NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 2420

STATE OF LOUISIANA

VERSUS

TERRY FOLSE

Judgment Rendered: May 4, 2007

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On appeal from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Suit Number 414771

Honorable F. Hugh Larose, Presiding

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* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

The defendant, Terry Folse, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967. He pled not guilty and, after a trial by jury, was convicted as charged. The trial court sentenced the defendant to twelve years imprisonment at hard labor. The defendant moved for reconsideration of the sentence. The trial court denied the motion. The defendant now appeals, urging two assignments of error as follows:

1. There was insufficient evidence to prove that the defendant was guilty of possession with intent to distribute cocaine.

2. The trial court committed error in denying the defendant's motion to reconsider an excessive sentence.

Finding no merit in the assigned errors, we affirm the defendant's conviction, amend the sentence and affirm as amended, and remand with instructions.

FACTS

On February 9, 2005, Louisiana State Police Trooper Brent Dufrene was conducting a stationary radar patrol on Louisiana Highway 3087 (Prospect Road) in Lafourche Parish when he observed the defendant exceeding the posted speed limit.[1] Dufrene stopped the defendant and asked him to produce his driver's license. The defendant informed Dufrene that he did not have a license. Dufrene ran a check for outstanding warrants and discovered that the defendant had several active warrants. The defendant was placed under arrest. In a search of the defendant's person incident to the arrest, Dufrene recovered a cigarette package containing ten factory-rolled cigarettes, a partially burned "blunt" or "marijuana cigar," and a plastic lip-balm container with nine rocks of suspected crack cocaine inside. The rocks were not individually wrapped. No cash or drug paraphernalia was discovered on the defendant's person or in his vehicle. The defendant was

[1] The defendant was traveling at a speed of 78 miles per hour in a 65 miles per hour zone.

taken into custody. The entire encounter was captured on videotape.[2] Chemical analysis revealed that the rocks, totaling approximately 2.3 grams, contained cocaine.

SUFFICIENCY OF EVIDENCE

In defendant's first assignment of error, the defendant contends the evidence is insufficient to support his conviction of possession of cocaine with intent to distribute. Specifically, he asserts the State failed to prove the requisite element of intent to distribute the cocaine found on his person.[3] He contends that his mere possession of the cocaine, an amount of which was not inconsistent with personal use, does not prove specific intent to distribute. The defendant further asserts that the "cigar blunt" and factory-rolled cigarettes, which the State's expert admitted were means by which crack cocaine can be ingested, were evidence of personal use. Thus, he asserts, the evidence supports a verdict only for simple possession of cocaine.

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. See La. C.Cr. P. art. 821(B). The Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence must be excluded. La. R.S. 15:438; see State v. Northern, 597 So.2d

[2] Dufrene testified that his police unit was equipped with a camera that records sound and video.

[3] The defendant does not contest the fact that he possessed the cocaine.

48, 50 (La. App. 1st Cir. 1992). The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. State v. Fisher, 628 So.2d 1136, 1141 (La. App. 1st Cir. 1993), writs denied, 94-0226 & 94-0321 (La. 5/20/94), 637 So.2d 474 & 637 So.2d 476. 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).

To support a conviction for possession with intent to distribute a controlled dangerous substance, the State was required to prove both possession and specific intent to distribute. See La. R.S. 40:967(A)(1); State v. Young, 99-1264, p. 10 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1006. In this case, possession is not at issue. The defendant clearly possessed the cocaine found on his person. Thus, the issue herein is whether the State established the element of intent to distribute. In order to prove the element of intent to distribute, the State must prove the defendant's specific intent to possess to distribute. Specific intent is a state of mind. It need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. State v. Young, 99-1264 at 11, 764 So.2d at 1006.

Because evidence of intent is generally circumstantial, the Louisiana Supreme Court has enunciated criteria for determining intent to distribute. We should consider whether: (1) the defendant ever distributed or attempted to distribute illegal drugs; (2) the drug was in a form usually associated with distribution; (3) the amount was such to create a presumption of intent to

distribute; (4) expert or other testimony that the amount found in the defendant's actual or constructive possession was inconsistent with personal use; and (5) the presence of other paraphernalia evidencing intent to distribute. State v. House, 325 So.2d 222, 225 (La. 1975).

In the absence of circumstances from which an intent to distribute may be inferred, mere possession of illegal drugs is not evidence of intent to distribute unless the quantity is so large that no other inference is reasonable. State v. Greenway, 422 So.2d 1146, 1148 (La. 1982). For mere possession to establish intent to distribute, the State must prove the amount of the drug in the possession of the accused and/or the manner in which it was carried is inconsistent with personal use only. See State v. Hearold, 603 So.2d 731, 736 (La. 1992).

Analyzing the facts of the instant case and applying the House factors, we conclude the State's evidence adequately proved the defendant's intent to distribute the cocaine. Admittedly, the amount of cocaine seized (2.3 grams) does not give rise to a presumption of intent to distribute. However, we find that there was sufficient circumstantial evidence from which an intent to distribute may be inferred.

At the trial, Drug Enforcement Administration Agent Josh Champagne,[4] who was accepted as an expert in buying and selling illegal narcotics, testified that crack cocaine is typically distributed in $20.00 and $40.00 rocks. He explained that crack cocaine users typically purchase $20.00 rocks, while dealers purchase the larger $40.00 rocks. Agent Champagne explained that dealers purchase the larger rocks to cut them down and sell to users for a profit. Because the dealer will be cutting down the rocks into smaller, distributable portions, dealer-sized rocks are not typically individually wrapped.

[4] Agent Champagne is also a Lieutenant with the Lafourche Parish Drug Task Force.

Agent Champagne further testified that the rocks seized from the defendant were larger rocks, not of the size usually purchased by users. He testified that the size of the rocks seized was more consistent with intent to resell or distribute, and not for personal use. As further support for the conclusion that the defendant intended to distribute the cocaine, Agent Champagne testified that crack cocaine dealers routinely store the unwrapped rocks in concealment containers such as "Lifesaver, little candy holders," "pill bottles, Chapstick containers, etc." Also, typical crack cocaine users do not "ride around with crack in their possession." Because crack cocaine is so highly addictive, users typically purchase the drug for immediate use and they usually carry pipes or other drug ingestion paraphernalia. Agent Champagne opined that the size of the rocks, the lack of individual packaging, the concealment of the rocks in the lip-balm container, and the fact that there was no smoking paraphernalia found, were indicative of retail sale or distribution as opposed to personal consumption.

In support of his contention that the evidence was insufficient to support the requisite element of intent to distribute, the defendant cites an unpublished opinion,[5] wherein this court found that approximately 2.6 grams of cocaine was not inconsistent with personal use. However, it is important to note, as the State correctly pointed out in its brief, the facts of that case are distinguishable from the instant case in that the defendant in that case also possessed smoking paraphernalia (cigarette lighters and a metal smoking device). In this case, no such paraphernalia was found.

In the instant case, the jury was entitled to accept the expert's opinion and conclude that the defendant intended to distribute the cocaine seized from his person. Even in the absence of direct evidence that the defendant actually

[5] Rule 2-16.3 (C) of the Uniform Rules, Courts of Appeal, prohibits citation of unpublished opinions, notwithstanding the questionable applicability of C.C.P. art. 2168(B) to criminal appeal opinions.

person. Even in the absence of direct evidence that the defendant actually distributed or attempted to distribute the cocaine, the circumstantial evidence, viewed in the light most favorable to the State, established beyond a reasonable doubt the intent to distribute cocaine. This assignment of error lacks merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant contends the trial court erred in imposing an excessive sentence. Specifically, he argues that none of the aggravating circumstances enumerated in La. C.Cr. P. art. 894.1 are applicable to his case and, thus, the trial court was not justified in imposing the twelve-year sentence.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. 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. 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). 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. La. C.Cr. P. art. 894.1.

The trial court need not cite 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 for individual excessiveness should 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 is unnecessary when a sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So.2d 475, 478 (La. 1982).

A conviction for possession of cocaine with intent to distribute carries a penalty of a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years being without benefit of parole, probation, or suspension of sentence; and may, in addition, require payment of a fine of not more than fifty thousand dollars. La. R.S. 40:967(B)(4)(b). In the instant case, the defendant was sentenced to twelve years at hard labor with no fine.

Prior to imposing sentence, the trial court reviewed the facts of the case and the defendant's criminal history. The court noted:

> Mr. Folse, I've had an opportunity to review your record. You have a history of arrests for some 27 different charges ranging from murder, to batteries, to aggravated batteries, to drug dealings, to every form of violence that I can imagine. When this crime itself was committed you were on probation for an aggravated battery.
>
> You have exhibited to this Court a total disregard for the law and the rules.
>
> ...Mr. Folse, as I indicated before, the history of your criminal acts, the length of time which you have been in direct contact with the criminal system all exhibit to this Court an indication that you have no desire to live within the bounds of the rules of the court. It is therefore the opinion of this Court that an undue risk would exist during any period of suspended sentence or probated sentence that you would commit another crime.
>
> That you are in need of correctional treatment or a custodial environment that can be provided most effectively by your

commitment to a penal institution. That any lesser sentence imposed would deprecate the seriousness of your crime.

It is therefore the sentence of this Court the defendant shall be imprisoned at hard labor by the Department of Public Safety and Corrections for a term of twelve years. Defendant will be given credit for time served in custody prior to the imposition of this sentence.

The Court finds that the defendant is not convicted of a crime of violence. However, the Court does impose restrictions concerning the diminution of sentence for good behavior pursuant to Code of Criminal Procedure Article 890.1, and particularly the Court refers to R.S. 15:571.3.

...Mr. Folse, I wish I had some words to tell you that would make your (sic) realize which way you're going, but I think that's long sense (sic) overdue.

Considering the aforementioned reasons for sentence provided by the trial court, we find no merit in this assignment of error. Contrary to the defendant's assertions, we find that the trial court, in its reasons, adequately articulated justification sufficient to support the imposition of the twelve-year sentence. The sentence is neither grossly disproportionate to the severity of the crime, nor so disproportionate as to shock our sense of justice. This assignment of error is without merit.

REVIEW FOR ERROR

Additionally, we have discovered a sentencing error in that the trial court stated that the defendant was not to be eligible for good time credit. The defendant is not ineligible for good time credits on the possession of cocaine with intent to distribute under La. R.S. 15:571.3(C), because he was not adjudicated a habitual offender. See La. R.S. 15:571.3(C)(2). Furthermore, the provisions of La. R.S. 15:571.3(C) are directed to the Department of Public Safety and Corrections exclusively, and the sentencing judge has no role in the matter of good time credit. See State ex rel. Simmons v. Stalder, 93-1852 (La. 1/26/96), 666 So.2d 661 (quoting Jackson v. Phelps, 506 So.2d 515, 517-18 (La. App. 1st Cir.), writ denied,

508 So.2d 829 (La. 1987)). There does exist an exception under La. C.Cr. P. art. 890.1 whereby the trial court may deny diminution of sentence for good behavior if the crime for which the sentence is imposed is a crime of violence. However, as the trial court correctly noted at the sentencing, in this case the defendant's offense is not a crime of violence and does not subject him to this exception. Thus, denial of the defendant's right to credit against his sentence for good behavior is not authorized. This court may, upon review, correct an illegal sentence. La. C.Cr. P. art. 882(A).

For the foregoing reasons, we affirm the conviction and amend the sentence to delete the provision of the sentence denying the defendant eligibility for good time credit. We remand the matter to the trial court with instructions to amend the sentencing minute entry and criminal commitment to reflect this disposition. We affirm the remainder of the sentence in all respects.

CONVICTION AFFIRMED; SENTENCE AMENDED AND AS AMENDED AFFIRMED; AND REMANDED WITH INSTRUCTIONS.