NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

FREDERICK F. WILBERT

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

01-KA-1371

APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 97-2116, DIVISION "C,"
HONORABLE ALAN J. GREEN, PRESIDING.

APRIL 30, 2002

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges James L. Cannella
Thomas F. Daley and Walter J. Rothschild.

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SENTENCE VACATED; CASE REMANDED WITH INSTRUCTIONS

WJR

JKC

T.D.

This is defendant's second appeal to this Court. On March 25, 1997, the Jefferson Parish District Attorney filed a bill of information charging defendant, Frederick Wilbert, with three counts of armed robbery, a violation of LSA-R.S. 14:64. Defendant was arraigned on May 9, 1997, and pled not guilty.

In response to a defense motion, Count 2 was severed from counts 1 and 3 Defendant waived his right to a jury trial as to counts 1 and 3. On January 26, 1999, a bench trial was held as to those two counts. The judge found defendant guilty as charged as to Count 1. As to Count 3, the judge found defendant guilty of the lesser offense of first degree robbery, LSA-R.S. 14:64.1. On January 27, 1999, defendant was tried by a 12-member jury as to Count 2. The jury returned a verdict of guilty as charged. Defendant filed pro se motions in arrest of judgment and for new trial, both of which the trial court denied. Defense counsel filed motions for new trial and post verdict judgment of acquittal. Those motions were also denied.

On March 26, 1999, the trial court sentenced defendant to 99 years at hard labor on each of the two armed robbery convictions, without benefit of parole, probation or suspension of sentence. As to the first degree robbery conviction, the court sentenced defendant to 40 years at hard labor without benefit of parole,

probation or suspension of sentence. The court further ordered that the sentences run concurrently.

On April 12, 1999, defendant filed a motion to reconsider the sentences. The pleading, signed by the trial judge, states that the motion to reconsider the sentences is "granted/denied for the reasons orally assigned on the record." However, the record contains no clear ruling on the motion. The state filed a habitual offender bill of information, alleging defendant to be a third felony offender. On May 19, 1999, defendant was informed of his constitutional rights, and admitted to the allegations in the habitual offender bill. Defendant reserved his right to challenge his habitual offender sentence. The trial judge found defendant to be a third felony offender, and sentenced him to life imprisonment without benefit of parole, probation or suspension of sentence. LSA-R.S. 15:529.1A(b)ii.

Defendant took an appeal to this Court. In an opinion not designated for publication, this Court affirmed defendant's convictions. It also vacated defendant's enhanced sentence and remanded the case to the trial court for re-sentencing. See, State v. Wilbert, 00-KA-113 (La. App. 5 Cir. 5/30/00). (Attached hereto as Appendix "A"). This Court noted that the trial court had failed to vacate defendant's original sentence before imposing the enhanced sentence, and that the habitual offender sentence was thus null and void. This Court further noted that the trial court had erred in failing to issue a clear ruling on defendant's motion to reconsider sentence. Lastly, this Court ordered that the trial court inform defendant of the prescriptive period for filing an application for post-conviction relief.

The trial court acted on the remand on July 10, 2000. At that time defendant made an oral motion to withdraw his admission to the allegations in the habitual offender bill. The court denied this motion. The judge then vacated

defendant's sentences as to all three charges, and imposed a habitual offender sentence of life imprisonment without benefit of parole, probation or suspension of sentence. The court also denied defendant's motion to reconsider sentence.

On October 8, 2001, defendant filed an application for post conviction relief, requesting leave to file an out-of-time appeal. On October 18, 2001, the trial court issued an order granting defendant an out-of-time appeal. Defendant now appeals on the basis of two assignments of error.

FACTS

Given that defendant raises only sentencing issues herein, the underlying facts are not necessary to a disposition of those issues. For reference purposes, however, a copy of this Court's opinion in defendant's first appeal follows as Appendix "A." It contains a full discussion of the facts.

DISCUSSION

By his first assignment, defendant argues that the trial court should have allowed him to withdraw his guilty plea to the habitual offender bill of information. Defendant cites as authority LSA-C.Cr.P. art. 559A, which provides, "The court may permit a plea of guilty to be withdrawn at any time before sentence." Defendant argues that his guilty plea was not made knowingly and voluntarily, and was therefore not valid. Defendant's argument is misplaced.

Defendant admitted to the allegations in the habitual offender bill, which is an enhancement tool. He did not plead guilty to a substantive offense. Therefore, the provisions of Article 559 do not apply here.

It is well settled that in a habitual offender proceeding, the trial court must advise the defendant of his right to remain silent and his right to a hearing at which the state is required to prove the allegations of the multiple bill. State v. Walker, 01-348 (La. App. 5 Cir. 8/21/01), 795 So.2d 459, 463; State v. Chirlow, 99-142 (La. App. 5 Cir. 6/1/99), 738 So.2d 679, 684, writ denied, 99-1996 (La.

1/7/00), 752 So.2d 176. The record shows defendant expressed his wish to admit to the allegations in the habitual offender bill. The trial judge then explained to defendant his right to remain silent and his right to a hearing on the matter. The judge also informed defendant that he was subject to a mandatory life sentence as a third felony offender. The prosecutor noted that he had supplied defendant with copies of the convictions he intended to use as evidence should the state be required to prove its allegations.

Defendant stated that he understood his rights, and wished to waive them. He stated he was in no way coerced to admit to the state's allegations. Defendant and his attorney also signed a waiver of rights form which listed his rights with respect the habitual offender proceedings, and the sentence he would receive should he admit to the state's allegations.

The record does not show that any plea bargain was struck between the parties. It is therefore unclear what motivated defendant to admit to the allegations in the habitual offender bill, and to thereby submit to a mandatory life sentence. Nevertheless, the record shows that defendant's admission was made knowingly and voluntarily, after he was fully informed of his rights. Defendant argues the record clearly shows he was confused about the consequences of entering the admission. We do not find this to have been the case. When asked by the judge whether he understood his rights as explained to him, defendant responded affirmatively.

Defendant argues he was entitled to a hearing on his motion, and that the court denied him that right. The courts have held that when a motion to withdraw a guilty plea is made under LSA-C.Cr.P. art. 559, a court may hold an evidentiary hearing, but is not required to do so. State v. Burnett, 33,739, p. 11 (La. App. 2 Cir. 10/4/00), 768 So.2d 783, 791; State v. Greer, 572 So.2d 1166, 1169 (La. App. 1 Cir. 1990). As previously stated, defendant's argument does not concern

a substantive guilty plea to which Article 559 would clearly apply, and we find no error by the trial court in failing to hold a hearing on this issue. Further, as we find defendant understood the ramifications of his admission, we fail to find that the trial court erred in refusing to allow defendant to withdraw his admission to the habitual offender allegations. This assignment is without merit.

By his second assignment, defendant contends that error patent occurred when the trial court erred in sentencing the defendant on the multiple bill rather than a particular, predicating offense. Specifically, defendant argues that the trial court erred in vacating his sentences on all three counts, but imposing only one habitual offender sentence. We agree.

In the habitual offender bill of information, the state indicated that the sentence on Count 2 of the bill of information was the one it sought to enhance. Although this Court directed the trial court to vacate the "enhanced sentence" and re-sentence defendant as an habitual offender, the judge vacated all three of defendant's sentences. The trial court stated:

> All right. On remand from the Fifth Circuit, Mr. Wilbert, the Court has been informed that in sentencing you on the multiple bill, the Court failed to vacate the previous sentences of ninety-nine years, ninety-nine years, and forty years, on the convictions for armed robbery, two counts, and the first degree robbery of one count.
>
> The Court is now going to vacate those sentences and at this time I am going to sentence you to life imprisonment without benefit of parole, probation or suspension of sentence. . . .

The commitment pertaining to defendant's re-sentencing states, "The Defendant is sentenced to 99 years on count 1 concurrently. Life in prison on count 2 concurrently. 40 years on count 3 concurrently." While the commitment reflects compliance with this Court's instructions, it clearly conflicts with the transcript. When such is the case, the jurisprudence generally provides that the transcript prevails. State v. Lynch, 441 So.2d 732, 734 (La. 1983). It is evident,

based on the transcript, that the trial court failed to comply with this Court's order. Defendant now has three convictions, but only one sentence.

A trial court must impose a separate sentence for each count for which the defendant was convicted. Patent sentencing error occurs when a trial court, in sentencing for multiple counts, does not impose a separate sentence for each count. State v. Williams, 00-1850 (La. App. 5 Cir. 4/11/01), 786 So.2d 785, 797. Based on the foregoing, we find that the case again must be remanded to the trial court with instructions to re-sentence defendant, imposing a separate sentence as to each count. The trial court should also specify which sentence it is enhancing.

ERRORS PATENT DISCUSSION

The record was also reviewed for errors patent. LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990).

The July 10, 2000 commitment reflects that defendant "pleaded GUILTY under RS 15:529.1 on count 2) 14:64 F II ARMED ROBBERY."

The commitment should show that defendant was found guilty by a jury as to Count 2, and that he admitted to (or "pled guilty" to) the allegations in the habitual offender bill. The trial court is hereby ordered to amend the minute entry to correct this error.

In remanding the matter to the trial court, this Court ordered that defendant be informed of the two-year prescriptive period for post-conviction relief under LSA-C.Cr.P. art. 930.8. The trial court instructed defendant of the two-year prescriptive period, but improperly informed defendant that the period would begin on "today's date." The article provides that the prescriptive period begins to run when the judgment of conviction and sentence becomes final. The trial court is hereby ordered to inform defendant of this provision.

CONCLUSION

Accordingly, for the reasons assigned herein, defendant's sentence is vacated and the case is remanded for resentencing. The trial court is instructed to re-sentence defendant, imposing a separate sentence as to each of the three counts on which he was convicted. As to the habitual offender sentencing, the trial court must also specify which count (count 2) it is enhancing. Further, on remand, the trial court is instructed to correctly inform the defendant of the prescriptive provisions for seeking post-conviction relief pursuant to La. R.S. C.Cr.P. art. 930.8.

SENTENCE VACATED; CASE REMANDED WITH INSTRUCTIONS

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	00-KA-113
VERSUS	*	COURT OF APPEAL
FREDERICK F. WILBERT	*	FIFTH CIRCUIT
	*	STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
DOCKET NO. 97-2116, DIVISION "C"
HONORABLE ALAN J. GREEN, JUDGE

CHARLES GRISBAUM, JR.

CHIEF JUDGE

MAY 30, 2000

(Court composed of Judges Charles Grisbaum, Jr., James L. Cannella and Susan M. Chehardy)

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CONVICTIONS AFFIRMED; ENHANCED SENTENCE VACATED; AND REMANDED WITH INSTRUCTIONS AND FOR RE-SENTENCING

Defendant, Frederick F. Wilbert, appeals his conviction of two counts of armed robbery, La. R.S. 14:64, and one count of first degree robbery, La. R.S. 14:65, and his sentence of life imprisonment at hard labor. We affirm and remand.

ASSIGNMENTS OF ERROR

Defendant assigns as error the following, to-wit:

1) The verdict as to Count One was contrary to the law and evidence presented at trial.

2) The verdict as to Count Two was contrary to the law and evidence presented at trial.

3) The Trial Court erred by allowing evidence of "other crimes" into the trials without requiring "clear and convincing" proof that the defendant committed them.

4) The Trial Court committed error patent by sentencing the defendant to life imprisonment as an habitual offender without vacating any of the predicating sentences.

Defendant's original brief at pp. 3, 4.

FACTS

Defendant, Frederick F. Wilbert, was charged in a single bill of information with three counts of armed robbery. Count one was related to the December 20, 1996 armed robbery of a teller, June Lester, at Whitney National Bank, located at 5500 Veterans Boulevard. Count two was related to the January 9, 1997 robbery of a teller, Cresieda Luna, at Hibernia Bank, located at 4949 West Esplanade. Count three was related to the January 21, 1997 armed robbery of a teller, Wendy Castillo, at Hibernia National Bank, located at 2201 Veterans Boulevard. Counts one and three were tried by the trial judge on January 26, 1999; while count two was tried by jury on January 27, 1999. The defendant was found guilty as charged on counts one and two and guilty of the responsive verdict of first degree robbery on count three. The defendant was sentenced, without benefit of parole, probation or suspension of sentence, to 99 years on count one, 99 years on count two and 40 years on count three, to run concurrently. The defendant was then found to be a third felony offender and was sentenced to life imprisonment.

LAW AND ANALYSIS -- ISSUE ONE

Defendant contends that the evidence was insufficient to convict him of the count one armed robbery, and specifically, that no one at trial definitively identified the him as the robber. We disagree.

In reviewing claims challenging the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original).

After a thorough review of the record, in the light most favorable to the prosecution, we conclude that the evidence was sufficient to convict the

defendant of count one. Although she did not testify at trial, teller, June Lester, described the robber to Deputy Ronald Walker immediately after the robbery. According to Ms. Lester, the robber was a white male in his twenties, six feet in height, and weighing 165 pounds. He was wearing a blue parka-type hooded jacket. Mary Gigglio, the Assistant Manager of the Veterans branch of Whitney National Bank, testified that Ms. Lester informed her that the robber was a male with a gun, who demanded hundred-dollar bills. Mary Frank, a customer entering the bank during the robbery, testified that she saw the door to the bank burst open and a person run to a dark blue, two-door car. The individual was wearing long-sleeved clothing and had something hidden under his shirt. He also wore a knitted or crochet hat.

Deputy Henry Bonds' testimony established a connection between the defendant and the robber's getaway car. According to Deputy Bonds, on December 7, 1996, he investigated a DWI involving a one-car accident. The motorist, identified as Frederick Wilbert, IV, was driving a 1975 two-door medium to dark blue Oldsmobile.

The trial judge weighed the testimony of these witnesses and the surveillance photographs taken on the day of the robbery, as well as the link between the defendant and the matching description of the car used for the robber's getaway, and concluded that the defendant was the same individual depicted in the photographs. We, too, find that the evidence was sufficient to convict the defendant of the count one armed robbery.

LAW AND ANALYSIS -- ISSUE TWO

Similarly, the defendant contends the evidence was insufficient to convict him of the count two armed robbery, and specifically, that no one at trial definitively identified him as the robber. We disagree.

Cresieda Luna, the Hibernia teller who was the victim of this robbery, testified at trial. According to Ms. Luna, a white male with a goatee and clear, striking eyes entered the bank through the back door. He pointed a gun at her and told her he was going to blow her brains away if she did not give him the money, in hundred-dollar bills. She further testified that the man appeared to be 26 or 27 years old and was wearing several jackets, including a hooded one. Because his head was covered, she could not determine the color of his hair. She gave the robber the money, and he exited through the back door.

Two other witnesses also testified to the robber's physical appearance and actions. Carol Emmert, the central teller, testified that the robber first approached her window. She told him her window was closed, and he proceeded to Ms. Luna's window. He was in his twenties, weighed approximately 185 pounds, and wore a hooded dark green jacket, and exited out the back door. Johnny Selva, another employee, also observed the robber. He testified that the robber had a goatee and beard and wore a hood that covered his hair. He cursed the teller and demanded hundred-dollar bills. When the robber noticed Mr. Selva, he pointed the gun toward him. He also stated that the robber left through a back door. The foregoing shows that the defendant's physical appearance matches the witnesses' descriptions of the robber.

Based on the foregoing and the standard pronounced in Jackson, we find that the evidence adduced at trial was sufficient to convict the defendant of the count two armed robbery.

LAW AND ANALYSIS -- ISSUE THREE

Defendant asserts that evidence of other crimes was improperly admitted in both trials because there was not clear and convincing evidence that the defendant committed them. We disagree.

Generally, evidence of other crimes, or bad acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. La. Code Evid. 404(B)(1). It may, however, be admissible for other purposes, such as plan, knowledge, identity, or absence of mistake or accident. Id. If the state intends to use such evidence, the state shall provide the defendant reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial, if the defendant requests notice. If such evidence is used, the state must prove each offense by a preponderance of evidence. State v. Hernandez, 98-448, pp. 16-18 (La. App. 5th Cir. 5/19/99), 735 So. 2d 888, 897-899, writ denied, 99-1688 (La. 11/12/99), 750 So. 2d 194.

Here, evidence of the second robbery was introduced in the first trial to prove the first and third robberies, and evidence of the first and third robberies was introduced in the second trial to prove the second robbery.

In the third robbery, the conviction of which the defendant does not contest, Mary Castillo, a teller at Hibernia National Bank located at 2201 Veterans Highway, was approached by a white male with blue eyes, wearing a windbreaker-type jacket and a knit cap. He demanded fifties and hundreds and threatened to blow her head off if she did not comply. She gave the robber the money, and he exited through a back door. Another teller described the robber exactly as Ms. Castillo described him.

Approximately five minutes after the robbery, Deputy Matthew Bonurn was called to the scene of an automobile accident three to five blocks from the bank. There, he observed a blue Cadillac and a Chevrolet Nova. The driver of the Cadillac had left the vehicle. The officer found bands of money on the floor of the Cadillac. The Cadillac was registered to Frederick Wilbert. Several officers assisted in a search for the driver, whom they found in a drainage canal. Teller,

Castillo, accompanied the officers to the scene, where she identified the driver as the perpetrator of the bank robbery.

The similarities between this robbery and the other two robberies establish a modus operandi, or plan, to commit several armed robberies, and thus, evidence of the second robbery was properly admitted to prove the first and third robberies and evidence of the first and third was also admissible to prove the second robbery. In all three incidences, the descriptions of the robbers included a white male with light-blue eyes, wearing a lightweight jacket, a knit cap and gloves. The robber, in each, entered the bank from a back door, demanded fifties and hundreds, threatened the teller, did not carry a bag, exited on foot, and drove himself away from each scene in a blue car. Furthermore, the robberies were committed at approximately the same time of day, in a period of about a month, and very close in proximity. Based on these similarities, we find that the state proved that the defendant committed the other robberies to establish the defendant's modus operandi.

LAW AND ANALYSIS -- ISSUE FOUR

By this assignment, the defendant alleges three errors patent: that the trial judge failed to vacate his predicate sentence before sentencing him to life imprisonment as a habitual offender; that the trial judge failed to give him credit for time served, and that the trial judge failed to inform him of the applicable period for seeking post-conviction relief. The transcript reveals that the trial judge did not vacate the defendant's predicate sentence, as required by La. R.S. 15:529.1D(3). The failure to vacate the predicate sentence causes the original sentence to remain in effect, and makes the subsequent sentence as a habitual offender null and void. State v. Wilson, 99-214 (La. App. 5th Cir. 6/30/99), 743 So. 2d 728. Accordingly, we must vacate the enhanced sentence and remand this matter to the trial court for re-sentencing as a habitual offender.

Additionally, we note that the trial court failed to rule on the defendant's motion to reconsider sentence. While the trial judge signed an order pertaining to such motion, his ruling on that motion is unclear. We, therefore, instruct the trial judge to clarify his ruling.

The record also shows that the trial court failed to inform the defendant of the applicable period for seeking post-conviction relief. We, therefore, instruct the trial court to send the defendant written notice that he has two years from the finality of his conviction and sentence to seek post-conviction relief. La. Code Crim. P. art. 930.8. This notice should be sent within ten days of the rendering of this opinion.

Finally, credit for prior custody is now self-operating. La. Code Crim. P. art. 880. Therefore, the trial court did not need to verbally give the defendant such credit.

For the reasons assigned, we affirm the defendant's convictions, vacate the enhanced sentence, and remand this matter to the trial court for clarification of its ruling on defendant's motion to reconsider sentence, re-sentencing as a habitual offender, and notification to the defendant of the two-year period for seeking post-conviction relief.

CONVICTIONS AFFIRMED;
ENHANCED SENTENCE VACATED;
AND REMANDED WITH INSTRUCTIONS
AND FOR RE-SENTENCING

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY APRIL 30, 2002
TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.
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