STATE OF LOUISIANA	*	**NO. 2002-KA-0483**
VERSUS	*	**COURT OF APPEAL**
KENTRELL VANCE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 413-739, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay III)

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AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING

STATEMENT OF THE CASE

On April 4, 2000, the defendant, Kentrell Vance, was charged by bill of information with possession with the intent to distribute cocaine in violation of La. R.S. 40:967 and with possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1. The defendant pled not guilty to both counts at his arraignment on April 17, 2000. At a preliminary and suppression hearing was held on April 28, 2000, the trial court found probable cause and denied the defendant's motion to suppress evidence. On May 10, 2000, waiving his right to a jury trial, the defendant elected a bench trial that was conducted that day. The trial court, on May 17, 2000, found the defendant guilty of possession of cocaine and of possession of a weapon by a convicted felon. On May 24, 2000, it sentenced the defendant to concurrent sentences of seven years at hard labor on the cocaine conviction and ten years at hard labor on the firearms conviction. Subsequently, the State filed a multiple bill of information, which alleged that the defendant

was a multiple offender. On June 21, 2000, the defendant pled not guilty to the multiple bill and filed a motion to reconsider the sentence. A hearing on the motion to reconsider and on the multiple bill was held on August 11, 2000. The trial court denied the motion to reconsider the sentence, adjudicated the defendant as a second felony offender, vacated the original sentence imposed on the cocaine conviction, and re-sentenced the defendant to serve ten years at hard labor on the cocaine conviction. The trial court granted the defendant's motion for appeal on March 27, 2001.

STATEMENT OF FACT

Officer Michael Montalbano executed a search warrant at 2429 Thalia Street, Apartment C, on March 15, 2000. A confidential informant had notified the officer on March 8, 2000 that narcotics were being sold at the apartment. Officer Montalbano and Agent Mike Eberhardt of the Bureau of Alcohol, Tobacco and Firearms (ATF) set up a controlled purchase of narcotics through the informant, which took place on March 8, 2000. The informant identified the seller as a black male twenty-five years of age. The informant later provided Officer Montalbano with the names "Cutty" and "Gerard", the subjects living in the apartment. Subsequently, Officer Montalbano obtained a search warrant and advised his supervisor, Sergeant Gaudet. The sergeant executed the search warrant while the officer was in

court on an unrelated matter.

Officer Kyle Henrichs, who also assisted in the execution of the search warrant, observed the defendant leaving the apartment as the officers were approaching. When the defendant saw the officers, he hastily slammed the apartment door and ran down the stairs toward the driveway. Officer Henrichs ran after the defendant and eventually tackled him after he had ordered the defendant to stop and he did not comply. The officer handcuffed the defendant and took him back to the apartment. When Officer Montalbano arrived at the apartment, Gerard R. Joseph ("Gerard") and the defendant (who acknowledged that his nickname was "Cutty") had been arrested. Through a search of the defendant's person, Officer Montalbano found $123.00 and keys to the apartment. A search of the apartment revealed cocaine, four weapons, and $2,203.00 in cash.

Officer Henrichs assisted with the search of the apartment. He located a semi-automatic handgun in the hall closet. The weapon did not have a serial number on it. ATF Agent Eberhardt, who also participated in the controlled purchase and execution of the search warrant, located a .380 pistol under the sofa. In the closet in the front room, three bags of cocaine, United States currency, ammunition, a nine-millimeter gun, and a .22 caliber gun and ammunition were found. A fourth weapon was found in the hall

closet. A beeper, razor blades, a beaker glass, and small plastic Ziploc bags were found in the kitchen, along with Gerard's identification. The death certificate of the former occupant of the apartment was also found.

Gerard testified that there were approximately eight people in the hallway the day he and the defendant were arrested. He stated that the apartment was used as a "clubhouse" by several people in the neighborhood and that people would come and go as they pleased. Four to five people had keys to the apartment, including him, but the defendant did not have a key. Gerard further testified that the defendant did not know that there were drugs and weapons in the apartment. Gerard claimed ownership of the drugs and stated that the defendant was a user, not a seller.

The parties stipulated at trial that the defendant had two prior convictions for cocaine possession. They also stipulated that the substances found in the apartment tested positive for cocaine and weighed 35.5 grams.

ERRORS PATENT

A review of the record reveals an error patent in the sentence imposed by the trial court on the defendant's *conviction for possession of a firearm by a convicted felon*. La. R.S. 14:95.1 provides that "[w]hoever is found guilty of violating the provisions of this Section shall be imprisoned at hard

labor for not less than ten or more than fifteen years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars." The trial court erred by failing to state that the sentence of ten years was to be served without benefit of probation, parole or suspension of sentence and by failing to impose a fine of at least one thousand dollars. Formerly, this court followed State v. Frasier, 484 So.2d 122 (La. 1986), which held that a sentencing error favorable to the defendant that is not raised by the State on appeal may not be corrected. However, the legislature later enacted La. R.S. 15:301.1, which addresses those instances where sentences given contain statutory restrictions on parole, probation or suspension of sentence. Paragraph A of La. R.S. 15:301.1 provides that in instances where the statutory restrictions are not recited at sentencing, they are included in the sentence given, regardless of whether or not they are imposed by the sentencing court. Furthermore, in State v. Williams, 00-1725 (La. 11/29/01), 800 So.2d 790, the Louisiana Supreme Court ruled that section A of the statute self-activates the correction and eliminates the need to remand for a ministerial correction of an illegally lenient sentence, which may result from the failure of the sentencing court to impose punishment in conformity with that provided in the statute. (In Williams, the Supreme Court also held that the retroactive

application of the 180-day time period announced in section D of La. R.S. 15:301.1 to sentences imposed prior to August 15, 1999, is procedural and does not violate the prohibition of ex post facto laws; additionally, the Court ruled there that the 180-day time period defined in section D is applicable only to section B of the statute and not section A under which this the defendant's sentence falls). Hence, this Court need take no action to correct the trial court's failure to specify that the defendant's sentence be served without benefit of parole, probation or suspension of sentence. The correction is statutorily effected. (La. R.S. 15:301.1A). However, the trial court also failed to impose a fine between one and five thousand dollars. Because the trial court has discretion in determining the amount of the fine, the matter should be remanded for the imposition of a fine in accordance with La. R.S. 14:95.1.

ASSIGNMENT OF ERROR NUMBER 1

In this assignment of error, the defendant contends that his trial counsel was ineffective for failing to object to hearsay testimony by Officer Montalbano.

Generally, the issue of ineffective assistance of counsel is a matter more properly raised in an application for post-conviction relief to be filed in the trial court where an evidentiary hearing can be held. State v. Prudholm,

446 So.2d 729 (La. 1984); State v. Sparrow, 612 So.2d 191 (La. App. 4 Cir. 1992). Only when the record contains the necessary evidence to evaluate the merits of the claim can it be addressed on appeal. State v. Seiss, 428 So.2d 444 (La. 1983); State v. Kelly, 92-2446 (La. App. 4 Cir. 7/8/94), 639 So.2d 888. The present record is sufficient to evaluate the merits of the defendant's claim.

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced him. With regard to counsel's performance, the defendant must show that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. Regarding prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e. a trial whose result is reliable. Id., 466 U.S. at 687, 104 S.Ct. 2064. Both showings must be made before it can be found that the defendant's conviction resulted from a breakdown in the adversarial process that rendered the trial result unreliable. Id. A claim of ineffective assistance may be disposed of on the finding that either of the Strickland standards have not been met. State v. James, 555 So.2d 519 (La. App. 4 Cir. 1989). If the claim fails to establish either prong, the reviewing court need not address

the other. State ex rel. Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984).

If an error falls within the ambit of trial strategy, it does not establish ineffective assistance of counsel. State v. Bienemy, 483 So.2d 1105 (La. App. 4 Cir. 1986). Moreover, hindsight is not the proper perspective for judging the competence of counsel's decisions because opinions may differ as to the advisability of a tactic, and, an attorney's level of representation may not be determined by whether or not a particular strategy is successful. State v. Brooks, 505 So.2d 714 (La. 1987).

In the present case, the defendant contends that his trial counsel erred when he failed to object to hearsay testimony by Officer Montalbano concerning information received from the confidential informant as to the defendant's testimony. At trial, Officer Montalbano testified:

> Q. Would you please explain to the Court the nature of the ongoing investigation?
>
> A. On March 8th, I was notified by a confidential informant that narcotics were being sold at 2429 Thalia, Apartment C. The CI informed me that he or she purchased narcotics from the location.
>
> Q. What did you do when you received this information, Officer?
>
> A. I met with ATF Agent Mike Eberhardt who I used to work with when I was assigned to the ATF Task Force. He obtained money from the ATF Task Force fund, which we met with a CI at a pre-determined location. At the location, I searched the CI, found no weapons or contraband on him or currency, provided him with

money to go to the apartment to make a purchase.

* * * * *

Q. Once you acquired this order, what did you do then, Officer?
A. I was conducting further investigation into who owned the apartment. I could not determine through a computer check (IA) to the warrant. On the date of the 15th, I was notified by the CI. The CI informed me that he or she found out the names of the subjects who were living in the apartment now and were selling drugs. He told me one of them was named Cutty and the other was named Gerard. He didn't know the last names. Said he did not know Cutty's real name.

* * * * *

Q. Now, Officer, you say Kentrall Vance and Gerard Joseph. How were you able to establish their identities once you were on the location?

A. There was a female who stopped outside of the apartment - - Well, to begin with, provided (IA) they told me who they were, and a female that was out at the apartment said that Kentrall Vance, also known as Cutty. I asked him. He said that's his nickname, "Cutty."

Q. Kentrall Vance told you his nickname was "Cutty"?

A. Right. So this corroborated with what the CI told me.

* * * * *

Q. Where did you receive the information from your CI that you now had names from the people who were selling drugs out of that apartment?

* * * * *

BY THE WITNESS:
I received it on the day the warrant was executed.

BY MR. LEBLANC:

Q. The names that were given to you by the CI, were you able to match them up at a later time?

A. At a later time, yes.

Q. Who did you match those names up to?

A. Gerard Joseph and Kentrall Williams.

Q. Kentrall - -

A. Kentrall Vance. I'm sorry.

Hearsay is a statement made out of court offered as evidence in court to prove the truth of the matter asserted by the statement. La.C.E. art. 801 (C); State v. Everidge, 96-2665 (La.12/2/97), 702 So.2d 680, 684. Hearsay is excluded because the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability. In order to fall within the definition of hearsay, the statement must be offered to prove the truth of the statement's contents. Id., 702 So.2d at 685.

In State v. Granier, 592 So.2d 883, 888 (La. App. 4 Cir. 1991) this Court stated that a police officer, in explaining his own actions, may refer to statements made to him by other persons involved in the case. Such statements, which often fall into the hearsay exception, are admissible not to prove the truth of the statement being made, but rather are offered to explain

the sequence of events leading to the arrest of the defendant and, as such, are not hearsay. Id.

In the case at bar, the defendant is correct that Officer Montalbano's testimony contained hearsay evidence. The officer's testimony concerning the controlled purchase was admissible as it explains the officer's action in obtaining a search warrant for the apartment. Officer Montalbano's testimony concerning the identification of the defendant by the confidential informant and the female outside the apartment was hearsay, and the defendant's trial counsel should have objected. However, counsel's failure to object was not prejudicial. The trial judge, who presided over the preliminary and suppression hearings, was aware of the identifications made by the female and the confidential informant prior to trial. Furthermore, the defendant admitted to the officer that his nickname was "Cutty." In addition, the State produced additional evidence connecting the defendant to the apartment. Officer Montalbano testified that the defendant was in possession of keys to the apartment after Officer Henrichs apprehended the defendant. Officer Henrichs stated that he observed the defendant leaving the apartment as the officers were approaching. When the defendant saw the police officers, he slammed the apartment door shut and ran toward the driveway. Officer Henrichs ordered the defendant to stop but the defendant

did not comply. The officer ran after the defendant and eventually apprehended him. The defendant was arrested and searched by Officer Montalbano who found keys to the apartment on the defendant.

This assignment is without merit.

ASSIGNMENTS OF ERROR NUMBERS 2 AND 4

The defendant further argues that the missing transcripts preclude a complete appellate review of his convictions and sentences.

The state constitution provides that "[n]o person shall be subjected to imprisonment . . . without the right of judicial review based upon a complete record of all evidence upon which the judgment is based." La. Const. Art. I, §19. In felony cases, the recording of "all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel" is statutorily required. La. C.Cr.P. art. 843.

In State v. Ford, 338 So. 2d 107 (La. 1976), the Louisiana Supreme Court stated:

> Without a complete record from which a transcript for appeal may be prepared, a defendant's right of appellate review is rendered meaningless. A slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal would not cause us to reverse the defendant's conviction. But where a

> defendant's attorney is unable, through no fault of his own, to review a substantial portion of the trial record for errors so that he may properly perform his duty as appellate counsel, the interests of justice require that a defendant be afforded a new, fully-recorded trial.

338 So. 2d at 110.

In Ford, the court found the omission of the testimony of four State witnesses, of the voir dire, and of the opening statements made it impossible for counsel, who was appointed for the appeal, to adequately review the record for errors.

In State v. Diggs, 93-0324 (La. App. 4 Cir. 6/29/95), 657 So.2d 1104, this court found the unavailability of an officer's complete testimony necessitated a new trial. In Diggs, the defendants were convicted of distribution of cocaine based upon alleged sales to undercover police officers. While three officers had participated in the undercover operation, only two of them testified at trial. No record of the cross-examination or redirect exam, if any, was available for one of the officers; only the beginning of his direct examination was transcribed. This court held that this omission necessitated a new trial because it could not be determined whether the missing testimony was substantial or inconsequential, or whether any objections or motions had been made during the officer's testimony.

This court has recognized that a complete appellate review of a defendant's conviction and sentence can be accomplished even when there are missing portions of the trial record. In State v. Thomas, 92-1428 (La. App. 4 Cir. 5/26/94), 637 So. 2d 1272, this court found that the record was adequate for full appellate review. Missing from the appeal record were transcripts of the voir dire, jury instructions, opening statements, and closing arguments. The court noted that "[b]ecause the missing portions of the trial record are not evidentiary, their absence does not compromise the defendants' constitutional right to a judicial review of all evidence." Thomas, at 1274. In addition, the minute entries of trial did not indicate that the defendant made any objections during the proceedings missing from the record.

Also, in State v. Lyons, 597 So.2d 593 (La. App. 4 Cir. 1992), this court concluded that the appellate record was adequate for review although transcripts of the voir dire, of the impaneling of the jurors, of the opening statements, and a portion of the jury charges were missing. The court noted that the defendant had made no specific assignments of error as to the missing portions of the record except for the fact that they were missing.

In State v. Vaughn, 378 So.2d 905 (La.1979), portions of the testimony from the defendant's motion to suppress the identification were

not transcribed because of a malfunction in the recording equipment. On appeal, the Supreme Court stated that the missing testimony was hardly relevant or material to the issue presented by the motion to suppress. The court further noted that in determining the correctness of a ruling on a pretrial motion to suppress, it was not limited to the evidence presented at the hearing on that motion, but could consider all pertinent evidence adduced at the trial on the merits.

In State v. Byes, 97-1876 (La.App. 4 Cir. 4/21/99) 735 So.2d 758, the court stenographer was unable to locate the transcript of the hearing on the motion to suppress. Byes asserted a denial of constitutional right to review based on the absence of the transcript. This court noted that the only witness to testify at the motion hearing also testified at trial, and gave extensive testimony concerning the seizure of the evidence. Moreover, in an earlier assignment of error, the Byes court found no error in the trial judge's denial of the motion to suppress the evidence.

In the present case, the missing parts of the record include the transcript of the judge's verdict rendered on May 17, 2000, the transcript of the sentencing hearing, the denial of the defendant's motion to reconsider sentence, and the transcript of the multiple bill hearing. As the defendant does not challenge his multiple bill adjudication, the loss of the transcript of

the multiple bill hearing does not prejudice the defendant's right to complete appellate review. The lack of the transcript of the judge's verdict also does not prejudice the defendant's right to appellate review. The entire trial transcript is available for review and this Court will be able to review it to determine whether the State produced sufficient evidence to sustain the defendant's convictions. However, the lack of the sentencing transcript of May 24, 2000, in which the trial court sentenced the defendant on his conviction for being a convicted felon in possession of a weapon, prevents appellate review of the defendant's assignment of error concerning the excessiveness of the sentence and the denial of his motion to reconsider sentence. Accordingly, the defendant's sentence on his conviction for being a convicted felon in possession of a weapon must be vacated.

ASSIGNMENT OF ERROR NUMBER 3

The defendant also contends that the evidence was insufficient to support his convictions for possession of cocaine and possession of a firearm by a convicted felon.

This Court set out the standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most

> favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4th Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] 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." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a the defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So.2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-228.

The defendant argues that the State failed to prove that he had constructive possession of the guns and cocaine and that his prior

convictions were less than ten years from the present offense.

To convict a the defendant of being a convicted felon in possession of a weapon, the State must to prove beyond a reasonable doubt that the defendant possessed a firearm and that he had been convicted of a prior enumerated felony within the past ten years. La. R.S. 14:95.1; State v. Husband, 437 So.2d 269, 271 (La. 1983); State v. Jones, 544 So.2d 1294, 1295 (La. App. 4 Cir. 1989).

The State must prove that a defendant knowingly possessed narcotics in order to convict him of possession of narcotics. State v. Lewis, 98-2575, p. 3 (La. App. 4 Cir. 3/1/00), 755 So.2d 1025, 1027; State v. Ricard, 98-2278, p. 7 (La. App. 4 Cir. 1/19/00), 751 So.2d 393, 397. The State need not prove that a defendant was in actual possession of the narcotics found; constructive possession, or the exercise of dominion and control over the drugs, is sufficient to support conviction. Id. A defendant may be deemed to be in joint possession of a drug which is in the physical possession of a companion if he willfully and knowingly shares with the other the right to control it. State v. Booth, 98-2065, p. 5 (La. App. 4 Cir. 10/20/99), 745 So.2d 737, 742. Neither the presence of a defendant in an area where drugs have been found nor the fact that he knows the person in actual possession is sufficient to prove constructive possession. State v. Bell, 566 So.2d 959 (La.

1990). Factors to be considered in determining whether a the defendant exercised dominion and control over drugs are: the defendant's knowledge that illegal drugs were present in the area, the defendant's relationship with the person in actual possession, the defendant's access to the area where the drugs were found, evidence of recent drug use, the defendant's proximity to the drugs, and evidence that the area was being frequented by drug users. State v. Walker, 99-1957, p. 3 (La. App. 4 Cir. 5/17/00), 764 So.2d 1130,1133; State v. Mitchell, 97-2774, p. 12 (La. App. 4 Cir. 2/3/99), 731 So.2d 319, 328.

At trial, Officer Montalbano testified that a confidential informant told him that narcotics were being sold from 2429 Thalia Street, Apartment C. After arranging for a controlled purchase by the confidential informant, the officer learned that the men selling the narcotics were named "Cutty" and Gerard. The officer then obtained a search warrant for the apartment. Officer Henrichs, who assisted in the execution of the search warrant, testified that he observed the defendant exiting the apartment when they arrived on the scene. The officer stated that when the defendant observed the police officers, he hastily slammed the apartment door shut and ran down the stairs towards the driveway. Officer Henrichs ordered the defendant to stop but the defendant did not comply. The officer ran after the defendant

and apprehended him. Officer Henrichs took the defendant back to the apartment. Officer Montalbano arrested and searched the defendant. The officer found $123.00 and keys to the apartment on the defendant. At that time, the defendant told Officer Montalbano that his nickname was "Cutty." Cocaine, four weapons (a .380 pistol, a nine millimeter, a. 22 caliber, and a semi-automatic handgun) and United States currency in the amount of $2,203.00 were found in the apartment.

Such evidence is sufficient to prove that the defendant had constructive possession of the guns and cocaine. The defendant's possession of keys to the apartment indicated that he had control over access to the apartment. In addition, he was identified by name as one of the persons selling cocaine from the apartment. Further, the defendant's flight from Officer Henrichs is indicative of guilty knowledge. State v. Postell, 98-0503 (La. App. 4 Cir. 4/22/99), 735 So.2d 782.

In the present case, the parties stipulated that the defendant had prior convictions for possession of cocaine. Although there were no stipulations or evidence offered to prove the dates of the convictions, the lengths of the sentences imposed, and/or the release dates, the bill of information charging the defendant with possession of a weapon by a convicted felon listed the case numbers of the defendant's two prior convictions. The trial judge, as

the trier of fact, was able to determine from the case numbers of the prior convictions that the defendant's prior convictions occurred less than ten years from the present offense.

This assignment is without merit.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence for possession of cocaine is affirmed. The defendant's conviction for possession of a weapon by convicted felon is affirmed. The defendant's sentence for possession of a weapon by convicted felon is hereby vacated and the matter remanded for resentencing.

AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING