

STATE OF LOUISIANA

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NO. 2001-KA-1815

VERSUS

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COURT OF APPEAL

RONALD HAWKINS

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 403-405, SECTION "H"
Honorable Camille Buras, Judge

Charles R. Jones
Judge

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, and Judge Patricia Rivet Murray)

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AFFIRMED

The Defendant/Appellant, Ronald Hawkins, appeals his conviction and sentence for possession of marijuana with the intent to distribute. We affirm.

On November 24, 1998, the State charged Hawkins with possession with intent to distribute marijuana. Hawkins was found guilty as charged on February 10, 2000 and on March 10, 2000, the State filed a multiple bill of information. The court adjudged Hawkins a third felony offender and later vacated Hawkins' third offender adjudication, and found him to be a second offender. He was sentenced to twenty years imprisonment in the custody of the department of corrections, with credit for time served, sentence to run concurrent with any other sentence imposed. Hawkins' fines were waived but he was ordered to forfeit \$546 confiscated at the time of his arrest. This timely appeal follows.

Facts

On November 24, 1998, Officer Calvin Brazley was conducting undercover surveillance near North Dorgenois and Ursuline Streets in New

Orleans. Although he was alone at the time, he and Officer Randy Lewis were responding to hotline complaints concerning drug trafficking in the area. Officer Brazley observed three occupants in a white vehicle smoking what he believed to be marijuana. Officer Brazley followed the vehicle until it parked near a residence on St. Ann Street. As Officer Brazley surveyed the scene, he observed Hawkins exit a gate on the right side of the residence. Hawkins was wearing a black shirt and black jeans and carrying a bag with red contents, which he attempted to pass to another person standing behind the gate near the residence. Officer Brazley radioed Officer Lewis, and told him that he witnessed Hawkins hand a small bag of marijuana to another person. Officer Brazley then radioed other officers to move in and arrest Hawkins and the occupants of the white vehicle. Approximately two to three minutes after the takedown, Officer Brazley circled back in his car, and identified Hawkins by his clothing. No one in the area, other than Hawkins, was wearing a black shirt and black jeans.

When Officer Lewis arrived at the St. Ann Street residence, he observed Hawkins whose clothing matched the description supplied by Officer Brazley. Hawkins was still standing in front of the alleyway. Officer Lewis noted that there were two alleyways, one belonging to Hawkins' mother's house and the other belonging to the vacant house next door. The

alleyway of the vacant lot was locked. Two other subjects accompanied Hawkins, one of whom had been a passenger in the white vehicle that Officer Brazley had followed. The officers detained the trio, and the remaining occupants of the white vehicle. Officer Lewis proceeded down the alleyway from which Officer Brazley had observed Hawkins exit. Officer Lewis encountered a pit bull dog chained behind a gate. The dog was barking and growling at him. Hawkins told Officer Lewis that the dog belonged to him and that the animal would respond only to Hawkins. Officer Lewis instructed Hawkins to relocate the animal, and Hawkins complied. Officer Lewis continued down a pathway that came from the abandoned alleyway and discovered under the rear steps of the vacant house adjacent to the alleyway a plastic bag containing twenty-three small red Ziploc bags, each containing marijuana. The packets fit the description of red-tinted, small Ziploc bags that Officer Brazley had earlier described to Officer Lewis. Thereafter, Officer Lewis arrested Hawkins, and as he radioed his police station, he heard his call broadcast from a nearby car. The car contained a police scanner, which was picking up Officer Lewis' call. Hawkins informed Officer Lewis that the vehicle which he used belonged to his girlfriend, but that the scanner belonged to him. Officer Lewis confiscated \$546 from Hawkins' pants pocket at the time of his arrest.

The State and the defense stipulated at trial that if Criminalist Teresa Lamb, an expert in the identification of narcotics, were called to testify, she would verify that the green vegetable matter in the twenty-three plastic bags seized in this case proved to be marijuana.

Hawkins' mother, Ms. Miriam Nelson, testified at trial that she was home at the time of her son's arrest. She described his clothing as a white, tank t-shirt and black, short, cutoff jeans. Ms. Nelson denied that the alleyway of the vacant house was locked the day of the arrest.

Ms. Jonnay George, Hawkins' girlfriend, testified at trial that the day Hawkins was arrested, she rode with him in her car to her appointment with the hairdresser while Hawkins babysat her nine-year old son. After Hawkins' arrest, Ms. George's son told her that he had found a walkie-talkie and had been playing with it in her car. Ms. George further testified at trial that she had given Hawkins \$700 to deposit into her checking account on the day of the arrest.

Hawkins' aunt, Ms. Ethel Nelson, testified at trial that at the time of his arrest, he had been living with her for many years. On the day of his arrest, Ms. Nelson saw Hawkins leave the house around 10:00 a.m. wearing a white tank top, black jeans and black tennis shoes.

Errors Patent:

A review of the record for errors patent reveals none.

Assignment of Error No. 1:

In his first assignment of error, Hawkins argues that the evidence is insufficient to support his conviction for possession with intent to distribute marijuana.

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 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, 61 L.Ed.2d 560 (1979). 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). 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. 1989). When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The 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 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.

In the instant case, Hawkins 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 Hawkins 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. The State need only establish constructive possession of the controlled dangerous substance to support a conviction. *State v. Trahan*, 425 So.2d 1222 (La.1983). A person found in the area of the contraband can be considered in constructive possession if the illegal substance is subject to his dominion and control. *Id.*

Intent need not be proven as fact, but may be inferred from the circumstances and actions of the defendant. *State v. Ricard*, 98-2278 (La. App. 4 Cir. 1/19/00), 751 So.2d 393. Intent can be inferred from the circumstances surrounding the defendant's arrest. *State v. Mamon*, 98-1943 (La. App. 4 Cir. 9/8/99), 743 So.2d 766. The possession of large sums of cash may be considered circumstantial evidence of intent. *State v. Johnson*,

2000-1528 (La. App. 4 Cir. 2/14/01), 780 So.2d 1140 writ denied, 2001-0916 (La. 2/01/02), 807 So.2d 854.

In the instant case, Officer Lewis discovered twenty-three individually wrapped packets of marijuana in red ziploc bags under the steps of an abandoned house. A trail led from the steps to the alleyway of the abandoned house, and that alleyway was adjacent to the alleyway of Hawkins' mother's house. Shortly before Officer Lewis discovered the contraband, Hawkins had exited the alleyway area with the same kind of red ziploc bags of marijuana, and engaged in a hand to hand transaction of one of the bags with another individual. The steps and alleyway of the abandoned house were not accessible except through the alleyway of Hawkins' mother's house. Hawkins' pit bull dog guarded the alleyway and the animal would respond only to him. Thus, the State produced sufficient evidence for the jury to conclude that Hawkins constructively possessed the marijuana.

In *State v. House*, 325 So.2d 222 (La. 1975), the Supreme 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.

In this case, the facts indicate that Hawkins intended to distribute the marijuana he possessed. Officer Lewis confiscated twenty-three bags of marijuana, an amount greater than would be expected for personal use. The marijuana was packaged in individual packets, thus, ready for distribution. Shortly before Officer Lewis recovered the marijuana, Officer Brazley observed Hawkins distribute one packet similar to the packets of marijuana contained in the red ziplocked bag. Officer Lewis recovered \$546 from Hawkins' pants pocket at the time of his arrest. Moreover, Hawkins admitted owning a police scanner, a device that would alert him to the presence of police officers in his vicinity. Under these facts, the State presented sufficient evidence for the jury to reasonably conclude that Hawkins possessed marijuana with the intent to distribute. This assignment of error is without merit.

Assignment of Error No. 2:

In his second assignment of error, Hawkins argues that the “confrontation procedure” employed in this case created a substantial risk of misidentification in violation of *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed.2d 140 (1977).

Hawkins did not file a motion to suppress the identification nor did he lodge an objection to its admissibility at trial. A defendant who does not file a motion to suppress an identification, and who fails to contemporaneously object to the admission of the identification testimony at trial, fails to preserve the issue of its admissibility as an error on appeal. La. C.C.P. art. 841(A); *State v. Kirt*, 94-2301 (La. App. 4 Cir. 6/29/95), 657 So.2d 775. Nevertheless, the identification procedure was not an issue in this case, except and to the extent that a jury would consider identification an issue with regard to the sufficiency of the evidence.

At trial of this matter it was established that Officer Brazley radioed a description of Hawkins to Officer Lewis. Trial testimony established that no other person in the area wore the same clothing as Hawkins, and that he was among the same subjects that Officer Brazley observed smoking marijuana together. Officer Lewis detained the individual described, and approximately three to four minutes after relaying the description, Officer Brazley returned to the scene to confirm that Officer Lewis had detained the

correct individual. Moreover, Hawkins extensively and artfully cross-examined Officers Brazley and Lewis on the issue of his identification. The jury did not believe the suggestion that the officers arrested the wrong person. This assignment of error is also without merit.

Assignment of Error No. 3:

In his third assignment of error, Hawkins argues that he was prejudiced at trial by inadmissible hearsay. He cites instances wherein the State elicited testimony from Officers Brazley and Lewis concerning their verbal exchanges regarding the events observed by Officer Brazley which culminated in his arrest.

The statements to which Hawkins refers fall under the *res gestae* exception to the hearsay rule. The *res gestae* doctrine encompasses not only spontaneous utterances and declarations made before and after commission of the crime, but also testimony of witnesses regarding what they heard or observed before, during, or after the commission of the crime if a continuous chain of events is evident under the circumstances. *State v. Colomb*, 98-2813 (La. 10/1/99), 747 So.2d 1074.

The record in this case reflects that the evidence presented was offered as part of the *res gestae* in connection with the crime committed. The conversations between the officers related to one another the identification

of the suspect, and the nature of his actions during the course of events of the offense. The statements provide narrative completeness and form an integral part of the context facts in which the jury evaluated the State's case that Hawkins committed the offense. This assignment of error is also without merit.

Assignment of Error No. 4:

In his fourth assignment of error, Hawkins maintains that the district court erred in allowing the State to elicit expert testimony from Officers Brazley and Lewis as to his “intent” to possess marijuana, in violation of La. C.E. art. 704.

The first instance cited by Hawkins occurred during Officer Brazley’s direct testimony. The prosecutor stated:

Q. Officer, I’m going to ask you if you can open this. What does that contain, officer?

A. I can smell it now. Appears to be marijuana from the scent. It’s several small red bags containing green vegetable matter. *And from my experience*, it’s marijuana from the smell. (emphasis supplied by defense)

Hawkins fails to explain how the testimony constituted an inadmissible opinion as to intent. Officer Brazley simply identified the green vegetable matter as marijuana, drawing upon his experience as a narcotics

officer.

The second instance of alleged error cited by Hawkins occurred during Officer Lewis' direct testimony when the following exchange with the prosecutor took place:

Q. Officer, why did you arrest Mr. Hawkins for possession of marijuana with intent to distribute?

A. Well, it was [sic] combination of things. One being Detective Brazley's observations of the hand to hand narcotics transactions. Two, Detective Brazley's observations of Mr. Hawkins actually coming from the alley before making the transaction. The fact that Mr. Hawkins was the only person that could have went [sic] into the alley and make it to the narcotics, because of the dog and the location of where it was at. He was the only person that had access to it. There was no other way and no other person that could get to it because of the dog.

Officer Lewis responded to the State's question with a factual recollection of the events that led to Hawkins' arrest, including the observations of the previous transaction, the location of Hawkins vis-a-vis the narcotics, and his accessibility to the narcotics. The officer's response did not constitute inadmissible expert opinion as to Hawkins' intent or any other matter. This assignment of error is without merit.

Assignment of Error No. 5:

In his final assignment of error, Hawkins argues that the district court erred in denying his Motion to Suppress the evidence. He maintains that the officers lacked probable cause for his arrest, and that they had no warrant allowing them to search his mother's property; hence, the evidence seized from his person and the yard were obtained pursuant to illegal searches.

Art. 213 of the Criminal Code of Procedure authorizes a policeman to arrest a person who has committed an offense in his presence. Probable cause exists when the facts and circumstances known to the officers and of which they have reasonably trustworthy information are sufficient to justify the belief by a man of ordinary caution that the suspect has committed or is committing a crime. *State v. Daniel*, 2001-1736 (La. App. 4 Cir. 2/13/02), 811 So.2d 84. Incident to a lawful arrest, the officer may lawfully conduct a full search of the arrestee and the area within his immediate control for weapons and for evidence of a crime. *State v. Fontaine*, 2001-1291 (La. App. 4 Cir. 3/6/02), 814 So.2d 592.

In Hawkins' case, the money and other contraband confiscated from him were recovered pursuant to his arrest. The officers had probable cause to arrest Hawkins after Officer Brazley witnessed him transfer a red ziplocked packet of marijuana to another individual. Furthermore, even to the extent that Hawkins incorrectly alleges that the officers at this point

merely had reasonable suspicion to stop him, the officers gained additional information to confirm that Hawkins possessed marijuana once they discovered his stash at the abandoned property.

As to Hawkins' claim of violation of his privacy rights as a result of the search of his mother's property, whether a defendant has a constitutionally protected expectation of privacy involves a two part inquiry:

(1) a defendant must first show that he has a reasonable expectation of privacy in the area searched for the items seized; and (2) a defendant must also show that society is prepared to accept the expectation of privacy as objectively reasonable. *State v. Ragsdale*, 381 So.2d 492, 497 (La.1980);

State v. Hamilton, 2000-1176 (La. App. 4 Cir. 9/13/00), 770 So. 2d. 413.

Defendant's expectation of privacy, namely that he is entitled to place illegal contraband onto the property of others without government intrusion, is not recognized by society as reasonable. *State v. Campbell*, 93-1959 (La. App. 4 Cir. 5/26/94), 640 So.2d 622. A defendant has no expectation of privacy in the neighbor's back yard.

State v. Harper, 27,278 (La.App. 2 Cir. 8/23/95), 660 So.2d 537.

In the instant case, the area searched was the open area of the alleyway and the steps of the neighboring house, not Hawkins' property.

Moreover, the neighboring house was abandoned property, thus eliminating

any reasonable expectation of privacy for anyone, including Hawkins. The officers recovered the contraband without violating anyone's rights.

Hawkins further argues that the officers also made an illegal search when they accessed the abandoned property by briefly traversing the alleyway of his mother's house. At best, the alleyway constitutes "curtilage" of his mother's house. Although "curtilage" is entitled to some protection of privacy, this expectation is reduced. *State v. Brisban*, 2000-3437 (La. 2/26/02), 809 So.2d 923. More importantly, there was no search of, nor evidence recovered from, Hawkins' mother's property. Furthermore, officers had exigent circumstances to access the abandoned property through Hawkins' mother's alleyway in order to retrieve the contraband. This assignment is without merit.

DECREE

For the reasons stated herein, we find that all of the assignments of error raised on appeal by Ronald Hawkins lack merit. Therefore, we affirm the conviction and sentence of Ronald Hawkins.

AFFIRMED

