

**NOT DESIGNATED FOR PUBLICATION**

<b>STATE OF LOUISIANA</b>	*	<b>NO. 2015-KA-0771</b>
<b>VERSUS</b>	*	
<b>ELROY LUMAR</b>	*	<b>COURT OF APPEAL</b>
	*	<b>FOURTH CIRCUIT</b>
	*	<b>STATE OF LOUISIANA</b>

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 497-550, SECTION "A"  
Honorable Laurie A. White, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

\* \* \* \* \*

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

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**CONVICTION REVERSED;  
SENTENCE VACATED; REMANDED**

**NOVEMBER 4, 2015**

Defendant, Elroy Lumar, appeals his conviction for the possession with the intent to distribute marijuana and his sentence as a double felony offender to fifteen years at hard labor. Our review of the record shows the trial transcript is incomplete; accordingly, we reverse defendant's conviction, vacate his sentence, and remand the case to the trial court for proceedings consistent with this opinion.

#### **STATEMENT OF CASE**

On June 14, 2010, the State of Louisiana charged the defendant, Elroy Lumar, with one count of the possession with the intent to distribute marijuana. He entered a plea of not guilty. After the trial court denied his motion to suppress the evidence and found probable cause, the matter proceeded to trial on May 10, 2011. A twelve-person jury found the defendant guilty as charged.

On January 6, 2012, the court sentenced the defendant to serve five years at hard labor. The State noted its intent to file a multiple bill; and thereafter, the defendant admitted to being a second felony offender. The court vacated the defendant's previous sentence and imposed a sentence of fifteen years at hard labor without benefit of parole, probation, or suspension of sentence.

Defendant's trial counsel did not file a motion for appeal. However, his present counsel subsequently enrolled and filed an application for post-conviction relief, seeking an out-of-time appeal. The trial court granted the motion and set a return date.

Counsel then filed with this Court a motion for extension of time to lodge the record, noting that the trial transcript that he received from the court reporter was incomplete. This Court reviewed the motion and ordered the trial court to submit documentation to support defendant's notice of appeal and to take appropriate measures to correct any deficiencies in the record.<sup>1</sup> Thereafter, this Court issued a second order, directing the trial court to correct any deficiencies in the transcript before the appeal is lodged in this Court.<sup>2</sup>

When the record was lodged in this Court, the transcript was still incomplete. A certification from another court reporter attested that upon reviewing the record and listening to the trial recording, that portions of the record were missing and unavailable, including trial transcripts and recordings.

Thereafter, counsel for the defendant filed his appellate brief.

## **FACTS**

The record indicates the defendant was arrested during the execution of a search warrant on May 25, 2010 at 1354 St. Anthony Street. The officers found him and his girlfriend in the back bedroom of the residence when they arrived. The main officers involved in the search of the residence were Detective Troy Smith, Sergeant Kevin Imbraguglio,<sup>3</sup> and Detective Althena Monteleone.

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<sup>1</sup> *State of Louisiana v. Elroy Lumar*, 2015-KM-0333 (La. App. 4. Cir. 4/20/15).

<sup>2</sup> *State of Louisiana v. Elroy Lumar*, 2015-KM-0333 (La. App. 4 Cir. 7/27/15).

<sup>3</sup> While the trial transcript spells his name as "Imbragugio," it appears the correct spelling is "Imbraguglio," and this opinion will use this spelling.

The trial transcript begins with excerpts of the voir dire. It continues with what appears to be the middle of the cross-examination of the first witness, who is listed in the transcript only as “Detective/Officer.” From the context of the remainder of the transcript, as well as the testimony of Sgt. Imbraguglio, it appears that the first witness was Det. Smith; however, a definitive identification cannot be made. During this cross-examination, the witness testified that he could not remember if he was in the room when the officers first found the defendant. He testified that he made sure that the defendant was read his Miranda rights, and maintained that the defendant indicated that he understood these rights. He stated that the officers advised the defendant that they were executing the warrant, and he was under investigation for narcotics activity. The witness testified that he could not remember if the defendant’s girlfriend was present when the defendant was advised of his rights; however, he believed that Sgt. Imbraguglio was with the defendant in the back bedroom at that time. He stated that the defendant’s girlfriend may have been moved to the front room by that time. The witness testified that after the defendant was advised of his rights, Sgt. Imbraguglio questioned the defendant. The defendant revealed he had some marijuana in a black book sack that was inside a closet. The witness stated that the defendant was eventually taken into the living room while the officers searched the house.

The witness testified that the officers found a black book sack inside the closet. The officers found plastic bags of marijuana and a scale inside the sack. The witness admitted that there was nothing inside the sack identifying who owned it; notwithstanding, the sack was located in the closet where the defendant indicated it could be found and contained marijuana. The witness testified that the officers also seized \$910 in cash from inside the bedroom. On redirect, the witness

identified a firearm that the officers also seized on that date. On re-cross, he stated that Det. Monteleone seized the gun. Although the gun had been reported as stolen, the witness acknowledged that officers never determined if the defendant actually possessed it.

Sergeant Kevin Imbraguglio testified that he was one of the officers who executed the search warrant for the St. Anthony Street residence. He stated that when the officers made entry into the residence, they found the defendant and his girlfriend in the rear bedroom, and two young children were sleeping in a side bedroom. The officers “secured” everyone, advised them of the intent to search, gave them a copy of the search warrant, advised them of their Miranda rights, and relayed that they were under investigation for narcotics activity. Sgt. Imbraguglio testified that he asked the target of the investigation if he wanted to cooperate, and the defendant indicated that he would do so. The sergeant testified that the defendant then told him that he had “weed” in a book sack in the closet. Sgt. Imbraguglio stated that even if the defendant had not told him about the book sack, he would have searched the closet pursuant to the search warrant. Sgt. Imbraguglio said he found plastic baggies of marijuana, a black shoebox with more marijuana, a digital scale, and a box of sandwich bags when he looked into the book sack. He stated that the sandwich bags and scale were commonly used in packaging marijuana for resale. He estimated that the officers seized approximately one and a half pounds of marijuana from the book sack. He added that a cutting agent was also found inside the bag. Sgt. Imbraguglio estimated that a pound of marijuana costs approximately \$600-\$700, however, it could be more profitable if it was broken down for resale.

On cross-examination, Sgt. Imbraguglio testified that he first saw the defendant in the back bedroom, and the defendant's girlfriend, whom he identified as Kiera Johnson, was in the bedroom with him. He noted that both of them were out of bed by the time the officers arrived at the bedroom. He stated that the defendant and Ms. Johnson were individually handcuffed. They were eventually moved to the front room during the search. He stated that claimed the defendant was still in the bedroom when the defendant admitted he had marijuana in the book sack.

Detective Althena Monteleone testified that she helped to execute the search warrant at the St. Anthony Street residence. She stated she found a firearm outside the residence, wrapped in a sock, on a ledge under the raised residence. She identified the gun, which she stated had thirteen live rounds when she found it. She also testified that the officers learned that the gun had been stolen; however, they did not know the identity of the owner.

The parties stipulated that William Giblin was a criminalist for N.O.P.D.; and if he had appeared, he would have testified that the substance he analyzed tested positive for marijuana.

## **DISCUSSION**

### Errors Patent

A review of the record for patent errors reveals one as to the defendant's sentence. The defendant was convicted of possession with the intent to distribute marijuana; and as a second offender, the trial court imposed a sentence of fifteen years at hard labor without benefit of parole, probation, or suspension of sentence. The court erred by prohibiting parole eligibility. As per La. R.S. 40:966B(3), the defendant was subject to a sentence of five to thirty years at hard labor; the statute

does not prohibit parole eligibility. While La. R.S. 15:529.1G mandates that a sentence as a multiple offender be imposed without the benefit of probation or suspension of sentence, it does not prohibit parole eligibility. Thus, the sentence is illegally excessive. However, because the defendant's conviction and sentence must be reversed due to the incompleteness of the trial transcript, as discussed herein below, this Court takes no action with respect to the sentence.<sup>4</sup>

#### Assignments of Error

The defendant contends that he has been denied his right to an appeal because a full review of his conviction cannot be had based on the incompleteness of the trial transcript.<sup>5</sup> He asserts that the missing testimony of the first witness, who may have been Det. Smith, was vital to his appeal because Det. Smith obtained the search warrant, a warrant allegedly obtained on a tip from a paid confidential informant. He points out that Det. Smith did not testify at the suppression hearing.<sup>6</sup> Thus, the complete substance of his direct testimony and cross-examination testimony presented at trial is unknown. The defendant further asserts that he cannot support his contention that the evidence was insufficient to convict because he does not know what evidence Det. Smith presented on direct examination. We find defendant's claim has merit.

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<sup>4</sup> In addition, the court properly did not impose a fine because the appellant was sentenced as a multiple offender. See State v. Dickerson, 584 So. 2d 1140 (La. 1991); State v. Nora, 2013-0892 (La. App. 4 Cir. 6/18/14), 143 So. 3d 1237.

<sup>5</sup> Although he assigned the sufficiency of evidence as error, he makes no argument in his brief as to this assignment. Generally, the claim would be abandoned. See Rule 2-12.4; State v. Edwards, 2013-0665 (La. App. 4 Cir. 1/22/14), 133 So. 3d 132, writ den. 2014-0383 (La. 9/26/14), 149 So. 3d 259. Nonetheless, he "assigns" this error in order to show that he cannot raise the claim due to the missing trial testimony.

<sup>6</sup> The September 9, 2010 transcript of the suppression hearing indicates that Sgt. Imbraguglio was the sole witness at the hearing.

La. Const. art. I, §19 provides in pertinent part: “No person shall be subjected to imprisonment . . . without the right of review based upon a complete record of all evidence upon which the judgment is based.” See also La. C.Cr.P. art. 843, which requires that all trial proceedings be recorded. Louisiana jurisprudence has consistently held that where appellate counsel was not trial counsel, and no transcript of the testimony of trial is available, a defendant’s right to “appellate review is rendered meaningless . . . and the interests of justice require that a defendant be afforded a new, fully-recorded trial.” State v. Ford, 338 So. 2d 107, 110 (La. 1976). See also State v. Harris, 2001-1910 (La. App. 4 Cir. 4/24/02), 817 So. 2d 1164; State v. Johnson, 2001-1909 (La. App. 4 Cir. 1/23/02), 807 So. 2d 1071.

In cases where a trial transcript is unavailable due to no fault of a defendant, courts have consistently held that the defendant is entitled to a new trial. In both Harris and Johnson, the defendants moved for an appeal soon after sentencing, but due to problems with personnel in the district court the transcripts of trial were unavailable by the time the records were lodged in this court. In both cases, this Court vacated the defendants’ convictions and sentences and granted the defendants new trials. Likewise, in State v. Clark, 2000-0348 (La. App. 4 Cir. 12/13/00), 776 So. 2d 1249, the defendant moved for an appeal right after sentencing. By the time the appeal record was lodged in this Court, the notes for the first day of trial were missing, and the testimony of various witnesses was unavailable. We reversed the defendant’s conviction and sentence, noting his right to a meaningful appeal had been violated.

By contrast, in cases where the unavailability of trial transcript is due to inaction on the defendant’s part, this Court and other courts have affirmed the



defendants' convictions. In State v. Gonzales, 95-0860 (La. App. 4 Cir. 9/18/96), 680 So. 2d 1253, shortly after the defendant was sentenced and granted an appeal in 1983, she escaped custody and remained at large for ten years. On her capture, she learned that her appeal had not been lodged. By that time, the notes for the trial were lost, and the transcript was unavailable. This Court affirmed her conviction and sentence, noting that the loss of the transcript was attributable to her voluntary absence and her failure to take steps to insure that her appeal was lodged in this Court.

In State v. Ford, 92-2029 (La. App. 4 Cir. 1/31/95), 650 So. 2d 808, the trial court granted the defendant's appeal in 1980, but the appeal record was never lodged in the Supreme Court, which had appellate jurisdiction at that time. Although the defendant learned of this fact in 1984, he did not move to have the appeal lodged until 1991, at which time the trial court "reinstated" his appeal. By that time, the trial transcript was unavailable. This Court affirmed his conviction, noting that he waited eleven years after his appeal was granted and seven years after learning that his appeal had not been lodged before taking any steps to have the appeal lodged. See also State v. Clark, 93-0321 (La. App. 4 Cir. 10/27/94), 644 So. 2d 1130 and State v. Bernard, 583 So. 2d 111 (La. App. 5 Cir. 1991). In Bernard, the court upheld the defendant's conviction and sentence even though the trial transcript was unavailable because the defendant waited seven years to move for an appeal.

Here, the defendant pled guilty to the multiple bill a year after the conclusion of trial and five months after the he was originally sentenced. After the multiple bill plea, he specifically reserved his right to appeal his conviction; however, his trial counsel did not file a motion for appeal. Subsequently, new

counsel enrolled and moved for an out-of-time appeal, arguing that the defendant never implicitly or explicitly waived his right to appeal. The trial court granted defendant's motion.

Before the record was lodged in this Court, the defendant's new counsel took steps to have the entire transcript lodged with the appeal. In response to orders from this Court, another court reporter certified that she listened to the entire available audio file of the defendant's trial. She stated that the disc was scratched and damaged. She used a disc repair system to recover the file. Her certification noted that by looking at the disc's time stamps, she discovered that two portions of the trial were never recorded. One of these portions was the missing testimony of the first witness. Although most of the trial recording is available, the recording does not include the complete direct testimony and possibly part of the cross-examination of the first witness, presumably Det. Smith.

Therefore, as the record supports that the defendant was under the impression that his case was on appeal, this Court does not attribute the unavailability of a portion of the trial testimony to the defendant nor do we attribute any delays that resulted from the loss of a portion of the record to the defendant.

As discussed above, our jurisprudence supports that the lack of a complete trial transcript may entitle a defendant to a new trial if the inability to produce the transcript is not due to the defendant's dilatory actions. However, a slight inaccuracy in a trial record or an inconsequential omission from it which is immaterial to a proper determination of the appeal does not require reversal of a conviction. State v. Boatner, 2003-0485, pp. 4-5 (La. 12/3/03), 861 So. 2d 149, 153. A defendant is not entitled to relief because of an incomplete record absent a

showing of prejudice based on the missing portions of the transcript. Id. In Boatner, the Supreme Court found that the transcript was sufficient for appellate review because the defendant failed to show how he was prejudiced by the missing portions of testimony; and thus, failed to show there were material omissions from the record.

In State v. Norah, 2012-1194 (La. App. 4 Cir. 12/11/13), 131 So. 3d 172,<sup>7</sup> as here, the trial transcript lacked a portion of the direct testimony and a portion of the cross-examination of a police officer. This Court found that this omission did not impinge upon the defendants' right to a full appeal because the officer was not involved in the crime for which the defendants were being tried, the attempted second degree murder of the victim. On appeal, the defendants alleged, among other assignments, that their right to a full appeal was violated due to the omission of this officer's testimony. In assessing this claim, this Court stated:

But, as here, where only a small portion of the overall testimony is missing, we must first examine the available record, and decide whether the record "is so inadequate that the defendant's constitutional right to judicial review is prejudiced." *State v. Boatner*, 03-0485, p. 6 (La.12/3/03), 861 So.2d 149, 153. We come to this determination through a two-part analysis for materiality and prejudice, and will only remand for a new trial when both elements are satisfied.

First, we determine the materiality of the omission, which varies depending on the legal bases of the defendant's assignments of error, the missing portions' relevance in relation to those assignments, and our ability to properly review those assignments in the absence of that portion of the record. *See id.*, 03-0485 at p. 4, 861 So.2d at 153. Thus "[a] slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal does not require reversal of a conviction." *State v. LaCaze*, 99-0584, p. 17

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<sup>7</sup> Writs den. 2014-0084 (La. 6/13/14), 140 So. 3d 1188, and 2014-0082 (La. 6/20/14), 141 So. 3d 287.

(La.1/25/02), 824 So.2d 1063, 1076 (citing *State v. Brumfield*, 96–2667, pp. 15–16 (La.10/20/98), 737 So.2d 660, 669) (internal quotations omitted). *See also State v. Stukes*, 08–1217, p. 23 (La.App. 4 Cir. 9/9/09), 19 So.3d 1233, 1248.

Second, the defendant must show a “reasonable likelihood that he suffered prejudice” from that material omission in substantiating his other assignments of error. *Boatner*, 03–0485 at pp. 5–6, 861 So.2d at 153. *See, e.g., State v. Allen*, 99–2358, pp. 6–7 (La.App. 4 Cir. 3/21/01), 788 So.2d 62, 66.

Id. at pp. 9-10, 131 So. 3d at 182.

When we apply these precepts to the present matter, we note that the testimony that is missing from the defendant’s trial is the entire direct testimony and perhaps, part of the cross-examination of Det. Smith, one of the officers who executed the search warrant and the officer who authored the police report. Unlike the missing testimony in Norah, which was only partial and concerned an unrelated shooting and the capture of the defendants, the missing testimony in this present case concerned the crime for which the defendant was being tried. This was a material omission from the transcript of the trial proceedings that requires reversal. See Boatner, p. 4, 861 So.2d at 153.

The State acknowledges that the appellate record is incomplete. It maintains that it attempted to recover the missing portions of the record by contacting the court reporter for the district court proceedings in this matter. After many conversations with the court reporter, the State concludes that continuing the search would be futile. The State concedes that the defendant’s assignment of error has merit.

The defendant also alleges the insufficiency of evidence as an assignment of error. We recognize that this error was not briefed; however, we also note that this

assignment of error could not be adequately briefed because material portions of the record were omitted, including the testimony of the officer who executed the search warrant was missing. This missing testimony would be essential to a review of a sufficiency of the evidence claim.

Upon review, the omission of the missing testimony in this case cannot be attributed to the defendant. Unlike in Norah, the missing testimony in the present matter is vital to a review of the defendant's appeal because it bears directly on the sufficiency of the evidence to support his conviction. Therefore, this Court finds merit in defendant's assignments of error.

### **CONCLUSION**

We find the missing portion of the trial testimony is material to a review of the sufficiency of evidence and that the omission cannot be attributed to the defendant. Therefore, we find merit to the defendant's claim that he was denied a full right to appeal. Accordingly, for the reasons discussed herein, we reverse his conviction, vacate his sentence, and remand the matter for further proceedings consistent with this opinion.

**CONVICTION REVERSED;  
SENTENCE VACATED;  
REMANDED**