

Judgment rendered August 11, 2010  
Application for rehearing may be filed  
within the delay allowed by Art. 922,  
La. C.Cr.P.

No. 45,449-KA

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

STATE OF LOUISIANA

Appellee

versus

ANTHONY DARRELL DAY

Appellant

\* \* \* \* \*

Appealed from the  
First Judicial District Court for the  
Parish of Caddo, Louisiana  
Trial Court No. 271,401

Honorable Michael Pitman, Judge

\* \* \* \* \*

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Appellant

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\* \* \* \* \*

Before GASKINS, CARAWAY and PEATROSS, JJ.

NOT DESIGNATED FOR PUBLICATION.  
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

A jury found defendant, Anthony Darrell Day, guilty of possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1. Defendant was thereafter sentenced to 15 years at hard labor to be served without the benefit of parole, probation, or suspension of sentence. Day now appeals his conviction and sentence. We affirm.

*Facts*

On September 4, 2008, a search of the defendant's home was executed by the Shreveport Mid-Level Narcotic Unit pursuant to a search warrant. The search revealed, among other things, a Jennings 9 millimeter handgun and two photographs of defendant brandishing a handgun in various poses. Defendant, who previously pled guilty to a felony charge, was arrested for possession of a firearm by a convicted felon. Defendant was taken into custody and after an advisement and subsequent waiver of his *Miranda* rights, made a recorded statement whereby he admitted that he fired the gun into the air on "New Years" in January of 2007.

On October 6, 2008, the state filed a bill of information charging the defendant with one count of possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1, having been previously convicted on September 9, 2002, of possession of a controlled dangerous substance, Schedule II.

Following a jury trial, defendant was found guilty as charged. Thereafter, defendant filed motions for post verdict judgment of acquittal and for new trial. Both were denied. Defendant was sentenced on

November 13, 2009, to 15 years imprisonment at hard labor without the benefit of parole, probation or suspension of sentence. Defendant now appeals.

### ***Discussion***

#### *Sufficiency of the Evidence*

Defendant contends that the evidence was insufficient to convict. Specifically, he argues that there is no direct evidence of actual or constructive possession of a firearm and that he lacked the requisite intent to commit the offense.

When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accord with *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proved beyond a reasonable doubt. *State v. Hearold*, 603 So.2d 731 (La. 1992); *State v. Bosley*, 29, 253 (La. App. 2d Cir. 4/2/97), 691 So.2d 347, writ denied, 97-1203 (La. 10/17/97), 701 So.2d 1333.

The *Jackson* standard, now legislatively embodied in La. C.Cr.P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Pigford*, 05-

0477 (La. 2/22/06), 922 So.2d 517; *State v. Dotie*, 43,819 (La. App. 2d Cir. 1/14/09), 1 So.3d 833, *writ denied*, 09-0310 (La. 11/6/09), 21 So.3d 297.

The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So.2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Eason*, 43,788 (La. App. 2d Cir. 2/25/09), 3 So.3d 685, *writ denied*, 09-0725 (La. 12/11/09), 23 So.3d 913; *State v. Hill*, 42,025 (La. App. 2d Cir. 5/9/07), 956 So.2d 758, *writ denied*, 07-1209 (La. 12/14/07), 970 So.2d 529.

The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases 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 inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of every essential element of the crime. *State v. Sutton*, 436 So.2d 471 (La. 1983); *State v. Speed*, 43, 786 (La. App. 2d Cir. 1/14/09), 2 So.3d 582, *writ denied*, 09-0372 (La. 11/6/09), 21 So.3d 299; *State v. Parker*, 42,311 (La. App. 2d Cir. 8/15/07), 963 So.2d 497, *writ denied*, 07-2053 (La. 3/7/08), 977 So.2d 896.

A defendant's confession is direct evidence, for it is an acknowledgment of guilt for which no inference need be drawn. La. R.S. 15:499; *State v. McNeal*, 34,593 (La. App. 2d Cir. 4/4/01), 785 So.2d 957;

*State v. Jones*, 451 So.2d 35 (La. App. 2d Cir. 1984), *writ denied*, 456 So.2d 171 (La. 1984).

To support a conviction for possession of a firearm by a convicted felon, the state must prove: (1) the possession of a firearm; (2) a previous conviction of an enumerated felony; (3) absence of the 10-year statutory period of limitation; and (4) general intent to commit the offense. La. R.S. 14:95.2; *State v. Husband*, 437 So.2d 269 (La. 1983); *State v. Culp*, 44,270 (La. App. 2d Cir. 7/15/09), 17 So.3d 429; *State v. Ray*, 42,096 (La. App. 2d Cir. 6/27/07), 961 So.2d 607. The general intent to commit the offense of possession of a firearm by a convicted felon may be proved through the actual possession of the firearm or through the constructive possession of the firearm. *State. Johnson*, 03-1228 (La. 4/14/04), 870 So.2d 995; *State v. Chatman*, 43,184 (La. App. 2d Cir. 4/30/08), 981 So.2d 260. For purposes of the offense of possession of a firearm by a convicted felon, whether the proof is sufficient to establish possession turns on the facts of each case. Further, guilty knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. *State v. Chatman, supra*.

Constructive possession of a firearm occurs when the firearm is subject to the defendant's dominion and control. A defendant's dominion and control over a weapon constitutes constructive possession even if it is only temporary and even if the control is shared. *State v. Bailey*, 511 So.2d 1248 (La. App. 2d Cir. 1987), *writ denied*, 519 So.2d 132 (La. 1988). Constructive possession entails an element of awareness or knowledge that

the firearm is there and the general intent to possess it. *State v. Chatman*, *supra*; *State v. Kennedy*, 42,258 (La. App. 2d Cir. 8/15/07), 963 So.2d 521.

In the present case, defendant's predicate conviction of possession of a Schedule II controlled dangerous substance in 2002 is not contested.<sup>1</sup> Accordingly, the 10-year statutory limitation period had not yet elapsed. Therefore, the only contested facts are whether Day possessed the gun and whether he had the requisite intent to commit the offense.

During the trial on the matter, the state presented testimony from Corporals Raymond and Scott of the Shreveport Police Department. Both were involved in the September 4, 2008 search of the defendant's home. Corporal Raymond testified that he located and seized a Jennings 9 millimeter handgun from the home, shared by defendant and his mother, Mary Day. He described the firearm as a "functional weapon," with 8 rounds in the magazine and one in the chamber. The gun was introduced into evidence. Corporal Raymond testified that the weapon was located in the "middle south bedroom." Although he was unable to specifically identify where in the room the weapon was discovered, he indicated that pursuant to the search warrant's broad authorization he would have been able to search in drawers, between mattresses, and under pillows.

Corporal Scott testified that in conducting the search of the home he discovered two photographs of Day where he can be seen posing with a

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<sup>1</sup>Both the bill of information, filed September 19, 2001, charging defendant with distribution of a Schedule II controlled dangerous substance and the official court minutes reflecting defendant's guilty plea, on September 9, 2002, to possession of a Schedule II controlled dangerous substance were submitted into evidence, along with a copy of the guilty plea.

firearm in each photo.<sup>2</sup> Corporal Scott identified the gun found in the defendant's home as the same make and caliber of gun displayed in the photographs. Corporal Scott next testified that after the gun was located in defendant's home, defendant proceeded to give a post-*Miranda* recorded statement. The statement, which was played for the jury and submitted into evidence, revealed that defendant admitted to shooting the same gun found by the officers, "not this year, but last year," on "New Years." In his statement, Day asserted that the gun belonged to his girlfriend and that it had been missing anywhere from seven to nine months.

The defense called Eisha Madison as its first witness. Madison testified that she formerly dated the defendant for a period of eleven years and that she lived with Day in the house where the gun was found. Madison, who at the time of her testimony was in jail for misdemeanor theft, stated that the gun found during the search belonged to her. She admitted that she brought the gun to Day's house and acknowledged that it was a mistake to do so given that Day was a convicted felon and she knew he was not allowed to be around firearms. Madison told Day about the gun when she could not find its location inside the house. She believes the gun was lost sometime in 2007. Day helped her look for the gun, but they were never able to locate it. She additionally testified that Day could not have shot the gun on New Years in 2007 because the two spent the evening at Kokopellis night club and she did not witness Day with a handgun that

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<sup>2</sup>In one of the photographs defendant is seen squatting near a baby's stroller. His left hand is wrapped around what appears to be a beer can resting on the floor, while his right hand is holding a gun. In the second photograph the defendant is seen in the same clothing as the first photograph, standing with the handgun in his left hand pointed at his left temple. His right hand is positioned in front of his body and appears to be displaying a gang sign.

night. Madison was shown the two photographs previously admitted into evidence where defendant was seen holding a firearm. Madison testified that these photos were likely taken in 2000 because the photographs were taken when the defendant had his hair in ponytails, which he cut sometime in 2003. Madison further testified that the gun she lost was not the same gun that the defendant appeared holding in the photographs.

The defendant next took the stand in his own defense. He testified that the photos were taken in 1999 or 2000 because he got his hair cut sometime in 2002, right before he got on probation. He admitted that he helped Madison look for the gun after being told she lost it. Upon being asked why in his statement to the police he admitted to shooting the gun in 2007, Day responded, “Because I was real nervous, and I felt like I was being pressured.” Day testified that he might have shot a gun in the air “when the new millennium came in,” but denies shooting a gun in 2007.

After reviewing the record, we conclude that the physical evidence and the testimony presented by the state was sufficient to support the defendant’s conviction of illegal possession of a firearm by a convicted felon. Not only was the gun located in defendant’s home, but defendant’s original statement to the police was direct evidence that he was aware of the weapon’s presence in the house and that he had fired the weapon in the recent past. The fact that he later denied such possession and that his testimony was corroborated by his former girlfriend is a matter of weighing the evidence and making credibility determinations, not sufficiency. *See State v. Speed, supra*. Additionally, it was permissible for the jury to reject

the defense position that the photographs of the defendant holding the firearm were taken before his felony conviction.

Moreover, the jury could have reasonably found that defendant maintained constructive possession of the weapon. In *State v. Wesley*, 28,941 (La. App. 2d Cir. 12/13/96), 685 So.2d 1169, *writ denied*, 97-0279 (La. 10/10/97), 703 So.2d 603, this court held that ownership or control over a house where a weapon is found is one factor to aid the jury in its determination of whether a defendant constructively possessed a weapon. Similar to the instant case, the defendant in *Wesley* stated that the gun belonged to his girlfriend who lived with him in the home.

In light of the foregoing, we find that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant was in possession of a firearm as a convicted felon and that he had the general intent to possess the weapon.

#### *Excessive Sentence*

Defendant argues that the imposition of the maximum sentence was grossly out of proportion to the severity of the crime. Additionally he argues that the trial court gave improper consideration to evidence not introduced at trial and that the court erred in not considering a probated sentence.

Because Day failed to file a motion to reconsider the imposed sentence, he is relegated to having the appellate court consider the bare claim of constitutional excessiveness. *State v. Mims*, 619 So.2d 1059 (La.

1993); *State v. Masters*, 37,967 (La. App. 2d Cir. 12/17/03), 862 So.2d 1121; *State v. Duncan*, 30,453 (La. App. 2d Cir. 2/25/98), 707 So.2d 164.

A sentence violates La. Const. art. 1, §20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So.2d 1; *State v. Dorthey*, 623 So.2d 1276 (La. 1993); *State v. Bonanno*, 384 So.2d 355 (La. 1980). A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice. *State v. Weaver*, 01-0467 (La. 1/15/02), 805 So.2d 166; *State v. Lobato*, 603 So.2d 739 (La. 1992); *State v. Robinson*, 40,983 (La. App. 2d Cir. 1/24/07), 948 So.2d 379; *State v. Bradford*, 29,519 (La. App. 2d Cir. 4/2/97), 691 So.2d 864.

In sentencing the defendant, the trial court reviewed the defendant's criminal history attached to the response for discovery in this matter. The court noted the litany of misdemeanor offenses, to which it gave little weight. The court also considered that the firearm seized was found pursuant to a search warrant issued on suspicion of possession of controlled dangerous substances. The court noted that in the execution of the search warrant certain items were found indicative of gang and drug related activity, including large amounts of U.S. currency, a necklace adorned with "Cedar Grove 19," and two digital scales, one of which appeared to contain a white powdery substance thought to be cocaine.

In selecting a proper sentence for a criminal defendant, a trial judge is not limited to considering only prior convictions and may review all evidence of prior criminal activity. *State v. Cooks*, 36,613 (La. App. 2d Cir. 12/04/02), 833 So.2d 1034. When evaluating a defendant's criminal history, trial courts may consider evidence at sentencing that would otherwise be inadmissible at trial. *State v. Myles*, 94-0217 (La. 6/3/94), 638 So.2d 218. For example, the trial court may consider records of prior arrests, hearsay evidence of suspected criminal activity, conviction records, and evidence of uncharged offenses or offenses that were nolle prossed. *State v. Myles, supra*; *State v. Anderson*, 30,060 (La. App. 2d Cir. 10/29/97), 702 So.2d 40. Because the scope of information available to the sentencing court is so broad, the defendant has a due process right to rebut prejudicially false or misleading information that may affect the sentencing determination. *State v. Myles, supra*.

At the sentencing hearing, the court observed that based on the evidence found in defendant's home "the defendant is most likely involved in the illegal sale of controlled dangerous substances." Counsel did not object to any evidence reviewed by the court. As a result, Day cannot now complain that the court erred in relying on this information. *State v. Myles, supra*.

The sentencing range for the crime of possessing a firearm by a felon is imprisonment at hard labor for not less than 10 nor more than 15 years without the benefit of benefit of probation, parole, or suspension of sentence and a possible fine of not more than \$5,000. La. R.S. 14:95.1(B). Thus,

under La. R.S. 14:95.1(B), the law mandates that defendant's sentence be served "without the benefit of probation." Consequently, Day's argument that the court erred in failing to consider a probated sentence clearly lacks merit.

The record fails to show that Day's sentence is constitutionally excessive. The trial court concluded that the defendant presents an undue risk of re-offending and engaging in inherently dangerous drug-related activity. The record reflects that the trial court considered the record in its entirety and found no mitigating factors. We cannot say that the imposition of the maximum sentence available in the narrow sentencing range outlined by the legislature is constitutionally excessive. Accordingly, this assignment of error lacks merit.

Defendant also makes the argument, though not as a separate assignment of error, that he had ineffective assistance of counsel on remand because his counsel failed to file a motion to reconsider sentence after the defendant was sentenced. This failure, defendant argues, precludes him from raising a full excessive sentence claim on appeal. Additionally, defendant argues the trial counsel was ineffective in failing to object to the trial court's consideration of gang and drug related activity that was not introduced at trial.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief ("PCR") in the trial court than by appeal. However, defendant's claim is that he received ineffective assistance of counsel in the sentencing phase of the proceedings

which is not cognizable on collateral review pursuant to La. C.Cr.P. art. 930.3. *State v. Thomas*, 08-2912 (La. 10/16/09), 19 So.3d 466.

Accordingly, we will review the merits of defendant's claims.

The right of a defendant in a criminal proceeding to the effective assistance of counsel is mandated by the Sixth Amendment to the U. S. Constitution. *State v. King*, 06-1903 (La. 10/16/07), 969 So.2d 1228; *State v. Wry*, 591 So.2d 774 (La. App. 2d Cir. 1991). A claim of ineffectiveness of counsel is analyzed under the two-prong test developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish that his attorney was ineffective, the defendant first must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. The relevant inquiry is whether counsel's representation fell below the standard of reasonableness and competency as required by prevailing professional standards demanded for attorneys in criminal cases. *Strickland, supra*. The assessment of an attorney's performance requires his conduct to be evaluated from counsel's perspective at the time of the occurrence. A reviewing court must give great deference to trial counsel's judgment, tactical decisions, and trial strategy, strongly presuming he has exercised reasonable professional judgment. *State v. Grant*, 41,745 (La. App. 2d Cir. 4/4/07), 954 So.2d 823, writ denied, 07-1193 (La. 12/7/07), 969 So.2d 629; *State v. Moore*, 575 So.2d 928 (La. App. 2d Cir. 1991). See also, *State v.*

*Tilmon*, 38,003 (La. App. 2d Cir. 04/14/04), 870 So.2d 607, *writ denied*, 04-2011 (La. 12/17/04), 888 So.2d 866.

Second, the defendant must show that counsel's deficient performance prejudiced his defense. This element requires a showing the errors were so serious as to deprive the defendant of a fair trial, *i.e.*, a trial whose result is reliable. *Strickland, supra*. The defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show the error had some conceivable effect on the outcome of the proceedings. Rather, he must show that but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. *Strickland, supra; State v. Pratt*, 26,862 (La. App. 2d Cir. 4/5/95), 653 So.2d 174, *writ denied*, 95-1398 (La. 11/3/95), 662 So.2d 9. A defendant making a claim of ineffective assistance of counsel must identify certain acts or omissions by counsel which led to the claim; general statements and conclusory charges will not suffice. *Strickland, supra; State v. Jordan*, 35,643 (La. App. 2d Cir. 4/3/02), 813 So.2d 1123, *writ denied*, 02-1570 (La. 5/30/03), 845 So.2d 1067.

The mere failure to file a motion to reconsider sentence does not in and of itself constitute ineffective assistance of counsel. A basis for ineffective assistance of counsel may only be found if a defendant can "show a reasonable probability that but for counsel's error, his sentence would have been different." *State v. Allen*, 03-1205 (La. App. 5th Cir. 2/23/04), 868 So.2d 877. *See also, State v. Louis*, 32,347 (La. App. 2d Cir. 10/27/99), 744 So.2d 694; *State v. Lee*, 26,542 (La. App. 2d Cir. 5/12/94),

636 So.2d 634; *State v. White*, 03-1535 (La. App. 3d Cir. 4/28/04), 872 So.2d 588.

While counsel did not file a motion to reconsider sentence on Day's behalf, defendant does not state what mitigating circumstances counsel could have raised to show a reasonable probability that but for counsel's error, his sentence would have been different. Accordingly, defendant has failed to demonstrate any prejudice caused by the failure to file a motion to reconsider sentence and, therefore, has failed under the second prong of the *Strickland* test to show that his trial counsel was ineffective. We further find that the failure of defendant's trial counsel to object to the court's consideration of gang and drug related activity was not prejudicial error. As previously mentioned, the trial court's consideration of evidence otherwise inadmissible at trial was permissible in sentencing the defendant. The defendant has failed to come forth with any rebuttal evidence showing the information considered by the trial court was prejudicially false or misleading. *State v. Myles, supra*. As such, we find the ineffective assistance of counsel claim is without merit.

For the foregoing reasons, Day's conviction and sentence are affirmed.

**AFFIRMED.**