

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1695



STATE OF LOUISIANA

VERSUS

MARLON J. WELLS

Judgment Rendered: May 2, 2012

\*\*\*\*\*

Appealed from the  
22<sup>nd</sup> Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Trial Court Numbers 409,433; 413,949 and 500,145

Honorable Allison H. Penzato, Judge

\*\*\*\*\*

Walter P. Reed, District Attorney  
Covington, LA  
and  
Kathryn W. Landry  
Baton Rouge, LA

Attorneys for  
State – Appellee

Gwendolyn K. Brown  
Baton Rouge, LA

Attorney for  
Defendant – Appellant  
Marlon J. Wells

Marlon J. Wells  
St. Gabriel, LA

In Proper Person  
Defendant – Appellant

\*\*\*\*\*

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

## WELCH, J.

The defendant, Marlon J. Wells, was charged by bill of information filed under Twenty-second Judicial District Court Docket #409433 with one count of possession with intent to distribute cocaine (count I), a violation of La. R.S. 40:967(A)(1); and one count of possession with intent to distribute alprazolam (count II), a violation of La. R.S. 40:969(A)(1); and he pled not guilty.<sup>1</sup> He was charged by bill of information filed under Twenty-second Judicial District Court Docket #413943 with one count of unauthorized use of an access card (value over \$500), a violation of La. R.S. 14:67.3, and pled not guilty.<sup>2</sup> He was charged by bill of information filed under Twenty-second Judicial District Court Docket #500145 with one count of simple escape (count I), a violation of La. R.S. 14:110; and one count of disguising transactions involving drug proceeds (count II), a violation of La. R.S. 40:1041(A); and he pled not guilty. Subsequently, he withdrew his initial pleas under Twenty-second Judicial District Court Dockets #409433, #413943, and #500145, and pled guilty to the charges under those bills, "pursuant to [La. C.Cr.P. art.] 881.1." Thereafter, in regard to Twenty-second Judicial District Court Docket #409433, count I, the State filed a habitual offender bill of information, alleging the defendant was a third-felony habitual offender.<sup>3</sup> Pursuant to a plea agreement, the defendant agreed with the allegations of the habitual offender bill. On Twenty-second Judicial District Court Docket #409433, count I, he was adjudged a third-

---

<sup>1</sup> Tanyikia J. Wells was charged as a codefendant on this bill of information. As to Tanyikia Wells only, the bill was amended to charge one count of possession of cocaine and one count of possession of alprazolam. The record does not reflect the disposition of those charges.

<sup>2</sup> Ternice Negil Garvin and Tony Bush Evans were charged as codefendants on this bill of information. The record does not reflect the disposition of the charges against Garvin and Evans.

<sup>3</sup> Predicate #1 was set forth as the defendant's conviction in the Twenty-second Judicial District Court Docket #318279 for bank fraud. Predicate #2 was set forth as the defendant's conviction in the Twenty-second Judicial District Court for theft.

felony habitual offender and sentenced to twenty-eight years at hard labor without benefit of parole, probation, or suspension of sentence. On Twenty-second Judicial District Court Docket #409433, count II, he was sentenced to ten years at hard labor to be served concurrently with the sentence imposed under Twenty-second Judicial District Court Docket #409433, count I. On Twenty-second Judicial District Court Docket #413943, he was sentenced to ten years at hard labor to be served concurrently with the sentences imposed under Twenty-second Judicial District Court Docket #409433. On Twenty-second Judicial District Court Docket #500145, count I, he was sentenced to two years at hard labor to be served consecutively to all other sentences imposed that day. On Twenty-second Judicial District Court Docket #500145, count II, he was sentenced to ten years at hard labor to be served concurrently with the sentences imposed under Twenty-second Judicial District Court Dockets #413943 and #409433. He now appeals, filing a counseled brief with no assignments of error, but requesting review for error under La. C.Cr.P. art. 920(2). He also files a pro se brief alleging he was not fully informed of the legal consequences of changing his plea.

### **FACTS**

No factual basis appears in the record because the State and the defense stipulated a factual basis existed for the defendant's guilty pleas. The bill of information filed under Twenty-second Judicial District Court Docket #409433 charged counts I and II were committed on December 7, 2005. The bill of information filed under Twenty-second Judicial District Court Docket #413943 charged the offense was committed between March 3, 2006 and March 4, 2006. The bill of information filed under Twenty-second Judicial District Court Docket #500145 charged counts I and II were committed on October 6, 2007.

### **ISSUES PRESENTED**

The counseled defense brief contains no assignments of error and sets forth

that it is filed to conform with the procedures outlined in **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and **State v. Jyles**, 96-2669 (La. 12/12/97), 704 So.2d 241 (*per curiam*); see also **State v. Benjamin**, 573 So.2d 528 (La. App. 4<sup>th</sup> Cir. 1990).

**Benjamin** set forth a procedure to comply with **Anders**, 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 **Jyles**, 704 So.2d at 241; **State v. Mouton**, 95-0981 (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. She sets forth that after a review of the record, she has found no non-frivolous issues to present on appeal. Accordingly, she moves to withdraw. Her motion to withdraw sets forth she made a conscientious effort to determine whether there existed any non-frivolous issues on appeal, but found none.

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 filed a pro se brief with this court. In that brief he claims he was not fully informed of the legal consequences of changing his plea because he was told the plea was for 60-90 days under La. C.Cr.P. art. 881.1. The transcript of the sentencing hearing indicates, after fully informing the defendant of the consequences of changing his plea and sentencing him pursuant to a plea agreement, the trial court stated, "the Court will retain jurisdiction under Article 881.1 for a period of 90 days from today." The trial court was extending the time for the filing of a motion to reconsider sentence. See La. C.Cr.P. art. 881.1(A)(1). Thereafter, the defendant filed two motions to

reconsider sentence and a motion to withdraw his guilty pleas, but the motions were denied. We note review of sentences imposed in conformity with a plea agreement is precluded by La. C.Cr.P. art. 881.2(A)(2). Moreover, the record indicates the defendant avoided a possible life sentence as a fourth-or-subsequent-felony habitual offender by agreeing with the allegations of the habitual offender bill of information in exchange for the State agreeing not to prove he was a fifth-felony habitual offender. See La. R.S. 15:529.1(A)(1)(c)(i) (prior to amendment by 2010 La. Acts No. 911, § 1 & 2010 La. Acts No. 973, § 2).

This court has conducted an independent review of the entire record in this matter. Other than the illegal parole restriction on the sentence for bill of information #409433, count I, which we discuss below, we have found no reversible errors under La. C.Cr.P. art. 920(2). Furthermore, we conclude there are no non-frivolous issues or trial court rulings that arguably support this appeal. Accordingly, the defendant's convictions on all counts are affirmed; his habitual offender adjudication is also affirmed; and his sentences on bills of information #409433, count II; #413943 and #500145, counts I and II, are affirmed; but his sentence on bill of information #409433, count I hereby is vacated; and we remand for resentencing on that count. Defense counsel's motion to withdraw, which has been held in abeyance pending the disposition of this matter, is hereby granted.

#### **REVIEW FOR ERROR**

The defendant requests that this court examine the record for error under La. 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 La. C.Cr.P. art. 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.

In regard to bill of information #409433, count I, any person who violates La. R.S. 40:967(A)(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. La. R.S. 40:967(B)(4)(b).

As applicable here, any person who, after having been convicted within this state of a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows: if the third 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 a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction. La. R.S. 15:529.1(A)(1)(b)(i) (prior to amendment by 2010 La. Acts No. 911, § 1 & 2010 La. Acts No. 973, § 2).

On bill of information #409433, count I, the trial court sentenced the defendant, as a third-felony habitual offender, to twenty-eight years at hard labor without benefit of parole, probation, or suspension of sentence. However, La. R.S. 40:967(B)(4)(b) authorized imposition of only the first two years of the sentence without benefit of parole, and La. R.S. 15:529.1(G) does not restrict parole eligibility. When the amendment of a defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, does not sanction *sua sponte* correction by the court of appeal on the defendant's appeal of his conviction and sentence. **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (*per curiam*).

After a careful review of the record in these proceedings, other than the illegal parole restriction on the sentence for bill of information #409433, count I, we have found no reversible errors. See **State v. Price**, 2005-2514 (La. App. 1<sup>st</sup> Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La.

### CONCLUSION

For the foregoing reasons, the defendant's convictions and habitual offender adjudication are affirmed; the sentences on bills of information #409433, count II and #413943 and #500145, counts I and II, are affirmed; the sentence on bill of information #409433, count I is vacated, and the matter is remanded for resentencing on that count; and defense counsel's motion to withdraw is granted.

**CONVICTIONS AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCES ON BILLS OF INFORMATION #409433, COUNT II, #413943 AND #500145, COUNTS I AND II AFFIRMED; SENTENCE ON BILL OF INFORMATION #409433, COUNT I, VACATED AND REMANDED FOR RESENTENCING ON THAT COUNT; DEFENSE COUNSEL'S MOTION TO WITHDRAW GRANTED.**