

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1583

STATE OF LOUISIANA

VERSUS

MICHAEL E. JONES

Judgment Rendered: MAR 25 2011



APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 25,595

THE HONORABLE JANE TRICHE-MILAZZO, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCleendon, J. Concurs and Assigns Reasons.

McDONALD, J.

The defendant, Michael Edward Jones, was charged by bill of information with illegal possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1. He pled not guilty. The defendant waived his right to a jury trial and elected to be tried by the judge. Following a bench trial, the defendant was convicted as charged. The trial court sentenced the defendant to imprisonment at hard labor for twelve years.¹ The defendant moved for reconsideration of the sentence. The trial court denied the motion. The defendant now appeals, challenging the sufficiency of the evidence in support of his conviction. Finding no merit in the assigned error, we affirm the defendant's conviction and sentence.

FACTS

On December 29, 2007, officers from the Sorrento Police Department and the Gonzales Police Department were conducting a DWI checkpoint near the intersection of Louisiana Highway 22 and Louisiana Highway 70 in Ascension Parish. At some point during the operation, Arthur Nicholas approached the area driving a 1992 Chrysler Fifth Avenue. The defendant was seated in the front passenger seat of the vehicle. Officer Terry Albright, of the Sorrento Police Department, approached the vehicle and observed that Nicholas's eyes were glassy. He also smelled the odor of marijuana emanating from within the vehicle.

¹ Under La. R.S. 14:95.1(B), the trial judge was required to impose a mandatory fine of not less than one thousand dollars nor more than five thousand dollars. However, because the trial court's failure to impose the fine was not raised by the state in either the trial court or on appeal, we are not required to take any action. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. As such, we decline to correct the illegally lenient sentence.

Nicholas was instructed to proceed to the nearby Louisiana Tourist Information Center to participate in standard field sobriety tests. Nicholas complied. He parked the vehicle in a parking space on the concrete parking slab at the Information Center.

Officer Albright approached and asked Nicholas to exit the vehicle and perform the requested field sobriety tests. At the conclusion of the tests, Officer Albright concluded Nicholas was not under the influence. In questioning Nicholas, Officer Albright learned, however, that Nicholas did not have a valid driver's license. Nicholas indicated he had recently been released from jail and his driver's license was suspended. He was advised of his rights and informed that he would be arrested for driving under suspension. Officer Albright then approached the defendant and asked him to exit the vehicle. The defendant complied and walked toward the front of the vehicle.

At some point during the encounter, Nicholas fled the area on foot. Officer Albright and several other officers pursued Nicholas while Officer Duane Carpenter, of the Gonzales Police Department, remained with the defendant. During a subsequent search of the vehicle, a German 6.35 millimeter pistol was recovered from a vent inside the passenger compartment. According to the officers, the vent was located directly in front of the seat where the defendant had been seated. The gun was in plain view and within the defendant's reach. A nine-millimeter handgun was also recovered from the ground directly under the front passenger compartment door of the vehicle. The defendant, who had a prior conviction for simple burglary, was arrested and charged with illegal possession of a firearm.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues there was insufficient evidence to support a finding that he possessed the firearm in question.² Specifically, he argues that a reasonable hypothesis of innocence is that the gun belonged to someone else and was never in his possession or control. In support of this contention, the defendant notes that he did not own the vehicle, the gun was not registered to him, his fingerprints and/or DNA were not found on the gun and no one actually saw him discard the gun. Nor did anyone hear the gun hit the concrete.

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. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 requires that assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be applied when

² Although the testimony presented at the trial established that two handguns were recovered, the bill of information charges the defendant with possession of the nine-millimeter handgun found outside the vehicle.

circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational trier of fact that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

Louisiana Revised Statute 14:95.1(A) makes it unlawful for any person who has been convicted of certain felonies to possess a firearm. To prove a violation of La. R.S. 14:95.1, the state must prove: 1) the defendant's status as a convicted felon; 2) that the defendant was in possession of a firearm; and 3) the instrumentality possessed was a firearm. See State v. Mose, 412 So.2d 584, 585 (La. 1982). The state must also prove that ten years have not elapsed since the date of completion of the punishment for the prior felony conviction. La. R.S. 14:95.1(C) (1) (prior to the 2010 amendment).

The first element of the offense was met through the testimony of Vicki Poche, a criminal records analyst with the Louisiana State Police Criminal Records Division. Poche testified that the defendant was convicted of simple burglary in 2004. Clearly, this conviction fell within the ten-year statutory limitation period. On appeal, the defendant does not challenge his status as a convicted felon or the absence of the ten-year statutory limitation period. The specific issue raised by the defendant is whether the state sufficiently proved that he possessed the firearm either through actual possession or through constructive possession.

Louisiana Revised Statute 14:95.1 does not make "actual" possession a necessary element of the offense or specifically require that the defendant have the

firearm on his person to be in violation. "Constructive" possession satisfies the possessory element of the offense. **State v. Day**, 410 So.2d 741, 743 (La. 1982). Constructive possession of a firearm occurs when the firearm is subject to the defendant's dominion and control. **State v. Plain**, 99-1112 (La. App. 1st Cir. 2/18/00), 752 So.2d 337, 340-41 (constructive possession found where the defendant admitted to having the weapon underneath the mattress in his bedroom, the defendant then led officers to his bed and pointed out the location of the weapon, and the police recovered a weapon from the area the defendant had pointed out); **State v. Mose**, 412 So.2d at 585 (gun located in the defendant's bedroom sufficient for constructive possession); **State v. Frank**, 549 So.2d 401, 405 (La. App. 3d Cir. 1989) (constructive possession found where the gun was in plain view on the front seat of a car the defendant was driving but did not own); **State v. Lewis**, 535 So.2d 943, 950 (La. App. 2d Cir. 1988), writ denied, 538 So.2d 608 (La. 1989), cert. denied, 493 U.S. 963, 110 S.Ct. 403, 107 L.Ed.2d 370 (1989) (presence of firearms in the defendant's home, statement by the defendant that one gun belonged to his wife, and discovery of shoulder holster in the master bedroom indicated the defendant's awareness, dominion and control over the firearms). Louisiana cases hold that a defendant's dominion and control over a weapon constitutes constructive possession even if it is only temporary and even if the control is shared. **State v. Plain**, 752 So.2d at 340; **State v. Melbert**, 546 So.2d 948, 950 (La. App. 3d Cir. 1989); **State v. Bailey**, 511 So.2d 1248, 1250 (La. App. 2d Cir. 1987), writ denied, 519 So.2d 132 (La. 1988). In addition, the jurisprudence has added an aspect of awareness to the offense of La. R.S. 14:95.1. **State v. Lamothe**, 97-1113 (La. App. 5th Cir. 6/30/98), 715 So.2d 708, 712, writ

granted in part on other grounds, 98-2056 (La. 11/25/98), 722 So.2d 987 (per curiam). Therefore, the state must also prove that the offender was aware that a firearm was in his presence and that the offender had the general criminal intent to possess the weapon. Mere presence of a defendant in the area of the contraband or other evidence seized alone does not prove that he exercised dominion and control over the evidence and therefore had it in his constructive possession. See State v. Walker, 369 So.2d 1345, 1346 (La. 1979).

Whether the proof is sufficient to establish possession turns on the facts of each case. See State v. Harris, 94-0970 (La. 12/8/94), 647 So.2d 337, 338-39 (per curiam); State v. Bell, 566 So.2d 959, 959-60 (La. 1990) (per curiam). Further, guilty knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. See State v. Trahan, 425 So.2d 1222, 1226 (La. 1983); State v. Goiner, 410 So.2d 1085, 1086-88 (La. 1982).

In the instant case, Officer Albright testified that, before conducting the DWI checkpoint, the area was swept to assure there were no guns or other illegal items lying around. He further testified that the area was illuminated by a "light plant" and the ground surface consisted of smooth pads of concrete. According to Officer Albright, he personally checked the area in question before Nicholas parked his vehicle and the gun was not there at that time. The gun was later found directly under the passenger-side door. It was also established that, throughout the encounter, the defendant was the only person in the area where the gun was found. From this evidence, it was not unreasonable for the court to conclude that the defendant discarded the handgun.

We have considered the evidence in the light most favorable to the prosecution, and we find that any rational trier of fact could have concluded beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant possessed the nine-millimeter handgun found on the ground beneath the passenger side of the vehicle in question. The court obviously accepted the officers' testimony indicating that the gun was not in the area before the vehicle arrived there and rejected the defense theory that it could have possibly belonged to someone other than the defendant. When a case involves circumstantial evidence and the factfinder 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 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799. We find no such hypothesis in this case. In reviewing the evidence presented, particularly the testimony that the gun was not present in the area prior to the arrival of Nicholas's vehicle and that no one else was present in the vicinity, we cannot say that the trial court's determination was irrational under the facts and circumstances presented. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the factfinder. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). This assignment of error lacks merit.

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

CONVICTION AND SENTENCE AFFIRMED.

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VERSUS
MICHAEL E. JONES

McCLENDON, J., concurs and assigns reasons.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.

