

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2004-KA-2058**
VERSUS * **COURT OF APPEAL**
DEMOND JASMINE * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
*
*
*
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 439-916, SECTION "H"
Honorable Jerome M. Winsberg, Judge
* * * * *

Judge Roland L. Belsome
* * * * *

(Court composed of Judge Charles R. Jones, Judge David S. Gorbaty, Judge Roland L. Belsome)

Eddie J. Jordan, Jr.
District Attorney
Yolanda J. King
Assistant District Attorney
619 South White Street
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

2005

MAY 4,

Pamela S. Moran
LOUISIANA APPELLATE PROJECT
P.O. Box 840030
New Orleans, LA 701840030

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

The defendant, Desmond Jasmine, was convicted of a violation of La. R.S. 40:967, relative to possession with intent to distribute cocaine. He was sentenced to serve six years at hard labor, with the first two years without benefit of probation, parole or suspension of sentence. He is now appealing his conviction.

STATEMENT OF CASE

Defendant Desmond Jasmine and Kima Johnson were charged by bill of information on June 27, 2003, with one count each of possession with the intent to distribute cocaine in violation of La. R.S. 40:967 (B)(1). The defendant pleaded not guilty at his August 8, 2003, arraignment. On September 2, 2003, Kima Johnson entered a plea of guilty as charged. Ms. Johnson waived all delays and was sentenced to two years at hard labor, suspended, and she was placed on two years of active probation. After a hearing on November 6, 2003, the trial court found probable cause and denied the defendant's motion to suppress the evidence.

After a trial on March 8 and 9, 2004, a twelve-person jury found the defendant guilty as charged. On May 5, 2004, the trial court sentenced the defendant to six years in the Department of Corrections with the first two years to be served without probation, parole or suspension of sentence. On that same date, the trial court granted the defendant's oral motion for appeal.

STATEMENT OF FACT

Detective Kevin Imbraguglio, of the New Orleans Police Department Major Case Narcotics Unit, testified that he and Detectives Harry Stovall and Roy Phillips received information that the defendant was involved in drug activity. On June 16, 2003, at approximately 9:00 p.m. the detectives conducted surveillance at the intersection of Fig and Eagle Streets. The detectives observed the defendant walk from the 8900 block to the 8800 block of Fig Street. As the defendant approached the intersection of Fig and Eagle streets he removed a nine-millimeter Glock with a thirty-two round clip and placed it on the steps of 8803 Fig Street. The defendant then crossed the street and met with an African-American female, later identified as Kima Johnson. The defendant gave Ms. Johnson an object that she placed in her right shoe.

The detectives continued the surveillance and observed that an unidentified African-American male approached the defendant. The

defendant and the male had a brief conversation after which the defendant walked over to Ms. Johnson who handed the defendant a small object from her shoe. The defendant returned to the unidentified male and exchanged the small object for currency. After observing what appeared to be a hand-to-hand drug transaction the detectives detained the defendant and Ms. Johnson informing them that they were the subjects of an investigation.

Detective Stovall detained the defendant who was placed in hand cuffs while Detective Phillips detained Ms. Johnson. Detective Stovall searched the defendant and retrieved one hundred ninety-one dollars from his right front pocket. Detective Phillips detained Ms. Johnson and radioed for a female officer to conduct a search. Detective Imbraguglio retrieved the weapon from the steps of 8803 Fig Street. While the officers waited for the female officer to arrive and search Ms. Johnson, they ran a check on the weapon to determine if it was stolen. When the female officer arrived she searched Ms. Johnson and retrieved seventy dollars from her pants pocket and a plastic bag from her right shoe that appeared to contain five pieces of crack cocaine. The defendant and Ms. Johnson were then placed under arrest.

Detectives Stovall and Phillips testified corroborating the testimony of Detective Imbraguglio.

Kima Johnson gave contradictory testimony for the defense.

According to Ms. Johnson, the crack cocaine found in her shoe belonged to her and her alone. Ms. Johnson further testified that the defendant was unaware she possessed the cocaine and he was not involved in any drug transactions. Ms. Johnson also asserted that the gun found by the police did not belong to her or the defendant.

ERRORS PATENT

A review of the record revealed no errors patent.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error the defendant complains that the evidence was insufficient to support the conviction for possession with the intent to distribute 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, 1308 (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.* at 1311. 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, 1020. 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, 1201 (La. 1984).

The elements of possession of cocaine with the intent to distribute as found in La. R.S. 40:967 (A)(1), are: (1) proof that the defendant knowingly or intentionally possessed cocaine, (2) with the intent to distribute. 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. 4th Cir. 1990). Under Louisiana law, intent to distribute controlled dangerous substances can be inferred from the circumstances of the transaction. *State v. Johnson*, 529 So.2d 142, 145 (La. App. 4 Cir. 1988), citing La. R.S. 15:445. Certain factors 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 expert or other testimony established that the amount of drugs found in the defendant's possession is inconsistent with personal use only; and (4) whether there was any paraphernalia, such as baggies or scales, evidencing

an intent to distribute. *State v. Hearold*, 603 So.2d 731 (La. 1992).

A person may be deemed to be in joint possession of drugs in physical possession of another, under Louisiana law, if he willfully and knowingly shares the right to control the drugs. *State v. Ballansaw*, 00-0722 (La. App. 4 Cir. 9/6/00), 769 So.2d 656, 659.

In the instant case the defendant had joint possession of the cocaine in Ms. Johnson's possession. The detectives observed the defendant give Ms. Johnson an object, which she placed in her right shoe. Though not in the defendant's physical possession the drugs were under his dominion and control. The defendant had the intent to distribute the drugs because the detectives observed the defendant conduct what appeared to be a hand-to-hand drug transaction with an unknown African-American male in exchange for currency. When the defendant and Ms. Johnson were detained and arrested the police confiscated a plastic bag containing drugs in a form conducive to distribution to others. Therefore, the jury did not abuse its discretion in finding the defendant guilty as charged. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error the defendant complains the trial court erred in imposing an unconstitutionally excessive sentence.

La. C.Cr.P. art. 881.1 provides in part:

A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.

E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

According to the docket master and the minute entries the defendant's counsel did not file a motion to reconsider sentence on the date of sentencing or within thirty days of the date as required by La. C.Cr.P. art. 881.1, nor did he object at the time of sentencing. Therefore, this issue was not preserved for appellate review, and the defendant is precluded from raising it on appeal.

ASSIGNMENT OF ERROR NUMBER 3

The defendant complains he received ineffective assistance of counsel because his trial counsel failed to object to the defendant's sentence or file a motion for reconsideration of sentence.

The Louisiana Supreme Court in *State v. Brooks*, 505 So.2d 714, 724 (La. 1987) citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052,

80 L.Ed.2d 674 (1984) stated that hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful.

This court in *State v. Jason*, 99-2551 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, 871 citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), stated that the claim of ineffective assistance of counsel is to be assessed by the two-part test of *Strickland*. The defendant must show that his counsel's performance was deficient and that the deficiency prejudiced him. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Jason*, *id.* Counsel's deficient performance will have prejudiced the defendant if he can show that the errors were so serious as to deprive him of a fair trial. To carry this burden, the defendant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jason*, *id.*, citing *Strickland*, *id.*

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, 767 (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, 751 (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. *See, State v. Soco*, 441 So.2d 719, 720 (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. *See, State v. Quebedeaux*, 424 So.2d 1009, 1014 (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, 534, citing *State v. Howard*, 414 So.2d 1210 (La. 1982).

The Louisiana Legislature in La. R.S.40:967(B)(4)(b) set the sentencing range for a defendant found guilty of possession with the intent to distribute cocaine to be a minimum of two years and a maximum of thirty years. The six-year sentence imposed on the defendant is at the lower end of the sentencing range. The defendant has failed to show how his trial counsel's actions were deficient, and how the deficiency prejudiced him. The defendant's assignment of error is without merit.

DECREE

In light of the foregoing, the defendant's conviction and sentence is affirmed.

AFFIRMED