NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0980

STATE OF LOUISIANA

VERSUS

ANDREW K. GALATAS

Judgment Rendered: DEC 2 2 2010

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 414501-1

Honorable William J. Knight, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

Whipple, J. concurs. Given this court's prior published decision in State v. Smith, which we are bound to follow, the result reached herein is legally correct.

McCLENDON, J.

The defendant, Andrew K. Galatas, was charged by bill of information with possession with intent to distribute marijuana, a violation of LSA-R.S. 40:966(A)(1) (count 1); and pornography involving juveniles, a violation of LSA-R.S. 14:81.1 (count 2). He pled not guilty, but following a jury trial he was found guilty as charged on both counts. The State subsequently filed a habitual offender bill of information. At the habitual offender hearing, the defendant was adjudicated a fourth-felony habitual offender and was sentenced to sixty years imprisonment at hard labor without benefit of probation or suspension of sentence for the possession with intent to distribute marijuana conviction (count 1). He was sentenced to forty years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence for the pornography involving juveniles conviction (count 2). The sentences were ordered to run consecutively. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating the following three assignments of error:

1. The trial court erred by failing to arraign the defendant on the multiple offender bill of information.

2. The trial court erred in permitting the computer printout from Cajun II to be introduced into evidence.

3. The sentences imposed are illegally excessive because they were imposed consecutively, for a mistaken reason, and for an improper reason.

We affirm the convictions. We vacate the habitual offender adjudications and sentences and remand for further proceedings.

FACTS

On April 13, 2006, based on information from a complainant that the defendant owned a computer which contained child pornography, Lisa Freitas, an FBI agent assigned to the New Orleans field office, and other FBI agents, executed a search warrant at the defendant's trailer on Oak Drive in Slidell. The defendant's computer was seized. During the search of the defendant's trailer, agents also found a digital scale and fourteen bags of marijuana totaling about one pound. An FBI agent trained in forensic computer examination imaged the

hard drive of the defendant's computer and examined the files, both saved and deleted. The hard drive contained many images and video clips of child pornography.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in failing to arraign him on the habitual offender bill of information.

The record does not indicate that the defendant was advised by the trial court of the specific allegations contained in the habitual offender bill of information, his right to be tried as to the truth thereof, and his right to remain silent. See LSA-R.S. 15:529.1(D)(1)(a); **State v. Griffin**, 525 So.2d 705, 706 (La.App. 1 Cir. 1988). Such error on the part of the trial court will be considered harmless if, despite the defendant's not being advised of his rights, the defendant did not plead guilty or stipulate to the charges in the habitual offender bill and, instead, a habitual offender hearing is conducted, wherein the state actually proves the truth of the allegations. **State v. Mickey**, 604 So.2d 675, 678 (La.App. 1 Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

In this case, the defendant did not plead guilty or stipulate to the charges in the habitual offender bill. Instead, a habitual offender hearing was conducted, wherein the State actually proved the truth of the allegations and the defendant's identity. Therefore, while the trial court may not have fully complied with La. R.S. 15:529.1(D)(1)(a), under the circumstances present herein, we find that any such error was harmless. See **Mickey**, 604 So.2d at 678. Moreover, this issue is moot because the habitual offender adjudications and sentences are vacated.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that at the habitual offender hearing the trial court erred in allowing into evidence a "Cajun II" report from the Department of Public Safety and Corrections (DPSC).

Specifically, the defendant contends the DPSC computer printout constituted impermissible hearsay.

This assignment of error has merit. The predicate convictions of the defendant the State sought to prove at the habitual offender hearing were molestation of a juvenile (docket number 270498, 22nd JDC, St. Tammany Parish); illegal possession of stolen things, value over $500.00 (docket number 252944, 22nd JDC, St. Tammany Parish); issuing worthless checks, $100.00 total (docket number 249560, 22nd JDC, St. Tammany Parish); and illegal possession of stolen things, value over $500.00 (docket number 320075, CDC, Orleans Parish).

For the illegal possession of stolen things, value over $500.00 (docket number 252944), and issuing worthless checks convictions, the defendant entered guilty pleas on the same day, June 18, 1996. At the habitual offender hearing, the State conceded that, under existing law at the time, these convictions should count as one conviction. The State then suggested that the conviction for issuing worthless checks (docket number 249560) not be used against the defendant. The trial court agreed and adjudicated the defendant a fourth-felony habitual offender based on the three predicate convictions of molestation of a juvenile (docket number 270498), illegal possession of stolen things, value over $500.00 (docket number 252944), and illegal possession of stolen things, value over $500.00 (docket number 320075).

The backs of the bills of information for molestation of a juvenile and illegal possession of stolen things contained fingerprints, ostensibly the defendant's. Thus, at the habitual offender hearing, the State called a fingerprint expert to testify regarding the identity of the defendant. Based on a comparison of fingerprints taken from the defendant that day, the fingerprint expert testified that the fingerprints on the backs of the bills of information belonged to the defendant. The bill of information for possession of stolen property (docket number 320075) did not contain fingerprints. Thus, the State

called to testify Don Robertson, an employee of Probation and Parole in the Covington Division.

Robertson testified he supervised the defendant only on his parole release for his molestation of a juvenile conviction (docket number 270498). Robertson further testified that, at the prosecutor's request, he ran a Cajun II report on the defendant. The report, which was a computer printout from a DPSC database, indicated "the times [defendant] was incarcerated and under supervision" and "the docket information as to which district he was in, what the charge was, who was the judge, what the sentence was, and if it was a felony misdemeanor." When the Cajun II report was offered into evidence, defense counsel objected to the admission on the grounds of hearsay. Defense counsel noted Robertson was not the custodian of the records, and he did not upload the records. The State responded that, while those might be viable objections under LSA-C.E. art. 803(6), there are no such requirements under LSA-C.E. art. 803(8). The trial court overruled the objection and admitted the Cajun II report into evidence.

In **State v. Smith**, 04-0800, (La.App. 1 Cir. 12/17/04), 897 So.2d 710, we held that a computer printout from the DPSC entitled "Cajun II Court Docket Record Summary" qualified neither as a public record or report under LSA-C.E. art. 803(8) nor as a record of regularly conducted business activity under LSA-C.E. art. 803(6). Under LSA-C.E. art. 803(6), the business records exception to hearsay, records may be admissible if they qualify as records of regularly conducted business activity. The Cajun II report in this case does not fall under Article 803(6) because Robertson was not the custodian of records. When asked at the hearing if he was one of the "select few persons" that could upload to the secure database, Robertson responded, "No, sir." Robertson did not make the Cajun II report himself, nor did he establish under Article 803(6) that the record was "made at or near the time by, or from information transmitted by, a person with knowledge." LSA-C.E. art. 803(6). For example, on cross-examination at the hearing, the following colloquy between Robertson and defense counsel took place:

Q. Are you the custodian of those records?
A. No, sir, I printed them out. I downloaded them.
Q. Are you the person that input this information into this database?
A. No.
Q. Do you know who the person is that inputs this information into the database?
A. It's some clerical person in our department, but I'm not sure who.
Q. Is there more than one person that inputs this information into the database?
A. Yes, sir.
Q. Did you input any information that's contained in these records into the database?
A. No, sir.

Further, the Cajun II report does not qualify as a public record or report. Accordingly, the report is not admissible under LSA-C.E. art. 803(8), the public records exception to hearsay. **Smith**, 04-0800 at p. 7, 897 So.2d at 715. We also note that the Cajun II report admitted into evidence in this case was uncertified. The report was not properly authenticated, and such a report is not self-authenticating under LSA-C.E. art. 902. See LSA-C.E. art. 901; **Smith**, 2004-0800 at pp. 9-10, 897 So.2d at 716-17. As we opined in **Smith**, 2004-0800 at p. 10, 897 So.2d at 716-17, "We note that where the consequences are so grave, it would have been a small matter to have a document certified under La. C.E. art. 902(2)(b) so that it could be self-authenticating, if the document could not have been certified under the procedure outlined in La. R.S. 15:529.1F."

In order to obtain a multiple offender conviction, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Payton**, 00-2899, p. 6 (La. 3/15/02), 810 So.2d 1127, 1130-31.

Without the Cajun II report to consider, the only information contained in State's Exhibit MB6 (the Orleans Parish bill of information, minutes, and other

various documents for possession of stolen property, docket number 320075) to establish the defendant's identify is his name, race, sex, and date of birth. Under **Payton**, this information is insufficient to establish the defendant is the same person convicted of possession of stolen property.

Since all of the predicate convictions introduced into evidence at the habitual offender hearing were necessary for the trial court to adjudicate the defendant a fourth-felony habitual offender, the State did not establish the defendant's status as a fourth-felony habitual offender by competent evidence. Accordingly, we vacate the habitual offender adjudications and sentences and remand this matter to the trial court for further proceedings consistent with the findings in this opinion.[1] Because the sentences are being vacated, the remaining assignment of error addressing the defendant's sentences is pretermitted.

REVIEW FOR ERROR

Three days after the defendant's convictions, defense counsel filed a motion for a new trial and a motion for postverdict judgment of acquittal. The trial court did not rule on either of these motions. A motion for a postverdict judgment of acquittal must be made and disposed of before sentence. LSA-C.Cr.P. art. 821(A). A motion for a new trial must be filed and disposed of before sentence. LSA-C.Cr.P. art. 853. On remand, the trial court is ordered to rule on the defendant's written motions for a new trial and postverdict judgment of acquittal prior to resentencing the defendant.

CONVICTIONS AFFIRMED. HABITUAL OFFENDER ADJUDICATIONS AND SENTENCES VACATED. MATTER REMANDED FOR FURTHER PROCEEDINGS.

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[1] The defendant is not protected by principles of double jeopardy from being tried again under the Habitual Offender Law. See **State v. Young**, 99-1310, p. 5 (La.App. 1 Cir. 4/17/00), 769 So.2d 12, 14.