

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 0646

STATE OF LOUISIANA

VERSUS

OMAR HARVEY

CF
RHP
MM

Judgment Rendered: December 23, 2009

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APPEALED
FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TERREBONNE
DOCKET NUMBER 494,133
STATE OF LOUISIANA

THE HONORABLE GEORGE J. LARKE, JR., JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

McDONALD, J.

The defendant, Omar Harvey, was charged by bill of information with, and pled not guilty to, possession with intent to distribute marijuana (Count 1), a violation of La. R.S. 40:966A(1), simple escape (Count 2), a violation of La. R.S. 14:110A, and possession with intent to distribute cocaine (Count 3), a violation of La. R.S. 40:967A(1). A jury found him guilty as charged. The trial court sentenced the defendant to five years at hard labor for possession with intent to distribute marijuana and a concurrent nine years at hard labor for possession with intent to distribute cocaine, the first two years of which must be served without benefit of parole. The court sentenced the defendant to two years at hard labor for simple escape, ordering that sentence to run consecutively to all others being served. The defendant appeals, designating two assignments of error regarding only his conviction for simple escape. Finding no error, we affirm the convictions and sentences.

FACTS

On March 21, 2007, Deputy Wayne Anderson with the Terrebonne Parish Sheriff's Office was on patrol a few minutes before 1:00 a.m. when he noticed a car travelling approximately 45 miles per hour in a 35 mile-per-hour zone in the Bobtown area on Shrimper's Row in Grand Caillou. Anderson initiated a traffic stop, with which the driver complied. However, once stopped, the driver of the car jumped out, acting "irate" and causing Anderson to fear for his safety. The defendant was sitting in the front passenger seat of the car.

For his own safety, Anderson called for backup. He then conducted a pat-down search of the driver and placed him in the back of the patrol car. He asked the defendant to remain in the front passenger seat of the car until backup arrived. The defendant told Anderson that he wanted to leave and did not understand why Anderson would not let him get out of the car.

Deputy Brent Theriot responded to Anderson's call for backup. Once Theriot arrived, Anderson asked the defendant to get out of the car. Anderson was standing by the driver's-side door and saw the defendant drop a green cigarette pack on the ground. Anderson described the defendant as pretending to trip, throwing his arms in the air and stumbling around. Anderson then took the defendant to the front of the patrol car and explained that he was planning to do a pat-down search to check for weapons. He asked the defendant to place his hands on the hood of the car, and as he began the pat-down, the defendant put his left hand in the left-front pocket of his pants. Anderson then pulled the defendant's hand out of his pocket, handcuffed him, and completed the pat-down search.

After asking Theriot to keep an eye on the defendant, Anderson walked around to the passenger side of the car and picked up the green cigarette pack that he saw the defendant drop. Anderson opened it and discovered a clear plastic baggie containing a white powder later determined to be cocaine. Anderson then explained to the defendant that he was under arrest, ensured that his handcuffs were double-locked, and began a more thorough search of the defendant. Anderson found \$403 in the defendant's left-front-pants pocket.

After recovering the cash, Anderson attempted to continue the search. When he stooped to pat the defendant's right ankle, the defendant began running. Theriot slipped and fell when he tried to pursue the defendant and Anderson had to get up from a stooping position. This gave the defendant a 10 to 20-foot lead. During the chase, Anderson saw the defendant drop a plastic baggie with a white-colored substance in it in the middle of the road. That substance was later determined to be crack cocaine. The defendant's hands were cuffed behind his back, and Anderson saw the baggie drop from his hands while he was running. Although it was night, Anderson explained that his and Theriot's headlights, as well as those of the car in which the defendant had been a passenger, provided adequate lighting to see the

defendant during the chase. The defendant got approximately 75 yards away before Anderson and Theriot recaptured him. Further investigation of the scene led to the discovery of a small bag containing marijuana outside the front passenger door.

Anderson and Theriot concluded their portion of the investigation at the scene and prepared to transport the defendant and the driver in separate patrol cars to the jail. The defendant was placed in Theriot's unit, while the driver remained in Anderson's. The officers noticed that, while sitting in the back of the patrol car, the defendant had inexplicably moved his hands, which had been handcuffed behind his back, so that they were in front of him. Anderson re-cuffed the defendant's hands behind his back and placed him back into Theriot's patrol car. Theriot then transported the defendant to jail. After Theriot turned the defendant over to the custody of the jail, he followed protocol by returning to his patrol car to check for contraband. He found, stuffed in the back of the seat, a clear plastic bag containing three smaller bags of marijuana. Theriot explained that he had completed a thorough check of the car at the beginning of his shift and knew that the marijuana had not been there at that time. He also testified that the defendant was the only person that had been transported in his car that night.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant challenges the sufficiency of the evidence to support his conviction for simple escape. See La. R.S. 14:110A. He contends that the evidence is sufficient to support a conviction for attempted simple escape only. He argues that he was unsuccessful in escaping the custody of the officers because he was recaptured after a short chase.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That **Jackson** standard of review, incorporated in Article 821,

is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince any rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. La. C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

As the trier of fact, a jury is 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. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, p. 6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

La. R.S. 14:110A(1) defines simple escape as:

The intentional departure, under circumstances wherein human life is not endangered, of a person imprisoned, committed, or detained from a place where such person is legally confined, from a designated area of a place where such person is legally confined, or *from the lawful custody of any law enforcement officer* or officer of the

Department of Public Safety and Corrections. (Emphasis added).

After finding evidence that the defendant was in possession of narcotics, Anderson informed the defendant that he was under arrest, ensured that his handcuffs were double-locked, and began searching his person. Partway through the search, when Anderson was kneeling to feel around the defendant's ankle, the defendant "took off running." He ran down the street, into the grass, and toward a wooded area off to the side. The defendant ran approximately 75 yards before Anderson and Theriot "tackled him" to end the chase.

"Lawful custody," within the meaning of simple escape, applies not only to persons who have been placed in a jail facility, but also to those persons who have been arrested but not yet confined. See State v. Bullock, 576 So.2d 453, 455-56 (La. 1991). The defendant does not contest that he was within the lawful custody of the officers when he fled their control. Rather, he urges that he attempted to escape lawful custody, but his attempt was foiled when the officers caught him. We disagree.

Once the defendant broke free of the restraint lawfully imposed upon him by the officers, he was no longer within their control and, at that time, had committed the offense of simple escape. The defendant removed himself from lawful custody without authorization, forcing the officers to give chase and creating a potentially dangerous situation.

A reviewing court is not called upon to decide whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The jury obviously rejected the defendant's hypothesis of innocence based upon the contention that he was unsuccessful in his attempt to escape. We find such rejection reasonable.

After a thorough review of the record, we are convinced that, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of simple escape.

The defendant's first assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant asserts that his sentence for simple escape is excessive. He specifically asserts that, because the evidence is sufficient to support a conviction for attempted simple escape only, the sentence imposed, although the minimum mandatory sentence, is too severe. See La. R.S. 14:110B(3) (A person convicted of simple escape "shall be imprisoned with or without hard labor for not less than two years nor more than five years; provided that such sentence shall not run concurrently with any other sentence.").

The defendant initially was sentenced to serve five and nine years respectively for possession with intent to distribute marijuana and possession with intent to distribute cocaine. The court indicated that these sentences were to run concurrently with each other. In addition, the court sentenced the defendant to serve two years for simple escape, which was ordered to run consecutively to the other sentences imposed. The defendant filed a motion to reconsider the sentences, urging that his sentence "is excessive and that, although the Court ordered that the sentences in this case run concurrent with mover's parole, it did not specify the docket number thereof." The court granted the motion and, after a hearing, amended the sentences as to Counts 1 and 3, stating:

Let's go ahead and amend the sentence such that . . . Counts 1 and 3 can run concurrent with each other *and with any other time he's backing up*. Count 2 will run consecutive to 1 and 3 and it has to run consecutive to any other time he's backing up. (Emphasis added).

A thorough review of the record indicates that counsel did not make a

written or oral motion to reconsider the amended sentence. The procedural requirements for objecting to a sentence are provided in La. C.Cr.P. art. 881.1, which provides, in pertinent part, as follows:

A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.

* * *

B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.

C. If a motion is made or filed under Paragraph A of this Article, the trial court may resentence the defendant despite the pendency of an appeal or the commencement of execution of the sentence.

* * *

E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, **shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.** (Emphasis added).

The failure to make or file a motion to reconsider sentence **shall preclude** the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. One purpose of the motion to reconsider is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. **State v. Mims**, 619 So.2d 1059 (La. 1993) (per curiam).

The use of the term “resentence” in Article 881.1 makes it clear that when relief is granted, the result is imposition of a new sentence. Since a new sentence is imposed when relief is granted, the language of Article 881.1 requires that a new motion for reconsideration be filed, specifying the grounds for objection to the new sentence. See La. C.Cr.P. arts. 881.1, 881.2A(1). We cannot assume that

defendant's objections to the earlier sentence are equally applicable to the amended sentence imposed. The considerations that require giving the trial judge an opportunity to reconsider a sentence apply equally to a sentence imposed in response to a defense motion for reconsideration. See State v. Smith, 03-1153, pp. 6-7 (La. App. 1st Cir. 4/7/04), 879 So.2d 179, 183 (en banc).

As such, the defendant was required to file a new motion for reconsideration of sentence in the trial court in order to preserve appellate review of the new sentence. Id. The defendant, therefore, is procedurally barred from seeking review of this assignment of error. See State v. Duncan, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam); see also State v. LeBouef, 97-0902, p. 3 (La. App. 1st Cir. 2/20/98), 708 So.2d 808, 809, writ denied, 98-0767 (La. 7/2/98), 724 So.2d 206.

Moreover, the trial court imposed on the defendant the minimum sentence of two years for simple escape. We cannot say that the court abused its broad discretion in doing so. See State v. Lobato, 603 So.2d 739, 751 (La. 1992).

The defendant's second assignment of error is without merit.

CONCLUSION

Having found no merit in the defendant's assignments of error, the convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.