

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1930

STATE OF LOUISIANA

VERSUS

NELSON JACKSON

**On Appeal from the 21st Judicial District Court
Parish of Livingston, Louisiana
Docket No. 21695, Division "G"
Honorable Ernest G. Drake, Judge Presiding**

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Defendant-Appellant
Nelson Jackson**

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered May 7, 2010

*RPB
CF
JMM*

PARRO, J.

The defendant, Nelson Jackson, was charged by bill of information with possession of a firearm or carrying a concealed weapon by a person convicted of certain felonies, a violation of LSA-R.S. 14:95.1. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The defendant was sentenced to fifteen years of imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, assigning error to the sufficiency of the evidence, the effectiveness of counsel, and the constitutionality of the sentence imposed. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about October 21, 2006, during nighttime hours, Detective Jimmy Spire, a narcotics agent for the Livingston Parish sheriff's office, observed a vehicle being operated by the defendant as it travelled southbound on Drake Road in Albany. The detective conducted an investigatory stop of the vehicle at the defendant's residence. During a search of the vehicle, Detective Spire recovered a loaded .38 caliber handgun. The handgun was concealed inside the glove compartment.¹ After his criminal status was established, the defendant was placed under arrest and advised of his **Miranda** rights.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the state failed to prove beyond a reasonable doubt that he committed the offense of possession of a firearm by a convicted felon. The defendant notes that the firearm was not located on his person and that the state sought to prove that he had constructive possession of the firearm. The defendant notes that the firearm was located in an unlocked, closed

¹ The facts concerning the basis of the investigatory stop were not developed during the trial as the defendant stipulated that the stop was valid, because the detective had reasonable cause to believe that the defendant committed, was committing, or was about to commit a crime and that the ensuing search that revealed the gun was constitutionally valid and legal.

glove compartment, and could not be seen from the driver's area. The defendant further notes that the weapon was not processed for fingerprints. Moreover, the defendant notes that the bullets that were allegedly seized were lost before the trial. The defendant argues that there was no evidence that he was aware that the gun was in the glove compartment or that he had any intent to possess it.

The defendant further contends that he presented uncontradicted testimony that the gun belonged to another person who did not tell the defendant that it was in the glove compartment. The defendant argues that his mere presence in the vehicle where the firearm was stored in a closed glove compartment is insufficient to establish constructive possession.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Louisiana legislature in enacting LSA-Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince any rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown**, 03-0897 (La. 4/12/05), 907 So.2d 1, 18, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006). When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 02-1492 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460. As the

trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38. Thus, the fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

Louisiana Revised Statute 14:95.1 makes it unlawful for any person who has been convicted of certain felonies to possess a firearm. To prove a violation of LSA-R.S. 14:95.1, the state must prove: 1) the defendant's status as a convicted felon; and 2) that the defendant was in possession of a firearm. See **State v. Mose**, 412 So.2d 584, 585 (La. 1982). The state must also prove that ten years have not elapsed since the date of completion of the punishment for the prior felony conviction. LSA-R.S. 14:95.1(C)(1).

The first element of the offense was established through a stipulation reflecting that the defendant was previously convicted of a felony listed under LSA-R.S. 14:95.1, and that the conviction fell within the ten-year statutory limitation period. On appeal, the defendant does not challenge his status as a convicted felon or the absence of the ten-year statutory limitation period. The specific issue raised by the defendant is whether the state proved that he possessed the requisite intent to possess the firearm through constructive possession.

Louisiana Revised Statute 14:95.1 does not make "actual" possession a necessary element of the offense or specifically require that the defendant have the firearm on his person to be in violation. "Constructive" possession satisfies the possessory element of the offense. **State v. Day**, 410 So.2d 741, 743 (La. 1982). Constructive possession of a firearm occurs when the firearm is subject to the defendant's dominion and control. **State v. Plain**, 99-1112 (La. App. 1st Cir. 2/18/00), 752 So.2d 337, 340-41 (constructive possession found where the defendant admitted to having the weapon underneath the mattress in his bedroom, the defendant then led

officers to his bed and pointed out the location of the weapon, and the police recovered a weapon from the area the defendant had pointed out); **Mose**, 412 So.2d at 585-86 (gun located in the defendant's bedroom sufficient for constructive possession); **State v. Frank**, 549 So.2d 401, 405 (La. App. 3rd Cir. 1989) (constructive possession found where the gun was in plain view on the front seat of a car the defendant was driving but did not own); **State v. Lewis**, 535 So.2d 943, 950 (La. App. 2nd Cir. 1988), writ denied, 538 So.2d 608 (La. 1989), cert. denied, 493 U.S. 963, 110 S.Ct. 403, 107 L.Ed.2d 370 (1989) (presence of firearms in the defendant's home, statement by the defendant that one gun belonged to his wife, and discovery of shoulder holster in the master bedroom indicated the defendant's awareness, dominion, and control over the firearms). Louisiana cases hold that a defendant's dominion and control over a weapon constitutes constructive possession even if it is only temporary and even if the control is shared. **Plain**, 752 So.2d at 340; **State v. Melbert**, 546 So.2d 948, 950 (La. App. 3rd Cir. 1989); **State v. Bailey**, 511 So.2d 1248, 1250 (La. App. 2nd Cir. 1987), writ denied, 519 So.2d 132 (La. 1988). In addition, jurisprudence has added an aspect of awareness to the offense of LSA-R.S. 14:95.1. Therefore, the state must also prove that the offender was aware that a firearm was in his presence and that the offender had the general criminal intent to possess the weapon. **State v. Lamothe**, 97-1113 (La. App. 5th Cir. 6/30/98), 715 So.2d 708, 712, writ granted in part on other grounds, 98-2056 (La. 11/25/98), 722 So.2d 987 (per curiam). Mere presence alone of a defendant in the area of the contraband or other evidence seized does not prove that he exercised dominion and control over the evidence and therefore had it in his constructive possession. **State v. Johnson**, 03-1228 (La. 4/14/04), 870 So.2d 995, 999 (finding the evidence sufficient to support the defendant's conviction of possession of a firearm by a convicted felon). Cf. State v. Walker, 369 So.2d 1345, 1346 (La. 1979).

Whether the proof is sufficient to establish possession turns on the facts of each case. See State v. Harris, 94-0970 (La. 12/8/94), 647 So.2d 337, 338-39 (per curiam); **State v. Bell**, 566 So.2d 959, 959-60 (La. 1990) (per curiam). Further, guilty

knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. **Johnson**, 870 So.2d at 998.

In **State v. Fisher**, 94-2255 (La. App. 1st Cir. 12/15/95), 669 So.2d 460, writ denied, 96-0958 (La. 9/20/96), 679 So.2d 432, this court held that the evidence was insufficient to prove the defendant had the general intent to possess a gun found in his sister's purse, after a search of the vehicle the defendant was driving. Although the clip was found in the defendant's pocket, the sister's purse was located on the front passenger's seat floorboard and the sister produced proof that she was the registered owner of the gun. This court concluded that the evidence disclosed no intent to possess the gun, but only a mere acquiescence to the fact that the defendant's sister owned a gun and had it in her purse. **Fisher**, 669 So.2d at 462-63.

In **State v. Lamothe**, 97-1113 (La. App. 5th Cir. 6/1/99), 738 So.2d 55, a statement by the codefendant placed the gun in the car with the defendant. However, the evidence failed to indicate that the defendant was aware the gun was in the car and failed to prove the defendant's intent to possess the gun. The defendant denied knowledge of the gun in a statement to the police. The deputy who recovered the gun testified that he found it on the ground near the car. The defendant's mother testified that the car and the gun belonged to her and that she had left the gun under the seat of the car. The court found that the evidence did not support the conviction for possession of a firearm by a convicted felon. **Lamothe**, 738 So.2d at 57.

In **State v. Smith**, 98-0366 (La. App. 4th Cir. 5/12/99), 744 So.2d 73, the defendant was pulled over for speeding. A weapon was found under the driver's seat of the vehicle and was not in plain view. The owner of the vehicle, the defendant's mother, testified that she did not own the gun and had never seen it. The owner further testified that she had allowed several people to use the vehicle. The defendant's passenger testified that she did not become aware of the gun until it was produced during the search. The defendant did not have any ammunition on his person. The court found that the evidence did not support a conviction of being a convicted felon in possession of a firearm. **Smith**, 744 So.2d at 77.

In **State v. Morris**, 43,522 (La. App. 2nd Cir. 9/17/08), 996 So.2d 306, the court heard evidence that the defendant owned the vehicle he was driving when he was stopped. The defendant did not stop his car immediately after an agent activated his emergency lights; instead, the defendant kept driving while he and his passenger visibly moved about in the vehicle. Upon a search of the defendant's vehicle, the agent found the weapon in a semi-hidden location inside the passenger compartment, a location that must have been known to the defendant despite his testimony to the contrary. Unlike the other items found under the seat, the weapon was clean, suggesting that it had recently been placed there. Further, the weapon was in a position within reach of either of the occupants of the car, although it was closer to the defendant than to his passenger despite the defendant's protest to the contrary. The court found that all of this evidence together, when viewed most favorably to the state, proved beyond a reasonable doubt that the defendant had control of the weapon, even if that control was only temporary and shared with his passenger. **Morris**, 996 So.2d at 312.

Detective Spire testified that on the night he made the stop of defendant's vehicle and arrested him, he recovered the handgun from its unlocked glove compartment. He also found a box of .38 caliber bullets in the center console of the vehicle. The box was not full, and the handgun was fully loaded. The handgun was placed into evidence and later introduced at trial; however, the bullets were not. Detective Spire testified that he did not know the whereabouts of the bullets at the time of the trial, stating, "I didn't evidently put them in as evidence because the evidence custodian cannot find them." Detective Spire added that the bullets were .38 caliber and fit the .38 caliber handgun in evidence. Detective Spire later testified that he did seize the bullets, but was unaware of their whereabouts.

Officer Paul Brignac of the Livingston Parish sheriff's office was present at the time and observed the search of the vehicle. Officer Brignac saw the gun that was recovered and the box of ammunition and also noted that the box was not full. The search was ongoing as Officer Brignac approached the vehicle, and Detective Spire had already retrieved the evidence. Officer Brignac saw the handgun on the seat and the bullets that were in the center console. The defendant stipulated to his registered

ownership of the vehicle as the state presented evidence of such from the Office of Motor Vehicles.

Perlina Jackson, the defendant's mother, testified that the defendant lived with her, along with her other son. She further testified that the defendant was the only occupant of her residence who owned a vehicle and everyone shared it. She stated that the gun in question belonged to her deceased husband. According to her testimony, she placed the gun in the glove compartment and locked it on a Sunday that the defendant dropped her off at church. The gun was in her purse, but she removed it because it was too heavy. She stated that the defendant was not in the vehicle at the time and that he was across the yard, talking to someone. The defendant did not pick her up from church that day. She was in bed when the search and arrest took place and did not go outside. She stated that her older son told Detective Spire that the gun belonged to her. She further testified that she had bullets for the gun and that they were in a cabinet in her closet when the defendant was arrested. She stated that the defendant never saw those bullets.

The defendant's mother testified she normally kept the gun loaded and in her purse and only took it out to go to church. She stated that the gun "hadn't been in there [the glove compartment of the defendant's vehicle] about a day or two days before they arrested him." She did not tell the defendant that the gun was in his glove compartment and did not want him to find it in there. When asked how she locked the glove compartment, she stated that she just pushed it and it snapped and that she did not use a key. Detective Spire was recalled to the stand and testified that he did not recall speaking to anyone regarding the gun belonging to the defendant's mother or father or anyone other than the defendant.

Based on the evidence before us, we conclude there was sufficient evidence for the jury to determine that the defendant had constructive possession and dominion and control of the handgun. The defendant was the registered owner of the vehicle, the driver, and the sole occupant at the time of the offense. Two officers testified that ammunition was openly stored in the center console of the vehicle at the time of the stop. The glove compartment where the gun was located was unlocked. The jury

reasonably rejected the defendant's hypothesis of innocence. A rational juror could have concluded that all of this evidence together, viewed most favorably to the state, proved beyond a reasonable doubt that the defendant had constructive possession of the gun. **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 661. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant argues that his trial counsel was ineffective. The defendant notes that a motion to suppress was filed in this case, but that the defense counsel stipulated at trial that the investigatory stop was valid and that the search was constitutional. Although the facts were not developed at trial, the defendant notes that Detective Spire observed what he believed to be contraband being thrown from the defendant's vehicle and the stop and arrest were based on this observation. The defendant argues that the search of the vehicle exceeded the permissible scope, noting that he was not in reach of the passenger glove compartment and that there was no reason for him to know that a handgun was in the vehicle. The defendant contends that the stipulation resulted in a waiver of his right to contest the validity of the automobile search, a hearing on the motion to suppress, and an appeal on any adverse ruling on the motion.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court than by appeal. This is because post-conviction relief creates the opportunity for a full evidentiary hearing under LSA-C.Cr.P. art. 930.² **State v. Lockhart**, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. However, when the record is sufficient, this court may resolve this issue on direct appeal in the interest of judicial economy. **State v. Ratcliff**, 416 So.2d 528, 530 (La. 1982). Effective counsel has been defined to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." **United States v. Frugé**, 495 F.2d 557, 558 (5th Cir. 1974) (per curiam)

² The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 et seq., in order to receive such a hearing.

(quoting **Herring v. Estelle**, 491 F.2d 125, 127 (5th Cir. 1974)); see also **United States v. Johnson**, 615 F.2d 1125, 1127 (5th Cir. 1980) (per curiam). In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two-part test for review of a convicted defendant's claim that his counsel's assistance was so defective as to require reversal of a conviction. First, the defendant must show that counsel's performance is deficient. Second, the defendant must show that this deficient performance prejudiced the defense. A failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

In this case the defendant is relying on facts that were not borne out in the trial to support his claim of ineffective assistance of counsel. The state in response has also referenced facts regarding the investigatory stop that were not developed during the trial. According to the transcript, the defense objected to the introduction of the evidence regarding the stop as prejudicial and the trial court agreed and proposed the stipulation that was agreed upon. Since the appeal record is insufficient to address the merits of the defendant's ineffective assistance claims, the defendant should raise those claims in an application for post-conviction relief in the trial court.

ASSIGNMENT OF ERROR NUMBER THREE

In the final assignment of error, the defendant contends that the trial court imposed an unconstitutionally excessive sentence. The defendant contends that the trial court relied exclusively on his prior criminal history without any consideration of his age, effect of incarceration upon his family, or the seriousness of the offense. The defendant reiterates his argument that the gun belonged to his mother. The defendant argues that the imposed sentence is nothing more than the needless imposition of pain and suffering, and should be vacated.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly

disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Leblanc**, 04-1032 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 05-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 03-1423 (La. App. 1st Cir. 2/23/04), 873 So.2d 690, 692. Failure to comply with Article 894.1 does not necessitate the invalidation of a sentence or warrant a remand for resentencing if the record clearly illumines and supports the sentencing choice. **State v. Smith**, 430 So.2d 31, 46 (La. 1983). Maximum sentences may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. A trial court is entitled to consider the defendant's entire criminal history in determining the appropriate sentence to be imposed. **State v. Ballett**, 98-2568 (La. App. 4th Cir. 3/15/00), 756 So.2d 587, 602, writ denied, 00-1490 (La. 2/9/01), 785 So.2d 31. Thus, arrests can be considered.

The defendant was convicted of possession of a firearm by a convicted felon and faced a sentencing range of ten to fifteen years at hard labor without the benefit of parole, probation, or suspension of sentence and a fine between \$1,000 and \$5,000. LSA-R.S. 14:95.1(B). The defendant received the maximum term of fifteen years of imprisonment, but not the mandatory fine.

Before sentence was imposed, a presentence investigation was conducted. The trial court noted the defendant's extensive criminal history dating back to 1986, including convictions for DWI, simple burglary, attempted possession of cocaine, distribution of crack cocaine, possession of stolen property, possession of crack cocaine and drug paraphernalia, possession with intent to distribute cocaine, and simple criminal damage to property, as well as several arrests. The trial court counted up to nine felony convictions. Based on our review of the record, we do not find that the trial court abused its wide discretion in imposing the fifteen-year sentence on the defendant. This assignment of error lacks merit.

SENTENCING ERROR

In conducting our review of the record as required by LSA-C.Cr.P. art. 920(2), we note the existence of a sentencing error. The penalty provision for possession of a firearm or carrying a concealed weapon by a convicted felon includes a mandatory fine of not less than one thousand and not more than five thousand dollars. LSA-R.S. 14:95.1(B). The record reflects the trial court failed to impose a fine. Under the general provisions of LSA-C.Cr.P. art. 882(A), an illegal sentence "may" be corrected at any time by an appellate court on review. Because the trial court's failure to impose the fine was not raised by the state in either the trial court or on appeal, and the defendant is not prejudiced by the trial court's failure to impose the mandatory fine, we decline to amend the sentence imposed by the trial court. See State v. Price, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.