

STATE OF LOUISIANA

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NO. 2001-KA-0908

VERSUS

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COURT OF APPEAL

**BRIAN C. FALLEN AND
RICKEY SPIKES**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 407-690, SECTION "D"
Honorable Frank A. Marullo, Judge

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge Terri F. Love and
Judge Max N. Tobias, Jr.)

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CONVICTIONS REVERSED;
SENTENCES VACATED;
REMANDED.

The defendants, Brian Fallen and Rickey Spikes, were charged by a bill of information filed June 22, 1999, with distribution of crack. Both entered a not guilty plea at their arraignment held on June 24, 1999. A hearing on motions was conducted on July 27, 1999. The trial court found probable cause and denied the motion to suppress the evidence. On August 25, 1999, the defendants were tried before a twelve-member jury and the following verdicts were returned: Fallen was found guilty as charged of possession of cocaine with intent to distribute, and Spikes was found guilty of attempted possession with intent to distribute cocaine. Sentencing occurred on November 19, 1999. Fallen was sentenced to serve fifteen years at hard labor, and Spikes was sentenced to serve five years at hard labor. A multiple bill was filed as to each defendant. Fallen was adjudicated a third felony offender on November 3, 2000. After vacating the previous sentence imposed, the trial court resentenced Fallen to serve life imprisonment. On March 16, 2001, the trial court found Spikes not to be a multiple offender.

After receiving complaints of drug trafficking in an apartment building located at 1531 Governor Nicholls Street, on April 17, 1999,

Officer Arthur Powell parked his unmarked vehicle at the corner of Esplanade Avenue and North Robertson Street, which was near the apartment building. There, he observed Fallen ride up on a bicycle, and Spikes approached Fallen giving him money in exchange for an object. Fallen then returned to the apartment building. Officer Powell believed he has just witnessed a drug transaction, so he radioed for help. Detective Patrick Joseph responded.

As the detective approached the area, Spikes flagged him down, and offered him crack cocaine. The detective accepted the offer and got out of his vehicle. He walked with Spikes to the rear of the apartment building. Spikes repeatedly knocked on a door, but no one responded. As they walked back to the detective's car, Fallen appeared in the front, upstairs window of the apartment building and asked Spikes what he needed. Spikes said a "twenty," and Fallen told them to return to the back of the apartment building. The door was open, and Fallen was standing inside. Fallen displayed a rock, which appeared to be crack cocaine, and the exchange occurred. Spikes and the detective returned to the vehicle and got inside. The detective drove for a minute then parked underneath the interstate. He intended to arrest Spikes, but became concerned because Spikes held a screwdriver in his hand. Detective Joseph exited the vehicle and attempted

to slide his police radio out from under the seat so that he could call for help. Spikes saw this and ran. After a foot chase, Spikes was caught. No other drugs were found in the search incident to Spikes' arrest.

Detective Joseph and another officer returned to the apartment building located at 1531 Governor Nicholls Street. Detective Joseph whistled for Fallen. Fallen again met the detective at the rear door of the apartment building. Fallen was on his bicycle. The detective told Fallen that he wanted to purchase more cocaine and gave Fallen ten dollars, which Fallen placed in the right, front pocket of his jeans. Fallen told the detective that he had to go around the corner to get the additional drugs, but before Fallen could leave, he was arrested. Forty-five dollars was found in Fallen's pocket during the search incident to his arrest. The detective then received Fallen's permission to put his bicycle in the apartment. Upon opening the door, the detective observed in plain view a crack pipe and small baggie, both containing residue. Testing on the rock purchased by Detective Joseph and the residue contained in the pipe proved that the substances were cocaine. Testing on the small baggie showed nothing.

Because we find that the defendants' sole assignment of error to be of merit requiring a reversal and remand for a new trial, we pretermite a discussion of errors patent.

In their sole assignment of error, the defendants assert that the trial court erred in accepting a verdict that was unresponsive to the charged offense.

The defendants were charged with distribution of cocaine. Under La. C.Cr.P. art. 814(A)(48), the only responsive verdicts that may be rendered to a charge of distribution of cocaine are: (1) guilty; (2) guilty of attempted distribution of cocaine; (3) guilty of possession of cocaine; (4) guilty of attempted possession of cocaine; and (5) not guilty.

The verdict sheet presented to the jury in this case listed the responsive verdicts as: (1) guilty as charged; (2) guilty of attempted possession of a controlled dangerous substance, to wit, cocaine, with intent to distribute; (3) guilty of possession of a controlled dangerous substance, to wit, cocaine; (4) guilty of attempted possession of a controlled dangerous substance, to wit, cocaine; and (5) not guilty.

The jury found Brian Fallen guilty as charged of possession of a controlled dangerous substance, to wit cocaine, with the intent to distribute. The jury found Rickey Spikes guilty of attempted possession of a controlled dangerous substance, to wit, cocaine with the intent to distribute. Hence, the verdicts rendered are unresponsive and should not have been accepted by the trial court. La. C.Cr.P. art. 813 provides:

If the court finds the verdict is incorrect in form or is not

responsive to the indictment, it shall refuse to receive it, and shall remand the jury with the necessary oral instructions. In such a case, the court shall read the verdict and record the reasons for refusal.

In State v. Brown, 96-0595 (La. App. 4 Cir. 11/20/96), 684 So.2d 521, this Court considered a similar case. Brown was charged with distribution of cocaine, but the district court presented the jury with a verdict sheet that contained the same list of responsive verdicts as given on the verdict sheet in the instant case. The jury returned a verdict of “guilty as charged.” This Court found that the error in the verdict constituted an error patent requiring no objection and remanded the case for a new trial, citing State v. Thibodeaux, 380 So.2d 59 (La. 1980). We note that unlike in Brown, the trial court here also charged the jury on the incorrect responsive verdicts.

For the foregoing reasons, the defendants’ convictions and sentences are reversed and set aside, and this matter is remanded for a new trial.

REMANDED.

CONVICTIONS REVERSED;
SENTENCES VACATED;