NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 2159

STATE OF LOUISIANA

VERSUS

RICKY W. TISDALE

Judgment Rendered: June 8, 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 380891

The Honorable Allison H. Penzato, Judge Presiding

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* * * * * * * *

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs.

GAIDRY, J.

The defendant, Ricky W. Tisdale, was charged by amended bill of information with three counts of distribution of MDMA and one count of possession with the intent to distribute MDMA, violations of La. R.S. 40:966(A)(1).[1] The defendant initially pled not guilty. The defendant later changed his pleas to guilty as charged. Thereafter, the State filed a multiple offender bill of information, alleging the defendant was a fourth-felony habitual offender. The defendant initially admitted to the allegations in the multiple offender bill. At a subsequent hearing, the trial court sentenced the defendant, on each count, to fifteen (15) years at hard labor without benefit of parole, with the sentences to run consecutively. The defendant then submitted a motion to withdraw the guilty plea on the multiple offender bill, which the trial court granted. Later, the defendant submitted a motion to withdraw his motion to withdraw the guilty plea to the multiple offender bill. At a hearing on the multiple offender bill, the trial court found the defendant to be a fourth-felony habitual offender under La. R.S. 15:529:1. The trial court vacated the previously imposed sentences and resentenced the defendant on each count to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were to run concurrently. The defendant made an oral motion to reconsider sentences and advised the trial court of his intent to appeal. No written motion to reconsider the sentence was ever submitted. The defendant ultimately filed a pro-se motion for post-conviction relief seeking an out-of-time appeal, which was granted. The defendant now appeals, designating three assignments of error. We affirm the convictions, habitual-offender adjudications, and sentences.

[1] The defendant was also charged with one count of possession of a firearm by a convicted felon, but that charge is not part of this appeal.

FACTS

Due to the defendant's guilty pleas, the facts underlying the instant convictions were not fully developed. However, the State provided open-file discovery, and the State and the defendant agreed to stipulate that there were factual bases for the guilty pleas. According to the St. Tammany Parish Sheriff's Department Case Report, which is included in the record, the defendant was arrested after the St. Tammany Parish Narcotics Task Force conducted an undercover investigation into illegal drug activity at the defendant's residence. On November 5, 2003 the defendant sold twelve MDMA tablets to an undercover officer for $240. On November 12, 2003 the defendant sold ten MDMA tablets to the undercover officer for $200. Again, on January 2, 2004, the defendant sold fifteen MDMA tablets to the undercover officer for $260. Surveillance of the defendant's residence during this time period revealed frequent traffic to and from the house. The defendant was arrested and charged with one count of possession with intent to distribute MDMA on January 2, 2004, and at that time had $3,878 in cash in his pants pocket, including the bills received from the sales to the undercover officer. Around the same time as the defendant's arrest, narcotics officers conducted a search of his residence and found items with drug residue, numerous items of drug paraphernalia, a gun, and ammunition. Officers arrested several people who were at or came to the residence at the time of the search, some of whom stated that they had come to the residence to purchase MDMA, marijuana or cocaine.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant contends that the trial court erred in finding him to be a fourth-felony habitual offender. In support of this assignment of error, the defendant argues that his "enrolled counsel"

was not present when he admitted to the charges in the multiple offender bill, that there was no waiver of such counsel, that the counsel present with him apparently failed to review the multiple offender documents for legal sufficiency and failed to properly advise him, and that the trial court did not sufficiently explain his privilege against self-incrimination at trial. The defendant specifically recognizes that he is not raising an ineffective assistance of counsel argument, and that issue is not properly before the court.

We find no support for the defendant's position that the absence of his "enrolled counsel" created error. At a proceeding on March 2, 2009, the defendant pled guilty to counts 1-4 in the amended bill of information and admitted to the allegations in the multiple offender bill. Throughout this proceeding, the defendant was represented by Ms. Rachael Yazbeck instead of the defendant's counsel of record, Mr. James A. Williams. The minutes and transcript of the March 2, 2009 proceeding clearly show that Ms. Yazbeck appeared on behalf of the defendant, that the defendant was able to and did indeed consult with her during the proceeding, and even that the defendant admitted satisfaction with his lawyer's work. At no time did the defendant object to Ms. Yazbeck's representation, request his "enrolled counsel," or seek a continuance so that Mr. Williams could be present. Since the transcript plainly proves that Ms. Yazbeck was representing the defendant, and that this representation was acceptable to the defendant at that time, the defendant has waived any objections to this issue. Moreover, the defendant cites no authority for his argument that he is entitled only to representation by his "enrolled counsel."

Similarly, we find no support for the defendant's position that Ms. Yazbeck apparently failed to review the multiple offender documents for

legal sufficiency and failed to properly advise him. This argument appears to be based upon mere speculation, as nothing in the record supports the defendant's claims. Furthermore, the defendant has suffered no harm as a result of Ms. Yazbeck's representation at the March 2, 2009 proceeding. On August 18, 2009, while present in court with Mr. Williams, the defendant filed a motion to withdraw the guilty plea to the multiple offender bill, which the trial court granted. Then, on October 27, 2009, again while present in court with Mr. Williams, the defendant moved to withdraw his motion to withdraw the guilty plea on the multiple offender bill. Thus, the defendant ultimately admitted to the charges in the multiple offender bill with his "enrolled counsel" present. In making the latter motion, Mr. Williams stated as cause for the motion that "... he has had the opportunity to review the transcripts of the defendant's prior guilty pleas listed in the multiple offender bill. In the prior cases the defendant was properly advised of both his right to confront and cross exam [sic] witnesses against him, thereby complying with the provisions of Louisiana Code of Criminal Procedure article 556.1." These actions all occurred prior to the defendant's enhanced sentencing. Thus, the March 2, 2009 admission, as well as any "apparent" failures by Ms. Yazbeck, did not directly result in the defendant being adjudicated a multiple offender or receiving life sentences.

For the foregoing reasons, we find that the defendant's "enrolled counsel" argument is without merit.

Defendant also argues, in support of his contention that the trial court erred in adjudicating him a fourth-felony offender, that the trial court did not sufficiently explain his privilege against self-incrimination "at trial." At the outset, we note that the defendant apparently confuses his arguments, as Assignment of Error No. 1 concerns his adjudication as a multiple offender,

but in support of this Assignment of Error, the defendant argues that the trial court did not sufficiently instruct him regarding the waiver of privilege with respect to his guilty plea to the amended bill of information. The defendant also complains that the trial court failed to adequately explain his rights to him (though not his right against self-incrimination) before he admitted to the allegations in the multiple offender bill. Regardless of what the defendant intended to assign as error, we find that the trial court sufficiently explained the defendant's rights to him in both instances.

First, the defendant asserts that the advice he received regarding the privilege against self-incrimination in connection with his guilty pleas to the instant convictions did not meet the standard of certain Louisiana Supreme Court cases because the trial court did not specify that the privilege applied "at trial." See *State v. Robicheaux*, 412 So.2d 1313, 1316 (La. 1982) and *State v. Age*, 417 So.2d 1183, 1189 (La. 1981). In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must inform the defendant that by pleading guilty, he waives: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront his accuser. The judge must also ascertain that the accused understands what the plea connotes and its consequences. *State v. Henry*, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), only requires that a defendant be informed of the three rights enumerated above. The jurisprudence has been unwilling to extend the scope of *Boykin* to include advising the defendant of any other rights which he may have. See *Henry*, 788 So.2d at 541.

The advice concerning the privilege against self-incrimination given in this case is distinguishable from the cases cited by the defendant. In *Age*, the defendant simply signed a form that stated that he "... *by pleading guilty* waives right against self-incrimination." See *Age*, 417 So.2d at 1189. In *Robicheaux*, the trial court only told the defendant that by pleading guilty "You also give up the right to remain silent because by pleading guilty you're not remaining silent," and the record was devoid of evidence indicating that the defendant received advice concerning his privilege against self-incrimination from any other source. See *Robicheaux*, 412 So.2d at 1316.

In the instant case, the transcript of the proceeding indicates that at the time the defendant pled guilty to the charges in the amended bill of information: the defendant was represented by counsel; he was 30 years old; he had obtained his GED; he could read and write the English language; and he was not under the influence of any drugs, alcohol or other mind-altering substance that could affect his judgment. The trial court informed the defendant of the charges against him and the penalties for those offenses. The trial court then advised the defendant of his constitutional rights, as follows:

> [Court]: You have certain constitutional rights. You have the right to hire a lawyer of your choice to represent you. If you could not afford to hire one, one will be appointed to represent you without charge. You have the right to a trial in open court with or without a jury. At that trial you have the right to confront the witnesses who accuse you of having committed the crime. The State would be required to prove each and every element of the crime beyond a reasonable doubt. You would have the right to subpoena witnesses to testify on your behalf, *and you would have the right to invoke the privilege against self-incrimination and to remain silent.*
>
> If you were convicted at that trial, you have the right to appeal to the First Circuit Court of Appeal, the Louisiana

Supreme Court, and from there to the United States Federal Court.

After explaining these rights to the defendant, the trial court again asked if he understood the nature of the crimes that he was pleading guilty to, the possible penalties he could receive, and the constitutional rights discussed with him. The defendant, who was represented by counsel, answered affirmatively and acknowledged again that he did wish to waive all of his constitutional rights.

The context in which the privilege of self-incrimination is placed is significant. See *State v. Foy*, 2000-2521 (La. App. 1st Cir. 6/22/01), 808 So.2d 735, 738. Consideration of everything that appears in the record here convinces us that the defendant knowingly and intelligently waived his rights in pleading guilty to the charges in the amended bill of information. Unlike in *Age* or *Robicheaux,* which the defendant relies upon, the trial court in this case clearly placed the privilege against self-incrimination within the context of "at trial." Immediately preceding and following the description of the privilege, the court advised the defendant of his right to "a trial" with or without a jury, his right to confront witnesses, the State's burden to prove the crime beyond a reasonable doubt, and the right to appeal if convicted "at trial." There was no logical interpretation of the use of the privilege against self-incrimination other than "at trial." Thus, the trial court sufficiently explained the waiver of the privilege against self-incrimination to the defendant.

Finally, the defendant alleges that before he pled to the multiple offender bill of information the trial court did not sufficiently explain his rights to him, in particular what the State must prove at the multiple offender hearing. Prior to accepting a defendant's admission to the allegations of a

habitual-offender bill, the trial court must inform the defendant of "the allegation contained in the information and of his right to be tried as to the truth thereof according to law." La. R.S. 15:529.1(D)(1)(a). The trial court must also advise the defendant of the right to remain silent and of the right to a formal hearing wherein the State would have to prove the allegations of the habitual-offender bill. See *State v. Gonsoulin*, 2003-2473 (La. App. 1st Cir. 6/25/04), 886 So.2d 499, 501 (en banc), writ denied, 2004-1917 (La. 12/10/04), 888 So.2d 835. A full-fledged colloquy is not required. "The law requires that the record demonstrate that *the proceedings as a whole* were fundamentally fair and accorded the defendant due process of law." See *Gonsoulin*, 886 So.2d at 502. A trial court's failure to properly advise a defendant of his rights under the Habitual Offender Law requires that the habitual-offender adjudication and sentence be vacated. *State v. Gonsoulin*, 886 So.2d at 501. Compare *State v. Cook*, 2011-2223 (La. 3/23/12), 82 So.3d 1239 (per curiam).

In the instant case, at the arraignment on the multiple offender bill, the trial court informed the defendant of the allegations in the bill by having the bill read aloud for the record. Following the reading of the bill, the trial court informed the defendant that he had the right to a hearing, to be tried as to the truth of the allegations contained in the bill, that the State must prove the allegations contained in the bill, and that the defendant had the right to remain silent at that hearing. After this recitation of rights, the defendant, who was represented by counsel, admitted to the allegations. It is clear that the trial court sufficiently advised the defendant of his rights in that situation, complying with the requirements of La. R.S. 15:529.1(D)(1)(a) and in light of our decision in *Gonsoulin.*

We find the defendant's first assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 AND 3

In his second and third assignments of error, the defendant contends that the sentences of life imprisonment are legally infirm and unconstitutional and that the trial court erred in denying the motion to reconsider sentences, respectively.

At the outset, we note that the defendant's oral motion to reconsider sentence at the resentencing hearing did not include any grounds for the motion, and that no written motion to reconsider sentences was ever filed. Immediately before the trial court resentenced the defendant, the defendant argued for leniency in sentencing pursuant to *State v. Dorthey*, 623 So.2d 1276 (La. 1993). Specifically, the defendant objected to life sentences as out of proportion to the severity of the crimes, that the defendant had pled guilty, and that the predicate convictions listed in the multiple offender bill involved the sale of very small amounts of narcotics and were non-violent crimes. After hearing the defendant's arguments, the court proceeded directly to sentencing on the multiple offender bill, vacated the previous sentences, and resentenced the defendant to life in prison on each count. After detailing the factors that led to the decision to impose life sentences, the trial court stated that a life sentence was "... not grossly out of proportion to the seriousness of the offense. And therefore, does not find a life sentence constitutionally excessive as applied to this particular defendant. Any application for post-conviction relief must be filed within two years of the date this sentence becomes final. Anything further?" At this point the defense counsel stated:

> At this time, I'm going to file an oral motion for the Court to reconsider its sentence. I'll supplement that in writing. That

> motion needs to be filed so that I can reserve the right to appeal the Court's sentence.
>
> And also, Your Honor, notice our intent to appeal the sentencing in this matter to the First Circuit Court of Appeal. And likewise, we will supplement that in writing.

The trial court said those matters were noted for the record and that it would wait for the written motions. The record does not reflect that any such written motions were ever submitted.

Louisiana Code of Criminal Procedure art. 881.1, in pertinent part, provides:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> . . .
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> B. 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.
>
> . . .
>
> E. 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.

The defendant failed to comply with Article 881.1. He did not file a written motion to reconsider sentence. In addition, the oral motion the defendant made did not set forth a specific ground for reconsideration and thus, was not a properly made motion for reconsideration of sentence. Accordingly, in this case the defendant is procedurally barred from having his challenge to the sentences reviewed by this Court on appeal. See *State v. Duncan*, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). See *State v. Felder*, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827

So.2d 1173. Failure to urge a claim of excessiveness or any other specific ground for reconsideration of the sentence by oral or written motion at the trial court level precludes an appellate court's review of a defendant's claim of sentence excessiveness. *State v. Bickham*, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891.

Assignments of Error Nos. 2 and 3 are without merit.

DECREE

For the reasons set forth herein, we affirm the defendant's convictions, habitual-offender adjudications and sentences.

CONVICTIONS, HABITUAL-OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.