

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2000-KA-2728
VERSUS	*	COURT OF APPEAL
JAMAL B. FORD	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-677, SECTION "K"
Honorable Arthur Hunter, Judge

Judge Dennis R. Bagneris, Sr.

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

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AFFIRMED AND AMENDED

STATEMENT OF THE CASE

The defendant, Jamal B. Ford (“the defendant”), was charged by bill of information on December 30, 1999, with possession with intent to distribute cocaine in violation of La. R.S. 40:967(B)(1). Several hearings for determination of counsel were heard. On February 4, 2000, a capias was issued based on the defendant’s failure to appear. On February 9, 2000, counsel was determined, and the court recalled the capias and issued an ROR bond in the amount of \$50,000. Motions were held, and the trial court found probable cause and denied the motion to suppress evidence. A jury trial was held on March 15, 2000, and the defendant was found guilty as charged. On April 3, 2000, the defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal. Both were denied. The defendant was sentenced to five years imprisonment without benefit of probation, parole, or suspension of sentence, and the State filed a multiple bill.

On July 14, 2000, the multiple bill hearing was conducted. The trial

court found the defendant to be a second felony offender as alleged in the bill and sentenced to him fifteen years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The defendant's motion to reconsider sentence was denied. The defendant then filed a timely notice of appeal.

FACTS

Officer Michael Montalbano, a member of the New Orleans Police Department, 6th District, worked with the NOPD ATF Safe Home Task Force. He testified that on November 18, 1999, he had established surveillance at the intersection of Josephine and Laurel Streets after receiving complaints that narcotics were openly being sold in the area.

While seated in an unmarked, non-police vehicle with tinted windows, the officer observed an unknown subject walk up to the defendant, who was standing in front of a store located at the intersection. The two subjects spoke briefly before the unknown male handed the defendant an unknown amount of U. S. currency. The defendant then crossed the street to a vehicle and, using keys attached to his belt, opened the door. Officer Montalbano observed the defendant reach into the vehicle and retrieve a clear plastic bag, which appeared to contain crack cocaine. The defendant removed an object

from the bag and then called the unknown subject over to the car to hand it to the unknown subject. The defendant then replaced the bag and locked the car before the two walked back to the store.

Officer Raymond Veit testified that his partner, Officer Montalbano, informed him that he had observed an apparent narcotics transaction at the intersection and relayed a description of the two subjects. Officer Veit and Officer Mike Eberhardt proceeded to the intersection in an unmarked police vehicle. After observing the officers approach, the unknown subject fled into the St. Thomas Housing Development. Officer Eberhardt unsuccessfully attempted to detain the subject. The defendant proceeded to enter the store, where Officer Veit apprehended him. After determining that the defendant was not armed, Officer Veit, at Officer Montalbano's direction, proceeded to the vehicle where, on the driver's seat, he observed a plastic bag containing numerous white rock-like substances. Officer Veit believed these to be crack cocaine. Officer Veit, utilizing the defendant's keys, was able to seize the narcotics, twenty-four pieces of crack cocaine.

Karen Lewis-Holmes, an expert in the testing of controlled dangerous substances, testified that she performed a crystal test and a gas chromatograph mass spectrometer test on the evidence. Both tests were positive for cocaine.

ERRORS PATENT

A review of the record reveals two errors patent. Initially, the record fails to reflect that the defendant was arraigned or entered a plea of not guilty; however, La. C.Cr.P. art. 555 provides that if the defendant enters upon the trial without objecting to the failure to be arraigned, the error is waived and it is considered as if the defendant pled not guilty. In this case, no objection was made by the defendant for the failure to arraign. Accordingly, any resultant error was waived.

Additionally, the defendant filed post-trial motions for new trial and for judgment of acquittal. The trial court denied both motions on April 3, 2000, and on the same day, sentenced the defendant. La. C.Cr.P. art. 873 requires a twenty-four hour delay between the denial of a motion for new trial and sentencing, unless the defendant waives such delay. A defendant may implicitly waive the waiting period for imposing sentence by announcing his readiness for the sentencing hearing. Here, the defendant implied that he waived the required twenty-four hour delay when defense counsel responded in the affirmative when the trial court inquired as to whether he was ready for sentencing. State v. Jefferson, 97-2949, p. 4 (La. App. 4 Cir. 4/21/99), 735 So.2d 769, 772. Further, in State v. Bentley, 97-

1552 (La. App. 4 Cir. 10/21/98), 728 So.2d 405, this Court held that any error in failing to observe the 24-hour delay in sentencing after the denial of a motion for new trial did not prejudice the defendant, whose original sentence was vacated, and who was later found to be a habitual offender.

ASSIGNMENT OF ERROR NUMBER 1

The defendant contends that the evidence was insufficient to support the conviction. Specifically, the defendant contends that the State failed to prove beyond a reasonable doubt that he possessed the cocaine not for his personal consumption but with the intent to distribute.

The standard of review for the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

To support the defendant's conviction, the State must prove that the defendant "knowingly" and "intentionally" possessed the cocaine with the "intent to distribute." State v. Williams, 594 So.2d 476, 478 (La. App. 4th Cir. 1992). Specific intent to distribute may be established by proving circumstances surrounding defendant's possession which give rise to a

reasonable inference of intent to distribute. State v. Dickerson, 538 So.2d 1063 (La. App. 4th Cir. 1989).

In State v. Hearold, 603 So.2d 731, 735 (La. 1992), the Louisiana Supreme Court identified five factors which are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance as follows:

(1) [W]hether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.

In State v. Cushenberry, 94-1206, p. 6 (La. App. 4 Cir. 1/31/95), 650 So.2d 783, 786, this Court noted that the Hearold factors were “enunciated as ‘useful’ in determining whether circumstantial evidence is sufficient to prove intent to distribute,” but this Court held that the evidence need not “fall squarely within the factors enunciated to be sufficient for the jury to find that the requisite intent to distribute.”

In State v. Ash, 97-2061 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, writ denied, 99-0721 (La. 7/2/99), 747 So.2d 15, officers testified that they observed the defendant and a young female conversing, and the defendant

had his right hand extended. From their past experience the officers believed the defendant was engaging in a narcotics transaction in an area known for drug trafficking. This Court found these facts to be supportive of a finding of possession with intent to distribute.

In State v. Goodjoint, 30-727 (La. App. 2 Cir. 6/24/98), 716 So.2d 139, the arresting officer testified that he saw the defendant engage in a hand-to-hand exchange in an area where specific complaints had been received regarding drug dealing. When the officers attempted to talk with defendant, he broke and ran. He was apprehended with a matchbox containing thirty pieces of cocaine and was in possession of \$940. The court found there was no reason to disagree with the jury's finding that these circumstances were sufficient to infer beyond a reasonable doubt that defendant had the requisite intent to distribute the cocaine.

In State v. Roberson, 94-1570, (La. App. 3 Cir. 11/2/95), 664 So.2d 687, an off-duty officer noticed the defendant get up off a bench, walk over to a paper bag on the ground, and pull out two baggies that he suspected to be marijuana. He saw the defendant hand the baggies to another individual, receive money, and place the paper bag back on the ground in the same location. The paper bag was found to contain marijuana packaged in baggies. The Third Circuit found the testimony of the officer that he saw the

defendant hand two baggies to someone in exchange for money established the intent to distribute.

In State v. Johnson, 99-1053 (La. App. 4 Cir. 6/14/00), 766 So.2d 572, the arresting officer observed the defendant and at least two other individuals approach the defendant, engage in brief conversation, hand him currency in exchange for an object the defendant retrieved from his right front pants pocket, and depart. As the police approached the defendant, he began to walk away, removed a bag containing several pieces of a “rock-like” substance positive for cocaine from his right front pants pocket, and threw it over a nearby wooden fence. There was also testimony that the cocaine was packaged in a manner evidencing an intent to distribute, and that the amount of the cocaine was inconsistent with personal use only. This court concluded that the evidence was sufficient to prove the defendant possessed cocaine with the intent to distribute it.

In the instant matter, although there was no expert testimony regarding the amount of cocaine seized or testimony relative to how it was packaged, it should be noted that the bag contained twenty-four pieces of crack. Moreover, the defendant was observed exchanging crack from the bag in his car for money received from the unknown subject. Viewing the evidence in a light most favorable to the State, a reasonable trier of fact

could have concluded beyond a reasonable doubt that the defendant possessed cocaine with the intent to distribute it. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant contends that the trial court erred in denying his motion for mistrial after the prosecutor referred to the defendant's failure to testify. During the defendant's opening statement to the jury, the prosecutor made the following statement, "Objection, Judge. Now, this is argument. What are his witnesses going to say, Judge."

La. C.Cr.P. art. 770 provides that a mistrial shall be granted on motion of a defendant when remarks or comments made within the hearing of the jury by a prosecutor refer directly or indirectly to the failure of the defendant to testify in his own behalf.

The prosecutor's objection was not a direct comment on the defendant's failure to testify. Even assuming that it was an indirect reference to the failure to testify, an indirect reference would mandate a mistrial or other remedial action only if the trial court determines that the comment was intended to draw the jury's attention to the failure to testify. State v. Hamilton, 92-1919, p. 12 (La. 9/5/96), 681 So.2d 1217, 1225, cert. denied,

Hamilton v. Louisiana, 520 U.S. 1216, 117 S.Ct. 1705, 137 L.Ed.2d 830 (1997). Nothing suggests that the prosecutor's objection was intended to draw attention to any failure on the part of defendant to testify. The record reflects that during the prosecutor's opening statement, the defendant's attorney made numerous objections to the statement as argumentative. The pattern was reversed during the defendant's opening statement with more than a few objections being entered by the prosecutor. The particular objection in question was in reference to statements by the defense attorney characterizing potential testimony by an officer in the case as improbable. The intent of the objection was to draw attention to the fact that an opening statement should be confined to the facts that will be introduced at trial. Accordingly, the trial court's denial of the motion for mistrial was not error.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER 3

The defendant contends that the trial court erred in failing to allow defense counsel to argue to the jury the minimum mandatory sentence for possession with intent to distribute cocaine. "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. Jackson, 450 So.2d 621, 633-34 (La. 1984) (citations omitted).

During closing argument, the defendant’s attorney stated, “He’s looking 15 years, at minimum. For 15 years without parole, admitted,” when an objection was entered. The judge sustained the objection, stating that discussing sentencing during argument was improper. Defense counsel then stated that he had case law that stated otherwise.

Contrary to the defendant’s argument, the record does not reflect that he attempted to discuss the minimum mandatory sentence for the crime. Rather, he referred to the minimum mandatory sentence if the defendant was multiple billed, a practice which appellate counsel concedes is discretionary. See State v. Dominick, 94-1368 (La. App. 4 Cir. 4/26/95), 658 So.2d 1. As stated in State v. Jackson, 450 So.2d 621, 633-34 (La. 1984):

The defendant must state the basis for his objection when he makes it so that the trial judge has an opportunity to make the proper ruling and prevent or cure an error. State v. Baylis, 388 So.2d 713 (La.1980). The specific error which the trial judge is making must therefore be pointed out to the judge, and it is settled that defendant is limited on appeal to grounds for the objection articulated at trial. State v. West, 419 So.2d 868 (La.1982); State v. Provo, 396 So.2d 1298 (La.1981); State v. Johnson, 389 So.2d 372 (La.1980).

In Jackson, the defendant assigned as error the trial court’s refusal to instruct the jury regarding the mandatory penalty of life imprisonment for

second-degree murder. Although the trial court's failure to do so was erroneous, the Supreme Court denied the assignment because the defendant's actual request was that the trial court instruct the jury regarding all responsive verdict penalties, which was discretionary. Because the defendant did not specifically request the trial court to instruct on the mandatory life sentence for second-degree murder, the Supreme Court found that the defendant failed to preserve the error by making a proper objection. The Court's analysis in Jackson is persuasive here. The assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER 4

The defendant contends the trial court erred in imposing his sentence without the benefit of parole. This assignment has merit. La. R.S. 40:967 (B) requires that a defendant serve without eligibility for parole the mandatory minimum term of five years. It does not provide that the entire sentence be served without parole eligibility. Accordingly, the defendant's sentence is hereby amended to provide that he serve 15 years imprisonment at hard labor without benefit of parole eligibility for 5 years. The trial court is directed to make an entry in the minutes reflecting this change.

CONCLUSION

For the foregoing reasons, the defendant's conviction is affirmed. The defendant's sentence is amended to provide that the defendant serve 15 years imprisonment at hard labor without benefit of parole eligibility for 5 years. The trial court is directed to make an entry in the minutes reflecting the amended sentence.

AFFIRMED AND AMENDED