

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1499

STATE OF LOUISIANA

VERSUS

WAYMAN CHARLES HATCH

Judgment Rendered: February 13, 2009

* * * * *

On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 03-06-0283

Honorable Todd Hernandez, Judge Presiding

* * * * *

Doug Moreau
District Attorney
Aaron D. Brooks
Dylan C. Alge
Assistant District Attorneys
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

J. David Bourland
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Wayman Charles Hatch

* * * * *

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Handwritten initials: JM, JCW, RHP

McCLENDON, J.

Defendant, Wayman Hatch, was charged by bill of information with one count of possession with intent to distribute cocaine, a violation of LSA-R.S. 40:967(A). Carvis Wilkerson and Shekina Carter were charged as co-defendants in the same bill of information; however, prior to trial, the charge against Carter was dismissed. Defendant entered a plea of not guilty and was tried, along with co-defendant Wilkerson, before a jury. The jury determined defendant was guilty of the responsive offense of possession of cocaine, a violation of LSA-R.S. 40:967(C). Wilkerson was convicted of the responsive offense of attempted possession of cocaine; however, his conviction is not at issue in this appeal.

The state instituted habitual offender proceedings against defendant. Defendant admitted the allegations of the habitual offender bill and subsequently was sentenced to serve seven years at hard labor.

Defendant appeals, citing the following as error:

1. The trial court erred in denying defendant's motion to suppress the unconstitutionally prolonged detention and traffic stop of Kirk White.
2. The evidence is not sufficient to support the responsive verdict of possession of cocaine.

We affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On December 8, 2005, Lieutenant David McDavid, of the Zachary Police Department, received an anonymous tip that illegal narcotics were being sold from defendant's residence located at 5279 Lennox Street. Lt. McDavid, who was conducting activities as part of the Delta Narcotics Task Force, set up surveillance of the residence with other officers from the task force. Upon their arrival, the officers observed a vehicle parked in the driveway with what was later determined to be stolen Texas license plates. The officers also observed a white vehicle and a vehicle that they believed was associated with Wilkerson.

As the police officers continued conducting surveillance of defendant's residence, Kirk White exited the residence and left in the white vehicle. As White proceeded along Slaughter Road, and turned onto Church Street, Lt. McDavid followed in his unmarked truck. Lt. McDavid did not see a properly displayed license plate on White's vehicle. White also began backing up his vehicle on Church Street. Concerned that White would strike his truck, which was only a vehicle length behind, Lt. McDavid activated the siren and lights on his truck.

Lt. McDavid was familiar with White, having attended school with him. He also was aware that White had a history of crime and narcotics. White exited his vehicle and met Lt. McDavid between his truck and White's vehicle. Lt. McDavid explained to White that he had been pulled over for traffic violations of failure to properly display license plate and improper backing on a highway. Pursuant to Lt. McDavid's request, White's driver's license and vehicle information was obtained. Lt. McDavid called in the information to determine whether there were any outstanding warrants or other issues with White or his vehicle.

Lt. McDavid noticed that White had become very nervous, was sweating profusely, and repeatedly patted his front pocket, which evidenced a small bulge. Although the check of White's vehicle and license revealed no problems, Lt. McDavid advised White of his **Miranda** rights, then asked White if he had any narcotics or weapons on him. White reached into his pocket and pulled out four rocks of crack cocaine contained in crumpled newspaper.

Lt. McDavid asked White where he had obtained the cocaine, and White responded that defendant had fronted him the cocaine. After further questioning by Lt. McDavid, White indicated that more cocaine was located in defendant's residence.

Based on this information, Lt. McDavid obtained a no-knock search warrant for defendant's residence. Members of the Delta Narcotics Task Force were assembled to execute the warrant. Using a battering ram, the police officers were able to make entry into defendant's residence. Officer Marty Freeman was the first person to enter the residence. Officer Freeman observed

defendant and Wilkerson sprint down the hallway into a back bathroom and slam the door. Officer Freeman pursued the men, but could not immediately open the bathroom door because it was being held shut. Officer Freeman could hear the toilet running. Officer Chris Green, who secured the adjoining bedroom, also witnessed defendant and Wilkerson flee into the bathroom.

The officers were able to pry the bathroom door open and locate defendant and Wilkerson. Wilkerson was by the door, and because of the small size of the bathroom and Wilkerson's attempts to block the officers' entry, he was struck in the mouth when the door was forced open by the officers.

Defendant and Wilkerson were secured and placed in the living room along with Carter. Lt. McDavid recovered a box of nine-millimeter bullets from a nightstand just outside the bathroom. Officers searched defendant and recovered \$233.95 from his person. Officers searched Wilkerson and recovered approximately \$1,100 in cash from him. Although Wilkerson claimed the money was Carter's, Carter denied this fact.

Lt. McDavid and Officer Green went outside to check the pipeline coming from the bathroom going to the sewer line. The bathroom pipe had deteriorated and had become disconnected at a point just below the house. A baggie containing crack cocaine was exposed at the open end of the bathroom pipe. Lt. McDavid removed the baggie and had other officers return to the house to flush the toilet again in order to flush any remaining drugs from the pipe. Lt. McDavid testified that, after the toilet was flushed, he observed additional baggies of crack cocaine pass through the bathroom pipe, but was unable to retrieve them before the flowing water moved the baggies into another open pipe nearby.

The officers then contacted Lionel Lawson, a supervisor with the Zachary Water Department. Lawson opened the sewer main and hooked a Hydroblaster onto a pipe to flush the contents of the line back to where Lt. McDavid was being held by other officers over an open manhole close to defendant's residence. Lt. McDavid waited with a colander in anticipation of catching anything blown back towards him. After the Hydroblaster was activated, Lt. McDavid was able to

catch more baggies containing crack cocaine. The total amount of crack cocaine recovered from the baggies weighed 19.99 grams, which is consistent with a supply held by a mid-level drug dealer.

Kirk White testified on behalf of the defense. In sharp contrast to Lt. McDavid's account of the traffic stop, White claimed he was immediately ordered out of his vehicle by Lt. McDavid and asked, "where's the dope?" White further testified that Lt. McDavid told White that if he did not turn over the dope, Lt. McDavid would "put the dog" on him. White testified he removed the crack cocaine from his pocket, and placed it on the trunk of his vehicle, but he never told Lt. McDavid where he had gotten it. At trial, White claimed he had obtained the crack cocaine from an unknown dealer at a Fina gas station in Scotlandville.

Shekina Carter also testified for the defense. According to Carter, she had fallen asleep on the sofa with Wilkerson, when a loud noise awakened them. Carter testified that the next thing she knew, several uniformed men entered the living room and took her and Wilkerson to the floor. Carter stated that she did not see Wilkerson leave the room, nor did she see defendant run into the bathroom.

MOTION TO SUPPRESS

In his first assignment of error, defendant argues that the trial court erred in denying his motion to suppress evidence because Kirk White's detention following his traffic stop was illegally prolonged.¹ Specifically, defendant argues once Lt. McDavid completed the computer check of White and his vehicle, which came back clear, Lt. McDavid failed to inform White that he could leave.²

We note that in reviewing the correctness of the trial court's ruling on a motion to suppress evidence, the appellate court is not limited to the evidence adduced at the hearing on the motion; rather, it may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223

¹ White provided information used by Lt. McDavid to obtain the search warrant for defendant's residence.

² Article I, § 5, of the Louisiana Constitution provides standing to third persons adversely affected by an illegal search or seizure. See also **State v. Culotta**, 343 So.2d 977, 981 (La.1976).

n. 2 (La.1979). Because the assignment of error raised by defendant involves the testimony of Lt. McDavid and White, both of whom testified at the trial of this matter, we can review the propriety of the trial court's ruling by examining their trial testimony.

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. The standard is a purely objective standard that does not take into account the subjective beliefs or expectations of the detaining officer. Although they may serve, and may often appear intended to serve, as the prelude to the investigation of much more serious offenses, even relatively minor traffic violations provide an objective basis for lawfully detaining the vehicle and its occupants. **State v. Waters**, 2000-0356, p. 4 (La. 3/12/01), 780 So.2d 1053, 1056 (per curiam).

In the present case, it is not disputed that Lt. McDavid initiated a traffic stop of White because he felt White had committed two traffic violations, *i.e.*, failure to properly display the license plate for his vehicle,³ and improper backing of a vehicle on a roadway.⁴ However, defendant claims that Lt. McDavid illegally prolonged the traffic stop after he learned there were no problems with White's license or vehicle. Defendant argues that because Lt. McDavid testified that the traffic stop was unrelated to any suspicious activity at defendant's residence, once the license and vehicle check was completed, White should have been told he was free to leave. Defendant contends that Lt. McDavid failed to provide any articulable supporting details for his continued detention of White, other than his belief that a "suspicious criminal act was going on." As a result, defendant contends that the traffic stop of White evolved into an improper de facto arrest.

We disagree. In the present case, Lt. McDavid acted lawfully in stopping White's vehicle after observing the improper backing on Church Street and due to the inability to observe a license plate on White's vehicle. Given the

³ A violation of LSA-R.S. 47:507.

⁴ A violation of LSA-R.S. 32:281.

lawfulness of the initial stop, the reasonableness of the escalating encounter between White and Lt. McDavid hinged on whether the actions undertaken by the officer following the stop were reasonably responsive to the circumstances justifying the stop in the first place, as augmented by the information gained by the officer during the stop. See **State v. Miller**, 2000-1657, pp. 3-4 (La. 10/26/01), 798 So.2d 947, 949-50 (per curiam).

While Lt. McDavid testified that he stopped White because of traffic violations, he also testified that as he interacted with White and waited for the results of the license and vehicle check, White acted increasingly nervous. Lt. McDavid specified that White was sweating profusely and kept patting his front pocket, in which Lt. McDavid could observe a small bulge. Lt. McDavid testified that it took one to two minutes to complete the check of White's license and vehicle. After which, Lt. McDavid approached White, advised him of his **Miranda** rights, and directly asked White the reason he was so nervous and whether he had drugs or weapons on him. White then waived his **Miranda** rights and turned over the crack cocaine in his pocket.

In assessing the effect of the length of the detention, we take into account whether the police diligently pursued their investigation. See **State v. Miller**, 2000-1657 at p. 4, 798 So.2d at 950. In the present case, although Lt. McDavid stopped White for traffic violations, he was also aware that White had left a residence of suspected narcotics activity. Lt. McDavid was also personally familiar with White and was aware of his narcotics history. Further, Lt. McDavid provided specific examples of White's conduct, such as the profuse sweating and continued patting of the bulge in White's pocket that aroused his suspicions.

Defendant argues that Lt. McDavid was compelled to inform White that he was free to leave after the license and vehicle checks revealed no problems. However, we note that Lt. McDavid still had not completed a citation for either traffic offense, which was within his discretion to do. Further, given the escalation of White's nervous behavior under the circumstances already discussed, we cannot say Lt. McDavid's actions of advising White of his **Miranda**

rights and directly inquiring into whether he had illegal narcotics or weapons was an improper way to prolong White's detention. We note that White waived his rights and admitted he had the illegal narcotics on his person.

Under these circumstances, we cannot say the trial court erred in denying defendant's motion to suppress. This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, defendant argues that the evidence was insufficient to support his conviction for possession of cocaine. Defendant enumerates several "irrational" decisions by the jury including:

1. That the small amount of cocaine, resting on the edge of the cleanly cut sewer line leading from the house, was knowingly and intentionally possessed by defendant;
2. That there was enough time for defendants to run from the front room to the bathroom, close the door, and flush the cocaine, when the officers' intrusion was accomplished within a matter of seconds;
3. That the broken sewer line from the house to the sewer main existed in such condition prior to that evening, given the distance between the two broken/cut pipes, the clean nature of the separation, the lack of debris or waste, or residual water, indicating prior use;
4. That following police entry, the cocaine, which was allegedly flushed by defendants traversed the clean, broken end of the sewer pipe from the house, made a sharp left turn, and flowed into the other end of the broken pipe;
5. The small amount of cocaine recovered by Lt. McDavid miraculously appeared in the sewer main fifteen yards down the street from the residence after the Hydroblaster was used, and that such cocaine could be attributed to the defendant.

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 and the defendant's identity as the perpetrator of that 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 LSA-C.Cr.P. art. 821; **State v. Wright**, 98-0601, p. 2 (La.App. 1 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. The **Jackson** standard of review is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La.App. 1 Cir. 2/14/03), 845 So.2d 416, 420.

The appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn the determination of guilt by the fact finder. See **State v. Polkey**, 529 So.2d 474, 476 (La.App. 1 Cir. 1988), writ denied, 536 So.2d 1233 (La.1989). As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of witnesses, the question is one of the weight of the evidence, not its sufficiency. **State v. Young**, 99-1264, p. 10 (La.App. 1 Cir. 3/31/00), 764 So.2d 998, 1006. A determination of the weight to be given evidence is a question of fact for the trier of fact, and is not subject to appellate review. **State v. Payne**, 540 So.2d 520, 524 (La.App. 1 Cir.), writ denied, 546 So.2d 169 (La.1989).

To support a conviction of possession of a controlled dangerous substance, the state must prove that the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed the drug. Guilty knowledge therefore is an essential element of the crime of possession. A determination of whether or not there is "possession" sufficient to convict depends on the peculiar facts of each case. To be guilty of the crime of possession of a controlled dangerous substance, one need not physically possess the substance; constructive possession is sufficient. To establish constructive possession of the substance, the state must prove that the defendant had dominion and control over the contraband. A variety of factors are considered in determining whether a defendant exercised "dominion and control" over a drug, including: a defendant's knowledge that illegal drugs are in the area; the

defendant's relationship with any person found to be in actual possession of the substance; the defendant's access to the area where the drugs were found; evidence of recent drug use by the defendant; the defendant's physical proximity to the drugs; and any evidence that the particular area was frequented by drug users. **State v. Harris**, 94-0696, pp. 3-4 (La.App. 1 Cir. 6/23/95), 657 So.2d 1072, 1074-75, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls. The defendant may then be found guilty, unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La.1987).

In the present case, the jury was presented with testimony from Lt. McDavid that defendant's residence was under surveillance following an anonymous tip that illegal narcotics were being sold from the residence. Lt. McDavid observed White, whom he knew to have a criminal history including narcotics use, leave the residence. Lt. McDavid stopped White for traffic violations. During the stop, White turned over four rocks of crack cocaine that he said he had been fronted by defendant. After learning from White that more cocaine was in defendant's residence, Lt. McDavid obtained a search warrant for defendant's residence. Other officers of the Delta Narcotics Task Force were assembled to execute the no-knock warrant. Sergeant Hamum used a battering ram twice on the door, causing a loud noise, before the officers could gain entry.

Upon entry into the residence, the first officer entering observed defendant and Wilkerson running from the front room into a bathroom, and closing the door behind them. As Officer Freeman approached the bathroom door, he could hear the toilet flushing and his attempts to enter were initially resisted by someone holding the door shut.

Officer Green also observed defendant and Wilkerson flee into the bathroom following entry by the members of the task force, and provide resistance to the officers seeking entry. Over two hundred dollars in cash was

found on defendant, and eleven hundred dollars was found on Wilkerson. Wilkerson claimed that the cash belonged to Carter, but she denied that fact.

After examining the yard and pipes leading from defendant's residence, Lt. McDavid recovered a plastic bag containing crack cocaine from a broken pipe in defendant's yard. Later, when another officer returned to the house to flush the toilet in an attempt to clear anything from the line, Lt. McDavid observed two more plastic bags flow from one broken pipe into the exposed end of another broken pipe leading to the main sewer line. Later, when Lawson activated the Hydroblaster, Lt. McDavid was able to retrieve additional plastic bags containing crack cocaine from the main sewer line below defendant's residence.

The state also introduced photographs of the broken sewer line in defendant's yard. Although defendant argues that the pictures do not reflect that the area near the break was wet, Lt. McDavid testified he thought the area was wet.

The defense presented testimony from White wherein he denied telling Lt. McDavid that the cocaine was obtained from defendant. Although White admitted to being in jail with defendant prior to trial, White denied that he feared the defendant because of White's participation in the trial. The defense also presented testimony from Carter, who was in defendant's residence when the police executed the search warrant. Carter, who was dating Wilkerson at the time of this incident, denied that either defendant or Wilkerson fled the front room into the bathroom.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence supports defendant's conviction of possession of cocaine. Although defendant argues that the jury made irrational decisions in arriving at its verdict, we disagree. Clearly, the jury had a reasonable basis to conclude White obtained cocaine from defendant. The jury also had a rational basis to conclude that defendant attempted to dispose of any remaining cocaine in his residence by fleeing from the police and flushing it down the toilet. The fact that defendant's yard contained a broken exposed sewer line allowed the police the

opportunity to retrieve the cocaine. Whether it was plausible for the cocaine, once flushed, to flow over the area between the broken pipes, was a matter of the weight of the evidence and a question for the jury. From our review, given the actions of White, defendant, and Wilkerson, the jury weighed the testimony and was clearly rational in returning the responsive verdict of possession of cocaine. Accordingly, we find this assignment of error to be without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.