STATE OF LOUISIANA	*	**NO. 2000-KA-1109**
VERSUS	*	**COURT OF APPEAL**
RICHARD J. MILLER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-824, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
JOAN BERNARD ARMSTRONG

JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Miriam G. Waltzer and Judge David S. Gorbaty)

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AFFIRMED AS AMENDED.

STATEMENT OF THE CASE

The defendant, Richard Miller, was charged by bill of information on April 3, 1998, with possession of marijuana with the intent to distribute and with possession of more than twenty-eight grams, but less than 200 grams, of cocaine. At his arraignment, on April 20, 1998, the defendant pled not guilty. On April 12, 1999, a twelve-member jury found the defendant guilty as charged on both counts. On May 24, 1999, the trial court sentenced the defendant to fifty years at hard labor without benefit of parole, probation, or suspension of sentence on the cocaine count and to twenty years at hard labor on the marijuana count. On June 15, 1999, pursuant to a multiple bill filed by the State, the trial court found the defendant to be a multiple offender and vacated the sentence on the cocaine count. The trial court resentenced the defendant to fifty years at hard labor without benefit of parole, probation, or suspension of sentence to run concurrently with the sentence on the marijuana count. The trial court denied the defendant's

motion for reconsideration of sentence. The defendant now appeals.

STATEMENT OF THE FACTS

On November 5, 1997, probation and parole agents from the Department of Corrections were armed with an arrest warrant for the defendant for parole violations A group of agents went to 1826 Flood Street; and as they approached the residence, they saw the defendant standing in the doorway of the living room. When the defendant saw the agents, he fled into the house. The agents followed and captured him in a front bedroom. The agents arrested him; and, a search incident to the arrest revealed forty-three small packages of marijuana found in his jacket pocket, and another bag in his pants pocket containing fifteen pieces of crack cocaine. They also seized from his person shotgun shells and $220.00.

Lying in plain view on the top of a television in the bedroom was a bag of marijuana seeds, and a gun was on a television table. The agents then searched the bed next to which Miller was standing when he was captured and found three more handguns under its mattress. The agents also found ammunition in a dresser drawer and in the closet in that room. They also noted that there was clothing for an adult male in the closet.

While Miller was being arrested and searched, other agents swept through the house to secure the premises. Also present were Tammy

Mitchell, who was arrested, and two children. Agents entering the last room in the house observed in plain view two triple beam scales and a bottle of formaldehyde. The agents called for canine backup; and when the dog arrived, it "alerted" on a small safe which was inside the bedroom where Miller was apprehended. After the dog indicated contraband was inside the safe, the agents broke into the safe by removing its hinges. They found a large amount of cocaine, several bags of marijuana, approximately $1000.00, and a Sewerage and Water Board bill addressed to the defendant at the Flood Street residence. The defendant denied any ownership of the safe or its contents. Detective Clarence Gillard arrived at the residence at some point after the parole and probation officers requested assistance, and he stated that he processed the evidence found in the house. He identified forty-three ziplock bags, three small plastic bags, and two large plastic bags containing green vegetable matter and two plastic bags containing a white powder.

Criminalist Joseph Tafaro testified that he analyzed the substances seized from 1826 Flood and determined that they were cocaine and marijuana. He stated that the weight of the cocaine was 136.1 grams which included weight of the plastic bag. He further stated that the plastic bag weighed approximately 1 gram.

The defendant testified that he did not live at 1826 Flood and that he had given his parole officer three other addresses at which he could be found. He stated that he was at that address because Tammy Mitchell had called him to take her and the children, of whom he was the father, to the doctor. He denied that any drugs or ammunition were found on his person, and he stated that he did not know what was in the safe. He testified that the male clothing found in the house belonged to someone named Calvin whom Ms. Mitchell was seeing. He stated that the Sewerage and Water Board bill was in his name because Ms. Mitchell had asked him to get the account in his name.

DISCUSSION

ERRORS PATENT

A review of the record shows no errors patent except as noted in Assignment of Error No. 3, below.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, the defendant complains that the trial court erred by denying his motion to suppress the evidence. He argues that the trial court misapplied the "inevitable discovery" rule in holding that the items from the safe were not unlawfully seized. However, a review of the jurisprudence shows that it is not necessary to uphold the search and seizure

in this case pursuant to the “inevitable discovery” doctrine.

At the hearing on the motion to suppress the evidence, Larry Pohlman, a parole and probation agent with the Department of Corrections, testified that on November 5, 1997, his office received a tip that a subject, later identified as the defendant, who had been listed in the most wanted column of the newspaper, was at an address on Flood Street. Pohlman and other agents then proceeded to 1826 Flood to execute a parole warrant for the defendant whom Pohlman testified they had been looking for two or three months because of a parole violation. Pohlman further testified that the anonymous caller told him that the defendant was known to have several guns and drugs in the house and that the defendant was selling drugs.

The agents observed the defendant standing outside the residence indicated in the tip; and when he saw them, he ran inside the residence. The officers followed and apprehended him inside a bedroom located just to the right of the front door. Their entry was justified under the "hot pursuit" exception to the warrant requirement. In both State v. Ennis, 96-0811 (La. App. 4 Cir. 6/12/96), 676 So.2d 196 and State v. Byas, 94-1999 (La. App. 4 Cir. 12/15/94), 648 So.2d 37, this Court held entry into a residence was justified in the absence of a search warrant. In both cases, the officers had probable cause to believe that the person chased into a residence had

committed a crime, either through his opening his mouth and showing a bag of crack cocaine inside (Ennis), or his discarding a bag of cocaine as officers pursued him prior to his entry into the residence (Byas).

Once inside, the agents arrested the defendant pursuant to the arrest warrant. The marijuana, cocaine, shotgun shells, and money discovered in his clothing were properly seized as incident to his arrest. See State v. Wilson, 467 So.2d 503, 515 (La. 1985); State v. Johnson, 94-1170 (La. App. 4 Cir. 8/23/95), 660 So.2d 942. In addition, the gun and the bag of marijuana seeds discovered in sight near the television in the bedroom where the defendant was apprehended were properly seized pursuant to the plain view exception to the warrant requirement because the officers were justifiably in the bedroom when they saw these items. See State v. Hernandez, 410 So.2d 1381, 1383 (La. 1982); State v. Smith, 96-2161 (La. App. 4 Cir. 6/3/98), 715 So.2d 547; State v. Tate, 623 So.2d 908, 917 (La. App. 4 Cir. 8/19/93).

The discovery of the guns, the ammunition, and the contraband, added to the anonymous tip, gave the agents probable cause to believe the residence contained further contraband or evidence of crime. This probable cause alone generally would not authorize a police officer to search the residence without a warrant in the absence of exigent circumstances. See

State v. Page, 95-2401 (La. App. 4 Cir. 8/21/96), 680 So.2d 700, 709. However, the parole officer needed only reasonable cause to search the house due to the defendant's diminished expectation of privacy and the nature of the special relationship between parolees and their parole officers.

A parole or probation officer may conduct a warrantless search of a parolee or probationer and his residence and property based only upon a showing of reasonable cause to believe that the defendant is violating his parole or probation. In State v. Thomas, 96-2006 (La. App. 4 Cir. 11/6/96), 683 So.2d 885, the defendant alleged the trial court should have suppressed evidence seized from her purse pursuant to a search conducted after she tested positive for cocaine during a visit to her probation officer. In rejecting this argument, this Court referred to several Louisiana Second Circuit cases which upheld a probation or parole officer's right to search a parolee's or probationer's residence without a warrant. This Court stated:

> Probationers and parolees occupy essentially the same status. Both have a reduced expectation of privacy which allows reasonable warrantless searches of their persons and residences by their probation or parole officer, even though less than probable cause may be shown. This reduced expectation of privacy evolves from a probationer's conviction and agreement to allow a probation officer to investigate his activities in order to confirm that the probationer is in compliance with the provisions of his probation. Nevertheless, a probationer is not subject to the unrestrained power of the authorities; a search of a probationer

> may not be a subterfuge for a police investigation. A warrantless search of a probationer's property is permissible when:
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> > [I]t is conducted when the officer believes such a search is necessary in the performance of his duties, and must be reasonable in light of the total atmosphere in which it takes place. In determining the reasonableness of a warrantless search, we [a reviewing court] must `consider (1) the scope of the particular intrusion, (2) the manner in which it was conducted, (3) the justification for initiating it, and (4) the place in which it was conducted.' [State v.] Malone, supra, [403 So.2d 1234 (La. 1981)] at 1239.
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> State v. Shields, 614 So.2d 1279, 1282-83 (La.App. 2nd Cir.1993) writ denied 620 So.2d 874. See also cases cited therein. Although the State still bears the burden of proof because the search was conducted without a warrant, when the search is conducted for probation violations, the State's burden will be met when it establishes that there was reasonable suspicion that criminal activity was occurring. Malone; Shields.

Thomas, 96-2006 pp. 2-3, 683 So.2d at 886.

This Court applied the Malone factors and found the search of the defendant's purse, made after the defendant had tested positive for cocaine, was valid. This Court noted the scope of the intrusion was minimal in that the defendant had already been placed under arrest for a violation of a condition of her probation at the time the officers obtained her keys, opened

her car, retrieved her purse, and searched it. This Court also noted the manner and place of the search was not a subterfuge for a criminal investigation. The justification for the search was that it was routine procedure for such a search once a probationer tested positive for drug use. This court noted:

> A similar policy was upheld by the Supreme Court in Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164 (1987). In Griffin, the probationer's home was searched without a warrant pursuant to a Wisconsin regulation what stated that it was a violation of probation to refuse to consent to a search of one's residence. The probation office [sic] had received a tip that there might be guns in the probationer's apartment. The Wisconsin Supreme Court upheld the search on the grounds that it did not violate the Fourth Amendment because there were reasonable grounds for the search. The U.S. Supreme Court, while not disagreeing with the Wisconsin court, chose to affirm the search on the basis that "it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles." Id. at 873, 107 S. Ct. at 3168. The Court noted that the probation system itself presents "special needs" beyond normal law enforcement. The Court further noted that a warrant requirement would interfere with that system, "setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires;" further the delay inherent in securing a warrant "would make it more difficult for probation officials to respond quickly to evidence of misconduct" and "would reduce the deterrent effect that the possibility of expeditious searches would otherwise create. . . ." Id. at 876, 3170. The Court also analogized

> requiring a probation officer to obtain a warrant when there is a suspicion of a probation violation to requiring a parent to obtain judicial approval for a search of a minor child's bedroom; such a requirement would impair the parental custodial authority. The Court also emphasized that a probation officer is not a police officer, and that a probation officer is actually an employee of a Social Services department charged with protecting the public interest and with working for his "client's" welfare.

Thomas, 96-2006 pp. 4-5, 683 So.2d at 887.

Likewise, in State v. Marino, 2000-1131 (La. App. 4 Cir. 6/27/01), ___ So.2d ___, 2001 WL 767366, this Court upheld a warrantless search of a parolee's home, citing Thomas. In Marino, a woman who lived in the same home as the defendant had been arrested the day before for a violation of her probation, and she told her probation officer that the defendant had caused her to become addicted to drugs. This Court found that these facts gave the defendant's parole officer reasonable suspicion to believe the defendant was in violation of his parole, and when the defendant answered the door and admitted the officer to the residence the defendant shared with the woman, the officer could smell marijuana and saw marijuana lying in plain view on a table. Given these facts, this Court found the parole officer had probable cause to search the rest of the house.

In several cases, the Louisiana Second Circuit has upheld warrantless

searches of parolees' or probationers' residences where the parole/probation officer had reasonable cause to believe his client had committed parole/probation violations. See State v. Shields (La. App. 2 Cir. 1993), 614 So.2d 1279; State v. Bass (La. App. 2 Cir. 1992), 595 So.2d 820; State v. Shrader (La. App. 2 Cir. 1992), 593 So.2d 457; State v. Epperson, (La. App. 2 Cir. 1991), 576 So.2d 96; State v. Vailes (La. App. 2 Cir. 1990), 564 So.2d 778. Likewise, in State v. Carter (La. App. 3 Cir. 1986), 485 So.2d 260, the Third Circuit upheld a warrantless search of a defendant's trailer by a probation officer. In State v. Malone, 403 So.2d 1234 (La. 1981), the Court upheld the seizure of marijuana plants by a probation officer who followed a hose from the defendant's house into a wooded area where the plants were found.

Several federal appellate courts also recognize a parole/probation officer's right to search his client's premises without a warrant. In Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975), the defendant was arrested at a friend's house pursuant to a warrant issued in response to the defendant's violation of his conditions of parole. Pursuant to this arrest, the parole officer discovered a pipe with marijuana in the defendant's pocket. Six hours after the arrest, the officer then went to the defendant's house, searched it without a warrant, and found more marijuana. In upholding the

seizure of the marijuana from the defendant's garage, the court noted the parole officer had broad powers to supervise his parolee, and as a parolee the defendant was subject to the search of himself and his home. The court found the officer did not need probable cause to support the search, but he must show some basis for the search. The court noted that while there was no statutory authority for the warrantless search, there was a long line of cases supporting similar searches.

In U.S. v. Scott, 678 F.2d 32 (5th Cir. 1982), the court upheld a warrantless "seizure" of handwriting and typewriter exemplars from the defendant's residence by his parole officer. The court found that the officer did not need probable cause to enter and take the exemplars, but rather she only needed reasonable suspicion to support the search and seizure. Likewise, in U.S. ex rel. Santos v. New York State Bd. of Parole, 441 F.2d 1216 (2nd Cir. 1971), the court found a tip gave a parole officer reasonable grounds to believe the parolee defendant was dealing in stolen goods. The officer obtained an arrest warrant, and when he tried to execute it at the defendant's residence, he discovered the defendant was not at home. However, the defendant's landlady admitted the officer to the defendant's residence, and the parole officer searched the residence and found stolen property. The court upheld this warrantless search and seizure.

In contrast, the court in U.S. v. Bradley, 571 F.2d 787 (4th Cir. 1978), refused to follow Latta and struck down a search of a parolee's apartment by a parole officer six hours after the officer received a tip from the parolee's landlady that the defendant had a gun. The court held a parole officer to the same standard that any peace officer must meet in order to make a warrantless search. The court noted that although parolees have a diminished privacy expectation, there was no statutory authorization or guidelines to permit a parole officer to search a parolee's residence without a warrant.

In the instant case, one of the agents testified that the tip they received indicated the defendant was living at that residence. The agents seized a bill in the defendant's name that listed the residence as his address. Under Thomas and the other cases cited above, the warrantless search of the house was lawful. Taking the four Malone factors, the justification for entering the house was the arrest of the defendant for his parole violations. The place of the search was the defendant's house. The manner and scope were commensurate with the circumstances, given the fact that drugs and ammunition were found on the defendant's person at his arrest, and drugs and guns were found in plain view in the bedroom where he was captured. The officers then found more guns under the mattress next to which he was

captured, and a search of that room revealed more ammunition in a drawer and a closet. Other agents found two scales and a bottle of formaldehyde in another room in plain view.

Given the other contraband and weapons found in the house, it was not unreasonable for the agents to request canine backup. The use of a canine to detect contraband is not a "seizure" for Fourth Amendment purposes. See State v. Addison, 94-2431 (La. App. 4 Cir. 11/30/95), 665 So.2d 1224; State v. Bruser, 95-0907 (La. App. 4 Cir. 9/15/95), 661 So.2d 152. Once the dog "alerted" on the safe, the agents had not only reasonable cause but also probable cause to believe it contained contraband. Thus, the search of the safe was also within the scope of the Malone guidelines.

Because the arrest warrant was valid and because the parole agents were justified in searching the defendant's house, we cannot say that the trial court erred by denying the motion to suppress the evidence.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2 AND PRO SE ASSIGNMENTS OF ERROR NOS. 5 AND 6

In these assignments of error, the defendant complains that the State failed to present sufficient evidence of his guilt. He argues that there was no proof that he intended to distribute the marijuana found in his possession and that he was guilty of simple possession of marijuana. In his pro se brief, the

defendant asserts that the parole officers committed perjury and that there was conflicting testimony regarding the location of the marijuana seeds.

The standard for reviewing a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact after could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781; State v. Hawkins, 96-0766 (La. 1/14/97), 688 So.2d 473. The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La. App. 4 Cir. 5/25/89).

When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The reviewing court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory

explanation of events; rather, when evaluating the evidence in the light most favorable to the prosecution, the reviewing court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under Jackson v. Virginia. State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012. This is not a separate test from Jackson v. Virginia, but is instead an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984); State v. Addison, 94-2431 (La. App. 4 Cir. 11/30/95), 665 So.2d 1224.

The defendant was convicted of possession of marijuana with the intent to distribute. To support a conviction for possession with intent to distribute a controlled dangerous substance, the State must prove that the defendant knowingly and intentionally possessed the drug with the intent to distribute it. State v. Smith, 94-1502 (La. App. 4 Cir. 1/19/95), 649 So.2d 1078. In State v. Crosby, 98-0372, pp. 6-7 (La. App. 4 Cir. 12/2/99), 748 So.2d 502, 506, writ denied, 99-3555 (La. 1/28/00), 753 So.2d 833, this Court stated:

> To support defendant's convictions, the State must prove that the defendant "knowingly" and "intentionally" possessed the cocaine and marijuana with the "intent to distribute". State

v. Williams, 594 So.2d 476, 478 (La. App. 4 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. 4 Cir. 1989).

In State v. Hearold, 603 So.2d 731, 735-36 (La. 1992), the Louisiana Supreme Court stated:

> Intent is a condition of mind which is usually proved by evidence of circumstances from which intent may be inferred. State v. Fuller, 414 So.2d 306 (La. 1982); State v. Phillips, 412 So.2d 1061 (La. 1982); La. Rev. Stat. 15:445. In State v. House, 325 So.2d 222 (La. 1975), this court discussed certain factors which are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance. These factors include (1) whether 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.
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> In the absence of circumstances from which an intent to distribute may be inferred, mere possession of a drug does not amount to evidence of intent to distribute, unless the quantity is so large that no other inference is possible. State v. Greenway, 422 So.2d 1146 (La. 1982); State v. Harveston, 389 So.2d 63 (La. 1980); State v. Willis, 325 So.2d 227 (La. 1975).

In State v. Cushenberry, 94-1206 p. 6 (La. App. 4 Cir.

> 1/31/95), 650 So.2d 783, 786, this court described the Hearold factors as "useful" but 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."

Considering the quantity of marijuana seized from the residence, the State proved that the defendant had the intent to distribute the marijuana in his possession. Forty-three plastic bags containing marijuana were found on the defendant's person, and more bags of marijuana were found in the safe. This is such a large quantity that no other inference, apart from the one that the defendant intended to distribute all of this marijuana, is possible.

As to the defendant's assertion that the parole officers who searched his house committed perjury, the defendant points to discrepancies as to where the parole agents first saw the defendant when they drove up to 1826 Flood. The discrepancies on this point appear to be due to the different positions of the agents as they arrived at the residence and when they entered it. With regard to the marijuana seeds, the defendant asserts that there was conflicting testimony about where the seeds were found. Two parole officers testified that the bag of marijuana seeds was found on top of a television in the first bedroom, and the K-9 officer stated that his dog found some marijuana seeds or residue on a dresser. It appears that the parole officers and the K-9 officers were referring to two different things.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, the defendant complains that the trial court erred in imposing excessive sentences on both counts. He argues that the trial court failed to comply with the requirements of La. C.Cr.P. art. 894.1 when it imposed the sentences in that the court failed to take into consideration the fact that the defendant has two young children to support. He also asserts that there was no evidence that he was a violent offender. The defendant further complains that there are errors patent with respect to his sentences in that the cocaine sentence should not have been imposed without benefit of parole and that the marijuana sentence should not have been imposed without benefit of parole, probation, or suspension of sentence.

La. R.S. 40:967(F)(1)(a) provides that one convicted of possession of more than twenty-eight grams, but less than two hundred grams, of cocaine shall be sentenced to a term of imprisonment of not less than ten years and not more than sixty years and to payment of a fine of not less than $50,000 and not more than $150,000. Section G provides that with respect to any person to whom the provisions of Section F apply, the sentence shall not be suspended and the defendant shall not be eligible for parole or probation prior to serving the minimum sentence. La. R.S. 15:529.1(G) provides that

any sentence shall be without benefit of probation or suspension of sentence.

The sentence imposed on the defendant improperly provides that the entire sentence is to be without benefit of parole when parole ineligibility should have been limited to the first ten years of the sentence. Therefore, the sentence contains an error patent and must be amended to delete this provision. The sentence is also illegally lenient in that the trial judge failed to order payment of a fine; but because this is an error patent favorable to the defendant and the State has not complained, the illegally lenient sentence cannot be corrected on appeal. State v. Fraser, 484 So.2d 122 (La. 1986); State v. Samuels, 94-1408 (La. App. 4 Cir. 6/7/95), 657 So.2d 562.

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 with the severity of the crime. State v. Lobato, 603 So.2d 739 (La. 1992); State v. Telsee, 425 So.2d 1251 (La. 1983). The trial court has great discretion in sentencing within the statutory limits. State v. Trahan, 425 So.2d 1222 (La. 1983). The reviewing court shall not set aside a sentence

for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D).

Generally, the reviewing court must determine whether the trial judge adequately complied with the guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. State v. Soco, 441 So.2d 719 (La. 1983); State v. Quebedeaux, 424 So.2d 1009 (La. 1982). If adequate compliance with Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case. State v. Egana, 97-0318 (La. App. 4 Cir. 12/3/97), 703 So.2d 223. The articulation of the factual basis for the sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions; and, where the record clearly shows an adequate factual basis for the sentence, resentencing is unnecessary even where there has not been full compliance with Article 894.1.

At the original sentencing hearing, the trial judge stated that she reviewed the sentencing guidelines in terms of what would be any mitigating circumstances. The court noted the quantity of cocaine and marijuana found in defendant's possession and noted the defendant's criminal record. The judge stated that the defendant's record went back to 1981 and that the

defendant's adult record showed a 1987 conviction for theft, 1991 convictions for possession of cocaine and possession of a concealed weapon, and two separate convictions for being a convicted felon in possession of a firearm. The judge also referred to the weapons found in the defendant's possession when he was arrested. After noting the sentencing range for both convictions, the judge imposed a fifty year sentence for the cocaine conviction and a twenty year sentence for the marijuana conviction. The trial judge referred back to these reasons when she sentenced the defendant under the multiple bill.

It does not appear that the trial judge failed to articulate a sufficient basis for the sentences on either count. The defendant had a lengthy criminal record; and, he was found in possession of a large quantity of controlled dangerous substances, as well as numerous weapons. The trial judge specifically stated that she considered mitigating circumstances under the sentencing guidelines.

This assignment of error is without merit insofar as it concerns the trial court's failure to articulate a sufficient basis for the sentences; but, it does have merit with regard to the error patent noted by counsel in which the defendant's entire sentence rather than the first ten years is to be without benefit of parole.

PRO SE ASSIGNMENT OF ERROR NO. 1

In this assignment of error, the defendant complains that the trial court erred in denying his motion to dismiss counsel. On the morning of trial, the defendant complained to the trial judge that his attorney had come to see him only one time three days before trial at which time he asked the attorney to do some things and that this was not enough time to prepare a defense. Defense counsel stated that he did most of the things requested of him by the defendant and that he did not consider the case to be factually complicated. He further stated that the only thing he did not do was obtain a copy of transcript from the hearing in Magistrate Court which the defendant claimed contained a statement by the judge that there was no probable cause. Counsel stated that he explained to the defendant that the record did not show that and that there was a preliminary hearing at which probable cause was found. The defendant stated that he thought the case was complicated. The trial judge stated that defense counsel, who had been appointed to represent the defendant some two and one-half months earlier, was competent and able; and, when the defendant stated that he was not comfortable with his counsel, the judge told him to get comfortable very quickly.

In State v. Marshall, 99-2176, pp. 7-8 (La. App. 4 Cir. 8/30/00), 774

So.2d 244, 249-250, this Court stated:

> A defendant's right to assistance of counsel is protected by the United States and Louisiana constitutions. U.S. Const. Amend. VI; La. Const. art I, § 13. "'As a general proposition a person accused in a criminal trial has the right to counsel of his choice.'" State v. Jones, 97-2593, p. 3 (La. 3/4/98), 707 So.2d 975, 977, quoting State v. Harper, 381 So.2d 468, 470-71 (La. 1980); La. Const. art. I, § 13 (at every stage of a criminal proceeding a defendant "is entitled to assistance of counsel of his choice"). "The right to the assistance of counsel is so fundamental to the constitutional guarantee of a fair trial that its denial cannot be considered harmless error." State v. Trepagnier, 97-2427, (La. App. 4 Cir. 9/15/99) 744 So.2d 181, 187-88. The right of a defendant to counsel of his choice is implemented by C.Cr.P. art. 515, which states:
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> > Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court. The court may assign other counsel in substitution of counsel previously assigned or specially assigned to assist the defendant at the arraignment.
>
> However, the defendant's right to counsel is not absolute. The defendant's right to counsel of his choice "cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice." State v. Seiss, 428 So.2d 444, 447 (La. 1983), (citations omitted). The right must "'be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system.'" State v. Trepagnier, 97-2427, p. 8 (La. App. 4 Cir. 9/15/99), 744 So.2d 181, 188, quoting State v. Leggett, 363 So.2d 434, 436 (La. 1978). "Thus, the Louisiana Supreme Court has repeatedly upheld the trial court's denial of motions made on the day of trial based upon the defendant's dissatisfaction with appointed counsel. See State v. Seiss, 428 So.2d 444, 447 (La. 1983) and cases cited therein." Id.

This Court further stated a motion to dismiss counsel will be denied where the defendant provides no indication that counsel was incompetent or unprepared or had a conflict of interest that would render counsel unable to put on an adequate defense on behalf of the defendant. Id. at p. 9, 774 So.2d at 250.

We find no error in the trial court's ruling denying the defendant's request to dismiss his appointed counsel on the morning of trial. The defendant failed to establish that his counsel was incompetent, and the statements made by defense counsel show that he did nearly everything that was asked of him by the defendant prior to trial. The only thing that counsel did not do was obtain a transcript of the hearing from Magistrate Court because the transcript did not state what the defendant claimed it did with regard to probable cause.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

In this assignment of error, the defendant complains that the trial court erred in finding him to be a multiple offender. He argues that the State failed to present sufficient evidence of his identity.

The first issue that must be resolved is whether the defendant has preserved this issue for appellate review. In State v. Cossee, 95-2218 (La.

App. 4 Cir. 7/24/96), 678 So.2d 72, this Court held that the failure to file a written response to the multiple bill as required by La. R.S. 15:529.1(D)(1)(b) precluded appellate review of the defendant's claim that the documentary evidence was insufficient to support one of the prior convictions set forth in the multiple bill. The record in the present case does not contain a written response; but, the defendant specifically objected at the multiple bill hearing to the lack of fingerprint evidence. An oral objection has been found sufficient to preserve such issues for appellate review. State v. Anderson, 97-2587 (La. App. 4 Cir. 11/18/98), 728 So.2d 14. Thus, the defendant has preserved for appellate review the issue of identity.

La. R.S. 15:529.1(D)(1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. The State must establish the prior felony and that the defendant is the same person convicted of that felony. State v. Neville, 96-0137 (La. App. 4 Cir. 5/21/97), 695 So.2d 534, writ denied 97-1637 (La. 12/12/97), 704 So.2d 1180. There are various methods available to prove that the defendant is the same person convicted of the prior felony offense, such as testimony from witnesses, expert opinion as to a comparison of the defendant's fingerprints with those of the person previously convicted,

photographs contained in a duly authenticated record, or evidence of an identical driver's license number, sex, race, and date of birth. State v. Henry, 96-1280 (La. App. 4 Cir. 3/11/98), 709 So.2d 322. The mere fact that the defendant and the person previously convicted have the same name does not constitute sufficient evidence of identity. Id.

Raymond Loosemore, who was qualified as an expert in fingerprint identification, testified at the multiple bill hearing that he compared the set of fingerprints that he took from defendant on the morning of the hearing with those on a 1994 arrest register that showed a Richard Miller arrested for and charged with three different crimes. He stated that the fingerprints on the arrest register matched the ones he took of defendant. Loosemore also identified documents from the Clerk of Court's office that charged a Richard Miller with various crimes, and he stated that those documents contained no fingerprints. He noted that the name on the documents from the Clerk of Court's office was the same as that on the 1994 arrest register, and that both exhibits had the same date of birth, January 13, 1969, the same arrest number, and the same date of arrest, January 7, 1994. The trial court found that the State met its burden of proof that the defendant was the same Richard Miller convicted in 1994.

It does not appear that the trial court erred in finding the defendant to

be a second felony offender. The State presented sufficient evidence that the defendant was the same Richard Miller convicted in July 1994 of being a convicted felon in possession of a firearm. The arrest register which contained the fingerprints that matched those of the defendant was the same as the same arrest register that was part of the record of the prior conviction.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 3

In this assignment of error, the defendant complains that the trial court erred in sentencing him as a multiple offender without first vacating the original sentence. The minute entry for sentencing states that the trial judge vacated the original sentence, but the sentencing transcript contains no statement by the judge that the original sentence was vacated before the sentence on the multiple bill was imposed. Generally, where there is a discrepancy between a minute entry and a transcript, the transcript prevails. State v. Hall, 99-2887 (La. App. 4 Cir. 10/4/00), 775 So.2d 52; State v. Anderson, 99-1407 (La. App. 4 Cir. 1/26/00), 753 So.2d 321. In State v. Moffett, 572 So.2d 705 (La. App. 4 Cir. 12/20/90), this Court held that a multiple offender sentence must be vacated and the case remanded for resentencing where the trial court failed to vacate the original sentence prior to imposing the multiple offender sentence. Recently, however, this Court

found there was no need to vacate a multiple bill sentence when the original sentence had not been vacated where it was clear that the multiple bill sentence was to be served in the place of the original sentence, not imposed in addition to the original sentence. State v. Norwood, 2001-0432 (La. App. 4 Cir. 8/29/01), 802 So.2d 721. This Court cited to the Supreme Court's ruling in State v. Mayer, 99-3124 (La. 3/31/00), 760 So.2d 309, where the Court reversed the Fifth Circuit when it vacated a multiple bill sentence simply because the original sentence had not been vacated. This Court stated:

> In Mayer, the minute entry and commitment form reflected that the trial court vacated the original sentence, but the transcript did not so reflect. On appeal, the Fifth Circuit vacated the multiple offender sentence and remanded the case for resentencing. State v. Mayer, 98-1311 (La. App. 5 Cir. 9/28/99), 743 So.2d 304. The Supreme Court granted writs on this issue only, and in a per curiam opinion stated:
>
> > To the extent that the October 30, 1998 commitment/ minute entry reflects that the trial judge vacated the defendant's original sentence and thereby eliminated any possible confusion as to the terms of the defendant's confinement, the failure of the transcript of the multiple offender hearing to show that the court did so before sentencing the defendant as a multiple offender did not affect the substantial rights of the defendant. La.C.Cr.P. art. 921; see State ex rel. Haisch v. State, 575 So.2d 816

> (La.1991) ("The trial court is ordered to vacate the twenty-one year sentence it first imposed coincidentally with its imposition of the enhanced sentence. See La.R.S. 15:529.1(D).").

Mayer, 99-3124, 760 So.2d at 310.

In State v. Jackson, 2000 0717 (La. App. 1 Cir. 2/16/01), ___ So.2d ___, 2001 WL 133213, the First Circuit *en banc* interpreted Mayer to apply in cases where it was clear that the trial court meant the multiple offender sentence to replace the original sentence, not to be served in addition to the original sentence. The court stated:

> The supreme court did not overrule long-standing jurisprudence that, in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See State v. Lynch, 441 So.2d 732, 734 (La.1983). Instead, the supreme court noted that, to the extent the commitment and minute entry reflected that the judge vacated the original sentence, any possible confusion was eliminated as to the terms of the confinement and, thus, no substantial right of the accused was affected. See La.Code Crim. P. art. 921. Because court minutes in conflict with a transcript do not always accurately reflect a trial court's actions, we do not read the supreme court's decision as standing for the proposition that the trial court actually had vacated the original sentence. Rather, to the extent the trial court record showed that the trial court had done so, any possible

confusion was eliminated. In the instant case, the same judge pronounced both the original sentence on the armed robbery conviction as well as the new sentence under the habitual offender statute. Before the court sentenced defendant as a habitual offender, the prosecutor called the court's attention to the earlier sentencing. The proceedings give no indication the court intended to impose the habitual offender sentence as an additional penalty. Thus, the court obviously intended for the life imprisonment imposed after the habitual offender adjudication to be the sentence in this case. The court simply overlooked its duty to vacate the original sentence. Correction of the trial court's failure to vacate the original sentence does not involve the exercise of sentencing discretion and will eliminate any possibility of confusion as to the terms of the confinement. Thus, we vacate the original forty-year sentence imposed on February 20, 1997, to conform to the requirements of La. R.S. 15:529.1. It is not necessary to vacate the habitual offender sentence imposed on September 11, 1997, or to remand for resentencing. See La.Code Crim. P. art. 882; State v. Hunt, 573 So.2d at 587. However, the case is remanded for the district court to amend the minute entry and commitment to reflect that the original sentence has been vacated. State v. Jackson, 2000 0717 at p.3, ___ So.2d at ___.

Norwood, 2001-0432 pp. 4-5, 802 So.2d at 723.

This Court found that because the transcript of the multiple bill hearing indicated the sentence imposed pursuant to the multiple bill was to be served *instead of*, rather than *in addition to*, the original sentence, the multiple bill sentence was not illegal and need not be vacated because the original sentence had not been vacated.

In the instant case, the transcript of the multiple bill sentencing indicates the court stated it was imposing the "same sentence" on the multiple bill count it had previously imposed. The sentence imposed was to be served instead of, not in addition to, the original sentence. As per Mayer and Norwood, the sentence as a multiple bill need not be vacated simply because the court forgot to vacate the original sentence before imposing the enhanced sentence.

This assignment of error has no merit.

For the foregoing reasons, the defendant's convictions are affirmed, the sentence on the marijuana count is affirmed, and the sentence on the cocaine count

is amended to prohibit parole eligibility for only the first ten years.

AFFIRMED AS AMENDED.