

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 KA 0862**

**STATE OF LOUISIANA**

**VERSUS**

**ALLEN L. BELL**

**Judgment Rendered: December 21, 2011**

**Appealed from the  
Twenty-Second Judicial District Court  
In and for the Parish of Washington, State of Louisiana  
Trial Court Number #04 CR8 90706**

**Honorable Larry J. Green, Judge Presiding**

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**BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.**

**WHIPPLE, J.**

The defendant, Allen L. Bell, was charged by bill of information with attempted aggravated escape, a violation of LSA-R.S. 14:110(C)(1) and 14:27 (count 1), and battery of a correctional facility employee, a violation of LSA-R.S. 14:34.5 (count 2). The defendant pled not guilty and, following a jury trial, was found guilty as charged on count 1 and guilty of the responsive offense of simple battery on count 2. For the attempted aggravated escape conviction, the defendant was sentenced to five years imprisonment at hard labor; for the simple battery conviction, he was sentenced to six months in the parish jail. The sentences were ordered to run consecutively. The State filed a multiple offender bill of information. Following a hearing on the matter, the defendant was adjudicated a fourth-felony habitual offender. The trial court vacated both of the previously imposed sentences and resentenced the defendant to fifty years imprisonment at hard labor.

The defendant appealed. Finding error under LSA-C.Cr.P. art. 920(2), this court found that the trial court erred in vacating both of the defendant's original sentences while only imposing a single enhanced sentence of fifty years. This court noted a second concern with the defendant's habitual offender adjudication, wherein the State relied on multiple predicate convictions obtained on only two different dates and the record did not establish that the multiple convictions obtained on one of those dates arose from more than one criminal episode. Thus, counting the defendant's present conviction for attempted aggravated escape, this court found that under State ex rel. Porter v. Butler, 573 So. 2d 1106 (La. 1991), overruled by, State v. Shaw, 2006-2467 (La. 11/27/07), 969 So. 2d 1233, and based on the record before this court, the defendant was a third-felony habitual offender, not a fourth-felony habitual offender. Accordingly, the habitual offender

adjudication and sentence were vacated, and the case was remanded for further proceedings. See State v. Bell, 2005-1816 (La. App. 1st Cir. 5/5/06), 930 So. 2d 1239 (unpublished opinion).

The State filed another multiple offender bill of information. Following a hearing on the matter, the defendant was again adjudicated a fourth-felony habitual offender. The trial court sentenced the defendant to fifty years imprisonment at hard labor and ordered the fifty-year sentence to run concurrently with the count 2 sentence for simple battery. The defendant now appeals, designating the following two assignments of error:

1. The trial court erred in adjudicating him a fourth-felony habitual offender.
2. The sentence is unconstitutionally excessive since he is a third-felony habitual offender.

We affirm the convictions, habitual offender adjudication, and enhanced sentence. We again remand to the trial court for sentencing on the simple battery conviction.

### **FACTS**

On June 7, 2004, the defendant was an inmate at the Washington Parish Jail in Franklinton. Deputy Jake Magee, with the Washington Parish Sheriff's Office, was assigned to "pill call," wherein he would dispense medication to those inmates who needed it. While dispensing medication, an inmate threw bleach in Deputy Magee's face. The defendant then struck the deputy in the forehead, knocking him down. The defendant and two other inmates ran past Deputy Magee. The defendant entered the control room and attempted to open the jail door so he could escape. From the floor, Deputy Magee yelled for Richard Bickham, a trusty, to help him because there were inmates trying to escape. Bickham began fighting with the defendant. Deputy Magee eventually made his way to Bickham to assist

him in the struggle with the defendant. Finally, Deputy James Seals, with the Washington Parish Sheriff's Office, arrived and the defendant was subdued and handcuffed.

### ASSIGNMENTS OF ERROR

In his first assignment of error, the defendant argues the trial court erred in adjudicating him a fourth-felony habitual offender. Specifically, the defendant contends that his predicate convictions occurred on only two separate dates in 1994 and 1996. Defendant notes that pursuant to LSA-R.S. 15:529.1(B), multiple convictions occurring on the same date prior to October 19, 2004, are to be counted as one conviction. Accordingly, defendant contends he is "legally only" a third-felony habitual offender.

Prior to its 2005 amendment, LSA-R.S. 15:529.1(B) provided:

It is hereby declared to be the intent of this Section that an offender need not have been adjudged to be a second offender in a previous prosecution in order to be charged as and adjudged to be a third offender, or that an offender has been adjudged in a prior prosecution to be a third offender in order to be convicted as a fourth offender in a prosecution for a subsequent crime.

In State v. Johnson, 2003-2993 (La. 10/19/04), 884 So. 2d 568, 578, our Supreme Court held that, under LSA-R.S. 15:529.1, there is no statutory bar to applying the law in sentencing for more than one conviction obtained on the same date based on unrelated conduct. However, in 2005, in response to the Johnson decision, LSA-R.S. 15:529.1(B) was amended by adding a single sentence so that the paragraph provides:<sup>1</sup>

It is hereby declared to be the intent of this Section that an offender need not have been adjudged to be a second offender in a previous prosecution in order to be charged as and adjudged to be a third offender, or that an offender has been adjudged in a prior prosecution to be a third offender in order to be convicted as a fourth offender in a prosecution for a subsequent crime. *Multiple convictions*

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<sup>1</sup>Specifically, LSA-R.S. 15:529.1(B) was amended by LA Acts 2005, No. 218, § 1.

*obtained on the same day prior to October 19, 2004, shall be counted as one conviction for the purpose of this Section. [italics added].*

The effective date of the amendment was August 15, 2005. Thus, the law under this amendment applies when the offense occurs on August 15, 2005, or later, and when the predicate convictions occurred on the same day and prior to October 19, 2004.

The defendant points out that the convictions for his predicate offenses occurred prior to October 19, 2004, namely on November 10, 1994 and April 22, 1996. The defendant contends that pursuant to the 2005 amendment to LSA-R.S. 15:529.1(B), the multiple convictions obtained on November 10, 1994, are to be counted as one conviction; and the multiple convictions obtained on April 22, 1996, are to be counted as one conviction. According to the defendant, these two convictions, along with the instant conviction for attempted aggravated escape, total three convictions. Thus, the defendant argues, he is only a third-felony habitual offender.

The defendant's argument is misplaced. A defendant is to be sentenced in accordance with the version of LSA-R.S. 15:529.1 in effect at the time of the commission of the charged offense. State v. Parker, 2003-0924 (La. 4/14/04), 871 So. 2d 317, 326. The defendant committed the instant offense of attempted aggravated escape on June 7, 2004. Accordingly, the 2005 amended version of LSA-R.S. 15:529.1(B) is inapplicable to the instant matter. Instead, the controlling provision herein is Subsection B as it appeared prior to the 2005 amendment, as quoted above.

A source of the "based on unrelated conduct" language discussed in Johnson was Porter v. Butler, an earlier Supreme Court decision that discussed multiple convictions under the habitual offender law. In Porter, 573 So. 2d at 1108-09, the

Court found that, while multiple convictions obtained the same day for offenses arising out of a single criminal act or episode would be considered as one conviction for purposes of applying the habitual offender law, “there is no statutory bar to applying the habitual offender law in sentencing for more than one conviction obtained on the same day.” Accordingly, the Court held that where an offender with a prior felony conviction subsequently commits multiple separate felonies at separate times and is thereafter convicted of the subsequent felonies, he is subject to being adjudicated a habitual offender as to each conviction, regardless of whether the convictions are entered on the same date. See Shaw, 969 So. 2d at 1243.

Since the pre-amendment law is applicable to the instant matter, as noted, the rule under Porter is controlling herein. At the second habitual offender hearing following this court’s unpublished 2006 decision, the State introduced into evidence, among other documentation, bills of information with fingerprints, minute entries, and a transcript of guilty pleas establishing the defendant’s predicate convictions. At a Boykin hearing on April 22, 1996, the defendant pled guilty to over a dozen charges, including the following felony charges: simple criminal damage to property over \$500.00 on July 21, 1995, one of the victims being Ronald Robinson (docket number 95-CR6-62480, 22nd Judicial District Court, Washington Parish); theft of property of Jeff Hughes valued over \$500.00 between July 23, 1995 and July 24, 1995 (docket number 95-CR6-61869, 22nd Judicial District Court, Washington Parish); burglary of a residence of Delores Carter between July 21, 1995 and July 22, 1995 (docket number 95-CR6-61871, 22nd Judicial District Court, Washington Parish); burglary of Stuart’s Café on July 19, 1995 (docket number 95-CR6-62479, 22nd Judicial District Court, Washington Parish); and burglary of Pine Cash on July 16, 1995 (docket number 95-CR6-

62477, 22nd Judicial District Court, Washington Parish). On November 10, 1994, the defendant entered a guilty plea to the felony charge of theft of a vending machine owned by Bob Smith with a value in excess of \$500.00 on September 13, 1993 (docket number 94-CR6-56899, 22nd Judicial District Court, Washington Parish).

A review of the defendant's predicate convictions indicates that the defendant committed different crimes on different days in different locations involving different victims. Thus, since under Porter, convictions obtained on the same date can be counted separately if they arise out of separate criminal offenses committed at separate times, the defendant has at least six predicate felony convictions to be counted separately for sentence enhancement. Therefore, given the defendant's instant conviction of attempted aggravated escape, the trial court properly adjudicated the defendant a fourth-felony habitual offender.

In his second assignment of error, the defendant argues that his sentence is unconstitutionally excessive because he is only a third-felony habitual offender. Since this assertion is based entirely on the erroneous assumption that the defendant is a third-felony habitual offender instead of a fourth-felony habitual offender, as we have found, the argument is baseless. Moreover, a fifty-year sentence at hard labor, when the defendant's sentencing exposure was life imprisonment, is not unconstitutionally excessive. See State v. Thomas, 98-1144 (La. 10/9/98), 719 So. 2d 49, 50 (per curiam).

These assignments of error are without merit.

#### **REMAND**

We note that after the defendant was again adjudicated a fourth-felony habitual offender, the trial court sentenced the defendant to fifty years imprisonment at hard labor and ordered that the fifty-year sentence run

concurrently with the count two sentence for simple battery. However, the trial court failed to impose a new sentence for the simple battery conviction, which had been vacated on May 27, 2005. Accordingly, we remand for sentencing on the simple battery conviction.

**CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND ENHANCED SENTENCE AFFIRMED. REMANDED FOR SENTENCING ON THE SIMPLE BATTERY CONVICTION.**