

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0499

STATE OF LOUISIANA

VERSUS

DONTRELL ANTHONY ALVIS

—
**On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 600,942, Division "D"
Honorable David W. Arceneaux, Judge Presiding**
—

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Dontrell Anthony Alvis**

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered AUG 12 2014

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PARRO, J.

The defendant, Dontrell Anthony Alvis, was charged by an amended bill of information on count one with possession of hydrocodone (a Schedule II controlled dangerous substance), in violation of LSA-R.S. 40:967(C), and on count two with possession of a firearm by a person convicted of certain felonies, in violation of LSA-R.S. 14:95.1. The defendant entered a plea of not guilty on both counts.¹ After a trial by jury, the defendant was found guilty of the responsive offense of attempted possession of hydrocodone on count one, in violation of LSA-R.S. 14:27 and LSA-R.S. 40:967(C),² and guilty as charged on count two. Thereafter, the state filed a habitual offender bill of information against the defendant, seeking to enhance the sentence on both counts. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The trial court also denied the defendant's motion to quash the habitual offender bill of information. Subsequently, the defendant was adjudicated a habitual offender³ and sentenced as a fourth-felony offender on count one and as a second-felony offender on count two. On each count, the trial court imposed sentences of thirty years of imprisonment at hard labor. The trial court ordered that the sentences be served concurrently. The trial court denied the defendant's motion to reconsider the sentences. The defendant now appeals, assigning error to the trial court's denial of the motion for new trial and the motion to quash the

¹ The defendant was originally charged with three counts. Before the trial, the defendant initially pled guilty to possession of hydrocodone and possession of a firearm by a person convicted of certain felonies. The other charge, using a firearm while in possession of a controlled dangerous substance, was nolle prossed and the counts were renumbered. The trial court granted the defendant's subsequent motion to withdraw the guilty pleas, and the defendant went to trial on the remaining two counts.

² See also LSA-R.S. 40:979(A).

³ At the time of the adjudication, the trial court found that the defendant was a fourth-felony habitual offender. During the sentencing, the enhancement of both counts was specified as follows. The fourth-felony habitual offender status on count one is based on the following predicate guilty plea convictions in the 32nd Judicial District Court on April 19, 2007: possession of cocaine (docket number 462,936), unauthorized entry of an inhabited dwelling (docket number 473,721), and three counts of illegal use of a weapon (docket number 477,218). The second-felony habitual offender status on count two is based solely on the unauthorized entry of an inhabited dwelling predicate since, as noted by the trial court, the other predicates were listed in the instant bill of information as prior felonies and considered by the jury in support of the underlying conviction on count two.

habitual offender adjudication and sentencing. For the following reasons, we affirm the convictions, habitual offender adjudications, and sentences.

STATEMENT OF FACTS

On February 13, 2011, several Louisiana state troopers from Troop C responded to a dispatch from the Terrebonne Parish Sheriff's Department regarding a fight in progress at a Mobile gas station located on Highway 24 in Gray, Louisiana, less than a quarter of a mile north of Troop C. Upon pulling into the parking lot, one of the police units blocked a white Cadillac, as the driver (the defendant) attempted to exit the lot. After witnesses on the scene gave statements, the officers advised the defendant of his **Miranda**⁴ rights, questioned the defendant, and asked for consent to search the Cadillac. The defendant denied having a weapon or being involved in the fight and refused to allow the police to search the vehicle. Trooper Brian Harding then used the vehicle's license plate number to determine that the registered owner was Mary Livas. Livas was contacted, came to the scene, and gave the officers written consent to search the vehicle. During the search of the vehicle, the officers recovered a silver handgun near the driver's seat, underneath the center console and a small bag of white pills (subsequently determined by the Louisiana State Police Crime Laboratory to contain hydrocodone) inside the center console. After being transported to the Sheriff's Department, the defendant was advised of his **Miranda** rights again and interviewed. He stated that the gun and drugs belonged to him and further indicated that the other passenger in the Cadillac, his brother, Allen Alvis, was not involved. The defendant's statement was not recorded, and he refused to give a written statement.

During the trial, the defendant's brother and his cousin, Terrence Alvis, testified as defense witnesses. The defendant's brother testified that he witnessed a "gang of dudes" fighting, saw a gun fall to the ground, picked it up, and placed it in the Cadillac to prevent anyone from getting hurt. Allen indicated that the defendant was in the store at the time, did not come in contact with the gun, and was unaware of the presence of the gun. Allen

⁴ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

further indicated that the pills belonged to their cousin, Terrence, who similarly testified regarding the drugs. Specifically, Terrence contended that he often used his aunt's (Mary Livas') vehicle and that he left the drugs in the middle console of the vehicle earlier that day.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant argues that the trial court erred in not granting the motion for new trial. The defendant contends that the trial testimony presented by his brother, Allen Alvis, was supported by the testimony presented at the hearing on the motion for new trial. The defendant notes that at the hearing, Lakeshia Johnson and Cambrana Johnson confirmed that Allen picked up the gun and put it in the vehicle. The defendant notes that Cambrana informed one of the police officers at the scene that they were arresting the wrong individual. The defendant contends that the trial court failed to consider that there is a general mistrust of police among African Americans, which he contends explains the delay in the witnesses coming forward to testify in the defendant's case. The defendant also notes that after the trial, it was learned that Terrence Alvis's attorney provided documentation to show that Terrence had a prescription for hydrocodone. The defendant argues that the jury would have likely discounted testimony regarding his confession had they heard the evidence presented at the hearing.

Louisiana Code of Criminal Procedure article 851 provides, in pertinent part:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

* * *

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

A defendant who seeks a new trial based on newly discovered evidence must establish: (1) that the new evidence was discovered after trial; (2) that failure to discover the evidence before trial was not attributable to his lack of diligence; (3) that the evidence is material to the issues at trial; and (4) that the evidence is of such a nature that it would probably produce a different verdict in the event of retrial. **State v. Cavalier**, 96-3052 (La. 10/31/97), 701 So.2d 949, 951 (per curiam).

The trial court has much discretion in ruling on a motion for new trial. **State v. Hammons**, 597 So.2d 990, 994 (La. 1992). In ruling on a motion for new trial, the trial court's duty is not to weigh the new evidence as though it were a jury determining guilt or innocence; rather, its duty is the narrow one of ascertaining whether there is new material fit for a new jury's judgment. **Cavalier**, 701 So.2d at 951; **State v. Prudholm**, 446 So.2d 729, 736 (La. 1984). The merits of a motion for new trial based on newly discovered evidence should be viewed with extreme caution in the interest of preserving the finality of judgments. Furthermore, where the issue on a motion for new trial primarily involves a question of credibility, the trier of fact is better situated to make such determinations. See **State v. Tyler**, 342 So.2d 574, 587-88 (La.), cert. denied, 431 U.S. 917, 97 S.Ct. 2180, 53 L.Ed.2d 227 (1977).

In this case, in support of the motion for new trial, the defendant presented affidavits and testimony by Cambrana Johnson and Lakeshia Johnson at the hearing, indicating that they observed the defendant's brother, Allen, as he picked up a gun that was dropped during the fight. Lakeshia indicated that the defendant was in the store the whole time, and Cambrana similarly indicated that the defendant's brother was alone when he picked up the gun. Cambrana knew Allen, but did not personally know the defendant, and Lakeshia was familiar with both of the brothers. Cambrana denied telling the police that the defendant had a gun. Further, the defendant presented medical records purporting to show that his cousin, Terrence, had a prescription for

hydrocodone.⁵ Deputy Paul Thibodeaux testified for the state that, at the scene, Cambrana was yelling at the police, indicating that the defendant threatened her with a gun. According to Deputy Thibodeaux, Cambrana specifically pointed out the defendant as the one who had the gun that day. Deputy Thibodeaux further testified that Cambrana gave a written statement to the police, documenting the substance of her verbal statements. In the handwritten statement, Cambrana indicated as follows, "the boy in the white car pulled out a gun then police pulled up."

In **Cavalier**, the supreme court explained:

Newly discovered evidence affecting only a witness's credibility "ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial." Nevertheless, the court possesses the discretion to grant a new trial when the witness's testimony is essentially uncorroborated and dispositive of the question of guilt or innocence and it "appears that had the impeaching evidence been introduced, it is likely that the jury would have reached a different result." In making this determination, the court may assume that the jury "would have known that [the witness] had lied about the matter[.]"

Cavalier, 701 So.2d at 951-52 (citations omitted).

A trial court assessing the legal merits of a motion for new trial is given considerable latitude in evaluating the impact of newly discovered evidence on the verdict. The trial court has much discretion in ruling on a motion for new trial. Review of the trial court's ruling is limited to determining whether there was a clear abuse of that discretion. See State v. Henderson, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 758, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

We find no such abuse of discretion in the trial court's ruling. As noted by the trial court in denying the motion for new trial, arguably the defendant failed to show that with due diligence the evidence at issue was not discoverable before the trial. As further noted by the trial court, the witnesses lived on the same street as the defendant and gave affidavits only a few days after the trial. Further, during the trial, in contrast to the testimony presented regarding the defendant's confession, the defendant's

⁵ The trial court sustained the state's objection to the evidence in that it was hearsay, not properly authenticated, and did not include a letterhead or the name of a pharmacy or healthcare practitioner. The trial court allowed the defendant to proffer the evidence.

brother, Allen Alvis, testified that he picked up the gun unbeknownst to the defendant. Thus, this hypothesis of innocence was presented to the jury, and the testimony presented at the new trial hearing was merely cumulative. As previously stated, newly discovered evidence that only affects a witness's credibility will ordinarily not support a motion for new trial. The defendant concedes that Cambrana's testimony and affidavit in support of the motion for new trial was in conflict with her pretrial statement to the police the day of the offenses. As previously noted, recantations should be looked upon with the utmost suspicion. To refuse to grant a new trial on such a basis is not an abuse of discretion. See State v. Clayton, 427 So.2d 827, 832-33 (La. 1983) (on rehearing). Further, the defendant acknowledges in his brief that the jury likely considered Terrence Alvis's testimony in finding the defendant guilty of the responsive offense of attempted possession of hydrocodone, as opposed to the offense as charged.

After a thorough review of the record, we cannot say that the trial court abused its discretion in finding that the evidence was merely cumulative and would not have tended to change the result of the case. The newly discovered evidence cited by the defendant was not of such a nature that it ought to have produced verdicts different than those rendered at trial. Assignment of error number one lacks merit.⁶

ASSIGNMENT OF ERROR NUMBER TWO

In assignment of error number two, the defendant argues that the trial court imposed an illegal sentence. First, the defendant argues that the trial court erred in enhancing both counts, though they arose from the same incident and notes that the state did not specify which count it sought to have enhanced. Secondly, the defendant argues that the motion to quash should have been granted, because he was not fully informed of the consequences of his former guilty pleas to unauthorized entry of an inhabited dwelling and illegal discharge of a weapon. The defendant contends that the

⁶ We note that the defendant merely argues that there is a "reasonable possibility" that the testimony presented at the hearing would have produced different verdicts.

Boykin⁷ hearing was rushed, his rights were not explained, and that the elements of the offenses were not explained, though the trial court apparently sentenced him under LSA-R.S. 14:94(D). The defendant argues that he did not admit to the specific elements of the crime for which he was sentenced, noting that the state did not present a factual basis for the sentence. The defendant contends that the guilty pleas were not knowing and intelligent and were invalid for enhancement purposes.

If the defendant denies the allegations of the bill of information, the burden is on the state to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when they were taken. If the state meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the state. The state will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived those constitutional rights required by **Boykin**, namely, his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the state introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the state to determine whether the state has met its burden of proving that defendant's prior guilty plea was informed and voluntary and made with an articulated waiver of the three **Boykin** rights. **State v. Shelton**, 621 So.2d 769, 779-80 (La. 1993).

We note that at the trial, the defendant stipulated that, in the 32nd Judicial District Court on April 19, 2007, he pled guilty to three counts of illegal use of a weapon under docket number 477,218, to unauthorized entry of an inhabited dwelling under docket number 473,721, and to possession of cocaine under docket number 462,936, and at the

⁷ **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

hearing on the habitual offender adjudication, he again stipulated to being the same person who pled guilty to the predicate offenses on April 19. The defendant, however, denied the allegations of the habitual offender bill of information and filed a motion to quash the bill. At the hearing on the motion to quash and habitual offender adjudication, the state introduced the bills of information, a certified copy of the minutes from the date of his plea to the predicate offenses, showing the defendant was represented by counsel, and certified copies of the waiver of his constitutional rights form executed by the defendant as to each predicate. In support of the motion to quash, the defendant introduced the transcript of the **Boykin** hearing and argued that the examination was rushed and devoid of a statement of facts, as argued on appeal. The defendant conceded that he was advised of his three **Boykin** rights.

The documentary evidence presented by the state more than adequately satisfied the state's initial burden of proving the existence of the predicate guilty pleas and that defendant was represented by counsel. It was defendant's burden at that point to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. The defendant failed to carry his burden. The evidence introduced by the state and the transcript clearly show that the defendant was fully advised of his **Boykin** rights in pleading guilty to the predicate offenses. At the **Boykin** hearing, the former trial court had asked the defendant if his constitutional rights had been fully explained at the time of the execution of the waiver of rights forms, and the defendant responded affirmatively. The defendant was informed of the sentencing ranges on the predicate offenses, and the trial court carefully questioned the defendant regarding his understanding of each of the **Boykin** rights that were being waived. The defendant's contention has no merit because the jurisprudence has not extended **Boykin** to require counseling as to the consequences of the guilty plea or that there be a factual basis for the guilty plea.

Moreover, the state listed both of the instant convictions in the habitual offender bill of information, and the trial court clearly enhanced the sentences on both counts. As

noted by the trial court, the habitual offender bill of information under docket number 600,942 shows that the incidents occurred on different days and arose out of different circumstances on each conviction. Further, the defendant's argument that he cannot be multiple billed on two counts that arise out of the same criminal episode has no merit. In **State v. Shaw**, 06-2467 (La. 11/27/07), 969 So.2d 1233, 1245, the Louisiana Supreme Court overruled its previous decisions in **State ex rel. Porter v. Butler**, 573 So.2d 1106 (La. 1991), and **State v. Sherer**, 411 So.2d 1050 (La. 1982), and held that "[t]here is no statutory bar to applying the habitual offender law in sentencing for more than one conviction obtained on the same date, whether the convictions result from separate felonies committed at separate times or arise out of a single criminal act or episode." Considering the foregoing, we find that the second assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.