NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2523**
VERSUS	*	**COURT OF APPEAL**
JAMES SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 390-687, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Chief Judge William H. Byrnes III
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Terri F. Love)

Harry F. Connick
District Attorney
Juliet Clark
Assistant District Attorney
619 So. White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Holli Herrle-Castillo
LOUISIANA APPELLATE PROJECT
P. O. Box 2333

Marrero, LA 70073
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AFFIRMED; SENTENCE AMENDED AND AS AMENDED, AFFIRMED

STATEMENT OF CASE

Defendant James Smith was charged by bill of information on July 10, 1997, with possession with the intent to distribute cocaine in violation of La. R.S. 40: 967. Defendant pleaded not guilty at his July 15, 1997, arraignment. A twelve-person jury found the defendant guilty as charged on July 29, 1999. On October 22, 1999, the defendant was sentenced to fifteen years without benefit of parole, probation or suspended sentence. On November 24, 1999, the defendant was found to be a multiple offender. The trial court vacated the original sentence, and re-sentenced the defendant to fifteen years with credit for time served.

STATEMENT OF FACT

Detective Gabriel Favroff, of the New Orleans Police Department, testified that he received information from a confidential informant that a man known by the nickname Potato Head was dealing drugs out of an

apartment in a senior citizen complex located at 3200 Garden Drive on the west bank. The informant also described the man as being a Black male, with a fair complexion and slim build, between the ages of forty-five and fifty-five years old. The defendant fit that physical description. Detective Favroff conducted a surveillance of an apartment on the third floor of the complex. The detective observed the defendant conduct three separate drug transactions from his apartment. The detective witnessed two Black males and a Black female all approach the apartment, knock on the door, converse with the defendant for a few seconds and give the defendant money. The defendant then re-entered his apartment, and returned with the drugs. Detective Favroff further testified that the following day he completed an application for a search warrant and an order, which was later signed by Judge Russo of Magistrate Court. In the search warrant the address of the apartment to be searched was given as 3200 Garden Drive, and the apartment number was listed as 311. Detective Favroff also noted in his application for the search warrant that a note taped to the door obstructed the apartment number. The detective surmised that the apartment number was 311 by counting the doors on the third floor.

Once the search warrant had been obtained, the detective and several other officers returned to the building to execute the warrant. Upon entering

the building, Detective Favroff saw the defendant standing alone in the lobby near the front desk. The officers approached the defendant and informed him of the warrant to search his apartment. The defendant and the officers went to the defendant's apartment. The defendant then unlocked and opened the door. The officers checked the apartment to make sure no one was inside, and then began to search for drug contraband.

Detective Favroff testified that he found a metal box underneath the defendant's bed containing a plastic bag. In turn, the plastic bag contained a white powder substance he believed to be cocaine. The box also contained another plastic bag containing a hard rock like substance he believed to be crack cocaine, as well as food stamps and a purple bag with coins in it. The detective further testified that he found still another plastic bag that contained a hard rock like substance in the pocket of a jacket in the defendant's closet. The detective also retrieved one hundred ninety-three dollars from the pants the defendant was wearing.

Officer Sanford Johnson, of the New Orleans Police Department, testified that he was one of the officers who aided in the execution of the search warrant. Officer Johnson further testified that upon entering the defendant's apartment he confiscated a plastic bag containing a white residue from the defendant's coffee table. The officer also retrieved

personal papers with the defendant's name and address, as well as a billfold that contained a Sam's card, a Louisiana driver's license, and a Medical Center of Louisiana Hospital card all in the defendant's name. In addition, Officer Johnson retrieved the note taped to the apartment door that read, "I'll be back in a few" and "Sorry, but I'm taking a bath." Once the note was removed from the door it was discovered that the apartment number was actually 310 not 311. Detective Favroff testified that it was the same apartment from which he had observed the defendant conduct the drug transactions during his surveillance.

N.O.P.D. Officer Lewis Martinez testified that he was also present at the execution of the search warrant on apartment 310 of 3200 Garden Drive. Officer Martinez recovered a plastic bag containing several other plastic bags, a pair of scissors, and rubber bands. The officer further testified that the items were found on a table in the defendant's living room and that he turned the items over to Detective Favroff, the lead officer on the case, to be logged in as evidence.

Marcel Foxworth, an officer with the New Orleans Police Department, testified that he remained at the entrance of the apartment to ensure that no one entered as the search warrant was being executed inside by the other officers.

Theresa Lamb, a Criminalist with the New Orleans Police Department Crime Lab, conducted three separate tests on the powder and rock substances found in the defendant's apartment. All three tests were positive for cocaine. Ms. Lamb also conducted two separate tests on the white powder residue found in the plastic bag in the defendant's apartment. Those tests were also positive for the presence of cocaine.

ERRORS PATENT

A review of the errors patent checklist revealed that there was an error in the sentence imposed by the trial court judge. La. R.S. 40:967 (B) (1), as it read in 1997 when the defendant committed the crime and was indicted, did not deny the defendant benefit of parole, probation, or suspended sentence. Between the time of the offense in July of 1997, and the time that he was sentenced on October 22, 1999, the statute was amended by Act 1284 of 1997, effective August 15, 1997. The Act 1284 of 1997 amendment (which is still in effect today) requires that the first five years of the sentence be without the benefit of parole, probation or suspension of sentence. However, it was error for the trial judge to apply this sentence retroactively to this defendant. The defendant is to be tried under the statute in effect at the time of the commission of the offense. State v. Barris, 533 So.2d 89, 90

(La.App. 4th Cir.1988). The trial judge sentenced the defendant to fifteen years with out the benefit of parole, probation, or suspension of sentence, which was illegal under the version of the statute in effect at the time of the commission of the offense. Even though as a second offender he is ineligible for probation, the court was without authority to deny parole eligibility. The prohibition of parole is therefore reversed.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error the defendant complains that the evidence was insufficient to support the conviction for possession with the intent to distribute 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).

Id. 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.

In State v. Mitchell, 99-3342 (La. 10/17/00), 772 So.2d 78, the Louisiana Supreme Court stated:

> "The actual trier of fact's rationalities credibility calls, evidence weighing, and inference drawing are preserved ... by the admonition that the sufficiency inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." State v. Mussall, 523 So.2d 1305, 1311 (La.1988). The reviewing court is not called upon to determine whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. Rather, the court must assure that the jurors did

> not speculate where the evidence is such that reasonable jurors must have a reasonable doubt. (citing 2 C. Wright, Federal Practice and Procedure, Criminal 2d, § 467, at 465-466 (1982)). The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. Id. Finally, the "appellate court is constitutionally precluded from acting as a 'thirteenth juror' in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact." State v. Azema, 633 So.2d 723, 727 (La. App. 1 Cir.1993).

Id. at p. 8, 772 So.2d at 83.

The elements of possession of cocaine with the intent to distribute as found in La. R.S. 40:967 (A)(1), are (1) proof that he defendant knowingly or intentionally possessed cocaine, (2) with the intent to distribute. The State need not prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support conviction. State v. Allen, 96-0138 (La.App. 4 Cir. 12/27/96), 686 So.2d 1017, 1020. A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. Allen, id, citing State v. Jackson, 557 So.2d 1034, 1035 (La.App. 4th Cir.1990). Under Louisiana law, intent to distribute controlled dangerous substances can be inferred from the circumstances of the transaction. State v. Johnson, 529 So.2d 142, 145 (La.App. 4 Cir.1988), citing La. R.S. 15:445. Certain factors are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous

substance. These factors include: (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether expert or other testimony established that the amount of drugs found in the defendant's possession is inconsistent with personal use only; and (4) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. State v. Hearold, 603 So.2d 731 (La.1992).

In State v. Thomas, 543 So.2d 540 (La.App. 4th Cir.1989), this court held that evidence of defendant's possession of thirty-three baggies of powder cocaine was sufficient to sustain defendant's conviction for possession of cocaine with the intent to distribute.

In the instant case the defendant had constructive possession of the cocaine found in his apartment. The defendant was the only person seen entering and exiting the apartment. During the execution of the search warrant the police confiscated mail with only the defendant's name, address, and apartment number that matched the information of the apartment that was intended to be search. Though not in the defendant's physical possession, the drugs were under his dominion and control. The defendant had the intent to distribute the drugs in his possession because Detective Favroff observed the defendant on three separate occasions conduct what

appeared to be drug transactions where money was exchanged for objects. The police confiscated plastic baggies and rubber bands, which could have been used to distribute the drugs found. Additionally, the drugs were in a form that was conducive to distribution to others. Therefore, the jury did not abuse its discretion in finding the defendant guilty as charged. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error the defendant complains the trial court erred by failing to suppress the evidence. Specifically, the defendant argues that the search warrant obtained to search his apartment contained an incorrect apartment number. The defendant further argues that the wrong apartment number came from a confidential informant who stated that they observed the defendant selling drugs from apartment 311 and not 310. Additionally, when Detective Favroff gave the wrong apartment number it created doubt as to whether the location set out in the search warrant was simply incorrect or the wrong apartment was searched.

A search warrant must particularly describe the place to be searched. U.S. Constitution Amendment IV; Louisiana Constitution of 1974, Article I Section 5; La. C.Cr.P. art. 162. The description in a search warrant

application is sufficient if the place to be searched is described in sufficient detail to enable the officer to locate it with reasonable certainty and with the reasonable probability that the police will not search the wrong premises. State v. Korman, 379 So.2d 1061 (La.1980). A discrepancy between the location described in the warrant and the location searched will generally not invalidate the search warrant. Korman, id. However, if police officers knowingly search entirely different premises than that described in the warrant, the evidence seized will be suppressed because the warrant did not particularly describe the place to be searched. State v. Manzella, 392 So.2d 403 (La.1980).

In State v. Diggs, 98-0964 (La.App. 4th Cir. 6/24/98), 715 So.2d 692, the officers learned from a tip of drug sales from 2614 ½ Louisiana Avenue. The officers set up surveillance of the building and saw various transactions between pedestrians and a man who would appear on the balcony on the right hand side of the building. The officers obtained a warrant listing that address, and they actually watched a similar transaction just prior to executing the warrant. However, as they executed the warrant, they learned the building was a four-plex, and the apartment from which the deals were being made was really 2214 ½ Louisiana Avenue. The trial court suppressed the evidence due to the discrepancy of the address, but on review this court

reversed. This court noted that the affidavit adequately described the building to be searched, including the reference to the upper right hand apartment. In addition the officer who conducted the surveillance and prepared the warrant was also present when the warrant was executed.

In the instant case the search of the defendant's apartment was valid. Detective Favroff, like the officer in Diggs, conducted a surveillance of the defendant's apartment after receiving a tip of drug dealing. Detective Favroff then obtained a search warrant. In his warrant application the detective noted that the apartment number on the apartment he observed was obstructed by a note taped on the door. The detective concluded that the apartment number was 311 after he counted the doors on the third floor. When the detective and the other officers who accompanied him to execute the warrant returned to the defendant's building, they met the defendant in the lobby. The defendant then escorted the officers to his apartment, the same apartment with the note on the door, and the defendant unlocked the door allowing the officers to conduct the search. Additionally, Detective Favroff was the officer who conducted the surveillance of the apartment, and he was present when the warrant was executed. Therefore, the wrong apartment number in the search warrant was an honest mistake and there was no danger that the wrong apartment was searched. This assignment of error

is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In this assignment of error the defendant complains the trial court erred in failing to allow the defendant to choose a trial by judge.

La. C.Cr.P. art. 780 governs the waiver of a jury trial. The article states in pertinent part that a defendant, not charged with a capital offense, may waive a trial by jury and elect to be tried by a judge. The defendant, who shall be informed at arraignment of his right to a judge trial, "shall exercise his right to waive trial by jury in accordance with the time limits set forth in Article 521. However, with permission from the court, he may exercise his right to waive trial by jury at any time prior to the commencement of trial." La. C.Cr.P. art. 780 (b). The time limits set forth in La. C.Cr.P. art. 521 are "fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inadequate."

The defendant was arraigned on July 15, 1997, at which time he entered a plea of not guilty. The minute entry notes that the defendant was informed of his right to trial by judge or jury. On July 31, 1998, the defendant, through counsel, withdrew his plea of not guilty and entered a

plea of guilty as charged. The minute entry reflects that the judge then personally interrogated the defendant as to the rights he was waiving. The entry spells out the rights enumerated by the judge with the right to trial by judge or jury being listed first. The record does not reflect when it occurred, but the defendant obviously withdrew his plea of guilty and elected to be tried on the charges. The trial judge in a discussion with the defendant regarding a pro-se motion filed by the defendant before sentencing, in which the defendant stated that defense counsel failed to inform him of his choice as to a jury or judge trial, stated on the record that he personally advised the defendant of his right to trial by judge or jury. The defendant was informed on two separate occasions of his right to trial by judge or jury, and the trial judge on the record noted that the right was explained to the defendant. Therefore, this assignment of error is without merit.

DECREE

For the foregoing reasons, the defendant's conviction is affirmed and his sentence is amended to delete the prohibition of parole eligibility, and as amended, affirmed.

CONVICTION AFFIRMED; SENTENCE AMENDED AND AS AMENDED, AFFIRMED