STATE OF LOUISIANA	*	**NO. 2002-KA-0566**
VERSUS	*	**COURT OF APPEAL**
LOUIS WRIGHT AND KENDRICK F. SHORTS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-071, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *

JOAN BERNARD ARMSTRONG

JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin and Judge Max N. Tobias, Jr.)

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**CONVICTIONS AFFIRMED;
SENTENCES VACATED
AND REMANDED.**

STATEMENT OF CASE

Defendants Kendrick Shorts and Louis Wright were each charged by bill of information with one count of possession of cocaine in violation of La. R.S. 40:967. The defendants pleaded not guilty at their August 29, 2001, arraignment. Defendant Shorts elected to be tried by the trial judge. On October 22, 2001, the trial court found defendant Shorts guilty of attempted possession of cocaine. Defendant Shorts was sentenced to thirty-three months at hard labor on October 30, 2001. On October 22, 2001, a six-person jury found defendant Wright guilty of attempted possession of cocaine. On October 30, 2001, defendant Wright was sentenced to forty-seven months at hard labor. The record indicates the State filed a multiple bill alleging defendant Shorts to be a double offender. But, the record does not indicate a multiple bill hearing was ever held. The State also discussed filing a multiple bill against defendant Wright, but the record does not

indicate it was ever done. The trial court denied the defendants' motions for new trial, motion for post judgment verdict of acquittal, and a motion to reconsider sentence. The defendants now appeal.

STATEMENT OF FACT

Officer Hans Gauthier, of the New Orleans Police Department, testified that he and his partner Officer Robert Williams were working in plain clothes on July 11, 2001, in the French Quarter. The officers observed the defendants standing face-to-face on Bourbon Street. Officer Gauthier further testified that defendant Shorts gave defendant Wright a plastic bag containing a white object. The officers believed a drug transaction was taking place, so they approached the defendants. As defendant Wright saw the officers approach he gave the plastic bag and its contents back to defendant Shorts. When defendant Shorts saw the officers approaching he discarded the plastic bag and the white object. Officer Gauthier then pursued and arrested defendant Wright.

Officer Robert Williams testified corroborating the testimony of Officer Gauthier. Officer Williams arrested defendant Shorts and retrieved the plastic bag and the white object discarded by the defendant.

Corey Hall, a criminalist for the New Orleans Police Department,

testified that he tested the white rock-like object retrieved by Officer Williams, and it tested positive for cocaine.

ERRORS PATENT

A review of the record for errors patent reflects that the trial court failed to observe the mandatory twenty-four hour delay between the denial of a motion for new trial and sentencing, and the transcript does not reflect the defendants waived this delay. In State v. Augustine, 555 So.2d 1331 (La.1990), the Louisiana Supreme Court held that failure to waive the twenty-four hour delay voided the defendant' sentence if the defendant attacks his sentence, even though the defendant fails to specifically allege this failure as an error on appeal. Because defendant Shorts alleges on appeal that the trial court imposed an excessive sentence, his sentence must be vacated and the case remanded for resentencing. In addition, the sentences are excessive as to both defendants Shorts and Wright for the reasons set forth in defendant Shorts' second assignment of error.

DISCUSSION

SHORTS ASSIGNMENT OF ERROR NUMBER 1

Defendant Shorts argues that the trial court failed to adequately address him on the record concerning the waiver of his right to jury trial.

La. C.Cr.P. art. 780 provides, in part:

> A. A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury.
>
> B. The defendant shall exercise his right to waive trial by jury in accordance with the time limits set forth in Article 521. However, with permission of the court, he may exercise his right to waive trial by jury at any time prior to commencement of trial.

In State v. Abbott, 92-2731 (La. App. 4 Cir. 2/25/94), 634 So.2d 911, this court stated that the waiver of trial by jury was valid only if the defendant acted voluntarily and knowingly. The court further stated that the preferred method of ensuring that right was for the trial judge to advise the defendant personally on the record of his right to a jury trial and to require the defendant to waive the right personally, either in writing or by oral statement in open court on the record. However, as noted by this court in State v. Richardson, 575 So.2d 421 (La. App. 4 Cir. 1991), the Supreme Court has upheld cases in which a waiver of jury trial was made by the defendant's attorney, rather than the defendant personally, when the defendant was considered to have understood his right to a jury trial and still consented to the waiver.

The waiver of the right to a jury trial cannot be presumed. State v.

Wolfe, 98-0345, p.6 (La. App. 4 Cir. 4/21/99), 738 So.2d 1093, 1097.

In State v. Moses, 2001-0909, p.4 (La. App. 4 Cir. 12/27/01), 806 So.2d 83, 86, citing State v. Nanlal, 97-0786 (La. 9/26/97), 701 So.2d 963, this court indicated that where the record does not reflect a valid waiver of a defendant's right to trial by jury, the proper procedure is to remand the case to the district court for an evidentiary hearing to determine whether the defendant validly waived that right. If the evidence showed the defendant did not make a valid waiver of his right to trial by jury, the district court must set aside the defendant's conviction and sentence, and grant him a new trial.

In Moses, Id, the record contained no evidence that the defendant waived his right to a jury trial. However, in the instant case the transcript of the proceedings of October 18, 2001, the trial judge addressed defendant Shorts on the record:

> Court: I just want to make sure I get Mr. Shorts' waiver on the record. Where's Mr. Shorts ? Step up. We've selected a jury in this for Mr. Wright. Mr. Shorts you've indicated to us earlier that you waive your right to a jury trial and wanted to proceed by a judge trial. You understand that you have a right to trial by judge or jury?
>
> Shorts: Yes.
>
> Court: You've discussed that with your attorney?
>
> Shorts: Yes, ma'am.

> Court: And your desire was to proceed how?
>
> Shorts: Judge trial.
>
> Court: Okay. Let the record reflect that, again, on the record and just so we have it in the midst of the trial transcript and trial proceedings, we add that Mr. Shorts, again, waived his right, with his attorney at his side, to a jury trial and opted for judge trial.

It appears from the record that defendant Shorts knowingly, intelligently and orally waived his right to a trial by jury on the record in open court.

This assignment of error is without merit.

SHORTS ASSIGNMENT OF ERROR NUMBER 2

Defendant Shorts also argues the sentence imposed by the trial court is excessive and it was based on the defendant being a second time multiple offender without a multiple bill hearing adjudication.

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 needless and purposeless imposition of pain and suffering, and is grossly out of

proportion to the severity of the crime. State v. Labato, 603 So.2d 739 (La. 1992).

Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing 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).

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 his case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Quebedeaux, 424 So.2d 1009 (La. 1982).

The trial judge is given wide discretion in imposing a sentence, and a sentence imposed within the statutory limits will not be deemed excessive in the absence of manifest abuse of discretion. State v. Walker, 96-112 (La. App. 3 Cir. 6/5/96), 677 So.2d 532, 535, citing, State v. Howard, 414 So.2d 1210 (La. 1982).

At the time of the offense in this case under La. R.S. 40:967 (C)(2) the penalty for a first time possession offender provided:

> Any person who violates this Subsection as to any other controlled dangerous substance shall be imprisoned with or without hard labor for not more than five years and, in addition, may be sentenced to pay a fine of not more than five thousand

dollars.

At the time of the offense in this case La. R.S. 15:529.1 the Habitual Offender Law provided in part:

> If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction.

At the time of the offense in this case La. R.S. 14:27(D)(3) provided:

> In all other cases he shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted or both.

In the instant case, defendant Shorts avers his sentence is excessive and that he was sentenced as a second felony offender without a multiple bill hearing. The sentence range for a first time possession conviction is a maximum of five years or sixty months. The sentence range for a second time felony offender under the Habitual Offender Law is a minimum of thirty months and a maximum of ten years. However, the maximum sentence for a first time attempted possession conviction under the penalty portion of the attempt statute is one half of the longest term of imprisonment, which is two and one-half years or thirty months. The trial

court sentenced defendant Shorts to thirty-three months, three months over the maximum sentence for a first time attempted possession conviction. The sentencing transcript indicates the State filed multiple bills of information as to both the defendants after the sentences were imposed. There is no indication that a multiple bill hearing was ever held. Thus, the sentence was excessive for an attempted possession conviction without a multiple bill hearing adjudicating the defendant as a second felony offender.

WRIGHT'S ASSIGNMENT OF ERROR NUMBER 1

Defendant Wright contends that the evidence was insufficient to support his conviction of attempted possession of cocaine.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of 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 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. 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 the events. Rather, this court when evaluating the evidence in the light most favorable to the prosecution, must determine 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. State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012. This is not separate test from Jackson, but is instead an evidentiary guideline for the jury when considering circumstantial evidence, and this test 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).

The elements of possession of cocaine as found in La. R.S. 40:967 (C), are proof that the defendant knowingly or intentionally possessed cocaine. The State need not prove that the defendant was in actual

possession of the narcotics found; constructive possession is sufficient to support conviction. State v. Allen, 96-0138 (La. App. 4 Cir. 12/27/96), 686 So.2d 1017, 1020. A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. Allen, Id, citing, State v. Jackson, 557 So.2d 1034, 1035 (La. App. 4 Cir. 1990).

To prove attempt, the State must show that the defendant committed an act tending directly toward the accomplishment of his intent to possess cocaine. State v. Council, 2001-0639, p. 4 (La. App. 4 Cir. 11/28/01), 802 So.2d 970, 973.

In State v. Walker, 600 So.2d 911 (La. App. 4 Cir. 1992), this court found that the evidence introduced that the police officers saw the defendant disposing of individually packaged dosages of crack cocaine was sufficient to sustain a conviction for attempted possession of cocaine.

In the instant case, like Walker, the defendants were seen with and disposing of a white object that was later positively identified as crack cocaine. This assignment of error is without merit.

For the foregoing reasons, the defendants' convictions are affirmed, their sentences vacated, and the case remanded for resentencing of both defendants.

CONVICTIONS AFFIRMED;
SENTENCES VACATED
AND REMANDED.