

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 1893

STATE OF LOUISIANA

VERSUS

VIRGIL L. SMITH

Judgment rendered March 27, 2009.

Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 437672
Honorable Donald M. Fendlason, Judge

HON. WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
AND
KATHRYN W. LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

FRANK SLOAN
MANDEVILLE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

ATTORNEY FOR
DEFENDANT-APPELLANT
VIRGIL L. SMITH

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

Handwritten signature and initials in black ink, located on the left side of the page.

PETTIGREW, J.

The defendant, Virgil L. Smith, was charged by bill of information with simple robbery (originally attempted simple robbery but later amended) and second degree battery, violations of La. R.S. 14:65 and La. R.S. 14:34.1. The defendant entered a plea of not guilty. Following a trial by jury, the defendant was found guilty as charged. The State filed a habitual offender bill of information as to both counts. The defendant denied the allegations of the habitual offender bill of information. The trial court denied the defendant's motion for post verdict judgment of acquittal and motion for new trial. Prior to the hearing on the habitual offender bill of information, the trial court sentenced the defendant to seven years imprisonment at hard labor on count one and five years imprisonment at hard labor on count two, to be served concurrently. After a hearing on the habitual offender bill of information, the defendant was adjudicated a fourth felony habitual offender. The trial court vacated the previously imposed sentences and imposed life imprisonment at hard labor on both enhanced counts, to run concurrently. The defendant now appeals, raising error as to the habitual offender adjudication. For the following reasons, we affirm the convictions, habitual offender adjudications, and sentences.¹

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in treating his two predicate convictions of public intimidation as two separate convictions in adjudicating him a fourth felony offender. The defendant specifically notes that the convictions were entered on the same day, prior to October 19, 2004. While conceding that he would still be a fourth felony offender even if the two convictions were counted as one conviction, the defendant argues that it cannot be assumed that the trial court would have sentenced him to life imprisonment if it had not believed him to be a fifth felony offender.

¹ The facts of the instant offenses are not relevant to the issue raised on appeal. The robbery and second degree battery offenses arise from acts that took place on October 17, 2007, while the defendant was incarcerated. The victims are fellow inmates.

The habitual offender bill of information lists the following predicate convictions: a June 22, 2004 conviction of convicted felon in possession of a firearm; a July 16, 2002 conviction of possession of cocaine; and two February 11, 2003 convictions of public intimidation.² The State introduced the certified copy of the minute entry for the above convictions and copies of the corresponding bills of information. Under **State ex rel. Mims v. Butler**, 601 So.2d 649 (La. 1992) (on rehearing), prior convictions had to precede the commission of subsequent felonies for sentencing enhancement purposes. **State v. Johnson**, 2003-2993, p. 18 (La. 10/19/04), 884 So.2d 568, 579, however, held that **Mims** was incorrectly decided on the basis of an incomplete legislative record and expressly overruled the decision. Thereafter, effective August 15, 2005, La. R.S. 15:529.1B was amended to add: "[m]ultiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction for the purpose of this Section." See 2005 La. Acts No. 218, § 1.

The instant offenses were committed on October 17, 2007, after the effective date of 2005 La. Acts No. 218, § 1. The applicable habitual offender provisions are those in effect on the date the defendant committed the underlying offense. **State v. Parker**, 2003-0924, p. 17 (La. 4/14/04), 871 So.2d 317, 327. Thus, the defendant is correct in that the habitual offender law in effect on August 15, 2005, controlled this case.

Although the defendant filed a motion to quash the habitual offender bill of information and entered a general objection after the trial court imposed the enhanced sentences, the defendant did not raise the instant issue below. Further, the defendant did not file a motion to reconsider the enhanced sentences. Generally, under the clear language of La. Code Crim. P. art. 881.1E, failure to make or file a motion to reconsider

² The habitual offender bill of information also lists a predicate conviction for forcible rape. The forcible rape conviction was not considered in the instant habitual offender adjudication. The forcible rape conviction is the underlying felony used in the convicted felon in possession of a firearm predicate conviction. Although the defendant's appeal brief cites the jurisprudential holding regarding the use of the underlying felony in a convicted felon in possession of a firearm conviction to enhance a subsequent conviction, this is not at issue in the instant case since the forcible rape conviction was not used to enhance the defendant's convictions.

sentence precludes a defendant from raising an objection to the sentence on appeal.³ Accordingly, in this case the defendant is procedurally barred from having this challenge to the sentencing reviewed on appeal. See La. Code Crim. P. art. 841; **State v. Felder**, 2000-2887, p. 10 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Nonetheless, as explained below, there is no merit to the defendant's claim. First, the record indicates that the trial court considered the two convictions in question, entered on the same date, as one conviction. After listing the prior convictions and stating that the evidence of such was convincing, the trial court specifically stated that the defendant had "three previous convictions." The trial court properly sentenced the defendant pursuant to La. R.S. 15:529.1A(1)(c)(i). The trial court reviewed the sentencing guidelines of La. Code Crim. P. art. 894.1 and stated, in part, that lesser sentences would deprecate the seriousness of the defendant's crimes.

As noted by the defendant, he is a fourth felony offender regardless of whether the public intimidation convictions are treated as one or as two separate convictions, and the sentencing range would be the same. There is nothing in the record to suggest that the trial court considered the public intimidation convictions as two separate convictions. Moreover, it would not be improper for the trial court to consider the fact that the defendant actually had four previous convictions in sentencing the defendant within the range for a fourth or subsequent felony offender. This assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.

³ Louisiana Code of Crim. P. art. 881.2 provides two exceptions to this general rule, neither of which are applicable to the defendant in this case.