NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 2012

STATE OF LOUISIANA

VERSUS

LEONARD K. WISE

Judgment rendered: MAY - 7 2010

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number: 449329; Division: C
The Honorable Richard A. Swartz, Jr. Judge Presiding

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Walter P. Reed
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State of Louisiana

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Mary E. Roper
Baton Rouge, La.

Counsel for Appellant
Leonard K. Wise

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

The defendant, Leonard K. Wise, was charged by bill of information with one count of third-offense possession of marijuana, a violation of La. R.S. 40:966(C) and (E)(3). He pleaded not guilty.[1] Following a jury trial, he was found guilty as charged.

Thereafter, the State filed a habitual offender bill of information against the defendant, alleging that he was a second-felony habitual offender.[2] The defendant initially denied the allegations of the habitual offender bill. Subsequently, pursuant to a sentencing agreement, he admitted the allegations of the habitual offender bill. Thereafter, he was adjudged a second-felony habitual offender and was sentenced to ten years at hard labor without benefit of probation or suspension of sentence. He now appeals. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence. Additionally, we grant defense counsel's motion to withdraw.

FACTS

On February 14, 2008, St. Tammany Parish Sheriff's Department Deputy Gustave Bethea was providing security for a Valentine's Day event at the Sons of Italy Banquet Hall. According to Deputy Bethea, at approximately midnight, he detected the odor of marijuana while walking to his police car. He also saw smoke, which smelled like marijuana, coming from a Chevrolet Tahoe parked next to his police car. Deputy Bethea approached the driver's side and asked the driver to roll down his window. According to Deputy Bethea, the driver of the Tahoe, Richard D. Thornton, rolled the window down, and Deputy Bethea illuminated the interior of the

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[1] Predicate #1 was set forth as the defendant's October 12, 1998 conviction under Twenty-second Judicial District Court Docket #286857. The State introduced documentation at trial indicating that, in connection with predicate #1, the defendant pled guilty to possession of marijuana. Predicate #2 was set forth as the defendant's January 6, 2004 guilty plea, under Twenty-second Judicial District Court Docket #371929, to possession of marijuana. (R. 20). The State introduced documentation at trial indicating that, in connection with predicate #2, the defendant pled guilty to second-offense possession of marijuana.

[2] The habitual offender predicate offense was set forth as the defendant's October 12, 1998 guilty plea, under Twenty-second Judicial District Court Docket #286856, to possession with intent to distribute cocaine. (R. 51).

vehicle with his flashlight. Deputy Bethea testified that the defendant was the front passenger and a female was seated in the back of the vehicle. According to Deputy Bethea, the defendant then placed a clear plastic bag of green vegetable matter in the center console, which, based on eight years of experience as a police officer, Deputy Bethea recognized as marijuana. Deputy Bethea asked the occupants of the Tahoe to exit the vehicle, and the female ran away. Thereafter, Deputy Bethea recovered 11.24 grams of marijuana from the console of the Tahoe. He denied "planting" the marijuana in the Tahoe so that he could arrest the defendant.

Thornton testified at trial. He conceded that he had prior convictions for possession of marijuana and distribution of cocaine. He also conceded that he was present in the Tahoe on the night in question. He claimed that the defendant was the front passenger and that Dione Garrett and her friend or cousin, were the rear passengers. According to Thornton, he and the defendant were smoking legal cigarettes in the vehicle with the windows rolled up. He denied that anyone was smoking marijuana in the vehicle. He claimed that a police officer started beating on the window with a flashlight and ordered him to roll down the window. He claimed that rather than rolling down his window, he opened his door to talk to the police officer. He claimed that the police officer ordered him and the other occupants of the Tahoe out of the vehicle at gunpoint. He claimed that Garrett ran away, and that the police officer allowed Garrett's friend or cousin to leave. He claimed that the police officer then "went into the truck, and ... came out with a bag of marijuana." He denied that the defendant had been in possession of marijuana.

The defendant also testified at trial. He conceded that he had two prior convictions for possession of marijuana and a prior conviction for distribution of cocaine. He claimed he had never seen the bag of marijuana recovered from the Tahoe.

Neil Adam Fiest was accepted as an expert in the area of latent fingerprint analysis. Based on a comparison of the defendant's fingerprints and the fingerprints appearing on Twenty-second Judicial District Court bills of information 286857 (charging one count of possession of marijuana) and 371929 (charging one count of possession of marijuana), Fiest testified that the defendant was the same person who was convicted under those docket numbers.

ISSUES PRESENTED

The defense brief contains no assignments of error and sets forth that it is filed to conform with the procedures outlined in **State v. Benjamin**, 573 So.2d 528 (La. App. 4th Cir. 1990).

Benjamin set forth a procedure to comply with **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), wherein the U.S. Supreme Court discussed how appellate counsel should proceed when, upon conscientious review of a case, counsel found the case wholly frivolous. **Benjamin** has repeatedly been cited with approval by the Louisiana Supreme Court. See **State v. Jyles**, 96-2669, p. 1 (La. 12/12/97), 704 So.2d 241 (per curiam); **State v. Mouton**, 95-0981, p. 1 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam); **State v. Royals**, 600 So.2d 653 (La. 1992); **State v. Robinson**, 590 So.2d 1185 (La. 1992) (per curiam).

Defense counsel reviews the procedural history of the case and the evidence against the defendant. She sets forth that after a conscientious and thorough examination and review of the entire record, including the procedural history and facts, she has found no non-frivolous issues to present on appeal, and no ruling of the trial court which arguably supports an appeal, either under existing jurisprudence or under a change which should be effected in the law. Accordingly, she moves to withdraw.

A copy of defense counsel's brief and motion to withdraw were sent to the defendant. Defense counsel also informed the defendant that he had the right to

file a brief on his own behalf. The defendant has not filed a *pro se* brief with this court.

This court has conducted an independent review of the entire record in this matter. The minutes of the habitual offender arraignment reflect that, before accepting the defendant's stipulation to being a second-felony habitual offender, the trial court read the habitual offender bill to the defendant, advised him of his right to a habitual offender hearing, and advised him of his "right against self-incrimination." The transcript, however, indicates that the court only read the habitual offender bill to the defendant before accepting his stipulation to being a second-felony habitual offender. 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).

In **State v. Griffin**, 525 So.2d 705 (La. App. 1st Cir. 1988), the defendant was separately charged with simple burglary, a violation of La. R.S. 14:62, and with possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1. Pursuant to a plea agreement for ten-year concurrent sentences on each count, he pled guilty and agreed to stipulate to being a second-felony habitual offender. Thereafter, the State filed two separate habitual offender bills of information against the defendant, alleging he was a second-felony habitual offender. **Griffin**, 525 So.2d at 706. At the habitual-offender hearing, the State, defense counsel, and the defendant all agreed that the allegations of the multiple-offender bills were correct. **Griffin**, 525 So.2d at 706-07. Thereafter, the trial court adjudged the defendant a second-felony habitual offender and sentenced him in accordance with the plea agreement. On appeal, this court found that the trial court's failure to advise the defendant of the specific allegations contained in the habitual offender bills of information, his right to be tried as to the truth of the allegations, and his right to remain silent, before obtaining the stipulations to the habitual offender bills

of information, constituted error under LSA-C.Cr.P. art. 920(2), which required that the habitual offender adjudications and sentences be vacated. **Griffin**, 525 So.2d at 707.

Unlike the defendant in **Griffin**, however, the instant defendant received the statutory minimum sentence as a second-felony habitual offender and does not challenge his sentence on appeal. Absent the plea agreement in this case, the defendant's sentencing exposure is four times the sentence he received. Thus, the trial court's failure to comply with **Griffin** was not inherently prejudicial to the defendant. See **State v. Price**, 05-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277. Furthermore, we conclude there are no non-frivolous issues or trial court rulings which arguably support this appeal. Accordingly, the defendant's conviction, habitual offender adjudication, and sentence are affirmed. Defense counsel's motion to withdraw, which has been held in abeyance pending the disposition of this matter, is hereby granted.

DECREE

For the foregoing reasons, we affirm defendant Leonard K. Wise's conviction, habitual offender adjudication, and sentence. **IT IS ORDERED** that Mary E. Roper and the Louisiana Appellate Project be permitted to withdraw as counsel of record for defendant pursuant to their motion.

CONVICTION, HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED; MOTION TO WITHDRAW GRANTED