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NEWS RELEASE # 34

FROM CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **14th day of April, 2004**, are as follows:

PER CURIAM:

2003-K -1313 STATE OF LOUISIANA v. RONNIE L. FRANCOIS AND RICKY M. KEMP (Parish of Orleans) (Possession of Heroin with Intent to Distribute)
The decision of the court of appeal is therefore reversed and this case is remanded for consideration of the pro se assignments of error pretermitted on original appeal.
DECISION OF THE COURT OF APPEAL REVERSED; CASE REMANDED.

CALOGERO, C.J., dissents. The evidence of the crime for which defendant was convicted was insufficient.
JOHNSON, J., dissents and assigns reasons.
KNOLL, J., dissents and assigns reasons.

04/14/04

SUPREME COURT OF LOUISIANA

No. 03-K-1313

STATE OF LOUISIANA

v.

RONNIE L. FRANCOIS AND RICKY M. KEMP

On Writ of Certiorari to the
Fourth Circuit Court of Appeal

PER CURIAM:

Although the state and defense hotly disputed the inferences arising from the evidence, the circumstances underlying defendant-respondents' convictions and sentences for possession of heroin with intent to distribute in violation of La.R.S. 40:966(A)(1) were largely uncontested at trial. Pursuing an unrelated criminal investigation in August 2001, New Orleans Police Detectives Martin and Little arrived at an address on Gibson Street to execute an arrest warrant for Linda Francois. Henrietta Francois greeted the officers at the door and allowed them to look inside for her daughter. As the officers entered the hallway of the apartment, they saw that the door to the first bedroom was slightly ajar and they heard people talking and a television playing loudly. Because they were concerned for their safety, the officers announced their presence and pushed open the bedroom door.

As they entered the room, the officers observed respondent Francois sitting on a chair between two twin beds, scooping white powder from a plate and placing it on square pieces of foil that were laid out on a brown photo album resting on respondent Kemp's lap. Kemp, sitting on the right corner of one of the twin beds, had used a pair of scissors to cut the foil into "perfect" squares and

then folded the foils after Francois placed the white substance on them. The officers immediately arrested the two men and found 14 foils with heroin, six empty foils, a small mound of heroin on a plate with a plastic spoon, two pairs of scissors, a package of aluminum foil, pieces of foil cut into squares, a small plastic fork, a finger from a rubber glove which contained white residue, plastic bags containing residue, playing cards with residue on them, razor blades, and a box of sandwich bags which Detective Martin testified are commonly used in the streets to bundle together individual papers of heroin. In total, approximately five to six grams of heroin, or one quarter ounce, was seized. The officers also found $178 in cash, in denominations of twenties, tens, fives and ones, in the room and a medical bill addressed to Francois at that address. A search of the remainder of the apartment uncovered no additional contraband, and a search of respondents did not yield any weapons or cash from either of them. The officers did not inspect respondents' arms for track marks but they found no syringes or any other evidence which might have indicated that Francois's apartment functioned as a "shooting gallery." Although not qualified by the court as experts in drug trafficking, both officers testified on the basis of their experience in the Third District Narcotics Unit that the "assembly line" process they had observed reflected "the operation of drugs being prepared for sales."

On appeal, respondents argued that the evidence supported verdicts only for simple possession of heroin. The court of appeal agreed, although it readily conceded that "[b]ased on [the officers'] testimony, the jury reasonably could have inferred that the foils of heroin that were being prepared indicated an intent to distribute [because] the heroin was in a form associated with distribution." State v. Francois, 02-2056, p. 9 (La. App. 4th Cir. 4/9/03), 844 So.2d 1042, 1048.

However, the court found that factor "counterbalanced" by the fact that the heroin was also in the form associated with personal consumption, i.e., measured out in small foil packets, and that it was therefore "quite plausible that Mr. Francois and Mr. Kemp were preparing the heroin for their own personal consumption." Id. The court of appeal noted in this regard that neither officer testified that the packaging of heroin was inconsistent with personal use or that "drug dealers are the only ones who divide their heroin into individual doses." Id., 02-2056 at 10, 844 So.2d at 1049. The court further observed that the officers seized no weapons, cutting agents, scales, or large amounts of cash in connection with the arrests of respondents. Considering the totality of the circumstances, and applying the criteria set forth by this Court for determining whether circumstantial evidence is sufficient to prove an intent to distribute a controlled dangerous substance, see State v. Hearold, 603 So.2d 731, 735 (La. 1992), the Fourth Circuit concluded that "the jury reasonably could have inferred that [respondents] were packaging the heroin for their own personal use." Id., 02-2056 at 11, 844 So.2d at 1049. The court of appeal accordingly reduced respondents' convictions to simple possession of heroin and remanded the case to the district court for resentencing.

However, the court of appeal erred in amending the jury's verdicts because jurors considered and rejected the hypothesis that respondents had been preparing the bulk heroin for personal use as a basis for acquitting respondents of the charged offense and a reviewing court may impinge on the "fact finder's discretion only to the extent necessary to guarantee the fundamental due process of law." State v. Mussall, 523 So.2d 1305, 1310 (La. 1988). In cases involving circumstantial evidence, when the jury reasonably rejects the hypothesis of

innocence advanced by the defense, "that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt." State v. Captville, 448 So.2d 676, 680 (La. 1984). In the present case, respondent Francois's attorney put the issue of intent squarely before the jury when he urged jurors during closing argument to consider that:

> You can't take that stuff in big doses; it will kill you. So what do you do with it? Well, you break it down into useable sizes. To be used at a later date so you don't wind up killing yourself. You know, addicts sometimes, they'll just take this stuff forever. So what you do is you cut it down to size, you put it in your little tin foil, you maintain it; when you're ready to use it, you open a little tin foil and you put something in there whether its methyl alcohol or whatever, dissolves it and you put your needle in it and you put it in your arms. That's how it's done and that's what they did. Now you think that's not true? Well, let them show you evidence that that's not true.

We cannot say on the present record that jurors unreasonably or irrationally rejected this defense hypothesis of innocence. Even accepting defense counsel's argument that addicts would not consume the entire amount at one time, the care with which respondents converted the heroin from bulk form to individual doses supported a reasonable inference that they used a common method of packaging drugs for distribution because they meant to sell the squares on the street as opposed to dividing up the heroin for their own personal use at a later time. Because that inference flowed logically from the overall evidence presented by the state, including the opinions offered by the arresting officers, see State v. Short, 96-1069, p. 4 (La. App. 4th Cir. 5/7/97), 694 So.2d 549, 552 (officer's past experience, training and common sense may be considered in determining if his inferences from the facts at hand were reasonable), jurors did not deprive respondents of their due process right to a fact finder's rational decision making, Mussall, 523 So.2d at 1310, by rejecting the more remote

hypothesis that the packaging could have been for personal use as a basis for finding a reasonable doubt as to guilt that otherwise did not exist.

The decision of the court of appeal is therefore reversed and this case is remanded for consideration of the pro se assignments of error pretermitted on original appeal.

DECISION OF THE COURT OF APPEAL REVERSED; CASE REMANDED.

04/14/04

SUPREME COURT OF LOUISIANA

No. 03-K-1313

STATE OF LOUISIANA

versus

RONNIE L. FRANCOIS AND RICKY M. KEMP

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

CALOGERO, Chief Justice, dissents.

The evidence of the crime for which defendant was convicted was insufficient.

04/14/04

SUPREME COURT OF LOUISIANA
No. 03-K-1313

STATE OF LOUISIANA

Versus

RONNIE L. FRANCOIS, ET AL.

On Writ of Certiorari to the
Fourth Circuit Court of Appeal

JOHNSON, Justice dissents, assigning reasons.

In the instant case, this Court found that the Court of Appeal erred in reversing defendant's conviction for possession of heroin with intent to distribute, and reinstated the conviction. I respectfully disagree with the finding that the State presented sufficient evidence to prove that the defendant possessed the requisite intent necessary to warrant a conviction under La. R.S. 40: 966(A). The majority decision severely curtails the enumerated factors established to determine whether circumstantial evidence is sufficient to establish specific intent to distribute. In *State v. House*, this Court enumerated the following five factors to aid in determining whether circumstantial evidence is sufficient to establish specific intent to distribute:

> (1) whether the defendant ever distributed or attempted to distribute the drug;
>
> (2) whether the drug was in a form usually associated with possession for distribution to others;
>
> (3) whether the amount of drug created an inference of an intent to distribute;
>
> (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and
>
> 5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.

State v. House, 325 So.2d 222, 225 (La. 1975).

Mere possession of a controlled dangerous substance is not evidence of an intent to distribute unless the quantity possessed is so large that no other inference is reasonable. *State v. Tong*, 609 So.2d 822, 824 (La.1992)(citing *State v. Hearold*, 603 So.2d 731, 735 (La.1992)). In the instant case, the State retrieved only five to six grams of heroin. Further, there were two defendants in possession of a relatively small amount of heroin; hence, this was not a sufficient quantity of heroin to give rise to an inference of distribution. *State v. Johnson*, 2000-1528 (La.App. 4 Cir. 2/14/01), 780 So.2d 1140, writ denied, 2001-0916 (La.2/1/02), 807 So.2d 854 (finding a total of four pounds of marijuana too large an amount for personal use); *State v. Fernandez*, 489 So.2d 345, 347 (La.App. 4 Cir.1986) (finding twenty-one small bags and several larger bags of cocaine supported inference of distribution). The State introduced no evidence that either defendant had ever distributed or attempted to distribute drugs in the past. Further, there was no evidence of prior drug deals taking place in the apartment where the two men were discovered. Finally, the detectives found the defendants in a bedroom in a home with no history of facilitating drug trafficking, not on a street corner or in a known drug trafficking area. See *State v. Perry*, 97-1175, pp. 8-9 (La.App. 4 Cir. 7/22/98), 720 So.2d 345, 349 (contrasting a defendant found in his own home with drugs with one found on a street corner). Based upon the facts presented, the State failed to present sufficient evidence that the defendants intended to distribute heroin. For these reasons, I respectfully dissent.

04/14/04

SUPREME COURT OF LOUISIANA

No. 03-K-1313

STATE OF LOUISIANA

versus

RONNIE L. FRANCOIS AND RICKY M. KEMP

On Writ of Certiorari to the
Fourth Circuit Court of Appeal

Knoll, Justice, dissenting

Under the rule set forth in State v. Mussall, 523 So.2d 1305, 1310 (La. 1988), a reviewing court may impinge on the fact finder's discretion only to the extent necessary to guarantee the fundamental due process of law. This is just such a case.

The state fell far short of proving defendant's guilt *beyond a reasonable doubt* for possession with intent to distribute heroin. In my view, the state proved beyond a reasonable doubt defendant's guilt for possession of heroin.

It is well established in Louisiana that where the evidence is purely circumstantial, if it does not exclude every reasonable hypothesis of innocence, a rational juror cannot find defendant guilty beyond a reasonable doubt without violating constitutional due process safeguards. La. Rev. Stat. § 15:438 (2003); State v. Wright, 445 So.2d 1198, 1201 (La. 1984). Proof of guilt ought not only be consistent with defendant's guilt, but should be inconsistent with any reasonable hypothesis of innocence. State v. Shapiro, 431 So.2d 372, 375 (La. 1983). Although the circumstantial evidence rule might not have established a stricter formula than the more general reasonable juror's reasonable doubt formula, see Jackson v. Virginia, 443 U.S. 307 (1979), the rule emphasizes the need for careful observance of the usual standard, and provides a helpful methodology for its implementation in cases, as here,

hinging on the evaluation of circumstantial evidence. State v. Chism, 436 So.2d 464, 468 (La. 1983).

In reviewing a conviction based on circumstantial evidence, while this Court may not determine whether another possible hypothesis suggested by defendant could afford an exculpatory explanation of the events, this Court may determine whether a possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. State v. Davis, 92-1623, p. 17 (La. 5/23/94), 637 So.2d 1012, 1020. A hypothesis of innocence that is sufficiently reasonable must necessarily lead a rational fact finder to entertain a reasonable doubt about guilt. State v. Sutton, 436 So.2d 471, 475 (La. 1983). As such, it cannot be said the facts in this case supporting defendants' personal use of the heroin are wholly unreasonable such that this hypothesis of innocence may be reasonably rejected. The evidence to support possession with intent to distribute is simply not in this record. At best, the proof rises to mere speculation that the defendant could possess with intent to distribute the packaged heroin. This proof falls far short of proof beyond a reasonable doubt.

The majority notes the care with which respondents converted the heroin from bulk form to individual doses as supporting a reasonable inference that they used a common method of packaging the heroin for subsequent distribution. While this may be true, it is also equally reasonable that respondents were packaging the heroin in individual doses consistent with future personal use. The state failed in this case to present sufficient evidence that tended to prove beyond a reasonable doubt that the packaging method at issue was inconsistent with personal use. Ultimately, the circumstantial evidence in this case was simply insufficient to exclude every reasonable hypothesis of innocence.

Functioning in its capacity as an errors correcting court, the court of appeals

correctly observed that the mere presence of packaging consistent with distribution is not dispositive because such packaging reasonably could be viewed as consistent with either distribution or personal use. State v. Francois, 02-2056 (La. App. 4 Cir. 4/9/03), 844 So.2d 1042, 1049. We are primarily a policy-making court. It gives me concern that the majority opinion, as a matter of policy, is sanctioning this weak, circumstantial proof to support possession with intent to distribute. Today's decision will sanction the practice of allowing jurors in this state to speculate if the evidence is such that reasonable jurors must have a reasonable doubt. See State v. Mussall, 523 So.2d 1305, 1311 (La. 1988).

Accordingly, I respectfully dissent from the majority decision reversing the judgment of the court of appeal. I would affirm the judgment amending the conviction to judgments of conviction for the lesser included offenses of possession of heroin.