

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2008 KA 1078**

**STATE OF LOUISIANA**

**VERSUS**

**HUGO D. CABOS**

**Judgment Rendered: December 23, 2008**

**Appealed from the  
Twenty-First Judicial District Court  
in and for the Parish of Livingston, State of Louisiana  
Trial Court Number 21415**

**Honorable Brenda Bedsole Ricks, Judge Presiding**

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Hugo D. Cabos**

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**BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.**

*WJW*  
*TRD*  
*SP*

**WHIPPLE, J.**

The defendant, Hugo D. Cabos, was charged by bill of information with possession of cocaine in excess of 400 grams, a violation of LSA-R.S. 40:967(F)(1)(c). He initially pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to imprisonment at hard labor for twenty-five years and a fine of two hundred and fifty thousand dollars (\$250,000.00). The defendant now appeals, urging two assignments of error as follows:

1. The trial court abused its discretion by excluding impeachment evidence directly bearing on the credibility of the absent declarant of incriminating hearsay that was introduced by the prosecution in its case in chief.
2. The sentence imposed is excessive.

Finding no merit in these assignments of error, we affirm the defendant's conviction and sentence.

**FACTS**

At approximately midnight on November 28, 2006, Louisiana State Police Trooper Paul Chamarro was patrolling on Interstate 12 in Livingston Parish when he observed an older model Toyota 4Runner travelling eastbound. A license plate check revealed that the plate on the vehicle had expired in July of 2006. Trooper Chamarro activated his emergency lights and initiated a traffic stop. Once the vehicle stopped, Trooper Chamarro approached and instructed the driver to exit the vehicle. After multiple requests, the driver, subsequently identified as the defendant, finally complied. The passengers, Carlos Guillen (front seat) and Reyna Pacheco (rear seat), remained inside the vehicle.

The defendant immediately advised Trooper Chamarro that he did not speak English. Trooper Chamarro continued to converse with the defendant in Spanish. He advised the defendant of the reason for the stop and asked for his driver's

license. The defendant produced a license from the state of Texas. Trooper Chamarro continued to converse with the defendant regarding ownership of the vehicle and the defendant's travel plans. The defendant stated that the vehicle was owned by the son of the individual seated in the front seat of the vehicle (whom the defendant knew only as "Compadre"). After observing what he determined to be the nervous demeanors of the defendant and the passengers, and receiving conflicting information from them regarding their travel plans, Trooper Chamarro asked the defendant for permission to search the vehicle. The defendant agreed to allow the search and signed a written consent to search form. When Trooper Chamarro asked the defendant if there were any illegal drugs inside the vehicle, he responded negatively. Search of a storage compartment in the rear of the vehicle revealed three packages of suspected cocaine. Testing of the substance confirmed it was cocaine weighing over two kilograms. The defendant and both passengers were arrested and charged with possession of cocaine in excess of 400 grams (2000 grams).

Trooper Chamarro questioned all three individuals about the drugs. They all denied any knowledge of the existence of the drugs inside the vehicle. However, according to Trooper Chamarro, Guillen pointed at the defendant and stated that he was in charge. Later, in response to further questioning, the defendant told Trooper Chamarro that the cocaine he found was all that was in the vehicle and he did not know how much it was. Although the defendant testified at trial that the first time he saw the cocaine was when Trooper Chamarro found it and pulled it out, the jury found the defendant guilty as charged.

## ASSIGNMENT OF ERROR #1

In his first assignment of error, the defendant contends the trial court erred in excluding impeachment evidence that he claims directly assisted his defense and called co-defendant Guillen's credibility into question. Specifically, the defendant argues the trial court should have allowed the defense to present evidence of Guillen's bond, his failure to appear at his arraignment, and the fact that his \$300,000.00 bond was ordered forfeited. The defendant argues that the trial court's ruling denying his use of such evidence effectively denied him of: (1) his right to present a defense; (2) his right to blame a third party; and (3) his right to attack the credibility of an absent hearsay declarant.

Prior to trial, the defendant filed a Motion in Limine seeking a preliminary ruling on the admissibility of the aforementioned evidence regarding Guillen's bond. A hearing was held on the motion prior to opening statements. At the hearing, counsel for the defendant argued that the evidence was highly probative to the defendant's defense and should be allowed. In response, the state argued that the evidence of Guillen's bond and his failure to appear was not relevant to the charge against this defendant. The state further argued that since Guillen's whereabouts were unknown, the state could not possibly rebut the bond information if it were introduced. Thus, the state argued that any probative value of this evidence was greatly outweighed by its prejudicial effect. The trial court denied the motion. The court noted, "we're not trying this Mr. Gillian (sic). We're trying Mr. Cabos. And [the state's] burden is to prove these facts against him, not against anybody else."

On the second day of the trial, in light of Trooper Chamarro's testimony that Guillen had indicated that the defendant was "in charge," counsel for the defendant again requested that the defense be allowed to introduce the bond evidence to impeach Guillen (the declarant of the hearsay testimony provided by Trooper

Chamarro). Counsel argued that Guillen's ability to post a \$300,000.00 bond shows he had an "interest" or bias (to be considered by the jury in determining the facts of the case) and that his failure to appear for arraignment, after having posted such a significant bond, was relevant to attack his credibility (and his statement implicating the defendant).<sup>1</sup> The state responded, again urging the court to balance the prejudicial effect of the evidence against its probative value. The state specifically noted that simply because a person does not show up for arraignment after posting bond does not automatically suggest guilt. Regarding Trooper Chamarro's testimony that Guillen specifically implicated the defendant as the individual "in charge," the state noted that the defense did not object to this evidence when it was introduced. The trial court maintained its previous ruling that the evidence was inadmissible.

The Sixth Amendment of the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee the accused in a criminal prosecution the right to present a defense. See Washington v. State of Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).

Louisiana Code of Evidence article 806 provides:

When a hearsay statement, or a statement defined in Article 801(D)(2)(c) or (D)(3), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to attack the declarant's credibility, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness,

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<sup>1</sup>In an earlier motion, seeking an order allowing this evidence to be used at trial, defense counsel argued that this evidence showed that the co-defendant had access to large sums of money, which was highly relevant in determining ownership of the two kilos of drugs found in the vehicle.

the party is entitled to examine him on the statement as a witness identified with an adverse party.

A party may attack the credibility of a witness by examining him concerning any matter having a reasonable tendency to disprove the truthfulness of his testimony. LSA-C.E. art. 607(C). The subject matter of the attack, however, is limited by a relevancy balance. LSA-C.E. art. 607(D)(2) provides that the credibility of a witness may be attacked by extrinsic evidence, “unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.” See also LSA-C.E. art. 403. However, while LSA-C.E. art. 607(D)(1) provides that “[e]xtrinsic evidence to show a witness’ bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness,” a witness cannot be cross-examined as to a fact which is collateral or irrelevant to the issue at hand merely for the purpose of contradiction or impeachment. State v. Jackson, 2000-1573, pp. 5-6 (La. 12/07/01), 800 So. 2d 854, 857.

Relevant evidence is evidence having 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 it would be without the evidence. LSA-C.E. art. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or waste of time. LSA-C.E. art. 403. A trial court’s decision on the relevancy of evidence is given great weight and should not be overturned on appeal absent a finding of a clear abuse of discretion. See State v. Mosby, 595 So. 2d 1135, 1139 (La. 1992).

We find no abuse of discretion in the trial court’s ruling that evidence of Guillen’s bond amount and subsequent forfeiture of the bond was inadmissible at

the defendant's trial. The fact that Guillen posted a \$300,000.00 bond and subsequently forfeited it by failing to appear in court is irrelevant to the central issue of the trial in this case, i.e., the defendant's guilt or innocence. Even if the evidence of the amount and circumstances surrounding Guillen's bond could be viewed as suggesting that Guillen was also culpable, such evidence does not exclude the defendant's culpability or participation in the crime. As the state notes in its brief, both men could easily have been participants in the act of illegally possessing the large amount of cocaine found inside the vehicle. Evidence suggesting the co-defendant's participation and guilt does not make the defendant's participation and guilt more or less probable than it would be without the evidence. Thus, this evidence is clearly not relevant. Furthermore, even if the evidence were considered to have some marginal relevance to this case, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury.

Furthermore, the defendant has failed to show how the introduction of such evidence would have been favorable and, thus, related to his right to present a defense. The defense in this case was that the defendant was unaware of the presence of the drugs inside the vehicle he was driving. The trial court's ruling did not prevent the defendant from presenting this defense. Thus, the trial court did not err in refusing to allow the defendant to introduce this evidence.

This assignment of error lacks merit.

#### **ASSIGNMENT OF ERROR #2**

In this assignment of error, the defendant contends that the trial court erred in imposing an excessive sentence. Specifically, he argues the trial court considered improper and inapplicable aggravating circumstances, and failed to consider any mitigating factors, i.e., that this was the defendant's first felony conviction, when imposing the sentence.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). A sentence is 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. Hogan, 480 So. 2d 288, 291 (La. 1985). Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979); State v. Lanieu, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So. 2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So. 2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Lobato, 603 So. 2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. LSA-C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of article 894.1, but the record must reflect that it adequately considered the guidelines. State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). In light of the criteria expressed by article 894.1, a review of the individual excessiveness must consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. State v. Watkins, 532 So. 2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982).



Louisiana Revised Statute article 40:967(F)(1)(c) provides that a conviction for possession of four hundred grams or more of cocaine is punishable by imprisonment at hard labor for not less than fifteen years, nor more than thirty years, and payment of a fine not less than two hundred fifty thousand dollars, nor more than six hundred thousand dollars. Further, LSA-R.S. 40:967(G) restricts parole eligibility for the first fifteen years of the sentence.

In sentencing the defendant, although the trial judge did not list every aggravating or mitigating circumstance, the court indicated that it considered the sentencing guidelines set forth in LSA-C.Cr.P. art. 894.1. However, prior to imposing sentence, the trial court stated that the defendant is not an American citizen, and, accordingly, that he presented a risk of flight. The court further noted the risk that there may be other serious crimes committed in connection with the instant offense.

Based on the entire record, it is clear that, although the trial court did not articulate every aggravating and mitigating circumstance, the sentence was appropriate, given the circumstances of the offense and is supported by the record. There was no abuse of discretion by the trial court, and the defendant's sentence is not unconstitutionally excessive. Therefore, this assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED.**