NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2009-KA-0340**
VERSUS	*	
		COURT OF APPEAL
CARLOS SMITH	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 475-956, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *
(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Edwin A. Lombard)

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AFFIRMED

The single issue the defendant, Carlos Smith, raises on appeal is whether the evidence was insufficient to convict him for possession of cocaine with intent to distribute. Finding no error, we affirm.

STATEMENT OF THE CASE

On February 15, 2008, Mr. Smith was charged with one count of possession with intent to distribute cocaine, a violation of La. R.S. 40:967(B)(1), and one count of possession with intent to distribute marijuana, a violation of La. R.S. 40:966(A)(2). On March 13, 2008, Mr. Smith pled not guilty. On April 24, 2008, the trial court denied Mr. Smith's motion to suppress. The court found insufficient probable cause to substantiate the charge of possession with intent to distribute marijuana. However, the court found sufficient probable cause to substantiate the charges of possession with intent to distribute cocaine and simple possession of marijuana.

On August 27, 2008, following a bench trial, the trial court found Mr. Smith guilty as charged of possession with intent to distribute cocaine and simple possession of marijuana (first offense, a misdemeanor). The trial court ordered a pre-sentence investigation. On October 8, 2008, the trial court sentenced Mr.

Smith on the possession with intent to distribute cocaine charge to two years and recommended him for the "intensive incarceration and intensive parole supervision program" under La. R.S. 15:574.4(A)(the Louisiana Department of Corrections Impact Program). On the simple possession of marijuana charge, the trial court sentenced Mr. Smith to ninety days. The trial court ordered the sentences to run concurrently. This appeal followed.

STATEMENT OF THE FACTS

On January 15, 2008, New Orleans Police Department Officers Robert Hurst and Buddy Hedri were on routine patrol in a marked police vehicle. At about 1:15 a.m., the officers observed Mr. Smith disregard a stop sign. The officers thus decided to conduct a traffic stop. Responding to the police vehicle's siren and lights, Mr. Smith immediately pulled the vehicle he was driving to the side of the road. The officers then approached Mr. Smith's vehicle. According to Officer Hendri, the area was illuminated by a streetlight on the corner, the spotlight on the police vehicle, and the flashlight he was carrying. Officer Hedri approached on the passenger's side, and Officer Hurst approached on the driver's side. Officer Hendri spotted a handgun in the center console of Mr. Smith's vehicle, and he alerted Officer Hurst. Officer Hurst ordered Mr. Smith to exit the vehicle.

After obtaining Mr. Smith's identification, Officer Hedri ran Mr. Smith's name through the motion computer and learned that Mr. Smith had three outstanding warrants. Officer Hurst arrested Mr. Smith on the warrants. In the search incident to the arrest, Officer Hurst found in Mr. Smith's left jacket pocket a large clear plastic bag containing numerous smaller plastic bags, each containing small pieces of rock-like substance that Officer Hurst recognized to be crack cocaine. Officer Hurst also found in the same jacket pocket three bags containing

marijuana. In Mr. Smith's right front pants pocket, Officer Hurst found $189.00 in cash. Mr. Smith was arrested for possession with intent to distribute the cocaine and marijuana.

At trial, Officer Hurst's testified that he arrested Mr. Smith for possession with intent to distribute based on the amount of drugs, the packaging of the drugs, and the possession of currency in small denominations.[1] Officer Hurst identified the cocaine that he recovered from Mr. Smith based on the attached evidence tag; however, he testified that the cocaine was not in the same condition that it was in when he recovered it. Officer Hurst explained that the cocaine had been removed from the baggies. Officer Hurst further explained that when he retrieved the cocaine from Mr. Smith each piece was wrapped inside of a small plastic bag and then all of the small bags were placed inside of a larger bag.

Both parties stipulated that John Palm, the criminalist, was an expert in the testing and weighing of narcotics and that the substances recovered from Mr. Smith tested positive for cocaine and marijuana.[2] The State introduced into evidence the handgun, cocaine, and marijuana. The defense called no witnesses.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

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[1] Because the State failed to introduce into evidence the $189 in cash seized from Mr. Smith, the trial court indicated at trial that it would not consider "whatever this currency looked like, whatever denominations it was in." However, the court indicated that it could consider, as the fact finder, the officers' testimony as to what they saw.

[2] At the pre-trial motion hearing and for the record only at trial, the State introduced the criminal laboratory report, which described the evidence found on Mr. Smith and tested by the lab as follows:

1. One sealed plastic envelope containing one plastic bag containing seven small plastic bags containing numerous small plastic bags containing a total of 20.7 Grams of a "rock-like" substance . . . Positive for Cocaine.

2. One sealed plastic envelope containing three small, red colored, ziploc plastic bags each containing a vegetative material . . . Positive for Marijuana.

DISCUSSION

Mr. Smith's sole assignment of error is that the evidence was insufficient to support his conviction for possession of cocaine with intent to distribute. The standard for reviewing a claim of insufficiency of the evidence is whether, 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 (1979). Under the *Jackson* standard, all evidence, direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Jacobs*, 504 So.2d 817, 820 (La. 1987).

When circumstantial evidence forms the basis for the conviction, the totality of the evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The circumstantial evidence rule is not a separate test from the *Jackson* standard; rather, La. R.S. 15:438 merely "provides an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found defendant guilty beyond a reasonable doubt." *State v. Wright*, 445 So.2d 1198, 1201 (La. 1984). Although the circumstantial evidence rule is not a more stringent standard than the general reasonable juror's reasonable doubt formula, "it emphasizes the need for careful observance of the usual standard, and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence." *State v. Chism*, 436 So.2d 464, 470 (La. 1983).

Mr. Smith was charged with and convicted of possession with the intent to distribute cocaine. To sustain its burden, the State was required to show that Mr. Smith possessed the cocaine and that he had the intent to distribute it. *See State v.*

Howard, 00-2700 (La. App. 4 Cir. 1/23/02), 805 So.2d 1247; *State v. Williams*, 594 So.2d 476, 478 (La. App. 4th Cir. 1992). Mr. Smith admits to possessing the cocaine. Thus, the element of possession is not at issue. The narrow issue is whether the state established the specific intent to distribute.

Because intent is a state of mind, "[i]t is very unusual to have direct evidence of intent." *State v. Perkins*, 97-1119, p. 16 (La. App. 3 Cir. 6/17/98), 716 So.2d 120, 129. Instead, intent almost always is proved by "evidence of circumstances from which intent can be inferred." *State v. Hearold*, 603 So.2d 731, 735 (La. 1992). Stated otherwise,"[s]pecific intent to distribute may be established by proving circumstances surrounding defendant's possession which give rise to a reasonable inference of intent to distribute." *State v. Crosby*, 98-0372, p. 6 (La. App. 4 Cir. 11/17/99), 748 So.2d 502, 506 (citing *State v. Dickerson*, 538 So.2d 1063 (La. App. 4th Cir. 1989)).

The Louisiana Supreme Court has enumerated the following five factors that are useful to consider in determining whether circumstantial evidence is sufficient to establish specific intent to distribute:

1. whether the defendant ever distributed or attempted to distribute the drug;

2. whether the drug was in a form usually associated with possession for distribution to others;

3. whether the amount of drug created an inference of an intent to distribute;

4. whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and

5. whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.

Hearold, 603 So.2d at 735 (citing *State v. House*, 325 So.2d 222, 225 (La. 1975)). However, the evidence need not "fall squarely within the factors enunciated [in *Hearold, supra*] to be sufficient for the jury to find the requisite intent to distribute." *State v. Cushenberry*, 94-1206, p. 6, (La. App. 4th Cir. 1/31/95), 650 So.2d 783, 786.

Employing the *Hearold* factors, Mr. Smith argues that intent to distribute was not proven because:

- No clear evidence was presented as to the exact amount of cocaine seized.
- No expert testimony was presented regarding either the amount of drugs seized or the manner in which the drugs were packaged being inconsistent with personal use.
- No evidence was presented that he ever distributed or attempted to distribute cocaine.
- He was not seen engaging in any suspicious behavior or found in an area known for drug trafficking.
- The amount of money found in his pocket—$189—was not especially large and was not indicative of drug distribution.
- The existence of a gun in the vehicle was insufficient to prove he had the intent to distribute cocaine.

Mr. Smith thus contends that the conviction should be modified to simple possession of cocaine.

We find, as the State contends, that Mr. Smith's intent to distribute was sufficiently established by the following four factors: (i) the quantity of cocaine—approximately 20.7 grams;[3] (ii) the manner of packaging of the cocaine—seven

[3] At the motion hearing, the weight of the cocaine as indicated in the lab report was questioned by the trial court. Particularly, the court questioned whether the 20.7 grams referred to the weight of only the cocaine or of the plastic bag containing the numerous small plastic bags all within another plastic bag. At the hearing, however, the trial court did not have the benefit of visually inspecting the cocaine. At trial, the cocaine was introduced. Moreover, Officer Hurst testified at trial that the cocaine had been removed from its original packaging and placed into a single bag. From this testimony, it arguably could be inferred that the weight of the cocaine was determined without the packaging.

individual small plastic bags inside one larger plastic bag; (iii) the presence of a gun in the vehicle Mr. Smith was driving; and (iv) the currency found on Mr. Smith—$189.

In several cases this court has found sufficient evidence to support convictions for possession with the intent to distribute based merely upon the amount of drugs seized. *State v. Jones*, 97-2217 (La. App. 4 Cir. 2/24/99), 731 So. 2d 389, 399 (officers seized sixty-four tin foil packets of heroin); *State v. Ash*, 97-2061 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669 (officers seized twenty-one pieces of crack cocaine and a bag of powdered cocaine); and *State v. Bentley*, 97-1552 (La. App. 4 Cir. 10/21/98), 728 So. 2d 405, 412 (officers seized thirty-four pieces of crack cocaine). Although neither the exact number of pieces of cocaine nor the exact weight of the cocaine was determined, the trial court had the benefit at trial of visually inspecting the cocaine. We thus find it appropriate to defer to the trial court's apparent determination that the amount of cocaine indicated that Mr. Smith had the intent to distribute.

In support of his contention that the evidence was insufficient, Mr. Smith cites two cases: *State v. Jack*, 97-351 (La. App. 3 Cir. 10/8/97), 700 So.2d 1177; and *State v. Johnson*, 621 So.2d 903 (La. App. 4th Cir. 1993). We find both of those cases distinguishable.

In the *Jack* case, the defendant was arrested on an outstanding warrant while exiting a grocery store. During a search incident to his arrest, ten small individually wrapped plastic bags of marijuana wrapped in one large bag were found in the defendant's underwear. In finding the evidence insufficient to support a conviction for intent to distribute, the court of appeal in *Jack* reasoned that a jury could have reasonably inferred an intent to distribute based on the manner in which the

marijuana was packaged; nonetheless, the court found this element, standing alone, not dispositive because it was possible that the defendant could have simply purchased the marijuana packaged in that manner. In the *Jack* case, unlike in this case, there was no mention of any weapon or money found on the defendant.

In the *Johnson* case, the defendant was found in possession of six or seven rocks of crack cocaine and $81.00. Finding the evidence insufficient to support a conviction for possession with intent to distribute, this court expressly noted that although a weapon was found in the defendant's house, the defendant could not be linked to it, stating that "despite the State's attempt to link the defendant to the semi-automatic weapon, which had been found in the house where the defendant resided, it failed to prove the connection to the defendant. Again, there was absolutely no evidence to establish that the weapon belonged to the defendant, that he had ever handled it, or that he even knew it was in the house." *Johnson*, 621 So.2d at 907.

Unlike in the *Johnson* case, the weapon introduced into evidence in this case was clearly linked by the officers' testimony to Mr. Smith. The gun was found in the center console of the vehicle Mr. Smith was driving at the time he was arrested. In allowing the State, over the defense's objection, to introduce the gun into evidence, the trial court expressly noted that "weapons . . . are considered accoutrements of the drug trafficking trade." *See Hearold*, 603 So.2d at 736 (noting that "weapons or large sums of cash" were items commonly seized in drug distribution arrests.) The trial court thus found that the weapon was relevant in establishing Mr. Smith's specific intent.

Finally, we find Mr. Smith's reliance on the fact the officers did not testify that the area in which he was arrested was known for drug trafficking misplaced.

Mr. Smith was stopped by the police in the early morning hours possessing a handgun, a relatively large quantity of individually packed rocks of cocaine, and more than a trifling sum of money. Given the circumstances presented in this case, a rational trier of fact could have concluded beyond a reasonable doubt that Mr. Smith had the intent to distribute the cocaine that was found in his possession. Accordingly, we find no merit to Mr. Smith's assignment of error.

DECREE

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

AFFIRMED