

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2011 KA 1171

STATE OF LOUISIANA
VERSUS
HANNAH V. SALSBURY

Judgment Rendered: DEC 21 2011

On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 492311

Honorable William J. Crain, Judge Presiding

Walter P. Reed
District Attorney
Covington, Louisiana

Counsel for Appellee
State of Louisiana

Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Mary E. Roper
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Hannah V. Salsbury

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Pettigrew, J. Dissents and assigns Reasons.

McCLENDON, J.

Defendant, Hannah V. Salsbury, was charged by bill of information with possession of hydrocodone in combination with one or more active non-narcotic ingredients (a Schedule III controlled dangerous substance pursuant to LSA-R.S. 40:964), a violation of LSA-R.S. 40:968C. Defendant entered a plea of not guilty, and after a trial by jury, she was found guilty as charged. Thereafter, defendant was sentenced to three years imprisonment at hard labor and participation in drug treatment and the Impact Program. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, assigning error to the trial court's ruling on the State's motion in limine and to the constitutionality of the sentence. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On June 10, 2010, near 9:00 p.m., Corporal Shawn Graves of the St. Tammany Parish Sheriff's Office was travelling eastbound on U.S. Hwy. 90 when he observed an eastbound vehicle cross the center line several times. Corporal Graves conducted a traffic stop and, after performing several field sobriety tests, determined that the driver, Kerry Kennedy, was impaired. Kennedy admitted to smoking marijuana, drinking alcohol, and taking numerous hydrocodone tablets. Kennedy further informed the officer that he had medication belonging to a cousin in the center console of the vehicle and consented to a search of the vehicle. Corporal Graves recovered a prescription bottle of tablets from the vehicle. Meanwhile, Deputy James Stelfox arrived at the scene to assist and interviewed the passenger, defendant.

Defendant initially denied being in illegal possession of any substances but later admitted to possessing Lortabs. When asked about the location of the drugs, defendant removed five tablets from the left side of her brassiere. The tablets, in Lortab and Lorcet variations, contained hydrocodone.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, defendant argues that the trial court erred in granting the State's motion in limine, which prevented her from raising the defense of having a valid prescription. Defendant argues that the trial court's ruling constituted an unconstitutional denial of due process. Defendant notes that she did not file a motion to quash to raise the affirmative defense, leading to the State's motion in limine, which was originally denied by the trial court, but later granted when the State re-urged the motion after presenting its witnesses. Defendant argues that to the extent LSA-R.S. 40:991 prohibits her from presenting at trial a defense of having a valid prescription, it is unconstitutional. Defendant concludes that her ability to obtain a fair trial was thwarted by the trial court's refusal to allow the jury to consider the evidence. Defendant further notes that the error was not harmless, adding that the defense's opening statement led the jury to believe that the evidence at issue would be presented. Defendant further notes that in its closing argument, the State alerted the jury that defendant failed to present the evidence of a valid prescription as claimed in the opening statement by the defense.

A criminal defendant's right to present a defense is guaranteed by the Sixth Amendment of the United States Constitution and Article I, § 16 of the Louisiana Constitution. However, constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value. **State v. Governor**, 331 So.2d 443, 449 (La. 1976). "Relevant evidence" is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than without the evidence. LSA-C.E. art. 401. The trial judge, in deciding the issue of relevancy, must determine whether the evidence bears a "rational" connection to the fact in issue in the case. **State v. Williams**, 341 So.2d 370, 374 (La. 1976). Except as limited by the Code of Evidence and other laws, all relevant evidence is admissible and all irrelevant evidence is inadmissible. LSA-C.E. art. 402. Although relevant,

evidence may nonetheless be excluded, if the probative value is substantially outweighed by its prejudicial effect. See LSA-C.E. art. 403. Ultimately, questions of relevancy and admissibility are discretion calls for the trial court, and its determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. **State v. Duncan**, 98-1730, p. 10 (La.App. 1 Cir. 6/25/99), 738 So.2d 706, 712-13.

It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule III unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner. LSA-R.S. 40:968C. Pursuant to LSA-C.Cr.P. arts. 532(10) and 535A(7), as amended by 2009 La. Acts No. 265, § 2, if an individual charged with a violation of the Uniform Controlled Dangerous Substances Law has a valid prescription for that substance, he has grounds to file a motion to quash the related charge. Additionally, LSA-R.S. 40:991, which was added by 2009 La. Acts No. 265, § 1, provides:

A. An individual who claims possession of a valid prescription for any controlled dangerous substance as a defense to a violation of the provisions of the Uniform Controlled Dangerous Substances Law shall have the obligation to produce sufficient proof of a valid prescription to the appropriate prosecuting office. Production of the original prescription bottle with the defendant's name, the pharmacist's name, and prescription number shall be sufficient proof of a valid prescription as provided for in this Section.

B. As used in this Section, "controlled dangerous substance" shall have the same meaning as provided in R.S. 40:961(7) and "prescription" shall have the same meaning as provided in R.S. 40:961(33).

C. Any individual who claims the defense of a valid prescription for any controlled dangerous substance shall raise this defense before commencement of the trial through a motion to quash.

The defendant bears the burden of proving that he possessed otherwise illegal drugs pursuant to a valid prescription. See LSA-R.S. 40:990A; **State v. Lewis**, 427 So.2d 835, 839-40 (La. 1982) (on rehearing); **State v. Ducre**, 604 So.2d 702, 708-09 (La.App. 1 Cir. 1992). Louisiana Revised Statutes 40:961(33) provides the definition of a prescription as follows:

"Prescription" means a written request for a drug or therapeutic aid issued by a licensed physician, dentist, veterinarian, osteopath, or podiatrist for a legitimate medical purpose, for the purpose of correcting a physical, mental, or bodily ailment, and acting in good faith in the usual course of his professional practice.

When a trial court rules on a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See State v. Odom, 02-2698, pp. 5-6 (La.App. 1 Cir. 6/27/03), 861 So.2d 187, 191, writ denied, 03-2142 (La. 10/17/03), 855 So.2d 765. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Smith, 99-0606, p. 3 (La. 7/6/00), 766 So.2d 501, 504.

As noted by defendant, just before the trial began, the trial court denied the State's motion in limine. The State re-urged the motion before resting its case-in-chief. After hearing arguments on both sides, the trial court in part noted that the defense had the burden of proving that a valid prescription existed. The trial court further noted that defendant did not file a pretrial motion to quash to raise the affirmative defense as required by statute.

Louisiana Revised Statutes 40:991C clearly states that any individual who claims the defense of a valid prescription for any controlled dangerous substance *shall* raise this defense before commencement of the trial through a motion to quash. Statutes are presumed constitutional, and any doubt is to be resolved in the statute's favor. See State v. Brenner, 486 So.2d 101, 103 (La. 1986). The party challenging the constitutionality of a statute bears the burden in proving that statute unconstitutional. State v. Brooks, 541 So.2d 801, 811 (La. 1989); State v. Griffin, 495 So.2d 1306, 1308 (La. 1986).

At the outset, we note that defendant has not proffered any evidence of an affirmative defense for this court to review. To preserve the right to appeal a trial court ruling that excludes evidence, the defendant must make the substance of the evidence known to the trial court. LSA-C.E. art. 103A(2); State v. Johnson, 00-0680, p. 11 (La.App. 1 Cir. 12/22/00), 775 So.2d 670, 678-79, writ denied, 02-1368 (La. 5/30/03), 845 So.2d 1066. Because defendant failed to

make a proffer, she is barred procedurally from advancing this assignment of error on appeal. See **State v. Lynch**, 94-0543, pp. 17-18 (La.App. 1 Cir. 5/5/95), 655 So.2d 470, 480, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466.

Additionally, we find no merit in defendant's constitutional challenge of LSA-R.S. 40:991C. In **State v. Cunningham**, 04-2200 (La. 6/13/05), 903 So.2d 1110, the Louisiana Supreme Court found that the Appellate Division of the Criminal District Court for the Parish of Orleans erred in holding LSA-R.S. 15:499-501, regarding the admissibility of certificates of analysis, unconstitutional. The supreme court noted that the statutes do not infringe upon a defendant's constitutional right to confrontation, noting that the defendant merely has to subpoena the person who performed an examination or analysis of evidence. The supreme court further noted that if the defendant timely requests the subpoena or if the person subpoenaed responds to the subpoena, the provisions of the statute provide that a certificate of analysis shall not be prima facie proof of its contents or proper custody. As the State conceded therein at oral argument, once the defendant requests the subpoena, the certificate of analysis has no evidentiary value and the State must call the relevant witnesses to prove its case. **Cunningham**, 04-2200 at p. 17, 903 So.2d at 1121.

Similarly, in this case, we find that the requirement in LSA-R.S. 40:991C that defendant file a pretrial motion to claim the defense of a valid prescription does not render the statute unconstitutional. By simply requiring that defendant file a motion to quash before the trial to allow the trial court to determine the value of the evidence, LSA-R.S. 40:991 does not infringe upon defendant's constitutional right to present a defense. As noted above, constitutional guarantees do not assure a defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value. Further, this court's review of the entire record in this case reveals that at the sentencing hearing, the defense conceded that the prescription it presented prior to the trial did not match the drugs that were in defendant's possession in this

case. Based on the foregoing, we find that the trial court did not err in granting the State's motion in limine. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In her second assignment of error, defendant argues that the trial court erred in imposing an excessive sentence. Defendant notes that she was twenty years old at the time of the offense and had never been arrested before. Defendant also notes that at sentencing, the defense presented information regarding her past medical problems that preceded her use of hydrocodone for extreme pain. Specifically, defendant had been in a serious automobile accident in which she suffered debilitating injuries and which resulted in the death of a driver and another passenger. Defendant also notes that during the trial she was afraid to return to court after the lunch recess and the trial continued in her absence. Defendant argues that in imposing sentence, the trial court focused solely on the fact that she abandoned her trial and fled from the jurisdiction of the court.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La.App. 1 Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La.App. 1 Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of LSA-C.Cr.P. art. 894.1 need not be recited, the

record must reflect that the trial court adequately considered the criteria. **State v. Brown**, 02-2231, p. 4 (La.App. 1 Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of LSA-Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981).

The offense of possession of a Schedule III drug carries a maximum sentence of five years, with or without hard labor, and a possible fine of not more than \$5,000.00. LSA-R.S. 40:968C. As stated, defendant was sentenced to three years imprisonment at hard labor. In sentencing defendant, the trial court did note the fact that she absconded from the trial and did not voluntarily return but was ultimately located.¹ However, the trial court also noted several mitigating factors including defendant's lack of a criminal history, her age, and the nature of the crime. The trial court, however, noted that it had reservations about defendant's ability to comply with terms of probation. The trial court noted its consideration of the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances and the nature of the crime, we find no abuse of discretion by the trial court. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

¹ Before the sentence was imposed, the State noted that after information was received revealing defendant's whereabouts, she was apprehended in Arkansas where, according to the defense attorney, her family resides.

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PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.



I respectfully dissent from the majority's opinion.

A criminal defendant is constitutionally guaranteed the right to present a defense. U.S. Const. amend. VI; La. Const. Art. I, §16; **Chambers v. Mississippi**, 410 U.S. 284, 302, 93 S.Ct. 1038, 1949, 35 L.Ed.2d 297 (1973). It troubles me greatly that our Legislature and District Attorneys utilize "hocus pocus" to take these substantive rights away. I would reverse the trial court and remand for a new trial.