IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1862

Summary Calendar

BILL LOFTIS, JR.,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:92 CV 086 C)

(August 12, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

The federal district court denied Bill Loftis, Jr.'s petition for federal habeas relief but granted him a certificate of probable cause to appeal to this court. Finding no error, we affirm the district court's judgment denying Loftis federal habeas relief.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, we have determined that this opinion should not be published.

I

In the fall of 1989, Lavaissa Wayne Dial, an undercover narcotics enforcement officer, placed a house located at 2906 Cherokee Street in Big Spring, Texas under surveillance for several days. This was done after Dial received a tip from a reliable informant that drug-related activity was taking place at the residence. Based upon his surveillance, Dial determined that Loftis and his girlfriend, Barbara Lynn Quinlan, lived at the residence, and Dial observed a large number of cars and people coming and going from the residence.

On November 2, 1989 a search warrant was executed at the residence. Upon entering the home, officers saw Loftis and four other people clustered in close proximity to the kitchen sink. A woman was trying to wash something down the sink, and other people were trying to escape through the back door. Upon investigation, the officers found the triangular corner of a plastic bag, which was caught in the sink. The bag contained a substance which was later tested and identified as being a trace of methamphetamine. Drug paraphernalia including syringes, razor blades, a mirror with razor cuts, cotton balls, a spoon with cotton sticking to it, band-aids, and clear water was scattered on the counter.

At trial, the state's chemical expert testified that, although no specific weight had been assigned to the methamphetamine found in the bag, a "trace" of methamphetamine "is considered a weight." He also stated that the term "trace"

normally means "anything under a hundredth of a gram." One of the arresting officers testified that intravenous drug users place methamphetamine on a mirror and chop it with a razor blade. According to this officer, the powdered methamphetamine then is mixed with water and heated in a spoon, and the liquified drug is filtered into a syringe through a cotton ball placed in the spoon. The officer also testified that the plastic bag found in the sink contained enough methamphetamine for a user to have "taken a hit." Also, the indictment charged Loftis with an enhanced offense based upon a previous felony conviction, and the state proved the enhancement information at trial.[1]

The jury convicted Loftis of possession of a controlled substance of less than twenty-eight grams, enhanced by a prior felony conviction. The court revoked Loftis' probation and imposed a consecutive six-year term of imprisonment for the prior felony offense. The court assessed Loftis' sentence at twenty-seven years[2] in the custody of the Texas Department of Criminal Justice. Loftis' conviction, sentence, and revocation of probation were affirmed on direct appeal, and the Texas Court of Criminal Appeals subsequently refused a petition for discretionary review.

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[1] Loftis admitted his prior conviction during his punishment hearing.

[2] The maximum statutory penalty for the offense of conviction is twenty years. TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (West 1992); TEX. PENAL CODE ANN. §§ 12.33(a), 12.42(b) (West 1974). Although the court's judgment does not state that Loftis' sentence is enhanced, he has not alleged that his sentence is erroneous.

After exhausting state remedies, Loftis filed a federal habeas petition alleging that the prosecutor had introduced false evidence and perjured testimony; that the evidence was insufficient; and that he had been convicted of violating an unconstitutional statute. The district court denied Loftis' petition but granted a certificate of probable cause to appeal to this court. See 28 U.S.C. § 2253; FED. R. APP. P. 22(b) ("Necessity of Certificate of Probable Cause for Appeal").

II

Loftis asserts that (**a**) his trial was fundamentally unfair because the prosecutor introduced perjured testimony and false evidence; (**b**) the evidence is insufficient to support his conviction because there is no proof that he knowingly possessed methamphetamine; and (**c**) his conviction violates the Equal Protection Clause of the United States Constitution.

A

Loftis urges that his trial was unfair because the prosecutor knowingly introduced perjured testimony and false evidence. The allegation of perjury arises from alleged inconsistencies between the testimony of officers Dial and Howard regarding the location of the triangular plastic bag containing methamphetamine found in Loftis' kitchen sink. Specifically, at trial, Dial testified that he had found the bag in the kitchen sink while Howard testified that the bag was "in the sink where the pea trap fastened to the bottom of the sink." The prosecutor recalled Dial to clarify that Dial had found the bag at the

bottom of the sink "[i]n the li'l ole drain thing" where the sink drained into the pea trap. Based on the foregoing testimony, Loftis argues that the prosecutor caused Dial to testify falsely in order to obtain a conviction.

Although there was some uncertainty as to the precise location of the plastic bag containing methamphetamine, both officers testified that the bag was found in the sink of Loftis' home. Moreover, this "inconsistency" bears on the credibility of the officers testimony rather than upon its admissibility, and the jury had an opportunity to evaluate any inconsistencies in the officers' testimony. See Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990) ("[C]ontradictory trial testimony . . . merely establishes a credibility question for the jury."). Accordingly, we conclude that Loftis's perjured-testimony assertion is without merit.

Loftis also asserts that his trial was fundamentally unfair because the following items were admitted into evidence: a page torn from the Yellow Pages of a telephone book with a circled listing for a chemical supply company; two spoons; hypodermic syringes; and a pair of brass knuckles. According to Loftis, the telephone book listing, spoons, and brass knuckles were not listed on the police inventory report; the telephone listing and brass knuckles were irrelevant and misleading; and only the one useable syringe found in his kitchen should have been admitted at trial.

This court has expressly held that "[a]n evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the due process clause." Skillern v. Estelle, 720 F.2d 839, 852 (5th Cir. 1983), cert. denied, 469 U.S. 873 (1984). And an error in the admission of evidence will not justify habeas relief unless it is "material in the sense of a crucial, critical, highly significant factor." Id. (quotation and citation omitted).

Although Loftis objected to the introduction of the brass knuckles at trial, he did not object to the introduction of the other evidence at issue. Moreover, the fact that this evidence was found on the kitchen counter and near the drugs and that it is relevant to drug usage was established at trial through the testimony of the arresting officers. The brass knuckles were not material to Loftis' conviction but their admission constituted, at most, harmless error. See Skillern, 720 F.2d at 852. Accordingly, we conclude that the evidentiary rulings at issue did not render Loftis' entire trial fundamentally unfair.

B

Loftis suggests that the evidence is insufficient to support his conviction because there is no proof that he knowingly possessed methamphetamine. This court has held that "[i]nsufficiency of the evidence can support a claim for federal habeas corpus relief only where the evidence, viewed in the light most favorable to the prosecution, is such that no rational

finder of fact could have found the essential elements of the crime beyond a reasonable doubt." Young v. Guste, 849 F.2d 970, 972 (5th Cir. 1988) (emphasis added), citing Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

Because Loftis was convicted of a violation of state law, the substantive law of Texas defines the elements of the crime that must be proved. Young, 849 F.2d at 972. The Texas Controlled Substances Act prohibits the knowing or intentional unauthorized possession of any quantity of methamphetamine or certain of its derivatives. TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(6), 481.115(b) (West 1992). A conviction for unlawful possession of a controlled substance requires proof "that the accused exercised care, control and [or] management over the contraband, and . . . that the accused knew that the matter possessed was contraband." Gilley v. Collins, 968 F.2d 465, 468 (5th Cir. 1992) (quotation and citation omitted). In other words, "[p]ossession is more than being where the action is. Possession means dominion and control." Edwards v. State, 813 S.W.2d 572, 583 (Tex. App.--Dallas 1991, no pet.).

When the defendant does not have exclusive possession of the place where the contraband is found, the state must prove additional independent facts and circumstances that establish an affirmative link to the contraband. Gilley, 968 F.2d at 469. Relevant circumstantial evidence supporting a finding of possession includes: the defendant's presence when the search warrant was executed; the fact that the contraband was in plain

view; the contraband's accessibility and proximity to the defendant; the presence of other drug paraphernalia; and the defendant's ownership or possession of the location where the drugs were found. Id.; see also Edwards, 813 S.W.2d at 583. "A circumstantial case is legally sufficient [to prove possession] when some of these factors appear in concert." Edwards, 813 S.W.2d at 583. Additionally, if the amount of the controlled substance is too small to be quantitatively measured, the state must establish that the defendant knew that the substance in his possession was contraband. Garner v. State, 848 S.W.2d 799, 801 (Tex. App.--Corpus Christi 1993, no pet.).

The record establishes that (1) Loftis was aware that his friends were using methamphetamine; (2) he was in the kitchen where the drugs were found when the search warrant was executed; (3) the officers saw one of his friends attempt to dispose of the methamphetamine; (4) considerable drug paraphernalia was in plain view on the kitchen counter; and (5) Loftis had possession of the house where the drugs were found. Based upon this evidence, we hold that a rational finder of fact could have concluded beyond a reasonable doubt that Loftis possessed a controlled substance. See Young, 849 F.2d at 972.

C

Loftis also asserts that section 481.115 of the Texas Controlled Substances Act violates the Equal Protection Clause, and that his conviction under section 481.115 is therefore unconstitutional. Specifically, Loftis objects to the inclusion

of adulterants and dilutants in the aggregate weight of the controlled substance.

Under Texas law, simple possession of a controlled substance is defined as possession of a controlled substance that is, "by aggregate weight, including adulterants or dilutants, less than 28 grams." TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (West 1992). Section 481.115 put Loftis on notice that the possession of any amount of methamphetamine was illegal, testimony was introduced at trial to establish that there was enough methamphetamine in the bag to enable a user to "take a hit,"[3] and Loftis was convicted of possessing a controlled substance of less than twenty-eight grams. Accordingly, we conclude that Loftis' challenge to section 481.115 is without merit. Cf. Engelking v. State, 750 S.W.2d 213, 216 (Tex. Crim. App. 1988, no pet.).[4]

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[3] Accordingly, we conclude that Loftis' related contention that his conviction violates the Equal Protection Clause because the "trace" of methamphetamine that he was convicted of possessing has no "aggregate weight" is also without merit.

[4] In Engelking, section 481.115 was challenged as being unconstitutionally void for vagueness. In considering an assertion similar to the one raised by Loftis in the case before us, the Engelking court stated:

> [i]t was clearly established . . . that the appellant was in possession of methamphetamine. The statute gives the appellant ample notice that the possession of methamphetamine is illegal and that the penalty for this conduct may be increased given the presence of adulterating and diluting agents. The appellant ignored a clear statutory proscription on the possession of methamphetamine and we therefore fail to see how he was harmed by the inclusion of adulterants and dilutants.

Id.

III

For the foregoing reasons, we AFFIRM the district court's judgment denying Loftis federal habeas relief.