

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-0387**
VERSUS * **COURT OF APPEAL**
TERRY A. MOTEN * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-099, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
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HONORABLE WILLIAM H. BYRNES, III
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(Court composed of Judge William H. Byrnes III, Judge Michael E. Kirby,
Judge Terri F. Love)

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CONVICTION AND SENTENCE AFFIRMED

On October 28, 1999, defendant, Terry A. Moten, was found guilty as charged by a twelve-person jury, with possession of a firearm after having been previously convicted of a felony, a violation of La. R.S. 14:95.1. Following rendition of the verdict, defendant asked for immediate imposition of sentence, waiving all legal delays, and the trial court sentenced him to twelve years at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served. The trial court denied defendant's motion to reconsider sentence, and granted his motion for appeal.

FACTS

New Orleans Police Officer Brian Elsensohn testified that on the evening of September 23, 1999, he was patrolling in a marked police vehicle in the Fischer Housing Development, when he observed the defendant standing in a breezeway with his left side toward the police car. Defendant turned to see the police, then turned his back to them, lifted up his shirt, retrieved something from his waistband, dropped a firearm to the ground,

and fled. Officer Elsensohn retrieved the gun, while his partner pursued and apprehended defendant. Officer Elsensohn identified defendant at trial.

New Orleans Police Officer Todd Morrell testified that he chased and caught defendant, never losing sight of him. He identified defendant at trial. It was stipulated that defendant had a prior conviction for possession of cocaine.

Defendant testified at trial that on the night in question he was living approximately fifty or sixty feet from the location where he was arrested. He admitted that he was on intensive probation for possession of cocaine at the time he was arrested, and detailed his probation restrictions. Defendant stated that on the night in question police took him into custody as he was walking in the housing development. A police officer placed him into the second of seven police cars that eventually came on the scene, and he said a firearm was sitting on the passenger's seat. An officer said he would be released if told them what they wanted to know. Defendant said that when an officer discovered from a record check that he was on probation, another officer said "we got him." Defendant said he replied: "Man, why ya'll doing me this. This ain't my gun." An officer allegedly responded: "It's your gun, now. We know it ain't your gun but it's yours now." Defendant said police then took him to jail.

ERRORS PATENT

A review of the record reveals one error patent. The trial court sentenced defendant to an illegally lenient sentence. La. R.S. 14:14:95.1(B) provides that upon conviction of possession of a firearm after being previously convicted of an enumerated felony, an offender shall be imprisoned at hard labor for not less than ten nor 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 did not impose any fine upon defendant. However, this court will not correct an error patent favorable to defendant where it is not raised by the State. State v. Thomas, 99-2219, p. 4 (La. App. 4 Cir. 5/17/00), 764 So.2d 1104; State v. Martin, 98-1507, p. 8 (La. App. 4 Cir. 4/5/00), ___ So. 2d ___, ___, 2000 WL 528072.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, defendant argues that the trial court erred by permitting the prosecutor to question defendant regarding his probation, as well as details of his prior convictions, claiming that this line of questioning was irrelevant.

Relevant evidence is generally admissible; irrelevant evidence is generally inadmissible. La. C.E. art. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” La. C.E. art. 401. A trial court's ruling as to relevancy will not be disturbed absent a clear abuse of discretion. State v. Lewis, 97-2854, p. 20 (La. App. 4 Cir. 5/19/99), 736 So. 2d 1004, 1017, writ denied, 99-2694 (La. 3/17/00), 756 So. 2d 325; State v. Badon, 95-0452, p. 8 (La. App. 4 Cir. 11/16/95), 664 So.2d 1291, 1296.

Defendant correctly points out that the first eleven pages of the trial transcript reflect a cross examination of defendant directed to his status as a probationer. However, defense counsel questioned defendant on direct examination as to the restrictions placed on him as a probationer, including one prohibiting him from owning a firearm, obviously hoping to create an inference that defendant would not have possessed a firearm because he was aware that he was barred from owning a firearm by probation restrictions. When asked by the prosecutor whether he always followed his probation rules, defendant answered that he did. Defense counsel did not object to this line of questioning (except on the ground that the prosecutor was making a statement) until the prosecutor asked whether defendant was telling the jury

that he would never have violated the probation restrictions he was under at the time of his arrest, after eliciting from him an admission that he violated restrictions from an earlier probation. The objection appeared to be on relevancy grounds, and considering the defense strategy, it cannot be said that the trial court abused its discretion in overruling it. The second substantive objection by defense counsel, to a question concerning the location of a prior arrest, was sustained by the trial court. Defense counsel later objected that more time had been spent on the probation issue than on the entire case, and the trial court overruled “the objection.” This “objection” was not on a recognized ground, and it cannot be said that the trial court erred in “overruling” it. Defense counsel’s final objections were on the ground of relevancy, as to the issue of how many rocks of crack cocaine defendant would sell when he sold cocaine—defendant said just two or three. The trial court overruled these two objections. These last questions appear to have been irrelevant to any issue raised by defense counsel on direct examination. However, any error by the trial court in overruling these last two substantive objections was harmless, as the guilty verdict actually rendered in this trial was surely unattributable to the error. State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So. 2d 832, 845; State v. Brooks, 98-0693, p. 17 (La. App. 4 Cir. 7/21/99), 758 So. 2d 814, writ denied, 99-2519 (La.

2/25/00), 755 So. 2d 247.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant claims that the prosecutor's closing argument was improper, citing a particular portion of the argument wherein the prosecutor mentioned defendant's neighborhood, and urged the jury to end defendant's reign of terror by convicting him. However, defense counsel did not object to this portion of the prosecutor's closing argument. Where a defendant fails to contemporaneously object to an alleged improper comment made by the State during closing argument, any complaint thereto is waived. La. C.Cr.P. art. 841; State v. Williams, 96-1023, p. 13 (La. 1/21/98), 708 So.2d 703, 715, cert. denied, Williams v. Louisiana, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998).

There is no merit to this assignment of error.

DECREE

For the foregoing reasons, defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED