

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1823

STATE OF LOUISIANA

VERSUS

JIMMIE HARRISON

**Judgment Rendered:** MAR 23 2007

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On appeal from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
Suit Number 378604

Honorable Reginald T. Badeaux, III, Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

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**GUIDRY, J.**

The defendant, Jimmie Harrison, was charged by bill of information with simple escape (count 1), a violation of La. R.S. 14:110, and possession of a Schedule II controlled dangerous substance namely cocaine (count 2), a violation La. R.S. 40:967(C). He pled not guilty. Following a jury trial, the defendant was found guilty as charged on both counts.<sup>1</sup> After remand and on resentencing the defendant was sentenced to one year at hard labor for the simple escape conviction and five years at hard labor for the possession of cocaine conviction. The sentences were ordered to run consecutively. The defendant was subsequently adjudicated a fourth felony habitual offender and sentenced to life imprisonment without the benefit of probation, parole, or suspension of sentence. The life sentence was ordered to run consecutive to any other sentence being served. The defendant now appeals, designating one assignment of error. We affirm the possession of cocaine (count 2) conviction and sentence. We affirm the simple escape (count 1) conviction and the habitual offender adjudication. We vacate the original simple escape resentence. We amend the habitual offender sentence and affirm as amended. We remand with instructions.

**FACTS**

In November 2003, the defendant was enrolled in the “8 to 4 Program,” which is a type of work release for misdemeanor offenders sentenced to “parish jail time.” For several weeks, the defendant failed to show up for work. As a result, an arrest warrant for his escape was issued.

On February 10, 2004, while on duty, Deputy Jeremy Church with the St. Tammany Parish Sheriff’s Office saw the defendant in the yard of the defendant’s

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<sup>1</sup> This matter was originally before us wherein the assignments of error were not addressed because of the trial court’s failure to rule on the defendant’s motion for postverdict judgment of acquittal. In that case, we vacated the sentences and remanded to the trial court to rule on the defendant’s motion. See State v. Harrison, 2004-2786 (La. App. 1st Cir. 11/9/05), 913 So.2d 897 (unpublished). In the instant matter, three days prior to resentencing, the trial court denied the defendant’s motion for postverdict judgment of acquittal.

mother's house. Deputy Church contacted Deputy Lee Hardy, Jr., also with the St. Tammany Parish Sheriff's Office. By the time Deputy Hardy arrived at the scene, the defendant had gone around the corner of his mother's house. Deputy Church secured the backyard, while Deputy Hardy approached the front of the house. When Deputy Hardy knocked on the glass storm door, Elizabeth Harrison, the defendant's mother, motioned for Deputy Hardy to enter. Deputy Hardy entered the house, and asked Ms. Harrison if the defendant was still there. She motioned toward the back room. As Deputy Hardy turned, he saw the defendant coming out of one of the back rooms. He advised the defendant that he was under arrest. The defendant denied that he was Jimmie Harrison, but his mother verified that he was Jimmie Harrison, her son.

Deputy Hardy arrested and *Mirandized* the defendant. Deputy Hardy searched the defendant's person and found what appeared to be a crack pipe in his left front pocket. One end of the pipe was wrapped with tape, and the other end had burnt material in it. The defendant was placed in the back of Deputy Church's unit. Suspecting there could be additional drugs in the house, Deputy Hardy obtained written consent from Ms. Harrison to search the area the defendant had been in. The only people in the house at that time were the defendant (prior to being arrested), Ms. Harrison, and a young child about two years old. Deputy Hardy searched the room that, according to Ms. Harrison, the defendant had slept in the night before. Deputy Hardy found several crack pipes under the mattress and some pieces of crack cocaine underneath the bed. He also found a razor blade, a mirror, corner bags, and filter material. Ms. Harrison did not indicate that anyone else stayed in that room where the drugs were found and where the

defendant had slept the night before.<sup>2</sup>

### ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence was insufficient to support his possession of cocaine conviction. Specifically, the defendant contends that the State failed to prove that he had dominion and control over the seized drugs. The defendant does not contest his simple escape conviction.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this Court must consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the 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 La. C.Cr.P. art. 821(B); State v. Mussall, 523 So.2d 1305, 1308-1309 (La. 1988). The *Jackson* standard of review, incorporated in Article 821, 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. State v. Patorno, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of

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<sup>2</sup> Ms. Harrison’s written statement to the police, which was written by Ms. Harrison’s daughter, stated:

I Elizabeth C. Harrison identified my son Jimmie Harrison is my son (sic) and he does not live at 72366 Rose St. he only spent the night here. . . . I have nothing to do with what (sic) going on. And I don’t know what he did are (sic) doing because he don’t live here. he only comes here to eat and bath (sic). Jimmie was at my house 2-9-04 in and out. yes I give my permission for the police to go into and cerch (sic) the room.

the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

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. In order 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 or not 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. 1st Cir. 6/23/95), 657 So.2d 1072, 1074-1075, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477.

In this case, the jury was presented with two theories of who possessed the cocaine found by Deputy Hardy: the State's theory that defendant constructively possessed the cocaine that was found in the bedroom where he slept, and the

defendant's theory that the cocaine belonged to someone else.<sup>3</sup> The jurors obviously concluded that the version of the events suggested by the defense was a fabrication designed to deflect blame from the defendant. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Moten, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

The jury's verdict reflected the reasonable conclusion that the defendant, having dominion and control over the area where the cocaine was found, constructively possessed the cocaine. Through physical evidence and testimony, the State established that cocaine and drug paraphernalia were found in the bedroom of the defendant's mother's house where the defendant had recently slept. The defendant did not testify and presented no rebuttal testimony. See Moten, 510 So.2d at 61-62.

After a thorough review of the record, we find that the evidence supports the jury's verdict of guilty. We are convinced that viewing the evidence in the light most favorable to the State, 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 possession of cocaine.

The assignment of error is without merit.

#### **REVIEW FOR ERROR UNDER LA. C.C.R.P. ART. 920(2)**

On resentencing, the trial court sentenced the defendant to one year at hard labor for the simple escape conviction and five years at hard labor for the

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<sup>3</sup> The defendant did not testify, and no witnesses for the defense testified. The defendant's theory is gleaned from his closing argument wherein he suggests that the several crack pipes found may have indicated that there was a party in that room at some point, since the defendant would not need more than one crack pipe. He further points out that no fingerprints were taken on the crack pipes, and there was no investigation to determine who else may have been coming in and out of the house or the room.

possession of cocaine conviction. When the trial court sentenced the defendant to life as a fourth felony habitual offender, it failed to vacate the original resentence for simple escape, the conviction used as the basis for the sentencing enhancement.

The language of the habitual offender statute requires the sentencing court, when imposing a habitual offender sentence, to vacate any sentence already imposed in the case. However, when faced in previous criminal appeals with the failure of a trial court to vacate the original sentence, this court has simply vacated the original sentence to conform to the requirements of the habitual offender statute and has found it unnecessary to vacate the habitual offender sentence or remand for resentencing. Accordingly, we vacate the original one-year simple escape resentence to conform to the requirements of La. R.S. 15:529.1(D)(3). It is not necessary to vacate the habitual offender sentence imposed on May 11, 2006, or to remand for resentencing. See State v. Jackson, 2000-0717, pp. 3-6 (La. App. 1st Cir. 2/16/01), 814 So.2d 6, 9-11 (en banc), writ denied, 2001-0673 (La. 3/15/02), 811 So.2d 895.

We further note that the trial court erred when it sentenced the defendant to life without the benefit of probation, parole, or suspension of sentence under La. R.S. 15:529.1(A)(1)(c)(i). Any sentence imposed under the habitual offender statute shall be without benefit of probation or suspension of sentence. See La. R.S. 15:529.1(G). However, parole eligibility is prohibited neither by La. R.S. 15:529.1(A)(1)(c)(i) nor for the crime of simple escape. See La. R.S. 14:110(B)(1). Thus, the denial of parole eligibility on the defendant's habitual offender sentence is unlawful. Accordingly, we amend the defendant's life sentence to delete the condition denying parole eligibility. Resentencing is not required. Because the trial court sentenced the defendant to the maximum possible period of imprisonment, it is not necessary for us to remand for resentencing after removing the parole prohibition. However, we remand the case for the sole

purpose of ordering the trial court to amend the minute entry for sentencing, and if necessary, the commitment order. See State v. Benedict, 607 So.2d 817, 823 (La. App. 1st Cir. 1992). See also State v. Miller, 96-2040, p. 3 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 700-701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. Furthermore, the trial court is instructed to order that a certified copy of the new minutes and commitment order, if amended, be sent to the defendant and to the relevant prison authorities. See State v. Harris, 93-1098, 94-2243 (La. 1/5/96) 665 So.2d 1164 (per curiam).

**SIMPLE ESCAPE (COUNT 1) CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; ORIGINAL ONE-YEAR SIMPLE ESCAPE RESENTENCE VACATED; HABITUAL OFFENDER SENTENCE AMENDED AND AS AMENDED AFFIRMED; POSSESSION OF COCAINE (COUNT 2) CONVICTION AND SENTENCE AFFIRMED; AND REMANDED WITH INSTRUCTIONS.**