

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0912

STATE OF LOUISIANA

VERSUS

LUVENIA MARIE STOKES

Judgment rendered October 29, 2010.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 472501
Honorable William J. Crain, Judge



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LUVENIA MARIE STOKES

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KUHN, J. CONCURS + ASSIGNS REASONS
BEFORE: KUHN, PETTIGREW, JJ. and KLINE, J. *pro tempore*.¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

The defendant, Luvenia Marie Stokes, was charged by bill of information with distribution of cocaine (a Schedule II controlled dangerous substance pursuant to La. R.S. 40:964A(4)), in violation of La. R.S. 40:967A(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 new trial, and the defendant was sentenced to five years imprisonment at hard labor, with the first two years to be served without the benefit of probation, parole, or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, challenging the trial court's ruling on her motion for mistrial and the constitutionality of the sentence. We affirm the conviction, vacate the sentence, and remand for resentencing.

STATEMENT OF FACTS

On or about December 16, 2008, Detective Brandon Stevens of the St. Tammany Parish Sheriff's Office, Narcotics Division, conducted an undercover purchase of crack cocaine from the defendant. With the assistance of an informant, the police made arrangements for a meeting between Detective Stevens and the defendant on said date at the defendant's residence, located at 37182 Browns Village Road, Slidell, Louisiana. Wired with a recording device, Detective Stevens initially contacted the defendant by telephone and followed her instructions to meet her at her residence, drop her off at a second location about one-half of a mile from her residence, and drive around the block a couple of times while she obtained the drugs. Detective Stevens exchanged one hundred twenty dollars for a clear plastic bag containing pieces of hard white material later tested and determined to include 1.10 grams of cocaine.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends the trial court abused its discretion in refusing to grant a mistrial after a State witness presented testimony including a statement allegedly made by the defendant. The defendant notes that she was not given notice as to the existence of the statement, although such notice was requested in the defense's discovery motion. The defendant argues that the State

violated the rules of discovery and that the statement introduced was tantamount to a confession and highly prejudicial. The defendant contends that she was unable to assess the strength of the State's case without knowing that such a statement would be introduced. While noting that the defense was premised on mistaken identity, the defendant contends that the admonishment to the jury to disregard the statement was insufficient and that a mistrial was warranted.

The defendant argues that the State failed to comply with the discovery requirements set forth in La. Code Crim. P. art. 716B:

Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made.

The State's failure to comply with discovery procedures will not automatically demand a reversal. **State v. Burge**, 486 So.2d 855, 866 (La. App. 1 Cir.), writ denied, 493 So.2d 1204 (La. 1986). Accordingly, a conviction should not be reversed because of an erroneous ruling on a discovery violation absent a showing of prejudice. **State v. Gaudet**, 93-1641, p. 6 (La. App. 1 Cir. 6/24/94), 638 So.2d 1216, 1220, writ denied, 94-1926 (La. 12/16/94), 648 So.2d 386.

Mistrials are governed by La. Code Crim. P. arts. 770, 771, and 775. Article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial or when authorized by Article 770 or 771. Article 770 sets forth the mandatory grounds for a mistrial when certain prejudicial comments are made within the hearing of the jury by the judge, district attorney, or a court official during the trial or in argument. Article 771 outlines instances in which an admonition may be an appropriate remedy rather than a mistrial. A mistrial under the provisions of Article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness or of the prosecutor make it impossible for the defendant to obtain a fair trial. See State v.

Miles, 98-2396, p. 4 (La. App. 1 Cir. 6/25/99), 739 So.2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So.2d 231.

Before the transaction that formed the basis for the instant offense took place, the defendant instructed Detective Stevens to come inside her residence while she made a telephone call seemingly regarding her subsequent acquisition of the drugs. After the defendant finished the telephone call, Detective Stevens drove the defendant about one-half of a mile and met her again minutes later to complete the transaction. The defendant got back in the vehicle with Detective Stevens and after the transaction was complete, the defendant asked the detective to give her some of the drugs. Detective Stevens stated that he could not do so, claiming that he had to share it with someone else. When the defendant complained of the trouble she went through to obtain the drugs, Detective Stevens gave her an additional ten dollars for her trouble and drove her back to her residence. When asked if he had any problems seeing the defendant, Detective Stevens testified, "No, sir. I was with her, between being in the house and the car ride, I probably was in contact with her for a good 20 minutes or so." At approximately 4:00 p.m., that afternoon, Detective Stevens made a positive photographic identification of the defendant at the narcotics bureau and later identified the defendant in court during the trial.

Detective Julie Boynton of the St. Tammany Parish Sheriff's Office obtained a warrant for the defendant's arrest after Detective Stevens' photographic identification of her as the seller. The arrest took place at the defendant's residence, 37182 Browns Village Road in Slidell. During direct examination at the trial, the State asked the detective to tell the jury the facts and circumstances of the arrest. Detective Boynton testified that when the defendant asked why she was being arrested, Detective Boynton informed her that the arrest was for selling drugs to a white male in December. Detective Boynton further testified that the defendant reflected for a minute before stating, "Oh, I know who're (sic) talking about." The defense then objected and moved for a mistrial for lack of notice that the above statement would be used. The prosecutor argued that the testimony consisted of the res gestae of the arrest and added that he

was unaware of the statement until that morning. The trial court excused the jury to allow further discussion. The trial court determined that the testimony consisted of a statement by the defendant of which the defense was entitled to notice pursuant to La. Code Crim. P. art. 716. The trial court denied the motion for mistrial, noting that the objection interrupted the testimony. The trial court noted that a mistrial was not mandated by Article 770. The defense objected to the trial court's denial of the motion for mistrial and requested an admonition. The trial court agreed to admonish the jury to disregard the testimony pursuant to Article 771.

Where, as in this case, a mistrial is not mandated under Article 770, discretionary provisions of Article 771 apply. A mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. **State v. Berry**, 95-1610, p. 7 (La. App. 1 Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

We agree with the trial court's denial of the defendant's request for a mistrial. As noted by the defendant, the defense was premised on mistaken identity.² Detective Stevens had ample time to familiarize himself with the defendant and positively identified the defendant as the seller. The transaction commenced at the defendant's residence, the same place where the arrest took place. Considering the overwhelming evidence of the defendant's guilt, we find that the defendant did not suffer substantial prejudice, nor was she deprived of any reasonable expectation of a fair trial. Accordingly, the trial court did not abuse its discretion in denying the defendant's request for a mistrial. This assignment of error is without merit.

² We note that the defendant did not testify or present witnesses.

ASSIGNMENT OF ERROR NUMBER TWO

In the final assignment of error, the defendant contends that the trial court abused its discretion in imposing an excessive sentence. The defendant notes that she was a forty-eight-year-old, first-time felony offender at the time of sentencing. The defendant contends that the trial court failed to consider her personal history and potential for rehabilitation. The defendant notes that the offense involved a small amount of cocaine, a little over one gram. The defendant further notes that the prescribed statutory penalty would have allowed the trial court to place her on a period of probation after her mandatory minimum two-year sentence had been served.

Whoever commits the crime of distribution of cocaine shall be imprisoned at hard labor for not less than two years and for not more than thirty years, with the first two years of said sentence being served without the benefit of parole, probation, or suspension of sentence; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars. La. R.S. 40:967B(4)(b).

At the sentencing hearing in the instant case, the following colloquy occurred:

BY THE COURT:

The sentencing delays have been waived, Ms. Stokes was convicted of distribution of a Schedule II, specifically cocaine, by a jury. That sentence - - the sentencing range on that, I believe, is five to - - I think it's five to 20 and two without.

BY MR. LINDER [COUNSEL FOR THE DEFENDANT]:

Yes, sir.

BY THE COURT:

Is that correct?

BY MR. LINDER:

No, I think it's five to 15 or five to 30, the first two years without.

BY THE COURT:

Five to 30.

BY MR. NORIEA [PROSECUTOR]:

That's it.

BY THE COURT:

And two without. . . .

. . . .

I am going to sentence her to five years at hard labor in the custody of the Department of Corrections. I'm going to order that two of those years be served without benefit of probation, parole, or suspension of sentence. It's my belief that a lesser sentence would deprecate the seriousness of Ms. Stokes' crime.

Herein, the trial court imposed five years imprisonment at hard labor with two years to be served without the benefit of probation, parole, or suspension of sentence under the mistaken belief that the applicable sentencing range was five to thirty years imprisonment at hard labor. Thus, it is apparent that the trial court believed that the minimum term of imprisonment was being imposed and imposed the sentence without considering the full range of sentencing alternatives. Though the sentence actually imposed fell within the statutorily-prescribed range, the danger that such a mistake of law might have affected the trial court's attempt at leniency appears significant.

CONCLUSION

For the above and foregoing reasons, we affirm the defendant's conviction. However, we find that the imposition of sentence under a mistaken presumption as to the appropriate sentencing range constituted a mistake of law, and the imposed sentence must be set aside. **State v. Everett**, 432 So.2d 250, 251-252 (La. 1983); **State v. Spruell**, 403 So.2d 63, 64 (La. 1981) (per curiam). Accordingly, we remand the case to the trial court for resentencing after consideration of the proper sentencing range. See **State v. Butler**, 93-1317, pp. 14-15 (La. App. 1 Cir. 10/7/94), 646 So.2d 925, 933, writ denied, 95-0420 (La. 6/16/95), 655 So.2d 340.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING AFTER CONSIDERATION OF THE PROPER SENTENCING RANGE.

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KUHN, J., concurring.

I write separately to point out the potential exposure to a greater sentence a defendant has when she challenges the excessiveness of her sentence. As is evident from his colloquy with defense counsel and the prosecutor at the sentencing hearing, the trial judge was clearly mindful of the sentence he was imposing by stating, “[T]o give a lesser sentence would deprecate the seriousness of Ms. Stokes’ crime.” Because we must remand to correct the legal error due to the trial court’s misapprehension of the lower end of the sentencing range, defendant may now be sentenced to serve a greater term *because* she chose to raise as an issue the “excessiveness” of her sentence.