix felt that Morgan was more nervous, "over-tense," than most drivers would be in the circumstances. Explaining his speed, Morgan told Nix he was in a hurry and was traveling from Carthage to Dallas. Nix thought this unusual, because there was light traffic on the road, and, in Nix's words, "that's a long ways to have to speed and not think that they're going to get stopped." The rented status of the truck further aroused Nix's suspicion; in his experience, persons carrying drugs or illegal guns may use rental cars in order not to risk having their own vehicles seized.

In his case-in-chief, Morgan presented testimony from Anthony Washington, a homebuilder for whom Morgan did subcontract work. Washington said that he rented the truck for Morgan on a Thursday or Friday before the arrest and that Morgan had the truck over the weekend. Washington did not look in the glove compartment of the truck when he rented it, and he said the rental car representative did not look either. Washington testified he had never seen

Morgan with a weapon; on the job site where Morgan worked for him, Washington saw a couple of other men in the truck.

Here, the gun was found in the vehicle driven by Morgan, who was the only person in the truck. Although Morgan did not own the truck, it had been rented for his use. There was testimony the glove compartment was within reach of the driver. Based on the testimony that nobody looked in the glove compartment when the truck was rented, Morgan's defensive theory posited that the pistol could have been left there by the previous renter. There was also evidence that tools in the truck belonged to Morgan. A rational jury could have found Morgan intentionally or knowingly possessed the gun. Thus, the evidence is legally sufficient.

Looking at factual sufficiency, it is true that Washington said he had never seen Morgan with a weapon and that he had on one occasion seen other workers in the truck. Viewing the evidence in a neutral light, however, we cannot say the jury's verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust, or against the great weight and preponderance of the evidence. The evidence is factually sufficient.

(2) The Detention Was Not Unduly Prolonged

Morgan claims the trial court erred in overruling Morgan's objection to admission of evidence of the pistol, which violated Morgan's rights under the United States and Texas

Constitutions.[4] We examine the trial court's admission of evidence in the face of Morgan's objection.

As no claim is asserted that Morgan was not speeding when stopped by Nix, there is no question that the stop was initially proper. As there is also no claim that Morgan did not consent to Nix's search of the vehicle, the essence of Morgan's remaining argument here is that his detention was unduly prolonged, rendering his consent ineffective.

After discovering Morgan was in a rented vehicle, Nix asked if Morgan "had anything illegal in the vehicle; Morgan said, "no," and Nix asked if Morgan would mind if Nix looked in the truck. Morgan consented, orally and in writing, to Nix's search of the vehicle.[5] Nix said about ten minutes had elapsed between the traffic stop and his request to search the vehicle. The consent form signed by Morgan bears the time of 9:55 p.m., and Nix said he stopped Morgan at 9:45 p.m. During that time, Nix said he was in radio contact with his dispatcher checking the status of Morgan's driver's license and the registration on the truck. Nix said running these checks "takes a while," as he has to relay information to the dispatcher, who then has to enter that

[4]*See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Francis v. State*, 922 S.W.2d 176, 178 (Tex. Crim. App. 1996).
[5]At this point in Nix's testimony, Morgan objected that anything Nix testified about, from this point on, would be the result of an illegal detention. His objection was overruled, but he was granted a running objection to this line of testimony. Morgan did not file a motion to suppress evidence, and his trial objection did not assert violations of the United States and Texas Constitutions, which are the subject of his third and fourth points of error. However, when he made his trial objection, he notified the trial court of a memorandum in support of his argument, which is contained in the clerk's record. In that memorandum, Morgan argues the traffic stop constituted an illegal detention, and he invokes the United States and Texas Constitutions. We, therefore, find he preserved these arguments for our review. *See generally* TEX. R. APP. P. 33.1.

information into a computer; the dispatcher then obtains the results and relays the information to the officer.

After obtaining Morgan's consent to search the truck, Nix put Morgan in the backseat of Nix's patrol car; Morgan was not handcuffed, and the back window was opened partially so Nix could hear if Morgan needed to communicate with Nix. Nix said he put Morgan in the patrol car for Nix's safety. In the truck's glove compartment, Nix quickly found an unloaded .45 semiautomatic pistol and a loaded magazine clip for the gun. Nix returned to his car and asked Morgan if he had ever been convicted of a felony; Morgan said he had. Nix then requested Morgan's criminal history from his dispatcher; when he confirmed that Morgan was a convicted felon, Nix placed Morgan under arrest.

Morgan complains that Nix detained him beyond the amount of time needed to effectuate the reason for the traffic stop. Morgan claims that Nix had no reason to continue his investigation of Morgan other than Nix's "feeling" or "suspicion." We disagree with Morgan's view of the record. Nix stopped Morgan about 9:45 p.m.; Morgan told Nix he was in a hurry to get from Carthage to Dallas, and Nix thought this was unusual, that Morgan would intend to go over the speed limit over such a distance without being stopped. Nix felt that Morgan was acting more tense and nervous than a stopped driver would normally act, and Nix knew by experience that rental cars could be used by persons transporting contraband. While Nix was talking to Morgan and having the dispatcher check records on the truck and Morgan's driver's license, Nix requested

consent to search the truck. Morgan acquiesced, orally and in writing. Nix found the pistol almost immediately. At the time Nix found the gun, the dispatcher was apparently still checking Morgan's license and the vehicle's registration. After the gun was found, Nix asked the dispatcher to confirm Morgan's admission that he was a convicted felon.

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Davis v. State*, 947 S.W.2d 240, 243 (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)). During a routine traffic stop, an officer may detain an individual to check for outstanding warrants. *Walter v. State*, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000). An officer may also conduct computer checks on the driver's driver's license and the car's registration. *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004). "It is only after this computer check is completed, and the officer knows that this driver has a currently valid license, no outstanding warrants, and the car is not stolen, that the traffic-stop investigation is fully resolved." *Id*. at 63–64. Officers may request consent to search while processing the traffic stop. *State v. Williams*, 275 S.W.3d 533, 537 (Tex. App.—Texarkana 2008, no pet.). "A driver's consent to search the vehicle, if otherwise voluntary, is effective to legalize the search if it is given within the scope of a reasonable traffic stop." *Id*.

Morgan relies on the following three cases to support his argument that Nix detained Morgan longer than needed to complete Nix's investigation of the traffic stop: *United States v. Jones*, 234 F.3d 234 (5th Cir. 2000), *abrogated by United States v. Brigham*, 382 F.3d 500 (5th

Cir. 2004), and *United States v. Dortch*, 199 F.3d 193 (5th Cir. 1999), *abrogated by Brigham*, 382 F.3d 500; *Wolf v. State*, 137 S.W.3d 797 (Tex. App.—Waco 2004, no pet.). We find each of these inapposite to Morgan's situation.[6]

Wolf was stopped for having a defective license plate lamp. The stopping officer told Wolf he would be issued a warning, not a ticket, and then the officer requested Wolf's criminal history from the dispatcher. After the officer was notified Wolf had no criminal history, the officer detained Wolf and his passenger for three minutes until a canine unit arrived. *Wolf*, 137 S.W.3d at 800. The Waco Court of Appeals found that, because the officer lacked any reasonable suspicion[7] to detain Wolf after being officially informed that Wolf had no criminal history, the subsequent detention was unreasonable. *Id*. at 805.

Jones involved a situation in which, although the dispatcher had finished checking Jones' criminal history and notified the stopping officer there was no criminal history, the officer nonetheless continued to detain Jones, including not returning Jones' driver's license to him, for another three minutes before requesting consent to search the vehicle. *Jones*, 234 F.3d at 238.

[6]In addition to the federal cases not being controlling authority, we point out the panel opinion *Dortch* was "abrogated" by the Fifth Circuit's en banc opinion in *Brigham*, 382 F.3d 500. *See United States v. Pack*, No. 08-41063, 2010 U.S. App. Lexis 14562, at **33–34 (5th Cir. July 15, 2010) (not designated for publication). *Brigham*'s disavowal of the reasoning in *Dortch* appears to be limited to language in *Dortch*, as well as language in *Jones*, which, under the facts of those cases, could be interpreted as limiting law enforcement questioning to whatever suspected criminal activity about which the officer is concerned—for example, the possibility of a stolen car—and would therefore find questions about the driver's or passenger's travel itinerary, or summoning a canine where the suspected crime involved a stolen vehicle, impermissible. *See Brigham*, 382 F.3d at 510–12.

[7]The officer said he found Wolf "overly cooperative" and his passenger nervous. *Wolf*, 137 S.W.3d at 800–01.

In *Dortch*, the officer questioned Dortch about his criminal history, without telling Dortch the officer had already been provided with the completed history; and the record indicated the officer clearly intended to detain Dortch until a canine unit arrived. *Dortch*, 199 F.3d at 202.

In each of the cases argued by Morgan, law enforcement had completed the purpose of its traffic stop and completed checking the subject's criminal history. Conversely, in the instant case, Nix had not yet received from the dispatcher the requested information concerning Morgan's license and the vehicle's registration when he asked for, and received, Morgan's consent to search the vehicle.[8] The above cases cited by Morgan are distinct from Morgan's situation and we find them inapplicable to the instant situation.

Because Nix was still engaged in the reasonable investigation concomitant to the traffic stop, the detention and investigation were not unreasonable. *See Caraway v. State*, 255 S.W.3d 302, 308 (Tex. App.—Eastland 2008, no pet.) (while officer awaits computer warrant check, questioning about matters unrelated to initial traffic stop does not violate Fourth Amendment); *Edmond v. State*, 116 S.W.3d 110, 113–14 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (continued detention for no longer than required to ask whether defendant was transporting drugs and whether he would consent to search, not unreasonable extension of investigatory detention).

[8]Nix's testimony was that, after stopping and initially making contact with Morgan, after about ten minutes, he requested consent to search the truck. During that ten minutes, Nix said he was issuing a speeding citation and was in contact with the dispatcher, requesting information on Morgan's driver's license and the truck. Nix said it "takes a while" for this information to be compiled and relayed to him in his patrol car. It was during this period that Nix asked to search the vehicle. The consent-to-search form signed by Morgan states it was completed at 9:55 p.m., ten minutes after Nix said he pulled over the vehicle. There is no indication that information was received from the dispatcher before Morgan consented to the search.

Because Nix's questioning of Morgan and the length of time to do so were not unreasonable, there was no violation of Morgan's rights under the United States or Texas Constitutions.

We affirm the judgment and sentence of the trial court.

Josh R. Morriss, III
Chief Justice

Date Submitted: August 16, 2010
Date Decided: September 8, 2010

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