NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1549

STATE OF LOUISIANA

VERSUS

JERRY WAYNE PRICE

Judgment Rendered: MAR 23 2012

* * * * * *

On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 496718

Honorable William J. Knight, Judge Presiding

* * * * * *

Walter P. Reed
District Attorney
Covington, Louisiana

Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Lieu T. Vo Clark
Mandeville, Louisiana

Jerry Wayne Price
St. Gabriel, Louisiana

Counsel for Defendant/Appellant
Jerry Wayne Price

Defendant/Appellant
In proper person

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

Defendant, Jerry Wayne Price, was charged by bill of information with two counts of distribution of cocaine, violations of LSA-R.S. 40:967A(1). He entered a plea of not guilty on each count. Following a jury trial, defendant was found guilty as charged on both counts. He was sentenced, on each count, to twenty-five years at hard labor. Defendant moved for reconsideration of sentence, but the motion was denied. Thereafter, the State filed a habitual offender bill of information, alleging that defendant was a fourth-felony habitual offender.[1] Following a hearing, he was adjudged a fourth-felony habitual offender on count I. The trial court sentenced defendant, on count I, to thirty-five years at hard labor without benefit of parole, probation, or suspension of sentence.[2] The court ordered that the sentence imposed on count I would run concurrently with the sentence previously imposed on count II.

Defendant now appeals, filing a counseled and a pro se brief. In his counseled brief, he challenges the sentences imposed on counts I and II as unconstitutionally excessive. In his pro se brief, he challenges the sentence imposed on count I as unconstitutionally excessive; challenges the sufficiency of the evidence on counts I and II; challenges the denial of his motion to suppress evidence of identification; challenges the constitutionality of the guilty pleas in predicates #1 and #3 used to enhance his sentence on count I under the habitual offender law; and requests review for error under LSA-C.Cr.P. art. 920(2). For the following reasons, we affirm the conviction and habitual offender adjudication on count I; we vacate the enhanced sentence and remand

---

[1] Predicate #1 was set forth as defendant's October 25, 1999 guilty plea, under Twenty-second Judicial District Court Docket #306703, for possession of cocaine. Predicate #2 was set forth as defendant's October 8, 2003 guilty plea, under Twenty-second Judicial District Court Docket #365323, for possession of cocaine. Predicate #3 was set forth as defendant's October 29, 2004 guilty plea, under Twenty-second Judicial District Court Docket #382226, for possession of cocaine.

[2] The habitual offender sentencing minutes indicate, prior to imposing the enhanced sentence on count I, the trial court vacated the original sentence on that count. The transcript, however, does not indicate the trial court vacated the original sentence on count I. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). Although it is apparent from the court's actions that it intended to vacate the original sentence on count I, out of an abundance of caution, we vacate the original sentence imposed on count I. See **State v. Meneses**, 98-0699, p. 2 n.1 (La.App. 1 Cir. 2/23/99), 731 So.2d 375, 376 n.1.

for resentencing on count I; and we affirm the conviction and sentence on count II.

FACTS

St. Tammany Parish Sheriff's Office Detective Julie Boynton testified she purchased cocaine from defendant in Pearl River, Louisiana, on September 22, 2009 and October 6, 2009.

SUFFICIENCY OF THE EVIDENCE

In pro se assignment of error number 1, defendant argues that the testimony of Detective Boynton was insufficient to support the convictions because the audio recordings of the alleged drug deals were of such poor quality that they could not corroborate her testimony.

In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821B; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Jones**, 94-1098, p. 5 (La.App. 1 Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320.

Louisiana Revised Statutes 40:967A, in pertinent part, provides:

> [I]t shall be unlawful for any person knowingly or intentionally:
>
> (1) To ... distribute, or dispense ... a controlled dangerous substance ... classified in Schedule II.

Cocaine is a controlled dangerous substance classified in Schedule II. LSA-R.S. 40:964, Schedule II, A(4).

Detective Boynton testified at trial. On September 22, 2009, she was working as an undercover narcotics agent. She identified defendant in court as the person involved in the transactions with her that led to his arrest. Additionally, thirty-five minutes after the first drug transaction, she completed an

affidavit of identification, indicating the attached photograph of defendant depicted a person who she knew through "personal contact during a controlled purchase."

On September 22, 2009, Detective Boynton drove herself and a cooperating individual (C.I.), to James Crosby Road in Pearl River, Louisiana. The vehicle was equipped with audio-recording equipment. The State introduced an audio recording of the ensuing drug deal into evidence.

Detective Boynton stated that the sound of music on the recording was a cell phone ring and was defendant calling the C.I., first to see where they were and then to tell them he had seen them pass. Detective Boynton described the area where she was located so additional police officers monitoring the transaction could find her if necessary. She explained that the next sound on the recording was her talking to defendant after he got into the rear of the vehicle. Defendant asked Detective Boynton if she was a "cop," and she replied, "No." He stated "good" because it was his birthday and he did not want to go to jail. Defendant exchanged six rocks of crack cocaine for $100, and asked Detective Boynton if she would "come back." Detective Boynton replied, "Hell, yeah, I'll come back. I've got some money to burn ... If it's good, I'll come back." Defendant then asked for some of the drugs back, but Detective Boynton told him, "No, all of this is spoken for. I need it all."

Detective Boynton and the C.I. visited defendant again on October 6, 2009. Detective Boynton drove the same vehicle used in the earlier drug transaction. The State also introduced an audio recording of this drug deal into evidence.

Detective Boynton testified that when she arrived at the property, defendant instructed her to pull in and wait because he "had run out," but there was additional crack cocaine on the way. Defendant asked Detective Boynton if there was "anything more" she wanted to buy or if she wanted to increase the amount she was buying. She told him that she only had $225 on her, but would come back for more if he had more. Defendant replied that he would be gone for the weekend, trying to work offshore. Detective Boynton asked "why," and defendant

replied that he was not making enough money and needed to make some "real" money. Thereafter, another vehicle arrived, and defendant took $225 from Detective Boynton and got into the other vehicle. Defendant returned to Detective Boynton's vehicle and handed her a tissue containing two grams of cocaine through her driver's-side window. Detective Boynton acknowledged that the static noise on the recordings of the drug transactions was not present "in real life" when she exchanged money for drugs with defendant.

Defendant exercised his privilege against self incrimination and did not testify at trial. He offered a defense of mistaken identity.

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that defendant was guilty of distribution of cocaine on September 22, 2009 and October 6, 2009. The verdicts returned by the jury show that it accepted the testimony of Detective Boynton, including her explanation of what was occurring on the recordings of the drug transactions. Even without consideration of the recordings, any rational trier of fact could have found the evidence sufficient to convict defendant on counts I and II. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **State v. Lofton**, 96-1429, p. 5 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

EXCESSIVE SENTENCES

In counseled assignment of error number 1, defendant argues that the trial court erred in denying the motion to reconsider sentence. In counseled

assignment of error number 2, defendant argues that the sentences imposed on counts I and II were unconstitutionally excessive because he was only twenty-nine years old at the time of the commission of the offenses, because his predicate offenses were possession offenses, and because only a small amount of cocaine was involved in the instant offenses. In pro se assignment of error number 2, defendant argues that the sentence imposed on count I was unconstitutionally excessive because he "is a non-violent offender with nothing more than an addiction to cocaine."

As will be discussed herein below, the sentence on count I contained an illegal parole restriction. Thus, we vacate the sentence on count I, and remand for resentencing on that count. Accordingly, we review only count II under these assignments of error.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La.App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

Any person who violates LSA-R.S. 40:967A(1) as to cocaine, shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence; and may, in

addition, be sentenced to pay a fine of not more than fifty thousand dollars. LSA-R.S. 40:967B(4)(b).

On count II, defendant was sentenced to twenty-five years at hard labor. The trial court ordered the sentence imposed on count I would run concurrently with the sentence previously imposed on count II.

At the original sentencing hearing, the trial court noted that defendant had previous substance abuse issues with his previous controlled dangerous substance convictions, and during any period of probation, it was likely that defendant would continue with his involvement in the illicit sale or use of controlled dangerous substances. The court stated the sale of controlled dangerous substances was obviously dangerous to defendant and to those to whom he sold drugs, and the product could actually be labeled "poison." The court found any sentence less than the sentence it would impose would deprecate the seriousness of the offenses.

The sentence imposed on count II was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive. Accordingly, counseled assignments of error 1 and 2, in regard to the sentence imposed on count II, are without merit.

MOTION TO SUPPRESS IDENTIFICATION

In pro se assignment of error number 3, defendant argues that the identification process in the instant case was suggestive and totally unreliable because Detective Boynton was presented with only one photograph when she identified him. Prior to trial, defendant moved to suppress identification as improper and unconstitutional. Following a hearing, the motion was denied.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

A defendant attempting to suppress an identification must prove both that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure. An identification procedure is unduly suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. For this reason, identifications arising from single-photograph displays may be viewed in general with suspicion. The central question, however, is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive. Thus, despite the existence of a suggestive pretrial identification, an in-court identification is permissible if, under all the circumstances, there does not exist a very substantial likelihood of irreparable misidentification. **State v. Sparks**, 88-0017, p. 52 (La. 5/11/11), 68 So.3d 435, 477.

If an identification procedure is suggestive, courts must look, under the totality of the circumstances, to several factors in evaluating the likelihood of misidentification. These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. **Id.**, 88-0117 at p. 53, 68 So.3d at 477.

St. Tammany Parish Sheriff's Office Detective Scott Saigeon testified at the hearing on the motion to suppress identification and at trial.[3] He supervised the September 22, 2009 undercover operation involving defendant. On that date, a confidential informant advised Detective Saigeon that a black male, known as "J.R.," who lived on James Crosby Road in Pearl River, was involved in the retail distribution of crack cocaine. Detective Boynton was assigned to make an undercover purchase of drugs from the suspect on that date and again on October 6, 2009.

---

[3] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may also consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

Detective Saigeon testified that prior to the first purchase from the suspect, "through different information ... through various sources," he was advised that defendant was selling narcotics on James Crosby Road in Pearl River. Detective Saigeon generated a photograph of defendant, for later investigation, and secured it in his desk. Thereafter, a confidential informant offered to introduce an undercover officer to defendant.

Within an hour of the September 22, 2009 drug transaction, Detective Saigeon showed the photograph of defendant to Detective Boynton and asked her whether or not defendant was the individual that had just sold her narcotics. Detective Saigeon advised Detective Boynton that if defendant was not the drug dealer, "we would move on and try to further the investigation and try to identify the subject who had distributed narcotics to her." Detective Boynton immediately identified defendant as the drug dealer.

Detective Saigeon indicated he presented Detective Boynton with a single-photograph, rather than a photographic array, to view because, during the drug deal, defendant stated he could not go to jail on his birthday, and Detective Saigeon was aware that defendant's date of birth was the date of the first drug transaction. Detective Saigeon stated he was also aware that defendant's address was in the 38000 block of James Crosby Road, which was the location of the drug deal. Additionally, Detective Saigeon stated that he presented the photograph of defendant to Detective Boynton for her review an "extremely short time" after the drug transaction. Detective Saigeon felt that presenting Detective Boynton with a single photograph, rather that a photographic array, was more than sufficient based on his information about defendant, the audio he had personally heard, and the short time that had passed since the drug deal. He stated that compiling a photographic array would have taken much longer, and by showing Detective Boynton a photograph quickly, defendant could have been eliminated as a suspect if she had not identified him.

Detective Boynton testified at trial concerning her identification of defendant as the drug dealer. She indicated that she "specifically look[ed]" at

defendant because, as an undercover officer, she was aware she might have to identify him at a later date. She testified that when she was shown defendant's photograph, she immediately recognized him because of the time she had spent talking to him in the undercover vehicle. She stated, "I viewed the individual's face. I spoke to him. I actually made an exchange with him for crack cocaine and money. We talked about partying, going out for his birthday. And then I left the area and within probably 35 minutes I was shown a photograph, at which time I immediately recognized him." She had no doubt that defendant was the person who sold her drugs on September 22, 2009 and October 6, 2009.

There was no error or abuse of discretion by the trial court in denying the motion to suppress. Under the totality of the circumstances, the challenged identification was reliable. The likelihood of misidentification was low. Detective Boynton viewed defendant during the drug transactions from close range and for an extended period. She paid careful attention to his features, because she was aware she might have to identify him at a later date. She was certain of the accuracy of her identification, and only thirty-five minutes passed between the first drug deal and her identification of defendant as the drug dealer.

This assignment of error is without merit.

MOTION TO QUASH HABITUAL OFFENDER BILL

In pro se assignment of error number 4, defendant argues that the trial court erred in denying his motion to quash the habitual offender bill because the State introduced only minute entries in support of the use of predicates #1 and #3 for habitual offender purposes.

The State may, but is not required to, introduce transcripts concerning predicate offenses in a habitual offender proceeding. If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the

defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one that reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three **Boykin** rights.[4] **State v. Shelton**, 621 So.2d 769, 779-80 (La. 1993). The purpose of the rule of **Shelton** is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. **State v. Deville**, 04-1401, p. 4 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

Following the filing of the habitual offender bill of information, defendant moved to quash the bill. At the hearing on the motion, the defense argued that the State had failed to meet its burden of proof in regard to the predicate offenses because it had failed to introduce transcripts of the respective **Boykinizations**.

In connection with the habitual offender proceedings, the State introduced into evidence minute entries establishing that defendant, with representation of

---

[4] In **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court reversed five robbery convictions founded upon guilty pleas because the court accepting the pleas had not ascertained that the defendant voluntarily and intelligently waived his right against compulsory self-incrimination, right to trial by jury, and right to confront his accusers. **Boykin** only requires a defendant be informed of these three rights. "Its scope has not been expanded to include advising the defendant of any other rights which he may have, nor of the possible consequences of his actions." **State v. Smith**, 97-2849, p. 3 (La.App. 1 Cir. 11/6/98), 722 So.2d 1048.

counsel, and following advice and waiver of his **Boykin** rights, entered guilty pleas in connection with predicates #1, #2, and #3.[5] The trial court found the minute entries for the predicate offenses were entitled to the presumption of regularity and indicated all of defendant's constitutional rights had been explained to him in connection with his guilty pleas. The court found that defendant was a fourth-felony habitual offender.

There was no error. In connection with the challenged predicates, the State met its initial burden of proof under **Shelton.** Thereafter, defendant failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. Accordingly, the State had no burden to prove the constitutionality of the challenged predicates by "perfect" transcripts or otherwise.

This assignment of error is without merit.

REVIEW FOR ERROR

In pro se assignment of error number 5, defendant requests that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

Any person who violates LSA-R.S. 40:967A(1) as to cocaine, shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars. LSA-R.S. 40:967B(4)(b).

Any person who, after having been convicted within this state of a felony, thereafter commits any subsequent felony within this state, upon conviction of

[5] The State established the identity of defendant as the person referenced in predicates #1, #2, and #3 with testimony from Lloyd Thomas Morse. The trial court accepted Morse as an expert in the field of fingerprint identification and analysis.

said felony, shall be punished as follows: if the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life. LSA-R.S. 15:529.1A(1)(c)(i) (prior to amendment by 2010 La. Acts No. 911, § 1 & 2010 La. Acts No. 973, § 2).

On count I, the trial court sentenced defendant, as a fourth-felony habitual offender, to thirty-five years at hard labor without benefit of parole, probation, or suspension of sentence. However, LSA-R.S. 40:967B(4)(b) authorized imposition of only two years of the sentence without benefit of parole, and LSA-R.S. 15:529.1G does not restrict parole eligibility. Accordingly, we must vacate the sentence imposed on count I and remand for resentencing.

After a careful review of the record in these proceedings, other than the illegal parole restriction on the sentence for count I, we have found no reversible errors. See **State v. Price**, 05-2514, pp. 18-22 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION ON COUNT I AFFIRMED; ENHANCED SENTENCE VACATED AND REMANDED FOR RESENTENCING ON COUNT I; CONVICTION AND SENTENCE ON COUNT II AFFIRMED.