

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2001-KA-2102**
VERSUS * **COURT OF APPEAL**
RODERICK BURNS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
*
*
*
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 407-363, SECTION "I"
Honorable Raymond C. Bigelow, Judge
* * * * *
Judge Dennis R. Bagneris, Sr.
* * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,
and Judge David S. Gorbaty)

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

Sherry Watters
LOUISIANA APPELLATE PROJECT
P. O. BOX 58769

New Orleans, LA 70158-8769

COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AFFIRMED SENTENCE AMENDED, AFFIRMED AS AMENDED

STATEMENT OF CASE

On June 9, 1999, defendant, Roderick Burns, was charged by bill of information with distribution of cocaine in violation of La. R.S. 40:967. The defendant pled not guilty at his arraignment on June 25, 1999. A preliminary and suppression hearing was held on July 23, 1999. The trial court found probable cause and denied defendant's motion to suppress evidence. The defendant was found guilty as charged after a jury trial on August 30, 1999. The State filed a multiple bill of information alleging defendant was a second felony offender. The defendant pled not guilty to the multiple bill. A multiple bill hearing was held on May 12, 2000. The trial court found that the State failed to meet its burden to prove that the defendant was a second felony offender. The trial court then sentenced defendant to ten years at hard labor without benefits of probation, parole or suspension of sentence. On June 18, 2001, the defendant was granted an out of time appeal.

STATEMENT OF FACT

Detective Donald Polk was working in an undercover capacity on May 11, 1999. Polk was dressed in plainclothes and equipped with a recording device and a transmitter. Polk testified that he encountered the defendant, Roderick Burns, in the 7300 block of Chef Menteur Highway. The officer approached the defendant and asked the defendant if he could help the officer purchase a couple of dime bags of cocaine. The defendant stated that he did not have any cocaine with him but he could take the officer to someone he knew who had some cocaine. The defendant got into the officer's vehicle and they drove to a location across from Dwyer, in the 6600 block of Harbor View. The officer gave the defendant two ten dollars bills (the currency had been copied and marked). The defendant exited the vehicle and went to the residence at 6640 Harbor View. The defendant knocked on the door. The door was opened by a woman wearing a red blouse. She let the defendant in the house. When the defendant returned to the officer's vehicle, the defendant gave the officer one piece of crack cocaine. Detective Polk then gave the signal to the other officers that the transaction had occurred. The takedown teams arrived and arrested both the defendant and Detective Polk. After the other officers took the defendant to Central Lockup, Detective Polk returned to 6640 Harbor View and maintained surveillance on the residence. Detective Polk advised the

officers that the female, later identified as May Parker, was leaving the residence with two black males in a GMC truck.

Officer Joseph Tafaro, a criminalist with the New Orleans Police Department Crime Lab, testified that he examined the substances retrieved from the defendant and Parker. The substances tested positive for cocaine.

Detective Derek Burke testified that he had photographed the currency that he gave to Detective Polk to use in the undercover operation. Detective Burke was also part of the surveillance team who observed Detective Polk engage the defendant in conversation. The officer continued the surveillance when Polk and the defendant drove to the 6600 block of Harbor View.

Detective Burke observed the defendant exit Polk's vehicle and enter the residence at 6640 Harbor View. The defendant returned to Polk's vehicle, and he and Polk left the area. The defendant and Polk were stopped by the arrest team at the intersection of West Lake and Dwyer. After the defendant was taken away, Detective Polk got into Detective Burke's vehicle, and the two officers returned to 6640 Harbor View where they maintained surveillance on the residence. The officers observed May Parker leave the residence and enter a GMC truck. Parker was with two black males in the truck. Detective Burke advised other officers that Parker had left the residence. Parker was later arrested by other officers. Detective Burke

assisted in the execution of the search warrant on Parker's house. No narcotics were found in the house. However, the officers found two hundred dollars in the residence.

Detective Jake Schnapp was part of the take down team. He and his partner, Detective Sislow, stopped the defendant and Detective Polk. They arrested the defendant for distribution of crack cocaine. A short time later, Detective Schnapp stopped the GMC truck in which Parker was a passenger. The officer stopped Parker at the intersection of Downman and Dwyer. The officer advised Parker that she was under arrest for distribution of cocaine and advised her of her rights. Parker gave the officer cocaine that she had hidden under her blouse. One hundred ninety-six dollars were found in Parker's right front pant's pocket. Detective Schnapp informed Parker that the officers intended to obtain a search warrant for her residence. Parker then agreed to allow the officers to search the residence. Upon searching the residence, two hundred dollars were found in one of the bedrooms.

Detective Nicole Gauch assisted with the surveillance of Detective Polk and the defendant. She monitored Polk's conversation with the defendant. The officer heard Polk ask the defendant if the defendant could help Polk purchase a twenty-dollar piece of crack cocaine. The defendant told Polk that he could take Polk to a place where a purchase could be made.

The defendant entered Polk's vehicle, and they drove to the 6600 block of Harbor View. The defendant exited Polk's vehicle and went to 6640 Harbor View. The defendant knocked on the door which was answered by Parker. The defendant entered the residence. A short time later, the defendant left the residence and entered Polk's vehicle. Polk left the area and Polk and the defendant were detained at the intersection of Dwyer and West Lake.

Officer Joseph Joia was part of the take down team which detained and arrested the defendant. Officer Joia searched the defendant after his arrest and found nothing.

Nequil Dupron, a friend of May Parker's daughter, testified that he was at May Parker's house on May 11, 1999. Dupron testified that the defendant came to Parker's apartment at approximately 8:30 a.m. The defendant walked in and asked if he could use the restroom. The defendant went into the bathroom. When he came out, he gave Parker some money and told her that he would give her the rest later. He stated that he did not see Parker give the defendant any drugs. Dupron testified that he was at the residence when the police arrived and searched the house. The officers found money in a purse. Dupron acknowledged that he was not questioned or searched by the officers.

May Parker testified that she resided at 6640 Harbor View. She stated

that the defendant came to her house at approximately 8:30 a.m. on May 11, 1999. He asked to use the restroom. When the defendant came out of the bathroom, he gave Parker part of the money that she had loaned him. The defendant gave her forty dollars but still owed her more. She stated that she did not sell the defendant any drugs. Shortly after the defendant left, Parker left the residence with two male friends. The police stopped them. She gave the officers the cocaine and money that was on her person. Parker was advised of her rights and told of the officers' intent to obtain a search warrant for her residence. She consented to a search of her house. Parker stated that the money found in her purse was money she had won at a casino. She denied selling drugs to the defendant. She acknowledged that she smoked crack cocaine.

ERRORS PATENT AND ASSIGNMENT OF ERROR NUMBER 2

A review of the record reveals a patent error in the defendant's sentencing. The trial court sentenced the defendant to serve ten years without benefit of probation, parole or suspension of sentence. However, La. R.S. 40: 967 provided, at the time of the offense, that only the first five years of the sentence was to be served without benefit of probation, parole or suspension of sentence. Accordingly, the defendant's sentence should be amended to provide that only the first five years of the sentence is to be

served without benefit of probation, parole or suspension of sentence.

ASSIGNMENT OF ERROR NUMBER 1

In this assignment, the defendant contends that the State failed to produce sufficient evidence to sustain his conviction for distribution of cocaine.

The standard of appellate review for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A credibility determination is within the discretion of the trier of fact and will not be disturbed unless clearly contrary to the evidence. State v. Vessel, 450 So.2d 938 (La. 1984).

The issue of sufficiency relative to a purchase of narcotics with the alleged assistance of an intermediary was discussed by this court in State v. Parker, 627 So.2d 210, 212 (La. App. 4 Cir. 1993), as follows:

"Distribute" is defined in LSA-R.S. 40:961(13) as "to deliver a controlled dangerous substance ... 'Distributor' means a person who delivers a controlled dangerous substance...." "Deliver" is defined in LSA-R.S. 40:961(9) as "... the transfer of a controlled dangerous substance whether or not there exists an agency relationship." In addition, jurisprudence has defined "deliver" as transferring possession or control. State v. Martin, 310 So.2d 544, 546 (La.1975); State v. Simon, 607 So.2d 793 (La.App. 1st Cir.1992), writ den., 612 So.2d 77 (La.1993). . . . A defendant may be guilty as a principal in the crime of distribution if he aids and abets in the distribution or indirectly

counsels or procures another to distribute the controlled dangerous substance. State v. Parker, 595 So.2d 765 (La.App. 4th Cir.1992).

La.R.S. 14:24 defines principals as: "[A]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime...." See State v. Brooks, 505 So.2d 714 (La.1987), cert. den. Brooks v. Louisiana, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987); State v. Watson, 529 So.2d 94 (La.App. 4th Cir.1988), writ den. 535 So.2d 740 (La.1989). To support a defendant's conviction as a principal, the State must show that the defendant had the requisite mental state for the crime. Brooks; State v. Spotville, 583 So.2d 602 (La.App. 4th Cir.1991), writ den., 585 So.2d 577 (La.1991). Distribution of cocaine requires only general intent, and such intent is established by mere proof of voluntary distribution. State v. Chatman, 599 So.2d 335 (La.App. 1st Cir.1992).

This court, in Parker, 627 So.2d at 213, compared the facts of that case with those of other reported cases. In Parker, a third party, Albert Jones, agreed to sell two rocks of cocaine to an undercover police officer for fifty dollars. The evidence revealed that defendant Parker's participation consisted of merely asking Jones if he could examine the cocaine, looking at it, then saying to the officer, "It looks okay." The court found the evidence was insufficient to prove that the appellant was involved in the distribution. The court noted that, in other cases involving principals to distribution of contraband offense, the principal played a much more active role in the planning and orchestrating of the sale.

The court found the defendant was a principal in State v. Goins, 568 So.2d 231 (La. App. 3 Cir. 1990), in which a state witness offered direct evidence that the defendant totally orchestrated the narcotics purchase by initiating the drug transaction, and deciding the time and place where the parties would later meet to complete the drug transaction. In Goins, the defendant drove the state witness to two locations for the specific purpose of "finding cocaine to sell him."

In State v. Parker, 595 So.2d 765 (La. App. 4 Cir. 1992), the defendant flagged down an undercover officer and informed the officer that his brother-in-law had crack cocaine for sale. That defendant entered the officer's vehicle and directed the officer to a street corner and arranged for the purchase by the undercover officer of two rocks of cocaine for twenty dollars. This court found that any rational trier of fact could have found that the defendant aided and abetted in the commission of the crime of distribution of cocaine.

In State v. Fontenot, 524 So.2d 867 (La. App. 3 Cir.1988), the defendant arranged for a sale of marijuana between an associate and an undercover officer. The defendant in that case accompanied both men outside a bar and was present when the transaction occurred. After the exchange, the defendant commented about the high quality of marijuana that

the officer had purchased. The Third Circuit concluded that this evidence was sufficient to convict the defendant as a principal to the crime of distribution of marijuana.

Similarly, the Second Circuit held, in State v. Cook, 460 So.2d 1075 (La. App. 2 Cir. 1984), that instructions given by the defendant to the officer, to drive one block to a street where a male would be waiting to hand the man the money and to receive from him the marijuana, constituted aiding and abetting in the commission of the offense of distribution of marijuana.

In the case at bar, Detective Polk testified that when he asked the defendant about purchasing cocaine, the defendant told the officer that he could take him to someone who had some cocaine. The defendant entered Polk's vehicle and instructed Polk to drive to the 6600 block of Harbor View. Before exiting Polk's vehicle, he took the twenty-dollar bill from Polk. The defendant then went to the residence at 6640 Harbor View and was admitted into the residence by May Parker. The defendant exited the residence shortly thereafter and returned to Polk's vehicle. The defendant then gave Polk a rock of crack cocaine. The officers involved in the monitoring and surveillance of Detective Polk and the defendant corroborated Detective Polk's testimony. Officer Joseph Tafaro testified that the substance the defendant gave to Polk testified positive for crack

cocaine. The testimony revealed that the defendant offered to assist in the purchase of cocaine. While he did not have any cocaine on him for sale, he offered to take Detective Polk to someone who the defendant knew had cocaine for sale. The defendant took the officer's money, entered the residence at 6640 Harbor View and then exited the residence with a rock of crack cocaine that he gave to the officer. The testimony presented by the State was sufficient for a jury to conclude, beyond a reasonable doubt, that the defendant was guilty of distribution of cocaine.

This assignment is without merit.

CONCLUSION

Accordingly, the defendant's conviction is affirmed. The defendant's sentence is amended to provide that only the first five years of the sentence is to be served without benefit of probation, parole or suspension of sentence. The defendant's sentence, as amended, is affirmed.

**CONVICTION AFFIRMED SENTENCE AMENDED, AFFIRMED AS
AMENDED**

