

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 1569

STATE OF LOUISIANA

VERSUS

DEMARCUS KENTRELL HOLLINS

Judgment Rendered:

APR 09 2008

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Appealed from the
Twentieth Judicial District Court
in and for the Parish of East Feliciana, State of Louisiana
Trial Court Number 05-CR-559

Honorable William G. Carmichael, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

Whipple, J. dissents and assigns reasons. by [signature]

GUIDRY, J.

Defendant, Demarcus Kentrell Hollins, was charged by bill of information with one count of possession of cocaine, a violation of La. R.S. 40:967(C). Defendant entered a plea of not guilty and filed a motion to suppress the evidence. After his motion to suppress was denied, defendant was tried before a jury. The jury found defendant guilty as charged. The trial court subsequently sentenced defendant to five years at hard labor.

Defendant appeals. Because we have found the existence of reversible trial error, we reverse defendant's conviction, vacate his sentence, and remand the matter for a new trial.

FACTS

On October 4, 2005, at approximately 2:00 p.m., Officer Dwayne Wheeler of the Slaughter Police Department was patrolling the Louisiana Highway 19 area. Officer Wheeler passed a vehicle in the oncoming lane and noted that neither the driver nor passenger were wearing seat belts. Officer Wheeler activated the lights on his police unit and made a U-turn in order to stop the vehicle. After turning his unit, Officer Wheeler observed the vehicle drift into the opposite lane of traffic as both the driver and the passenger had turned to look at his unit.

The vehicle pulled over on La. Highway 19 in front of a video store. Before Officer Wheeler approached the vehicle, the driver, subsequently identified as defendant, exited the vehicle and walked toward Officer Wheeler's unit. Defendant walked approximately three feet past the back of his own vehicle toward Officer Wheeler. The entire time, Officer Wheeler observed that the defendant and the passenger, who remained in the vehicle, repeatedly looked at each other.

Officer Wheeler recognized defendant from previous interactions of traffic stops and narcotics arrests. When asked for his driver's license, defendant reached toward his back pocket and again looked at his passenger, who would later be identified as Jonathon Fields. According to Officer Wheeler, defendant began fumbling in his front pockets and his eyes kept darting back and forth to his own vehicle, Fields, and Officer Wheeler. Officer Wheeler noticed defendant's hands were trembling. Defendant eventually produced his driver's license from his back pocket.

Defendant's behavior aroused Officer Wheeler's concern that there may be weapons or narcotics either on defendant's person or in the vehicle. Officer Wheeler requested permission to search defendant's vehicle and defendant gave his consent.

Officer Wheeler asked defendant to place his hands on the vehicle so he could pat him down for weapons. Defendant immediately walked back towards his own vehicle and got even with the rear driver-side door. Defendant placed his hands on the vehicle and again looked inside the vehicle. Suddenly, the front passenger-side door opened and Fields exited. Officer Wheeler ordered Fields back into the vehicle, but Fields began running away. Fields ignored Officer Wheeler's orders to stop. Officer Wheeler told defendant to stay where he was and gave chase to Fields. Officer Wheeler was unable to apprehend Fields and radioed for assistance. Defendant was placed under arrest and taken to the Slaughter Police Department.

Officer Kenny Stewart, of the Wilson Police Department, responded to the call for assistance. Approximately an hour later, Fields was apprehended about a mile away from the scene of the traffic stop. Fields was brought into the Slaughter Police Station and given his Miranda rights.

Fields was initially reluctant to speak with the police, but eventually stated that when defendant saw his vehicle was being stopped by the police, he handed Fields a plastic bag containing cocaine and told Fields if the police started to search him (defendant) that Fields was to run. Fields told the police he tucked the bag into his boxers and that he had dropped the bag behind a house on Magnolia Avenue, underneath a tree.

The police recovered the cocaine in the area described by Fields. Testing by the Louisiana State Police Crime Lab revealed the bag contained 4.22 grams of cocaine. Defendant did not testify at trial.

PROCEDURE

We find reversible error raised by defendant's third assignment of error. The defendant argues in his first assignment of error that the evidence is insufficient to support his conviction. When issues are raised on appeal, both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused is entitled to an acquittal under Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proven beyond a reasonable doubt. When the entirety of the evidence is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion by the court of the trial error issues as to that crime would be pure dicta since the issues are moot.

On the other hand, when the entirety of the evidence is sufficient to support the conviction, the accused is not entitled to an acquittal, and the

reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial. If the reviewing court determines there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused must receive a new trial, but is not entitled to an acquittal even though the admissible evidence, considered alone, was insufficient. Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), State v. Hearold, 603 So.2d 731, 734 (La. 1992); State v. Woods, 2000-2147, pp. 3-4 (La. App. 1st Cir. 5/11/01), 787 So.2d 1083, 1087, writ denied, 2001-2389 (La. 6/14/02), 817 So.2d 1153.

Accordingly, we proceed first to determine whether the entirety of the evidence was sufficient to support the defendant's conviction for possession of cocaine.

SUFFICIENCY OF THE EVIDENCE

Defendant argues the evidence is insufficient to support his conviction for possession of cocaine because the only evidence of defendant's guilt is the testimony of Fields, which is uncorroborated and fails to dispel all reasonable doubt concerning defendant's guilt.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. See La. C.Cr. P. art. 821(B). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to

prove,” every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Smith, 2003-0917, pp. 4-5 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 798-99.

Guilty knowledge is an essential element of the crime of drug possession. State v. Harris, 94-0696, p. 3 (La. App. 1st Cir. 6/23/95), 657 So.2d 1072, 1074, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477. Evidence of flight or furtive behavior by the defendant may support a finding of guilty knowledge sufficient to prove defendant's knowing possession of cocaine. State v. Sylvia, 2001-1406, p. 4 (La. 4/9/03), 845 So.2d 358, 361.

On the issue of whether the evidence sufficiently proved possession, the State is not required to show actual possession of the narcotics by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a

finding of constructive possession. State v. Smith, 2003-0917 at 5-6, 868 So.2d at 799.

A determination of whether or not there is “possession” sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. State v. Smith, 2003-0917 at 6, 868 So.2d at 799.

The evidence in this case establishes defendant had possession of the drugs. Fields testified that defendant gave him the drugs following the traffic stop, and that defendant instructed him to run if he [defendant] were searched. Officer Wheeler also testified that defendant exhibited nervous behavior during their interaction following defendant’s exit from his vehicle.

As trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. State v. Harris, 94-0696 at 3, 657 So.2d at 1074.

Clearly, the jury completely accepted Fields’s testimony that defendant possessed the drugs prior to being stopped by Officer Wheeler, and that Fields had no prior knowledge of drugs in the vehicle. Because the defendant’s conviction is based on the jury’s credibility determination, we find the evidence sufficiently supports his conviction.

This assignment of error is without merit.

MOTION TO SUPPRESS

In his second assignment of error, defendant argues the trial court erred in denying his motion to suppress evidence because the investigatory stop of defendant's vehicle was not justified.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. Measured by this standard, La. C.Cr. P. art. 215.1, as well as federal and state jurisprudence, recognizes the right of a law enforcement officer to temporarily detain and interrogate a person who he reasonably suspects is committing, has committed, or is about to commit a crime. Reasonable suspicion for an investigatory detention is something less than probable cause and must be determined under the specific facts of each case on the basis of whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. State v. Hardeman, 2004-0760, p. 4 (La. App. 1st Cir. 2/18/05), 906 So.2d 616, 622.

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. The standard is a purely objective one that does not take into account the subjective beliefs or expectations of the detaining officer. Although they may serve, and may often appear intended to serve, as a prelude to the investigation of much more serious offenses, even relatively minor traffic violations provide an objective basis for lawfully detaining the vehicle and its occupants. State v. Hardeman, 2004-0760 at 4-5, 906 So.2d at 622.

In the present case, Officer Wheeler observed that defendant and Fields were not wearing seat belts, a clear violation of La. R.S. 32:295.1. A

law enforcement officer may not search or inspect a motor vehicle, its contents, the driver, or a passenger solely because of a violation of this Section. La. R.S. 32:295.1(F)

However, once Officer Wheeler initiated the traffic stop of defendant's vehicle, defendant's actions aroused the suspicions of Officer Wheeler. Specifically, defendant exited his vehicle and began walking toward the police unit before he was asked to do so. Defendant frequently looked back at his vehicle, and was observed fidgeting with his hands by placing them in his pockets, then removing them multiple times. This behavior provided a reasonable basis for Officer Wheeler to suspect that defendant was in possession of some type of weapon or contraband. Officer Wheeler testified that as a result of defendant's behavior, he obtained permission to search defendant's vehicle. Prior to searching defendant's vehicle, Officer Wheeler planned to pat down defendant for safety reasons. Rather than placing his hands on the back of his own vehicle or the front of the police unit, defendant walked to the driver's side of his own vehicle, thereby placing Officer Wheeler on the other side of the vehicle from where Fields would exit and flee.

In the present case, the consent search obtained for defendant's vehicle was not based "solely" on the traffic stop for failure to wear a seat belt. Moreover, the consent search of defendant never took place because Fields fled before it could be performed. Finally, even if defendant was improperly searched and/or arrested for a seat belt violation, such action did not yield the evidence defendant seeks to suppress.¹ The evidence defendant seeks to suppress, the cocaine, was discovered after Fields was taken into custody, when Fields informed the police where to find it.

¹ Defendant was arrested after Fields fled the scene; however, defendant makes no argument that his arrest was improper.

It is well settled that if property is abandoned without any prior unlawful intrusion into the citizen's right to be free from governmental interference, then such property may be lawfully seized. In such cases, there is no expectation of privacy, and then, no violation of a person's custodial rights. State v. Jones, 2001-0908, p. 7 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 708, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Accordingly, defendant is seeking to assert a privacy right of Fields; yet, because Fields abandoned the cocaine, Fields has no such right.

Under the facts and circumstances of this case, the trial court properly denied defendant's motion to suppress the evidence abandoned by Fields after Fields fled the scene.

This assignment of error is without merit.

ACCOMPLICE INSTRUCTION

In his third assignment of error, defendant argues the trial court erred in denying his request to provide an accomplice instruction. Specifically, defendant contends that the trial court should have instructed the jury that "great caution" should be given regarding the testimony of Fields.

It is the duty of the trial judge to give a requested charge, which does not require qualification, limitation, or explanation and is not included in the general charge or another special charge, if it is wholly correct and pertinent to the case. La. C.Cr. P. art. 807. This is a corollary of the trial judge's basic obligation to charge the jury as to the law applicable to the case, under which he is required to cover every phase of the case supported by the evidence whether or not accepted by him as true. La. C.Cr. P. art. 802. It follows from these rules that the trial judge is required to charge the jury, in response to an otherwise proper request, as to the law applicable to any

theory of defense which a jury could reasonably infer from the evidence. State v. Marse, 365 So.2d 1319, 1323 (La. 1978).

In the present case, the theory of defense, simply put, was that Fields' testimony was not to be believed. Clearly, Fields' credibility was the most important aspect of the jury's determinations. Although the trial court provided the jury with general instructions covering credibility determinations and considerations in evaluating the testimony of witnesses, it denied defense counsel's request to charge the jury that Fields' testimony should be considered with great caution due to the fact he was an accomplice in the crime. In denying defendant's request, the trial court ruled that defendant was not an accomplice and that Fields' testimony was corroborated by other evidence.

In finding Fields was not an accomplice, the trial court found that Fields was never arrested or charged with any crime stemming from this incident. However, an accomplice has been strictly defined as one who is associated with others in the commission of a crime. La. R.S. 14:23 and 24; State v. David, 226 La. 268, 272, 76 So.2d 1, 2 (1954). This definition is broader than the standard used by the trial court. Despite the fact Fields was never arrested or charged with a crime arising from this incident, his own testimony clearly associates him with defendant in the commission of this crime. Fields admitted he exited defendant's vehicle with the drugs, fled from the police with the drugs, and discarded the drugs to avoid being apprehended with the drugs on his person. Based on these circumstances, we disagree with the trial court's finding that defendant was not an accomplice.

Where the state's case relies on uncorroborated accomplice testimony, the judge should instruct the jury to consider the testimony with caution;

where the accomplice's testimony is materially corroborated, however, such a caution need not be given. Material corroboration is defined as evidence that confirms material points in an accomplice's tale and confirms the defendant's identity and some relationship to the situation. State v. Swartz, 444 So.2d 660, 662-63 (La. App. 1st Cir. 1983).

In the present case, we do not find that there was any material corroboration of Fields' testimony. Although defendant's suspicious actions in dealing with Officer Wheeler could circumstantially corroborate Fields' testimony that defendant possessed the drugs prior to the traffic stop, this behavior could just as easily be construed as defendant's awareness that Fields' possession of the drugs was about to be discovered by the police. Moreover, there is no way to corroborate Fields' claim that he had no prior knowledge that defendant had drugs in the vehicle or that defendant threw the drugs to Fields just before exiting his vehicle because of the traffic stop. Accordingly, we cannot say that Fields' self-serving testimony was materially corroborated by any other evidence presented to the jury.

Because we find Fields was an accomplice and his testimony was not corroborated by any other evidence presented to the jury, we next determine whether this error of the trial court constitutes reversible error. Failure to provide a requested jury charge constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. State v. Marse, 365 So.2d at 1323-24; La. C.Cr.P. art. 921. The test is whether there is a reasonable possibility the error might have contributed to the conviction and whether the court can declare a belief that the error is harmless beyond a reasonable doubt. The reviewing court must find the verdict actually rendered by this jury was surely unattributable to the error. State v. Juniors,

2003-2425, p. 54 (La. 6/29/05), 915 So.2d 291, 331, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006).

As previously mentioned, the defense theory presented at trial was that Fields' testimony completely exonerating himself from any prior knowledge of drugs in the vehicle was not to be believed. However, because we have determined Fields was an accomplice and it was solely his testimony that linked the drugs to defendant, the trial court's failure to provide the jury with an accomplice instruction regarding Fields' testimony had the effect of unfairly bolstering Fields' credibility and the State's case. Moreover, the refusal to provide the accomplice instruction intruded upon the general charge to the jury instructing it to consider any possible motives of a witness in testifying. While Fields may not have been charged or arrested in connection with this incident, his motives in providing statements against defendant to the police immediately following this incident were in no doubt colored by his role in the incident. This scenario precisely illustrates the reason for providing an accomplice instruction to the jury as to how to treat such testimony. As a result, we find defendant's right to present his defense by placing Fields' credibility into question was clearly affected.

Under these circumstances, we find the trial court committed reversible error in denying defendant's request to provide the accomplice instruction because there is a reasonable possibility that the unfair bolstering of Fields' testimony led to defendant's conviction. We cannot say the verdict was surely unattributable to the error. This assignment of error has merit.

Accordingly, we reverse defendant's conviction, vacate the sentence, and remand this matter to the district court for a new trial.

**CONVICTION REVERSED, SENTENCE VACATED, AND
REMANDED FOR NEW TRIAL.**

others in the commission of a crime, LSA-R.S. 14:23 & 24; State v. David, 226 La. 268, 272, 76 So. 2d 1, 2 (1954), Fields denied any awareness that the defendant possessed the drugs until the defendant tossed the plastic bag at him following the initiation of the traffic stop.

Finally, even if such an instruction was warranted, in my view, the failure to give the accomplice instruction was harmless under the facts presented.

For these reasons, I respectfully dissent.