

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-KA-2098**
VERSUS * **COURT OF APPEAL**
LEROY B. SIMMONS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 423-127, SECTION "B"
Honorable Patrick G. Quinlan, Judge
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Judge David S. Gorbaty
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(Court composed of Judge Charles R. Jones, Judge Max N. Tobias Jr., Judge David S. Gorbaty)

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AFFIRMED

Leroy B. Simmons was charged by bill of information on July 16, 2001 with possession of cocaine, a violation of La. R.S. 40:967(C). At arraignment on July 19, 2001, he pleaded not guilty. After a hearing on September 17, 2001, the trial court found probable cause and denied the motion to suppress the evidence. A six-member jury found him guilty as charged after trial on March 6, 2002. The State filed a multiple bill charging Simmons as a third felony offender. Simmons pleaded guilty to the multiple bill, and on April 4th he was sentenced to serve five years at hard labor as a triple offender under La. R.S. 15:529.1. The defendant's motion to reconsider the sentence was denied, and his motion for an appeal was granted.

FACTS

At trial, Officers Michael Dimarco and Donald Haynes testified that at about 3:20 p.m. on May 14, 2001, they observed the defendant and another man participating in what appeared to be a drug sale. The officers were driving in the 1100 block of St. Philip Street when they observed two men engaging in a hand-to-hand transaction. When the defendant saw the marked police car approaching, he immediately got on a bicycle and pedaled away. The other man walked in a different direction. The officers followed

the defendant. (A third officer, who was also in the police car, followed the other man.) As they neared Simmons, he stopped his bicycle. When the officers got out of the car, the defendant dropped a small blue-tinted baggie from his left hand. The bag contained vegetable matter and a small white rock-like substance. Simmons was arrested. In a search incident to arrest, Officer Haynes found a metal tube in defendant's right front pocket; the tube had a cocaine residue and charred edges. Officer Haynes testified that he believed the tube to be a crack pipe.

Officer John Palm, Jr., an expert in the identification, testing, and analysis of narcotics, testified that he analyzed the residue found in what he described as the "ceramic tube smoking pipe" from the defendant's pocket; the residue proved positive for crack cocaine. When asked under cross-examination what the tube's original purpose might have been, the officer concluded that it would be used in electrical work or insulation. Officer Palm also tested the material found in the small baggie and found that neither the vegetative matter nor the rock-like substance proved to be contraband.

ASSIGNMENT OF ERROR NUMBER ONE

In his sole assignment of error, the defendant argues that the evidence is insufficient to support the conviction because possession of a ceramic tube

containing drug residue did not establish the requisite element of guilty knowledge.

Recently, in *State v. Sylvia*, 2001-1406 (La. 4/9/03), 2003 WL 1826668, __So. 2d__, the Louisiana Supreme Court reviewed the State's burden of proof in a possession of cocaine case involving a crack pipe, stating:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 397, 99 S.Ct. 261 L.Ed. 2d 560 (1979); *State v. Cummings*, 95-1377 (La. 2/28/96) [sic], 668 So. 2d 1132. A reviewing court must consider the record as a whole, as would any rational trier of fact. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. *State v. Mussall*, 523 So. 2d 1305 (La. 1988). The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall, supra*. A 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. *State v. Smith*. 600 So. 2d 1319 (La. 1992).

The defendant in the instant case was charged with possession of cocaine, a violation of La. R.S. 40:967. To support a conviction for possession of cocaine, the State must present evidence establishing beyond a reasonable doubt that the

defendant was in possession of the drug and that he knowingly and intentionally possessed it. La. R. S. 40:967(C); *State v. Toups*, 01-1875 (La. 10/15/02), 833 So.2d 910. Guilty knowledge is an essential element of the crime of possession of cocaine. *State v. Edwards*, 354 So.2d 1322 (La. 1978). The elements of knowledge and intent are states of mind and need not be proven as facts, but may be inferred from the circumstances. *State v. Trahan*, 425 So.2d 1222 (La. 1983).

State v. Sylvia, 2001-1406, pp. 1-2 (La. 4/9/03), ____ So. 2d at ____.

In *State v. Sylvia*, as in the instant case, the defendant argued that the evidence was insufficient to support his conviction. The Court set out the issue as

whether the defendant's possession of drug paraphernalia containing trace amounts of cocaine is sufficient to prove beyond a reasonable doubt that defendant "knowingly" possessed the cocaine, i.e., that defendant had the requisite "guilty knowledge" to support a conviction for possession of cocaine.

Id. at p. 2, ____ So.2d at ____.

The Court then examined the jurisprudence on the issue:

Found in these cases are several examples of corroborating evidence which would be sufficient to support the inference of guilty knowledge to defendants who are in possession of residue-containing drug paraphernalia. For example, cocaine residue, visible to the naked eye, would be evidence sufficient to support a conviction for possession of cocaine. *State v. Shields*, 98-2283

(La.App. 4 Cir. 9/15/99), 743 So.2d 282; *State v. Porter*, 98-2280 (La.App. 4 Cir. 5/12/99), 740 So.2d 160. Evidence of flight or furtive behavior by the defendant may also support a finding of guilty knowledge sufficient to prove the defendant's knowing possession of cocaine. *State v. Postell*, 98-0503 (La.App. 4 Cir. 4/22/99), 735 So.2d 782. Possession of multiple pieces of drug paraphernalia, or evidence of recent drug use, are factors evidencing guilty knowledge. *State v. Knight*, 00-1051 (La.App. 4 Cir. 5/23/01), 794 So2d 33 (citing *State v. Drummer*, 99-0858 (La. App. 4 Cir. 12/22/99), 750 So. 2d 360 and *State v. Monette*, 99-1870 (La.App. 4 Cir. 3/22/00), 758 So.2d 362). Finally, physical possession by the defendant of an instrument with no utility other than the ingestion of drugs is indicative of his guilty knowledge that the instrument contained controlled dangerous substances. *State v. Spates*, 588 So.2d 398 (La. App. 2 Cir. 1991).

Id. at p. 3, ____ So.2d at ____.

Reviewing the factors indicating corroborating evidence found in the case at bar, we note that the defendant was in possession of drug paraphernalia containing a visible residue. Officer Haynes testified that the pipe he found in Simmons' right front pocket had "cocaine residue and charred edges." Moreover, Simmons attempted to flee when he noticed the police car by immediately getting on his bicycle and riding away. He also displayed furtive behavior in dropping the baggie as the officers approached him.

The defendant maintains, however, that the evidence is

insufficient because he did not have a lighter or pushrod and because a ceramic tube has a legitimate use in electrical or insulation work.

Thus, he concludes, this instrument does have utility other than use in the ingestion of crack cocaine and cannot be construed as evidence of guilty knowledge.

The ceramic tube found on defendant's person in this case showed a drug residue and was charred on each end. This evidence of drug use does not support a reasonable hypothesis of innocence as the defendant argues. Rather, when combined with the officers' initial observation of defendant participation in a drug transaction and with his immediate flight and furtive behavior, the dirty ceramic tube with charred ends provides evidence of guilty knowledge. The fact that the defendant was not carrying a cigarette lighter or push rod does not negate the strong evidence of drug possession.

In *State v. Sylvia, supra*, the Supreme Court concluded:

Unlawful possession of cocaine is a general intent crime. La. R.S. 40:966(C); La. R.S. 14:11; *State v. Banks*, 307 So.2d 594 (La.1975). General criminal intent is present "when the circumstances indicate that the offender, in the *ordinary course of human experience*, must have adverted to the prescribed criminal consequences as *reasonably certain* to result from his act or failure to act." La. R.S. 14:10(2) (emphasis added). It was entirely reasonable for a jury to conclude that by the defendant's possessing an obviously used pipe he must have realized, in the ordinary course of human experience, that it was also reasonably certain that he was possessing the residue contained

in that pipe and, therefore, possessing the cocaine. [Footnote omitted]. Thus, viewing the evidence presented in a light most favorable to the prosecution, we find that the defendant's possession of an obviously used instrument with no utility other than the ingestion of cocaine satisfies the State's burden of proving the defendant had the requisite general intent to support a conviction for possession of cocaine.

State v. Sylvia, 2001-1406, p. 5 (La. 4/9/03), ___ So.2d at ___.

Similarly, viewing the evidence presented in this case in the light most favorable to the prosecution, we conclude that the State proved that the defendant knew the ceramic tube he carried contained cocaine residue. No matter what the original use of the pipe, the fact that it was found in the defendant's pocket under these circumstances indicates its immediate use was only to ingest cocaine.

CONCLUSION

Accordingly, for the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED