TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-04-00515-CR

Ambrosio Garcia, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BURNET COUNTY, 33RD JUDICIAL DISTRICT
NO. 806, HONORABLE V. MURRAY JORDAN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Ambrosio Garcia, Jr., of engaging in organized criminal activity and possessing more than fifty pounds of marihuana, and it assessed twenty-year prison terms for both offenses. *See* Tex. Pen. Code Ann. § 71.02 (West Supp. 2005); Tex. Health & Safety Code Ann. § 481.121 (West 2003). Garcia contends that the State failed to corroborate the testimony of the accomplice witnesses and that the evidence is otherwise legally and factually insufficient to sustain the convictions. He also asserts that there is a fatal variance between the indictment and the evidence, and that the two convictions constitute double jeopardy.

The State concedes error requiring that the organized crime conviction be reversed. Count one of the indictment alleged that Garcia and three other men possessed marihuana with the intent to establish, maintain, or participate in a combination or the profits of a combination. As appellant argues in his variance point, and as the State concedes in its brief, mere possession of a controlled substance is not a predicate offense under the organized crime statute. *See* Tex. Pen. Code Ann. § 71.02(a)(5). Therefore, we will sustain point of error three on this ground, reverse Garcia's conviction for organized criminal activity, and dismiss count one. This renders moot Garcia's double jeopardy argument in point of error one. We will overrule the remaining points of error insofar as they challenge the sufficiency of the evidence with regard to count two and sustain Garcia's conviction for marihuana possession.

Department of Public Safety Trooper Jose Colombo stopped a 1999 pickup truck for a traffic offense on the afternoon of October 26, 2003. Garcia was driving the truck. With him were Rafael Reyes Ramos, who owned the truck, Wesley Scott Kibodeaux, and Joshua Jackson. Officer Colombo testified that he noticed a strong odor of burned marihuana when he approached the truck. The four men were visibly nervous and avoided eye contact with the officer.

Garcia did not have a driver's license, and the officer later learned that it had been suspended. Garcia told Colombo that his other truck had broken down about a mile-and-a-half away and that he and his companions were looking for a wrecker or a parts store. Colombo arrested Garcia on an outstanding warrant and placed him in his patrol car.

Colombo asked the three passengers to get out of the pickup. Kibodeaux told Colombo that he had been smoking marihuana and that he had some in his possession. The officer

searched the interior of the truck and found a small amount of marihuana where Kibodeaux had been seated. When questioned out of the hearing of the other men, Kibodeaux told Colombo that the other truck Garcia had mentioned contained a load of marihuana. Kibodeaux was arrested and placed in a Blanco County sheriff's vehicle.

Using Garcia's instructions, Colombo drove to where the other truck had broken down. The officer inspected the second truck, a 1982 model, and found a hidden compartment beneath the bed. Through a crack, the officer could see that the compartment contained packages of the sort used to transport drugs. By this time, Garcia, who had previously referred to the disabled truck as his, was denying ownership. In fact, the 1982 truck was shown to belong to Jesus Sandoval of Del Rio. Police ultimately removed packages containing two hundred fifty pounds of marihuana from the hidden compartment.

Kibodeaux testified that he met Garcia in May 2003. Kibodeaux said that on several occasions he had helped Garcia transport marihuana from Del Rio to Lubbock, where they both lived. According to Kibodeaux, he and Garcia would drive to Del Rio, generally with at least one other person, and pick up a truck in which the marihuana had been concealed. On the return trip to Lubbock, Garcia would drive in a "flashy car" to attract the attention of law enforcement, while Kibodeaux would drive the truck loaded with marihuana. According to Kibodeaux, Garcia financed the marihuana operation and made all the decisions. Kibodeaux testified that Garcia had given him money and a car in exchange for his assistance.

Jackson also testified for the State. He said that he had known Garcia since they were in the eighth grade, and that Garcia had often asked him to go with him on his trips to Del Rio to

purchase marihuana. Jackson testified that this was the first time he had agreed to do so, and that he agreed to take part after Garcia offered him $1500.

Kibodeaux and Jackson were accomplice witnesses. A conviction cannot be had upon the testimony of an accomplice unless the testimony is corroborated by other evidence tending to connect the defendant with the offense, and the corroboration is not sufficient if it merely shows the commission of the offense. Tex. Code Crim. Proc. Ann. art. 38.14 (West 1995). It is not necessary that the corroborating evidence directly connect the defendant to the crime or be sufficient in itself to establish the defendant's guilt. *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). Article 38.14 is satisfied if the combined weight of the nonaccomplice evidence tends to connect the defendant to the offense. *Id.*

Garcia told Colombo after he was stopped that he and his companions were looking for a tow truck or parts for the disabled vehicle in which the marihuana was found. Garcia initially referred to the disabled truck as his, although he later sought to distance himself from it. Regardless of his ownership of the truck, Garcia's knowledge of the truck and its location is sufficient to connect him to the marihuana concealed therein and thus to corroborate the accomplice witnesses. Point of error two is overruled.

Finally, appellant challenges the legal and factual sufficiency of the evidence to sustain his conviction for marihuana possession. The question presented is whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (legal sufficiency); *Griffin v. State*, 614 S.W.2d 155, 158-59 (Tex. Crim. App. 1981) (legal sufficiency); *Zuniga v. State*, 144 S.W.3d 477, 484 (Tex.

Crim. App. 2004) (factual sufficiency). In a legal sufficiency review, all the evidence is reviewed in the light most favorable to the verdict; it is assumed that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Griffin*, 614 S.W.2d at 159 (citing *Jackson*, 443 U.S. at 318-19). In a factual sufficiency review, all the evidence is considered equally, including the testimony of defense witnesses and the existence of alternative hypotheses. *Orona v. State*, 836 S.W.2d 319, 321 (Tex. App.—Austin 1992, no pet.). Although due deference still must be accorded the fact finder's determinations, particularly those concerning the weight and credibility of the evidence, the reviewing court may disagree with the result in order to prevent a manifest injustice. *Johnson v. State*, 23 S.W.3d 1, 9 (Tex. Crim. App. 2000). The evidence will be deemed factually insufficient to sustain the conviction if the proof of guilt is too weak or the contrary evidence is too strong to support a finding of guilt beyond a reasonable doubt. *Zuniga*, 144 S.W.3d at 484-85; *see Johnson*, 23 S.W.3d at 11.

Appellant urges that the State failed to prove that he exercised care, custody, and control over the marihuana. He notes that there was no fingerprint evidence connecting him to the truck in which the contraband was concealed, he was not shown to have the keys to this truck, and he was not the owner of the truck. Nevertheless, appellant's familiarity with the truck as shown through Colombo's testimony and Kibodeaux's and Jackson's testimony regarding Garcia's leadership role in the drug transport scheme are sufficient, under the relevant standards of review, to legally and factually support the judgment of conviction for possession of marihuana. Point of error four is overruled.

The judgment of conviction for engaging in organized criminal activity is reversed and count one of the indictment is dismissed. The judgment of conviction for possession of marihuana is affirmed.

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Bea Ann Smith, Justice

Before Justices B. A. Smith, Puryear and Pemberton

Affirmed in Part; Reversed and Dismissed in Part

Filed: April 20, 2006

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