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| **STATE OF LOUISIANA** | * | **NO. 2002-KA-1209** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **GERRY E. MILLER** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-114, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
**Judge Steven R. Plotkin**
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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, Judge Terri F. Love)

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**AFFIRMED**.One of the issues in this appeal is whether the trial court erred in denying the defendant's motion for a post verdict judgment of acquittal and motion for new trail. The other issue is whether the sentence of five years was excessive. For the reasons below, we affirm the judgment of the trial court.

**PROCEDURAL HISTORY**

The defendant, Gerry E. Miller, was charged by information with one count of possession of cocaine, in violation of La. R.S. 40:967(c). A six-person jury found the defendant guilty as charged. Prior to sentencing, the defendant filed a motion for post-verdict judgment of acquittal pursuant to La.C.Cr.P. 821 and/or a motion for new trial, which the trial court denied. The trial court sentenced the defendant to five years in the Department of Corrections, the maximum term of imprisonment allowed for the charge. Immediately thereafter, in open court, the defendant orally moved for reconsideration of the sentence pursuant to La. C.Cr.P. art. 881.1, on the grounds that the sentence was excessive. The trial court denied the motion for reconsideration of the sentence and granted his motion for appeal.

**STATEMENT OF FACTS**

Two New Orleans Police officers testified at the defendant's trial. Detective Richard Pari testified that he was assigned to the narcotics unit on July 17, 2001 when he received information from a confidential informant that "Gerry" and "Vanessa", who reside at 301 Tricou Street in New Orleans, were dealing crack cocaine and would make deliveries in the immediate vicinity of their residence using a red KIA vehicle. Based on this information, he established surveillance of the residence located at 301 Tricou Street, as well as mobile surveillance when the defendant drove his vehicle. Det. Pari parked his unmarked Ford Taurus police vehicle within a block of the residence, and used his binoculars to watch the residence. He testified that he observed the defendant, later identified as Gerry Miller, leave the residence in a red KIA compact vehicle. He followed the defendant who drove in a circuitous manner: "[h]e made a lot of turns, went a lot of different directions, eventually returned back to the residence." The officer testified that it was his belief that the purpose of the defendant's drive was to check for the presence of police.

The officer testified that the defendant returned to the residence, and a light-skinned black female, later identified as Vanessa Peters, entered the vehicle. The defendant and Ms. Peters drove to a corner store located at St. Maurice and Chartres Street where an unknown female approached the

passenger's side of the vehicle and engaged in conversation with Ms. Peters. Ms. Peters proceeded to conduct a hand-to-hand transaction with this other unknown female outside the vehicle. The officer stated that it appeared that this unknown female handed this light-skinned black female seated in the passenger's side of the vehicle an unknown amount of currency. The female, this prospective buyer, then departed from the location. The officer testified that during this transaction the defendant was "seated there looking forward behind the wheel." The officer made an investigatory stop of the vehicle, and during the stop, retrieved a dual compartment contact lens case from Ms. Peters' hair. The officer found cocaine in each of the two compartments of the contact lens case and placed both Ms. Peters and the defendant under arrest.

On cross-examination, the officer stated that while watching the house for fifteen minutes, he did not see anyone enter or leave, prior to the defendant's departure. The officer also testified that while following the defendant in his vehicle on the circuitous route, he did not observe the defendant stop to talk to anyone or conduct any hand to hand transactions. The defense attempted to impeach the officer with his testimony from the motion to suppress hearing held on September 17, 2001, in which he stated he could not recall whether the defendant stopped at a grocery store. The

defense also attempted to impeach the testimony of the officer with his report, in which he did not state that there had been an exchange of currency and drugs. The officer, however, explained that he routinely writes his reports and testifies in court using the phrase "hand to hand drug transaction" to indicate the exchange of currency and drugs. The officer testified that the defendant did not have drugs on his person at the time of the stop and had nine dollars in currency on his person at the time of arrest.

Officer Edward Prater testified that on July 17, 2001, he was assigned to the narcotics unit on surveillance at the residence on Tricou Street when he observed a female exit the residence and engage in a hand-to-hand transaction with an individual who exited a blue Oldsmobile. After Ms. Peters received an object, she returned to the residence, reemerged with the defendant, and the two departed in a red vehicle. At that time, Officer Prater notified Officer Pari of his observations. On cross-examination, Officer Prater testified that during the hand-to-hand transaction, the defendant was inside the residence, and that he did not observe Ms. Peters give the defendant anything.

The State and the defense stipulated that the substance found in the contact lens case in Ms. Peters' hair was cocaine, and the State introduced the test results of the crime lab finding the substance to be cocaine.

**ERRORS PATENT**

A review of the record for errors patent reveals none.

**ASSIGNMENT OF ERROR NUMBER 1**

The defendant challenges the sufficiency of the evidence, by claiming that the trial court erred in denying the defendant's motion for a post-verdict judgment of acquittal pursuant to La. C.C.P. art. 821 and motion for new trial because the evidence, as seen in the light most favorable to the State, did not permit a finding of guilty. The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Rosiere, 488 So.2d 965 (La.1986). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La.1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Mussall, 523 So.2d 1305.

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. Perron, 2001-0214, p. 5 (La. App. 4 Cir. 1/16/02), 806 So.2d 924, 928, *citing* State v. Shapiro, 431 So.2d 372 (La.1982). When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La.R.S. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of events; rather, when evaluating the evidence in the light most favorable to the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under Jackson v. Virginia. State v. Davis, 92-1623 (La.5/23/94), 637 So.2d 1012. This is not a separate test from Jackson v. Virginia, but it is instead an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984); State v. Addison, 94-2431, p. 6 (La. App. 4 Cir. 11/30/95), 665 So.2d 1224, 1228.

To support a conviction for possession of a controlled dangerous

substance in violation of La. R.S. 40:967, the State must prove that the defendant knowingly and intentionally possessed the drug. Perron, 2001-0214, p. 6, 806 So.2d 924, 928. The State need not prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support conviction. Perron, 2001-0214, p. 6, 806 So.2d 924, 928, *citing* State v. Trahan, 425 So.2d 1222, 1226 (La.1983). The mere presence of a defendant in the area where the narcotics were found is insufficient to prove constructive possession. State v. Collins, 584 So.2d 356, 360 (La. App. 4 Cir.1991). A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. Perron, 2001-0214, p. 6, 806 So.2d 924, 928 *citing* State v. Jackson, 557 So.2d 1034, 1035 (La. App. 4 Cir.1990). A person may be deemed to be in joint possession of a drug, which is in the physical possession of another, if he willfully and knowingly shares with the other the right to control it. Perron, 2001-0214, p. 6, 806 So.2d 924, 928, *citing* State v. Smith, 245 So.2d 327, 329 (La. 1971). Determination of whether a defendant had constructive possession depends on the circumstances of each case. Perron, 2001-0214, p. 6, 806 So.2d 924, 928, *citing* State v. Cann, 319 So.2d 396, 397 (La.1975). In determining whether defendant exercised the requisite dominion and control, factors which may

be considered are 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. Perron, 2001-0214, p. 6-7, 806 So.2d 924, 928, *citing* State v. Reaux, 539 So.2d 105, 108 (La. App. 4 Cir.1989).

The defendant cites State v. Chambers, 563 So.2d 579 (La. App. 4 Cir.1990) in support of his argument that the State failed to prove his actual or constructive possession of the cocaine and failed to prove that he exercised dominion and control over it or that he willingly and knowingly shared with Ms. Peters the right to control the cocaine. In Chambers, narcotic agents observed a black Camaro stop in a driveway where drug transactions were occurring. The driver gave money and appeared to receive drugs from a man standing in the driveway. Later, when the police stopped the Camaro, both occupants of the car were searched. The driver possessed three pieces of crack cocaine, but none was found on the defendant, Chambers, who was a passenger in the automobile. Even though there was evidence that the defendant witnessed the drug transaction and knew the driver of the car possessed cocaine, this Court found there was not enough evidence to prove active or constructive possession of cocaine.

The facts of the instant case are distinguishable from those in Chambers. The testimony of the officers in the instant case indicates that the defendant exercised the requisite dominion and control over the cocaine to be found in constructive possession. The officers testified that they had information from a confidential informant that "Gerry" and "Vanessa", who reside at 301 Tricou Street in New Orleans, were dealing in crack cocaine and would make deliveries in the immediate vicinity of their residence using a red KIA vehicle. The officers observed the defendant's circuitous drive, which was consistent with a person checking for the presence of police before transporting narcotics. The officers observed the defendant driving the compact KIA vehicle, in which the passenger and driver are inches apart. This was the vehicle used during the hand-to-hand transaction between Ms. Peters and the unknown female. The events in question happened over the course of a few minutes; under the totality of the circumstances, it would have been impossible for the defendant to be unaware of the cocaine. The facts of the case show that the defendant had the requisite dominion and control over the cocaine to support constructive possession. Viewing the record as a whole, the trial court did not err in denying the defendant's motion for a post verdict judgment of acquittal and motion for new trial. Therefore, this assignment is without merit.

**ASSIGNMENT OF ERROR NUMBER 2**

Second, the defendant argues that the maximum sentence of five years in the Department of Corrections was grossly out of proportion to the severity of the crime. As the Louisiana Supreme Court stated:

> A sentence which falls within the statutory limits may be excessive under certain circumstances. State v. Brown, 94-1290 (La.1/17/95), 648 So.2d 872, 877. To constitute an excessive sentence, this Court must find that the penalty is so grossly disproportionate to the severity of the crime as to shock our sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and therefore, is nothing more than the needless imposition of pain and suffering. Id. The trial judge has broad discretion, and a reviewing court may not set sentences aside absent a manifest abuse of discretion. State v. Cann, 471 So.2d 701, 703 (La.1985).

State v. Guzman, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167. To ensure adequate review of a sentence by appellate court, the record must indicate that the trial court considered factors set forth in sentencing guidelines. State v. Coleman, 94-0666, p. 10-11 (La. App. 4 Cir. 12/15/94), 647 So.2d 1355, 1361. If the judge records the factors affecting his sentencing decision, the sentence should not be set aside as excessive unless it is grossly disproportionate to the offense or represents nothing more than the needless infliction of pain and suffering. State v. Cooley, 98-0576, p. 12 (La. App. 4 Cir. 11/17/99), 747 So.2d 1182, 1189.

Once the appellate court reviewing the sentence finds adequate compliance with statutory guidelines, the court must look to the facts and sentences of other cases to determine whether the sentence imposed is too severe in light of particular circumstances of defendant's case, keeping in mind that maximum sentences

should be reserved for the most egregious violators. State v. Desdunes, 576 So.2d 520, 529-530 (La. App. 4 Cir. 1990); State v. Berry, 630 So.2d 1330, 1333 (La. App. 4 Cir.1993); State v. Gibson, 591 So.2d 416, 419 (La. App. 4 Cir. 1991).

In the instant case, the Pre-Sentence Investigation report (PSI) indicates the defendant has an extensive prior criminal record in California, including adult convictions for possession of heroin (one), pimping (one), robbery (two), assault of a police officer (one), and burglary (five). The defendant also has a juvenile record, including drug offenses. At the time of the instant offense, according to the PSI, the defendant was forty-eight years old, and had served no less than three terms of supervision, with no less than two revocations. According to the PSI, the defendant admitted to past in-patient treatment drug treatment, HIV positive status, and current kidney problems. Lastly, the PSI notes that the defendant’s version of the facts of the instant case differ greatly from those provided by the police officers and

Ms. Peters, claiming instead that on the day in question, he was giving a friend a ride to a retirement community when he was pulled over for a traffic violation and during the stop, crack fell out of his friend's hairdo.

In State v. Bartholomew, 562 So.2d 1086, 1088 (La. App. 4 Cir. 1990), this Court found that the maximum term of imprisonment of five years for possession of cocaine was not excessive where the defendant had a lengthy prior criminal record and was disrespectful of the legal system. The Court in Bartholomew compared the facts of that case with those in State v. Gleason, 533 So.2d 1032,

1034 (La. App. 4 Cir.1988), in which this Court found that a term of five years

imprisonment was not excessive for possession of nineteen ounces of cocaine where the defendant was a first offender but has previously been exposed to cocaine, although not convicted for that association, and was arrogant and disrespectful of the legal system. Bartholomew, 562 So.2d 1086, 1088. In State v. Fairley, 02-168, (La. App. 5 Cir. 6/26/02), 822 So. 2d 812, the court upheld a sentence of five years for possession of cocaine for a defendant with an extensive prior criminal history, including convictions for armed robbery and battery on a police officer.

The defendant in the instant case is similar to the defendants in the above cited cases, in which the maximum term of imprisonment was not found to be excessive. The defendant has an extensive criminal history, including drug use, and his version of the facts differs substantially from the testimony of the officers. Thus, the trial court did not abuse its discretion by imposing the maximum term of imprisonment, and this assignment is without merit.

**CONCLUSION**

The trial court did not err in denying the defendant's motion for a post

verdict judgment of acquittal or motion for new trial, as the evidence was sufficient to support his conviction for possession of cocaine. The trial court did not abuse its discretion in sentencing the defendant to the maximum period of five years incarceration in the Department of Corrections for possession of cocaine. This sentence was not excessive.

Accordingly, defendant's conviction and sentence are affirmed.

**AFFIRMED.**