

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1051

STATE OF LOUISIANA

VERSUS

DAVID G. PHILLIPS

Judgment Rendered: May 4, 2007

**Appealed from the
Eighteenth Judicial District Court
in and for the Parish of Iberville, State of Louisiana
Trial Court Number 171-81**

Honorable J. Robin Free, Judge Presiding

*** * * * ***

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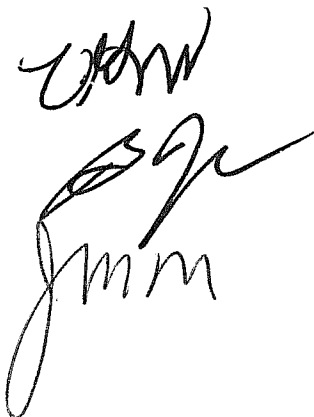
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BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.



WHIPPLE, J.

David Phillips, defendant, presents two issues to this court. The first is that the trial court failed to assign defendant a determinate sentence following this court's previous instruction, and second, defendant argues that the trial court erred in denying defendant's motion to withdraw his guilty plea.

FACTS

In 1981, defendant entered a guilty plea to the charge of forcible rape. The trial court sentenced defendant to thirty-five years at hard labor. On July 17, 2004, in response to defendant's motion to correct an illegal sentence, the trial court resentenced defendant to the same term of thirty-five years at hard labor. Defendant appealed, arguing that this sentence was still indeterminate because it failed to indicate which portion of the sentence was to be served without benefit of parole, probation, or suspension of sentence.

In State v. Phillips, 2004-1607 (La. App. 1st Cir. 5/6/05) (unpublished), this court agreed that defendant's sentence was still indeterminate, vacated the sentence, and remanded the matter for resentencing.

On October 13, 2005, the trial court held a hearing in order to resentence defendant. During that hearing, the trial court resentenced defendant to a term of thirty-five years at hard labor, all without benefit of probation, parole, or suspension of sentence, to be served concurrent with any other sentence defendant was serving. Defendant objected to the new sentence on the basis that the sentence was harsher than what was intended as part of his 1981 plea bargain. The trial court noted that there was no evidence of record to show what the prior plea agreement entailed.

Following a recess, the trial court again addressed defendant and stated that the court had become aware that defendant had, in fact, entered his 1981 guilty plea as part of a plea bargain. The trial court then withdrew defendant's new sentence and set a date for another hearing after defendant stated that he intended to file a motion to withdraw his 1981 guilty plea and alleged that he had not been given an opportunity to consult with his attorney.

On February 23, 2006, the trial court held a hearing to consider defendant's motion to withdraw his guilty plea. During this hearing, defense counsel argued that defendant's plea should be withdrawn because he was not fully informed and did not fully understand the nature of the charge to which he was pleading. Defense counsel claimed that at the time defendant entered his plea, he was sixteen years old, possessed an eighth-grade education and could barely read and write. Defense counsel contended that defendant failed to understand what portion of his sentence would be without benefit of parole, probation, or suspension of sentence. Defendant specifically claimed he thought he would be eligible for parole after serving two years in prison.

Thereafter, the following exchange occurred between the trial court and defendant:

THE COURT:

I've got a problem here. Something is not working for me. [Defendant], you feel free at any point in time, sir, to jump in on this conversation, all right?

[DEFENDANT]:

Okay.

THE COURT:

Even if I make the whole thing without benefit, you've served enough time, have you not?

[DEFENDANT]:

Yes, sir.

THE COURT:

What's the problem then?

[DEFENDANT]:

The guilty plea itself. Originally I first filed a motion to withdraw the guilty plea in 1982.

THE COURT:

Okay.

[DEFENDANT]:

It was denied at that time for no reason. And, what I'm asking the Court today to do is to just allow me to withdraw the guilty plea and sentence me to credit for time served.

THE COURT:

You don't understand, if you are – if the guilty plea is withdrawn, I can't just give you credit for time served. That would mean we would have to start over again, basically.

[DEFENDANT]:

No, sir, with credit towards the prior plea, for the amount of time already served.

THE COURT:

But, what I'm saying is this: You've already served the time. In other words, you made the plea. You have finished the time now. You're done with it. What advantage do you gain by going back, withdrawing a plea, and just getting credit for time served? You're already done with it. You get the same benefit.

[DEFENDANT]:

Yes, sir, but –

THE COURT:

But what?

[DEFENDANT]:

-- this conviction that I now have for this Court was used against me in Baton Rouge.

The prosecutor indicated that defendant had served twenty-three years and eight months and had been released on good time for his forcible rape conviction. Defendant then informed the court that following his release, he was arrested and convicted for manslaughter. Defendant then revealed that

“The problem is that the Court used this conviction to enhance my sentence on the manslaughter conviction.”

The trial court subsequently denied defendant’s motion to withdraw his guilty plea. In doing so, the trial court stated, “It appears to the Court that the purpose of this motion to withdraw a guilty plea is only to defeat the habitual offender status, the enhanced penalty status that’s been applied to you in another jurisdiction.” However, the trial court added, “But, in order to stay in accordance with what you thought you were getting, that will be the sentence of the Court.”

At the outset, we note that at the time of defendant’s previous appeal, this court was unaware that defendant had already completed his original sentence for his forcible rape conviction and was serving another sentence resulting from a manslaughter conviction. Defendant postured his prior appeal to this court in a manner that suggested that he was seeking an answer regarding his parole eligibility as it related to his forcible rape conviction. No brief was filed on behalf of the State to inform this court otherwise.

However, given the record before us and our understanding now of the circumstances of defendant’s incarceration, we find the trial court resentenced defendant to a determinate sentence, namely the thirty-five years at hard labor with parole eligibility after two years, which is the sentence defendant claimed he thought he agreed to under his 1981 plea. Furthermore, by defendant’s own admission, he was released after serving his sentence for forcible rape. Pretermittting the issue of mootness, for purposes of this appeal, we find that defendant has now received the sentence he believed appropriate under his 1981 guilty plea; there is no legal reason or justification to withdraw the plea. Accordingly, we find no abuse

of discretion by the trial court in denying defendant's motion to withdraw his 1981 guilty plea for forcible rape.

These assignments of error are without merit.

**CONVICTION AND NEW SENTENCE FOR FORCIBLE RAPE
AFFIRMED.**