

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-KA-1097**
VERSUS * **COURT OF APPEAL**
NATHANIEL CRAWFORD * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-093, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * *
Judge David S. Gorbaty
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(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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

William R. Campbell, Jr.

LOUISIANA APPELLATE PROJECT
700 Camp Street
New Orleans, LA 70130
COUNSEL FOR DEFENDANT/APPELLANT

**CONVICTION AFFIRMED; SENTENCE
SET ASIDE; REMANDED FOR RESENTENCING**

Nathaniel Crawford appeals his sentence of forty months at hard labor, with credit for time served. For the following reasons, we affirm the conviction, set aside the sentence, and remand to the trial court for resentencing.

STATEMENT OF CASE:

On September 26, 2001, the State charged Nathaniel Crawford with third offense possession of marijuana, a violation of La. Rev. Stat. 40:966 (D)(3). On November 29, 2001, a six-member jury convicted Crawford of attempted possession of marijuana, third offense. The court sentenced Crawford to serve forty months at hard labor, with credit for time served and waived court costs. That same day, the trial judge denied Crawford's motion to reconsider sentence, and granted his motion for appeal.

STATEMENT OF FACT:

On September 26, 2001, police officers conducted a wanted subject search for the defendant at the residence of Ms. Tonya Peters. Ms. Peters

allowed the officers entrance to her home, and directed them to a rear bedroom where Crawford was sleeping. Upon entering the bedroom, the officers observed a small bag containing marijuana on a dresser near the bed. The officers confiscated the marijuana, arrested Crawford, and charged him with possession of marijuana. The State and the defense stipulated that the substance confiscated at Ms. Peters' home tested positive for marijuana.

ERRORS PATENT:

There is an error patent as to the legality of the defendant's sentence, which is discussed in conjunction with the defendant's assignment of error.

ASSIGNMENT OF ERROR:

In a sole assignment of error, Crawford argues that the trial court erred in enhancing his sentence for attempted possession of marijuana based upon two previous convictions for possession of marijuana. He contends that his enhanced sentence is illegal and constitutionally excessive. This assignment has merit.

On November 9, 2001, the State charged Crawford with violating La. Rev. Stat. 40:966(D)(3), possession of marijuana, third offense. However, the bill of information incorrectly listed case number 404-650 "D" as a conviction for possession of marijuana, when in fact, it was for a violation of La. Rev. Stat. 40:966(A), possession of marijuana with intent to distribute.

Nevertheless, Crawford argues that there is no legal provision for enhancing his sentence for attempted possession of marijuana based on either of his prior convictions, citing *State v. Keys*, 328 So.2d 154 (La.1976). He maintains, therefore, that his forty-month sentence for attempted possession of marijuana, third offense is illegal.

In *State v. Keys, supra*, the State charged Keys with possession of marijuana, second offense. The jury returned the responsive verdict of attempted possession of marijuana, second offense, and Keys was sentenced accordingly, as a second offender. On appeal, the Supreme Court reversed Keys' sentence because the statute did not provide for a second offense for attempt to commit the crime. The Supreme Court found that the term "second offense" in the bill of information which charged Keys with possession of marijuana, second offense, required that that be the second time Keys was convicted of the same charge. Because the jury convicted Keys of attempted possession of marijuana, the Supreme Court concluded that Keys was in fact a first offender with respect to that conviction. Accordingly, the Supreme Court set aside Keys' sentence, and remanded the case to the trial court for resentencing to no more than one-half the sentence prescribed in La. Rev. Stat. 40:966(D)(1), or one half of six months.

The defendant in this case, as the defendant in *Keys*, was charged by

bill of information with possession of marijuana as a multiple offender, but convicted of attempted possession of marijuana, third offense. Regardless of the degree of enhancement, second offender status in *Keys* or third offender status in this case, the legal principle is the same. The verdict of attempted possession of marijuana requires that Crawford be sentenced as a first offender as to that offense, not to an enhanced sentence for possession of marijuana, third offense.

CONCLUSION:

Accordingly, we affirm the conviction; set aside the sentence, and remand the case for resentencing in accordance with the views expressed herein.

**CONVICTION AFFIRMED; SENTENCE
SET ASIDE; REMANDED FOR RESENTENCING**