NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0217**
VERSUS	*	**COURT OF APPEAL**
EUGENE JARROW & LOUIS SCHREINER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 394-573, SECTION "B"
HONORABLE PATRICK G. QUINLAN, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr., and Judge David S. Gorbaty)

HOLLI HERRLE-CASTILLO
LOUISIANA APPELLATE PROJECT
P.O. BOX 2333
MARRERO, LOUISIANA 70073
COUNSEL FOR DEFENDANT/APPELLANT, EUGENE JARROW

WILLIAM R. CAMPBELL, JR.
LOUISIANA APPELLATE PROJECT
700 CAMP STREET
NEW ORLEANS, LOUISIANA 70130

COUNSEL FOR DEFENDANT/APPELLANT, LOUIS SCHREINER

AFFIRMED

STATEMENT OF CASE

On 8 January 1998, defendants, Eugene Jarrow ("Jarrow") and Louis Schreiner ("Schreiner"), were each indicted on one count of possession with the intent to distribute marijuana in violation of La. R.S. 40:966, one count of possession with the intent to distribute heroin in violation of La. R.S. 40:966, and one count of possession of more than twenty-eight grams but less than two hundred grams of cocaine in violation of La. R.S. 40:967. The defendants pled not guilty to all counts at their arraignment on 18 February 1998. The trial court conducted a suppression hearing on 23 April 1998 and denied the defendants's motions to suppress evidence. Trial was conducted from 19 April to 21 April 1999.

Schreiner waived his right to a jury trial and proceeded with a bench trial. The trial court found Schreiner guilty of possession of marijuana, guilty of possession of heroin, and guilty of possession of cocaine. The jury found Jarrow guilty of possession of marijuana, not guilty of possession with the intent to distribute heroin, and guilty of attempted possession of cocaine.

At the 28 April 1999 sentencing hearing, Schreiner was sentenced to six months in parish prison on the marijuana possession conviction, five years at hard labor without benefit of probation or suspension of sentence on the heroin possession conviction, and five years at hard labor on the cocaine possession conviction, all to be served concurrently. An appeal was granted to Schreiner on his motion for same.

The State subsequently filed a multiple bill of information alleging Jarrow to be a third felony offender as to the third count (the attempted possession of cocaine conviction). A multiple bill hearing was conducted on 16 June 1999. Jarrow filed motions for new trial and post verdict judgment of acquittal. The court denied all of Jarrow's motions. He waived delays and was adjudicated a third felony offender on the cocaine charge. Jarrow was sentenced to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. The trial court also sentenced Jarrow to serve six months in parish prison on the marijuana conviction. Jarrow's motion to reconsider sentence was denied. The court granted his motion for appeal.

FACTS

On 30 July 1997, New Orleans Police Officer Herbert Warren spoke with a confidential informant ("CI") who indicated that drug trafficking was

occurring at 1435 Cambronne Street, a residence. Officer Warren and Police Officer Eric Hessler provided the CI with a twenty dollar bill to make a controlled buy of drugs. The officers observed the CI enter the residence. A few seconds later, the CI exited the premises and returned to the officers with a rock of crack cocaine. Officer Warren then continued the surveillance of the residence for approximately two hours. During that time, he observed several people enter and exit the residence. Some people walked to residence and others drove. A police take down team was able to stop one person who had entered and exited the residence. That person, who had been driving a white GMC truck, was found to be in possession of ten ounces of cocaine. Officer Warren told Officer Hessler of the results of his surveillance. Officer Hessler then obtained a search warrant for the residence. Officer Warren was still conducting the surveillance when the search warrant was executed, at 6:05 p.m. on that day. After other officers secured the residence, Officer Warren entered the residence. All narcotics were found in the living room, either on top of a coffee table or in a drawer below the coffee table. A large plastic ziploc bag of marijuana, a small plastic bag of marijuana, foil packets of heroin, individually wrapped rocks of crack cocaine, and a plastic bag containing crack cocaine were found and seized. Currency in the amount of $1,989.00 in bills of various

denominations was found in the coffee table drawer and seized. A scale, plastic freezer bags, and plastic sandwich bags, were also found and seized. Documentation in the residence indicated that Schreiner was the occupant of the residence.

TESTIMONY OF WITNESSES

Officer Hessler testified that upon entering the residence, he observed that Jarrow was being detained by officers in the living room. Other officers were in the process of apprehending and detaining Schreiner and co-defendant Brealy. Ultimately, Schreiner was detained in the kitchen and Brealy was detained in the hallway after exiting the bathroom. A systematic search of the residence was conducted. Several items were seized and the subjects were arrested. No money or drugs were found on any individual defendant.

Sgt. Darryl Albert testified that he participated in the execution of the search warrant and was the first officer to enter the residence. Upon entering the residence, he saw Jarrow and Brealy sitting on a sofa. When an officer announced “police”, Jarrow threw his hands up and Brealy attempted to flee to the rear of the residence. He observed a large amount of marijuana and crack cocaine on a coffee table in the living room. Jarrow and Brealy had marijuana on their laps. When Brealy jumped up, the marijuana on his lap

spilled on the living room floor. Brealy was apprehended by Sgt. Albert between the kitchen and a bedroom. He patted him down for weapons but found none. Jarrow was searched by another officer.

Officer Euclid Talley testified that he was immediately behind Sgt. Albert upon the search warrant execution. When he entered the residence, he observed two males sitting on a sofa with marijuana and cocaine in front of them. Jarrow threw his hands up and Brealy attempted to flee. Sgt. Albert detained Brealy. Officer Talley saw Schreiner flee to the rear of the residence and enter a bathroom shutting the door behind him. Seconds later, Schreiner opened the door, and Officer Talley detained him. Officer Talley heard no toilet flush but he did see water swirling in the toilet. The officer patted down Schreiner for weapons but found none.

Teresia Lamb, a criminalist with the New Orleans Police Department Crime Lab, analyzed the items seized from the residence. They tested positive for marijuana, heroin and cocaine. She weighed the cocaine and found that it weighed approximately 139 grams.

ERRORS PATENT

A review of the record for errors patent reveals none.

JARROW'S ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, Jarrow contends that the trial court

erred in adjudicating him to be a third felony offender. The defendant contends that the State failed to prove his identity and that the predicate guilty pleas were valid.

The Louisiana Supreme Court set forth the burdens of proof in habitual offender proceedings in State v. Shelton, 621 So.2d 769, 779-780 (La. 1993):

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. [footnote omitted] If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin [v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969)] rights. [footnote omitted] We note that this new procedure will not only give

> appropriate significance to the presumption of regularity which attaches to judgments of conviction which have become final, but will also provide an advantage to defendants who were previously under [State v.]Lewis [367 So. 2d 1155 (La. 1979)] unable to introduce any extra-record evidence and whose guilty pleas were heretofore under [State v.]Tucker [405 So. 2d 506 (La. 1981)] found constitutionally valid by mere proof of a minute entry and a guilty plea form.

A review of the multiple bill hearing reveals that while Jarrow questioned the validity of the prior guilty pleas, he failed to object to the trial court's ruling on his identity. Thus, Jarrow has not preserved the identity issue for review on appeal.

Further, Jarrow argues that the State failed to prove that the prior guilty pleas were valid. In Orleans Parish Criminal District Court case bearing docket number 326-625, Jarrow pled guilty on 6 September 1988 to possession with the intent to distribute cocaine. The minute entry and waiver of rights/guilty plea form indicate that Jarrow was represented by counsel and informed of his rights by the court. The form was initialed by and signed by Jarrow, his counsel, and the trial judge. In Orleans Parish Criminal District Court case bearing docket number 269-092, Jarrow pled guilty on 30 April 1979 to armed robbery. The minute entry and waiver of rights/guilty plea form from that conviction reveals that Jarrow was represented by counsel and advised of his rights by the trial court. The

waiver of rights form was initialed by the defendant and signed by the defendant, defendant's counsel, and the trial judge. Such evidence is sufficient to show that the defendant was represented by counsel and fully advised of his rights by the trial court prior to pleading guilty in each case.

This assignment of error is without merit.

JARROW'S ASSIGNMENT OF ERROR NUMBER 2

Jarrow further argues that the trial court imposed an unconstitutionally excessive sentence. After adjudicating him a third felony offender, the trial court sentenced Jarrow to the mandatory life sentence under La. R.S. 15:529.1A(1)(b)(ii).

Section 20 of Article I of the Louisiana Constitution of 1974 provides that "No law shall subject any person . . . to cruel, excessive or unusual punishment."

A sentence within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless imposition of pain and suffering." State v. Caston, 477 So.2d 868 (La. App. 4 Cir. 1985). 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); State v. Quebedeaux, 424 So.2d 1009 (La. 1982).

If adequate compliance with Article 894.1 is found, a 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, supra; State v. Guajardo, 428 So.2d 468 (La. 1983).

As noted above, under La. R.S. 15:529.1, Jarrow was subject to a mandatory life sentence as a third offender convicted of attempted possession of cocaine. The penalties provided by La. R.S. 15:529.1 are not unconstitutional on their face. State v. Pollard, 93-0660 (La. 10/20/94), 644 So.2d 370. The trial court has the authority to reduce a mandatory minimum sentence provided by the statute for a particular offense and offender when such a term would violate the defendant's constitutional protection against excessive punishment. Id. Because the minimum sentence is presumed constitutional, a trial court, in considering whether the minimum sentence for a particular crime would be unconstitutional if applied to a particular defendant, may do so only if there is substantial evidence to rebut the

presumption of constitutionality. State v. Young, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, writ denied, 95-3010 (La. 3/22/96), 669 So.2d 1223.

Jarrow has offered no evidence to distinguish himself as an exception and thereby rebut the presumption that the mandatory minimum sentence is constitutional. Further, the trial court recognized that, in addition to the convictions listed in the multiple bill of information, Jarrow had a prior conviction for being a felon in possession of a weapon, a pending charge for attempted second degree murder, and numerous arrests for felony offense.

This assignment is without merit.

JARROW'S ASSIGNMENT OF ERROR NUMBER 3

Jarrow also argues that the State failed to produce sufficient evidence to support his conviction for attempted possession of cocaine.

When assessing the sufficiency of evidence to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 561 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

Additionally, 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. La. R.S. 15:438 is not a separate test from Jackson v. Virginia, supra, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a 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, supra.

To prove attempted possession of cocaine, the State must show that the defendant had the specific intent to possess cocaine and committed an act directly tending toward his intent to possess the drug. State v. Lavigne, 95-0204 (La. App. 4 Cir. 5/22/96), 675 So.2d 771, writ denied, 96-1738 (La. 1/10/97), 685 So.2d 140. Possession may be actual or constructive. State v. Chambers, 563 So.2d 579 (La. App. 4 Cir. 1990). A person in the area of the contraband may be considered in constructive possession if the illegal substance is subject to the person's dominion and control and the person has guilty knowledge. State v. Trahan, 425 So.2d 1222 (La. 1983); State v. Cormier, 94-537 (La. App. 3 Cir. 11/2/94), 649 So.2d 528; Bujol v. Cain,

713 F.2d 112 (5th Cir. 1983), cert. denied, 464 U.S. 1049, 104 S.Ct. 726, 79 L.Ed.2d 187 (1984). Several factors are to be considered in determining whether the defendant exercised dominion and control so as to constitute constructive possession, namely, the defendant's knowledge that illegal drugs were 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 any evidence that the residence was frequented by drug users. State v. Chambers, supra; State v. Allen, 96-0138 (La. App. 4 Cir. 12/27/96), 686 So.2d 1017. The elements of knowledge and intent are states of mind and need not be proven as fact but inferred from the circumstances. State v. Guillard, 98-0504 (La. App. 4 Cir. 4/7/99), 736 So.2d 273.

Guilty knowledge is an essential element of the crime of possession of cocaine. State v. Goiner, 410 So.2d 1085 (La. 1982). Although a conviction for possession of cocaine can stand on the possession of the slightest amount of the illegal drug, the quantity of the substance will have some bearing on the defendant's guilty knowledge. State v. Gaines, 96-1850 (La. App. 4 Cir. 1/29/97), 688 So.2d 679, writ denied, 97-0510 (La. 9/5/97), 700 So.2d 503; State v. Spates, 588 So.2d 398 (La. App. 2 Cir. 1991). The elements of knowledge and intent are states of mind and need not be proven as facts;

they may be inferred from the circumstances. State v. Reaux, 539 So.2d 105 (La. App. 4 Cir. 1989). The fact finder may draw reasonable inferences to support these contentions based upon the evidence presented at trial.

In the case at bar, Officers Albert and Talley testified that when they entered the residence, they observed Jarrow sitting on a sofa in the living room. A large plastic bag of marijuana and crack cocaine was on the coffee table directly in front of him. Criminalist Lamb testified that the cocaine weighed approximately 139 grams. Thus, a large quantity of narcotics was directly in front of the Jarrow and within his grasp. Officers Warren and Hessler testified that they had a CI make a controlled purchased from the residence approximately two hours prior to the execution of a search warrant. They stated that the CI returned with one rock of crack cocaine. In addition, for the two hours prior to the execution of the warrant, Officer Warren testified that he conducted a surveillance of the residence and observed numerous people entering and exiting. At no time did he see Jarrow leave the residence. Such testimony is sufficient to prove that Jarrow had constructive, if not actual, possession of the cocaine. Thus, the State produced sufficient evidence to support the defendant's conviction for attempted possession of cocaine.

This assignment is without merit.

JARROW'S ASSIGNMENT OF ERROR NUMBER 4 AND

SCHREINER'S ASSIGNMENT OF ERROR NUMBER 2

Both Jarrow and Schreiner suggest that the trial court erred when it denied their motions to suppress evidence. They contend that the affidavit for the warrant did not show probable cause to support the search of the residence.

The applicable law pertaining to the issuance of search warrants is set forth in State v. Martin, 97-2904 (La. App. 4 Cir. 2/24/99), 730 So.2d 1029, writ denied, 99-0874 (La. 10/1/99), 747 So.2d 1136:

> La.C.Cr.P. article 162 provides that a search warrant may be issued "only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for the issuance of the warrant." The Louisiana Supreme Court has held that probable cause exists when the facts and circumstances within the affiant's knowledge, and those of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that evidence or contraband may be found at the place to be searched. State v. Duncan, 420 So.2d 1105 (La.1982). The facts which form the basis for probable cause to issue a search warrant must be contained "within the four corners" of the affidavit. Id. A magistrate must be given enough information to make an independent judgment that probable cause exists for the issuance of the warrant. State v. Manso, 449 So.2d 480 (La.1984), cert. denied Manso v. Louisiana, 469 U.S. 835, 105 S.Ct. 129, 83 L.Ed.2d 70 (1984). The determination of probable cause involves probabilities of human behavior as understood by persons trained in law enforcement. State v. Hernandez, 513 So.2d 312 (La.App. 4 Cir.1987), writ denied, 516 So.2d 130 (La.1987).
>
> In its review of a magistrate's finding of probable cause,

> the reviewing court must determine whether the "totality of circumstances" set forth in the affidavit is sufficient to allow the magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a reasonable probability that contraband ... will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclu[ding] that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2232, 76 L.Ed.2d 527 (1983).

97-2904 at pp. 4-5, 730 So. 2d at 1031-1032.

Officer Hessler provided the following information in the affidavit for the search warrant:

> On Wednesday, the 30th day of July, in the afternoon hours, Sgt. Eric Hessler had the occasion to meet with a confidential and reliable informant regarding the retail distribution of crack cocaine and heroin in the uptown area. The C.I. stated that a N/M subject whom he knew as Eugene Jarrow was selling both crack cocaine can [sic] heroin from the residence of 1435 Cambronne Street. The C.I. stated that this illegal activity was occurring on a daily basis, and that he had purchased the illegal narcotics from this subject and location in the recent past for personal use. The C.I. further indicated that a white male subject lived at 1435 Cambronne Street, and that Jarrow sold from there and also was hiding there during the day, and hid at 4507 Tchoupitulas [sic] Street during the late night hours. The C.I. indicated that Jarrow kept the days [sic] supply of narcotics and the proceeds from his narcotics sales at 4507 Tchoupitulas [sic] Street due to the fact that he believed the police were unaware of his association with this residence. The C.I. believed Jarrow was wanted by the police, possibly for an aggravated battery charge.
>
> To verify the information obtained from the C.I., Sgt. Hessler requested he participate in a controlled purchase from the residence of 1435 Cambronne Street. The C.I. agreed to do this. Sgt. Hessler searched the C.I. for any contraband or monies, and then supplied him with a twenty-dollar bill from the N.O.P.D. Narcotics Fund. The C.I. was instructed to purchase crack cocaine. The C.I. was then driven

into the area by Sgt. Hessler and Officer Herb Warren, and was observed to.

An unknown person opened the front door and let him in. After about 30 seconds, the C.I. was observed to exit, and walk directly back to the observation officers. Upon entering the vehicle, he turned over to Sgt. Hessler one clear piece of plastic containing a white compressed substance. The C.I. indicated that Eugene Jarrow was in fact inside, but during the course of the conversation, Jarrow indicated to him he was going to get more "stuff" this afternoon, due to the upcoming new month, which coincides with the issuance of numerous payroll checks and government checks. The C.I. was then released and the officers proceeded to Central Evidence and Property Division where the purchased contraband was placed on the books under Control No. D67974. Sgt. Hessler then checked the name of Eugene Jarrow through the N.O.P.D. Motion Computer and learned that he was in fact currently wanted for attempted murder under warrant number 383494, issued 12-9-96, and that he was also a convicted narcotics trafficker and had been charged in the past with numerous weapons and drug related charges. A computer check of the address of 1435 Cambronne Street also revealed that a white male subject by the name of Louis Schreider [sic] had resided there as late as 1995. Louis Schreiner also has a history of drug related charges. A computer check relative to the address of 4507 Tchoupitoulas Street revealed no information.

On July 30, 1997 at 4:00 p.m., Officer Herb Warren began conducting a surveillance of 1435 Cambronne Street. Within minutes [of] doing so, he began observing vehicular and pedestrian traffic to the house in a manner consistent with that of narcotics sales. At 4:10 p.m., Officer Warren observed a white male subject driving a white GMC truck stop at the residence. The white male got out and entered the residence. A short time later the white male exited and drove off on Cambronne Street to Willow. This subject was followed out of the area and stopped at the intersection of Olive and Carrolton. During the investigative stop, the white male was found to be in possession of approximately 10 ounces of powdered cocaine.

Based on the information received from the confidential and reliable informant, the controlled purchase conducted, the investigation conducted and the ongoing surveillance, as well as the arrest of the subject observed leaving the residence, it is the belief of this officer that the residence of 1435 Cambronne Street is being used as a retail outlet for the distribution of crack cocaine and heroin.

Despite their arguments to the contrary, the affidavit provides sufficient evidence for a finding of probable cause. Officer Hessler stated that the information from the CI had been reliable in the past. Further, all information received from the CI was corroborated through the officer's own investigation. The controlled purchase and seizure of cocaine from the subject in the GMC truck support the officer's belief that cocaine was being sold from the residence. The officer's background checks on Jarrow and Schreiner also provide ample information for a finding of probable cause. Both men were known to be involved in drug trafficking, and Jarrow had an outstanding warrant for attempted murder. Officer Warren's continuing surveillance of the residence also revealed the probability that narcotics were being sold from the residence. Thus, sufficient information is found in the affidavit to support a finding of probable cause. The trial court did not err when it denied the defendants's motions to suppress evidence.

This assignment is without merit.

SCHREINER'S ASSIGNMENT OF ERROR NUMBER 1

Schreiner contends that the State produced insufficient evidence to support his convictions for possession of marijuana, possession of cocaine, and possession of heroin.

In discussing Jarrow's Assignment of Error Number 3 above,

we discussed that law applicable to insufficient evidence. That law is applicable to Schreiner's assignment. In addition, we note that a defendant can have constructive possession if he jointly possesses an illegal drug with a companion and if he willfully and knowingly shares with his companion the right to control of the drugs. State v. Walker, 514 So.2d 602 (La. App. 4 Cir. 1987).

In the case at bar, the evidence introduced at trial indicated that Schreiner was the main occupant of the residence. The officers found mail addressed to him with the address of 1435 Cambronne Street. Further, all the narcotics were found in the living room. When the officers entered the residence, they observed a large quantity of marijuana and cocaine on the coffee table. Foil packets of heroin and a large amount of currency was found in the coffee table drawer. A scale, plastic freezer bags and plastic sandwich bags were found in the living room. Such evidence is sufficient to support Schreiner's convictions for his occupancy of the residence and the large quantity of narcotics and currency found in the residence lend support to a finding that that he had possession of the narcotics. Schreiner's attempt to flee and discard other narcotics provides support for the jury's verdict.

This assignment is without merit.

CONCLUSION

Accordingly, the convictions and sentences of Jarrow and Schreiner are affirmed.

AFFIRMED