NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1189

STATE OF LOUISIANA

VERSUS

DONALD DARK

Judgment Rendered: February 11, 2011

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On Appeal from the 32nd Judicial District Court
In and For the Parish of Terrebonne
Trial Court No. 504,054

Honorable Randall L. Bethancourt, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

Defendant, Donald Dark, was charged by bill of information with possession of cocaine, a violation of LSA-R.S. 40:967(C). He pled not guilty and, following a trial by jury, was convicted as charged. After denying the defendant's motions for new trial and for post-verdict judgment of acquittal, the trial court sentenced the defendant to five years at hard labor, with credit for time served. Thereafter, the State filed a habitual offender bill of information, seeking to enhance the defendant's sentence pursuant to LSA-R.S. 15:529.1.[1] Following a hearing, the trial court adjudicated the defendant to be a fourth-felony offender, vacated the original sentence, and sentenced him to twenty years at hard labor, without benefit of probation or suspension of sentence, consecutive to any other sentence the defendant may be serving.[2] Defendant has appealed, arguing in two assignments of error that the evidence was insufficient to support his conviction and that the trial court erred in denying his motion to reconsider sentence. Defendant has also filed a motion in this court to summarily reverse his conviction. For the following reasons, we deny the defendant's motion and affirm the conviction, habitual offender adjudication, and sentence.

FACTS

At approximately 3:45 a.m. on the morning of January 24, 2008, Officer Greg Gaubert of the Terrebonne Parish Sheriff's Office was patrolling alone in his patrol car on a roadway located in Terrebonne Parish known as Shrimper's Row. He came upon a vehicle abandoned in the middle of the road, with its lights off and the driver's side door standing open. No one was in or near the vehicle. Upon

[1] All references made herein to LSA-R.S. 15:529.1 are made to that provision as it formerly existed prior to its amendment by 2010 La. Acts, Nos. 69, 911, and 973.

[2] Although the sentencing minutes state that the sentence was also imposed without benefit of parole, the sentencing transcript, as well as the written reasons for sentence, both reflect that the trial court did not actually impose the sentence with any restriction on the defendant's parole eligibility. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

checking the license plate number with dispatch, he discovered that the vehicle description associated with the license plate number did not match the vehicle "in front of [him]." When he was unable to identify the current owner of the vehicle,[3] he instructed dispatch to send a wrecker to tow the vehicle out of the roadway.

Officer Gaubert then moved next to the hood of his patrol car to begin completing the necessary paperwork. In order to see, he pointed the spotlight affixed near the patrol car's windshield down toward the hood, illuminating both the hood and the surrounding area of ground. As he stood between the driver's door and the front tire, he dropped his pen on the road near his feet and reached down to pick it up. He observed nothing else on the ground at that point.

While engaged in his paperwork, Officer Gaubert was approached by the defendant, who asked what was "going on." After being told that the vehicle had several traffic violations and was being towed, the defendant shook his head and walked away. Officer Billy Dupre, Jr., also of the Terrebonne Parish Sheriff's Office, arrived on the scene to assist Officer Gaubert. When the defendant approached the officers a second time, they asked him if he owned the vehicle. He initially said he did, but shortly thereafter said it belonged to someone else.

Upon obtaining the defendant's identity, the officers learned that he had outstanding warrants. At that point, the defendant was advised of the warrants and placed in handcuffs. The officers instructed him to lean over the hood of the patrol car (where Officer Gaubert had earlier been completing his paperwork) and searched him for weapons. Even though one officer stood on each side of the defendant, they had some difficulty in conducting the search because he refused to stand still. He kept trying to turn around and continuously moved around. No weapons were found and the defendant was placed in the back of the police unit.

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[3] Officer Gaubert obtained the VIN number for the vehicle, called it in to dispatch, and the registered owner was contacted; that person reported that she had sold the car to a local car lot. Further, Officer Gaubert could find no paperwork in the car that identified the current owner.

Immediately thereafter, as the officers walked back toward the front of the police unit, they noticed a clear plastic baggy containing a white powdery substance, later identified as cocaine, on the ground near the patrol car where the defendant's feet had been when he was searched. Defendant was advised of his **Miranda**[4] rights and asked about the plastic baggy. He denied any knowledge of it.

MOTION TO SUMMARILY REVERSE CONVICTION

Initially, we note that, after the record was lodged with this Court, defense counsel filed a motion to summarily reverse defendant's conviction, due to the fact that the record failed to include several pertinent transcripts. However, this Court subsequently issued an interim order to the trial court, pursuant to which the appellate record has now been supplemented with those transcripts. Accordingly, the defendant's motion to summarily reverse his conviction is hereby denied as being moot.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant argues the evidence was insufficient to prove beyond a reasonable doubt that he possessed the cocaine seized in this case. Specifically, he contends the State's evidence failed to exclude the reasonable hypothesis that, since the area where the cocaine was found was a high-crime area, the cocaine was thrown down by someone else.

In support of this contention, the defendant notes that the baggy containing the cocaine was not found in his actual possession and neither officer actually saw him drop or attempt to drop anything, nor did they see anything fall out of his clothes. Furthermore, he points out that he was searched with an officer standing on each side of him, while his hands were handcuffed behind his back, implying he would have had no opportunity to drop the baggy without being seen. According to the defendant, it is unreasonable to believe he would have voluntarily

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

approached the officers on two occasions with cocaine in his possession. He notes that Officer Dupre testified that Shrimper's Row was a high-crime area, and it was not uncommon to find drugs "thrown down" in such areas. However, the defendant fails to mention that Officer Dupre further testified he had never found any drugs on the ground on Shrimper's Row.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, 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 beyond a reasonable doubt. See LSA-C.Cr.P. art. 821; **State v. Lofton**, 96-1429, p. 4 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in LSA-C.Cr.P. art. 821 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 fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Riley**, 91-2132, p. 8 (La. App. 1 Cir. 5/20/94), 637 So.2d 758, 762. The reviewing court is required to view 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. **State v. Smith**, 2003-0917, p. 5 (La. App. 1 Cir. 12/31/03), 868 So.2d 794, 799.

To support a conviction for 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. Therefore, guilty knowledge 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. **State v. Harris**, 94-0696, p. 3 (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.

In order to convict, the State is not required to show actual possession of the drug by the defendant. 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. **Smith**, 2003-0917 at p. 5, 868 So.2d at 799. 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. **Harris**, 94-0696 at pp. 3-4, 657 So.2d at 1075.

After a thorough review of the record, we are convinced that any rational factfinder viewing the evidence presented in this case in the light most favorable to the State could find that the evidence proved, beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession of cocaine and the defendant's identity as the perpetrator of the offense. The verdict rendered by the jury indicates that it rejected the defendant's hypothesis that the cocaine was thrown down by someone else. When a case involves circumstantial evidence and the factfinder reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **Smith**, 2003-0917 at p. 5, 868 So.2d at 799. No such hypothesis exists in the instant case.

Officer Gaubert testified that, while investigating the abandoned car and filling out his paperwork, he walked at least three times in the same area by the patrol car where the cocaine was found. He indicated that he looked down at the ground to watch his footing as he walked in that area, because the road was not well-maintained. Moreover, at one point, he dropped his pen on the roadway in the same area where the defendant was later searched and had to bend down and pick it up. He explained that the ground within an area of five to six feet thereof was illuminated by the spotlight he had pointed down toward the hood of the police unit. According to Officer Gaubert, the baggy was not there at that time. He testified emphatically that if the baggy had been there he "would have seen it .... [t]here's no doubt that it was not there."

It was further established that the defendant was searched in this same area. Officer Gaubert indicated the defendant was searched while leaning over the hood of the patrol car, in order to better limit his movement. During the search, although the defendant was told several times not to turn around or move, he was uncooperative, repeatedly moving his body, including his legs, and attempting to turn around. The officers had to regain control of him at least twice and tell him to remain on the hood.

After completing the search, the officers placed the defendant in the back of the patrol car. Upon returning to the front of the vehicle, the officers immediately noticed the baggy on the ground in the same area where the defendant had been standing during the search. Throughout this incident, no one else was present, nor did any cars pass by.

Considering the entirety of the evidence, particularly the testimony that the baggy was not present prior to the search, the jury reasonably could have concluded that the cocaine was secreted on the defendant's body or clothing and fell to the ground as he was actively moving about and twisting during the search.

In this respect it is pertinent to note that the defendant was wearing baggy jeans that folded toward the bottom, which could have provided several places for concealment. Further, it was established that no one else was in the vicinity, nor did any other vehicles pass by. Given these circumstances, the jury reasonably rejected the only hypothesis of innocence presented by the defense, which was that someone else dropped the drugs on the ground.

A rational factfinder, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence that the defendant had dominion and control over the baggy of cocaine found by the officers on the roadway and knowingly possessed it. We cannot say that the jury's determination was irrational under the facts and circumstances presented to it. See **State v. Ordodi**, 2006-0207, pp. 14-15 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected, by the jury. See **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant contends the trial court erred in denying his motion to reconsider his twenty-year sentence. Specifically, he contends the sentence is unconstitutionally excessive because, at the time that the defendant rejected an offered plea bargain, the trial court incorrectly informed him of his penalty exposure as a habitual offender.

Prior to trial, the defendant was offered a plea bargain of four years at hard labor. After defense counsel informed the court that the defendant wished to reject the offer, the following colloquy occurred:

THE COURT:

Okay, sir, do you understand that once you reject it, the deal is off the table. You can't come back later on and get the same deal. Do you understand that?

[DEFENDANT]:

Yes, sir.

THE COURT:

And do you further understand that if the district attorney is successful in prosecuting you, they're going to multiple bill you as a second or third or fourth offense defendant; do you understand that?

[DEFENDANT]:

Yes, sir.

THE COURT:

Is that right, [Assistant District Attorney] Luke?

MR. LUKE:

Yes, Your Honor, he will be double billed once we convict him.

THE COURT:

What's he looking at, if you're successful?

MR. LUKE:

Habitual offender, eight years.[5]

THE COURT:

So you're looking at eight years. You understand that?

[DEFENDANT]

Yes, sir.

THE COURT:

Okay. Just want to make sure you understand that. And you don't want the plea, right?

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[5] By "double billed," the assistant district attorney presumably meant charged as a second-felony habitual offender. If the defendant had, in fact, been adjudicated and sentenced as a second-felony habitual offender, his actual penalty exposure would have been a minimum of two and one-half years and a maximum of ten years. LSA-R.S. 15:529.1(A)(1)(a) and LSA-R.S. 40:967(C)(2).

[DEFENDANT]

No, sir.

THE COURT:

Okay. That's up to you.

As previously noted, after being adjudicated a fourth-felony offender, the defendant was sentenced to the mandatory minimum sentence of twenty years at hard labor, pursuant to LSA-R.S. 15:529.1(A)(1)(c)(i).[6] Although defense counsel filed a timely motion to reconsider sentence, the motion merely reiterated the sentence imposed and requested that the court reconsider the sentence. No specific grounds for reconsideration were given. However, on appeal, the defendant now argues that, because the trial court incorrectly advised him he faced a sentence of eight years as a habitual offender, that is the longest sentence that could be imposed without being constitutionally excessive. He maintains the incorrect information provided by the State and the court influenced his decision to go to trial as opposed to accepting the plea bargain offered to him.

Initially, we note that under LSA-C.Cr.P. art. 881.1(E), a defendant must file a motion to reconsider sentence setting forth the "specific ground" upon which the motion is based in order to raise an objection to the sentence on appeal. If the defendant does not allege any specific ground for his claim of excessiveness or present any argument or evidence not previously considered by the court at original sentencing, he is relegated on appeal to a review of his bare claim of excessiveness. See **State v. Mims**, 619 So.2d 1059, 1059-60 (La. 1993) (per curiam).

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[6] Although the trial court adjudicated the defendant to be a fourth-felony offender, the trial court erroneously stated in its written reasons for sentence that the defendant was being sentenced as a fifth-felony habitual offender. We note that under LSA-R.S. 15:529.1(A)(1)(c)(i) the penalty exposure is the same for fourth and fifth-felony habitual offenders. In any event, despite the statement made in the written reasons, the sentencing transcript reveals that the trial court actually imposed sentence upon the defendant as a fourth-felony habitual offender.

In this case, because the defendant's motion to reconsider did not allege any specific grounds for reconsideration of his sentence, he is limited on appeal to a review for constitutional excessiveness. Furthermore, the defendant's assertion that he was misinformed of his penalty exposure as a habitual offender does not raise a claim of constitutional excessiveness, despite his attempt to categorize it as such. Accordingly, since he did not raise this contention as a specific ground for reconsideration of his sentence, he is precluded from challenging his sentence on this basis on appeal.[7] Our review is limited herein to a bare claim of constitutional excessiveness.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Even when a sentence is within statutory limits, it may be unconstitutionally excessive. See **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 454. A trial court has wide, although not unbridled, discretion in imposing a sentence within statutory limits. **State v. Trahan**, 93-1116, p. 25 (La. App. 1 Cir. 5/20/94), 637 So.2d 694, 708. The sentence imposed will not be set

[7] The record reflects that the defendant had already consulted with his attorney and decided to reject the plea bargain even before he appeared in court and the colloquy in question took place. Therefore, he may in fact have been fully informed of his actual penalty exposure by counsel. If not, there may be an issue of ineffective assistance of counsel. In any event, the extent to which the defendant was informed of his potential penalty exposure by counsel and the effect that may have had on his strategic decision to go to trial rather than accept a plea bargain, are not issues that can be decided on the record before us on appeal. If the defendant wishes to pursue these issues, he should do so by application for post-conviction relief. See **State v. Lockhart**, 629 So.2d 1195, 1207-08 (La. App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

aside absent a showing of manifest abuse of the trial court's wide discretion. **Andrews**, 94-0842 at p. 9, 655 So.2d at 454.

For his possession of cocaine conviction, the defendant ordinarily would have been exposed to a penalty of imprisonment, with or without hard labor, for not more than five years and a fine of not more than $5,000.00. See LSA-R.S. 40:967(C)(2). However, as a fourth-felony habitual offender, the defendant was subject to a minimum mandatory sentence of not less than twenty years and a maximum sentence of life imprisonment under LSA-R.S. 15:529.1(A)(1)(c)(i). Thus, the sentence imposed not only complied with statutory requirements, but actually was the minimum sentence statutorily permissible.

In **State v. Johnson**, 97-1906, p. 6 (La. 3/4/98), 709 So.2d 672, 675, the supreme court held that the minimum sentences imposed by the Habitual Offender Law upon multiple offenders are presumed to be constitutional. Only in rare situations are downward departures from the minimum sentence provided under the Habitual Offender Law warranted. **Johnson**, 97-1906 at p. 9, 709 So.2d at 677. In order to rebut the presumption of constitutionality, a defendant must clearly and convincingly show that the mandatory minimum sentence provided under the Habitual Offender Law is unconstitutionally excessive. **Johnson**, 97-1906 at p. 11, 709 So.2d at 678.

In the present case, the defendant has not met the burden of showing by clear and convincing evidence that the mandatory minimum sentence of twenty years is constitutionally excessive as applied to him. The record reveals that, although he was adjudicated a fourth-felony offender, he also had another conviction for possession of cocaine that was outside of the ten-year cleansing period provided by LSA-R.S. 15:529.1(C). The evidence presented at the habitual offender hearing established that the defendant also had convictions for possession of cocaine,

distribution of cocaine, and introduction of contraband into a penal institution prior to the instant offense.

In concluding the mandatory minimum sentence of twenty years was warranted in this case, the trial court gave the following written reasons:

> Mr. Dark failed to carry his burden of proof under *Johnson, supra*. He has shown no unusual or extraordinary circumstances at play in this case that would support such a rare downward departure from the 20 year statutory minimum sentence. His criminal record includes a plethora of primarily drug-related felony convictions over a short period of time, despite his having been incarcerated for much of this time. He received no pardons, and no conviction has been set aside by any post-conviction proceeding. Mr. Dark has learned either very little or nothing at all from his prior travels through our criminal justice system. He continues to disregard the laws of the State of Louisiana. The Court is, therefore, convinced that the statutory minimum is the appropriate sentence for this defendant under these circumstances. A lesser sentence will not satisfy the goals of the habitual offender statute, to deter and punish recidivism, and would be inappropriate.

Considering the defendant's criminal history and the reasons given by the trial court, we find no abuse of discretion in the trial court's imposition of the twenty-year sentence. Defendant has demonstrated no justification for a downward departure from the mandatory minimum sentence provided by the Habitual Offender Law. Defendant's sentence is not unconstitutionally excessive.

This assignment of error lacks merit.

MOTION TO SUMMARILY REVERSE CONVICTION DENIED; CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.