

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2009-KA-0644**
VERSUS * **COURT OF APPEAL**
RAYMOND SMITH * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 475-454, SECTION "K"
Honorable Arthur Hunter, Judge

Charles R. Jones
Judge

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Max N. Tobias, Jr.)

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AFFIRMED

Raymond Smith appeals his conviction and sentence for being a convicted felon in possession of a firearm and two counts of possession of cocaine. We affirm.

The State of Louisiana by bill of information charged Smith with possession of a firearm by a convicted felon, possession with intent to distribute cocaine, and distribution of cocaine.¹ Because the police officers failed to appear for the hearing on motions that was scheduled pretrial, the district court found no probable cause and ordered Smith's release. A hearing on motions for a preliminary hearing and to suppress the evidence was subsequently held. The district court denied the motion to suppress the evidence and found probable cause to substantiate the charges of a felon in possession of a firearm and possession of cocaine. The court found no probable cause for distribution of cocaine. Smith elected a bench trial, and the State amended the bill of information as to the two cocaine charges to simple possession. The district court found Smith guilty as charged on all three counts. He was sentenced to serve ten years at hard labor on the firearm conviction and to serve five years at hard labor on each of the cocaine convictions.

¹ His codefendant was charged with possession of cocaine.

The sentences were ordered to run concurrently with each other and with any other sentence Smith may be serving. His motion for appeal was granted. In response to the State's motion to correct an illegal sentence, the district court amended Smith's firearm sentence to include a \$1000.00 fine. On that same day, he was adjudicated a fourth felony offender. After vacating the original sentence imposed on count two for possession of cocaine, the district court resentenced Smith pursuant to La. R.S. 15:529.1 to serve twenty years at hard labor. The sentence was ordered to run concurrently with any other sentence he was serving. This timely appeal follows.

Officer Robert Ponson and three other officers wearing plain clothes were on foot patrol in the 1800 block of Iberville Street in New Orleans, Louisiana. They were on patrol in that area because of complaints of drug activity. The officers focused on a residence located at 1816 Iberville Street that contained several apartments. Officer Ponson and his partner, Officer Sherman Skipper, were positioned across the street from the residence. Officers Aaron Wiltz, Leron Stewart, and Nicholas Williams were positioned on the opposite side of the street next to the residence. It was 8:30 at night, and the area was lighted by streetlights.

From their positions, the officers observed the codefendant, Ms. Queenie Pomfrey, walk towards the residence, and Smith was seen coming down the alley that was located alongside the residence. Smith met Ms. Pomfrey at the gate, and after speaking with Ms. Pomfrey for a moment, Smith exited the gate. The officers observed Ms. Pomfrey hand Smith some currency, and Smith handed her a small plastic bag containing a white substance. Because the officers believed that they had witnessed a hand-to-hand drug transaction, the officers approached the two and identified themselves as police officers. Officer Ponson detained Smith and

conducted a pat-down search of him. During the search, the officer removed a loaded handgun from the waistband of Smith's pants. Smith was arrested, and a search incident to his arrest produced a clear bag containing a rock-like substance, a gutted lighter containing numerous rocks, a homemade crack pipe, a razor blade, and \$35.00. Ten one dollar bills that were clutched in Smith's hand were also confiscated. Ms. Pomfrey had in her hand a plastic bag containing a rock-like substance, and she was arrested. The officers did not enter the premises.

Smith testified at trial that earlier on the same day of his arrest, he helped Ms. Pomfrey when she ran out of gas in her van. He stated that it was the first time he had met Ms. Pomfrey. Later that evening when he was leaving his apartment, he saw her van pulling up in front of the residence. Smith said he spoke to her at the gate, and she asked to use the restroom. While he was leading Ms. Pomfrey up the front staircase, three police vehicles with the lights activated pulled up in front of the residence. When he returned to the gate to open it for the officers, two of the officers grabbed him, placed him on the police car, and ran his name. The rest of the officers entered and searched the yard. Ms. Pomfrey was retrieved from the staircase, and an unidentified officer placed a lighter on the police vehicle. Smith was then taken into Apartment B of the residence, which was unoccupied.² He was placed in a chair while the officers searched the apartment.³ The officers found a sack containing a gun alongside the television in the apartment. Smith denied owning the weapon, and he denied selling crack cocaine to Ms. Pomfrey.⁴

Gloria Poole, who lives in one of the apartments, said that she opened her door and saw the police inside the gate. She did not see what the police were

² Smith lived in Apartment D.

³ The apartments came furnished.

⁴ Smith admitted to his conviction for distribution of false drugs.

doing because upon seeing the police, she went back inside her apartment and closed the door.

The parties stipulated that Sergeant Harry O'Neal was an expert in the analysis and identification of controlled substances. The substances found on both Smith and Ms. Pomfrey tested positive for the presence of cocaine.

The parties stipulated that Officer Joseph Pollard was an expert in the analysis of fingerprints.⁵ He compared the fingerprints taken from Smith in court to the fingerprints on the arrest register from Smith's prior conviction for distribution of false drugs and determined that both sets of prints belonged to Smith. The prints contained on the bill of information from the prior conviction were not suitable for comparison.

A review of the record reveals two errors patent. First, neither the docket master nor minute entries show that Smith was arraigned. The failure to arraign a defendant is considered waived if he enters trial without objecting thereto; in such cases a plea of not guilty is assumed. La. C.Cr.P. art. 555. Smith did not object to the omission at trial or on appeal. Thus, the failure of the record to show that he was arraigned on the charges warrants no relief. State v. Perez, 98-1407, pp. 19-20 (La. App. 4 Cir. 11/3/99), 745 So.2d 166, 178.

Second, the district court neglected to restrict parole eligibility on Smith's sentence for being a convicted felon in possession of a firearm as required by La. R.S. 14:95.1. However, as per La. R.S. 15:301.1A and State v. Williams, 2000-1725, p. 10 (La. 11/28/01), 800 So. 2d 790, 799, the sentence is deemed to have been imposed with the restriction, even in the absence of the trial court's failure to delineate the restriction. Thus, there is no need for this court to correct the

sentence. See State v. Phillips, 2003-0304, p. 3 (La. App. 4 Cir. 7/23/03), 853 So. 2d 675, 677.

In Smith's first assignment of error, he asserts that the record does not reflect that he made a knowing and intelligent waiver of his constitutional right to a trial by jury. However, the supplemental transcript that was made part of the record after his brief was filed shows a valid waiver of his right to a jury trial. The supplemental transcript reflects the following colloquy between the court and Smith:

THE COURT:

I've been informed by your attorney that you wish to have a trial by judge; is that correct?

THE DEFENDANT:

Yes, sir.

THE COURT:

And you understand and realize that the Constitution gives you a right to be tried by jury, but you can waive that right and have a trial by judge, and I'll decide the issues regarding your case; do you understand that?

THE DEFENDANT:

Yes, sir.

THE COURT:

And you've discussed your request with your Attorney?

THE DEFENDANT:

Yes, sir.

THE COURT:

⁵ The defense initially stipulated to the prior conviction but later withdrew that stipulation.

And you're satisfied that you wish to waive your right to trial by jury; is that correct?

THE DEFENDANT:

Yes, sir.

THE COURT:

Let the record reflect, the defendant has knowingly, intelligently, and voluntarily waived his right to trial by jury.

The waiver of a defendant's right to a trial by jury is never presumed; it must be express. While the trial judge must determine if the defendant's jury trial waiver is knowing and intelligent, that determination does not require a Boykin-like colloquy.⁶ State v. Duplessis, 2007-1005, p. 5 (La. App. 4 Cir. 12/19/07), 974 So. 2d 65, 69.

Here, the colloquy shows that the court advised Smith of his right to a jury trial as well as his right to waive that right. The district court asked him if he understood his rights and had discussed his rights with his counsel. Smith responded affirmatively to both questions. Thus, he knowing and intelligently waived his right, and this assignment of error is without merit.

Smith's second assignment of error in which he argues that the evidence was insufficient to convict him of the offenses charged is based upon the conflicting testimony presented at trial. He asserts that his testimony was more credible than that of the officers because his testimony was corroborated by the only independent witness at trial, Gloria Poole, and because there was no fingerprint evidence linking him to the weapon and drugs found by the police.

⁶ Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Ms. Poole's testimony corroborated Smith's testimony only insofar as she stated that she observed the police inside the gate. Smith's testimony that Ms. Pomfrey only sought to use the restroom and that the officers searched the yard and an apartment in the building was uncorroborated. On the other hand, the officers consistently testified that they observed a hand-to-hand transaction between Smith and Ms. Pomfrey, and that no search of the premises was conducted. Apparently, the district court found the officers' testimony more plausible despite the fact that no fingerprints were lifted from the evidence seized from Smith.

Caselaw suggests that conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. State v. Jones, 537 So. 2d 1244, 1249 (La. App. 4 Cir. 1989). Such a determination rests solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witness. Id. A trier of fact's determination as to the credibility of a witness is a question of fact entitled to great weight, and its determination will not be disturbed unless it is clearly contrary to the evidence. State v. Vessell, 450 So. 2d 938, 943 (La. 1984). Here, the district court's credibility determination is not contrary to the evidence.

Smith was convicted of possession of a firearm by a convicted felon. Under La. R.S. 14:95.1, the State was required to prove that he possessed a firearm, that he had a prior conviction of an enumerated felony within the last ten years, and that he had the general intent to commit the offense. The State met its burden.

Officer Ponson testified that he removed a loaded firearm from the waistband of Smith's pants. Thus, the district court reasonably concluded that Smith intentionally possessed a firearm. See State v. Jones, 544 So. 2d 1294, 1296-1297 (La. App. 4 Cir. 1989). Officer Pollard compared Smith's fingerprints

taken in court to those from a 1999 conviction for distribution of false drugs and testified that Smith's prints matched those taken from the 1999 conviction.⁷ Smith also admitted to the prior conviction. Thus, the district court reasonably concluded that he had a prior conviction that qualified.

Smith was additionally convicted of possession of cocaine which requires proof that he intentionally possessed cocaine. La. R.S. 40:967. The district court reasonably concluded that Smith intentionally possessed cocaine based upon the evidence presented at trial. Officer Ponson testified that he recovered from Smith's person a clear bag containing a rock-like substance and a gutted lighter containing more rock-like substances; Officer O'Neal testified that the rock-like substances confiscated from Smith tested positive for the presence of cocaine.

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, 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. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757, 758 (La. App. 4 Cir. 1991). Viewed in this light, the evidence was sufficient to support Smith's convictions. This assignment of error is without merit.

DECREE

For the foregoing reasons, the convictions and sentences imposed upon Raymond Smith are affirmed.

AFFIRMED

⁷ A violation of the Uniform Controlled Dangerous Substances Law, La. R.S. 40:961, et seq., is an enumerated felony.