

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-0518**
VERSUS * **COURT OF APPEAL**
TONY DUNCAN * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 402-364, SECTION "F"
Honorable Dennis J. Waldron, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby
and
Judge David S. Gorbaty)

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COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AND SENTENCE AFFIRMED
MOTION TO WITHDRAW AS COUNSEL OF RECORD GRANTED

STATEMENT OF THE CASE

Tony Duncan was charged by bill of information on October 19, 1998, with possession of marijuana with intent to distribute, in violation of La. R.S.40: 966(A)(2) and with possession of a firearm by a convicted felon, in violation of La. R.S. 14:95.1. At his arraignment on October 26th he pleaded not guilty. Probable cause was found and the motion to suppress the evidence and statement was denied on December 29th.

On January 27, 1999, Duncan withdrew his earlier pleas and entered a plea of guilty as charged to the possession of marijuana with intent to distribute charge and a plea of guilty to the lesser charge of attempted possession of a firearm by a convicted felon. He was sentenced on that same day to serve five years at hard labor on each plea; additionally the attempted possession of a firearm by a convicted felony sentence was imposed without benefit of parole, probation, or suspension of sentence. The sentences are to run concurrently. The defendant's motion for an appeal was granted.

The only facts in the record in this case come from the transcript of the motion hearing on December 11, 1998. Sergeant Steven Gaudet testified that a confidential informant told him that a woman was selling marijuana from her residence at 2521 St. Andrew Street. From a hotline used by citizens to report narcotics activity, the sergeant learned also that the woman's name was Katherine, that she was about forty years old, and that

she was married to a man who worked for a waste management company. The sergeant then took the confidential informant to the address on St. Andrew Street where—for five dollars—he purchased a “nickel” bag of marijuana from a woman. At trial Sergeant Gaudet identified Katheleen Brewster as the woman he observed sell marijuana to the C.I. Two days after the sale, on August 17th, a search warrant was obtained for 2521 St. Andrew Street. The sergeant was not with his officers when they initially entered the apartment. When he arrived about five minutes later, the defendant, TONY Duncan, and Katheleen Brewster were in custody. The sergeant asked Katheleen Brewster if her sister Renee Butler, a/k/a Connie Brewster, was also involved in selling marijuana, and Ms Brewster answered affirmatively. At that time Renee Butler, who lived across the courtyard, was seen on her steps, and when the sergeant confronted her, she admitted to selling marijuana. In her home Renee Butler pointed out a shoebox containing fifteen small clear Ziploc bags of marijuana, which she kept under the bed, and a canine search of the premises led to a half-pound of marijuana in a closet.

Officer Robert Ferrier testified that he procured the search warrant for the St. Andrew Street residence. The officer said that he and his partner, Officer Harris, saw Katheleen Brewster on her front porch and advised her

that they had a search warrant for her residence. A seven-year-old girl was in the front room, and TONY Duncan was getting a hair cut on the back porch. The officer gave the couple their Miranda rights. Ms Brewster told him that marijuana was in the bedroom, and there he found eight bags of marijuana in a green plastic bag and another eight bags in a tan purse. Additionally thirty-five dollars was found. The couple was arrested. When Ms Brewster was asked about firearms in the house, she acknowledged that Mr. Duncan had found a handgun at work, and it was in a dresser drawer in the bedroom. The officer found that Tony Duncan had a prior conviction for possession of cocaine from August 11, 1998. When a canine search of the apartment occurred, an additional bag of marijuana and a twenty-dollar bill were found in a red purse in the living room. At one point Katheleen Brewster said that the marijuana belonged to her and that Tony Duncan did not know about it, but he interrupted her and said, "I know about the weed. I'll take the charge."

DISCUSSION Counsel filed a brief requesting a review for errors patent. Counsel complied with the procedures outlined by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in State v. Benjamin, 573 So. 2d 528 (La. App. 4th Cir. 1990). Counsel filed a brief complying with State v. Jyles, 96-2669 (La. 12/12/97), 704 So. 2d

241. Counsel's detailed review of the procedural history of the case and the facts of the case indicate a thorough review of the record. Counsel moved to withdraw because he believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal. Counsel reviewed available transcripts and found no trial court ruling, which arguably supports the appeal. A copy of the brief was forwarded to defendant, and this Court informed him that he had the right to file a brief in his own behalf.

As per State v. Benjamin, this Court performed an independent, thorough review of the pleadings, minute entries, bill of information, and transcripts in the appeal record. Defendant was properly charged by bill of information with a violation of La. R.S. 40:966(A)(2), and the bill was signed by an assistant district attorney. Defendant was present and represented by counsel at arraignment, the motion hearing, and sentencing.

We note two errors patent in that each of the defendant's sentences is illegally lenient. Both La. R.S. 40:966(A)(2) and La. R.S. 14:95.1(B) provide for imposition of a fine as well as for imprisonment. La. R.S. 14:27(D)(2), the attempt statute, provides that a defendant be sentenced "in the same manner" as for the offense attempted with a fine not exceeding one-half the largest fine mandated. The trial court did not impose fines on this defendant. However, we will not correct an error in the defendant's favor

that was not raised by the State. State v. Fraser, 484 So. 2d 122 (La. 1986).

Our independent review reveals no non-frivolous issue and no trial court ruling, which arguably supports the appeal. Defendant's conviction and sentence are affirmed. Appellate counsel's motion to withdraw is granted.

CONVICTION AND SENTENCE AFFIRMED
MOTION TO WITHDRAW AS COUNSEL OF RECORD GRANTED