Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00653-CR

KELVIN WAYNE TILLMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court of
Harris County, Texas
Cause No. 809,890

O P I N I O N

A jury convicted appellant, Kelvin Wayne Tillman, of possessing at least 400 grams of cocaine with intent to deliver. Appellant was sentenced to 60 years' confinement and a $75,000 fine. In this appeal, we determine whether: (1) the evidence was legally and factually sufficient to support the possession element of appellant's conviction; (2) the State disproved appellant's defense of entrapment beyond a reasonable doubt; and (3) appellant was denied effective assistance of counsel. We affirm.

Background

Houston Police Department ("HPD") Sergeant John Belk sets up sting operations in an effort to build cases against corrupt HPD officers. Paul Ward, one of Belk's informants, apprised Belk that an officer was stealing drugs from drug couriers. According to Ward, appellant participated with the officer in the drug thefts. Based on this information, Belk devised a sting operation targeting appellant and his friend, Rodney Gaynor. Belk wanted to catch appellant stealing drugs and use the charge against him as leverage to persuade appellant to help him with subsequent sting operations. Belk provided Ward and Kerry Warner, another informant, fictitious information that a Colombian drug dealer carrying a large amount of cocaine in the trunk of his car would be staying at a local motel. That information was subsequently conveyed to appellant and Gaynor.

After leaking this information, extensive surveillance and security involving at least 12 officers was set up. Belk testified that the officers working in the sting operation were to make sure nothing happened to the drugs. Officers implanted a teletracking device in two kilograms of cocaine, put it in a backpack and placed it in the trunk of a car. An officer then parked the car at the Road Runner Motor Inn.

Appellant, Gaynor, and Warner arrived at the motel. Appellant approached the vehicle, broke the driver's window, opened the door, and activated the trunk release. Warner opened the trunk and took the backpack containing cocaine. Appellant never touched the cocaine. Appellant and Warner returned to their car and sped off. The officers pursued and arrested them. Appellant then agreed to help in a subsequent sting operation, which resulted in the arrest of two HPD officers. Appellant was later charged and convicted of possession with intent to deliver the cocaine.

Legal Sufficiency

Appellant first argues that the evidence is legally insufficient to support his conviction. In determining whether the evidence is legally sufficient to support a verdict, we view the evidence "in the light most favorable to the verdict" and ask whether "any

rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt." *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998).

Appellant argues that the evidence is legally insufficient to support his conviction for possession of cocaine, where the state failed to show that he knowingly and intentionally possessed cocaine and he was not a party to a crime. More specifically, appellant contends that: (1) it was a legal impossibility for appellant to exercise care, custody and control of the cocaine because of the extensive means the police used not to allow it out of their control; (2) he did not exercise care, custody and control because he never touched the cocaine.[1]

As to the latter argument, under the law of parties, it is of no consequence that only Warner had physical possession of the cocaine: "[a] person is criminally responsible for an offense committed by the conduct of another if: acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994). Further, possession need not be exclusive. *Rodriguez v. State*, 635 S.W.2d 552, 553 (Tex. Crim. App. 1982). Appellant admitted in his confession that they intended to take the cocaine and sell it. The evidence also showed that appellant broke the window and activated the trunk release for the purpose of aiding Warner in taking possession of the drugs, thus committing the charged offense. The evidence was more than sufficient to show that appellant was criminally responsible of possession as a party.

Legal impossibility exists "where the act if completed would not be a crime, although what the actor intends to accomplish would be a crime." *Chen v. State*, 42 S.W.3d 926, 929 (Tex. Crim. App. 2001). The completed act of possessing drugs is a crime and,

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[1] Appellant also cites *Johnson v. State*, 867 S.W.2d 134 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). There, undercover officers borrowed computers for a sting operation and sold them to the appellant. Since the indictment alleged the property was stolen and the State failed to prove that allegation, the court held the evidence was legally insufficient to support the charged offense. The problem in *Johnson* is that the State alleged something that it could not prove – that the property was stolen when it was only borrowed. Here, there is no discrepancy between what was alleged and proven. *Johnson* is thus inapplicable.

as stated, appellant completed the crime by possessing the drugs as a party. Therefore, appellant was not confronted with a *legal* impossibility. What appellant describes is, at most, a factual impossibility, which is not a defense under Texas law. *Id.*[2]

We therefore find that the jury could have found the essential elements of the crime beyond a reasonable doubt. Issue one is overruled.

Factual Sufficiency

Appellant next argues that the evidence is factually insufficient to support the possession element of his conviction. In contrast to a legal sufficiency review, a review of factual sufficiency requires that the evidence be viewed in a neutral light, favoring neither party. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). The verdict will be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*

Appellant's factual sufficiency issue hinges largely on the faulty premise "that there is no way on earth the appellant could have possessed it [cocaine] under the circumstances. Mr. Warner was specifically told not to let the dope get away or he would regret it." As already discussed, appellant's lack of physical possession and the heavy security to keep the cocaine within the State's reach did not preclude appellant's having unlawful possession of it under the law. We overrule appellant's factual sufficiency issue.

Entrapment

In issue three, appellant argues that the trial court erred in overruling his pretrial motion to suppress, where the State failed to disprove entrapment beyond a reasonable

[2] Factual impossibility exists when "due to a physical or factual condition unknown to the actor, the attempted crime could not be completed." *Id.* In other words, factual impossibility "refers to a situation in which the actor's objective was forbidden by the criminal law, although the actor was prevented from reaching that objective due to circumstances unknown to him." *Id.* Clearly, the physical condition and circumstances unknown to appellant was the heavy police security.

doubt.[3]

At trial, the accused has the burden of producing evidence raising the defense of entrapment. After the accused has met this initial burden, the burden of persuasion falls on the State to disprove entrapment beyond a reasonable doubt. *England v. State*, 887 S.W.2d 902, 908 (Tex. Crim. App.1994). Legal sufficiency is determined in the light most favorable to the prosecution whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and also could have found against the appellant on the issue of a defense beyond a reasonable doubt. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992); *Torres v. State*, 980 S.W.2d 873, 875 (Tex. App.--San Antonio 1998, no pet.).

The test for entrapment under section 8.06 of the Texas Penal Code[4] is two-pronged, comprised of subjective and objective elements. *England*, 887 S.W.2d at 913. The first prong is the subjective test. The accused must show that because of police persuasion he was induced to act. *Id*. Second, under the objective prong, the accused must show that the conduct that induced him to act would have induced an ordinary person. *Id*.

We first examine prong one. Appellant claims he was "offered" the cocaine "to get involved in this sting operation." This mischaracterizes the evidence. Appellant did not

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[3] We note that the trial court conducted a pre-trial "motion to suppress proceeding," however, it pertained to the voluntariness of appellant's statement after his arrest, and not the entrapment issue. In fact, there is nothing in the record presented to us showing that appellant raised entrapment prior to trial. The State characterizes the issue as "the jury erred in rejecting his entrapment defense." Though appellant has presented nothing for review pertaining to any pretrial entrapment issue, we will treat the issue as one of whether the evidence disproving the defense of entrapment was legally sufficient at trial.

[4] Section 8.06 reads, in relevant part:

> It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording an opportunity to commit an offense does not constitute entrapment.

TEX. PEN. CODE ANN. § 8.06(a).

find out about the sting operation until after the offense was complete. Appellant was merely informed by law enforcement (via Ward and Warner) that a car containing cocaine would be parked outside a hotel. Neither the police nor the informants offered anything to appellant, nor did they engage in any other behavior to persuade him to act on that information. They made appellant aware of the cocaine. This was not an inducement; merely an opportunity to commit the offense. *See* TEX. PEN. CODE ANN. § 8.06(a).[5]

Appellant also cites *Sebesta v. State*, 783 S.W.2d 811 (Tex. Crim. App. 1986) for the proposition that:

> [u]nder the objective standard, prohibited police conduct usually includes, but is not limited to, matters such as extreme pleas of desperate illness in drug cases, appeals based primarily on sympathy, pity, or close personal friendship, offers of inordinate sums of money, and other methods of persuasion which are likely to cause the otherwise unwilling person--rather than the ready, willing and anxious person–to commit an offense.

Id. at 814. Extrapolating from this, appellant argues that the "inducement" of 2.2 kilos of cocaine is similar to offering a person an inordinate sum of money. We agree with the State that it is untenable that a normally law-abiding citizen would break into a drug dealer's car to steal the cocaine simply because the person learned of the cocaine's presence and realized its worth. A person inclined to steal cocaine from a drug dealer not only would undertake a dangerous theft, but also would have to commit the offense of distributing the cocaine to realize any monetary reward. We disagree that a normally law-abiding citizen, upon hearing the information related to appellant, would have been willing to do any of these acts.

We therefore find there was legally sufficient evidence for the factfinder to conclude beyond a reasonable doubt that appellant was not entrapped. We overrule this issue.

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[5] Appellant also points to the officers' conduct in discussing the sting operation and alleged discussions that they might not prosecute him if he assisted them. These allegations are immaterial to the entrapment issue because they occurred after the offense.

Ineffective Assistance of Counsel

Finally, appellant claims he was denied effective assistance of counsel where counsel failed to object to, produce and develop certain evidence; failed to subpoena witnesses; and failed to object to the State's closing arguments.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). It is the appellant's burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Scrutiny of counsel's performance must be highly deferential. *Id.* We indulge a strong presumption that counsel's representation falls within the wide range of reasonable professional assistance; that is, counsel's actions (or inactions) might be considered "sound trial strategy." *See Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999). We presume "that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id.* The court of criminal appeals has set an extremely high bar for proving ineffective assistance claims on direct appeal. *See Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999). The court explained:

> [A] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors in the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record.

Id. at 813-14 (citations and quotation marks omitted).

Since the record is silent as to the reasoning behind trial counsel's alleged omissions, appellant has failed to provide a basis upon which we can conclude counsel's

representation fell below an objective standard of reasonableness. To find that trial counsel was ineffective based on appellant's asserted grounds would call for speculation, which we will not do. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Thus appellant has failed to overcome the presumption that counsel acted competently. We overrule this issue.

The judgment of the trial court is affirmed.

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Don Wittig
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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