NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0960**
VERSUS	*	**COURT OF APPEAL**
KEVIN SANTIAGO AND DARRYL SUMLER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 392-313, SECTION "B"
Honorable Patrick G. Quinlan, Judge

* * * * * *

Judge Patricia Rivet Murray

* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Terri F. Love)

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AFFIRMED

Defendants, Kevin Santiago and Darryl Sumler, were charged with possession with intent to distribute cocaine, a violation of La. R.S. 40:967, pled not guilty, and were tried together. On March 2, 1999, the jury found Santiago guilty of possession of cocaine, and Sumler guilty of attempted possession of cocaine.

Both defendants pled not guilty to multiple bills filed by the State. Following a hearing, the trial court adjudicated Kevin Santiago a third-felony offender, and sentenced him to life imprisonment without benefit of parole, probation or suspension of sentence. Darryl Sumler withdrew his not guilty plea to the multiple bill, and entered a plea of guilty. The trial court adjudicated him a second-felony offender, and sentenced him to twenty years at hard labor.

Santiago appeals his conviction, his adjudication as a triple offender, and his sentence. Sumler appeals his conviction alone. For the reasons that follow, we affirm.

FACTS

Teresia Lamb, a NOPD criminalist, testified that her job entails testing and identifying evidence collected at a crime scene, including controlled dangerous substances. Ms. Lamb tested and weighed the white powder and rock-like substances seized by the police at the time of the defendants' arrests. The substances tested positive for cocaine and weighed 411 grams.

Detective Michael Harrison testified that he was assigned to the narcotics section of the NOPD. On May 15, 1997, Harrison executed a search warrant on 6738 Tara Lane. Earlier that day, Harrison had conducted surveillance of the residence and had witnessed, on three occasions, what he believed to be drug transactions. According to Detective Harrison, he saw various individuals knock on the front door, engage either Kevin Santiago or Darryl Sumler in brief conversations, and then give either Santiago or Sumler currency in exchange for an object. Harrison radioed these events to his back up team, and, armed with the warrant he had apparently obtained before that day's surveillance, staged his team's execution of it. He stationed two officers at the rear of the residence to thwart escape, while he and two other officers covered the front door. The burglar bars on the front of the residence were locked, so the officers ripped the bars from the hinges to gain entry. As they forced the burglar bars open, Harrison could see into the residence because the front door was open. He heard commotion in the

residence, and saw Sumler run into the bathroom and then out the back door, followed by Santiago. When the officers entered the residence, they saw numerous packets of crack cocaine in the living room, kitchen and bathroom, as well as cocaine residue on a coffee table along with a razor blade, plastic bags and a digital scale. The officers confiscated $160.00 from the coffee table, $2,000.00 from a china cabinet in the living room, $1,433.00 from defendant Sumler, and several bags of cocaine from defendant Santiago. The officers retrieved documentation at the dwelling indicating that Ms. Ula Jimerson was the resident; however, Sumler told Harrison that he lived in the residence and that Ms. Jimerson had nothing to do with the narcotics.

Sgt. Jeffrey Robertson testified that he assisted in the execution of the search warrant on 6738 Tara Lane. When he and other officers gained entry into the residence, he pursued several suspects fleeing through the back door. As he ran through the dwelling, he noticed the bathroom to his left and several packets of cocaine on the bathroom floor. Robertson chased defendant Santiago into the backyard and ordered him to stop. As Santiago complied with Robertson's order, he discarded a plastic bag. After securing Santiago, Robertson retrieved the discarded bag and saw that within the bag were several smaller bags containing a white powder. He also confiscated

currency and a pager from Santiago. When Robertson returned to the house to assist in the search, he noticed powder residue on a coffee table along with a razor blade, baggies and currency. Behind an adjacent china cabinet, Robertson found numerous plastic bags containing a white powder substance. There were pieces of rock cocaine strewn across the living room floor, and $2,000.00 in the china cabinet drawer.

Detective Joseph Williams corroborated the testimony of the previous State's witnesses concerning execution of the search warrant and entry into the residence. Williams observed a cocaine trail into the bathroom and scooped a large quantity of unbagged cocaine from the toilet bowl. He then went into the backyard to assist in the apprehension of the fleeing suspects. Williams chased defendant Sumler through two or three neighboring backyards until Sumler surrendered. Williams stated that Sumler was Ms. Jimerson's cousin, and that Sumler frequently stayed at her residence.

Detective Paul Toye testified that he too was part of the entry team that executed the search warrant on 6732 Tara Lane. When he entered the residence, he saw defendant Sumler run into the bathroom and then exit the residence through the back door. Toye chased the fleeing subjects and apprehended Byron Glover.

The defense called Byron Glover, who testified that he had nothing to

do with the narcotics recovered at 6732 Tara Lane. Glover said he went to Ms. Jimerson's residence to give her an estimate to cut the grass. He also said he walked through the residence, but saw neither cocaine nor anyone in the residence with Ms. Jimerson. He had just exited the residence and was standing in the backyard when he heard a lot of commotion and Ms. Jimerson scream. Glover denied fleeing from the police.

Henry D. Glover, Sr., Byron Glover's father, testified that he runs a lawn and garden service and that his son, Byron, was working for him in May 1997.

In rebuttal, Officer Roy Phillips testified that he and Officer Felix covered the rear door of 6732 Tara Lane when the police executed the search warrant. When he and Officer Felix stationed themselves in the backyard, there was no one else there. Less than a minute after taking up his position, Phillips saw four men exit the rear door. Two of the four men ran from the rear yard, but were apprehended. The other two, Byron Glover and Kevin Santiago, were detained as soon as they exited the residence.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

SANTIAGO'S ASSIGNMENT OF ERROR – EXCESSIVE

SENTENCE

By this assignment, the defendant Santiago argues that his sentence is unconstitutionally excessive. He contends that because his prior convictions did not involve crimes of violence, he is entitled to a downward departure from the mandatory minimum sentence of life imprisonment as a third felony offender.

Recently, in *State v. Lindsey*, 99-3256, pp. 2-4 (La. 10/17/00), ____ So. 2d ___, 2000 WL 1545310, the Louisiana Supreme Court reaffirmed the guidelines it had set forth in *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672, as to what circumstances must be present for a court to exercise its discretion to declare excessive a minimum sentence mandated by the Habitual Offender Law. The Court reemphasized that such a declaration is appropriate only where there is clear and convincing evidence that because of unusual circumstances, the defendant is *exceptional*, which determination may not be based solely upon the defendant's record of non-violent offenses. *Lindsey, supra*, at pp. 2-4, citing *Johnson, supra*, at pp. 6-9, 709 So. 2d at 676-677.

In the instant case, the State charged Santiago with possession of more than four hundred grams of cocaine; however, the jury convicted him of simple possession. The court sentenced him pursuant to La. R.S. 15:529.1 A

(1)(b)(ii), which provides that a third-felony habitual offender shall be sentenced to life imprisonment if any one of the three felonies is a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years.

In 1991 and 1997 Santiago pled guilty to possession of stolen property and possession of heroin, respectively. Possession of heroin carries a term of imprisonment of four to ten years at hard labor and a fine of not more than five thousand dollars. La. R.S. 40:966C(1).

Santiago supports his argument of excessive sentence by citing *State v. Burns*, 97-1553 (La.App. 4 Cir. 11/10/98), 723 So.2d 1013, *writ denied*, 98-3054 (La.4/1/99), 741 So.2d 1282, in which this court vacated the life sentence of a quadruple offender after his conviction for distribution of one rock of crack cocaine. We find no relevant similarities between the instant case and *Burns*, however. In B*urns*, our decision was based upon evidence that the twenty-five year old defendant was addicted to drugs, was well-liked in the community, and had a mental deficiency relating to his having suffered a gunshot wound to the head, as well as upon the non-violent nature of his offenses and the small quantity of drugs seized. We therefore decline to extend the rationale of *Burns* to the instant case, which not only involves a large amount of cocaine from multiple transactions, but in which there is no

evidence as to the defendant's addiction, his character, or any redeeming social virtues he might possess. *See, e.g., State v. Finch*, 97-2060 (La. App. 4 Cir. 2/24/99), 730 So.2d 1020, *writs denied*, 99-1240, 99-1300 (La.10/8/99), 750 So.2d 179, 963; *State v. Long*, 97-2434 (La. App. 4 Cir. 8/26/99), 744 So.2d 143, *writ denied*, 99-2780 (La.3/17/00), 756 So.2d 1140.

Unlike the defendant in *Burns*, Santiago's record indicates he is a recidivist whose criminal conduct continues to escalate. Therefore, we do not find that the sentence mandated by the Habitual Offender Law is unconstitutionally excessive in this case.

SANTIAGO'S AND SUMLER'S ASSIGNMENT OF ERROR – INSUFFICIENCY OF THE EVIDENCE

Santiago and Sumler each assert a claim of insufficiency of the evidence to support their convictions.

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any 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 560 (1979); *State v. Jacobs,* 504 So.2d 817 (La.1987). The reviewing court is to consider the record as a whole, 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, 1309-10 (La.1988). In applying this standard, the reviewing court must defer to the credibility choices and justifiable inferences of fact made by the jury. *State v. Rosiere*, 488 So.2d 965, 968 (La.1986). The determination of credibility is a question of fact within the sound discretion of the trier of fact and will not be disturbed unless clearly contrary to the evidence. *State v. Vessell,* 450 So.2d 938, 943 (La.1984).

In Santiago's case, to support a conviction for possession of cocaine, the State must establish that the defendant was in possession of the drug and that he knowingly or intentionally possessed it. *State v. Shields*, 98-2283 p. 3 (La. App. 4 Cir. 9/15/99), 743 So.2d 282, 283. Guilty knowledge is an essential element of the crime of possession of cocaine. *State v. Williams,* 98-0806, p. 6 (La. App. 4 Cir. 3/24/99), 732 So.2d 105, 109, *writ denied,* 99-1184 (La.10/1/99), 748 So.2d 433.

Sgt. Jeffery Robertson testified that he chased Santiago through the residence, into the yard, and ordered him to stop. As Santiago complied,

Robertson witnessed Santiago discard a plastic bag, which contained several smaller bags of cocaine. Robertson also seized currency from Santiago.

Viewing this evidence and the evidence as a whole, in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Santiago knowingly and intentionally possessed cocaine.

As for Sumler, 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, 580 (La. App. 4 Cir.1990). A person in the area of the contraband may be considered in constructive possession if it is subject to his dominion and control and if he has guilty knowledge. *State v. Magee,* 98-1325 (La. App. 4 Cir. 12/15/99), 749 So.2d 874, *writ denied,* 1999-3587 (La. 6/2/00), 763 So.2d 593, citing *State v. Trahan,* 425 So.2d 1222, 1226 (La.1983).

Factors relevant to a defendant's dominion and control include: 1) the defendant's knowledge that illegal drugs are in the area; 2) the defendant's

access to the area where the drugs are found; 3) the defendant's physical proximity to the drugs; 4) evidence that the area was frequented by drug users; and 5) evidence of recent drug use by the defendant. *State v. Magee, supra,* 749 So.2d at 877.

The elements of knowledge and intent are states of mind and need not be proven as facts, but may be inferred from the circumstances. *State v. Reaux*, 539 So.2d 105 (La. App. 4 Cir.1989), citing *State v. Tasker*, 448 So.2d 1311 (La. App. 1 Cir. 1984), w*rit denied,* 450 So.2d 644 (La. 1984). The fact finder may draw reasonable inferences to support these contentions based upon the evidence presented at trial.

Detective Michael Harrison testified that prior to execution of the search warrant, he witnessed Sumler engage in two drug transactions at the Tara Lane residence. Upon forcing the burglar bars from the front door, Harrison saw Sumler run into the bathroom, and then out the back door. Detective Joseph Williams testified that upon entering the residence, he saw a trail of cocaine leading into the bathroom and that he scooped a large quantity of unbagged cocaine from the toilet. Thereafter, Williams chased Sumler through three neighboring yards before apprehending him. The officers confiscated $1,433.00 from Sumler; and finally, Sumler told the officers that he lived at the residence, and admitted that Ms. Jimerson had

nothing to do with the narcotics.

The officers' observations, coupled with Sumler's flight and declaration the residence was his, reveal that the jury's conclusion that Sumler attempted to possess cocaine was not unreasonable. Accordingly, we do not find that either defendant's conviction was based upon insufficient evidence.

SANTIAGO'S ASSIGNMENT OF ERROR – MULTIPLE OFFENDER ADJUDICATION

In this assignment, Santiago argues the trial court erred in adjudging him a third felony offender on the basis of a constitutionally deficient plea of guilty to possession of heroin.

The first issue we address is whether the defendant has preserved this claim for appellate review. In *State v. Cossee*, 95-2218 (La. App. 4 Cir. 7/24/96), 678 So.2d 72, this court held that the failure to file a written response to the multiple bill as required by La. R.S. 15:529.1(D)(1)(b) precluded appellate review of the defendant's claim that the documentary

evidence was not sufficient to support the prior convictions set forth in the multiple bill.

We have held that when, as here, the record does not contain the defendant's written response to the multiple bill, the issue will not be preserved for appellate review unless the objection was made orally. *State v. Anderson*, 97-2587 (La. App. 4 Cir. 11/18/98), 728 So.2d 14.

At the multiple bill hearing, defense counsel questioned Santiago's identity as the person convicted of possession of heroin by focusing on the lack of fingerprints on the guilty plea form. Therefore, he preserved the issue of identity for appellate review; however, for the first time on appeal, counsel attacks the guilty plea as deficient in that it was not knowingly and voluntarily made. Because this issue has not been preserved for appellate review, we decline to consider it.

SANTIAGO'S ASSIGNMENT OF ERROR – INEFFECTIVE ASSISTANCE OF COUNSEL

In this assignment, Santiago argues that because his right to contest the constitutionality of his guilty plea was not preserved for appellate review, his counsel was ineffective for failing to file a motion to quash the multiple bill as predicated upon a faulty plea.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. *State v. Prudholm*, 446 So.2d 729 (La.1984); *State v. Johnson*, 557 So.2d 1030 (La. App. 4th Cir.1990). Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. *State v. Seiss*, 428 So.2d 444 (La.1983); *State v. Landry*, 499 So.2d 1320 (La. App. 4 Cir.1986).

A defendant's claim of ineffective assistance of counsel is to be assessed by the two part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. 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. *Strickland, supra,* at 686, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra,* at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4th Cir. 1992).

To prove that a defendant is a multiple offender, the State must establish by competent evidence that there is a prior felony and that the defendant is the same person who was convicted of the prior felony. *State v. Chaney*, 423 So.2d 1092 (La.1982). Where the prior conviction resulted from a plea of guilty, the State must show that the defendant was advised of his constitutional rights and that he knowingly waived those rights prior to pleading guilty, as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The Louisiana Supreme Court adopted a scheme for burdens of proof in Habitual Offender proceedings in *State v. Shelton*, 621 So.2d 769 (La.1993). This scheme was succinctly summarized in *State v. Conrad*, 94-232 (La. App. 5 Cir. 11/16/94), 646 So.2d 1062, 1064, *writ denied*, 94-3076 (La.4/7/95), 652 So.2d 1345, as follows:

> If the defendant denies the multiple offender allegations then the burden is on the State to prove (1) the existence of a prior guilty plea, and (2) that defendant was represented by counsel when the plea was taken. Once the State proves those two things, the burden then shifts to the defendant to produce *affirmative* evidence showing (1) an

> infringement of his rights, or (2) a procedural irregularity in the taking of the plea. Only if the defendant meets that burden of proof does the burden shift back to the State to prove the constitutionality of the guilty plea. In doing so, the State must produce either a "perfect" transcript of the *Boykin* colloquy between the defendant and the judge or any combination of (1) a guilty plea form, (2) a minute entry, or (3) an 'imperfect' transcript. If anything less than a "perfect" transcript is presented, the trial court must weigh the evidence submitted by the defendant and the State to determine whether the State met its burden of proof that defendant's prior guilty plea was informed and voluntary.

In the case at bar, the State produced evidence of Santiago's prior conviction for possession of heroin. The State introduced the bill of information, the docket master, the guilty plea form, the arrest register and the minute entry of the guilty plea. The documents reveal that counsel represented Santiago at the time he entered the guilty plea. Santiago, his attorney, and the trial judge signed the waiver of rights form. In addition, the waiver of rights form and the minute entry indicate that the trial court advised the defendant of his right to a jury trial, right to cross-examination of witnesses, privilege against self- incrimination, and right to compel and confront witnesses. The trial court also advised the defendant he would be sentenced to four years with credit for time served.

These documents reveal that the State met its burden of proving the validity of the guilty plea. At that point, the burden of proof shifted to Santiago to show that there was an infringement of his rights and/or a procedural irregularity in the plea.

To meet this burden, Santiago argues that the State failed to try him within the two-year time limitation of La. C.Cr.P. art. 578, which provides in pertinent part: "Except as otherwise provided in this Chapter, no trial shall be commenced: ... (2) In [non-capital] felony cases after two years from the date of institution of the prosecution". He contends that his guilty plea was not knowing and voluntary because it was made after the statutory deadline for commencement of trial had expired.

LSA-C.Cr.P. art. 579 provides in part that the period of limitation set forth in LSA-C.Cr.P. art. 578 shall be interrupted if: "... the defendant cannot be tried . . . for . . . cause beyond the control of the state." This article further provides that the "periods of limitation established by article 578 shall commence to run anew from the date the cause of interruption no longer exists." As noted in *State v. Rome, supra*, 93-1221 p. 4 (La.1/14/94), 630 So.2d 1284: "An interruption of prescription occurs when the state is unable, through no fault of its own, to try a defendant within the period specified by statute."

In addition, LSA-C.Cr.P. art. 580 provides:

> When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by article 578 shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial.

Santiago's trial on the possession of heroin charge was held approximately twenty-six months after the bill of information was filed in that case. However, the record reveals that approximately three months of delay resulted from the district court having to appoint successive defense counsel and another four months of delay was occasioned by on-going trials and court closures – causes beyond the control of the State. C.Cr.P. art. 579 A(2). In each of these instances, the time limitations of LSA-C.Cr.P. art. 578 were interrupted. As per La.C.Cr.P. art. 579(B), the time limitation of art. 578 began to run anew from the date the cause of the interruptions no longer existed. Moreover, the record reflects that Santiago filed a motion for speedy trial, which was ruled on by the district court on January 16, 1997. From that date, the State is afforded no less than one year to commence trial, according to La.C.Cr.P art. 580. Santiago was tried on February 27, 1997, forty-two days after the ruling on his motion for speedy trial.

Therefore, because the State’s prosecution of Santiago for possession of heroin was timely, his guilty plea was not constitutionally flawed, and his claim of ineffective assistance of counsel is groundless.

SUMLER'S ASSIGNMENT OF ERROR – EVIDENCE OF OTHER CRIMES

By this assignment, defendant Sumler claims the court impermissibly allowed other crimes evidence.

Prior to opening statements, counsel for Sumler unsuccessfully moved in limine to exclude any evidence of narcotics transactions. Specifically, Sumler objects to Detective Michael Harrison's testimony that surveillance of the Tara Lane residence prior to execution of the warrant revealed that Sumler engaged in two drug transactions. Sumler argues that because he was charged with possession of cocaine, not with distribution, Detective Harrison's testimony was prejudicial.

La. C.E. art. 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it plans to use at trial for such purposes, **or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.** (Emphasis supplied.)

Generally, evidence of other crimes is inadmissible at trial because of

the likelihood that the trier of fact will convict the defendant of the immediate charge based on his prior criminal acts. However, pursuant to the res gestae exception, evidence of another crime is admissible "when it is related and intertwined with the charged offense to such an extent that the State could not have accurately presented its case without reference to the other crime." *State v. Colomb*, 98-2813. p. 3 (La.10/1/99), 747 So.2d 1074, 1075; *State v. Powell*, 98-0278, p. 6 (La. App. 4 Cir. 11/17/99), 746 So.2d 825, 829. A close connexity in time and place is required between the evidence of other crimes and the charged offense. *Powell*, 98-0278 at p. 7, 746 So.2d at 829. Evidence admissible under the res gestae exception is not subject to any notice requirements. *See* La. C.E. art. 404(B)(1). In *State v. Colomb*, *supra*, the Louisiana Supreme Court elaborated on the res gestae exception:

> The res gestae or integral act doctrine thus 'reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness.' *Old Chief v. United States*, 519 U.S. 172, 186, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997). The test of integral act evidence is therefore not simply whether the state might somehow structure its case to avoid any mention of the uncharged act or conduct but whether doing so would deprive its case of narrative momentum and cohesiveness, 'with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.' *Id.*

98-2813 at p. 3, 747 So.2d at 1076.

In the instant case, we conclude that the objectionable evidence was admissible pursuant to the res gestae exception. It was part of the orderly narration of fact leading up to the execution of the search warrant, and culminating in the defendants' arrests.

CONCLUSION

Accordingly, for the reasons stated, the defendants' convictions and sentences are affirmed.

AFFIRMED