

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0542

STATE OF LOUISIANA

VERSUS

JONATHAN A. JUNGE

Judgment rendered: November 3, 2006

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number 392169; Division "J"
The Honorable William J. Knight, Judge Presiding**

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Jonathan A. Junge**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

JWP Pettigrew, J. Conners

[Handwritten initials]

DOWNING, J.

Defendant, Jonathan Junge, was charged by bill of information with one count of possession of cocaine, a violation of La. R.S. 40:967(C). Defendant entered a plea of not guilty and proceeded to trial before a jury. The jury found defendant guilty as charged. The trial court subsequently sentenced defendant to five years at hard labor. The record indicates that the State instituted habitual offender proceedings, but there is no indication in the record that defendant was ever adjudicated as an habitual offender.

Defendant appeals. We affirm.

FACTS

On December 2, 2004, Deputy Liniel Thompson, of the St. Tammany Parish Sheriff's Office, was working in an unmarked police unit for the Street Crimes Division. Several other officers, also in unmarked units, accompanied Deputy Thompson. The police were patrolling the area of Interstate 10 and Gause Boulevard near a group of hotels that were known for a heavy occurrence of prostitution and illegal drug activity.

Deputy Thompson noticed an older-model vehicle leave the parking lot of the Value Travel Inn and decided to follow it. The driver of the vehicle committed a lane violation as he crossed the solid white line when entering the turn lane leading to the westbound entrance to Interstate 10. Because of the heavy volume of traffic and safety concerns, Deputy Thompson followed the vehicle for approximately two miles and activated his lights and siren only after the vehicle exited the interstate.

Deputy Thompson testified that defendant was the driver of the vehicle. Another man, Donald Diller, was also in the vehicle. Defendant and Diller had come from New Mexico in the hope of finding work in the area. According to Deputy Thompson, defendant appeared to be a little

more nervous than the average person pulled over for traffic stop. Deputy Thompson specified that defendant was fidgeting with his hands and looking around. Because of his experience with the area from where the vehicle came, Deputy Thompson asked defendant if there was any contraband in the vehicle. Defendant immediately responded, "You can search my trunk, but you can't search my car." Defendant's response only heightened Deputy Thompson's suspicions, since that was not what he asked defendant. Deputy Thompson then specifically asked defendant if he could search the vehicle and defendant refused.

Deputy Thompson radioed for a K-9 unit, and within minutes Officer John Gallagher of the Slidell Police Department, and his K-9 unit, Phimco, arrived. Officer Gallagher walked Phimco around defendant's vehicle, and the dog alerted on the right side of the car near the right rear door.

Deputy Thompson opened the defendant's car and began to search it. Deputy Thompson recovered a black, purse-like bag underneath the right front passenger seat. The bag contained several needles, a spoon with a white residue, a plastic cap, a pack of Ephedra, and a cotton filter. Deputy Thompson also recovered a single needle from under the driver's seat.

Following advisement of his rights, defendant told the police that he had smoked methamphetamine in the past. Two other officers then took the passenger Diller, back to the Value Travel Inn where the men were staying. Cocaine and methamphetamine were found in the hotel room. Diller was subsequently arrested.

Tasha Carnes, an employee of the St. Tammany Parish Sheriff's Office Crime Lab, was accepted by the trial court as an expert in the field of analysis of controlled dangerous substances. Carnes tested the evidence submitted in connection with this case. The results of Carnes's testing

revealed that the metal spoon and two syringes tested positive for the presence of cocaine.

Defendant testified on his own behalf. Defendant stated that when he was younger he had problems with addiction, but after getting shot in 1998, he had accepted the Lord and had remained drug free since. Defendant claimed he met Diller as he was passing through New Mexico, and that Diller told him he had friends in Louisiana who could get them jobs working construction.

Defendant and Diller arrived in Louisiana a few weeks before his arrest. Defendant claimed he allowed Diller to drive his car two or three times a week. Defendant testified that Diller initially told him he was not using drugs, but that he later found out Diller had a “massive” drug problem. The reason the men were staying at the Value Travel Inn was because it was the cheapest place they could find. Defendant claimed that on the night they were arrested, they were on their way to a friend’s house to borrow money for gas until they received their first paychecks.

Defendant denied that he refused to give Deputy Thompson consent to search his vehicle. Defendant claimed that he told Deputy Thompson that the trunk was full of tools and he did not want to remove the tools and put them on the street. According to defendant, Deputy Thompson told him that was all right; they could just get a K-9. The next thing he knew, the K-9 was scratching on his car. Defendant denied that the items with cocaine residue found in his car belonged to him. Defendant further claimed Deputy Thompson threatened him on three occasions.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues that the evidence was insufficient to support his conviction for possession of cocaine. Defendant

specifically argues that his passenger, Diller, regularly shared the vehicle and that most of the needles containing trace amounts of cocaine were found under the passenger seat of the vehicle.

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.Code Crim. P. art. 821(B). The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 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,” every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. 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. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, and his own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Smith**, 2003-0917, pp. 4-5 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 798-99.

Guilty knowledge is an essential element of the crime of drug possession. **State v. Harris**, 94-0696, p. 3 (La. App. 1st Cir. 6/23/95), 657 So.2d 1072, 1074, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477. Evidence of flight or furtive behavior by the defendant may support a

finding of guilty knowledge sufficient to prove defendant's knowing possession of cocaine. **State v. Sylvia**, 2001-1406, p. 4 (La. 4/9/03), 845 So.2d 358, 361.

On the issue of whether the evidence sufficiently proved possession, the State is not required to show actual possession of the narcotics by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 2003-0917 at pp. 5-6, 868 So.2d at 799.

A determination of whether or not there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. **State v. Smith**, 2003-0917 at p. 6, 868 So.2d at 799.

In the present case, the State presented evidence that defendant appeared very nervous and avoided eye contact with Deputy Thompson. The subsequent search of defendant's vehicle revealed items with cocaine residue in a car belonging to defendant, in close proximity to the driver's

seat. Defendant shared a hotel room in an area known for drug activity with his passenger, Diller, for several weeks prior to this instant offense. A subsequent search of the room revealed drugs among defendant's belongings. Defendant also admitted that he had used drugs in the past.

As trier of fact, the jury was 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. Harris**, 94-0696 at p. 3, 657 So.2d at 1074.

In the present case, the jury obviously rejected defendant's testimony that he had no knowledge of the drugs in his car. Viewing all of the evidence in the light most favorable to the prosecution, we find the evidence sufficiently supports defendant's conviction for possession of cocaine.

MOTION TO SUPPRESS

In his second assignment of error, defendant argues the trial court erred in denying his motion to suppress evidence because the investigatory stop of defendant's vehicle was not justified.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. Measured by this standard, La. Code Crim. P. art. 215.1, as well as federal and state jurisprudence, recognizes the right of a law enforcement officer to temporarily detain and interrogate a person who he reasonably suspects is committing, has committed, or is about to commit a crime. Reasonable suspicion for an investigatory detention is something less than probable cause and must be determined under the specific facts of each case on the basis of whether the officer had sufficient knowledge of

facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. **State v. Hardeman**, 2004-0760, p. 4 (La. App. 1st Cir. 2/18/05), 906 So.2d 616, 622.

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 one 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 a 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. Hardeman**, 2004-0760 at pp. 4-5, 906 So.2d at 622.

In the present case, Deputy Thompson testified that he observed defendant's vehicle move into the turning lane over a solid white line. Deputy Thompson had probable cause to believe that a traffic violation had occurred, thereby giving him authority to stop defendant's vehicle. Defendant's suspicious behavior led to the calling of the K-9 unit, whose alerting to an area of defendant's vehicle provided probable cause to search the vehicle.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his final assignment of error, defendant argues that the trial court imposed an excessive sentence because defendant did not possess the drugs.

Article I, § 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. Generally, a sentence is

considered excessive if it appears to be grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, the sentence is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Johnson**, 2003-0150, p. 4 (La. App. 1st Cir. 9/26/03), 857 So.2d 586, 589.

La. Crim. Code P. art. 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of article 894.1, but the record must reflect the trial court adequately considered the criteria. 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 the sentencing decision. **State v. Johnson**, 2003-0150 at p. 4, 857 So.2d at 589.

The penalty for possession of cocaine is imprisonment with or without hard labor for not more than five years and a defendant may be sentenced to pay a fine of not more than five thousand dollars. La. R.S. 40:967(C)(2). In the present case, the trial court sentenced defendant to the maximum term of five years at hard labor.

In sentencing defendant, the trial court noted that defendant had a criminal history relative to drug possession as far back as 1986. The trial court found that there was an undue risk that during a period of suspended sentence or probation, the defendant would commit another crime. The trial court further noted that correctional treatment was appropriate, and that

defendant's previous history with narcotics had not resulted in a change in behavior.

Maximum sentences may be imposed for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040, p. 4 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. In the present case, defendant still maintains his innocence and claims the drugs found in his vehicle belonged to his passenger, Donald Diller. However, defendant's actions at the time of the search indicate otherwise. We note defendant's evasive behavior towards Deputy Thompson led the jury to conclude defendant was aware contraband was in his vehicle. Moreover, when Deputy Thompson inquired about the needles and other items found in defendant's vehicle, defendant explained that he had a prior problem with methamphetamine. At trial, defendant testified that he had been drug-free since 1998. Under the circumstances, we find defendant's refusal to admit he knew such items were in his vehicle and his defense that the items belonged to his passenger, place him in the worst class of offender. If defendant truly had no knowledge that these items were in his vehicle on the night of his arrest, he would have immediately explained such to the police. Unfortunately, defendant's decision to provide conflicting explanations for the presence of the items in his vehicle compounded the impression of his guilt. Under these circumstances, we cannot say the trial court abused its discretion in sentencing defendant to the maximum sentence.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED