

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * NO. 2002-KA-0570
VERSUS * COURT OF APPEAL
MICHAEL BROOKS * FOURTH CIRCUIT
* STATE OF LOUISIANA
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 404-219, SECTION "G"
Honorable Julian A. Parker, Judge

Judge Miriam G. Waltzer

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay III,
Judge Dennis R. Bagneris, Sr.)

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AFFIRMED.

On 14 January 1999, a bill of indictment was filed against Michael Brooks charging him with possession of heroin with intent to distribute in violation of La. R.S. 40:966(A) and also with possession of more than 28 but less than 200 grams of cocaine in violation of La. R.S. 40:967(F)(1)(a). At his arraignment on 20 January Brooks pleaded not guilty. After a hearing on 19 February the trial court found probable cause and denied the motion to suppress the evidence. A trial begun on 17 April was declared a mistrial on 18 April. After a trial on 10 September 2001, a twelve-member jury found the defendant guilty of the responsive verdicts of attempted possession of heroin and attempted possession of more than 28 grams of cocaine. Brooks was sentenced on 26 October to serve two years and eleven months at hard labor on each count; the terms are to run concurrently. The court ordered him to pay \$2,490 to the Judicial Expense Fund and a \$10 assessment fee to the District Attorney's Office. The defendant's motion for an appeal was granted.

At trial Sergeant Michael Harrison testified that on 22 December

1998, he applied for a search warrant for Apartment A at 2811 Magnolia Street as part of his investigation of cocaine sales involving the defendant and Danny Nelson. After receiving the warrant, he went to the rear door of Apartment A on 24 December at 1 a.m. and “breached” the door; when it opened, he saw Michael Brooks and Danny Nelson getting up from the kitchen table where they had been sitting. Both men ran through the living room and out the front door. Two police officers, which were standing outside the front door, apprehended the men. The sergeant described the kitchen table as a small round kitchenette table with two chairs near it. The table contained a plate of cocaine—some of it powder and some of it rocks—and plastic bags with which to package the drug. Some of the cocaine had been wrapped. A razor blade, a scale, a sifter, and a loaded nine-millimeter pistol as well as twelve packets of heroin, a calculator, spoon, and scissors were all set out on the table. When the sergeant entered the kitchen he found a woman hiding behind the door. Donna McClinton, the lessee of the apartment, and another woman were in the living room. Pictures of the kitchen table were shown to the jury. The sergeant assumed that everyone in the apartment was involved with the drugs because the kitchen table was in plain view of anyone in the living room, and so everyone was arrested. In a search incident to arrest, Michael Brooks was

found to have a bag containing 38.27 grams of powdered cocaine and another bag containing 48.6 grams of crack cocaine in his pocket. He also had \$731 in another pocket. Under cross-examination, the sergeant stated that he began his investigation on 17 December and that he had the names of Danny Nelson and Donna McClinton, but he knew the second man only as “Duke.” “Duke” proved to be Michael Brooks’ nickname; however, the officer did not ever see Brooks during the investigation and saw him only in the kitchen when the police entered the apartment. The officers knocked on the door, heard some movement within, and then hit the door with a battering ram twice. After the first blow, the door opened enough for the sergeant to see the defendant and Nelson getting up from the kitchen table. The parties entered into a stipulation that fingerprints were taken from the items on the kitchen table and the results were negative as to the defendant and Danny Nelson.

Detective Wayne Jacque, who was working with Sergeant Harrison, also testified. He told the jury that he hit the door with the ram, and when it opened slightly, he saw two men getting up from the kitchen table. The detective said about five seconds passed from the time he knocked on the kitchen door until the time he hit the door with the ram the first time. His testimony tracked that of his partner, Sergeant Harrison.

Ms. Kim Bolden, assistant manager for public housing in the C.W. Peete Housing Development, testified that she had examined the lease and found that Donna McClinton resided in Apartment A at 2811 Magnolia Street and Danny Nelson lived in Apartment B in the same building. No evidence was presented to show that Michael Brooks resided in either of those apartments.

Officer Harry Parker testified that he was standing at the front door of Apartment A when Michael Brooks and Danny Nelson ran out. He apprehended Brooks and Officer Gregory Hills stopped Nelson. When the officer patted Brooks down for weapons, he found none. (Later, in the apartment, the defendant was found to be carrying drugs). The officer went into the apartment and noticed drugs on the kitchen table.

Captain Maxie Jefferson of Central Lockup testified that an arrest register is created when someone is booked. On Brooks' arrest register his address is listed at 2811 Magnolia Street.

Officer Ed Delery, an expert in light examination, took fingerprints from the plastic bags, firearm, and drugs found in this case. He found no fingerprints that connected Brooks or Nelson to any of the items tested.

The parties stipulated that they would accept the report from the crime laboratory. The report showed that the cocaine and heroin recovered in this

case were tested and proved positive in each case.

Lieutenant Reginald Jacque, an expert in detection, packaging and distribution of controlled dangerous substances, testified as to the difference between powdered and crack cocaine, the use of a sifter in packaging cocaine, the use and packaging of heroin, and the use of a digital scale in packaging cocaine. Lieutenant Jacque opined that 122 grams of cocaine, twelve foils of heroin, a loaded weapon, scale, sifter, and plastic bags found in one kitchen would indicate that the apartment was used for retail distribution of controlled dangerous substances.

A review of the record for errors patent reveals none.

In a single assignment of error, the defendant argues that the evidence is insufficient to support the conviction for attempted possession of heroin.

This court, in considering a similar situation in State v. Brent, 2000-0072 (La. App. 4 Cir. 11/29/00), 775 So. 2d 565, set out the following standard:

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *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).

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. LSA-R.S. 15:438. LSA-R.S. 15:438 is not a separate test from *Jackson v. Virginia, supra*, but rather is 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, supra*.

LSA-R.S. 40:966(C) makes it unlawful for any person to knowingly or intentionally possess heroin, a controlled dangerous substance classified in Schedule I. To prove a defendant attempted to possess a controlled dangerous drug, the State must prove that the defendant committed an act tending directly toward the accomplishment of his intent, i.e. possession of the drugs. *State v. Chambers*, 563 So.2d 579 (La. App. 4 Cir. 1990). The State need not prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support the conviction. See *State v. Trahan*, 425 So.2d 1222, 1226 (La. 1983); see also *State v. Cann*, 319 So.2d 396, 397 (La. 1975). The mere presence of a defendant in the area where the narcotics were found is insufficient to prove constructive possession. See *State v. Collins*, 584 So.2d 356, 360 (La. App. 4 Cir. 1991); see also *Cann, supra* at 397.

Furthermore, in *State v. Holmes*, 99-0898 (La. App. 4 Cir. 11/8/00), 791 So. 2d 669, 678, this court discussed the requirements for proof of constructive possession and stated:

a person may be considered to be in constructive possession if the illegal substance is subject to his dominion and control, or if he willfully and knowingly shares with another person in actual possession of a drug the right to control the drug. *Trahan, supra*. As this court noted in *State v. Reaux*, 539 So. 2d 105, 108 (La. App. 4 Cir. 1989):

In determining whether defendant exercised the

requisite dominion and control the jury may consider his knowledge that illegal drugs are in the area, his relationship with one found to be in actual possession, his access to the area where drugs were found, his physical proximity to the drugs and the evidence that the area was frequented by drug users.

In the case at bar, Sergeant Harrison testified that he got the search warrant on the basis of his investigation of Nelson and “Duke’s” activity, and the sergeant and Detective Jacque both testified that they observed Brooks and Nelson getting up from the kitchen table on which were spread twelve foil packets of heroin and more than one hundred grams of cocaine as well as a gun and drug packaging tools. According to the guidelines stated in State v. Reaux, supra Brooks had dominion and control over the heroin because he obviously knew the twelve packets were in front of him on the kitchen table. There was no testimony at trial as to his relationship with Danny Nelson and Donna McClinton, but he and Nelson were suspected by the police of working together to distribute drugs. McClinton was the resident in the apartment where they were apprehended.

In State v. Williams, 594 So.2d 476 (La. App. 4 Cir. 1992), officers executing a search warrant at an apartment ran through a kitchen and a living room containing no furniture, past an empty bedroom and into a second bedroom containing only a table, a chair and a television, and where two

defendants were found. On the table the officers observed a small pile of cocaine, several bags of cocaine, various paraphernalia, and \$560.00 in small bills. Under the table the officers found a bottle of muriatic acid. One defendant was convicted of possession of cocaine with the intent to distribute and the other defendant was convicted of attempted possession of cocaine with the intent to distribute. This court found the evidence sufficient to support the convictions.

In State v. Brent, 2000-0072 (La. App. 4 Cir. 11/21/00), 775 So. 2d 565, this court found the defendant guilty of attempted possession of heroin in a situation similar to the case at bar. Officers entered a residence to find the defendant and another person with twenty-four tin foil packets containing heroin in a film canister, three syringes and a cap containing a liquid residue in the kitchen. A large sum of cash was found on the defendant and three guns were discovered in the residence. The defendant was not the lessee of the apartment.

In State v. Maresco, 495 So. 2d 311 (La. App. 4 Cir. 1986), this court upheld the defendant's conviction for possession of a large open box of marijuana which was set next to him in the apartment of another.

In the case at bar, because cocaine was found in Brooks' pockets, he does not contest his conviction for attempted possession of more than

twenty-eight grams of cocaine, but he argues that no evidence connects him to the heroin. However, like the defendant in Maresco, the circumstances indicate he had dominion and control over the twelve packets of heroin. In State v. Mitchell, 99-3342 (La. 10/17/00), 772 So.2d 78, the Louisiana Supreme Court commented on the circumstantial evidence-reasonable hypothesis of innocence rule, stating:

On appeal, the reviewing court "does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events." State v. Davis, 92-1623 (La.5/23/94), 637 So.2d 1012, 1020. Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. Id. (emphasis in original).

99-3342 at p. 7, 772 So. 2d at 83.

The evidence in the instant case is such that any rational juror could have found proof beyond a reasonable doubt that Brooks knew the heroin was on the premises and that he had dominion and control over the illegal substance in the residence.

There is no merit in this assignment.

Accordingly, the convictions and sentences of the defendant are affirmed.

AFFIRMED.