NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1697**
VERSUS	*	**COURT OF APPEAL**
JOHN F. DOTY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 412-198, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

Defendant, John Doty, appeals his conviction of attempted possession of cocaine and his sentence as a multiple offender. Defendant was charged with one count of simple possession of cocaine, pled not guilty, was tried by a six-member jury, and was found guilty of attempted possession, a violation of La. R.S. 40:967. The State filed a multiple bill, and after pleading guilty to being a second offender, defendant was sentenced under R.S. 15:529.1 to serve thirty months at hard labor with credit for time served. On appeal, defendant argues that the evidence was insufficient to convict him and that his sentence is excessive. After considering these arguments and reviewing the record, we affirm.

STATEMENT OF THE FACTS

On January 6, 2000 at approximately 1:00 a.m., Officer Anthony Rome and Officer Donald Battiste were on patrol in the Eighth District, specifically the 800 block of Orleans Avenue in the French Quarter, when they observed the defendant urinating on the steps of a house. The officers

exited their vehicle and approached the defendant, who began staggering away. The officers arrested the defendant, who smelled strongly of alcohol, for the municipal offenses of urinating in public and public intoxication. The defendant was not issued a summons because he had no identification with him.

After the defendant was arrested, he was frisked for weapons and contraband, but nothing was found except a cigarette lighter. Officer Battiste then checked the rear of the police vehicle, including under the back seat, in accordance with standard procedure, before the defendant was placed inside. The officers then took the defendant to Central Lock-up. Once there, the defendant was removed from the vehicle, and Officer Battiste again checked the back. When the officer lifted up the rear seat, he found a small glass pipe with a visible white residue in the screen. Upon showing the pipe to his partner and the defendant, the defendant stated, "Officer, I'm sorry. I put that there. I didn't think you were going to look there. I didn't want to take the charge." According to the stipulation entered into by the defense counsel, subsequent testing of the residue in the pipe by an expert, Officer O'Neal, showed positively that the substance was cocaine.

ERRORS PATENT

A review of the record for errors patent reveals that there are none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the appellant argues that the evidence was insufficient to show that he knew there was cocaine in the pipe. He suggests that his inculpatory statement that he did not want to take the charge was, at best, a reference to a charge of possession of narcotics paraphernalia and not indicative of an intent to possess or attempt to possess cocaine.

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 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); 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, p. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-28.

The defendant was convicted of attempted possession of cocaine, a violation of La. R.S. 14:27 and 40:967. La. R.S. 40:967 (C) provides that "It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II ...." Cocaine is a Schedule II controlled dangerous substance under La. R.S. 40:964. Attempted possession of controlled dangerous substances is a responsive verdict to the charge of possession. La. C.Cr.P. art. 814(A)(50).

To support a conviction for possession of a controlled dangerous

substance, the State must prove that the defendant was in possession of the illegal controlled dangerous substance and that the defendant knowingly or intentionally possessed the drug. La. R.S. 40:967(C); State v. Ricard, 98-2278, p. 7 (La. App. 4 Cir. 1/19/00), 751 So. 2d 393, 397, writ denied 2000-0855 (La. 12/8/00), 775 So.2d 1078. Guilty knowledge is an essential element of the crime of possession of a controlled dangerous substance. Ricard; State v. Williams, 98-0806, p. 6 (La. App. 4 Cir. 3/24/99), 732 So. 2d 105, 109. Knowledge need not be proven as a fact, but may be inferred from the circumstances. State v. Porter, 98-2280, p. 3 (La. App. 4 Cir. 5/12/99), 740 So. 2d 160, 162.

A trace amount of cocaine in a crack pipe, i.e., residue, can be sufficient to support a conviction for possession of cocaine. State v. Shields, 98-2283, p. 3 (La. App. 4 Cir. 9/15/99), 743 So. 2d 282, 283, and cases cited therein. However, the amount of the substance seized has a bearing on the defendant's guilty knowledge and intent. State v. Monette, 99-1870, p. 5 (La. App. 4 Cir. 3/22/00), 758 So. 2d 362, 365. With respect to crack pipe cases, "the peculiar nature of the pipe, commonly known as a 'straight shooter' and used exclusively for smoking crack cocaine, is also indicative of guilty knowledge." State v. McKnight, 99-0997, p. 4 (La. App. 4 Cir. 5/10/99), 737 So. 2d 218, 219; Williams, 98-0806 at p. 7, 732 So. 2d at 109.

Also, recent drug use is a factor evidencing guilty knowledge, as is flight or furtive behavior. See Monette.

One of the circumstances most often cited as evidencing guilty knowledge in crack pipe cases–combined with the fact of possession of the pipe itself–is the presence of visible cocaine residue in the pipe. For example, in State v. Tassin, 99-1692 (La. App. 4 Cir. 3/15/00), 758 So. 2d 351, this court held that the testimony of two police officers that visible cocaine residue in a crack pipe found in the defendant's purse was sufficient to show guilty knowledge. In State v. Lewis, 98-2575 (La. App. 4 Cir. 3/1/00), 755 So. 2d 1025, an arresting officer noticed what, based on his experience, he believed to be cocaine residue in a crack pipe; this court noted that "the presence of visible cocaine residue in the crack pipe found in the defendant's front coat pocket is sufficient evidence to support the inference that the defendant had the requisite intent to attempt to possess cocaine." 98-2575 at p. 4, 755 So. 2d at 1028. In State v. Drummer, 99-0858 (La. App. 4 Cir. 12/22/99), 750 So. 2d 360, writ denied, 2000-0514 (La. 1/26/01), ___So. 2d ___, the defendant's possession of two crack pipes containing visible cocaine residue was sufficient to establish guilty knowledge. And in State v. Guillard, 98-0504 (La. App. 4 Cir. 4/7/99), 736 So. 2d 273, the arresting officer testified that a crack pipe recovered from the

defendant appeared to contain cocaine residue. This court stated: "Defendant's possession of a crack pipe with visible cocaine residue in it allows an inference that the defendant had the intent to attempt to possess cocaine." 98-0504 at p. 6, 736 So. 2d at 277.

This court in State v. Postell, 98-0503 (La. App. 4 Cir. 4/22/99), 735 So. 2d 782, writ granted, 99-1482 (La. 11/12/99), 748 So. 2d 1172, did reverse a defendant's conviction for possession of cocaine which was present in a crack pipe; however, that case is factually distinquishable from the instant situation. In Postell, the police officer lawfully approached the defendant who, in response, dropped something to the ground. The officer recognized the object as a crack pipe, but was unable to detect the presence of any drugs in the pipe. The presence of cocaine in the pipe was subsequently discovered by microscopic examination of crystals obtained from a solvent rinse of the pipe and a gas chromatograph test. An expert in the identification and analysis of controlled dangerous substances testified that the residue found in the pipe as result of the solvent rinse was not visible to the naked eye. No evidence was produced to show that the defendant displayed furtive behavior upon seeing the arresting officer approaching him. No evidence of recent drug use by the defendant was shown, and no evidence was produced to show that the defendant had attempted to obtain

cocaine.

Postell is clearly distinguishable from the instant case and the others cited above in that the arresting officer herein testified that the pipe contained visible cocaine residue. Furthermore, the defendant in this case attempted to conceal the crack pipe, and when it was discovered, admitted that he knew possession of the contraband would result in a criminal charge.

We therefore find that the State produced sufficient evidence to support the defendant's conviction.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the appellant contends that the sentence imposed upon him is excessive. He argues that the trial court failed to consider mitigating factors when it sentenced him to twice the minimum sentence of fifteen months.

The defendant's conviction for attempted simple possession of cocaine exposed him to a sentencing maximum of one-half that of the completed offense, or thirty months. La. R.S. 14:27, 40:967(C). The State filed a multiple bill charging the defendant as a second offender, to which the defendant admitted his guilt. The sentencing range was thus increased to a minimum of fifteen months and a maximum of sixty months pursuant to

La. R.S. 15:529.1. The defendant was sentenced to twice the minimum and one-half the maximum.

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. 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. 4 Cir. 1987). 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.

In State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, 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).

In the instant case, the trial court ordered a presentence investigation report. The court noted that the defendant was a third offender, with a conviction in January 1992 for felony theft; the defendant’s probation was revoked in July of the same year when the defendant was convicted of burglary. The defendant received a six- year sentence for the burglary

conviction. The trial court noted that the defendant's parole was subsequently revoked in June 1997, apparently because of new arrests.

Although the trial court did not mention any mitigating factors at sentencing, defense counsel did not mention any either. The presentence investigation report reflects that the defendant is a thirty-four year old third offender, although he was convicted of being only a second offender. The defendant informed the interviewing officer that he has been taking drugs and drinking since 1990, and that his "drug of choice is cocaine." The probation and parole officer noted that the defendant had committed more crimes while on probation and parole, and that the defendant admitted to never having been gainfully employed. The only potentially mitigating factor in the record is that the defendant has been diagnosed with paranoid schizophrenia. However, the officer noted in the report that it was the department's view that the defendant "has chosen to be a criminal and is using his `diagnosis' as an excuse to not get a job." The recommendation made by the probation and parole officer was that the defendant receive the maximum sentence in prison.

The trial court did not impose the maximum sentence; instead the court imposed only one-half the maximum. Under the circumstances, we do not find defendant's sentence to be constitutionally excessive.

CONCLUSION

Accordingly, for the reasons stated, we affirm the appellant's conviction and sentence.

AFFIRMED