

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0910

STATE OF LOUISIANA

VERSUS

RICKY EARLY HILLS

Judgment Rendered: October 29, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case Number 10-08-0427
Honorable Michael R. Erwin, Presiding

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* * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The defendant, Rickey Earl Hills,¹ was charged by bill of information with possession of cocaine, a Schedule II controlled dangerous substance, a violation of La. R.S. 40:967(C). See La. R.S. 40:964. The defendant entered a plea of not guilty, was found guilty as charged after a jury trial, and was sentenced to five years of imprisonment at hard labor. The trial court denied the defendant's motion to reconsider sentence. The State filed a habitual offender bill of information, and the defendant was adjudicated a fifth-felony habitual offender. The trial court sentenced the defendant to fifty-four years of imprisonment.² The defendant now appeals and urges two assignments of error challenging the denial of his motion to reconsider sentence and motion to quash the habitual offender bill of information. For the following reasons, we affirm the conviction, the habitual offender adjudication, and the sentence of March 3, 2010, and we vacate the original sentence.

STATEMENT OF FACTS

On the night of September 6, 2008, officers of the Baton Rouge City Police Department came into contact with the defendant while on foot patrol to enforce a temporary curfew imposed after Hurricane Gustav. Specifically, the officers were conducting a walk-through at the North Foster Motel when the defendant was observed sitting on the edge of his bed, by the doorway, with a lighter and an approximately three-inch glass cylindrical pipe drawn to his mouth.³ The defendant was placed under arrest and a search incident to the arrest resulted in the

¹ The defendant's first name is interchangeably spelled as "Rickey" or "Ricky" in the record and the evidence presented in support of the predicate convictions.

² While the sentencing transcript reflects that the trial court was silent at the time of the sentencing as to the manner of service, in accordance with the minutes and criminal commitment, the sentence is to be served at hard labor.

³ There was no electricity or air conditioning as a result of the hurricane; the defendant's door, along with others in the complex, was open, and he was in plain view.

recovery, from the front pocket of defendant's shirt, of a rock-like substance later determined to be cocaine.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant challenges his habitual offender adjudication. The defendant specifically argues that the State did not sufficiently prove the prior convictions, noting that two of them were entered on the same date, September 8, 1994, that case number 02-03-555 had no fingerprints for comparison, and that for all of the alleged prior convictions, the State presented only a bill of information and a "fill in the blank" minute entry as proof of their existence. The defendant contends that testimony presented at the hearing on the motion to quash the habitual offender bill of information showed that the "fill in the blank" minute entries do not necessarily reflect what occurred, but only what should have occurred or what had been pre-typed using computer codes. The defendant argues that the State failed to comply with minimum requirements to prove that the defendant was a habitual offender and that the prior convictions were lawfully obtained.

If the defendant denies the allegations of the habitual offender 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 the pleas were taken. State v. Shelton, 621 So. 2d 769, 779 (La. 1993). 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 which 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. Shelton, 621 So. 2d at 779-80.

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, voluntary, and made with an articulated waiver of the three Boykin rights.⁴ Shelton, 621 So. 2d at 780; State v. Bickham, 98-1839, p. 4 (La. App. 1st Cir. 6/25/99), 739 So. 2d 887, 889-90.

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. See State v. Deville, 04-1401, p. 4 (La. 7/2/04), 879 So. 2d 689, 691 (per curiam).

In support of his argument that the minute entries used by the State herein are insufficient, the defendant cites State v. Longo, 560 So. 2d 530 (La. App. 1st Cir. 1990), and State v. Blunt, 464 So. 2d 869 (La. App. 4th Cir. 1985). In Longo, this court held that where a transcript of the plea of guilty is not introduced in evidence,

the state may not rely upon a pre-typed, pre-printed, or otherwise pre-fabricated fill-in-the-blank *extract* of the minutes of the court in which a predicate conviction occurred to prove a valid and knowing waiver of constitutional rights, because such an extract is not a true

⁴ Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), requires that a trial court ascertain, before accepting a guilty plea, that the defendant has voluntarily and intelligently waived: 1) his right against compulsory self-incrimination; 2) his right to trial by jury; and 3) his right to confront his accusers. Boykin only requires that a defendant be informed of these three rights.

minute entry, *i.e.*, a contemporaneous record of the prior proceeding. Instead, a copy of the *actual* minute entry itself must be introduced to prove advice of and a valid waiver of Boykin rights.

Longo, 560 So. 2d at 533 (citation omitted).

The habitual offender bill of information lists the following prior convictions in the Nineteenth Judicial District Court: a July 20, 1990 guilty plea to felony theft under docket number 03-90-0670, Section I; a September 8, 1994 guilty plea to simple burglary under docket number 01-94-0982, Section III; September 8, 1994 guilty pleas to two counts of forgery under docket number 07-94-1615, Section III; a June 9, 1997 guilty plea to simple burglary under docket number 03-97-0510, Section V; and October 1, 2003⁵ guilty pleas to two counts of simple burglary under docket number 02-03-0555, Section IV. While the defendant notes that two of his predicate convictions were entered on the same date, September 8, 1994, and should have been counted as one conviction under La. R.S. 15:529.1B, the trial court only adjudicated him to be a fifth-felony offender based on predicate convictions for four separate dates. Thus, the remaining issue is whether the evidence presented by the State established the existence of the prior convictions and that the defendant was represented by counsel when they were taken.

At the habitual offender proceeding, the State presented the bills of information and actual minute entries for each of the above noted prior convictions. At the hearing on the motion to quash, defense witness Yvette Whitfield, a Nineteenth Judicial District Court minute clerk, testified that a computer macro system that generates language is used to construct minute entries, including Boykin information. She confirmed that the defendant's and attorney's name and the charge are typed in. During cross-examination, Whitfield specified

⁵ The habitual offender bill of information provides an incorrect date for the guilty pleas for these particular prior convictions. The October 1, 2003 date is in accordance with corresponding minutes in evidence.

that when clerks convert in-court notes to typed minutes by computer, separate codes provide anticipated language, which is read by the clerks and checked for accuracy and is amended or supplemented when necessary.

The minute entries herein, unlike those in State v. Blunt and State v. Longo, reflect a full Boykin inquiry and the assistance of counsel. In Blunt, the minute entry was a form with blank spaces only for the defendant's and his attorney's names. In Longo, the minute entry had blank spaces for the defendant's name and age. In the instant case, based on the appearance of the minute entries and the testimony presented at the motion to quash hearing, we find that the minute entries were not pre-fabricated or pre-printed, and consisted of a contemporaneous record of a Boykin examination. As noted by the defendant, fingerprint evidence was linked to the defendant as to each predicate offense, with the exception of the 2003 simple burglary convictions.

To prove that a defendant is a multiple offender, the State must establish by competent evidence that there is a prior felony conviction and that the defendant is the same person who was convicted of the prior felony. State v. Chaney, 423 So. 2d 1092, 1103 (La. 1982). The Louisiana Supreme Court has held a conviction may be maintained by competent evidence other than fingerprints. State v. Payton, 00-2899, pp. 8-9 (La. 3/15/02), 810 So. 2d 1127, 1132. The 2003 convictions were linked to the defendant based on the name, date of birth, social security number, and address.⁶ A careful review of the documentation introduced by the State in support of the use of the predicates to establish the defendant's habitual offender status convinces us that the State met its initial burden under Shelton. Specifically, the State proved the existence of the convictions at issue and that the

⁶ With the exception of an address provided in the 1990 theft conviction (the oldest predicate), the 2003 predicate convictions and the other predicates had a matching date of birth, address, and social security number.

defendant was represented by counsel by introducing certified true copies of the bills of information and actual minutes for the guilty plea convictions. Thereafter, the 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 further burden to prove the constitutionality of the predicates at issue by “perfect” transcript or otherwise. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the trial court erred in denying his motion to reconsider sentence. The defendant argues that the trial court failed to consider that his non-violent history shows evidence of drug abuse and addiction. The defendant notes that the fifty-four-year imprisonment term was imposed after he informed the trial court he was forty-six, adding that this was arbitrary and essentially throws his life away with no possibility of rehabilitation for his drug addiction. The defendant also notes that despite his record, he was offered a three-year sentencing plea bargain prior to trial, with credit for the year and one-half he had already served. The defendant argues that the enhanced sentence ultimately imposed was severe, punitive, and unjustifiable based on these facts.

At the outset, we note that the trial judge did not vacate the original sentence before resentencing the defendant as a habitual offender. As it is apparent from the court's actions that it intended to vacate the original sentence, out of an abundance of caution, we vacate the first sentence. See State v. Thomas, 95-2348, pp. 6-7 (La. App. 1st Cir. 12/20/96), 686 So. 2d 145, 149, writ denied, 97-0192 (La. 3/14/97), 690 So.2d 36. See also La. R.S. 15:529.1(D)(3) (“and shall vacate the previous sentence if already imposed”).

We further note that the record does not reflect either an oral or written motion to reconsider the new sentence imposed on March 3, 2010. In felony

cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set, the State or defendant may make or file a motion to reconsider sentence. La. C.Cr.P. art. 881.1A(1). The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based. La. C.Cr.P. art. 881.1(B). Herein, the trial court advised the defendant that he had thirty days to file a motion for reconsideration of the new sentence. No such action was taken. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the State or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. La. C.Cr.P. art. 881.1(E). One purpose of the motion to reconsider is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The considerations that require giving the trial judge an opportunity to reconsider a sentence apply equally when a trial judge has imposed a new and different sentence. Accordingly, the defendant is procedurally barred from having his challenge to the new sentence reviewed by this court on appeal. State v. Smith, 03-1153, pp. 6-7 (La. App. 1st Cir. 4/7/04), 879 So. 2d 179, 183 (en banc); State v. Duncan, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So. 2d 1141, 1143 (en banc per curiam).

REVIEW FOR ERROR

The defendant asks 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 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. After a careful

review of the record in these proceedings, we have found no reversible errors. 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.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; ORIGINAL SENTENCE VACATED; AND SENTENCE OF MARCH 3, 2010 AFFIRMED.