STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0080

STATE OF LOUISIANA

VERSUS

MARLONE RASHEN BRUMFIELD

Judgment Rendered: SEP 21 2017

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On Appeal from the 22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 567470

The Honorable William J. Burris, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

PENZATO, J.

Defendant, Marlone R. Brumfield, was charged by amended bill of information with aggravated obstruction of a highway, a violation of La. R.S. 14:96 (count one); possession of a schedule II controlled dangerous substance–cocaine, a violation of La. R.S. 40:967(C) (count two); and third-offense possession of marijuana, a violation of La. R.S. 40:966(E)(3) (count three). He pled not guilty. Prior to trial, the state severed count three. Following a jury trial, defendant was found guilty as charged on counts one and two. Thereafter, he filed motions for new trial and postverdict judgment of acquittal, both of which the trial court denied. The state filed a habitual offender bill of information, alleging defendant to be a fourth-felony offender with respect to both convictions.[1] Defendant denied the contents of the habitual offender bill and, after a hearing, the trial court adjudicated him to be a fourth-felony habitual offender on each count. On count one, the trial court sentenced defendant as a fourth-felony habitual offender to life imprisonment at hard labor, without probation or suspension of sentence. On count two, the trial court sentenced defendant as a fourth-felony habitual offender to twenty years at hard labor, without probation or suspension of sentence, concurrent with the sentence on count one. Defendant filed a motion to reconsider these sentences, which the trial court denied. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm the convictions, habitual offender adjudications, and sentence on count two; we amend the sentence on count one and affirm that sentence as amended.

[1] The alleged predicate convictions are as follows: 1) a May 31, 2005 conviction for simple robbery under St. Tammany Parish (22nd JDC) docket number 396405; 2) a July 16, 2008 conviction for aggravated battery under St. Tammany Parish (22nd JDC) docket number 404979; and 3) an August 22, 2011 conviction for second-offense possession of marijuana (a felony at the time of this conviction) under St. Tammany Parish (22nd JDC) docket number 506272.

FACTS

On the evening of August 26, 2015, officers with the St. Tammany Parish Sheriff's Office narcotics division utilized a "cooperating individual" (CI) to set up a controlled purchase of liquid promethazine and codeine. Defendant was the target of the investigation, and the sale was to occur in the parking lot of a Wendy's fast food restaurant on La. Hwy. 21 in Covington.

Several St. Tammany Parish Sheriff's detectives parked in the area of the Wendy's in unmarked vehicles. Detectives Scott Thomas, Jason Prieto, and Roger Gottardi conducted surveillance from their vehicles located in adjacent parking lots. Detectives Bart Ownby and Jay Quinn sat inside a single vehicle in the Wendy's parking lot, intending to make contact with defendant. The CI and two unidentified detectives were located at the police station, where the CI maintained contact with defendant.

Defendant arrived at the Wendy's in a white truck, and drove slowly around the parking lot. He then entered the Wendy's drive-thru line, but exited it before reaching the window. At some point while he was in the parking lot or the drive-thru line, defendant sent a text message to the CI, asking who the "white guy" was. The information regarding this text message was radioed to the detectives in the area. Shortly after sending the text message, defendant exited the Wendy's parking lot and began to drive down Stirling Boulevard.

Once defendant exited the Wendy's parking lot, the detectives decided to effect a traffic stop of the vehicle. In an attempt to do so, the detectives began to maneuver their unmarked vehicles around defendant's truck to try to box it in and prevent him from fleeing. At that time, they had not activated their emergency lights or sirens. Once defendant was boxed in on three sides (front, back, and left), the detectives activated their emergency lights. In response, defendant applied the truck's brakes, causing the police vehicles to the left and front to continue onward

without him. He cut from the right lane of traffic, turned through the left lane, jumped the median on La. Hwy. 21, and began to travel at a high rate of speed in the opposite direction, disregarding traffic signals. Defendant eventually entered I-12 and traveled eastbound at speeds in excess of 100 miles per hour. In doing so, he maneuvered his vehicle around several tractor-trailers and other passenger vehicles. In one particular incident, defendant cut in front of a tractor-trailer, causing it to slam on its brakes and the pursuing officers to drive on the interstate's shoulder to prevent a collision. As defendant continued to evade officers on I-12, he turned off his vehicle's headlights despite the darkness and time of day (approximately 9:45 p.m.). Defendant exited the interstate at U.S. Hwy. 190 in Covington and continued to drive at a high rate of speed, disregarding traffic signals, and driving on the shoulder and median. He reached the Claiborne Hill area, where he sideswiped a church van that was traveling in the middle lane. He then turned onto Boston Street (U.S. Hwy. 190 Business) and then onto Lee Lane. He entered the Boston Commons parking lot, where the vehicle ultimately struck the handicapped ramp of an area business. Defendant exited the crashed vehicle and began to flee on foot, but he was soon apprehended.

After being apprehended, defendant was informed of his **Miranda**[2] rights and Deputy T.J. Schlesinger initiated an outer clothing pat down. Deputy Schlesinger felt what appeared to be a cigarette box on defendant's lower body. He received permission from defendant to remove the box, which was located inside defendant's underwear. Deputy Schlesinger opened the box with the defendant's permission and observed a substance that later tested positive as containing cocaine. Deputy Schlesinger also found a small quantity of marijuana in defendant's back pocket. A search of the vehicle driven by defendant revealed two bottles of red liquid.

[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Chemical analysis of the liquid in these bottles indicated that the substance was diphenhydramine (Benadryl). Defendant did not testify at trial.

SUFFICIENCY OF THE EVIDENCE

When issues are raised on appeal as to both sufficiency of the evidence and other trial errors, the appellate court should first review the sufficiency of the evidence. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992). In his second assignment of error, defendant contends that the evidence presented at trial was insufficient to support his conviction for possession of cocaine. In particular, he argues that the state failed to prove beyond a reasonable doubt that he knowingly or intentionally possessed the cocaine. Defendant does not challenge his conviction for aggravated obstruction of a highway.

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. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in La. Code of Crim. Proc. art. 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 the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that

evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732.

To support a conviction for possession of cocaine, the state must present evidence establishing beyond a reasonable doubt that the defendant was in possession of the drug and that he knowingly or intentionally possessed it. La. R.S. 40:967(C). Guilty knowledge is an essential element of the crime of possession of cocaine. The elements of knowledge and intent are states of mind and need not be proven as facts, but may be inferred from the circumstances. **State v. Sylvia**, 2001-1406 (La. 4/9/03), 845 So.2d 358, 361.

Defendant does not dispute that he possessed the cocaine. Rather, he argues that his possession was not knowing or intentional. At trial, the only hypothesis of innocence presented to the jury on this count was advanced through defense counsel's closing argument. At that time, defense counsel put forth the theory that defendant was unaware of the presence of the cocaine in the cigarette pack because he was an addict without delayed gratification abilities. Thus, defense counsel's theory was that defendant would have ingested the cocaine if he were aware of its presence.

The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83.

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 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 in this case reflected the reasonable conclusion that defendant knowingly and intentionally possessed the cocaine. The jury reasonably rejected the defense theory that defendant, as an addict, would not be able to possess cocaine without immediately ingesting it. The circumstances presented by the state that are particularly indicative of defendant's guilt are the location of the cocaine when it was recovered–inside a cigarette box located in defendant's underwear–and defendant's flight. The Louisiana Supreme Court has noted that evidence of flight by a defendant may support a finding of guilty knowledge sufficient to prove knowing possession of cocaine. See **Sylvia**, 845 So.2d at 361 (citing **State v. Postell**, 98-0503 (La. App. 4th Cir. 4/22/99), 735 So.2d 782). In accepting a hypothesis of innocence that was not unreasonably rejected by the factfinder, a court of appeal impinges on a factfinder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law. **State v. Mire**, 2014-2295 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814 (per curiam).

After a thorough review of the record, we find that the evidence supports the jury's verdict finding defendant guilty of possession of cocaine. Viewing the evidence in the light most favorable to the prosecution, and to the exclusion of every reasonable hypothesis of innocence, any rational trier of fact could have found beyond a reasonable doubt that defendant was guilty of this offense. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 422 (per curiam).

This assignment of error is without merit.

MOTION TO SUPPRESS

In his first assignment of error, defendant contends that the trial court erred in denying a motion to suppress the evidence found on his person and in the vehicle, all of which was seized by the police without a warrant. He contends that the police had no reasonable suspicion to attempt to pull over his vehicle, that Deputy Schlesinger's actions exceeded the allowable scope of a pat down, that there was no consent, and that the search of the vehicle was not a valid inventory search.

The Fourth Amendment to the United States Constitution and Article I, section 5, of the Louisiana Constitution protect people against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by La. Code Crim. P. art. 215.1, as well as both federal and state jurisprudence. **State v. Bracken**, 506 So. 2d 807, 811 (La. App. 1st Cir.), writ denied, 511 So. 2d 1152 (La. 1987) (citing **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); and **State v. Pautard**, 485 So.2d 909 (La. 1986)). Reasonable cause for an investigatory detention is something less than probable cause and must be determined under the facts of each case by 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. The right to make an investigatory stop and question the particular individual detained must be based upon reasonable cause to believe that he has been, is or is about to be engaged in criminal conduct. **Pautard**, 485 So.2d at 911. The totality of circumstances must be considered in determining whether or not reasonable cause exists. **State v. Belton**, 441 So. 2d 1195, 1198 (La. 1983).

At the hearing on the motion to suppress, Detective Thomas testified that the defendant's actions when he entered the Wendy's parking lot were not consistent with what people do inside of a parking lot. Defendant was riding the brake and was driving extremely slow compared to the other vehicles, as if he was looking for

something. After he sent a text message to the CI asking who the "white guy" was, defendant jumped into the drive-through line and jumped out of the line before placing his order. Detective Thomas stated that he and the other officers tried to effect a traffic stop in order to further their investigation of defendant, and to corroborate the information given by a third party. According to Detective Thomas, it was a reasonable suspicion that defendant had the items the officers were looking for in the vehicle, namely codeine with promethazine cough syrup.

We find that the above articulated facts and circumstances, within the officers' knowledge, in connection with the reasonable inferences drawn therefrom, provided the officers with a reasonable cause to believe that defendant had been, was or was about to be engaged in criminal conduct. See **Bracken**, 506 So. 2d at 812. Thus, the attempted investigatory stop was legal.

Continuing the analysis, following the attempted traffic stop, defendant led officers on a protracted chase that ended only when he crashed his vehicle, fled on foot, and was eventually detained by patrol officers who were called in to assist. In taking evasive actions by engaging in numerous acts of dangerous driving, defendant ultimately gave the police probable cause to arrest him for any of the offenses he committed, including the offense for which he was convicted in count one. Upon his apprehension, defendant was properly searched incident to his arrest, and gave Deputy Schlesinger permission to remove and open the cigarette box containing cocaine. Therefore, all of the contraband was lawfully seized from defendant's person. See **State v. Warren**, 2005-2248 (La. 2/22/07), 949 So. 2d 1215, 1226. This search and seizure was lawful regardless of whether defendant was formally under arrest at the time of the search. See **State v. Surtain**, 2009-1835 (La. 3/16/10), 31 So. 3d 1037, 1046.

Defendant also challenges the search of the vehicle, but this search was justified under the automobile exception to the warrant requirement. Under the

automobile exception, police may search a vehicle without obtaining a search warrant if the car is readily mobile and probable cause exists to believe it contains contraband or evidence of criminal activity. See **Pennsylvania v. Labron**, 518 U.S. 938, 940, 116 S.Ct. 2485, 2487, 135 L.Ed.2d 1031 (1996) (per curiam); **United States v. Ross**, 456 U.S. 798, 809, 102 S.Ct. 2157, 2164-65, 72 L.Ed.2d 572 (1982). In such cases, no special exigency is required beyond a showing of the mobility of the automobile. **Maryland v. Dyson**, 527 U.S. 465, 466, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442 (1999) (per curiam). Further, it has been held in applying the automobile exception that there is no constitutional distinction between seizing and holding a vehicle before presenting the probable cause issue to a magistrate and immediately searching the vehicle without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment and the Louisiana Constitution. **State v. Gordon**, 93-1923 (La. App. 1st Cir. 11/10/94), 646 So.2d 1005, 1010. In this case, at the time the vehicle was searched, defendant's person had already been searched, and he had been found to be in possession of cocaine and marijuana. This information, coupled with the officers' knowledge from the initial set up to purchase promethazine and codeine from defendant, gave them probable cause to believe the vehicle might contain contraband or evidence of criminal activity. Even if we were to find the vehicle search to be unlawful, any error concerning the admission of evidence seized from the vehicle would be harmless beyond a reasonable doubt because no true contraband was discovered. See La. Code Crim. P. art. 921.

Considering the above, the trial court was correct in denying the motion to suppress the evidence. The officers had reasonable suspicion to attempt to pull over defendant's vehicle. Thereafter, his actions gave rise to probable cause leading to his arrest, a search of his person incident thereto, and a search of the vehicle also supported by probable cause.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his third assignment of error, defendant contends that his sentences are unconstitutionally excessive. Though defendant does not clearly state that he challenges both sentences as excessive, we treat this assignment of error as if he has done so.

Prior to addressing the merits of defendant's final assignment of error, we note a sentencing error which is correctable by this court on appeal. Our review for error is pursuant to La. Code Crim. P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

On count one, defendant was sentenced as a fourth-felony habitual offender to life imprisonment, without probation or suspension of sentence. The trial court clearly stated that defendant was being sentenced according to the "mandatory provisions of law" after finding that two of defendant's prior felonies (aggravated battery and simple robbery) were for crimes of violence and his instant felony was punishable by imprisonment for twelve years or more. See La. R.S. 14:2(B)(5) & (23); La. R.S. 14:96(B). Accordingly, defendant's "mandatory" sentence is one which also requires the restriction of parole. See La. R.S. 15:529.1(A)(4)(b).

When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence. The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in

any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence. La. R.S. 15:301.1(A).

An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A). As an appellate court, we are authorized to correct an illegal sentence that involves no more than the ministerial correction of a sentencing error. **State v. Carter**, 2016-1078 (La. App. 1st Cir. 12/22/16), 210 So. 3d 306, 309, writ not considered, 2017-0399 (La. 4/24/17). In the instant case, the correction of this sentencing error does not require discretion, so we amend the sentence on count one to include a restriction of parole.

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). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than the needless infliction of pain and suffering. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. 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. 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).

As discussed above, because of defendant's prior felony convictions, the sentence imposed on count one was mandatory. For his conviction and habitual offender adjudication on count two, the habitual offender sentencing range was

twenty years to life. On this count, the trial court imposed a legal, minimum sentence of twenty years, without probation or suspension of sentence, to run concurrently with the sentence on count one. See La. R.S. 15:529.1(A)(4)(a) & (G); La. R.S. 40:967(C)(2).

Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. **State v. Dorthey**, 623 So.2d 1276, 1278 (La. 1993). In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court re-examined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence in the context of the Habitual Offender Law. The court stated that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 709 So.2d at 676 (quoting **State v. Young**, 94-1636 (La. App. 4th Cir. 10/26/95), 663 So. 2d 525, 531 (Plotkin, J., concurring), writ denied, 95-3010 (La. 3/22/96), 669 So. 2d 1223.)

The trial court imposed the two sentences in this case as directed by the Habitual Offender Law (minus the ministerial correction made by this court). At the sentencing hearing, defendant presented no evidence to rebut the presumption that the mandatory sentences were constitutional, but he argued that one of the prior felonies used to enhance his instant sentences (the conviction for second-offense possession of marijuana) is now classified as a misdemeanor and should not be used to enhance his instant sentences. See La. R.S. 40:966(E)(1)(b) (following amendment by 2015 La. Act No. 295). Defendant's motion to reconsider sentence argued that he was not trying to violate the law, that he has children who depend on his support, and that he is in need of rehabilitation. On appeal, he argues that he has

always struggled with drugs, and he reiterates the claim regarding enhancement using the second-offense marijuana conviction.

Defendant failed to "clearly and convincingly" rebut the presumption that the mandatory sentences were constitutional. Defendant did not present to the trial court any particular or special circumstances that would support a deviation from the mandatory minimum sentences provided for in the Habitual Offender Law.[3] Defendant failed to clearly and convincingly show that because of unusual circumstances, he was the victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of the case. See **Johnson**, 709 So.2d at 676. There was no reason for the trial court to deviate from the provisions of La. R.S. 15:529.1(A)(4)(a) and (b) in sentencing the defendant, and the sentences were not grossly disproportionate to the severity of the offenses. Therefore, these sentences were not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCE ON COUNT TWO AFFIRMED. SENTENCE ON COUNT ONE AMENDED AND, AS AMENDED, AFFIRMED.

[3] Even assuming we were to find merit in defendant's claim that the second-offense possession of marijuana conviction could not be used to enhance his instant sentences, he would still be subject to third-offense habitual offender sentences of life imprisonment, without parole, probation, or suspension of sentence on count one, and 40 months to ten years, without probation or suspension of sentence on count two. See La. R.S. 15:529.1(A)(3)(a) & (b); La. R.S. 40:967(C)(2).