STATE OF LOUISIANA	*	**NO. 2000-KA-2280**
VERSUS	*	**COURT OF APPEAL**
DONNEL COLEMAN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 403-657, SECTION "B"
HONORABLE PATRICK G. QUINLAN, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, Judge David S. Gorbaty)

JONES, J., CONCURS IN PART AND DISSENTS IN PART

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AFFIRMED

STATEMENT OF CASE

On December 16, 1998, the defendant, Donnel Coleman, was charged with distribution of a substance falsely represented to be cocaine in violation of La. R.S. 40:971.1. The defendant pled not guilty to the charge at his arraignment on March 29, 1999. A preliminary hearing was held on May 14, 1999. The trial court found probable cause. After a jury trial on July 7, 1999, the defendant was found guilty of attempted distribution of a substance falsely represented to be cocaine. On July 14, 1999, the State filed a multiple bill of information alleging defendant to be a third felony offender. A multiple bill and sentencing hearing was held on September 14, 1999. The trial court adjudicated the defendant to be a third felony offender and sentenced him to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. On April 7, 2000, the defendant filed a motion to reconsider sentence and a motion for an out of time appeal. The trial court denied the motion to reconsider sentence. The trial court granted the motion for out of time appeal and set a return date of July 21, 2000.

STATEMENT OF FACT

On September 22, 1998, New Orleans Police Officer Valdemetreia McCollum and State Trooper Derrick Stewart were assigned to a "buy-walk operation" called "Operation Trick or Treat." Officer McCollum testified that she and Trooper Stewart were the undercover police officers who negotiated the narcotics sales. Back up officers monitored them via audio and video equipment. As Officer McCollum and Trooper Stewart drove through the area of Amelia and Magazine Streets, the defendant made eye contact with and motioned to Officer McCollum. She parked her vehicle and the defendant and another man, later identified as Kelvin Smith, walked up to the vehicle. The defendant asked what she wanted. Officer McCollum told the defendant that she wanted to buy a ten-dollar piece of crack cocaine. The defendant and Smith told Officer McCollum that all they had was a twenty-five-dollar rock of crack. She told them that she did not have that much money. She stated that she had enough money for a ten or twenty dollar rock of crack cocaine. The defendant then told Smith to give Officer McCollum the other piece that they had earlier. Smith said, "You're sure?" The defendant responded "Yeah, give'em the other piece." Smith reached into his pocket and gave Officer McCollum the other piece of crack cocaine. She then gave them a twenty-dollar bill. After she drove away from the

scene, she realized that the defendant and Smith had sold her bunk. At trial, Officer McCollum identified the videotape of the incident and testified that the videotape accurately reflected the events. The officer also identified the object which the defendant and Smith sold to her.

Officer Steven Imbraguglio supervised the undercover operation. The officer testified that he supplied Officer McCollum with the funds from the New Orleans Police Department to purchase the narcotics. The funds were not marked because he knew that they would not recover the funds. If they attempted to confiscate the money, then the undercover operation would have been jeopardized.

Officer Harry O'Neal, a drug chemist with the New Orleans Police Department Crime Lab, testified that he examined the object purchased by Officer McCollum from the defendant. The object tested negative for controlled dangerous substances.

Louisiana State Trooper Ernest Dykes monitored the transmitting device that had been placed in the undercover vehicle. Trooper Dykes testified he was driving on Magazine Street when Officer McCollum stated that she had been flagged down. He pulled over one block from Amelia Street where he could see the corner. He then heard the conversation between Officer McCollum and the defendant. The officer stated that he

saw the two people Officer McCollum described walk towards her car. He could not see the two men while they were standing by the car. He was able to see them when they walked away from the vehicle. The officer testified that he kept the two men in sight until the officers in the marked vehicle stopped the two men and interviewed them.

Officer Andrew Roccaforte participated in the undercover operation in a support capacity. The officer testified that it was his duty to identify the individuals who had sold narcotics to the undercover agent. After the transaction was completed, the officer was provided with descriptions of the subjects. The officer drove into the area and stopped the defendant and Kelvin Smith. The defendant and Smith were interviewed and released.

Kelvin Smith testified on behalf of the defendant. He acknowledged that he was arrested for distribution of bunk and pled guilty to that offense. Smith stated that he knew the defendant and that they were friends. Smith testified that the defendant was not with him on the day that Smith sold bunk to Officer McCollum. He stated that the defendant was in the area that day but that the defendant was not part of the deal. According to Smith, the defendant did not know that Smith was selling bunk. The defendant did not get any money out of the deal.

The defendant testified that he was not involved in the drug deal. He

acknowledged prior convictions for possession of cocaine and attempted armed robbery. He stated that he did not physically participate in the narcotics transaction. He admitted that he was standing next to Smith when Smith sold the bunk to Officer McCollum and told Smith to give Officer McCollum "the twenty" he had.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

The defendant argues that the State failed to produce sufficient evidence to sustain his conviction for attempted distribution of a substance falsely represented to be cocaine.

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred

according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. La. R.S. 15:438 is not a separate test from Jackson v. Virginia, supra, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, supra.

La. R.S. 40:971.1 provides:

> It shall be unlawful for any person to produce, manufacture, distribute, or dispense any substance which is represented to be a controlled dangerous substance and which is an imitation controlled dangerous substance, or any controlled dangerous substance which is a counterfeit controlled dangerous substance.

To support a conviction for an attempt, the State must prove that the defendant had the specific intent to commit the crime and did or omitted some act toward accomplishing his goal. A person may be convicted of an attempt to commit a crime even where it appears that the defendant actually perpetrated the offense. La. R.S. 14:27.

A principal is a person concerned in the commission of a crime, whether present or absent, and whether he directly commits the act constituting the offense, aids and abets in its commission, or directly

counsels or procures another to commit the crime. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of the crime are principals, and mere presence at the scene is not enough. State v. Graves, 96-1537 (La. App. 4 Cir. 9/10/97), 699 So.2d 903; State v. Marshall, 94-1282 (La. App. 4 Cir. 6/29/95), 657 So.2d 1106. One may only be convicted as a principal for a crime for which he personally has the requisite mental state. Id. Specific intent may be inferred from the circumstances of the transaction and from the actions of the accused. State v. Graham, 420 So.2d 1126 (La. 1982).

In the present case, Officer McCollum testified that the defendant and Smith motioned for her to pull over. When she did, the two men approached her vehicle and offered to sell her cocaine. Both Smith and the defendant negotiated the deal with Officer McCollum. The defendant asked Officer McCollum what she wanted. Officer McCollum told the two men she was looking for a ten-dollar piece. When Smith stated that he had only a twenty-five-dollar rock, the defendant told Smith to give Officer McCollum the "twenty piece." While Smith took the alleged rock of crack cocaine from his pocket and gave it to Officer McCollum to complete the deal, the defendant was the person who negotiated the transaction. The videotape of the incident corroborated Officer McCollum's testimony. In addition, the

defendant admitted on cross-examination that he was standing next to Smith when Smith sold the bunk to Officer McCollum and told Smith to give McCollum "the twenty" he had. Officer O'Neal testified that the object purchased by Officer McCollum from the defendant tested negative for controlled dangerous substances.

The testimony presented by the State was sufficient to prove, beyond a reasonable doubt, that the defendant was guilty, at least, of attempted distribution of a substance falsely represented to be cocaine. The evidence reveals that the defendant was involved in the negotiation of the narcotics transaction. Even though he did not physically give the bunk to Officer McCollum, he intended to sell, and sold, the officer a substance falsely represented to be cocaine.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant also contends that the trial court imposed an unconstitutionally excessive sentence. He was sentenced to life imprisonment as a third felony offender under La. R.S. 15:529.1(A)(2)(b)(ii). He concedes that the life sentence was mandatory but argues that the sentence is unconstitutionally excessive in his case.

La. R.S. 15:529.1(A)(1)(b)(ii) provides:

> If the third felony or either of the two 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 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.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Sepulvado, 367 So.2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Lobato, 603 So.2d 739 (La. 1992); State v. Telsee, 425 So.2d 1251 (La. 1983).

The minimum sentences imposed on multiple offenders by the Habitual Offender Law are presumed to be constitutional. State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672. The defendant bears the burden of rebutting the presumption that the mandatory minimum sentence is constitutional. State v. Short, 96-2780 (La. App. 4 Cir. 11/18/98), 725 So.2d 23. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it that would rebut the presumption of constitutionality. State v. Johnson, 97-1906

at p. 7, 709 So.2d at 676.

In the case at bar, the defendant pled guilty to the multiple bill of information which alleged defendant to be a third felony offender. In addition to the present conviction for attempted distribution of bunk, the defendant had prior convictions for possession of cocaine and attempted armed robbery. The multiple bill documents reveal that the defendant pled guilty to possession of cocaine in November of 1995 and was sentenced to two years at hard labor. The sentence was suspended and defendant was placed on active probation for two years. His probation was revoked in October of 1997 as a result of his conviction for attempted armed robbery. The defendant pled guilty to attempted armed robbery in September of 1997 and was sentenced to fifteen months at hard labor. The present incident occurred in September of 1998. These facts indicate that the defendant is the type of career criminal for whom the mandatory life sentence statute was created. The defendant has progressed from possession of cocaine to attempted distribution of bunk in less than five years even with a stint in jail for possession of cocaine and attempted armed robbery. It should be noted that although the jury found the defendant guilty of attempted distribution, the facts of the case could have supported a conviction for distribution. Further, the defendant has not produced any evidence suggesting that

mandatory life sentence is unconstitutionally excessive in light of the circumstances of this case. The trial court did not impose an unconstitutionally excessive sentence when it sentenced the defendant to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence.

This assignment is without merit.

CONCLUSION

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED