NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0393**
VERSUS	*	**COURT OF APPEAL**
EDDIE A. COLE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 400-976, SECTION "A"
Honorable Charles L. Elloie, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray and Judge Max N. Tobias, Jr.)

Harry F. Connick
District Attorney
Leslie Parker Tullier
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Yvonne Chalker
LOUISIANA APPELLATE PROJECT
P.O. Box 665
New Orleans, LA 70119
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTIONS AFFIRMED. SENTENCE AMENDED AND, AS AMENDED, AFFIRMED.

Eddie A. Cole was charged by bill of information on 27 August 1998, with distribution of cocaine and also with possession of cocaine with intent to distribute, both violations of La. R.S. 40:967(A). At his arraignment on 1 September 1998 he pleaded not guilty. The trial court found probable cause and denied the motion to suppress the evidence on 10 November 1998 . After trial on 9 June 1999, a twelve-member jury found him guilty as charged on both counts. The State filed a multiple bill charging Cole as a fourth felony offender, and after a hearing on 10 September 1999, he was sentenced on count one to serve twenty years at hard labor as a third felony offender under La. R.S. 15:529.1(A)(1)(b)(i), and he was sentenced on count two to serve ten years; both sentences were imposed without benefit of parole, probation, or suspension of sentence, and they are to run concurrently. The defendant's motion for an appeal was granted.

At trial Officer Patrick Michael Brown testified that on 18 August 1998, he supervised a buy-bust narcotics operation in which an undercover officer purchased narcotics from a street vendor in an area known for drug activity. Three additional officers served as spotters staying in close

proximity to the undercover agent. The spotters also maintained surveillance of the vendor. Prior to the operation, Officer Brown photocopied $105.00 (in ten dollar and one dollar bills) and gave it to Officer Henry, the undercover agent. The vehicle the undercover agent drove was equipped with video and audio capacities. About 7 p.m. the buy-bust operation took place in the 4800 block of Chef Menteur Highway. After the undercover agent made the purchase, Officer Brown and the backup team detained the defendant and took a Polaroid picture of him, which was later shown, to the undercover agent. The agent identified the person in the picture as the man who sold him cocaine, and Officer Brown arrested the defendant. When searched incident to arrest, the defendant was found to have two of the photocopied ten-dollar bills.

Officer Paul Toye testified that he monitored the conversation in the undercover vehicle between the agent and the vendor. The officer and his partner, Officer Brown, were at the intersection of Congress Street and Chef Menteur Highway; they could hear the conversation between Officer Henry and the defendant that was occurring in the parking lot of the Friendship Inn. When the sale was completed, Officer Toye drove to that location and detained the defendant. When Officer Toye searched the defendant, he found $160 in cash, which included two of the photocopied ten-dollar bills

and also four pieces of crack cocaine.

Detective Yvonne Farve testified that on 18 August 1998, she worked as a spotter following the undercover agent into the area and maintaining surveillance of him. She watched as Detective Henry drove into the parking lot at the Friendship Inn and began speaking to a man wearing a white shirt with FUBU on the front, black jeans, and black shoes. He was leaning against a gray station wagon. Detective Farve also drove into the parking lot and parked within three spaces of the undercover agent. She had equipment allowing her to listen to the conversation in the agent's car. She heard the detective ask for two tens, the defendant reply he had only twenties, and the detective agree to purchase one twenty. The defendant walked over to the station wagon and sat in the passenger seat. He reached beneath the seat and took out a plastic bag from which he removed an object. He then walked back over to the detective and handed him a small object. As soon as Detective Henry drove away, Detective Farve notified her backup that the purchase was completed.

Detective Adam Henry testified that he was the undercover officer during the buy-bust operation on 18 August 1998. The videotape of the transaction was played for the jury. Detective Henry said that when he asked the defendant "what was happening," the defendant replied that he had

only twenties. The detective stated that as an undercover agent he has had people on the street decline to sell him anything. However, on this occasion that did not happen. The agent identified the rock of cocaine wrapped in clear plastic that he purchased from the defendant.

The parties stipulated that the five pieces of white rock were tested and proved to be crack cocaine.

Before addressing the assignments of error, we note two errors patent in the record. First, there is no minute entry of the hearing at which the defendant was sentenced; however, the sentencing transcript is in the record, and thus this error is harmless. Second, both the defendant's sentences were imposed with prohibitions on parole, probation, and suspension of sentence. In 1998 when these offenses occurred, La. R.S. 40:967(B) did not prohibit parole, probation, or suspension of sentence. Under La. R.S. 15:529.1(G) probation and suspension of sentence are prohibited, but there is no restriction on parole. Thus on count one the defendant's sentence must be corrected to delete the prohibition on parole. On count two, the defendant's sentence must be corrected so as to delete the prohibitions on parole, probation, and suspension of sentence.

In his first assignment of error, the defendant argues that the evidence was insufficient to support his conviction on count two for possession with

intent to distribute cocaine. He claims that the State did not prove that the four rocks in his pocket were for distribution rather than personal use.

In State v. Johnson, 99-1053 (La. App. 4 Cir. 6/14/00), 766 So. 2d 572, 576-77, this court citing State v. Ash, 97-2061 (La. App. 4 Cir. 2/10/99), 729 So.2d 664,667-68, summarized the standard of review that applies when a defendant claims that the evidence produced to convict him was constitutionally insufficient:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty 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 the 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 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 proved such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This 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*, 504 So.2d 817 (La. 1987).

To support defendant's convictions, the State must prove that the defendant "knowingly" and "intentionally" possessed the cocaine with the "intent to distribute". *State v. Williams*, 594 So.2d 476, 478 (La.App. 4 Cir. 1992). Specific intent to distribute may be established by proving circumstances surrounding defendant's possession, which give rise to a reasonable inference of intent to distribute. *State v. Dickerson*, 538 So.2d 1063 (La.App. 4 Cir. 1989).

In *State v. Hearold*, 603 So.2d 731, 735-36 (La. 1992), the Louisiana Supreme Court stated:

> Intent is a condition of mind, which is usually proved by evidence of circumstances from which intent may be inferred. *State v. Fuller*, 414 So.2d 306 (La. 1982); State *v. Phillips*, 412 So.2d 1061 (La. 1982); La. R.S.15:445. In *State v.House*, 325 So.2d 222 (La. 1975), this court discussed certain factors which 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 the amount of drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.
>
> * * *
>
> In the absence of circumstances from which

> an intent to distribute may be inferred, mere possession of a drug does not amount to evidence of intent to distribute, unless the quantity is so large that no other inference is possible. *State v. Greenway*, 422 So.2d 1146 (La. 1982); State *v. Harveston*, 389 So.2d 63 (La. 1980); State *v. Willis*, 325 So.2d 227 (La. 1975).
>
> In *State v. Cushenberry*, 94-1206 p. 6 (La.App. 4 Cir. 1/31/95); 650 So.2d 783, 786, this court described the *Hearold* factors as "useful" but held that the evidence need not "fall squarely within the factors enunciated to be sufficient for the jury to find that the requisite intent to distribute."

Applying the factors listed above to the case at bar, we note that Officer Brown testified that the buy-bust operation took place on a street known for narcotics transactions. The defendant was videotaped selling what proved to be a rock of crack cocaine to undercover Officer Henry, and the jury watched the videotape. The additional four pieces of crack cocaine found in the defendant's pocket were in clear plastic wrap just like the piece sold to Officer Henry. Furthermore, an intent to distribute may be inferred from the circumstances—the defendant's having $160 in one pocket and four rocks of cocaine in another pocket and having just been seen selling a rock of cocaine; additionally, his walking over to a car and selecting a rock for the undercover agent from his inventory of rocks kept there under the seat. All these facts indicate that Eddie Cole was in the business of selling crack cocaine and the rocks he carried were for sale.

Viewing the evidence in the light most favorable to the State, the evidence was sufficient to convict the defendant of possession with intent to distribute cocaine.

This assignment lacks merit.

In his second assignment of error, the defendant maintains that he was entrapped into selling cocaine.

In State v. Brand, 520 So. 2d 114 (La. 1988), the Supreme Court discussed the defense of entrapment as follows:

> Entrapment is a defense which arises when a law enforcement official or an undercover agent acting in cooperation with such an official, for the purpose of obtaining evidence of a crime, originates the idea of the crime and then induces another person to engage in conduct constituting the crime, when the other person is not otherwise disposed to do so. The defense is designed to deter the police from implanting criminal ideas in innocent minds and thereby promoting crimes, which would not otherwise have been committed. Obviously, law enforcement agents should not persuade citizens to commit crimes, and the defense is recognized to prevent shocking police inducement of the perpetration of a crime.
>
> Entrapment is an affirmative defense. Thus, the burden was on defendant to prove entrapment by a preponderance of the evidence. The question whether the government agent implanted the criminal idea in the mind of an innocent person to induce the commission of a crime that would not otherwise be committed is one for the jury.
>
> The entrapment defense will not be recognized when the law enforcement official merely furnishes the accused with an opportunity to commit a crime to which he is predisposed. In entrapment cases, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. Thus, the focus in determining an entrapment defense is on the conduct and predisposition of the defendant, as well as the

conduct of the government agent.

520 So. 2d at 117.

In State v. Long, 97-2434 (La. App. 4 Cir. 8/25/99), 744 So. 2d 143, this court considered a similar entrapment issue and stated:

> The entrapment defense is composed of two elements: (1) an inducement by a state agent to commit an offense; and (2) lack of predisposition to commit the offense on the part of the defendant. [Citation omitted].

State v. Long, at pp. 10-11, 744 So. 2d at 150-151.

Officer Henry testified that initially he approached the defendant and asked what was happening and the defendant answered he had only twenties. The officer also stated that he has on occasion tried to buy drugs and been unsuccessful, but in this case the defendant was willing to sell cocaine and immediately went to a nearby car, retrieved the rock and sold it to the officer. Cole has not proved by a preponderance of the evidence that he was induced to obtain cocaine for the officer. Even assuming there was some inducement, the evidence clearly shows that Cole was predisposed to commit the crime. Thus, there was no entrapment.

Accordingly, for reasons stated above the defendant's convictions are affirmed. His twenty-year sentence is amended to delete the prohibition of parole, and his ten-year sentence is amended to delete the prohibition of benefits of parole, probation, or suspension of sentence. As amended his

sentences are affirmed.

CONVICTIONS AFFIRMED. SENTENCE AMENDED AND, AS AMENDED, AFFIRMED.