NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1095

STATE OF LOUISIANA

VERSUS

ELISSA B. SMITH

Judgment Rendered: FEB 10 2012

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 493,079

Honorable Allison H. Penzato, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

The defendant, Elissa B. Smith, was charged by bill of information with four counts of simple burglary, in violation of La. R.S. 14:62, and one count of bank fraud, in violation of La. R.S. 14:71.1. She initially pled not guilty to all charges. Following a thorough Boykin examination, the defendant withdrew her prior not guilty pleas and pled guilty as charged. The defendant was sentenced to concurrent terms of imprisonment at hard labor for twelve years on each of the simple burglary convictions. She received a sentence of ten years imprisonment at hard labor on the bank fraud conviction. The court ordered that all of the sentences be served concurrently.

The defendant later moved for reconsideration of the sentences. In the motion, defendant argued the twelve-year sentences exceeded the ten-year terms offered in the initial plea offer. Defendant asked to be resentenced. The trial court denied the motion. The defendant now appeals, urging in a single assignment of error that the trial court abused its discretion in refusing to conduct a hearing on the defense motion to reconsider the sentences.

Finding no merit in the assigned error, we affirm the defendant's convictions and sentences.

FACTS

Since the defendant pled guilty following her attorney's stipulation that a factual basis existed for the pleas, the facts surrounding the instant offenses were not fully developed. A review of the bill of information reveals that on April 22, 2010, the defendant committed the offense of simple burglary by the unauthorized entry of the property of Rebecca Dietrich, with the intent to commit a felony or theft therein. The bill also reveals that on June 8, 2010, the defendant committed the offense of simple burglary by the unauthorized entry of the property of Joyce McCloskey, with the intent to commit a felony or theft therein. On June 5, 2010,

the defendant committed the offense of simple burglary of the property of Nancy Bousfield and of Latasha Jones on June 4, 2010. The bill further reflects the defendant committed the offense of bank fraud, by knowingly or attempting to execute a scheme to obtain monies, funds, credits, assets, securities or any other property owned by or under the custody or control of Whitney Bank.

DISCUSSION

In her sole assignment of error, the defendant argues the trial court abused its discretion in refusing to conduct a hearing on her motion to reconsider the sentences. Defendant claims that on March 2, 2011, she was initially offered a plea agreement of concurrent sentences of ten years imprisonment, but she was removed from the courtroom to be transported back to the "upstate" facility where she was being housed before she could agree to accept the plea. She claims she was returned to court on April 6, 2011; however, at this point the ten-year sentences were no longer offered. Instead, she was offered the plea agreement of twelve-year concurrent sentences, which she ultimately accepted. The defendant argues that she was denied due process of law, since she was not afforded an opportunity to accept the state's original plea. She asks that the case be remanded for a hearing on the motion.

In response, the state argues that since the defendant's sentences were entered as a result of a plea agreement, under La. C. Cr. P. art. 881.2, she is barred from having the sentences reviewed on appeal.

Initially, we observe that Article 881.2(A)(2) does provide that "[t]he defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea." However, the prohibition of this article is applicable to agreed specific sentences and/or agreed sentence ranges or sentencing caps. See State v. Young, 96-0195, p. 5 (La. 10/15/96), 680 So. 2d 1171, 1174; State v. Fairley, 97-1026, pp. 4-5 (La.

App. 1st Cir. 4/8/98), 711 So. 2d 349, 352. The record reflects that the trial court discussed the possible penalties for the offenses with the defendant before imposing sentence, including the possibility of imprisonment for not more than twelve years for the simple burglary convictions, but the court did not mention that any particular sentence and/or range was agreed upon. Thus, the state is incorrect in its claim that the defendant is barred from seeking review of the sentences.

Before defendant pled guilty on April 6, 2011, her attorney set out the terms of the plea agreement: the state agreed to not file a multiple offender bill; the sentences would run concurrently on each count and concurrently with defendant's parole time; and defendant would receive credit for time served. When defendant mentioned there had been an earlier plea agreement, the court said the defendant was offered a prior plea agreement but "failed to avail herself of the plea agreement during the time allowed by the Court" and, thus, the earlier plea agreement had been withdrawn. The court made it clear that if defendant did not believe the sentences complied with the plea agreement, she could withdraw the guilty pleas before the conclusion of the proceeding. Defendant acknowledged the twelve-year sentences were imposed in accordance with the plea agreement offered at the time of the guilty pleas.

If a guilty plea is induced by a plea bargain, or by what a defendant justifiably believes was a plea bargain and he pleaded guilty in part because of that justifiable belief, the bargain must be enforced or the defendant be allowed to withdraw from the plea. State ex rel. Miller v. Whitley, 615 So. 2d 1335, 1336 (La. 1993) (per curiam). This remedy applies only if the state was a party to the agreement. If the state was not a party to the terms of the agreement, the defendant is entitled to withdraw his guilty plea, but is not entitled to enforcement of the sentencing cap. State v. Perrilloux, 99-1314, p. 7 (La. App. 5th Cir. 5/17/00), 762 So. 2d 198, 203; see also State v. Corley, 605 So. 2d 647, 648 (La. App. 4th Cir.

1992). Absent a showing of detrimental reliance prejudicial to the substantial rights of the defendant or evidence of bad faith by the District Attorney's Office, a prosecutor remains free to withdraw from a plea agreement up to the time the plea is entered. State v. Givens, 99-3518, p. 15 (La. 1/17/01), 776 So. 2d 443, 455-56.

The minutes for March 2, 2011, indicate the matter was before the court for discovery and other pretrial motions. On motion of the defense counsel, the court ordered the matter continued to the date of trial. The only indication in the record concerning an earlier plea offer are the comments of the court and defendant during the guilty plea proceedings on April 6, 2011. Additionally, it is not clear from the allegations in the motion to reconsider the sentences if the state was a party to the alleged agreement for ten-year terms of imprisonment for the simple burglary counts.

Even if the facts are as defendant alleged in the motion to reconsider sentences, it is apparent the pleas in the instant case were not induced by the withdrawn offer. See Mabry v. Johnson, 467 U.S. 504, 510, 104 S.Ct. 2543, 2548, 81 L.Ed.2d 437 (1984), abrogated in part, on other grounds by Puckett v. United States, 556 U.S. 129, __, 129 S.Ct. 1423, 1430 n.1, 173 L.Ed.2d 266 (2009). Defendant pled guilty with the advice of counsel, and there is no indication the pleas were the product of the original offer. Defendant does not ask to withdraw the guilty pleas. To the extent defendant maintains in the motion that her due process rights were violated, we note she was fully aware of the consequences when she pleaded guilty. Under these circumstances, we find no error in the trial court's denial of the motion to reconsider the sentences. Furthermore, insofar as the defendant claims the trial court erred in refusing to conduct a hearing when she filed the motion to reconsider the sentences, La. C. Cr. P. art. 881.1(D) authorizes a trial court to deny a motion to reconsider a sentence without a contradictory hearing. Accordingly, the defendant is not entitled to relief on appeal premised on

the trial court's refusal to hold a hearing. See State v. Pursell, 04–1775, p. 4 (La. App. 1st Cir. 5/6/05), 915 So. 2d 871, 873.

CONCLUSION

For the foregoing reasons, the defendant's contention that the trial court erred in denying her motion to reconsider sentences without a hearing lacks merit. Finding no merit in the assigned error, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.