STATE OF LOUISIANA	*	**NO. 2001-KA-0975**
VERSUS	*	**COURT OF APPEAL**
DARLENE SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-767, SECTION "J"
Honorable Leon Cannizzaro, Judge

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Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

Harry F. Connick
District Attorney
Juliet Clark
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Karen G. Arena
LOUISIANA APPELLATE PROJECT
PMB 181
9605 Jefferson Hwy., Suite I
River Ridge, LA 70123
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTIONS AFFIRMED;
SENTENCE AS TO COUNT ONE IS AMENDED
AND AFFIRMED AS AMENDED;
SENTENCE AS TO COUNT TWO IS AFFIRMED

Darlene Smith appeals her convictions for attempted possession of cocaine and possession of cocaine, respectively, in violation of R.S. 40:967. We affirm.

Smith was charged by bill of information with one count of distribution of cocaine and one count of possession of cocaine. A twelve person jury, with ten concurring on the verdict, found her guilty of attempted possession of cocaine as to count one, and guilty of possession of cocaine as to count two. She was sentenced to serve eight years at hard labor without benefit of probation, parole, or suspension of sentence with credit for time served for count one and as to count two she was sentenced to serve five years imprisonment with credit for time served. Her sentences are to run concurrently. This timely appeal follows.

Sergeant Mike Glasser of the New Orleans Police Department testified at trial that on July 12, 2000, at around ten in the evening, he was working in an undercover capacity in the Treme area of the city. As he was stopped at Marais and St. Philip Streets, Sergeant Glasser observed a female, later identified as Smith, walk in front of his vehicle and then asked if he had

a cigarette. Sergeant Glasser responded by saying he did not smoke, at least not cigarettes. Smith then asked Sergeant Glasser what he did smoke and Sergeant Glasser said that he was looking for a “dime” or a “twenty”, meaning a ten dollar or twenty dollar piece of crack cocaine. Smith told the officer she could get some for him if he would “break off a piece” for her. Sergeant Glasser agreed, and was told by Smith to drive around the block and then return to the same place.

Sergeant Glasser testified that Smith tried unsuccessfully on two occasions to get the cocaine the officer wanted, but she was unable to do so because of police presence in the area. He further testified that Smith then suggested, and the officer agreed, to give her twenty-five dollars for three “dimes,” one of which Smith would keep. Smith also requested a one-dollar tip for her services. The money used by Sergeant Glasser previously had been photocopied at the police station.

The sergeant further testified that Smith returned with a twenty-dollar rock of cocaine for him, which she turned over to him. Once Smith walked away, Sergeant Glasser radioed his back-up officers with her description, and they detained and arrested her. In a search incident to her arrest, officers found the pre-recorded one dollar bill and a piece of crack cocaine in her possession along with a crack pipe in her purse. It was stipulated at trial that

both the rock Sergeant Glasser received from Smith and the rock found on her tested positive for cocaine.

The defendant testified that she was involved in the transaction because she is a drug addict.

A check of the record revealed possible errors in the composition of the jury, its vote, and Smith's sentence that are discussed in the assignments of error. There are no other errors patent.

In her first assignment of error, Smith complains that the mode of trial was improper for a charge of possession of cocaine. Specifically, she argues that a possession of cocaine charge requires a six-person jury, but her case was tried on a distribution charge, which requires a twelve-person jury.

La. C.Cr.P. art. 493.2, which gives the mode of trial for the joinder of felonies, provides:

> Notwithstanding the provisions of Article 493, offenses in which punishment is necessarily confinement at hard labor may be charged in the same indictment or information with offenses in which the punishment may be confinement at hard labor provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

In State v. Bazile, 99-1821 (La. App. 4 Cir. 3/29/00), 757 So.2d 851. The defendant was stopped and searched by the police when he was observed trying to flag down a passing car, and he discarded what later turned out to be a rock of crack cocaine. This Court found that charges of possession of heroin and possession of cocaine were properly joined in one bill of information, and tried by one jury of twelve with ten concurring. This Court based its decision on La. C.Cr.P. art. 493.2, because the charges were similar in nature (possession of two controlled and dangerous substances) and the charges were based on the same act or transaction.

In the instant case, Smith was charged in the same bill of information with possession of cocaine and distribution of cocaine. As in Bazile, the charges are of a similar nature and arise from the same act or transaction. Both charges are for possession of cocaine and are attributed to the defendant's acts on July 12, 2000. The testimony at trial indicated that back-up officers arrested Smith after she purchased narcotics for an undercover police officer. Upon arrest she had in her possession a single rock of crack cocaine and a crack pipe, which tested positive for cocaine. The joinder of the two charges was proper under La. C.Cr.P. art. 493.2. Thus, Smith was properly tried before a jury of twelve with ten concurring on the verdict. This assignment of error is without merit.

In her second assignment of error, Smith complains that the district court imposed an illegal sentence as to count one, attempted distribution of cocaine, when it ordered the entire eight-year sentence to be served without the benefit of probation, parole, or suspension of sentence.

La. R.S. 40:967 (B)(4)(b), as it existed at the time of the offense, provided:

> Distribution, dispensing, or possession with intent to produce, manufacture, distribute or dispense cocaine or cocaine base or a mixture or substance containing cocaine or its analogues as provided in Schedule II (A) (4) of R.S. 40:964 shall be sentenced to a term of imprisonment at hard labor for not less than five years nor more than thirty years, with the first five years of said sentence being without 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.

In the instant case, the district court imposed the prohibition against probation, parole, or suspension of sentence on the entire eight years for count one. According to La. R.S. 40:967 (B)(4)(b) the district court had the authority to impose the prohibitions on the first five years only. Therefore, Smith is correct in that her sentence as to count one was illegal.

DECREE

For the reasons herein indicated, the convictions and the sentence as to count two of Darlene Smith are affirmed. Her sentence as to count one is amended to delete the prohibition of parole, probation, or suspension of sentence eligibility for the last three years of the sentence, and is affirmed as amended.

CONVICTIONS AFFIRMED;
SENTENCE AS TO COUNT ONE IS AMENDED
AND AFFIRMED AS AMENDED;
SENTENCE AS TO COUNT TWO IS AFFIRMED