NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1208**
VERSUS	*	**COURT OF APPEAL**
RICHARD G. BEAUDIN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-895, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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CONVICTION AND SENTENCE REVERSED AND REMANDED

STATEMENT OF THE CASE:

On December 19, 2001, the defendant was charged by bill of information with possession of cocaine. La. R.S. 40:967(C)(2). He was arraigned and pled not guilty January 7, 2002. A six-member jury found him guilty of attempted possession January 22, 2002. La. R.S. 14:27. He was sentenced to thirty months at hard labor, ordered into the About Face program, and ordered to undergo substance abuse counseling. The trial court indicated it would later consider a motion to reconsider sentence if such a motion were filed. The defendant filed a motion for appeal. He later filed pro se motions for new trial and in arrest of judgment, both of which were denied.

ERRORS PATENT:

A review of the record revealed no errors patent.

FACTS:

Officer Sharice Harper of the New Orleans Police Department found

the defendant lying on the ground at the corner of St. Joseph and Carondelet Streets. He smelled of alcohol, had blood shot eyes, and had trouble standing on his own. He was arrested for public intoxication. A search incident to arrest revealed a small clear plastic straw, which had been cut. The straw was found in either the defendant's front pants pocket or his front shirt pocket. Officer Harper could not remember which.

At trial, John Palm, a Criminalist with the New Orleans Police Department, testified traces of a white powder tested positive for cocaine. The traces were so minute that they were destroyed in the testing.

ASSIGNMENT OF ERROR ONE:

Defendant contends the evidence was insufficient to support the conviction. Specifically, he contends that the State did not meet its burden of proving beyond a reasonable doubt that he knew that there was cocaine in the straw.

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 of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

To support a conviction for possession of cocaine, the State must

prove that the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed it. State v. Shields, 98-2283, p. 3 (La. App. 4 Cir. 9/15/99), 743 So.2d 282, 283. State v. Lavigne, 95-0204 (La. App. 4 Cir. 5/22/96), 675 So. 2d 771; State v. Chambers, 563 So. 2d 579 (La. App. 4 Cir. 1990). To prove attempt, the State must show that the defendant committed an act tending directly toward the accomplishment of his intent to possess cocaine. Chambers, 563 So. 2d at 580.

The elements of knowledge and intent need not be proven as facts, but may be inferred from the circumstances by the fact finder. State v. Porter, 98-2280, p. 3 (La. App. 4 Cir. 5/12/99), 740 So.2d 160, 162. A trace amount of cocaine in a crack pipe can be sufficient to support a conviction for possession. See Shields, supra; Porter, supra. However, the amount of the substance seized will have some bearing on the defendant's guilty knowledge. State v. Taylor, 96-1843(La. App. 10/29/97), 701 So. 2d 766, 771. Evidence of flight, concealment, and attempt to avoid apprehension is relevant when circumstantial evidence is used to establish guilty knowledge. State v. Davies, 350 So.2d 586 (La.1977).

In State v. Lavigne, 95-0204 (La.App. 4 Cir. 5/22/96) 675 So.2d 771, this court affirmed the defendant's conviction for attempted possession of cocaine even though there was no visible cocaine stating,

Appellant was seen acting in an irate manner. The small pipe

> found in his pocket is the type commonly used for smoking cocaine, and it contained a residue, which proved to be cocaine. Here, guilty knowledge can be inferred from the appellant's actions prior to his arrest, from his dominion and control of the pipe commonly used with drugs, and from the residue of cocaine found in the pipe. Unlike the appellant in Trahan who claimed no knowledge of the drugs found in his trailer, appellant was in possession of the pipe containing the drug, and the only reasonable interpretation is that he knew the pipe contained cocaine residue. His claim is without merit.

Id., 95-0204 at p. 13, 675 So.2d at 779.

In State v. Gaines, 96-1850 (La.App. 4 Cir. 1/29/97), 688 So.2d 679, this Court likewise affirmed the defendant's conviction for possession of cocaine saying,

> In the instant case the defendant ran when he saw the officers approaching him. Although part of this could be attributable to his wanted status and his possession of the gun, the jury could have also found that this action was partially due to his possession of the pipe containing the drug residue. In addition, one officer testified without contradiction as to the purpose of the pipe. See, State v. Spates, supra. [588 So.2d 398 (La.App. 2 Cir. 1991)] At trial the appellant did not argue that the residue was so small that he could not have known it was in the pipe; instead, his defense was that one of the officers falsely told the others that he found the pipe on him while he was still sitting in the police care outside the police station. Given these factors, it appears the jury could have disbelieved the appellant's story, found beyond a reasonable doubt that he knowingly possessed the glass pipe as well as the cocaine residue inside it. This assignment is without merit.

Id., 98-1850 at p. 7, 688 So.2d at 683.

In State v. Jones, 94-1261 (La. App. 3 Cir. 5/17/95), 657 So.2d 262,

the Third Circuit found that the evidence was sufficient to establish guilty knowledge where the defendant ran from the police and discarded the crack pipe during his flight. The court also noted with approval the reasoning of the Second Circuit in State v. Spates, stating "Physical possession of an instrument with no utility other than the ingestion of crack cocaine is sufficient under the Jackson v. Virginia standard to support a conviction for possession of cocaine." Id., 94-1261 at p. 12, 657 So.2d at 270. This court has cited both Spates and Jones with approval on numerous occasions. See for instance: State v. Bullock, 99-2124 (La. App. 4 Cir. 6/14/00), 766 So.2d 585; State v. Tassin, 99-1692 (La. App. 4 Cir. 3/15/00), 758 So.2d 351; State v. Rice, 99-1204 (La. App. 4 Cir. 3/15/00), 758 So.2d 911; State v. Magee, 98-1325 (La. App. 4 Cir. 12/15/99), 749 So.2d 874; State v. Postell, 98-0503 (La.App. 4 Cir. 4/22/99), 735 So.2d 782; State v. Williams, 98-0806 (La. App. 4 Cir. 3/24/99), 732 So.2d 105; State v. Gaines, 96-1850 (La. App. 4 Cir. 1/29/97), 688 So.2d 679.

In State v. Postell, 98-0503 (La. App. 4 Cir. 4/22/99), 735 So.2d 782, this court reversed the defendant's conviction saying, "In the case at hand, the defendant did not attempt to flee nor did he exhibit any other furtive behavior that would support a finding of guilty knowledge. … The record reveals no evidence of corroborating factors that would lead to the

conviction of the defendant based on the circumstantial evidence presented." Id., 98-0503 at pp. 7, 8, 735 So.2d at 786, 787.

In State v. Jeffrey Jones, 2000-1942 (La. App. 4 Cir. 7/25/01), 792 So.2d 117, the officer testified that he and his partner had just effected an arrest and were en route to Central Lockup with a prisoner when the officer observed the defendant standing in a doorway with an object to his mouth. The officer and his partner stopped to investigate. As they exited their vehicle, the defendant brought the object down to his side with his right hand and dropped it to the ground. The officer retrieved the object, a crack pipe containing wire mesh and cocaine residue, which was warm to the touch when retrieved. The officer acknowledged that he did not recover a lighter or matches from the defendant and that he did not observe any smoke emanating from the defendant's mouth. The arrest occurred in a high narcotics area.

This court found Jeffrey Jones could be distinguished from Postell, as the defendant, upon seeing the officers exit the vehicle, removed the pipe from his mouth and surreptitiously dropped it to the ground. Although the defendant did not attempt to flee, the furtive behavior was consistent with guilty knowledge. Additionally, the fact that the defendant had the pipe to his mouth, which was warm to the touch when retrieved and contained wire

mesh and cocaine residue, may have indicated to the jury that the defendant had the requisite intent to attempt to possess cocaine, even though no lighter or matches were recovered. The Jeffrey Jones court also noted that in Postell, the arresting officer, "an experienced and well-trained officer of the New Orleans Police force, did not and could not detect the presence of cocaine at the time of arrest. Therefore, the defendant was not charged with possession of cocaine until after the tests had been performed and a positive result was rendered." Id., 98-0503 at p. 8, 735 So.2d at 786. By contrast, in Jeffrey Jones, the defendant was arrested for possession of cocaine and the officer testified regarding his recovery of the crack pipe, "I picked up the object. It turned out to be a crack pipe containing wire mesh and cocaine residue. It was still warm to the touch when I retrieved it." The officer's testimony indicated that he was aware the pipe contained cocaine residue at the time he retrieved it as the defendant, upon seeing the officers exit the vehicle, removed the pipe from his mouth and surreptitiously dropped it to the ground.

The facts of this case do not support a finding that the evidence was sufficient. In contrast to Gaines, the defense of the case was that the amount of the drug was so small that the defendant could not have known that he possessed cocaine, not that he did not possess the straw itself. Indeed, the

amount of the drug was so small; it was destroyed in the testing process. There was no testimony that a cut plastic straw is commonly used for cocaine ingestion or that a clear plastic straw is drug paraphernalia. A clear plastic straw in fact has other utility than drug ingestion, whereas a crack pipe does not.

No fingerprint test was done on the straw to show whether other people might have handled it, and the defense suggests that the defendant might well have picked it up off of a bar where he had been drinking and begun nonchalantly chewing on it, thereby marking the clear straw with white marks.

While the arresting officer testified that she saw a white substance on the straw, the criminalist who testified at trial said that he could not tell by looking at the straw that it contained an illegal substance, that in fact he could not tell what was in the straw. He said bending or chewing the straw could have caused its white discoloration.

The arresting officer said that she could tell the defendant was drunk, but she could not tell whether he was high on any other substance. Important in light of the comparison to the earlier cited jurisprudence, the officer testified that the defendant was not combative. There was no evidence of his having made furtive movements or having attempted flight.

He did not attempt to conceal the straw or to discard it. Nor was there any testimony that the area in which the defendant was arrested was a high crime area.

Under the above-cited cases, the evidence was insufficient to support the conviction in that the State did not sufficiently show that the defendant knowingly and intentionally possessed the cocaine.

This assignment has merit.

ASSIGNMENT OF ERROR TWO:

The defendant argues ineffective assistance of counsel because during rebuttal argument by the State, the prosecutor told the jury that the defendant was eligible to have his conviction expunged should the jury find him guilty, and defense counsel did not object.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. State v. Prudholm, 446 So. 2d 729 (La. 1984); State v. Johnson, 557 So. 2d 1030 (La. App. 4 Cir. 1990); State v. Reed, 483 So. 2d 1278 (La. App. 4th Cir. 1986). Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the

issues on appeal. State v. Seiss, 428 So. 2d 444 (La.1983); State v. Ratcliff, 416 So. 2d 528 (La. 1982); State v. Garland, 482 So. 2d 133 (La. App. 4 Cir. 1986); State v. Landry, 499 So. 2d 1320 (La. App. 4 Cir. 1986).

The defendant's claim of ineffective assistance of counsel is to be assessed by the two part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fuller, 454 So. 2d 119 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Strickland, supra at 686, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. State v. Sparrow, 612 So. 2d 191, 199 (La. App. 4th Cir. 1992).

This court has recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." State v. Bienemy, 483 So. 2d 1105 (La. App. 4 Cir. 1986). Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." State v. Brooks, 505 So. 2d 714, 724 (La. 1987), cert. denied, Brooks v. Louisiana, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987).

Here, defense counsel said in his closing argument that if the jury found the defendant guilty, he would bear all the consequences of being a convicted felon. The State responded in rebuttal that the defendant could have the conviction expunged, such that he would not have to bear lifelong public ridicule or scorn, “carrying this cross as a scarlet letter.” The State argues that its rebuttal argument was proper because it was in answering the argument of the defendant. La. C.Cr.P. art. 774. In fact, the statement that the defendant was eligible to have the conviction expunged was substantively incorrect because the defendant had two prior convictions, one for assault and one for burglary, and was therefore not eligible for the instant conviction to be expunged under La. C.Cr.P. art. 893.

The jury's function is to determine guilt. Any argument concerning the possible sentence to which the defendant would be subjected upon conviction was improper for either side to raise. However, the statement by the State that the defendant could have the conviction expunged was clearly wrong. The court may find that the defendant has proven first prong of Strickland. Counsel was deficient in not objecting to the incorrect statement concerning expungement.

As to whether the second prong was proven, i.e. that the deficiency prejudiced the defendant, the jury found the defendant guilty of attempted possession rather than the greater crime charged, indicating it was not impressed by the strength of the State's case. In light of the discussion in assignment of error one, argument by the State that the defendant would suffer no long-term punishment for the crime might well have influenced the jury to convict where it might otherwise have not.

As such, it appears that the State did err, which it admits, and that its error might have contributed to the conviction of the defendant.

Accordingly, the defendant's conviction are reversed and remanded to the trial court.

CONVICTION AND SENTENCE REVERSED AND REMANDED