

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0444

STATE OF LOUISIANA

VERSUS

MITCHELL LOMAX BROXSON

Judgment Rendered: September 14, 2011

**Appealed from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 24712**

The Honorable Brenda Bedsole Ricks, Judge Presiding

**Scott M. Perrilloux
District Attorney
Patricia Parker
Assistant District Attorney
Amite, Louisiana**

**Counsel for Appellee
State of Louisiana**

**Lieu T. Vo Clark
Mandeville, Louisiana**

**Counsel for Defendant/Appellant
Mitchell Broxson**

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Handwritten signatures and initials on the left side of the page. There are two distinct signatures, one above the other, and a circular stamp or mark below the second signature.

GAIDRY, J.

The defendant, Mitchell Lomax Broxson, was initially charged by bill of information with one count of creation or operation of a clandestine laboratory for the unlawful manufacture of a controlled dangerous substance (count I), a violation of La. R.S. 40:983; and one count of possession of a schedule IV controlled dangerous substance (count II), a violation of La. R.S. 40:969(C), and pled not guilty.¹ Prior to the beginning of testimony at trial, the State nol-prossed count II. Following a jury trial on count I, the defendant was found guilty as charged, with eleven of the twelve jurors voting to convict him. He was sentenced to fifteen years at hard labor. He now appeals, contending his conviction by a non-unanimous verdict violated his rights under the Louisiana and United States Constitutions, and the sentence imposed was unconstitutionally excessive. For the following reasons, we affirm the conviction and sentence on count I.

FACTS

Livingston Parish Sheriff's Office Deputy Ken McMorris testified at trial. On September 29, 2009, he activated the emergency lights on his vehicle after observing a white truck cross the centerline of Louisiana Highway 1019 several times. The truck refused to stop, and turned off onto Buck Carroll Road. The vehicle ultimately stopped in front of a barn, and the passenger, later identified as the defendant, jumped out and began running. As he ran, he threw a gallon can of Coleman camp fuel into a garbage can and a bag into another garbage can. The defendant ran into a wooded area. The driver of the vehicle, later identified as Ronald David

¹ Ronald David Coutee was charged by the same bill of information with the same offenses as defendant. In exchange for his truthful testimony, count I against him was amended to an attempt, and count II was nol-prossed.

Coutee, also jumped out and began running, but Deputy McMorris quickly apprehended him.

Coutee consented to a search of the vehicle. In the vehicle, Deputy McMorris found three containers of lye drain opener, a black bag containing plastic tubing, several empty 120 mg pseudoephedrine blister packs, and an empty pack of lithium batteries. The bag thrown into the garbage can contained fifty coffee filters, Ziploc bags, and octane booster. A hazardous materials team had to be called to collect the evidence. Thereafter, at the end of a nearby trail, the police found an "active meth lab."

The defendant was apprehended with the assistance of a canine. According to Deputy McMorris, the defendant stated that he and Coutee had just left Watson Auto Parts, where they had purchased the camp fuel and lye, and were going to manufacture methamphetamine, but "[Deputy McMorris] messed them up and caught them before they could get started."

The trial court accepted Tri-Parish Narcotics Agent Heath Martin as an expert in the field of the creation and operation of methamphetamine (meth) labs. Agent Martin indicated that the quarter-inch plastic tubing recovered at the scene was commonly used to create various components of a meth lab, including "a bubbler hose." He noted that coffee filters were widely used to filter out methamphetamine after it is salted using the hydrogen chloride generator. He stated that lithium is used in the ephedrine extraction or ephedrine reduction process. He testified that Coleman camping fuel is commonly used to either store lithium or as a filtering solvent in the washing process of methamphetamine. He also indicated that lye is used in the ammonia extraction phase of meth manufacturing, and octane booster is used to "wash" meth, or take out its discoloration.

Ronald David Coutee also testified at trial. He indicated that the defendant met him at his brother's house and asked him to take him to get some camp fuel. Coutee drove his brother's truck to Watson Auto Parts. Coutee indicated, at the store the defendant purchased camp fuel, and gave him money and asked him to buy lye. Coutee indicated that the defendant purchased coffee filters on the way back. Coutee conceded pseudoephedrine and tubing were used in a "meth cook." He indicated that on the day of the incident he told Deputy McMorris that the items in the vehicle, around the vehicle, and in the garbage can, were used to cook meth.

The defendant also testified at trial. He claimed that he visited Ronald Coutee on the day of the incident to help him mow grass. He claimed he and Coutee later purchased camp fuel to clean truck and lawn mower parts. He claimed he ran from Deputy McMorris because he thought Deputy McMorris was one of Coutee's enemies. He denied confessing to Deputy McMorris, and denied manufacturing or trying to manufacture methamphetamine with Coutee.

CONSTITUTIONALITY OF NONUNANIMOUS VERDICT

In assignment of error number 1, the defendant argues that his conviction by a nonunanimous verdict under La. Code Crim. P. art. 782(A) violated his state and federal constitutional rights.

Initially, we note that the defendant failed to preserve this claim for review by special pleading and particularized argument. *See State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, 739 ("It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. ... While there is no single procedure for attacking the constitutionality of a statute, it has long been

held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized.”).

Moreover, La. Code Crim. P. art. 782(A) is constitutional and does not violate the Fifth, Sixth, and Fourteenth Amendments. *Bertrand*, 6 So.3d at 743; *State v. Jones*, 2009-0751 (La. App. 1st Cir. 10/23/09), 29 So.3d 533, 540. There is no authority to the contrary. Accordingly, we are not at liberty to ignore the controlling jurisprudence of superior courts on this issue. See *Bertrand*, 6 So.3d at 743.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 2, the defendant argues that the trial court imposed an unconstitutionally excessive sentence by imposing the maximum sentence.

The record indicates that the defendant failed to make or file a motion to reconsider sentence in this matter. Accordingly, review of this assignment of error is procedurally barred. See La. Code Crim. P. art. 881.1(E); *State v. Duncan*, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

CONCLUSION

The defendant’s conviction and sentence are affirmed. Costs of this appeal are assessed to defendant, Mitchell Lomax Broxson.

CONVICTION AND SENTENCE AFFIRMED.