NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0629**
VERSUS	*	**COURT OF APPEAL**
TERRANCE WILSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 401-422, SECTION “A”
Honorable Charles L. Elloie, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Miriam G. Waltzer, and Judge Dennis R. Bagneris, Sr.)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF CASE

On September 14, 1998, the defendant, Terrance Wilson, was charged by bill of information with possession with the intent to distribute cocaine in violation of La. R.S. 40:967. The defendant pled not guilty at his arraignment on October 27, 1998. A preliminary hearing was held on November 17, 1998 at which the trial court found probable cause. The defendant was found guilty as charged after a jury trial on September 14, 1999. A sentencing hearing was conducted on September 28, 1999. The trial court sentenced the defendant to serve ten years at hard labor without benefit of probation, parole or suspension of sentence. On the same date, the State filed a multiple bill of information. However, the trial court granted defendant's motion to quash the multiple bill on December 19, 2000.

STATEMENT OF FACT

On September 8, 1998, Officer Melvin Williams and his partner were on routine patrol. Officer Williams stated that he observed the defendant as he approached the eleven hundred block of Carondelet Street. When the defendant saw the police vehicle, the defendant nervously turned around, ran

up a set of stairs and dropped a Frito Lay corn chip bag on the steps. The officers exited their vehicle and followed the defendant. Officer Williams stated that he apprehended the defendant and recovered the chip bag. There were eighty-six pieces of crack cocaine in the bag. Ninety-five dollars in United States currency was found on the defendant in a search incident to his arrest.

Glen Gilyot, a civilian criminalist with the New Orleans Police Department Crime Lab, testified that the objects retrieved by Officer Williams tested positive for cocaine.

ERRORS PATENT AND ASSIGNMENT OF ERROR NUMBER 4

A review of the record for errors patent reveals that the trial court imposed an illegally excessive sentence. Under La. R.S. 40:967 as it existed at the time of the offense, only the first five years of the sentence is to be served without benefit of probation, parole or suspension of sentence. The trial court stated that the defendant's entire ten-year sentence was to be served without benefits. Thus, the defendant's sentence should be amended to provide that the first five years of the sentence is to be served without benefit of probation, parole or suspension of sentence.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends that the trial court erred when it denied the defendant's motion to suppress evidence. The defendant argues that there was no reasonable suspicion for an investigatory stop. A review of the appeal record reveals that the defendant did not file a motion to suppress evidence and did not object to the admission of the cocaine at trial. Therefore, this issue has not been preserved for review on appeal. La. C.Cr.P. article 841.

ASSIGNMENT OF ERROR NUMBER 2

The defendant also argues that the State produced insufficient evidence to support his conviction for possession with the intent to distribute cocaine.

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, 61 L.Ed.2d 560 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

To support defendant's conviction, the State must prove that the defendant "knowingly" and "intentionally" possessed the cocaine with the "intent to distribute". La. R.S. 40:467; State v. Williams, 594 So.2d 476, 478 (La. App. 4 Cir. 1992). Specific intent to distribute may be established

by proving circumstances surrounding defendant's possession which give rise to a reasonable inference of intent to distribute. State v. Dickerson, 538 So.2d 1063 (La. App. 4 Cir. 1989).

In State v. Hearold, 603 So.2d 731, 735 (La. 1992), the Louisiana Supreme Court identified five factors which are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance as follows:

> (1) [W]hether 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 the amount of drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.

In State v. Cushenberry, 94-1206, p. 6 (La. App. 4 Cir. 1/31/95), 650 So.2d 783, 786, this Court noted that the Hearold factors were "enunciated as 'useful' in determining whether circumstantial evidence is sufficient to prove intent to distribute", but this Court held that the evidence need not "fall squarely within the factors enunciated to be sufficient for the jury to find the requisite intent to distribute."

In the case at bar, the defendant argues that there was no evidence to suggest that he had an intent to distribute drugs. The defendant is incorrect.

Officer Williams testified that he observed the defendant discard the chip bag when the defendant saw the police vehicle. The officer retrieved the bag and found eighty-six pieces of crack cocaine in the bag. The defendant actions were indicatives of the distribution of drugs. Further, no drug paraphernalia suggesting personal use was found on the defendant. Also, the eighty-six rocks of cocaine in the bag that were discarded by the defendant, is consistent with distribution not personal use. Also, the defendant had $95 dollars in his possession which indicates money in the possession of a small time distributor. Typically, a drug user would not have any money in his possession it would have been spent of drugs.

Officer Williams acknowledged that most of the pieces found in the bag were "crumbs" or "shakes," which the officer described as "crumbs that you can put in a crack pipe to smoke it." Criminalist Glen Gilyot also testified that many of the cocaine fragments were "simply fragments of another piece." The State produced sufficient evidence to prove, beyond a reasonable doubt, that the defendant possessed the cocaine with intent to distribute. Thus, the defendant's conviction for possession with intent to distribute cocaine is affirmed.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

The defendant further assigns as error the trial court's commenting on the State's evidence in the presence of the jury. The alleged comments occurred during the defendant's cross-examination of Officer Williams concerning the bag the defendant allegedly threw down. Defense counsel was questioning the officer on whether the bag was a potato chip bag or a corn chip bag.

> Q. So again I'll ask you on November 17th you told us it was a potato chip bag is that not correct?
>
> A. Yes, sir.
>
> Q. And this is clearly a Frito bag, is that correct, corn chips?
>
> A. Corn chip bag, yes, sir.
>
> Q. You know the difference between potato chips and corn chips?
>
> A. If you refer to the report it says corn chip.
>
> Q. I didn't ask you that. Do you know the difference between a potato chip bag and a corn chip bag?
>
> A. Yes, sir, I do.
>
> Q. November 17th it was potato chips, now it's corn chips?
>
> A. That could easily have been a mistake on my part it was a chip bag. It's clearly a Frito Lay chip bag. In the report it states - -
>
> MR. BURNS:
> Objection, Your Honor, we've covered this ground - -
>
> MR. FONTENELLE:
> Your Honor, if he doesn't want to hear it I wouldn't want to hear it either.

MR. BURNS:

. . . I think I’m making an objection. Potato chip, corn chip, I think the Officer has explained.

THE COURT:

I think he has Mr. Fontenelle, we’re not going to dwell on that.

MR. FONTENELLE:

No, sir, I’m ready to continue to move on.

*   *   *   *   *   *

Q. Were these other people with Mr. Wilson?

A. I have no idea, sir.

Q. Did they appear to be with Mr. Wilson?

A. Everybody was standing in a crowd. They were standing out front like I said.

Q. They were all standing - -

MR. BURNS:

Your Honor, at this point I think I’m going to object to the relevance of the other people. I think the Officer again has explained that he checked those people out, they were fine, they didn’t run, they were released.

MR. FONTENELLE:

Your Honor, the issue is who threw down the bag.

THE COURT:

Overruled, I’ll let him explore. The Officer, he’s holding his own.

MR. BURNS:

Thank you.

BY MR. FONTENELLE:

Q. They were all standing around - -

MR. FONTENELLE:
Your Honor, I object to that commentary by the Court. I believe it's a commentary on the witness's testimony.

THE COURT:
No, it's not.

MR. FONTENELLE:
Well I believe it is and if the record will so reflect.

THE COURT:
I'm just saying I'm overruling his objection.

MR. FONTENELLE:
Please let the record reflect.

La. C.Cr.P. art. 772 provides:

> The judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

One element of a fair trial is the requirement of complete neutrality on the part of the judge. State v. Jones, 593 So.2d 802 (La.App. 4 Cir.1992). It is the duty of the trial judge to abstain from any expression of opinion or comment on facts or evidence in a criminal jury trial. State v. Williams, 375 So.2d 1379 (La.1979). Reasons given by the trial judge in the jury's presence for his rulings on objections for admitting or excluding evidence or explaining the purpose for which evidence is offered or admitted are not

objectionable as comments or expressions of opinion provided they are not unfair or prejudicial to the accused. State v. Edwards, 420 So.2d 663 (La.1982).

The transcript reveals that the comments made by the trial judge were not prejudicial or improper. The trial judge was simply providing the reasons for his rulings on the State's objections. In the first instance, the trial judge granted the State's objection noting that defense counsel's questioning was repetitive. In the second instance, the trial judge overruled the State's objection that defense counsel's questions were not relevant and that he was badgering the witness. The trial court noted that the information sought by defense counsel may have been relevant and that defense counsel was not harassing the officer.

This assignment is without merit.

CONCLUSION

Accordingly, the defendant's conviction and sentence for possession with the intent to distribute cocaine is affirmed.

CONVICTION AND SENTENCE AFFIRMED