

MONCIVALLLES v. STATE

Tex. 601

Cite as 733 S.W.2d 601 (Tex.App.—San Antonio 1987)

tion, testimony from a state's witness, Zuniga, that appellant carried a "buck-blade knife, whatever you call it" ... "a long time ago ..." Absent any evidence that appellant was in the habit of carrying such a knife, or any type of knife and particularly on the date in question, there is no showing of any effect on the defense's case. Second, appellant points out that his counsel did not object to evidence that a search warrant for narcotics was being executed at appellant's home at the same time appellant was arrested at a different location. Furthermore appellant complains that his trial counsel elicited direct testimony from appellant's wife that appellant was named in the search warrant and later elicited from appellant that the narcotics were actually found pursuant to the execution of the search warrant. This testimony was sought by appellant's counsel in seeming contradiction to his attempted attack on the warrant as a pretext to arrest the appellant. The prosecutor subsequently referred to the finding of narcotics in his closing argument without objection. Appellant also alleges that his trial counsel allowed into evidence, without objection, that appellant was on parole and, at the time of his arrest, there was a warrant for appellant's arrest for violating the conditions of his parole. Officer Trevino was also allowed to testify that appellant was selling marijuana out of his trailer house. Appellant has not shown that there is a reasonable probability that, but for his counsel's alleged unprofessional errors the result of the proceeding would have been different.

[17] Finally, appellant claims he was not adequately represented because his trial counsel failed to object to improper argument by the prosecutor during the guilt-innocence phase. Appellant alleges that the prosecutor was permitted to mistate the "voucher rule" concerning interlineation of proffered written statements in such a way as to interject his personal opinion of appellant's written statement. Appellant further states that there was no objection to the prosecutor's unsworn testimony during argument that: "I think that this man is a liar and a murderer." We cannot conclude

that the prosecutor's argument was outside the scope of permissible jury argument. It was a reasonable deduction from the evidence.

The judgment of the trial court is affirmed.



Arturo M. MONCIVALLLES, Appellant,

v.

The STATE of Texas, Appellee.

No. 04-86-00437-CR.

Court of Appeals of Texas,  
San Antonio.

May 29, 1987.

Defendant was convicted for constructive delivery of heroin by the 144th District Court, Bexar County, Roy R. Barrera, Jr., J., and defendant appealed. The Court of Appeals, Butts, J., held that: (1) evidence was insufficient to sustain conviction, and (2) after conviction is reversed for insufficiency of evidence, trial court must enter judgment of acquittal.

Reversed and judgment of acquittal ordered.

1. Drugs and Narcotics ⇐119

Evidence was insufficient to sustain conviction of defendant for constructive delivery of heroin; undercover police officer and defendant did not negotiate price of heroin, and evidence failed to establish that heroin belonged to defendant, that prior to its delivery by unknown person, it was under his direct or indirect control, or that unknown delivery person was acting as defendant's agent or under his direction. Vernon's Ann.Texas Civ.St. art. 4476-15, § 1.02(6).

## 2. Criminal Law ¶1188

After conviction is reversed for insufficiency of evidence on appeal, trial court must enter judgment of acquittal.

Mark Stevens, San Antonio, for appellant.

Fred G. Rodriguez, Al Hernandez, Tina Tussay, Ilse D. Bailey-Graham, Criminal Dist. Attys., San Antonio, for appellee.

Before ESQUIVEL, BUTTS and CHAPA, JJ.

## OPINION

BUTTS, Justice.

Appeal is from conviction for constructive delivery of heroin. Punishment, which was enhanced, was assessed at 50 years' imprisonment.

Appellant first assails the sufficiency of the evidence to prove delivery by constructive transfer. The indictment contains two paragraphs, the first charging appellant with actual delivery, and the second with constructive delivery. The State elected to proceed to trial on the constructive delivery allegation, which was, in pertinent part, that appellant did on February 13, 1985:

then and there knowingly and intentionally deliver to MARIO RAMIREZ by constructive transfer, a controlled substance, to-wit: HEROIN ...

The Controlled Substances Act, TEX. REV.CIV.STAT.ANN. art. 4476-15, § 1.02(6) (Vernon Supp.1987) provides, in pertinent part:

"Deliver" or "delivery" means the actual or constructive transfer from one person to another of a controlled substance ...

The Court of Criminal Appeals in *Rasmussen v. State*, 608 S.W.2d 205 (Tex. Crim.App.1980) interpreted a constructive transfer to be "the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant." (Citations omitted). *Davila v. State*, 664

S.W.2d 722, 724 (Tex.Crim.App.1984) (On State's Petition for Discretionary Review).

In determining the sufficiency of the evidence, this Court will review the evidence to ascertain whether a rational trier of facts could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. State*, 672 S.W.2d 801 (Tex.Crim.App.1984); *Carlsen v. State*, 654 S.W.2d 444 (Tex.Crim.App.1983).

The evidence shows that San Antonio Police Department undercover officer Mario Ramirez went to a certain street intersection and was approached by Gilbert Gonzales, who inquired whether he was "looking to connect." According to Ramirez, Gonzales offered to introduce him to his own heroin supplier. They went to a house on the corner of West Commerce and Northwest 34th Street. Immediately behind that house was another one, located at 101 Northwest 34th Street; there was an opening in the chainlink fence between the houses.

Gonzales called out for "Tootie." Appellant appeared from the house on West Commerce. Although Ramirez, who said he did not know appellant, testified that "Tootie" was appellant's nickname, Gonzales denied that appellant was "Tootie." He referred to appellant as Arturo. They were at the back of appellant's house (outside). Appellant asked Gonzales what he wanted and who Ramirez was; Gonzales identified Ramirez as his cousin. Ramirez told appellant he wanted to score "80" (\$80.00 worth of heroin). Appellant asked if he had the money. The evidence differs here. Gonzales testified that another person who was with them (Freddy Rodriguez) handed him the money, and he then gave it to appellant. But Ramirez said he had the money, and Gonzales took it from him and handed it to appellant. Appellant took the money and went through the chainlink fence and into the second house on 34th Street. That is the last time appellant was seen or heard. A different and unknown hispanic male emerged from that house and handed a balloon to Ramirez. Proof later showed it contained heroin. Ramirez subsequently identified appellant from a photo-

graphic display. The third party who gave Ramirez the balloon was not identified. The indictment was returned in December, 1985.

Gonzales testified the house on West Commerce was Arturo's house and that the house into which he disappeared was not his. The evidence does not show otherwise. The indictment affirms the West Commerce address as appellant's. It is unclear from Gonzales' testimony where other persons on the scene that he saw at that time were located. The officer testified that the house on West Commerce was appellant's; he had checked the records.

Appellant was not charged with being a party to the actual transfer of the heroin which occurred when the unknown person delivered it to Ramirez. See, TEX.PENAL CODE ANN. §§ 7.01, 7.02 (Vernon 1974). Because the indictment alleged "constructive transfer," the State was required to prove that. *Davila v. State, supra*, at 724.

[1] The evidence fails to establish that the controlled substance (heroin) in question belonged to appellant, or that prior to its delivery by the unknown person, it was under his direct or indirect control. The evidence equally fails to establish that the unknown person was acting as appellant's agent or under his direction. The only facts linking appellant to the offense charged are that appellant came out of his house, was therefore on the scene, and spoke to the officer and Gonzales. He was not shown to have spoken to the unknown person after he went into the other house; he was not shown to have spoken to anyone after he left the officer and Gonzales. There was testimony there were other persons nearby in a doorway.

Contrary to the argument by the State that appellant "negotiated" the price, there was no negotiation. The officer asked for "80;" appellant asked if he had the money, and appellant was given the money. These facts do not satisfactorily evidence either appellant's ownership or control of the contraband, particularly since any control of the premises on 34th Street was negated. While the facts are suspicious, they do no more than raise a suspicion that appellant

was an agent of someone in the second house (from which the unknown person emerged with the contraband) or that the unknown person was either appellant's agent or acting under his direction or that someone in control of the premises was appellant's agent.

At most the evidence shows that appellant took the money into the house on 34th Street. It does not show that he was the one who relayed the offer to buy, although that, too, may be a strong suspicion. The fact that appellant understood what "80" meant and carried the money into the second house does not constitute proof that the contraband was under his direct or indirect control prior to its delivery to Ramirez. Furthermore, appellant's act in taking the money from the buyer to someone inside the second house, even assuming he did relay the offer to buy, and a third unknown person actually delivered the contraband, would not be sufficient to prove that the seller acted at the "instance or direction" of appellant. There is no proof that appellant had any control over that person's actions. The critical factor that "prior to the delivery the substance was directly or indirectly under the defendant's control," *Queen v. State*, 662 S.W.2d 338, 340-41 (Tex.Crim.App.1983), has not been proved.

We sustain the first point of error that the evidence is insufficient to prove that appellant constructively delivered the contraband in this case.

[2] Because of our disposition of the first point, we do not address the second argument that the trial court erred by not granting appellant's motion to quash the indictment. The Supreme Court edict of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) requires that in reversing for insufficiency of the evidence, we also direct the trial court to enter a judgment of acquittal.

