STATE OF LOUISIANA	*	**NO. 2002-KA-1395**
VERSUS	*	**COURT OF APPEAL**
WARREN A. CHAMP	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-120, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr., Judge Michael E. Kirby)

HARRY F. CONNICK, DISTRICT ATTORNEY
JULIET CLARK, ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

CHRISTOPHER A. ABERLE
LOUISIANA APPELLATE PROJECT
P.O. BOX 8583
MANDEVILLE, LA 704708583
COUNSEL FOR DEFENDANT/APPELLANT

STATEMENT OF CASE:

Defendant Warren Champ was charged by bill of information on November 13, 2001, with possession of cocaine in violation of La. R.S. 40:967. Defendant pleaded not guilty at his November 20, 2001, arraignment. On December 11, 2001, a six-person jury found the defendant guilty of attempted possession of cocaine. On February 14, 2002, the defendant was sentenced to thirty months in the About Face Program under La. R.S. 15:574.5. On that same date, the trial court denied the defendant's motion to reconsider sentence and granted the defendant's motion for appeal. The state also filed a multiple bill on that same date alleging the defendant to be a third offender. On June 13, 2002, the defendant pled guilty to the multiple bill. The trial court vacated its previous thirty month sentence and re-sentenced the defendant to thirty months in the About Face Program.

STATEMENT OF FACT:

Officer Juan Wilson, of the New Orleans Police Department's Second District Task force, testified that on November 1, 2001, he and his partner, Officer Preston Bax, were on proactive patrol when they saw the defendant driving without a seatbelt. The officers ran the license plate number on the defendant's vehicle and discovered it had been switched. The defendant was driving a tan four-door Mercury Topaz, and the license plate on the vehicle belonged to a silver four-door Cadillac. The officers stopped the defendant and asked for his driver's license, registration and insurance. When the Officers ran the defendant's name in their computer they discovered the defendant's driver's license was suspended. The defendant was arrested for driving with a suspended license. During a search incident to arrest the officers found a socket wrench type tool in the defendant's pocket. The tool contained some wire mesh type material normally found in crack pipes. The defendant was charged with possession of cocaine.

Officer John Palm, of the New Orleans Police Department, testified that the test conducted on the tool found in the defendant's pocket came back positive for the presence of cocaine. Officer Bax also testified and he

confirmed Officer Wilson's testimony.

ERRORS PATENT:

A review of the record revealed there are no errors patent.

DISCUSSION:

COUNSEL'S ASSIGNMENT OF ERROR NUMBER 1:

The defendant complains that the trial court misled the jury regarding the element of knowledge and/or specific intent by charging the jury that quantity is irrelevant to guilt.

At the conclusion of the trial the court instructed the jury as follows:

> BY THE COURT
>
> * * *
>
> As I explained earlier, there are three essential elements you must be convinced of beyond a reasonable doubt in order to find Mr. Champ guilty of the charge of possession of cocaine. The three elements are: One, you must find that the substance in question in this case today is cocaine. Two, you must find that on the day in question, November 1st of this year, that Mr. Champ was in possession of that cocaine. And three, you must find that he did knowingly and intentionally possess the cocaine. By that, the law means you must find that he was aware or knew what it was that he was possession, and with this

awareness, he still possessed it.

Three essential elements: that the substance is cocaine, that he possessed it, and he knew what it was he was possessing.

The second responsive verdict you'll be asked to consider is that of attempted possession of cocaine. There are two definitions of an attempt under the laws of Louisiana. The first definition involves two elements. In order for someone to be guilty of an attempt to commit a crime, the jury must find: One, that the offender had the intention or the desire to commit a crime, that is what he wanted to do; and Two you must find that he did one act in furtherance of his intention or desire to commit a crime in order to be guilty of an attempt to commit that crime.

As it relates to this case, in order to find Mr. Champ guilty of attempted possession of cocaine, the jury must find, One, that the defendant intended or desired to possess cocaine, that is what he wanted to do, and Two, you must find that he did something, he did one act in furtherance of that intention or desire to possess cocaine in order to be guilty of an attempt to possess cocoaine. [sic]

The second definition of an attempt under our law involves your descretion [sic] as the judges of the facts. The law gives you certain discretion or authority as jurors in this case. That discretion allows you to return a lesser verdict of guilty of an attempt to commit a crime even though you may feel based upon the evidence presented that the completed crime has been proven to your satisfaction and beyond a reasonable doubt. For lack of a better term, the law says the jury has the right to give someone who is charged with an offense a break or some consideration by finding him guilty of a lesser charge if the jury finds that is appropriate under the circumstances of this case.

The third and final possible verdict is that of not guilty. If the ladies and gentlemen of the jury find that the State has failed to prove to your

satisfaction and beyond a reasonable doubt any element with regard to the law of possession of cocaine, and they have failed to prove any element with regard to the law of attempted possession of cocaine, then it is your duty and responsibility to return a verdict of not guilty with regard to this case.

There are three special instructions I will give you that relate to this case. The first one involves a residue or tract amount of cocaine.

A conviction for possession of cocaine may rest upon the possession of a mere trace or residue of that substance. The amount of the drug seized is relevant to the defendant's guilty knowledge if there is no corroborating circumstance.

The second special instruction involves evidence, direct and circumstantial. In law, there are –

A JUROR:

Would you repeat the first one?

BY THE COURT:

As to residue. A conviction for possession of cocaine may rest upon the prescence [sic] of a mere trace or residue of that substance. The amount of the drug seized is relevant to the defendant's guilty knowledge if there is no other corroborating circumstance.

* * *

After the jury had deliberated for about thirty minutes, it returned to the courtroom seeking further instructions, as follows:

[FOREPERSON]

The jury wishes to ask the Court to explain the guilty of attempted possession of cocaine and its relationship to amounts and its relationship to the charge of drug paraphernalia that was discussed, possession of drug paraphernalia.

THE COURT:

Okay. As with the charge of possession of cocaine, the attempted really has no -- there's no direct necessary relationship to an amount. There does not necessarily have to be any particular quantity of cocaine under the law of possession or attempted possession if you are considering those verdicts. The same thing with regard to the law of paraphernalia. Paraphernalia is really not a concern for the jury at this time. You're going to be asked to determine whether or not the man possessed cocaine, attempted to possess cocaine, or if he is not guilty.

Attempted possession, I can give you -- I can elaborate a little bit on the law of attempt if that might help you. As I said, there are two definitions of an attempt under the laws of this state. The first definition involves two elements. In order to be guilty of an attempt to commit a crime, you, the jury, have to find, One, that the offender intended or desired to commit a crime. That's what he wanted to do, he wanted to commit a particular crime. And Two, you have to find that he did something, he did one act in furtherance of that intention or desire.

* * *

In this case you have to find that Mr. Champ intended or desired to possess cocaine, that's what he wanted to do, he wanted to possess cocaine, and you have to find that he did at least one act, he did something in furtherance of his intention or desire to possess cocaine in order to be guilty of an

attempt to possess cocaine.

The second definition of an attempt involves your discretion as the judges of the facts. As I said, the law gives you certain authority in this case. That authority allows you to return a lesser verdict of guilty of an attempt to commit a crime even though you may feel based upon the evidence that you heard that the completed crime has been proven to your satisfaction and beyond a reasonable doubt. As I said, for lack of a better term, the law says you have the right to give someone who is charged with a crime a break, if you would, by finding him guilty of the lesser charge of an attempt if you feel that is appropriate under the circumstances of this case.

To answer the initial question, a quantity really has nothing to do with it. Any quantity would suffice, be it a small quantity or a large quantity, and paraphernalia is really not an option to the jury in this proceeding, that is not what is considered a responsive verdict or an option. That is not – that is not a relevant – relevant to any of the law that I've explained to you, paraphernalia. The charge is whether he possessed cocaine, whether he attempted to possess it, or whether he is not guilty.

[DEFENSE COUNSEL]

Judge, I take exception to saying quantity is irrevelant.

THE COURT:

Other than as I explained earlier in the initial instructions . . . I think if they mean as to residue, in other words, they can't – if the question was, Can you find someone guilty of a trace or residue amount of cocaine under the definition of an attempt, the answer to that would be yes.

[DEFENSE COUNSEL]

But I think the same thing applies that they can also consider the small amount as it relates to guilty knowledge.

THE COURT:

I disagree to some extent because the question becomes -- the question becomes under the attempt definition – under the attempt definition, it is not a requirement that the man actually be in possession of any cocaine at all. Under the attempt definition, he does not have to have any cocaine at all but he has to have the intention or the desire to possess cocaine and he has to have one -- and he has to do one act in furtherance of that intention or desire, so again, I do not think that the quantity really relates --

[DEFENSE COUNSEL]

But Judge --

THE COURT:

-- to amount -- the amount of cocaine does not relate to an attempt definition.

[DEFENSE COUNSEL]

Excuse me, Judge, but the item or the amount he attempts to possess. I mean, that's going to be -- I think it goes to guilty knowledge. That's a specific intent crime.

THE COURT:

I agree it is a -- he has to desire -- his desire has to be to possess cocaine, that has to be his desire to possess cocaine, and he has to do one act

> in furtherance of his intention or desire, but the law does not require that he actually be in possession of cocaine to be guilty or an attempt to possess cocaine, nor is there any specific amount -- there could be no amount of cocaine if he does not to have -- he does not have to be in possession of any amount of cocaine. He could be possessing no cocaine at all but if he has the intention to possess it and he does one act in furtherance of that intention to possess it, then if you find that, you could be justified in saying he attempted to possess cocaine.

Defendant now seizes upon the court's phrase "quantity really has nothing to do with it" to argue that one cannot be confident the jury was unaffected by the instructions since this was not a typical "straight shooter glass" crack pipe and the residue was not readily apparent. He submits that the socket wrench at issue here had other, legitimate, uses besides smoking crack cocaine. However, he somewhat conveniently neglects to note that the socket wrench was stuffed with wire mesh, which the officers observed protruding from the tool. In our view, this made the device clearly recognizable as a crack pipe.

We conclude that the charge, taken as a whole correctly informed the jury regarding trace or residue amounts of cocaine. The defendant has taken one statement in jury instruction out of context.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 1

The defendant complains the trial court misled the jury regarding the jury's question of whether possession of drug paraphernalia constitutes intent by law.

The following exchange occurred between the jury foreperson and the trial judge:

> FOREPERSON:
> Judge we have two other questions. Does the possession of drug paraphernalia constitute intent by law?
>
> COURT:
> That's a fact question.
>
> FOREPERSON:
> Okay.
>
> COURT:
> That's a fact question that's really not a legal question. That is a question for you all to determine. That's a question for you all to decide.

La. R.S. 14:10 divides criminal intent into specific and general intent, which are defined as follows:

> (1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.
> (2) General criminal intent is present whenever there is specific intent, and also 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.

The Fifth Circuit in State v. McKinney, 99-395 p.6 (La. App. 5 Cir. 11/10/99), 749 So.2d 716,719, found, "The determination of whether the requisite intent is present in a criminal case is for the trier of fact to determine."

The trial judge in the instant case was correct in telling the jury that the determination of whether the defendant's possession of drug paraphernalia constituted intent was a question of fact. This assignment of error is without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 2

The defendant complains the trial court misled the jury regarding the penalties in this case because the court knew the defendant would probably be charged as a multiple offender.

The following exchange occurred between the jury foreperson and the trial judge:

> FOREPERSON:
> And the last question I think we had was can you discuss with us the various penalties involved with the verdicts?
>
> COURT:
> I'll do that, I'll do that. If you're found

> guilty of possession of cocaine, the penalty is anywhere from zero up to five years at hard labor. What that means is, the judge has the discretion to sentence someone - - I could say you don't do any sentence at all you get zero sentence you go home, you could get up to five years in jail, you could get a fine, or you could get probation. I have a number of options.
>
> The same thing with an attempt except the numbers are smaller. It's anywhere from zero up to thirty months. Possession of cocaine is zero to five years, attempted possession is zero to thirty months. And again, it's the same thing as possession. No sentence, thirty months, probation or fine, in my discretion.

La. R.S. 40:967(C) provides:

> **C. Possession.** It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner, as provided in La. R.S. 40:978 while acting in the course of his professional practice, or except as otherwise authorized by this Part.

La. R.S. 40:967(C)(2) provides:

> (2) Any person who violates this Subsection as to any other controlled dangerous substance shall be imprisoned with or without hard labor for not more than five years and, in addition, may be sentenced to pay a fine of not more than five thousand dollars.

La. R.S. 14:27(A) and (D)(3) provides:

> A. Any person who, having a specific intent to

> commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
>
> (3) In all other cases he shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both.

The sentences given to the jury by the trial judge were in fact the sentences set forth by the legislature in the above-cited statutes. Additionally, at the time the question was asked by the jury the defendant had not been convicted, and the determination of the defendant as a multiple offender was still speculative and had not been proven by the state. This assignment of error is without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 3

The defendant challenges his adjudication as a third felony offender because the requisite cleansing period had expired.

At the June 13, 2002, multiple bill hearing in the instant case the defendant plead guilty to the multiple bill, and a portion of the examination by the trial court occurred as follows:

> COURT:
>
> Mr. Champ, Ms. Vix has indicated to me that you are admitting to the court that you're the

same man that has two prior felony convictions, one for an aggravated battery, one for possession of stolen property, both occurring in this building is that correct?

DEFENDANT:
Yes.

COURT:
Do you understand you do not have to admit that? You have the right to a hearing whereby the state must prove to me that you are the same person that has these prior felony convictions, but by admitting to this, you give up your right to a hearing and you give up your right to appeal this aspect of your case, do you understand that?

DEFENDANT:
Yes.

Prior to accepting the defendant's plea to the multiple bill, the court also advised him of his right to remain silent.

Because the defendant pled guilty to the multiple bill he waived his right to object to his adjudication as a third offender. This assignment of error is without merit.

CONCLUSION

For the above and foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.