NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1346**
VERSUS	*	**COURT OF APPEAL**
LOUIS SIMMONS, JR. AND ANN AUGILLARD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 404-146, SECTION "F"
Honorable Dennis J. Waldron, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge William H. Byrnes, III, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

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DEFENDANT SIMMONS' CONVICTIONS AND SENTENCES AFFIRMED
DEFENDANT AUGILLARD'S CONVICTION AND SENTENCE AS TO COUNT ONE AFFIRMED; CONVICTION AND SENTENCE AS TO COUNT TWO VACATED AND SET ASIDE

STATEMENT OF THE CASE

Defendants Louis J. Simmons (alternately, "defendant Simmons," and "Simmons") and Ann Augillard (alternately, "defendant Augillard," and "Augillard") were jointly charged by bill of information on January 13, 1999, in count one with possession of cocaine with intent to distribute, a violation of La. R.S. 40:967(A), and in count two with possession of cocaine in the amount of twenty-eight grams or more, but less than two hundred grams, a violation of La. R.S. 40:967(B). Defendant Simmons pled not guilty at his February 18, 1999 arraignment. Defendant Augillard pled not guilty at her March 5, 1999 arraignment. The trial court found probable cause and denied defendants' motion to suppress the evidence and statements. On June 30, 1999, a twelve-person jury found defendant Simmons guilty as charged as to both counts, and defendant Augillard guilty as charged as to count one, and guilty of possession of cocaine as to count two. On October 22, 1999, the trial court sentenced defendant Simmons to

thirty years at hard labor on each count, with the first five years of the sentence on count one, and the first ten years of the sentence on count two, without the benefit of parole, probation or suspension of sentence. Defendant Simmons was given credit for time served as to count two. Both sentences were to run concurrently. On that same date, the trial court sentenced defendant Augillard to twelve years at hard labor on count one, with the first five years without the benefits of parole, probation or suspension of sentence, with credit for time served, and, as to count two, five years at hard labor. Both sentences were to run concurrently. The trial court noted an objection to the sentences and denied any request for reconsideration of sentence. The trial court granted defendants' motions for appeal.

FACTS

New Orleans Police Detective Patrick Joseph testified that on November 11, 1998, he and other officers executed a search warrant at 1586 Conti Street, Apartment "O," located in the Iberville Housing Development, and subsequently, forcibly entered the apartment. Inside the apartment, the officers recovered three pieces of crack cocaine from a table next to where defendant Simmons was sitting, two clear plastic bags of powdered cocaine

from defendant Simmons' person, crack cocaine from defendant Augillard's bedroom dresser, and some marijuana. Defendants Simmons and Augillard were in the apartment at the time of the search, along with defendant Augillard's brother and three of her children. Officers later executed a search warrant at defendant Simmons' residence at 2341 Monticello Street, where police recovered a safe containing sixteen plastic bags of cocaine. Defendant Simmons admitted ownership of the cocaine found on his person, a lit marijuana "cigar" found next to where he was sitting at the Conti Street apartment, and the cocaine found in the safe. The officers found evidence indicating that defendant Augillard resided at the Conti Street apartment. Also seized was some paraphernalia–a vial, razor blades, and marijuana papers.

New Orleans Police Officer Marcellus White participated in the execution of the search warrant at the Conti Street apartment. He testified that as other officers entered the front door of the apartment, defendant Augillard attempted to leave through the rear downstairs hallway door with an infant in her hand. After another officer took Ms. Augillard back up the rear stairs, Officer White saw and retrieved a small bag containing crack cocaine from the inside of the wooden door, where a knob normally would have been.

New Orleans Police Officer Desmond Pratt participated in the execution of the search warrant at the Conti Street apartment. He testified that prior to the date that the warrant was served, he had participated in a surveillance of the apartment, sending a confidential informant there. Officer Pratt also participated in the search of the Monticello Street residence.

New Orleans Police Officer Louis Richardson Jr. participated in the execution of the search warrant at the Conti Street apartment and the subsequent arrest of defendants. He searched defendant Simmons and recovered the two bags of cocaine and eighty-seven dollars in currency from Simmons' person.

New Orleans Police Officer Roland Doucette participated in the execution of the search warrant at the Conti Street apartment and the subsequent arrest of defendants. He recovered crack cocaine from defendant Augillard's second-floor bedroom, and marijuana from the kitchen.

New Orleans Police Officer William Giblin, a criminalist with the crime lab, tested the substances recovered. Officer Giblin testified that the substances tested positive for marijuana and cocaine. He weighed the contents of six of the sixteen bags of cocaine recovered from defendant Simmons' safe, finding the total weight to be thirty-two grams. He tested

this cocaine. However, he said the total weight of the cocaine in the sixteen bags was 85.4 grams. Officer Giblin said the total weight of the cocaine found in defendant Augillard's bedroom dresser, including "some plastic," was 5.1 grams.

Detective Joseph was recalled as a witness, and he testified that he recovered the sixteen bags of cocaine, fifteen hundred dollars in currency, and jewelry in defendant Simmons' safe. He stated on cross-examination that a confidential informant was sent into the Conti Street apartment to purchase cocaine and returned with two pieces of crack cocaine. The officers could not see the informant actually enter the apartment, only the front of the building containing that apartment.

It was stipulated that if New Orleans Police Officer Joseph LeBlanc had been called as a witness he would have testified that he was the first officer to enter the Conti Street apartment, and that upon entering observed defendant Simmons discarding the marijuana cigar. It was further stipulated that if Sergeant March Mornay had been called as a witness, his testimony would have been the same as that of Detective Joseph.

Shelita Simmons, defendant Simmons' mother, testified that she resided at 2341 Monticello Street. She said her son kept money, a watch and a chain in his safe, but no narcotics. She also said he had a job fixing flat

tires.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NUMBER ONE

In this assignment of error, defendant Louis Simmons claims that his sentence of thirty years for possession with intent to distribute cocaine is constitutionally excessive.

La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La.App. 4 Cir. 2/3/99), 727 So.2d 1264, 1272, rehearing granted on other grounds, (La.App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La.App. 4 Cir. 4/15/98), 715 So.2d 457, 461, writ denied, 98-2360 (La. 2/5/99), 737 So.2d 741. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So.2d 386, 387 (La.App. 4th Cir. 1987), writ denied, 516

So.2d 366 (La. 1988). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So.2d 672, 677. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La.App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La.App. 4 Cir. 9/15/99), 744 So.2d 181, 189; State v. Robinson, 98-1606, p. 12 (La.App. 4 Cir. 8/11/99), 744 So.2d 119, 127. If adequate compliance with La. C.Cr.P. art. 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 the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Ross, 98-0283, p. 8 (La.App. 4 Cir.

9/8/99), 743 So.2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La.App. 4 Cir. 8/4/99), 752 So.2d 184, 185, writ denied, 99-2632 (La. 3/17/00), 756 So. 2d 324.

However, in State v. Major, 96-1214 (La.App. 4 Cir. 3/4/98), 708 So.2d 813, writ denied, 98-2171 (La. 1/15/99), 735 So.2d 647, this Court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So.2d at 819.

In State v. Soraporu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating

> circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear [s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id. "The trial court is entitled to consider the defendant's entire criminal history in determining the appropriate sentence to be imposed." State v. Ballett, 98-2568, p. 25 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 602.

La. R.S. 40:967(B)(2)(4)(b) provides that a person convicted of possession with intent to distribute cocaine shall be sentenced to imprisonment at hard labor for not less than five nor more than thirty years and, in addition, may be fined not more than fifty thousand dollars. Defendant was sentenced to thirty years, the maximum term of imprisonment. He was not fined, and thus, did not receive the possible maximum sentence. Defendant was twenty-three years old at the time of sentencing. The trial court gave extensive reasons for imposing the sentence. The trial court strongly condemned both of the defendants for their drug activity in the presence of defendant Augillard's children who, the court noted, were ages seven, four, and one as of the date of sentencing. The court told defendant Simmons that the price he would pay was because of that. The court condemned defendant Simmons' misplaced priorities, i.e., for having cash and jewelry in his safe, while leaving Ms. Augillard's

children living in a housing project.

The trial court also noted the defendant's extensive juvenile criminal record, which began with arrests at age twelve for possession of stolen property and theft. The defendant's first felony conviction was in May 1990, at age fifteen, for distribution of crack cocaine, for which he received one year of probation. In May 1991, the defendant was again convicted of distribution of crack cocaine, and was sentenced to one year in the custody of the Department of Corrections (the "DOC"). One day later, in a separate case, the defendant was convicted of possession of a stolen automobile and resisting an officer, for which he received one year and six months, respectively, in the custody of the DOC. Arrests apparently made at the same time for unlawful use of body armor, battery of a police officer and flight from an officer did not result in convictions. In November 1992, the defendant was convicted of illegal use of a weapon and sentenced to two years in the Louisiana Training Institute. In May 1997, the defendant was convicted of his first offense as an adult--possession of marijuana--for which he received six months inactive probation. During the year 1997, the defendant was arrested for twenty offenses, but he was convicted of only two: battery, for which he was sentenced to six months in parish prison, and resisting an officer, for which he received one year active probation. The

other eighteen offenses ranged from attempted first degree murder and illegal use of a weapon in April 1997, to two counts of simple assault, one count of public intimidation, five counts of extortion, one count of simple criminal damage to property and the one count of resisting an officer, all apparently growing out of the same incident in late December 1997. The trial court noted that defendant had been charged on December 13, 1997 with assaulting a female with a gun, but that he received a speedy trial release from that aggravated assault charge in March 1998.

In State v. Calway, 98-2061 (La.App. 4 Cir. 11/17/99), 748 So.2d 1205, this court affirmed a maximum sixty-year sentence imposed on a second-felony habitual offender convicted of possessing cocaine with the intent to distribute. The defendant had six prior convictions over a twenty-year period: two for theft, one for burglary, one for possession of drug paraphernalia, one for possession of cocaine, and one for possession of marijuana. The trial court gave extensive reasons for imposing the sentence. Defendant had been arrested in the middle of selling a rock of crack cocaine, discarded four rocks as he fled from police, and was found in possession of nineteen more rocks upon his apprehension.

In the instant case, the criminalist's report reflects that the weight of the powder cocaine in the two bags found on defendant Simmons' person

was 11.9 grams. The weight of the powder cocaine in the sixteen bags seized from Simmons' Monticello Street residence was 85.4 grams. It is reasonable to assume that the two bags of powder cocaine recovered from defendant's person were part of the lot of powder cocaine found at his Monticello Street residence. These were the only two seizures of powder cocaine. Defendant Simmons admitted owning all of the powder cocaine, as well as the marijuana cigar he apparently was smoking when police entered the Conti Street apartment. The defendant's record reflects that he has been trafficking in cocaine since he was fifteen years old. He had seven criminal convictions, including four felony convictions, prior to his convictions in the instant case. Although the defendant is young, considering the totality of the circumstances, it cannot be said that the sentence imposed on count one makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, or is grossly out of proportion to the severity of the crime.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In this assignment of error, defendant Ann Augillard claims that the sentence imposed for her conviction as to count two, for possession of cocaine, is constitutionally excessive. Discussion of this issue is pretermitted, however, as a review of this assignment of error reveals that the evidence is patently insufficient to support defendant Augillard's conviction for this offense. Where, as in the instant case, a review of the record clearly shows that the State's case is devoid of evidence of an essential element of the offense, the defendant's conviction and sentence must be set aside, "regardless of how the error is brought to the attention of the reviewing court." State v. Raymo, 419 So.2d 858, 861 (La. 1982); see also State v. Browder, 471 So.2d 726, 728 (La.App. 4th Cir. 1985), citing Raymo.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La.App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> 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 act 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); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must

> consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] 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." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
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> In addition, 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. This is not a separate test from Jackson v. Virginia, supra, but rather 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).

98-0011 at pp. 13-14, 744 So.2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La.App. 4 Cir. 12/3/97), 703 So.2d 223, 227-228.

Both defendants, Simmons and Augillard, were charged with the same offenses: count one, possession with intent to distribute cocaine, and count two, possession of cocaine in an amount twenty-eight grams or more but less than two hundred grams. Both were convicted of possession with intent to distribute. Simmons was convicted of possession of twenty-eight grams or more but less than two hundred, while Ms. Augillard was found guilty of

"simple" possession as to that charge.

To convict for possession of narcotics, the State must prove that a defendant knowingly possessed narcotics. State v. Lewis, 98-2575, p. 3 (La.App. 4 Cir. 3/1/00), 755 So.2d 1025, 1027; State v. Ricard, 98-2278 c/w/ 99-0424, p. 7 (La.App. 4 Cir. 1/19/00), 751 So.2d 393, 397; State v. Brady, 97 1095, pp. 7-8 (La.App. 4 Cir. 2/3/99), 727 So.2d 1264, 1268, rehearing granted on other grounds, (La.App. 4 Cir. 3/16/99). The State need not prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support conviction. Id. Two relevant factors to be considered in determining whether a defendant had constructive possession of drugs, i.e., exercised dominion and control over them, are defendant's relationship with the person in actual possession, and defendant's access to the area where the drugs were found. State v. Mitchell, 97 2774, pp. 11-12 (La.App. 4 Cir. 2/3/99), 731 So.2d 319, 328. "A person may be deemed to be in joint possession of a drug which is in the physical possession of a companion if he willfully and knowingly shares with the other the right to control it." State v. Booth, 98-2065, p. 5 (La.App. 4 Cir. 10/20/99), 745 So.2d 737, 742. Factors to be considered in determining whether a defendant exercised dominion and control over drugs are: the defendant's knowledge that illegal drugs were present 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 evidence that the area was being frequented by drug users. Mitchell, 97-2774 at p. 12, 731 So.2d at 328; Booth, 98-2065 at p. 6, 745 So.2d at 742.

At trial, the only evidence as to the weight of any cocaine seized that was twenty-eight grams or more was the 85.4 grams of cocaine seized from defendant Simmons' Monticello Street residence, where his parents also lived. The criminalist testified that crack cocaine found in Ms. Augillard's bedroom dresser at her Conti Street apartment weighed 5.1 grams. There was also evidence of several rocks of crack cocaine found on a table in Ms. Augillard's apartment (the criminalist's report indicates that the gross weight of this was one gram), and a bag of what was believed to be crack cocaine found in a rear door leading out of a rear hallway to her apartment. Defendant Simmons had two bags of cocaine on his person when searched at Ms. Augillard's apartment (the criminalist's report shows the gross weight of these two bags was 11.9 grams). The jury convicted both defendants of possession with intent to distribute. These convictions were presumably based on, in Simmons' case, the two bags of powdered cocaine found on his person–presumably part of the lot found on Monticello Street–and possibly

the crack cocaine found on the table near him. Ms. Augillard's conviction for this offense was apparently based on her constructive possession of the crack cocaine found in her bedroom dresser, the crack cocaine on the table in her apartment, and the crack cocaine found in the rear door after she was apprehended there attempting to flee.

As to the charge of possession of twenty-eight or more but less than two hundred grams of cocaine, defendant Simmons was obviously convicted of this offense based on his constructive possession of the 85.4 grams of cocaine found in his Monticello Street residence. As to this charge, defendant Augillard was convicted simply of possession of cocaine. Since the evidence presented by the State as to this charge could only have been the 85.4 grams of cocaine found on Monticello Street, the question arises as to whether there was any evidence that defendant Augillard had constructive possession over that cocaine. There was no evidence whatsoever from which the jury could have concluded that defendant Augillard possessed this cocaine. While Ms. Augillard obviously enjoyed some type of relationship with defendant Simmons, there is no indication that she shared with Simmons a right to control the powder cocaine found at his Monticello Street residence. There was no evidence that she had ever been to the Monticello Street residence, much less that she had access to the cocaine

there, which was locked in a safe. Simmons' Monticello Street residence was located in the Carrollton area of the city, far away from Ms. Augillard's apartment in the Iberville Housing Development. Defendant Augillard's only connection to drugs was to the crack cocaine and marijuana found in her Conti Street apartment. Defendant Simmons admitted ownership of all of the powder cocaine–the two bags found on his person, and the sixteen bags found in the safe at his Monticello Street residence.

Thus, no rational trier of fact could have found beyond a reasonable doubt that defendant Augillard exercised dominion and control, i.e. constructive possession, over the 85.4 grams of powder cocaine found at defendant Simmons' Monticello Street apartment. As previously discussed, the only evidence presented by the State as to this count, charging possession of twenty-eight grams or more but less than two hundred grams, was the 85.4 grams of cocaine. It appears that this was a "compromise verdict." However, even compromise verdicts are subject to review for sufficiency of the evidence.

Defendant Augillard's conviction and sentence as to count two must be reversed and set aside.

CONCLUSION

For the foregoing reasons, defendant Simmons' convictions and sentences are hereby affirmed. Defendant Augillard's conviction and sentence as to count one of the indictment is hereby affirmed. Defendant Augillard's conviction and sentence as to count two are hereby vacated and set aside.

DEFENDANT SIMMONS' CONVICTIONS AND SENTENCES AFFIRMED;
DEFENDANT AUGILLARD'S CONVICTION AND SENTENCE AS TO COUNT ONE AFFIRMED; CONVICTION AND SENTENCE AS TO COUNT TWO VACATED AND SET ASIDE