NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0679

STATE OF LOUISIANA

VERSUS

CHARLIE RICK, III

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket Nos. 384,326, 384,327, and 384,328, Division "I"
Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered February 10, 2012

PARRO, J.

The defendant, Charlie Rick, III, was charged by three separate bills of information with distribution of marijuana, in violation of LSA-R.S. 40:966(A)(1). He pled guilty as charged. For each conviction, the defendant received a sentence of ten years at hard labor, with the sentences to be served concurrently. The sentences were suspended, and he was placed on supervised probation for five years with special conditions, including payment of a $2,000 fine for each conviction. The defendant's probation was terminated early and satisfactorily. Thereafter, when he was unsuccessful in having the records in these matters expunged, he requested post-conviction relief on the basis that the guilty pleas were not knowingly, intelligently, and voluntarily entered. The trial court allowed the defendant to withdraw his guilty pleas. Subsequently, when the state sought to bring the defendant to trial on these charges, the defendant filed a motion to quash based on the ground of double jeopardy. After a hearing, the trial court granted the defendant's motion.

The state has appealed,[1] alleging as the only assignment of error, that the trial court erred in granting the defendant's motion to quash based on double jeopardy. Finding merit in this argument, we reverse the ruling that granted the motion to quash and remand for further proceedings.

FACTS

Because the defendant entered guilty pleas, and the guilty plea transcript was not included in the appellate record, there are few facts in the record pertaining to these offenses. The minutes indicate that the parties stipulated to a factual basis supporting these charges, and the trial court accepted the stipulation. According to the three bills of information, the defendant[2] distributed marijuana on May 7, 17, and 19, 2004. The Scientific Analysis Report from the Louisiana State Police Crime Laboratory

[1] The defendant's motion to dismiss this appeal was denied on August 11, 2011.

[2] Codefendant Darryl James Perrin, Jr. was also charged in all three bills of information (bill nos. 384326-8). Codefendant Carla Marie Strunc was charged in bill nos. 384326-7. Codefendant Priscilla Ashley Collins was charged only in bill no. 384326. While the charge against Collins apparently was nol-prossed, the record does not reveal the status of the charges against Perrin and Strunc.

indicates that there were twenty-nine plastic bags containing almost twenty-nine pounds of marijuana.

ASSIGNMENT OF ERROR

In its sole assignment of error, the state contends that the trial court erred in granting the defendant's motion to quash, which was based on double jeopardy. We agree.

To resolve this matter, a tedious recitation of the somewhat confusing procedural history is required. The bills of information were filed on August 3, 2004. On November 8, 2004, the defendant entered his guilty pleas. The minute entries for this date conclude with the following statement: "Further, Court informed the defendant that it would review this matter in three (3) years and would consider amending the minutes to include the provision of Article 893 of the Code of Criminal Procedure if he successfully completes his probation." On July 21, 2006, the defendant filed a motion to terminate probation and requested that the court terminate his probation "early and satisfactory." While the minutes indicate the trial court granted the motion on September 6, 2006, a petition for cause filed by the defendant's probation officer on April 26, 2007, includes a request for a court order terminating the defendant's probation on November 8, 2006. The trial court signed the order associated with this petition for cause on May 18, 2007.

On April 17, 2009, the defendant filed three separate motions (one under each bill number) to amend the November 8, 2004 minute entry of the guilty-plea proceeding "to reflect the Court's intention that defendant be sentenced under the provisions of Art. 893." While the trial court signed, without a hearing, one of the orders attached to these motions on May 1, 2009, and the two remaining orders on June 29, 2009, a minute entry dated May 4, 2009, indicates the guilty-plea minutes were amended to reflect: "Court deferred imposition of Sentence under the provisions of Article 893 ... ." On June 30, 2009, the defendant filed a motion to set aside the convictions and dismiss the prosecutions in accordance with the provisions of LSA-

C.Cr.P. art. 893(E)(2), which the trial court granted, without a hearing, on July 8, 2009. On August 14, 2009, the defendant filed a motion for expungement of his "court and arrest records" pursuant to LSA-R.S. 44:9. The state, through the Department of Public Safety and Corrections, Office of State Police, Bureau of Criminal Identification and Information, filed an opposition to the expungement of the records. In the opposition, the state noted that, because the defendant's convictions were for distribution of marijuana, he had been ineligible for an Article 893 deferral of the imposition of sentence and dismissal of prosecution.[3] Furthermore, the state also asserted that "expungement" of the records of felony convictions was not available when hard labor sentences were actually imposed (as in this case), in contrast to the situation when the imposition of a sentence has been deferred.

On December 21, 2009, the defendant filed an application for post-conviction relief. In that application, the defendant alleged that he had learned only recently that his offenses were not eligible for expungement. The defendant further alleged that he had relied on the assertion that the offenses would be eligible for expungement and, because of this error, he averred that the guilty pleas were "not entered knowingly, intelligently and voluntarily." Therefore, he requested that his November 8, 2004 guilty pleas and sentences be vacated. According to the court minutes, on May 3, 2010, the trial court granted the defendant's request to withdraw his guilty pleas. Thereafter, the matter was set for trial.

On September 16, 2010, the defendant filed a motion to quash. The defendant alleged that his probation was terminated early and satisfactorily on November 8, 2006, and that a trial would constitute double jeopardy. After a contradictory hearing on December 16, 2010, the trial court found that further prosecution would constitute double jeopardy and granted the motion to quash.

The United States Constitution provides that no person shall be twice put in

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[3] This assertion of Article 893 ineligibility was correct. See LSA-C.Cr.P. art. 893(D)(1)(b), prior to its designation as Article 893(E)(1)(b) by 2006 La. Acts, No. 581, § 1.

jeopardy of life or limb for the same offense. U.S. Const. amend. V. The Louisiana Constitution provides "[n]o person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained." LSA-Const. art. I, § 15. See also LSA-C.Cr.P. art. 591.

At the motion to quash hearing, both the state and the defendant correctly pointed out that his probation had been successfully terminated in 2006. At this juncture, the sentences were completed, and the matter was at an end. However, as noted by the state, it was the defendant who, upon learning that the records of these offenses could not be expunged, moved for and was granted the right to withdraw his guilty pleas[4] on the basis that they were not validly entered.[5]

We are not convinced by the defendant's argument that double jeopardy must attach to forbid a trial since he had already been "punished" and because he had "served his time" by successfully completing probation. In its reply brief, the state relies upon **United States ex rel. Betts v. County Court for LaCrosse County**, 496 F.2d 1156 (7th Cir.) (per curiam), cert. denied, 419 U.S. 1057, 95 S.Ct. 641, 42 L.Ed.2d 655 (1974). In **Betts**, the habeas petitioner had pled guilty to burglary and completed his two-year sentence. After an apparently successful appeal, he was allowed to withdraw his guilty plea. He entered an appearance after rearraignment on the burglary charge and moved to dismiss further proceedings on the basis of double jeopardy. Both the trial court and the Wisconsin Supreme Court denied relief. However, a federal district court granted habeas relief on the basis of double jeopardy, reasoning that a retrial was barred because he had already served a completed sentence. In reversing, the Seventh Circuit stated: "Petitioner could have obviated any retrial by withdrawing his then pending appeal after completing his

[4] We note that evidence of a plea of guilty, which was later withdrawn, is not admissible against the party who made the plea in any civil or criminal proceeding. See LSA-C.E. art. 410(A)(1).

[5] We reject the defendant's suggestion in his brief that the state and/or the trial court failed to perform a part of the plea agreement. Nothing in the instant record indicates the trial court or the state misinformed the defendant, at the time he entered his guilty pleas, regarding the availability of expungement.

sentence. Since the collateral consequences of his conviction are apparently important to petitioner, it is not so unfair for the State also to consider them important. A retrial will serve to determine petitioner's guilt or innocence for collateral [purposes] ... ." **Betts**, 496 F.2d at 1157.

We find the rationale put forward in **Betts** to be persuasive. Since the defendant voluntarily withdrew his pleas of guilty, we find the state is not barred by double jeopardy principles from pursuing a trial on these distribution of marijuana charges. Therefore, we conclude that the trial court erred in finding a double jeopardy violation in a situation created entirely by the defendant's legal machinations. In the event of convictions after a trial on these charges, the trial court should certainly give due sentencing consideration to the fact that the defendant has already spent two years on probation and paid fines and other probation costs, as well as giving him credit for time served, if any.

This assignment of error has merit. Therefore, we reverse the ruling granting the motion to quash and remand for further proceedings.

REVERSED AND REMANDED.