NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2123**
VERSUS	*	**COURT OF APPEAL**
ELTON L. COLEMAN, A/K/A RANDY PAIGE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-781, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge David S. Gorbaty
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(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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CONVICTION AFFIRMED; SENTENCE AFFIRMED AS AMENDED

On November 19, 1999, Elton A. Coleman, a/k/a Randy Paige, was charged by bill of information with two counts of possession with intent to distribute marijuana in violation of La. R.S. 40:966(A)(2) and one count of attempted simple escape in violation of LA. R.S. 14:110(A). At his arraignment on January 4, 2000, the defendant pled not guilty. After hearings on February 10, 2000 and April 4, 2000, the trial court found probable cause and denied defendant's motions to suppress evidence.

After a trial on May 24, 2000, a twelve-member jury found defendant guilty of counts one and three, possession with intent to distribute marijuana and attempted simple escape. On May 30, 2000, the trial court sentenced the defendant to thirty years at hard labor on count one and one year on count three, to be served consecutively. The State then filed a multiple bill of information, and after a hearing on June 13, 2000, the court found defendant to be a second felony offender. On June 26, 2000, the trial judge vacated the sentence for count one only, and re-sentenced defendant to fifty years at hard

labor without benefit of probation, parole, or suspension of sentence, to be served concurrently with any other sentence. Defendant subsequently filed this appeal.

FACTS

Officer Travis McCabe testified that on July 15, 1997, he executed a search warrant at 1232 St. Ferdinand Street. As a result, the defendant was placed under arrest for possession with intent to distribute marijuana. While Coleman was being detained in a police vehicle, a crowd gathered and became unruly. During the incident, defendant attempted to flee by kicking out one of the windows in the police unit. However, he failed to escape.

At trial, Sergeant Michael Lohman testified that on February 2, 1998, he and Sergeant Steven Imbragugglio were conducting surveillance from an unmarked vehicle on 1225 St. Roch Street, Apartment A. They saw the defendant exit the apartment. A few minutes later, an unknown subject approached Coleman and engaged in a brief conversation before handing the defendant what appeared to be U.S. currency. Coleman then entered the apartment, came out moments later, and handed the subject an unknown small object. The subject left, and the defendant continued to loiter in front of the apartment. Based on these observations, the officers believed they

had witnessed a narcotics transaction.

Subsequently, a second subject approached the defendant, and once again, the subject handed defendant what appeared to be currency. Defendant entered the apartment and returned to hand the subject a small object before he departed. Defendant then went back inside.

Shortly thereafter, a white Camry pulled up in front of the apartment, and a subject, later identified as William Pittman, exited and knocked on the door. A female, later identified as Sabrina Reed, answered the door and engaged in a brief conversation with Pittman before making an exchange. Pittman returned to the vehicle and drove away.

Sgt. Lohman, having witnessed three apparent narcotics transactions, notified two detectives in the direction of travel of the Camry that they should conduct an investigatory stop of the vehicle. The officers did so and recovered marijuana from the vehicle.

Lohman and Imbagugglio were about to leave to prepare a search warrant when they observed another male subject approach the apartment and engage in an argument with the defendant. This subject, later identified as Brian Butler, raised his hands over his head and backed away from defendant, then turned and ran past the surveillance vehicle. The officers heard Butler say, "I'm going to report your ass."

Moments later, the officers heard a call on the radio concerning an attempted armed robbery at their location, and two uniformed officers arrived at the location in a marked vehicle shortly thereafter. Realizing that the presence of uniformed officers could jeopardize their investigation and cause occupants of the apartment to destroy any contraband, the officers decided to secure the residence before obtaining a warrant.

The officers knocked on the door and were greeted by Sabrina Reed, who was advised that she was under investigation for narcotics violations. The officers encountered the defendant exiting the kitchen. The officers located three women inside the kitchen. The subjects were relocated to the living room, and shortly thereafter, Damian Arnolie entered the residence. He advised the officers that he lived at the apartment. Within minutes another subject named Radcliffe arrived, who stated that he was the boyfriend of Sabrina Reed and also a resident of the apartment. All of these subjects were placed under investigation for narcotic violations.

Once the residence was secure, the officers prepared and obtained a warrant to search the premises. Upon returning, the officers questioned if anyone wished to provide information relating to contraband, narcotics or weapons being in the apartment. Sabrina Reed and Damion Arnolie led the officers to the rear bedroom where they showed the officers a cigarette pack

containing fifty-nine plastic baggies containing marijuana, a sawed off shotgun, and a nine millimeter pistol. The officers also recovered two large sandwich bags containing marijuana from the nightstand as well as $280 in U.S. currency.

In the middle bedroom, the officers located three plastic bags containing marijuana under the mattress. With the aid of a narcotics canine, the officers recovered a brown paper bag in the closet containing twenty-two small Ziplock bags of marijuana. In the kitchen, the officers located 124 small bags of marijuana in the dryer. All the subjects in the residence, including the defendant, who gave the officers a false name, were arrested for possession with intent to distribute marijuana. The parties stipulated that the evidence was tested, and that the tests were positive for marijuana.

ERRORS PATENT

A review of the record reveals two errors patent. Although a minute entry shows that the defendant was present in court for arraignment, the record fails to reflect that defendant was actually arraigned or entered a plea of not guilty. However, La. C.Cr.P. art. 555 provides that if the defendant enters upon the trial without objecting to the failure to be arraigned, the error is waived, and it is considered as if the defendant pled not guilty. In this

case, no objection was made by the defendant for the ostensible failure to arraign. Accordingly, any resultant error was waived.

The record further shows that the trial court sentenced Coleman immediately after denying his motions for new trial. La. C.Cr.P. art. 873 requires a twenty-four hour delay between the denial of a motion for new trial and sentencing, unless the defendant waives such delay. A defendant may implicitly waive the waiting period for imposing sentence by announcing his readiness for the sentencing hearing. State v. Steward, 95-1693 (La. App. 1 Cir. 9/27/96), 681 So.2d 1007. In State v. Francis, 93-953 (La. App. 5 Cir. 3/16/94), 635 So.2d 305, the court found that the defendant impliedly waived the required twenty-four hour delay when defense counsel responded in the affirmative when the judge inquired whether he was ready for sentencing. Likewise, in the instant case, counsel responded in the affirmative when the trial court asked whether defendant was ready for sentencing. As such, defendant impliedly waived the required twenty-four hour delay.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant argues that the evidence was insufficient to support the conviction. Specifically, defendant contends that the State failed to prove

beyond a reasonable doubt that he possessed the marijuana in question.

The standard of review for the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

The State had the burden of establishing beyond a reasonable doubt, first, that defendant knowingly or intentionally possessed marijuana, and second, that defendant possessed it with an intent to distribute it. La. R.S. 40:966(A)(1); State v. Moffett, 572 So.2d 705 (La.App.4 Cir.1990).

It is not necessary that the State prove that the defendant had actual physical possession of the narcotics; proof of constructive possession is sufficient to support a conviction. State v. Trahan, 425 So.2d 1222 (La.1983); State v. Dickerson, 538 So.2d 1063 (La. App. 4 Cir. 1989). Neither the mere presence of the defendant in an area where drugs have been found nor the mere fact that he knows the person in actual possession is sufficient to prove constructive possession. State v. Bell, 566 So.2d 959 (La.1990). Nevertheless, a person found in the area of the contraband is considered in constructive possession if it is subject to his dominion and control and if he has guilty knowledge. Trahan, 425 So.2d at 1226. The

elements of knowledge and intent are states of mind which need not be proved as facts, but which may be inferred from the circumstances. State v. Reaux, 539 So.2d 105 (La. App. 4 Cir.1989). The finder of fact may draw reasonable inferences to support these contentions based on the evidence presented. Id.

Defendant does not contest that the evidence was sufficient to establish the intent to distribute element of the crime. Rather, defendant contends that the evidence was insufficient to establish that he was in either actual or constructive possession of the marijuana.

As defendant notes, several factors weigh against a finding that he constructively possessed the marijuana in question. The State did not establish defendant's relationship to anyone in the apartment or that he lived at the apartment. Other occupants of the residence admitted ownership of the marijuana in the rear bedroom. There was no testimony that defendant was seen in or near the other bedroom where marijuana was located. The marijuana in the kitchen was not in open view. Finally, there was no evidence of recent drug use in the apartment.

However, these facts are not dispositive of the case. The defendant was observed engaging in two apparent narcotics transactions from the residence, and the apartment was a veritable warehouse of small quantities

of marijuana ready for sale.

In State v. Douglas, 30,393, p. 6 (La. App. 2 Cir 2/25/98), 707 So.2d 512, 516, the Second Circuit considered the issue of constructive possession in search and seizure cases involving the presence of multiple parties where no actual possession of the illegal substance is present, opining:

> Under certain factual settings, shared constructive possession by all the parties might be inferred and substantially proven. Yet, in other settings, some of the parties' proximity to the contraband and their prior access to and occupancy of the area may be much stronger than the more casual connection of the other persons with the scene. In such cases, the inferences indicating the stronger dominion and control of the actual occupants of the area can cast reasonable doubt on the implication of the constructive possession of the other parties present on the premises.

The circumstances in this case create a strong presumption that Sabrina Reed and Damion Arnolie exhibited the strongest measure of dominion and control over the marijuana found in the rear bedroom. However, the question remains whether defendant can be seen as a joint possessor of that marijuana as well, or alternatively, as being in constructive possession of the marijuana in the second bedroom or in the dryer.

In State v. Harris, 597 So.2d 1105 (La. App. 2 Cir. 1992), police entered a house where defendant was seated on a sofa with another subject. The police recovered a matchbox containing cocaine behind the couch.

Paraphernalia was located in another room. It was not established that defendant lived at the house. The court reversed the conviction, finding that it was possible for either of the two parties on the couch to have dropped the drugs at the time of the arrest.

In State v. Cann, 319 So.2d 396 (La. 1975), when a search warrant was executed, the defendant was found in a bedroom behind locked doors with a female person. No contraband was found on him or in the bedroom. Marijuana was found in the kitchen in plain view. Because the apartment belonged to someone else, and other people were found in the apartment, the court found that the evidence was not sufficient to uphold a finding that the defendant had constructive possession of the drugs. In finding that defendant neither shared possession, dominion, or control over the marijuana in the house, the court noted that there was no evidence that defendant knew or had reason to know that the marijuana was in the kitchen, that he lived in the apartment, or that he had been there on other occasions.

In contrast to Cann, the facts of this case reflect that defendant exhibited a strong measure of dominion and control over the residence even though it was not established if he was a resident. The officers observed defendant after initially exiting the apartment to apparently loiter in front of the structure. Upon his first encounter with an individual, defendant

received an unknown amount of U.S. currency, entered the house and returned with a small object, which he handed to the subject. Defendant's ability to come and go with all apparent freedom was exhibited when this process was repeated shortly thereafter. Certainly a logical inference to be drawn from these facts was that, if not a resident, defendant was at least more than a guest, perhaps something in the vein of a vendor. These facts could have led a reasonable jury to conclude that defendant had dominion and control over the apartment. He certainly had access to the marijuana in the dryer, if not elsewhere. Whether or not he may have or did share dominion and control with one or more of the persons apprehended in the case is of no moment.

Furthermore, the fact that defendant was observed engaging in two apparent narcotics transactions that required him to procure the drugs from within the residence was sufficient for a reasonable jury to conclude that defendant possessed the requisite guilty knowledge that the marijuana was present in the apartment. That the defendant provided a false name to the police might have contributed to the conclusion that he knew of the drugs as well. A jury is free to choose among reasonable constructions of the evidence. Viewing the evidence in the light most favorable to the State, it was sufficient to allow a reasonable jury to find beyond a reasonable doubt

that defendant possessed the marijuana.

ASSIGNEMENT OF ERROR NUMBER TWO

Defendant also argues that his counsel was ineffective, and that this deficiency prejudiced his defense. 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. See, e.g., State v. Peart, 621 So.2d 780, 787 (La.1993). It is well settled, however, that where the record contains sufficient evidence to decide the issue, and the issue is properly raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. State v. Hamilton, 92-2639 (La.7/1/97), 699 So.2d 29.

Defendant contends his attorney was deficient for "basically withdrawing his motion to suppress evidence." The record reflects that counsel did not call any witnesses at the motion to suppress evidence after the State proffered the search warrant. Defendant avers that his counsel was ineffective for failing to challenge the validity of the warrant, "specifically, that information forming the basis of that warrant may have been obtained illegally."

If this court were to decide this issue on appeal, defendant could be

deprived of an opportunity to raise the issue in post-conviction relief because the issue, once decided on appeal, cannot be raised a second time in post-conviction relief. La. C.Cr.P. art. 930.4 (A); State v. Newsome, 534 So.2d 87, 90 (La. App. 3 Cir. 1988). As such, we decline to address this issue at the present time.

ASSIGNMENT OF ERROR NUMBER THREE

Defendant asserts that his sentence of fifty years as a second offender is excessive and amounts to the needless infliction of pain and suffering. Defendant claims the trial court was biased because defendant was indicted for first-degree murder. Further, defendant maintains that the trial court placed too much emphasis on the presence of weapons.

Article 1, § 20 of the Louisiana Constitution prohibits excessive sentences. State v. Baxley, 94-2982, p.3 (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 (La. App. 4 Cir. 4/15/98), 715 So.2d 457. However, the penalties provided by the legislature reflect the degree to which the criminal

conduct is an affront to society. Baxley, 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. 2-3 (La. 3/4/98), 709 So.2d 672, 674; State v. Webster, 98-0807, p.3 (La. App. 4 Cir. 11/10/99), 746 So.2d 799, 801. 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, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So.2d 1215, 1217.

La. C.Cr.P. art. 894.1 specifically requires the trial court to "state for the record the considerations taken into account and the factual basis therefore in imposing sentence." However, articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions, is the goal of Art. 894.1. Where the record clearly demonstrates 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). Thus, a failure to comply with La. C. Cr. P. art. 894.1 does not render the sentence invalid if the sentencing choice is clearly

supported by the record and reflects that the sentence is not excessive. State v. Smith, 430 So.2d 31 (La. 1983); State v. Scott, 593 So.2d 704, 711 (La. App. 4 Cir. 1991). The reviewing court must also keep in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Quebedeaux, 424 So.2d 1009 (La.1982).

In imposing sentence in the instant case, the trial court stated:

> After having been arrested for the incident that led to his being charged by bill of information in Count 2, after having been arrested for that incident and released on bond, Mr. Coleman was arrested once again for the incident that forms the basis of Count 1, the count that he was convicted of. He was again released on bond in connection with that matter. While released on bond and out on bond, Mr. Coleman was arrested and indicted by the grand jurors of the State of Louisiana for the Criminal District Court for the Parish of Orleans for the offense of first degree murder. The court notes as did the jury that in connection with both Count 1 and Count 2, there were firearms present in connection with the drug distribution operation to which Mr. Coleman was a part of. Furthermore, the Court notes Mr. Coleman's violent propensities as exhibited by the facts and circumstances that led up to the charge in Count 2 relative to attempted simple escape from Officers Pedro Enis and Officer Delaney. The Court further notes that in connection with the police officers' attempt to take Mr. Coleman into custody on July 15th, 1997 that numerous supporters of his appeared on the scene, attempted to be overpowering with police officers [sic] and as Officer Travis McCabe described, "There was nearly a riot," which further convinces the Court that this defendant has serious violent propensities and that he will exhibit those propensities in an effort to protect his drug trafficking operations.
>
> The Court has considered the provisions of Louisiana Code of Criminal procedure Article 894.1. I find and hold as follows: That there is undue risk that during the period of a

> suspended sentence or probation that the defendant will commit another crime. The Court finds that the defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to a penal institution. The Court finds that a lesser sentence in this case will deprecate the seriousness of the defendant's crime. Furthermore, the Court finds that Mr. Coleman used firearms while in the commission of the crimes alleged and convicted of in the bill of information by the jury. And as mentioned previously, the Court is also particularly disturbed by the fact that this defendant while out on bond twice was arrested for other crimes, including the crime of first-degree murder. The Court is cognizant of the fact that on the multiple offender bill of information the sentencing range in this case is fifteen years to sixty years. The Court finds you to be a dangerous and incorrigible criminal, and I further find that any hopes of rehabilitation in your case or any chance of rehabilitation in your case would out weigh the potential danger that you pose to this community. Therefore, as to Count 1 of the bill of information, the sentence of thirty years in this case previously imposed is hereby vacated and set aside. And it's the sentence of the Court that you serve fifty years at hard labor in the custody of the Louisiana Department of Corrections with credit for time served without the benefit of probation, parole, or suspension of sentence. This sentence of fifty years is to be served consecutively with any other sentence you are serving, including but not limited to any probation or parole time that you may be backing up.

Defendant was convicted of possession with intent to distribute marijuana. As a second felony offender, defendant was subject to a possible sentence of not less than fifteen years but not more than sixty years. The trial judge considered the gravity of the crime and the defendant's violent propensities. He also noted that, while out on bond, the defendant was

arrested for two other crimes, including first-degree murder. Considering the defendant's criminal history and the facts of this case, we conclude that the sentencing judge properly tailored the punishment to fit this particular defendant and this particular crime. The judge deemed the defendant a danger to society, and the sentence imposed accomplishes the legitimate purpose of protecting society from further action by the defendant.

ASSIGNMENT OF ERROR NUMBER FOUR

Defendant contends the trial court erred in imposing his sentence without the benefit of parole. The assignment has merit. La. R.S. 40:966(B)(2) does not require that the sentence be served without benefit of parole, nor does La. R.S. 15:529.1 prohibit parole eligibility as a second offender. As such, we amend the defendant's sentence to remove that portion of the trial judge's decree.

CONCLUSION

Accordingly, for the foregoing reasons, the defendant's conviction is affirmed, and his sentence is affirmed as amended.

CONVICTION AFFIRMED; SENTENCE AFFIRMED AS AMENDED