NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0620**
VERSUS	*	**COURT OF APPEAL**
EDDIE TRIPLETT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 400-740, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

On August 18, 1998, appellant Eddie Triplett was charged by bill of information with possession of cocaine. The trial court heard and denied the appellant's motion to suppress evidence on September 17, 1998. A jury found the appellant guilty as charged following trial on October 21, 1998. On March 1, 1999, after a hearing on the multiple bill, the appellant was found to be a fourth felony offender and sentenced to life imprisonment without benefit of probation, parole or suspension of sentence. A motion to reconsider sentence was denied.

STATEMENT OF THE FACTS

On July 27, 1998, at about 10:45 p.m., Police Officers Jeff Keating and Edgar Staehle were on pro-active patrol in a high crime area when they observed the defendant on a bicycle peeping into the window of a parked car. When the defendant noticed the officers, he changed direction and rode away from the officers at a rapid pace. While pedaling away, the defendant looked nervously over his shoulder.

The officers ordered the defendant to stop and get off of his bicycle, which he did. He placed his right hand into his right front pocket and removed a clear plastic bag, then put the bag into his mouth. When Officer Keating told him to spit out the object the defendant threw the bag down. It landed about five feet from where Officer Staehle was standing near the police car. Officer Staehle retrieved the bag, which contained a white substance the officers believed to be cocaine.

Both officers testified that the defendant was the only person stopped at that location on that night. However, the defendant testified that the officers stopped another person at the same time that they stopped him. He further testified that he saw this other person drop the bag. The defendant testified that the officers ran both names for records, then arrested him and let the other person go. On cross-examination, the defendant admitted to convictions for distribution of cocaine in 1993, for simple burglary and possession of cocaine in 1989, and for burglary of an inhabited dwelling in 1979.

ERRORS PATENT

A review of the record indicates that there were none.

ASSIGNMENT ONE

The defendant argues that the trial court erred by denying his motion

to suppress the evidence. We disagree.

A temporary stop by a police officer of a person in a public place is authorized by LSA- C.Cr.P. art. 215.1A, which provides in part:

> A law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions.

See also Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); State v. Clark, 612 So. 2d 232 (La. App. 4th Cir. 1992); State v. Johnson, 557 So. 2d 1030 (La. App. 4th Cir. 1990). Reasonable cause for an investigatory stop is something less than probable cause; nevertheless, the officer must have knowledge of specific, articulable facts, which reasonably warrant the stop. State v. Lee, 462 So. 2d 249 (La. App. 4th Cir. 1984). The totality of the circumstances must be considered in determining whether reasonable cause exists. State v. Belton, 441 So. 2d 1195 (La. 1983), cert. den., 466 U.S. 953, 104 S.Ct. 2158 (1984). A trial judge's decision to deny a motion to suppress will be afforded great weight and will not be set aside unless to do so is clearly mandated by a preponderance of the evidence. State v. Lee, 545 So. 2d 1163 (La. App. 4th Cir. 1989).

In the instant case, Officers Keating and Staehle observed the defendant stopped on a bicycle peering into the window of a parked car.

When the defendant noticed the officers, he changed direction and attempted to flee. The officers testified that they were on pro-active patrol in an area with a high incidence of narcotics trafficking, auto thefts and burglaries. It was reasonable for the officer to suspect that the defendant was about to break in to the parked car. After the defendant was stopped, he took an object out of his pocket and placed it in his mouth. At this point, the officers had probable cause to believe that the object the defendant was attempting to hide or destroy was contraband. There was no error in the trial court's denial of the motion to suppress evidence.

ASSIGNMENT TWO

The defendant argues that he was denied the presumption of innocence by the prosecutor's references, during cross-examination, to his incarceration since his arrest and to his failure to produce defense witnesses. He claims that the reference to his being in jail since July "effectively clothed [him] in an orange prison uniform." He further claims that the prosecutor's questions about his presenting only his own testimony in defense confused the jury as to who had the burden of proof.

In recognition of defendant's right to a presumption of innocence, the State cannot compel a defendant to stand trial before a jury while dressed in identifiable prison clothes. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691

(1976). Past Louisiana courts have upheld convictions on the basis of defendant's failure to establish deprivation of his right to a presumption of innocence by clear and convincing evidence, focusing on the fact that defendant's attire was not identifiable prison garb. State v. Yates, 350 So. 2d 1169 (La.1977); State v. Kinchen, 290 So. 2d 860 (La. 1974); State v. Tennant, 262 La. 941, 265 So. 2d 230 (1972).

The defendant further compares the reference to State v. Turner, 379 U.S. 466, 85 S.Ct. 546 (1965), in which the two deputies who were custodians of the sequestered jurors, were key prosecution witnesses. In that case, defendant avers that, like standing trial in prison garb, the use of prosecution witnesses as the custodial deputies who had regular contact with the jurors has a continual effect on the jurors, which presents an unacceptable risk of impermissible factors coming into play.

In the instant case, the prosecutor's reference occurred during cross-examination of the defendant about the person he alleged threw down the cocaine, as follows:

Q And you saw him with cocaine?
A Yes, sir.
Q Did you tell the police that?
A Yeah.
Q Okay. And they just decided to let him go?
A Uh-huh.
Q Did you tell anybody else about this?
A My lawyer.
Q Did you ask you lawyer to subpoena this person?

MR. JUPITER (defense counsel):
Objection. Objection. It's privileged information.

THE COURT:
Overruled.

THE WITNESS:
No, sir.

BY MR. HUBER (prosecutor):
Q Did you ask anybody to do anything about this? I mean, to be wrongly accused and you know who had the drugs, what actions did you take - -
A I wasn't looking to go to trial with this.

MR. JUPITER:
Objection, your Honor. He's shifting the burden to this man. He's shifting the burden. It's the Government's burden to prove guilt beyond a reasonable doubt. He has no burden.

THE COURT:
Mr. Jupiter, I'm not going to comment on this other than to say I overrule your objection.

BY MR. HUBER:
Q You've been in prison since July. Can you tell us this person's name?

MR. JUPITER:
Objection. That's a mistrial.

THE COURT:
Overruled.

THE WITNESS:
Yes, sir.

The defendant then gave the name of the person he alleged threw down the cocaine. The prosecutor continued to ask him if he had done anything with this information. The defendant proceeded to explain that he did not have a phone number or address and doubted that the person would come to court and admit to the offense.

The prosecutor's reference to the defendant's pre-trial incarceration was momentary. It was thus not comparable to the continuous effect of trial in prison garb and did not effect his presumption of innocence.

The defendant's argument relative to State v. Turner has no merit. The issue in that case was the continual contact between sequestered jurors and deputies who were also State witnesses. The Court's concern was the effect that this contact might have on the jurors' credibility determinations. There was no issue of contact between jurors and State witnesses in the instant case. The Turner case is thus inapplicable.

As to the questions about the defendant's actions relative to pursuing the alleged guilty party, these were not asked for the purpose of confusing the jury about the burden of proof, but were attacks on the credibility of the defendant's story. It is neither unusual nor impermissible for the prosecutor to ask a testifying defendant if he has documents or witnesses to back up his story.

Because defense counsel did not object to the burden of proof portion of the jury instructions, one assumes they were sufficient to adequately inform the jury that the State had the burden to prove the defendant's guilt beyond a reasonable doubt. In addition, in response to a juror's question relative to the difference between possession and attempted possession, the trial judge, after explaining the difference in the sentence and rereading the charge relative to attempt, added:

> Additionally, in Louisiana, as jurors you have a large amount of discretion in the verdict in which you can return. So the law allows you, even if you believe that the evidence established that the crime charged, possession of cocaine, was proven beyond a reasonable doubt, you are free to return a verdict of attempted guilty of possession as a responsive verdict to that charge if that's what you choose to do.
>
> And, once again, if the State has failed to prove guilt of the defendant, either as to the crime charged or to the attempted charge, the law requires that you return a verdict of not guilty.

Even this supplemental instruction given by the court is sufficient for the jurors to understand that the burden of proof is on the State, and that the defendant's guilt must be proven beyond a reasonable doubt. Accordingly, the defendant was not denied a fair trial due to any confusion as to who had the burden of proof.

This assignment is without merit.

ASSIGNMENT THREE

The defendant argues that the trial court erroneously instructed the jury as to the sentencing range over his objection. He notes that the trial court advised the jury that the sentence for possession of cocaine had a maximum sentence of five years, and an attempt was one-half the sentence of the completed offense. The trial court further advised the jury that there was no minimum sentence. This instruction was given despite his admitting prior convictions, which mandated a life sentence on a multiple bill.

A similar issue was raised in State v. Dominick, 94-1368 (La. App. 4 Cir. 4/26/95), 658 So. 2d 1, writ denied, 95-2291 (La. 2/2/96), reconsideration denied, 95-2291 (La. 3/22/96), 669 So. 2d 1225. On appeal, this court stated:

> Finally, Dominick argues that the trial court erred by granting the state's motion in limine prohibiting defense counsel from relating to the jury the minimum mandatory period of incarceration to which appellant was exposed. He maintains that, considering the State's intention to file a multiple bill alleging three predicate offenses, the defense should have been permitted to advise the jury that a conviction would result in a minimum mandatory sentence of twenty years flat time.
>
> As stated in State v. Jackson, 450 So.2d 621, 633-34 (La.1984):
>
> > When the penalty imposed by the statute is a mandatory one, the trial judge must inform the jury of the penalty on the request of the defendant and must permit the defense to argue the penalty to the jury. State v. Hooks, 421 So.2d 880 (La.1982); State v. Washington, 367 So.2d 4 (La.1978). In instances other than when a mandatory legislative

> penalty with no judicial discretion as to its imposition is required following verdict, the decision to permit or deny an instruction or argument on an offense's penalty is within the discretion of the trial judge. State v. Williams, 420 So.2d 1116 (La.1982); State v. Dawson, 392 So.2d 445 (La.1980); State v. Carthan, 377 So.2d 308 (La.1979); State v. Blackwell, 298 So.2d 798 (La.1974) (on rehearing), cert. denied, 420 U.S. 976, 95 S.Ct. 1401, 43 L.Ed.2d 656 (1975).
>
> Although the multiple bill carries a mandatory minimum, the filing of the multiple bill is optional with the State. In any event, the allegations of the multiple bill must be proved before the mandatory minimum sentence becomes an issue and under Dorthey, the trial court has the discretion in not applying the mandatory minimum sentence if the facts warrant. Accordingly, any instruction or argument to the jury relative to the minimum sentence that a defendant could receive as a quadruple offender is within the discretion of the trial judge. Accordingly, this assignment is without merit.

State v. Dominick, 94-1368, pp. 4-5, 658 So. 2d at 3.

In the instant case, defense counsel told the jury, during voir dire, that the defendant faced a life sentence for the offense. The State objected. The trial court advised the jury that sentencing was not an issue, but that "the statute prescribes the sentence, if found guilty for possession of cocaine, of from zero to five years."

On direct examination by defense counsel, the defendant was asked

about his record, to which he replied, “Well, right now I’m facing life for this petty charge here.” Then, in closing argument, defense counsel stated that he had “reason to doubt that [the defendant] should go to prison for the rest of his life.“ The prosecutor objected and requested that the court instruct the jury on the sentence. The court instructed the jury as to the sentence for a conviction for possession of cocaine.

After the jury left the courtroom for deliberations, defense counsel objected to the instruction and the following transpired:

> THE COURT:
>
> You object to you telling them life and me telling them what the law is. Is that what you’re --
>
> MR. JUPITER:
>
> Your Honor, I don’t have no problem you telling them the law if you’re telling -- if he’s admitted on the stand that he has prior convictions, you should tell them 15:529 as well, he’s facing life, if you’re going to tell them anything.
>
> THE COURT:
>
> He hasn’t been convicted. They haven’t filed a multiple bill. They haven’t proven that any of those convictions are Constitutional, and no sentence has been imposed. All right?
>
> Just as in a capital murder case, the State can’t argue to a jury, “Don’t worry. Come back death. An Appellate Court will look at it,” because then they’re relieving the ultimate burden from them. All right?
>
> Because that’s perspective. That’s something that may happen in the future. They’re not allowed to do that, and I told you do not argue that the sentence may be life because that is something that has not happened. It’s not appropriate. All right?
>
> Sentencing is not appropriate, period, except in a capital case, and it’s not appropriate in this (case). And I told you

> before, I asked you not to do it. If you're going to do it then I'm going to clarify the law for the jury.

When a juror questioned the trial court about the difference between possession and attempted possession, the court reiterated that the sentencing was left to the court, then restated the sentences for possession and attempted possession. The juror then advised the court that he was more concerned with the definitions of possession and attempted possession. The court then reread the charge on attempt and on possession.

After the jury left the courtroom to deliberate, defense counsel again objected and accused the court of misstating the law. The trial court replied:

> THE COURT:
>
> No. I have not misstated the law as to Mr. Triplett. I note your objection for the record.
>
> The juror said sentencing was not their concern, but since the only other distinction is that they're both felonies and whether it is or isn't a felony is not a relevant sentencing consideration, and as for sentencing being a relevant consideration, you interjected it, Mr. Jupiter.
>
> You interjected the whole discussion of sentencing by standing up in voir dire, I believe, and talking about the fact that he was facing a life sentence. So if you didn't want it to be a factor involved in this case you shouldn't have brought it up to begin with.

Considering defense counsel's several attempts to interject the possibility of a life sentence, and the holding in Dominick, the trial court did

not err in exercising its discretion by advising the jury of the sentencing range prescribed for the instant offense, but not the life sentence prescribed under the Habitual Offender Law.

ASSIGNMENT FOUR

The defendant argues that his life sentence is unconstitutionally excessive. La. R.S. 15:529.1A(1)(c)(ii) provides:

> If the fourth or subsequent felony or any of the prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or of any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

The defendant was adjudicated a fourth felony offender. One of his prior felonies was distribution of cocaine, which is a violation of the Controlled Dangerous Substances Law punishable by more than five years. Accordingly, the statute prescribes a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

The defendant does not allege error in the adjudication. Rather, he argues that the life sentence is unconstitutionally severe as applied to his case.

An appellate court reviews sentences for constitutional excessiveness under La. Const. Art. I, § 20. A sentence is constitutionally excessive it if

makes no measurable contribution to acceptable goals of punishment or is the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. Courts have the power to declare a sentence excessive even if it falls within the statutory limits. State v. Sepulvado, 367 So. 2d 762 (La. 1979). The trial court has the authority to reduce a mandatory minimum sentence provided by the multiple offender statute for a particular offense and offender if the sentence would be constitutionally excessive. State v. Pollard, 93-0660 (La. 10/20/94), 644 So. 2d 370. Because the Habitual Offender Law has been held constitutional, the minimum sentences it imposes upon multiple offenders are presumed to be constitutional. State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672. To rebut the presumption of constitutionality, the defendant must clearly and convincingly show that he is exceptional in that, because of unusual circumstances, the defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. State v. Young, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 531, writ denied, 95-3010 (La. 3/22/96), 669 So. 2d 1223.

As noted above, the defendant's life sentence is prescribed by statute and is thus presumed constitutional. It is therefore incumbent upon the

appellant to rebut the presumption. The Defendant argues, as the sole mitigating factor, that the instant offense, if it were a first offense, "carries a sentence as low as zero years or probation." He avers that there is no evidence that he was engaged in the widespread distribution of cocaine. He further avers that the predicate felonies are relatively minor and non-violent. He then erroneously lists the predicates as simple burglary and possession of cocaine, and avers that there is "no other evidence of an extensive and violent criminal history."

In the instant case, the appeal record indicates that the defendant was charged with burglary of an inhabited dwelling on July 14, 1979, in two separate cases. In one case, CDC # 271-410, the defendant pled guilty to a reduced charge of simple burglary. In that case, the defendant's co-defendant pled guilty as charged to simple burglary of an inhabited dwelling and possession of a firearm by a convicted felon. In the other case, CDC # 271-421, the defendant pled guilty as charged to simple burglary of an inhabited dwelling and possession of stolen objects valued at $480.00. The defendant pled to both cases in the same court on October 26, 1979, and was ordered to serve concurrent two-year sentences in Parish Prison. For purposes of the multiple bill, the State used the case in which the defendant pled guilty to the reduced charge of simple burglary, though he admitted the

conviction for burglary of an inhabited dwelling during his trial testimony.

On October 29, 1987, the defendant was found in possession of cocaine. In that case, the appellant pled guilty as charged on March 23, 1988, was given a two-year suspended sentence, and was placed on eighteen months probation. His probation was revoked on November 20, 1989, and his original sentence was made executory.

On January 27, 1993, the defendant was arrested for distribution of cocaine. On August 26, 1998, the defendant pled guilty to that charge under an agreement that the State would not file a multiple bill. He was sentenced to ten years at hard labor.

Considering the above extensive and serious criminal record, the trial court did not abuse its discretion in refusing to deviate from the life imprisonment sentence prescribed by statute.

CONCLUSION

Accordingly, the defendant's conviction and sentence are affirmed**CONVICTION AND SENTENCE AFFIRMED**