

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1418

STATE OF LOUISIANA

VERSUS

TORONZO THOMPkins

Judgment Rendered: May 4, 2007.

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On Appeal from the
17th Judicial District Court,
in and for the Parish of Lafourche,
State of Louisiana
Trial Court No. 399480

Honorable Walter I. Lanier, III

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State of Louisiana

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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

Whipple, I concur

SAK
JLM

CARTER, C.J.

The defendant, Toronzo Thompkins, was charged by bill of information with distribution of a Schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967A(1). The defendant pled not guilty. Subsequently, the State amended the bill of information to additionally charge the defendant as “a multiple offender” (second or subsequent offender) under LSA-R.S. 40:982, alleging that he had previously been convicted of possession of cocaine and possession with the intent to distribute cocaine. The defendant was arraigned and pled not guilty to the amended charge. Following a jury trial, the defendant was unanimously found guilty as charged. The defendant filed motions for postverdict judgment of acquittal and new trial. His motion for new trial was denied.¹ The defendant was sentenced to thirty-five years imprisonment at hard labor, with four years of the sentence to be served without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, designating one assignment of error.² We vacate the defendant’s conviction and sentence for the second or subsequent offense distribution of cocaine. We order the entry of a modified judgment of conviction for the lesser offense of distribution of cocaine in violation of LSA-R.S. 40:967A(1). The case is remanded to the trial court for resentencing on the modified judgment of conviction.

¹ There was no ruling on the defendant’s motion for postverdict judgment of acquittal. However, such failure to rule on this motion did not “inherently prejudice” the defendant. See **State v. Price**, 05-2514, p. 21 (La. App. 1 Cir. 12/28/06), ___ So.2d ___, ___ (en banc).

² The defendant filed a supplemental brief that raises no new issues. Rather, it is essentially a response to the State’s brief.

FACTS

On December 9, 2003, Captain B.J. Rock with the Assumption Parish Sheriff's Office was working with the Lafourche Parish Drug Task Force in an undercover capacity to make drug purchases. Donnie Danos, a confidential informant working with the Lafourche Parish Drug Task Force, contacted the defendant, whom Danos knew, to arrange a drug purchase. Captain Rock and Danos met the defendant at Bollinger's Shipyard in Lafourche Parish. Captain Rock purchased six rocks of crack cocaine from the defendant for \$100.00.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that he was convicted pursuant to LSA-R.S. 40:982, a "non-existent crime." Specifically, the defendant contends that his conviction and sentence should be vacated because evidence of his prior convictions was included in the bill of information and presented to the jury at the trial. The erroneous introduction of such evidence, according to the defendant, was "severely prejudicial" and cannot be deemed harmless.

As previously noted, the bill of information was amended to charge the defendant as a "multiple offender" pursuant to LSA-R.S. 40:982. Following jury selection, but prior to the reading of the bill of information and the preliminary jury instructions, defense counsel objected to the jury being instructed on the defendant's previous convictions. After lengthy discussion, the trial court overruled the objection. Prior to opening statements, the deputy clerk read the bill of information to the jury. The reading of the bill included the defendant's two previous 1997 drug convictions. The trial court then informed the jury that the defendant had been charged with distribution of cocaine as a second or subsequent drug offender and that, if the jury found that the defendant was previously

convicted, he was subject to an enhancement penalty if he was found guilty of the present charge.

In opening statement, the prosecutor informed the jury that the defendant was accused of being a second or subsequent drug offender and that, through court records, the State would show that the defendant was convicted both of possession of cocaine and possession with intent to distribute cocaine in 1997. During the trial, with the jury present, the parties stipulated that the defendant in the present case was the same person who was previously convicted of the two previous 1997 drug-related crimes listed in the bill of information. The parties further stipulated that those previous convictions were violations of LSA-R.S. 40:982. During closing argument, the prosecutor reiterated that the defendant stipulated that he was the same person who had been previously convicted of possession of cocaine and possession with intent to distribute cocaine. Following closing arguments, the jury instructions by the trial court included the following: "The defendant has been charged in the bill of information with having committed the offense of distribution of cocaine after being previously convicted of possession of cocaine and possession with the intent to distribute cocaine."

In **State v. Skipper**, 04-2137, p. 23 (La. 6/29/05), 906 So.2d 399, 415, our supreme court held that "[LSA-]R.S. 40:982 is a sentencing enhancement provision which must be implemented after conviction similar to [LSA-]R.S. 15:529.1." In finding that LSA-R.S. 40:982 was not to be treated as a substantive element of the presently charged offense, the **Skipper** court concluded:

Specifically, the allegations of the prior offense must not be placed in the charging instrument of the second or subsequent drug-related offense nor may evidence of the prior offense be presented to the jury determining the defendant's guilt or innocence in the trial of the second or subsequent drug-related offense for the purpose of sentence enhancement under [LSA-]R.S. 40:982.

Skipper, 04-2137 at p. 25, 906 So.2d at 417.

In the instant matter, allegations of the defendant's prior offenses were placed in the charging instrument. Further, evidence of his prior offenses was presented to the jury at the trial. However, a **Skipper** error is not a structural error and is, therefore, subject to harmless error analysis. See State v. Ruiz, 06-1755, p.7 (La. 4/11/07), ___ So.2d ___, ___.³ The test for determining whether an error is harmless is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

At the trial of this matter, Captain B.J. Rock, the commander of the Narcotics Division with the Assumption Parish Sheriff's Office, testified that he assisted the Lafourche Parish Drug Task Force in making a recorded controlled drug buy from the defendant. In an undercover capacity and wired for audio transmission, Captain Rock met the defendant at Bollinger's Shipyard in Lafourche Parish and purchased six rocks of crack cocaine from the defendant for \$100.00. Two days later, Captain Rock viewed a photograph lineup and picked out the defendant as the person who sold him the crack cocaine. Captain Rock also

³ The Supreme Court also noted in **Ruiz** that the rule announced in **Skipper** applies retroactively to non-final decisions. See Ruiz, 06-1755 at p.5, ___ So.2d at ___.

identified the defendant in open court as the person who sold him the crack cocaine.

Donnie Danos, who worked as a confidential informant for about two years with the Lafourche Parish Drug Task Force, testified that he set up the drug deal with the defendant. Danos called the defendant on a cell phone and told him that he wanted to buy some crack cocaine. Danos did not know the defendant as Toronzo Thompkins, but only as "T" or "Tonto." During the six-month period prior to the drug purchase at issue, Danos had called the defendant eight or ten times and met with him to purchase drugs. In the ten-year period prior to the drug purchase at issue, Danos testified that he met with the defendant eighty or ninety times. During the drug purchase at issue, Danos rode in the passenger seat while Captain Rock drove. When they arrived to meet the defendant, the defendant approached them in a white Buick or Pontiac. Danos testified that he waived at "T" and told Captain Rock that the driver was "T." Only Captain Rock exited the vehicle to make the drug purchase. Danos stayed in the vehicle and did not participate in, or hear, the transaction.⁴ Both Danos and Captain Rock testified that a female was in the passenger seat of the vehicle the defendant was driving. Captain Rock testified that there was also a young child in the back seat. Danos testified that he had seen both the white vehicle and the girl before. He had seen the white vehicle at apartments where the defendant had lived in the past. Danos testified he had visited the defendant a few times at these apartments. Approximately ten months later in October 2004, Danos viewed a photograph

⁴ Captain Rock and Danos rode in a red truck equipped with mounted cameras for videotaping undercover drug transactions. Because the defendant's vehicle passed the red truck before stopping, the truck's cameras were unable to capture the defendant making the drug transaction.

lineup and picked out the defendant as the person who sold him the crack cocaine. Danos also testified that he was certain that the defendant was the person he knew as "T."

During its posttrial jury instructions, the trial court gave a limiting instruction to the jury that the defendant's prior convictions were not to be considered in the determination of the defendant's guilt or innocence on the present charge. Specifically, the trial court stated:

If you find that the defendant was previously convicted, as alleged, then he is subject to an enhancement penalty if you find him guilty of the conduct charged in this bill of information. The prior convictions are alleged, solely, to enhance penalty if you convict the defendant of the offense charged. You are not to consider, or in any way take the prior convictions into account, in determining the defendant's guilt or innocence of the conduct charged in this bill of information.

Considering the foregoing, we are convinced that the guilty verdict rendered in this trial was surely unattributable to the fact that the jury was exposed to evidence of the defendant's prior drug convictions. See State v. Smith, 06-0820, p. 8, (La. App. 1 Cir. 12/28/06), ___ So.2d at ___, ___. We find also that the LSA-R.S. 40:982 (second or subsequent offense) conviction is severable from the portion of the conviction that relied upon LSA-R.S. 40:967A(1) (distribution of cocaine), the most recent conduct. Accordingly, we vacate the second or subsequent drug conviction portion of the defendant's conviction and sentence under LSA-R.S. 40:982 and enter a modified judgment of conviction for the most recent conduct of distribution of cocaine in violation of LSA-R.S. 40:967A(1). See Smith, 06-0820 at p. 7, ___ So.2d at ___. This case is remanded for resentencing on the modified judgment of conviction.

ORIGINAL CONVICTION VACATED AND MODIFIED TO DISTRIBUTION OF COCAINE AND, AS MODIFIED, CONVICTION AFFIRMED. SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING ON MODIFIED JUDGMENT OF CONVICTION.